Solicitors PI: access to documents seized by the Law Society following intervention

There was widespread abuse of mortgage lending products in the five-year period to Summer 2007. In many cases, conveyancing firms became involved in fraudulent transactions merely by acting for the borrower and the mortgage lender where there was some element of impropriety in the application. In most cases the solicitor's involvement was entirely proper and in no way sinister. However, in a minority but rising number of lender claims, evidence of fraud on the part of a conveyancer has emerged.

The Minimum Terms and Conditions (MTC) laid down each year for the profession by The Law Society contain a fraud exclusion (Condition 6.8), which allows a Qualifying Insurer to decline an indemnity to any Insured in respect of a claim where that Insured has committed or condoned fraud or dishonesty. However, the policies are composite in nature, containing multiple contracts of insurance, and insurers are, therefore, obliged to cover other "innocent" Insureds.

Precisely because of the risk of the 'fraudulent rogue' many, though by no means all, lenders declined to appoint sole practitioners to their conveyancing panels. Provided, however, there were at least two partners, then the barriers to panel appointment for conveyancers were set at a very modest level and quality control by lenders in relation to monitoring their panels was generally lax.

Against this backdrop, when a conveyancer like Mr Onobrakpeya colludes with others to steal very large sums of client monies, the state of knowledge of his partner(s) as regards the dishonest activities determines whether the PI insurer or the lender client bears the resulting losses. Many millions of pounds can be at stake (as in the present case).

In general terms, recognising the traits of a fraudulent solicitor and distinguishing those from the 'merely careless' often requires a painstaking and expensive forensic exercise, piecing together the evidence from often disparate transactions occurring over extended periods of time for different former clients. Indeed, the courts have recognised that the line between gross incompetence and fraud can be a very fine one. Where, as in this case, the solicitors' regulator has intervened into a practice and taken possession of its records, the process of gaining access to relevant papers to undertake the forensic exercise is often more difficult than where the firm's practice continues. Except where the former client is implicated in the suspected fraud or where the client is a victim and waives its rights to assert privilege or confidentiality, the courts will limit the access to those papers necessary to deal with claims raised against the insured firm. The courts will generally only deviate from this approach when cogent evidence of fraud is put before it to justify overriding the client's legal professional privilege and rights to confidentiality (as to which, see the principles laid down by the court in Nationwide v Various Solicitors (1999) PNLR 52).

In Quinn Direct Insurance Limited v The Law Society of England and Wales, the PI insurers appear to have abandoned the prudent approach of gathering evidence related only to existing or emerging claims against the defunct firm, in favour of a full-frontal assault and all-out bid to obtain all papers held by the Law Society following the intervention into South Bank Solicitors. Thus, in their Part 8 proceedings Quinn sought:

> "*...access to all such documents of [the Firm] as the Defendant has in its possession or control including without limitation all accounting records to consider whether under the policy the Claimant is obliged to indemnify or obliged not to indemnify Mr Ikoku.*"

The rejection of this approach, by a judge noted for his robust and no-nonsense attitude to fraud claims, underlines several practical points to keep in mind when dealing with such sensitive issues:

- evidence-based and targeted disclosure has a much better prospect of success than a blanket request for access to a practice's documents following an intervention;
- the court will presume a lawyer innocent until a *prima facie* case is raised against him;

- the regulator (and the court) will continue to be suspicious of wide-ranging disclosure applications in these circumstances, particularly in the light of this judgment.

The judgment serves to underscore the existing law and it is difficult to see how the application (or any appeal) could have succeeded. Whilst frustrating, time-consuming and expensive, care, patience and prudent judgment need to be exercised in formulating defined disclosure requests in these type of cases and the rights of former clients need to be given due thought and consideration.

In the broader context, where lenders request solicitors' files and ledger cards as part of a review of loss-making transactions, firms can (with the encouragement and assistance of insurers) seek confirmation that lenders have no objection to the solicitor discussing the matter and disclosing the relevant file to its PI insurers. Lenders are, in the vast majority of cases, content to do so for two reasons: first, file requests from lenders typically prompt a notification to insurers of circumstances that might give rise to a claim; and, secondly, it is generally in the interests of lenders to engage PI insurers in relation to their claims.

Finally, where there is perceived to be a real risk of intervention (for whatever reason), it is important that insurers obtain as much relevant information and documentation as possible from the firm. It may, for example, be appropriate to copy certain files (whether in hard copy or electronically) in order to preserve evidence, whilst undertaking not to read them unless and until claims are made or confidentiality is waived at a later date. This is particularly important in the mortgage fraud context, where "lost" or destroyed files are a common feature.

Simon Chandler and Peter Maguire and both partners specialising in solicitors PI insurance within the Insurance and Reinsurance Group and familiar with the circumstances and factors described in Quinn v The Law Society. They can both be contacted on 0207 367 3000