Newsletter: July 2014

Chairman's letter

Dear PNBA Members,

Welcome to the re-launched PNBA newsletter. I am very grateful to Caroline Harrison QC, Kate Livesey and Simon Hale for producing it, and to Isabel Barter and Shail Patel for their contributions. Unfortunately Sweet & Maxwell's enthusiasm for publishing a hard copy version appears to have waned, so we have had to resort to electronic means. We are still at something of a trial stage and suggestions for improvements or articles will be gratefully received.

Due to very high demand, I am pleased to report that all places for the Clinical Negligence Weekend at Clare College, Cambridge, have now been booked. I would like to thank Cara Guthrie and Christopher Johnston QC for organising this event. Places remain available for the Lawyers' Liability Day at Gray's Inn, organised by Spike Charlwood and Jamie Smith, which will take place in October. We have excellent line-ups of speakers for both events, and I am sure each will be of real benefit to members who attend. For November we are planning an event on the civil justice reforms/Mitchell and its clarification, with Prof. Dominic Regan and HHJ Iain Hughes QC, moderated by Mrs Justice Carr. As with the newsletter, if you have suggestions for future speaker events please let me or a committee member know, as our aim is to arrange events which are topical and relevant to members' practices.

The publication of this newsletter coincides with the launch of the PNBA's new-look website. You will find a number of links throughout this newsletter which will take you to the site. I would like to thank Jacqueline Simpson and Victoria Woodbridge, our Secretary, for their hard work in helping to rebuild it. Please visit it for papers of past addresses to the association, lecture notes and other useful materials.

In this edition of the newsletter, we are delighted to provide members with access to the paper delivered by Baroness Hale of Richmond as the Peter Taylor Memorial Address earlier this year, entitled "Professional Negligence: A Panacea for the Law's Injustices?" Her Ladyship has kindly made this paper available.

Finally, on an IT note, if like me you have a Macintosh computer it may be of interest to know that, contrary to what Sweet & Maxell's helpline told me, you can read an electronic version of the White Book on it. They have the technology, called ProView, but seem strangely reluctant to advertise its existence.

Best wishes

William Flenley
william.flenley@hailshamchambers.com

New Silks in 2014

On behalf of the Executive Committee and the members of the Association in general, the editors would like to offer warm congratulations to the following PNBA members on their appointment to silk in April 2014:

- **Rachel Ansell QC – 4 Pump Court**
- **Alexander Antleme QC – Crown Office Chambers**
- **Graham Chapman QC – 4 New Square**
- **John de Bono QC – Serjeant's Inn Chambers**
- **Jonathan Hough QC – 4 New Square**
- **Jacob Levy QC – 9 Gough Square**
- **Adrienne Lucking QC – 36 Bedford Row**
- **Ben Quiney QC – Crown Office Chambers**
- **Hugh Sims QC – Guildhall Chambers**
- **Adam Tolley QC – Fountain Court**

We wish them every success in the next chapter of their respective careers.

NEWS ARCHIVE

News
Newsletter: July 2014

Denton v T H White Ltd

Court of Appeal
14 July 2014
[2014] EWCA Civ 906

Subject: Procedure – Relief from Sanction – Approach to be adopted

Summary:

The Court of Appeal gave further guidance about the proper approach to be adopted upon an application for the grant of relief from sanction under CPR 3.9, and considered its earlier decision in *Mitchellv Mirror Group Newspapers.*

Abstract:

The three cases under appeal were relief from sanction cases raising no particularly novel points on their facts. However the Court of Appeal had become aware of a strong tide of opinion about *Mitchell* stemming from the way it has been interpreted and applied in subsequent first instance and Court of Appeal decisions. The criticisms, summarised at paragraph 21 of the judgment, essentially concerned the perceived undue harshness of *Mitchell*, the narrowness of the 'triviality' concept, and the disproportionate penalties imposed on litigants as a result.

Accordingly the court gave further guidance on the application of *Mitchell*; though whether the decision merely reinterprets or rather overhauls the approach will be a matter of debate. The *Mitchell* approach is of course to consider whether the breach was trivial, and if so to grant relief, and if not, to consider whether there was a good reason for the breach. Occasionally (as in *Chartwell*) Judges would also go on to consider whether relief should be granted 'in all the circumstances' even where the first two stages were not met.

The Court confirmed that Judges must take a three stage approach to considering applications for relief from sanction.

On the first stage, there had been undue focus in the lower courts on the 'triviality' concept, overlooking that in *Mitchell* itself the expressions 'minor' and 'insignificant' were used. The heart of the question was (or should be) whether the breach was "*serious or significant"*. If it was neither, it would usually be unnecessary to spend much time on the other stages. If the breach is serious or significant, the second and third stages assume greater importance.The focus should no longer be on whether the breach was trivial.

As to the meaning of these two concepts, the Court recognised they "*are not hard edged and that there are degrees of seriousness and significance"*.

The Court endorsed the Law Society and Bar Council's submission that it helped to think of whether the breach was material or immaterial, in the sense of whether it imperilled hearing dates, and disrupted the litigation, including litigation generally. Nevertheless a breach could be serious without imperilling the instant litigation – the example given by the Court was non-payment of court fees.

On the second stage Judges should consider the 'good reason' test. Evidently the Court was content with the manner in which that part of the *Mitchell* test has been applied, as it declined to give further guidance on it.

The third stage received considerable attention, with the Court noting that many decisions had simply ignored its existence. The third stage is, as per the wording of CPR 3.9(1) to consider "*all the circumstances of the case, so as to enable it to deal justly with the application"*.

Factors (a) and (b) of CPR 3.9(1) (the need for efficiency and proportionate cost, and the need to enforce compliance with the rules) had been described in *Mitchell* as of "*paramount importance"*. The majority (and this is where the majority and the minority of Jackson LJ differed) moved away from that strict view by finding simply that those considerations should be of "*particular importance"* when considering all the circumstances.

Thus the factors in CPR 3.9 (1) (a) and (b) give rise to the first and second stages, but they also come back in the third stage as features of particular importance.

While that sounds somewhat abstract, the Court gave some guidance on how it is intended to work. The third stage is where features such us the promptness of the application for relief and the previous history of compliance can be taken into account. This is an important clarification as some courts (including the Court of Appeal in *Durrant*) treated other breaches as affecting the triviality of the breach in question, making an otherwise trivial breach a serious one. The Court in *Denton* rejected that approach; seriousness and significance are to be judged against the particular breach at stage 1. The question of other breaches arises only under stage 3 – and only if one gets there.

The Court's intention is that the new focus on stage 3 will give rise to a "*more nuanced"* approach than Judges had been adopting.

Jackson LJ's dissenting judgment took the view that the factors in 3.9 (1) (a) and (b) are not to be regarded of "*particular"* significance when considering all the circumstances of the case. His Lordship differed from the majority on the construction of CPR 3.9 to that extent, considering that the reason for their express and exclusive inclusion was to ensure they were considered (and not forgotten) rather than to show they should be given particular weight. That difference in approach made no difference on the facts of the three cases before the Court however, so it remains to be seen whether it will make any difference in practice.

Finally the Court also gave guidance to the opposing party in relief applications. It was strongly critical of the sorts of tactical traps set, and positions taken by parties seeking to take advantage of breaches to give a windfall in the case. The opposing party is now encouraged to make a realistic assessment of the application of the three stage test, and if it is met, to consent to relief without the need for any further court hearing. The courts should be more ready to "*penalise opportunism"* and ready to award indemnity costs in appropriate cases – including where the opposing party refuses to agree reasonable extensions of time.

The judgment is of huge significance. The ramifications can be summarised as follows.

Parties and Judges must, in effect, abandon triviality as a touchstone of relief from sanction, to be replaced by seriousness and significance. It goes without saying that these are much woollier and less restrictive concepts, and little guidance has been given other than that significance is intended to import some enquiry into the consequences of the breach. It arguably therefore moves much close to the old *Biguzzi* approach of considering whether the breach caused prejudice to the opposing party.

There is also a shift of emphasis; from the party in breach having to show that its breach was trivial, to the opposing party having to show that it was serious and significant. The nature of the language used subtly therefore moves the goal posts in favour of the party in breach.

There is likely to be a degree of satellite litigation as Judges wrestle with the new concepts. No doubt the CA in *Denton* would say these concepts have been around since *Mitchell*, but practice at the coal face, and the reported judgments, all point to the sole focus at the first stage being triviality.

Persistent minor offenders will fare better. Other breaches cannot make a minor breach serious. If the breach is not serious, the court should not spend much time on stages 2 and 3, so relief is granted. Arguably however where there is serious, persistent offending the Court will be more willing to refuse relief under the third stage.

Opposing parties will be far more nervous about resisting applications for relief, particularly in cases with no obvious detrimental consequences flowing from the breach. However given the novelty of *Mitchell* – let alone its reinterpretation in *Denton*, there are likely to be many borderline cases giving rise to difficult decisions.

In difficult cases both parties will appeal to the third stage as assisting them, permitting, as it does, a much more open textured analysis of 'all of the circumstances'. No doubt parties in breach will rely on Jackson LJ's approach, though that is a minority view and not binding. This creates some risk of parties making a return to the old CPR 3.9 approach, with wide ranging evidence dealing with matters all and sundry – precisely what the Jackson Reforms hoped to avoid.

In conclusion, it appears that a party in breach stands a greater chance of obtaining relief under the reinvented *Denton* test than he did under the approach developed after *Mitchell*.The degree of the certainty which has developed will however be lost. Many a case has settled after a breach of a rule or deadline because the party's advisers took the view that there was little or no prospect of obtaining relief. While the change of tack from the Court of Appeal will give those parties new cause for optimism, it will plainly encourage more satellite litigate in the short term. And while the Court of Appeal hopes to discourage that by threats of indemnity costs, where the lower courts have had such difficulty interpreting the test, they lawyers may not do much better.

After seven months of experience under *Mitchell* the need for a change of approach has been accepted by the Court of Appeal. The decision in *Denton* shows that litigants can be assured that the higher courts remain very alive to court users' opinions on these matters. It now falls to practitioners to grapple with this new guidance.

Shail Patel

4 New Square

R. (on the application of Hafiz & Haque Solicitors) v The Legal Ombudsman

Administrative Court (Lewis J.)
11 April 2014
[2014] EWHC 1539

Subject:

Judicial review– Professional complaints – Legal advice and fees – Successful challenge by solicitors to decision of the Legal Ombudsman

Summary:

The Court quashed on irrationality grounds a decision of the Legal Ombudsman upholding a complaint against a firm of solicitors and directing that the solicitors' fees should be reduced.

Abstract:

The complainant, Tahira Qureshi, was a national of Pakistan seeking asylum in the United Kingdom. She had attended the offices of the claimant solicitors and instructed them to act on her behalf in relation to her asylum interview for a fixed fee of £2800, excluding disbursements.

Three interviews took place: a screening interview, which the solicitors did not attend, and two further substantive interviews which the solicitors did attend. Ms Qureshi's asylum claim was rejected.

Ms Qureshi complained to the Legal Ombudsman Service about the level of service provided and the fees charged. One ground of complaint was that the solicitors had not attended the screening interview.

In a letter to the Legal Ombudsman Service, the solicitors explained that the difference between a screening interview and the substantive asylum interview had been explained to Ms Qureshi and referred to certain attendance and file notes in that regard which were said to be attached. They said they had not attended the screening interview with Ms Qureshi because legal representation was not required at it.

A report made by a member of the Ombudsman staff recommended a finding that the service provided to the Ms Qureshi had been reasonable and that no further action should be taken. Ms Qureshi exercised her right to refer the matter to the Ombudsman for a determination.

In her final decision, the Ombudsman decided that the evidence demonstrated that the solicitors had generally provided a reasonable level of service to Ms Qureshi, save for their failure to attend at her screening interview. The Ombudsman took the view that the fixed fee charged to Ms Qureshi included attendance at the screening interview, that it had clearly been envisaged that the solicitors would attend the screening interview, as they had attended the subsequent substantive interviews, that there was no evidence that the firm had explained to Ms Qureshi that they would not attend the screening interview and no evidence that they had explained to her that representation was not required at it. The Ombudsman directed that the solicitors' fees should be reduced by £300 to reflect the failure to attend the screening interview and ordered the solicitors to pay £100 for distress and inconvenience.

In support of their application for judicial review of the Ombudsman's decision, the solicitors relied upon the contemporaneous attendance notes referred to in their letter to the Ombudsman. The judge found that the attendance notes provided evidence that the difference between the screening and substantive interviews had been explained to Ms Qureshi and that she had been told that the solicitors would attend the two substantive interviews only.

Before the Administrative Court, the Legal Ombudsman Service contended that one of the attendance notes relied upon by the solicitors had not been sent to the Ombudsman. Noting that it was unfortunate that the Ombudsman had not provided a witness statement on this subject and that the Legal Ombudsman Service had put no contemporaneous evidence before the court to indicate that the attendance notes had not been received, the judge concluded on the balance of probabilities that the attendance note had been enclosed in the solicitors' letter to the Ombudsman which referred to it.

On the basis that the attendance note had been sent to the Ombudsman, the judge held the that the Ombudsman's decision upholding the complaint in respect of non-attendance by the solicitors at the screening interview was unlawful since the Ombudsman's conclusions that the fixed fee included attendance at the screening interview and as to what Ms Qureshi had been told about the solicitors' attendance at it did not accord with the attendance note evidence. The nature of the error could be expressed in a number of ways: it was illogical and irrational to reach a conclusion in the face of contrary evidence when there was no other evidence to support that conclusion; and in failing to take account of the evidence contained in the attendance notes, the Ombudsman had failed to take into account material considerations.

Alternatively, if attendance note evidence referred to in the solicitors' letter to the Legal Ombudsman Service had not been received, the Ombudsman had erred in making her decision without considering obtaining it.

Kate Livesey

4 Pump Court

Gabriel v Little

Supreme Court: Permission to Appeal Granted, Hearing Forthcoming
Court of Appeal: [2013] EWCA Civ 1513

Subject:

Solicitors; Duties of Care; Remoteness; Recoverable Losses

Summary:

The Supreme Court has granted permission to appeal as to the solicitors' liability part of the Court of Appeal's recent decision in *Gabriel v Little* [2013] EWCA Civ 1513. It looks as if this must have been because there is an arguable point of general public importance in relation to the application of the House of Lords' decision in *Saamco*, with regard to the scope of the solicitors' duty to the claimant and the extent to which the damage claimed fell within that scope.

Abstract:

Mr Gabriel knew Mr Little. Mr Little and Mr Gabriel had a chat in the Red Hart public house in November 2007. They discussed Mr Little's plan to develop a building at Kemble airfield. They discussed in outline the possibility that Mr Gabriel would make a loan of £200,000, with interest of £70,000, in connection with the development of the building.

The effect of the findings of the deputy judge (Robert Englehart QC) was that there then followed a series of misunderstandings. A company called Whiteshore was set up to undertake the development. Mr Gabriel proceeded to lend the £200,000, thinking that it would all be used to develop the property. In fact the position was that (i) Mr Little in effect controlled Whiteshore; (ii) Whiteshore was buying the property for £150,000 plus VAT; (iii) Whiteshore had no other source of funds, so Mr Gabriel's money was mostly going to fund the purchase; (iv) Whiteshore bought the property from another company controlled by Mr Little. The judge, however, rejected the suggestion that Mr Little had misled Mr Gabriel. They must have been at cross-purposes.

Mr Gabriel instructed solicitors called BPE to act for him in the transaction. BPE realised that Mr Gabriel's money would largely be used for Whiteshore to purchase the property, but, in breach of duty, they failed to make this clear to Mr Gabriel. So again, Mr Gabriel was at cross-purposes, this time with his solicitors.

Whiteshore defaulted. Mr Gabriel had a first legal charge over the property. As a result it was sold in July 2010 but only for £13,000. Mr Gabriel therefore suffered a large loss and he sued Mr Little and BPE.

Mr Gabriel had lent the £200,000 without realising the true nature of the transaction. That was due to BPE's breach of duty in failing to explain it to him. As to causation, the judge held that, if he *had* realised the true nature of the transaction, Mr Gabriel would not have lent. Subject to arguments as to the scope of duty and *Saamco*, Mr Gabriel would therefore have been able to recover his loss from the solicitors BPE.

The judge applied *Saamco*, and considered whether Mr Gabriel's loss fell within the scope of BPE's duty. He said at [91]:

"In the present case [BPE]'s breach of duty meant that Mr Gabriel was not able to know the true nature of the loan transaction into which he was entering. He was thus deprived of the choice whether or not to enter into the transaction with knowledge of its true nature. As I have concluded, he would not have entered into the loan if he had known what was known to [BPE]. In these circumstances, it seems to me that it was quite foreseeable that if BPE's duty was broken in the way which occurred Mr Gabriel would be likely never to recover his loan and have to depend on recovery from disposal of a wholly undeveloped property in a poor state of repair. Doubtless, the fall in property values in 2008 made this disposal more problematic, but it cannot be said that it was that fall which caused Mr Gabriel's loss. It is my view that in the particular circumstances of this case Mr Gabriel is, subject to any questions of contributory negligence and mitigation, entitled to recover all his losses from having entered into this transaction. In coming to this conclusion, I have endeavoured to follow the approach of Chadwick J in *Bristol West Building Society v Fancy Jackson [1997] 4 All ER 582, [1997] NPC 109* (insofar as he addresses the case of Steggles Palmer) and of the Court of Appeal in *Portman Building Society v Bevan Ashford [2000] PNLR 344*."

This is a reference to the *Steggles Palmer* case, which suggests that, where a lender's solicitors fail to report to the lender information tending to the show that the borrower is someone to whom it would not wish to lend, all of the lender's loss falls within the scope of the solicitor's breach of duty; hence all the loss is recoverable. The result of the trial was, therefore, that Mr Gabriel was able to recover all his loss from the solicitors BPE: it all fell within the scope of their duty to him.

On appeal, counsel for the solicitors (Roger Stewart QC) persuaded the Court of Appeal to take the opposite view as to the application of *Saamco*.

Gloster LJ, giving the only reasoned judgment, agreed at [73] that BPE had owed Mr Gabriel a duty to inform him that the loan money was going to be immediately applied in Whiteshore's purchase of the property from its owner High Tech, and in the discharge of a charge over it. BPE had breached that duty.

She then considered the application of *Saamco*. She held at [80] that it was not possible to characterise Mr Gabriel's losses as the foreseeable consequences of the information supplied by BPE being wrong. She added at [82] that

"This was not a case (contrast Steggles Palmer) where the information as to the destination of the loan monies (i.e. in discharge of the Lloyds TSB charge) would have shown Mr Little to have been a fraudster. The judge's findings of fact in relation to Mr Little do not permit of that result."

Gloster LJ's view was, in summary, that the cause of Mr Gabriel's loss was his own decision to invest his money in the project without taking elementary precautions first, such as obtaining a valuation of the property before lending. At [84] she listed various other steps which he should have taken.

Comment:

The appeal to the Supreme Court raises the prospect of that court considering in detail the distinction, applying *Saamco*, between cases where either none or part of the claimant's loss falls within the scope of the defendant's duty, and those in which all of that loss falls within the scope of that duty. At the recent PNBA and Tecbar joint seminar Dr Janet O'Sullivan remarked that the application of 'scope of duty' principles is particularly difficult in tort cases, since there is no statute or contractual provision setting out the scope of the rule which imposes liability. Lords Mance, Carnwath and Hodge granted permission to appeal. They must have considered that it was arguable that the principle which the Court of Appeal applied was wrong. That leaves open the enticing possibility of a wholesale reconsideration, in the Supreme Court, of the application of the *Saamco* principle.

William Flenley QC

Hailsham Chambers

Mehjoo –v- Harben Barker (a Firm)

Mehjoo –v- Harben Barker (a Firm)
Court of Appeal
March 25, 2014
[2014] EWCA Civ 358; [2014] All ER (D) 13 (Apr)

Subject:

Accountants – Duties of care – Tax Advice – Non-domiciled Status

Summary:

The Court of Appeal allowed an appeal by the Defendant accountants, on the basis that the Judge was wrong to find that they had owed their client, the Claimant, a duty of care that embraced specialist advice about and arising from his status as a non-domiciled person.

Abstract:

The appellant generalist accountants (HB) appealed against a decision of the Judge ([2013] EWHC 1500 (QB), [2013] All ER (D) 132 (Jun)) who found that they were under a duty to advise (without a request to do so) their client (M) of the potential advantages of being non-domiciled (non-dom) and to refer him to a non-dom specialist.

M, who had been born in Iran but was resident in the UK since 1971, had entered into a tax scheme (not as a result of advice of HB but advice given by another company on a later occasion) in an attempt to avoid paying CGT on the sale of his share of his business. This was challenged by HMRC.

Having reached a settlement with HMRC, he sued his long-standing accountants (HB), arguing that the written retainer between the parties had been varied either as a result of a course of conduct or alternatively at a meeting on 2nd October 2004 where CGT saving schemes were discussed such that they were under a duty to provide tax planning advice to him with or without a request.

M contended that HB should have advised him that (a) he was not, probably was not, or might not be domiciled in the UK; (b) being a non-dom carried with it significant tax advantages; and (c) he should consult a non-dom specialist.

M said that if he been so advised, a non-dom specialist would have advised him to enter into bearer warrant planning (BWP) which was a tax scheme only available to non-doms. Had that occurred, he would have saved the tax and interest M paid to HMRC to settle the Revenue's challenge to his CGT-avoidance scheme, plus the cost of entering that unsuccessful scheme.

HB's appeal was allowed. As to the scope of duty, the Court of Appeal held the Judge had erred in finding that the retainer had been varied as a result of HB's course of conduct. The Court said the Judge had failed to distinguish between "routine tax advice" and more sophisticated forms of tax planning such as BWP. HB had never offered to give M such advice. HB did offer a more extensive tax planning service, but this was available only on request. M never made any request for this service.

There was a meeting between M & HB on 2nd October 2004, which the Judge had considered important in widening HB's scope of duty to include advice on tax planning. However the Court of Appeal held that the Judge had failed to differentiate between the matters discussed at that meeting which would have been "obvious possibilities" to a generalist accountant, in contrast to measures such as BWP (it was not suggested by either party that HB should have been aware of BWP).

The Court of Appeal held that HB were under no duty to advise M in relation to his potential non-dom status, because it was not relevant at the time. The Court said this was because HB would have known that non-dom status would not confer any tax advantages on M in relation to the shares in his UK-registered company, unless the *situs* of the shares could be changed. (The aim of BWP was to change the *situs* of the shares, so that they became offshore assets). HB did not know whether the *situs* of the shares could be changed, nor was it reasonable to expect them to know this. For these reasons, there was no duty on the part of HB to advise M that non-dom status carried with it significant tax advantages, or to advise him to consult a non-dom specialist.

It might reasonably be said that a firm such as HB should at least have alerted Mr Mehjoo to the possibility that there might be available a more radical scheme. On the facts, HB had told M that various tax-saving schemes might be available. M had known about the tax charge and had chosen not to follow up on the availability of tax-saving schemes.

Comment:

The Court of Appeal appears to provide some reassurance to generalist accountants because their scope of duty has been narrowly drawn. However, the boundaries of the duty to advise remain unclear. For example, it is difficult to conceive there being a clear 'bright line' which separates "*routine tax advice*" from "*more sophisticated*" tax planning. Second, there is a tension between the absence of *any* duty to advise the client in relation to sophisticated forms of tax planning, and the suggestion that they should still alert him to the *possibility* that there may be more radical schemes. How is the client to request further services or specialist advice, if he has no guidance about what services or possible specialist advice might be available, and of potential benefit?

What is clear is that generalist accountants should ensure that their written retainer is kept up to date and clearly sets out the limits of advice/knowledge, and they should be astute not to jeopardise those limits by their own conduct in, for example, advising beyond the boundaries of their knowledge or outside their 'comfort zone'. Careful written notes describing the precise advice given should help them to remain inside the limits that have already prescribed (and where necessary, to prove that later!).

Isabel Barter (Junior Counsel for M)

2 Temple Gardens

Santander UK –v- RA Legal Solicitors

Santander UK –v- RA Legal Solicitors
Court of Appeal
24 February 2014
[2014] EWCA Civ 183; [2014] P.N.L.R. 20

Subject:

Breach of Trust – Causation – Forgery – Mortgage Fraud – Solicitors' powers and duties – Strict Liability

Summary:

Where a trustee applies for relief from liability for his breach of trust, he must prove that there was no sufficiently material connection between his conduct and the beneficiary's loss, failing which the trustee will not normally be entitled to relief.

Abstract:

In May 2009, the Claimant ("Santander") advanced £150,000 plus fees to a borrower, Mr Vadika, in connection with his purported purchase of a property owned by Ms Emma Slater. The Defendant ("RA Legal") acted for Mr Vadika. Solicitors called Sovereign Chambers LLP ("Sovereign") represented to RA Legal that they were instructed by Ms Slater upon the sale.

Santander's advance was added to a £50,000 contribution from Mr Vadika, and the total purchase monies of £200,000 were transferred to Sovereign's client account on 28th July 2009, to be held to RA Legal's order. On 29th July 2009, RA Legal released the funds to Sovereign's use, and Sovereign purported to complete the sale that day.

The purported sale was in fact fraudulent. Although Ms Slater was the true owner, she had not instructed Sovereign and was unaware of the purported sale. Sovereign was a genuine firm of solicitors with apparently good standing on the SRA website, but it did not apply the purchase monies for the purpose of completion and instead the funds disappeared from its client account.

Santander brought a claim against RA Legal for breach of trust. At first instance, Andrew Smith J followed the decisions of the Court of Appeal in *Davisons (Solicitors) v Nationwide* [2012] EWCA Civ 1626 and *AIB Group (UK) PLC v Mark Redler & Co* [2013] EWCA Civ 45, and held that RA Legal had indeed been in breach of trust when it released Santander's advance on 29th July 2009, even though it did so innocently. However, he went on to grant RA Legal relief from liability for that breach of trust under section 61 of the Trustee Act 1925. The Judge's central conclusions in so holding was that no act or omission by RA Legal had been sufficiently causally connected with Santander's loss, because the real cause of the loss had been Sovereign's fraud; and that, even if it had been connected to the loss, the conduct did not amount to fault on RA Legal's part that was sufficiently serious, or involved such a departure from ordinary and proper standards, as to cut them off from the court's discretion to relieve them of liability.

Santander appealed on the basis that the findings of breach of trust were too narrow, and against the grant of relief under section 61. RA Legal cross appealed against the finding that there had been a breach of trust, contending that there had been no breach of trust at all.

The leading judgment was that of Briggs LJ; the Chancellor agreed with Briggs LJ's judgment before adding a few passages of his own, and Proudman J agreed with both judgments.

Faced with *Davisons* and the earlier Court of Appeal decision in *Lloyds TSB PLC v Markandan & Uddin* [2012] EWCA Civ 65, RA Legal could do little more than preserve for argument in the Supreme Court its submission that there had been no breach of trust at all. It is understood that Santander has now applied for permission to appeal to the Supreme

Court, but no decision on that application has yet been published.

Turning to the first part of Santander's appeal, the question was whether RA Legal had committed a breach of trust on 28th July 2009, when it transferred the advance to Sovereign's account pending completion, on terms that Sovereign was to hold the advance to RA Legal's order. The Court of Appeal held that the purchaser's solicitor has no implied authority to transfer the advance to the client account of any other solicitor than the firm which is in fact acting for the owner and intending vendor of the Property upon which the lender is to obtain a charge on completion. Accordingly, the earlier transfer on 28th July 2009 had been a breach of trust.

The second part of Santander's appeal was centrally concerned with the type of connection which must exist between the solicitor trustee's conduct and the loss of the trust property (the advance), before the solicitor trustee will be disentitled from claiming relief under section 61. Briggs LJ held that the test was clearly not one of strict causation or even "but for" causation, yet there had to be a connection of relevance:

"28… it seems to me that some element of causative connection will usually have to be shown, and that conduct (even if unreasonable) which is completely irrelevant or immaterial to the loss will usually fall outside the court's purview under section 61…"

In his short supplemental judgment, the Chancellor agreed with Briggs LJ that the test of connection was certainly not a "but for" causation test, and formulated the trustee's burden under section 61 as being to satisfy the Court:

"…that despite his or her unreasonable conduct, none of that conduct played any

material part in the occasioning of the loss… that his or her unreasonable conduct did not materially contribute to the opportunity for the loss or did not materially increase the risk of such loss"

It therefore appears that there must exist a connection of materiality between the conduct complained of and the loss of the trust property, which may fall short of satisfying the "but for" test, but which must have at least materially increased the opportunity or risk for the loss to occur.

The Court of Appeal went on to allow Santander's appeal against the grant of relief to RA Legal on the facts. Firstly, Briggs LJ stated that, rather than considering each specific complaint about the trustee's conduct individually, the question was whether the trustee's relevant conduct was reasonable, taken as a whole. Briggs LJ commented that he felt the Judge had taken *"an altogether too lenient view of the seriousness of R.A. Legal's numerous departures from best practice…"*

Secondly, when applying the material connection test, the Court of Appeal held that various failings by RA Legal did have a sufficient connection with the loss to justify withholding relief. The Court was particularly struck by the fact that RA Legal did not obtain a written or any other undertaking from Sovereign to obtain a discharge of the relevant existing charge, nor any written evidence of an obligation upon Sovereign to return the advance upon demand if completion did not occur.

Thirdly, there is a sense from the Court of Appeal's decision of a desire to encourage (or perhaps enforce) best practice in conveyancing transactions. Briggs LJ stated:

"99. A conclusion that, but for those aspects where R.A. Legal's conduct fell seriously and unreasonably short of best practice, the fraud would probably have succeeded by no means leads to the result that those parts of R.A. Legal's conduct are unconnected with the loss. They all represent departures from a sophisticated regime, worked out over many years, whereby risks of loss to lenders and lay clients are minimised, even if not wholly eradicated. Where solicitors fail, in serious respects, to play their part in that structure, and at the same time are swindled into transferring and then releasing trust money to a fraudster without authority, they cannot expect to persuade the court that it is fair to excuse them from liability, upon the basis that they have demonstrated that they have in all respects connected with that loss, acted reasonably."

Comment:

Pending further consideration of the issues raised in this authority by the Supreme Court, the present position is that a careless solicitor can no longer expect to secure relief in a fraud case where his acts or omissions were not the direct cause of the loss. If the carelessness had a material bearing upon facilitating the risk of the fraud succeeding, the Court will be unlikely to grant the lifeline.

Simon Hale

4 New Square

R. (on the application of Mr Lincoln Crawford OBE) – v – The Legal Ombudsman

Administrative Court (Popplewell J.)
5 February 2014
[2014] EWHC 182 Admin

Subject:

Judicial review– Professional complaints – Legal advice and fees – Successful challenge by barrister to decision of the Legal Ombudsman

Summary:

The Court quashed on irrationality grounds a decision of the Legal Ombudsman upholding a complaint against a barrister by a public access client in the first judicial review challenge of the Ombudsman by a barrister to reach a substantive hearing.

Abstract:

The complainant, Mr Sadik Noor, had instructed Mr Crawford, a barrister of over 35 years call, to advise him on a public-access basis in relation to claims for unfair dismissal and disability discrimination against his employer.

Mr Crawford's client care letter recorded agreement that he should provide "*an initial advice in conference*" to Mr Noor for an up-front fee of £650 plus VAT. Mr Noor sent some papers in advance, which Mr Crawford read, and he brought with him to the conference a further lever-arch file of papers. At the conference, Mr Crawford and Mr Noor discussed some of the papers in the new file and Mr Crawford said that he would need to take time to read all the documents which Mr Noor had brought with him. After discussing the case for 1 ½ to 2 hours but before the conference had reached its conclusion, Mr Crawford left the conference room to obtain a document from the clerks' room; but when he returned, Mr Noor had gone, taking with him all the papers including those on which Mr Crawford had been working. The conference therefore ended prematurely.

Mr Noor complained to the Ombudsman that he had received no advice from Mr Crawford and should be repaid the entire fee.

In his provisional and final decisions, the Ombudsman accepted that it was appropriate that Mr Crawford should receive some remuneration for the time he had spent reading papers in advance of the conference. He also accepted that Mr Noor had left before the conference had come to a natural conclusion, and so Mr Crawford did not have the opportunity to provide any kind of 'summing up'. However, he inferred from the fact that Mr Crawford had not produced notes of the conference that only limited advice had been given, and considered that this amounted to poor service. He therefore directed that Mr Crawford should repay to Mr Noor one half of his fee.

Upon Mr Crawford's application for judicial review of the Ombudsman's decision, the judge referred to the considerable latitude afforded to the Ombudsman to resolve complaints swiftly and informally by reference to the statutory criterion of what is fair and reasonable in the circumstances and to the Ombudsman's ability to apply his own standards of what he considered to have been good practice at the relevant time. However he held that the Ombudsman's decision was irrational in the *Wednesbury* sense and must be quashed. It was impossible to read the decision in any way other than as adopting an illogical process of reasoning. It had been irrational to infer from the barrister's failure to provide the Ombudsman with a note of advice given orally in conference that the client had been given only limited advice and had therefore been provided with a poor service.

Comment:

A second LeO decision was overturned by the Administrative Court on irrationality grounds on 11 April 2014 in ***R. (on the application of Hafiz & Haque Solicitors) v The Legal Ombudsman*** **[2014] EWHC 1539**. This wasa judicial review claim brought by solicitors on the basis that the Ombudsman had upheld a complaint based on findings which were inconsistent with the available evidence and therefore illogical.]

Kate Livesey

4 Pump Court