



Solicitors Assistance Scheme newsletter

Spring 2003

Chairman's Report

I suspect that the Proceeds of Crime Act 2002, which, at the time of writing, is on the point of coming into force, will increase the pressure on the profession and therefore is likely to multiply the number of referrals to panel members. I have already received two requests for advice on suspicious transactions. The obligations imposed by the Act and the money laundering regulations are extensive, if not draconian. The Law Society is also considering changes to the rules to take account of these legislative changes.

If only for this reason, I would urge every member to attend the seminar on 4th June (see below), when the new provisions will be fully explained. At the same time, we will have to consider our ethical obligation of confidentiality which is, of course, seriously eroded by these new obligations. Not only will solicitors be at risk of disciplinary proceedings if they fail to comply, but they may also have to face prosecution in the criminal courts and indeed at least one practitioner has already received a jail sentence. These changes to the law are going to impact on every solicitor in the land.

It has been quite difficult to obtain guidance on what has become a complex area of law and I have found that different Government departments and even the Law Society have differing opinions on what needs to be reported. Hopefully, things will become clearer in the next few weeks but I suspect much will continue to depend on the proper exercise of our judgment.

It is because we need to proffer best advice to our colleagues that we are seeking best guidance ourselves. At the same time, your committee has been working hard to ensure that the Solicitors Assistance Scheme continues to receive sufficient funding to cover the cost of training and other activities.

During recent months the Law Society Council in the person of Paul Marsh has been attempting to co-ordinate the various groups which offer some form of pastoral care to solicitors. It was interesting to note that at the first joint meeting of the groups concerned several of their representatives did not know of each others' existence. Despite repeated attempts to promulgate the message, I am aware of the huge number of our colleagues who do not know what we do. Equally many of those with problems do not know where to seek help.

The Law Society has, therefore, decided to establish a 'Pastoral Care Portal' to facilitate access to the different groups for 'the lost lambs'. I think that it is fair to say that all these groups are concerned to retain their distinct identity and your committee consider it vitally important that solicitors are able to continue to obtain relevant information from Bronwen Still, Susannah Lewis and their team at Redditch who are best equipped to direct the 'horses' to the right courses – or vice versa – insofar as referrals to Solicitors Assistance Scheme members are concerned.

If you have any comment on the above or any other matter, please do not hesitate to let us know. Our contact details are set out at the end of this newsletter.

David T. Morgan

Chairman

A letter from the Administrator

Dear Scheme member

I hope by now most of you recognise my name and know that I am your first port of call if you need any help at all with Scheme matters. Please get in touch if your personal details change, if you have an ethical query or if you need to refer a client on. I would also be glad to hear from you if you have any ideas for improving the Scheme or for training.

I have met quite a few of you as I have been the Scheme administrator for 10 years and hope to meet more. I work in Professional Ethics. This department has been linked to the Scheme, not since the Scheme's inception 30 years ago, but for some 20 years. The link was made because of the confidentiality the department extends to its dealings with the profession which echo the relationship of a Scheme member with his or her referee.

In my capacity as Administrator I arrange meetings, training, publish and update the list of members, give talks on the work of the Scheme, liaise between the Society and the Scheme and act as the first point of contact for solicitors seeking Scheme help. As I write this list I feel there must be a lot more that I do as the Scheme is such an important and enjoyable part of my job. I do though have other roles that I perform within Professional Ethics.

Of course, during the time I have been doing the job of administrator, you have acquired an Executive Committee who now quite rightly make the policy decisions for the Scheme. I am an employee of the Law Society and I recognised when I took over as administrator the importance of members themselves making decisions on how the Scheme should be run and having its own voice. The cornerstone of the Scheme is that it is independent of the Society and this is of primary importance to the clients it serves. This means that this should not just be a matter of lip service but should be a fact. I provide support which I accept underpins your work but you the members provide the help and make the ultimate decisions.

I take my hat off to you all as I have seen the valuable job you do for the profession – without you the profession would be the loser.

Susannah Lewis

Training seminar

Members should not miss an excellent training seminar on the hot topic of money laundering and the proceeds of crime to be presented by Alison Matthews, Money Laundering and Serious Fraud Task Force and George Staple QC, former head of SFO

Date: 4 June 2003

Time: 11a.m.

Venue: Law Society, 113 Chancery Lane, London WC2

To reserve a place, please phone Susannah Lewis on 0207 320 5795

Martin J Halley - v - Law Society

In *Martin J Halley -v- Law Society* the Court of Appeal dismissed the Claimant's appeal against the first instance decision that he was not entitled to payment out of monies held to his credit in a solicitors' client account. This followed the Law Society's intervention in the solicitor's practice on the basis of suspected dishonesty in relation to a fraudulent high yield

investment scheme. The Court of Appeal determined that the monies were held on trust for the investors pursuant to Schedule 1, paragraph 6(1) of the Solicitors Act 1974.

Mr Halley ('H') initially brought proceedings against the Law Society for payment out of a sum in the region of US \$114,000 held in a sole practitioner's client account to H's credit. This allegedly represented commission paid in relation to a fraudulent high yield investment programme. The Law Society had intervened in the practice on the ground of suspected dishonesty. The Judge at first instance held that the monies were derived from fraud to which H was a party and that he was not entitled to the funds, not because the fraud was of itself a bar to the claim, but on the basis that H did not have legal title to the monies.

The Judge held, following the rule in re. *Hallett's Estate* [1880] 13 ChD 696 that H had drawn from client account those funds to which he was entitled, leaving those to which he was not in the solicitors' client account.

H argued on appeal that the Law Society did not hold the monies on behalf of the victims of the fraud, as the beneficial interest in the funds did not revert to them unless the 'contracts' in question were rescinded. The Law Society, whilst accepting that the beneficial interest in the funds did not automatically revert to the victims of the fraud, responded that, as the contracts were simply fraudulent devices to obtain monies, no beneficial interest could pass to H, the fraudster, and that, as the scheme was a fraud, it had no legal effect.

The Court of Appeal held that legal title to the funds had become vested in the Law Society following its intervention into the practice, pursuant to statute, but that H had failed to establish a right to payment out of the monies. The transactions in question did not effectively transfer the beneficial interest in the monies to H, as they were unenforceable. The Court of Appeal held that the agreements upon which H sought to rely were the result of a fraud to which he was a party and he could not therefore seek to invoke the equitable jurisdiction of the Court to grant the relief sought.

The appeal was dismissed and the funds were held by the Law Society on a resulting trust for the victims who had been fraudulently induced to pay them.

Recovery of investigation costs

Since about mid-2002, the Office for the Supervision of Solicitors has been able to recover the cost of its investigations into alleged inadequate professional service or professional misconduct where there is an adverse finding at first instance against a firm or solicitor.

If there is a request for a review of that decision by the firm or solicitor and the first instance decision is upheld, further costs of the review are recoverable. The costs recoverable are 'fixed' at £840 for an adverse first instance decision and £215 where there is an adverse review. The costs levy applies only to solicitors against whom a complaint is made and then upheld.

The Office for the Supervision of Solicitors has built into the process a discretion to recover a lesser sum where it would be clearly equitable to do so and in fact the adjudicators have so far tended to treat the fixed costs figures as ceilings rather than the fixed charges. The largest cost levy to date has been £600 on a first instance decision.

The fixed costs figures were not plucked out of thin air but were the result of a comprehensive standard costing methodology. This involved:

- a) surveying the investigatory processes and obtaining average times for different activities
- b) applying the average hourly costs for different grades of staff, and
- c) applying this to get a standard cost per activity.

To ensure fairness in this approach a 25% discount was applied before arriving at the final fixed costs figures.

Office for the Supervision of Solicitors

All decisions of the Office for the Supervision of Solicitors (OSS) are now made by adjudicators in the first instance save in two cases – interventions and decisions on complaints made about members of the Council or Adjudicating Panel. A single member of the Panel can authorise an intervention in cases of urgency.

The Practice Standards division of the OSS is to be expanded from five to fifty people charged with policing general compliance (as opposed to accounts rules compliance). Theoretically all solicitors' firms will be visited. However, the higher risk firms against which multiple complaints have been made will be targeted first.

Holder v Law Society

In *Holder v Law Society* [2003] EWCA Civ 39 the Court of Appeal confirmed the legality of the Law Society's power to intervene in solicitors' practices when dealing with suspected dishonesty, fraud or other cases of serious misconduct.

The intervention was triggered when there appeared to be more than £200,000 missing from the client account of David Holder's practice. Holder argued that the power of intervention granted by the Solicitors Act 1974 contravened the European Convention on Human Rights as applied by the Human Rights Act 1998. He cited Article 1 of the First Protocol to the Convention – the right of every person to be entitled to quiet enjoyment of his possessions – which in his case included client fees. The Law Society was granted summary judgment but Holder appealed.

Holder submitted that the human right contained in Article 1 should be interpreted in accordance with the principles laid down by the Strasbourg Court in relation to the requirement of proportionality (“there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised by any measure depriving a person of his possessions” *Holy Monasteries v. Greece* [1994] 20 EHRR 1). Holder submitted that under no circumstances could the power of intervention be justified because of its effect in destroying the solicitors' practice. Their Lordships rejected this broad submission.

When considering issues of proportionality, the all-important matter was the margin of appreciation or discretion or area of judgment allowed to the legislator and the decision maker. In the present case, the margin arose at two stages: first, the discretion allowed to the legislator in establishing the statutory regime and, second, the discretion of the Law Society as the body entrusted with the decision in an individual case. At the first stage, while the procedure was recognised as draconian in some respects, it was necessary for the protection of the public interest, and the Courts had repeatedly emphasised the balancing exercise which it involved. Their Lordships could see no material difference between that balancing exercise and the fair balance which Article 1 required (“... the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights” *Sporrong and Lönnroth v. Sweden* [1983] 5 EHRR 35). Nor did their Lordships see any reason why the 1998 Act should be thought to have changed anything.

Their Lordships could see no arguable grounds for thinking that the margin allowed to the legislature had been crossed. Having reached that point, the Law Society's actions had to be judged by reference to the procedure laid down by Parliament, not to some hypothetical alternative procedure.

Practice Direction

Practice Direction of the Solicitors Disciplinary Tribunal on adjournments gives guidance on the circumstances which will not generally be regarded as sufficient grounds in themselves for an adjournment:

- Existence or possibility of other proceedings (civil or criminal) unless there is a real risk of ‘muddying waters of justice’
- Lack of readiness/clash of commitments
- Financial difficulties in arranging representation or attending the hearing
- Medical evidence consisting only of a DSS sick note or similar.

(Practice Direction, 4 October 2002)

Miscellaneous Rule Changes

These may be found in the *Solicitors’ Practice (Consequential Amendments) Rules 2003*.

SOLICITORS ASSISTANCE SCHEME COMMITTEE

The Committee is dedicated to providing assistance to solicitors who are encountering business problems, or personal difficulties which impact on their practice. Information is treated in confidence.

For further details, or advice, please contact either of the following:

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