

The issues for solicitors in these transactions are numerous:-

- A solicitor acting for a developer of one of these schemes can, in certain circumstances, find itself liable to the investor purchasers, even if it does not have a retainer to act for them;
- A solicitor's involvement can be said to lend credibility to the "scheme" which in turn can attract regulatory interest;
- Solicitors involved in these developments can inadvertently find themselves in breach of the Solicitors Accounts Rules as well as the FSA's Rules on Collective Investment Schemes;
- Generally, the fact that solicitors are always insured will mean that as a profession, we are the target for such claims especially when the developer has gone out of business or disappeared.

## Residential Conveyancing

The purchaser's solicitor can also be found to have acted in breach of trust even when there was nothing that they reasonably could have done to uncover the fraud. This is the current position of the law as a result of the Judgment in the firm of Dreamvar (UK) Limited v Mishcon de Reya [2016] EWHC 3316 (Ch).

<https://www.dacbeachcroft.com/en/gb/articles/2017/october/property-fraud-conveyancers-beware/>

Whilst the profession awaits the outcome of the appeal which will be heard in February 2018, it is worth bearing in mind that clients can insure against this potential risk and that all property owners can register online to receive alerts from the Land Registry if there is any activity relating to their property.

## Litigation

Changes to no win no fee arrangements which prevent Claimant firms from obtaining success fees has caused difficulty for a number of personal injury law firms and has forced them to diversify. One of the main areas where they have focused their attention is in relation to solicitors' liability for allegedly under settled personal injury claims.

Just as the claims for under settled ancillary relief applications are loss of chance claims, so are these matters. The difficulty for solicitors is that the threshold for a Claimant in establishing a loss of chance is low. The Claimant only has to show that the chance of them achieving a better result is "more than fanciful".

Our advice is to ensure that robust supervision structures are in place in order to try to avoid a later exposure.

- Fighting back against the rise of failed personal injury claims against solicitors

<https://sites-dacb.vuturevx.com/110/4218/landing-pages/fighting-back-against-the-rise-of-failed-personal-injury-claims-against-solicitors.asp?sid=241d10ee-bde0-478d-9737-03987043cc44>

## Regulatory Risks

Since the introduction of Outcome Focused Regulation, the SRA has been particularly active in investigating firms, particularly the larger firms, and taking disciplinary action against them.

Breaches of the Solicitors Accounts Rules, particularly Rule 14.5 which prohibits a solicitor from operating his client account as a bank account, has been a significant area of focus. The SRA successfully prosecuted a firm called Fuglers as a result of a breach of this Rule and has used that case as a blueprint to prosecute other firms. This has led to significant career damaging or limiting sanctions for some members of the profession.

Some Insurers offer an extension under their professional indemnity policies to provide cover for the defence costs of disciplinary proceedings even where those proceedings are not linked to a claim. In some cases, solicitors can buy D&O policies which provide similar cover. Such extensions or D&O policies are likely to become more popular and, in our view, are an absolute necessity for law firms nowadays. Cover can be extended to respond to adverse costs orders made in favour of the SRA and for the fines.

We recommend speaking to your broker in relation to such cover.

<https://www.dacbeachcroft.com/en/gb/articles/2017/september/50-predictions-professional-liability/>

Insurance – Market Conditions & Trends 2017/18

<https://sites-dacb.vuturevx.com/110/4839/uploads/interactive-imct-report-2017.pdf>

# The Pelican Brief

Risk insights and intelligence

Issue 004 | March 2018

## Trends and Claims Update



### Background

In this article, we explore current threats to the profession and look to the future to identify new claims exposures.

Our experience in representing solicitors in the defence of professional negligence claims tells us that the following areas should be monitored closely.

# The SRA statistics suggest that reports of “Bogus firms” have doubled since 2012, with almost half of these reports involving copying the identity of an existing law firm.



## Technological and Data Risks Friday Afternoon Frauds and Phishing Scams

Cyber attacks have already cost law firms and their Insurers millions in claims payments and have even caused some solicitors' PI Insurers to withdraw from the market.

Firms will now be familiar with the typical scenario in which they are asked to transfer completion monies following a conveyancing transaction to a different bank account to the account originally provided.

This is often a result of an opportunistic email hack. Our advice which reflects that issued by the Law Society and the SRA is that solicitors should always telephone to confirm bank details in order to avoid this exposure.

In addition, the instance of “fake” law firm websites continues to increase. The SRA statistics suggest that reports of “Bogus firms” have doubled since 2012, with almost half of these reports involving copying the identity of an existing law firm. Our advice is to monitor your website regularly in order to check the position.

[https://www.lawgazette.co.uk/law/city-firm-tells-of-copycat-cyber-fraud/5063485.article?utm\\_source=dispatch&utm\\_medium=email&utm\\_campaign=%20GAZI41016](https://www.lawgazette.co.uk/law/city-firm-tells-of-copycat-cyber-fraud/5063485.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZI41016)

## Artificial Intelligence (“AI”) and New Technology

Automation is an increasing feature of professional life. Law firms, especially the larger firms, are keen to remain at the cutting edge of new technological developments. The profession is investing in I.T. and other programmes to help automate more routine processes.

This may improve accuracy and at the moment there is no indication that AI is any more likely to be the cause of a claim than simple human error.

It is, however, important that firms obtain their clients' agreement to use AI and to manage any risks associated with a particular AI process. Contracts with AI suppliers will also need to be the subject of close scrutiny.

- In-depth analysis: Artificial intelligence: the legal and regulatory challenges

<https://www.dacbeachcroft.com/en/gb/articles/2017/september/in-depth-analysis-artificial-intelligence-the-legal-and-regulatory-challenges/>

## General Data Protection Regulation

The GDPR is the biggest change in data protection legislation in decades. It will provide individuals with greater control over the use of their data and increase the burden on Data Controllers. The Information Commissioner will be able to impose fines of up to £17m in the event of a breach. This is a huge increase on the current powers which provide for fines of up to £500,000.

Law firms will have to ready themselves for GDPR as it will come into force on 25 May 2018. It is inevitable, however, that we will not all be ready and some could find themselves the subject of regulatory action or claims arising from data breaches.

In addition, a victim of a data breach need no longer demonstrate that they have suffered a financial loss in order to bring a claim against the Data Controller for their breach of duty under the Data Protection Act. The potential for claims arising from a data breach is very significant because law firms often hold large amounts of personal data. Such data includes sensitive personal data and lawyers are often required to use and share that data in order to perform their duties to their clients.

Even more significantly, law firms often hold sensitive personal data which relates to individuals who are not their clients. This presents some unique exposures the effect of which is that firms will have duties to groups of individuals who are not even their clients.

The SRA has issued publications on line in an attempt to ready the profession for the introduction of GDPR. See, for example, [www.sra.org.uk/risk/outlook/risk-outlook-2017-2018.page](http://www.sra.org.uk/risk/outlook/risk-outlook-2017-2018.page).

- Personal Data: the new oil and its toxic legacy under the General Data Protection Regulation

<https://www.dacbeachcroft.com/media/1032098/dacbea058-gdpr-liability-study-v4.pdf>

## Private Client Work

### Tax Avoidance Schemes

Solicitors are often asked to advise on tax or handle transactions which involve tax related issues. Solicitors have been involved in the design and implementation of schemes which are aimed at reducing or avoiding tax liabilities altogether. We have seen this before in the context of SDLT schemes.

The SRA has recently issued a Warning Notice on this issue ([www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Tax-avoidance---your-duties--Warning-](http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Tax-avoidance---your-duties--Warning-)

[notice.page](http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Tax-avoidance---your-duties--Warning-notice.page)). HMRC's attitude to tax avoidance or mitigation has hardened in recent years and new powers now enable them to pursue solicitors who have facilitated such schemes. Lawyers may, therefore, find themselves subject to disciplinary and/or regulatory action if they have knowingly taken steps to assist a client in breaching the HMRC Rules.

### Loss of Opportunity and Ancillary Relief Proceedings

These claims are brought on the basis that the Claimant lost the opportunity, as a result of alleged negligence by their solicitor, to obtain a better result in those proceedings.

In this context, pensions can be a very contentious issue. Armed Forces' pensions, for example, are very valuable assets as they are final salary schemes. It is often prohibitively expensive to instruct an actuary to advise on the value of a pension and solicitors are sometimes asked to perform a rudimentary assessment of the value of a pension to save costs.

This can, however, leave the solicitor vulnerable to a loss of chance claim. We have seen an increase in claims in this area.

### Claims by Disappointed Beneficiaries

With the increase in property prices, even modest estates which contain property may have significant values. It is not surprising that the number of Will disputes has increased over recent years. We regularly see claims brought by disappointed beneficiaries who say that they have lost out as a result of drafting issues in Wills. Sometimes an application for rectification can resolve the issue but often these issues prove to be expensive claims.

Claims can also arise in relation to the management of estates. Examples that we have dealt with recently include failing to obtain all available reliefs from Inheritance Tax, failing to achieve a reasonable sale price for assets comprised in the estate and mistakes in the distribution of the estate in accordance with the Will.

### Claims arising from failed Investment Schemes

Investment schemes have taken a number of forms over recent years. One popular version is the purchase of off plan properties in the UK and abroad. Typically, schemes are marketed as “normal” property investments but purchasers are required to pay large deposits which are then not properly secured. The purchaser is then exposed to the loss of that deposit if the development is never completed and the deposit dissipated.