



**SPG**

THE SOLE  
PRACTITIONERS  
GROUP





# AGM

Sunday 26 June 2022



# COFFEE BREAK

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Back at 11:15





#spgconf2022





**Helen Gregory**

**Partner, Milsted Langdon**

**MILSTED LANGDON**

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**Sole Practitioners' Conference:  
ACCOUNTS IN LITIGATION**

**Helen Gregory**

**26 June 2022**

 [milstedlangdon.co.uk](https://www.milstedlangdon.co.uk)

# My use of accounts

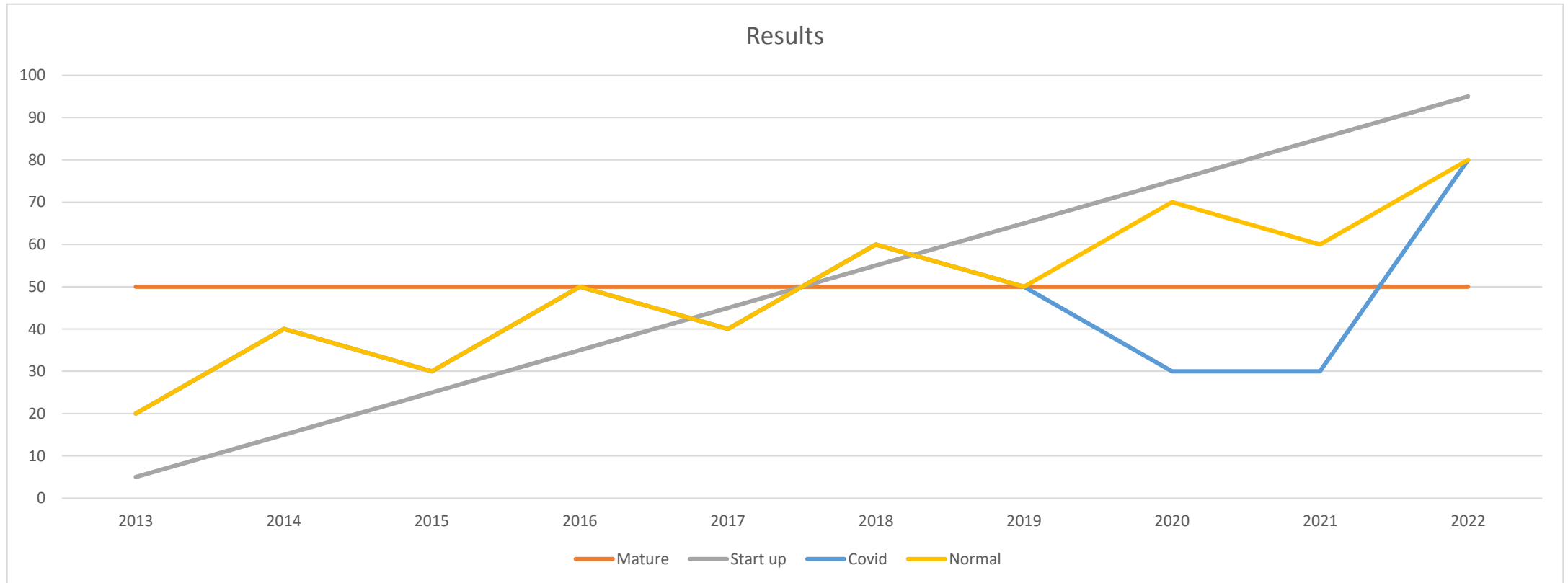
- Trained in audit
- Forensic accounting since 1998, expert since 2006
- Secondments to prosecuting authorities
- Why and how do I use accounts?



# Accounts: what are they?

- Financial statements
- UK Generally Accepted Accounting Practice (UKGAAP)
- Management accounts
- Forecasts
- Not all accounts are prepared equal

# Accounts: what do they show



# Accounts: possible problem areas

- Directors' remuneration - market rate?
- Cash business – income complete?
- Directors' Loan Account (DLA) – personal expenses
- Fictitious entries

# Accounts: possible problem areas

- Own or rent property – profit impact
- Stock – different ways to account
- Shares – right to vote

# Accounts: impact of COVID-19

- Profit trend
- Furlough payments
- Coronavirus Business Interruption Loan Scheme / Bounce Back Loan Scheme

# Accounts: information request

- Full accounts for last five years
- Management accounts for the last period
- Market valuations for certain assets
- Transactions not at market value
- Shareholders' agreement
- Recent share transactions

# Q&A

# Contact details

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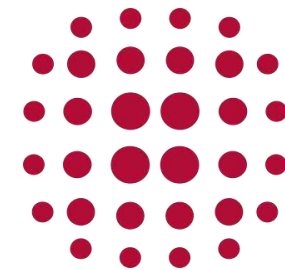




#spgconf2022



Broking done *differently*



Solicitors  
Regulation  
Authority

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MILSTED LANGDON



# Graham Sellers

Counsel, Atlantic Chambers

# Conflicts of Interest in Conveyancing

**Graham Sellers**

LLB (Hons), LLM (Cantab), Barrister

Atlantic Chambers, Liverpool



# CONVEYANCING



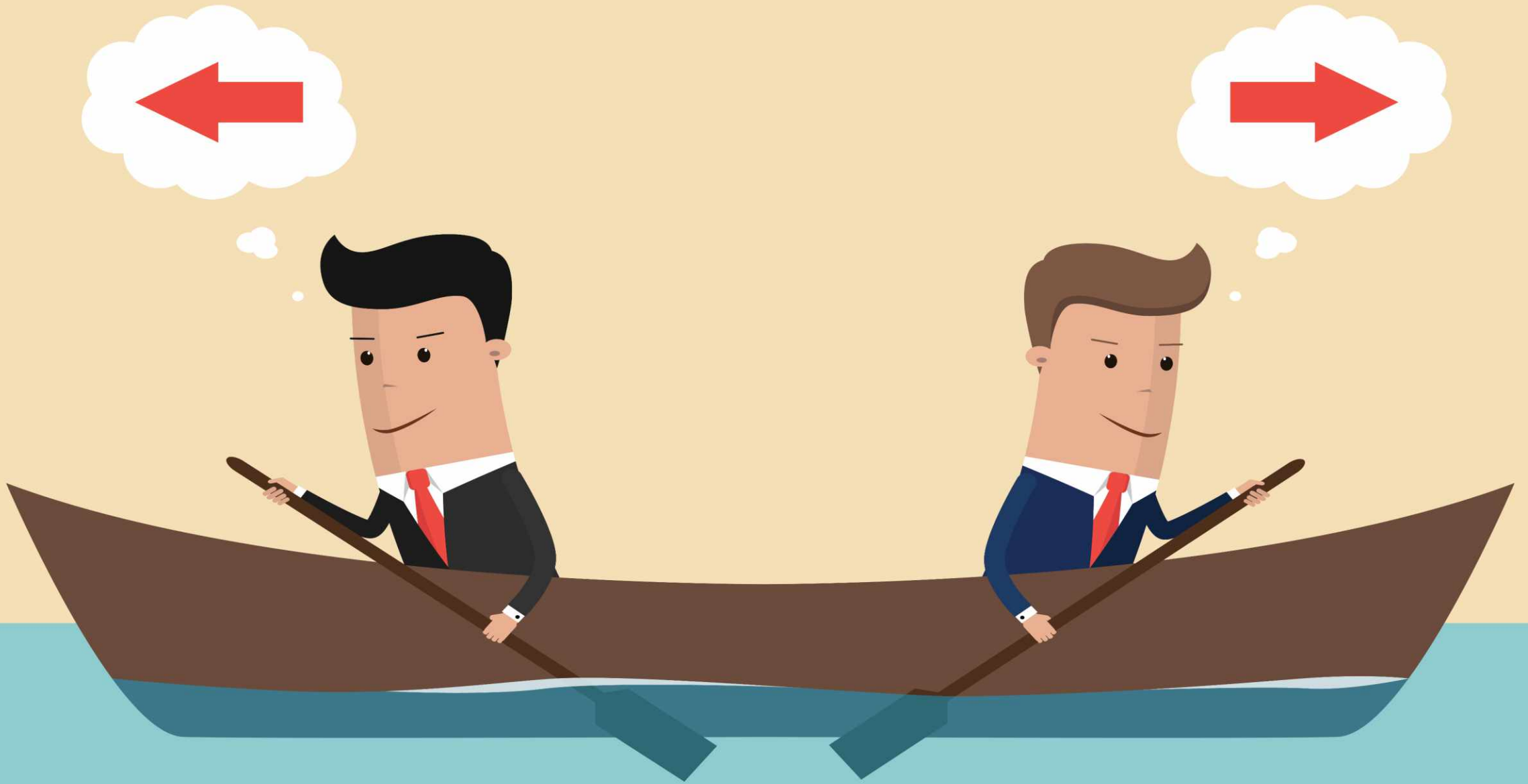
**SOLD**  
CONTRACT

Mortgage Loan Agreement



# Some fundamental considerations .....

- Are the clients' interests different?
- Might your ability to give independent advice to the clients be fettered?
- Is there a need to negotiate between the clients?
- Is there an imbalance in bargaining power between the clients?
- Are any clients vulnerable?



# What's it all about?

- Acting for both parties
- Mortgages: Acting for lender and borrower
- Acting for joint buyers
- Acting for two or more joint borrowers
- Acting for seller and lender
- Undertakings
- Dealing with persons other than solicitors
- Client confidentiality
- Money laundering
- Mortgage fraud
- Property and title fraud
- 2022: Ukraine and the Russian dimension

# Why is it so important?

- Regulatory / professional misconduct
- Professional indemnity / negligence
- Linked transactions – conveyancing chain
- Criminal – AML aspects
- Reputational
- Financial





Conflict of  
Interest

# An overview ..... the GS approach .....

- Insofar as possible, do not get yourself into a conflict situation to begin with
- Be acutely aware of how conflicts can arise, how quickly they can arise and just how difficult they can be to resolve
- Put yourself in the position of all relevant parties; even if there is no actual conflict, might there be a perception of a conflict?
- Try to anticipate what problems might arise in the transaction in question. What about wider duties and obligations?
- It's all about risk management – what risk is acceptable and what isn't?
- As a general rule of thumb, the earlier a conflict is actually identified, the easier it is to manage
- Does the situation need to be reported to your PI insurer?
- Texts: **The Law Society's Conveyancing Handbook** (28<sup>th</sup> edition)  
**Cordery on Solicitors / Legal Services**
- SPG: subject to the boundaries of confidentiality, it's good to talk .....
  - talk to a trusted colleague
  - talk to the SRA's helpline

SCRATCH  
THE  
SURFACE

# Acting for both parties

- Conflict of Interests
- SRA Codes of Conduct
- Mortgages
- Contract races
- Merger of firms
- Solicitor who moves to another firm
- Joint borrowers

# Conflict of interests

- General principle: As a general principle of professional conduct, a solicitor or firm of solicitors should not accept instructions to act for two or more clients in the same transaction where there is a conflict or a significant risk of a conflict between the interests of those clients.
- Neither a solicitor nor his firm should continue to act for two or more clients if a conflict of interests arises between those clients.

# SRA Codes of Conduct

- Acting for both seller and buyer: A solicitor cannot act for both seller and buyer of land where there is a conflict of interests or a significant risk of conflict.
- Separate duties to act in the best interests of each client: When a solicitor is acting for both seller and buyer a conflict of interests may arise because the solicitor owes separate duties to act in the best interests of each client. Para.6.2 SRA Code of Conduct for Solicitors, RELs and RFLs and para.6.2 SRA Code of Conduct for Firms support SRA Principle 7 which requires a solicitor to act in the best interests of each client. The decision as to whether to act for both buyer and seller rests with the solicitor. Para.2.1 Code for Firms requires a solicitor to have effective systems and controls in place to enable the solicitor to identify and assess potential conflicts of interest. These systems and controls should be appropriate to the size and complexity of the firm and the nature of the work undertaken and to enable the solicitor to assess all relevant circumstances, including whether:
  - (a) the clients' interests are different;
  - (b) the solicitor's ability to give independent advice to the clients may be fettered;
  - (c) there is a need to negotiate between the clients;
  - (d) there is an imbalance in bargaining power between the clients; or
  - (e) any clients are vulnerable.

- Rare instances where no potential conflict: Acting for a seller and buyer is an area which carries an obvious risk of conflict and a solicitor would not be expected to routinely act for both seller and buyer. However, there may be rare instances where a solicitor might conclude that there is no potential conflict of interest, and, in such cases, the solicitor must be able to justify acting for both seller and buyer. The solicitor should keep a record of the decision to act. A solicitor who has decided to act should actively monitor the situation for a conflict of interest arising, bearing in mind there could be considerable implications for each of the clients and for others involved in a series of linked transactions such as a conveyancing chain, should the solicitor need to withdraw because of a conflict situation. The SRA may take regulatory action if compliance cannot be demonstrated.

- No other risk of non-compliance: Where a solicitor is satisfied that there is no potential conflict of interest, he should also satisfy himself that if he were to act, there would be no other risk of non-compliance with the SRA Principles or SRA Codes of Conduct. In particular, the decision to act for both seller and buyer should be of benefit to both clients, rather than in the solicitor's own commercial interests.
- Independence and integrity: Where a solicitor is considering acting for both seller and buyer, the solicitor must also consider the following key principles:
  - (a) act with independence (SRA Principle 3); and
  - (b) act with integrity (SRA Principle 5).



- Confidentiality and disclosure: In addition to dealing with conflicts, solicitors must also bear in mind their duties of confidentiality and disclosure. For example, one party may want certain information, which is also material to the other party, kept confidential. In this situation, a solicitor's duty of confidentiality takes precedence and the solicitor would have to consider ceasing to act for the other party.

- Substantially common interest: Under para.6.2 Code for Solicitors and para.6.2 Code for Firms, a solicitor or firm can act for more than one party, even if there is a client conflict, where the clients have a **substantially common interest** in relation to a matter or a particular aspect of it, if:
  - (a) the clients have given informed consent, given or evidenced in writing, to the solicitor or firm acting;
  - (b) where appropriate, the solicitor or firm puts in place effective safeguards to protect the clients' confidential information; and
  - (c) the solicitor or firm is satisfied it is reasonable to act for all the clients.
- A '**substantially common interest**' is defined as "a situation where there is a clear common purpose between the clients and a strong consensus on how it is to be achieved".

# Mortgages

- Acting for both lender and borrower: A solicitor may act for both lender and borrower provided the solicitor can comply with SRA Principle 7 and the provisions in the Code for Solicitors and Code for Firms which support this principle which requires the solicitor to act in the best interests of each client. The provisions which support this principle are:
  - (a) the solicitor must not act where the solicitor's duty to act in the best interests of the client conflicts, or there is a significant risk that it may conflict, with the solicitor's own interests (para.6.1 Code for Solicitors and para.6.1 Code for Firms); and
  - (b) the solicitor must not act where the solicitor owes separate duties to act in the best interests of two or more clients in relation to a matter and those duties conflict, or there is a significant risk that those duties may conflict (para.6.2 Code for Solicitors and para.6.2 Code for Firms).

- Effective systems and controls: Para.2.1 Code for Firms requires a solicitor to have effective systems and controls in place to enable the solicitor to identify and assess potential conflicts of interest. The systems and controls should be appropriate to the size and complexity of the firm and the nature of the work undertaken and to enable the solicitor to assess all relevant circumstances, including whether:
  - (a) the clients' interests are different;
  - (b) the solicitor's ability to give independent advice to the clients may be fettered;
  - (c) there is a need to negotiate between the clients;
  - (d) there is an imbalance in bargaining power between the clients; or
  - (e) any clients are vulnerable.

- Non-standard mortgages: The risk of a conflict is high if non-standard mortgage terms are being used or if, in the case of a standard mortgage, the solicitor does not use the approved certificate of title. A mortgage will be a standard mortgage where:

- (a) it is provided in the normal course of the lender's activities;

- (b) a significant part of the lender's activities consists of lending; and

- (c) the mortgage is on standard terms.

- Acting for both: It may be possible to act for a lender and borrower on the grant of a mortgage of land where:
  - (a) the mortgage is a standard mortgage of property to be used as the borrower's private residence;
  - (b) the solicitor is satisfied that it is reasonable and in the clients' best interests for the solicitor to act; and
  - (c) the certificate of title required by the lender is in the form approved by the Law Society and the Council of Mortgage Lenders (now UK Finance).

- No assumptions please: A solicitor should never automatically assume in these circumstances that there is no conflict of interests and that it is permissible to act for both parties.
- Where the mortgage is at arm's length but is not a standard mortgage, there is likely to be an increased risk of a conflict of interests because the terms of the mortgage may be prejudicial to one party or may involve negotiation.

# Contract races

- General principle: If the transaction involves a contract race, the same firm should not act for two or more prospective buyers competing for a residential property due to the high risk of a conflict.
- Potential exemption re commercial property: It may be possible to act in the case of commercial property under para.6.2 Code for Solicitors and para.6.2 Code for Firms as the clients will be competing for the same objective. Both clients must have given informed consent, given or evidenced in writing, to the solicitor or firm acting; where appropriate, the solicitor or firm must put in place effective safeguards to protect the clients' confidential information; and the solicitor or firm must be satisfied it is reasonable to act for all the clients.
- A solicitor or firm should not act for both the seller and one of the prospective buyers in any contract race.



# Merger of firms

- General principle: As a result of a merger or amalgamation a firm may find that it is acting for both seller and buyer in the same transaction. If the firm identifies that there is a conflict of interests, the firm should cease to act for one or both of the parties from the date of the merger. The firm may continue to act for one party only if the duty of confidentiality to the other is not at risk.
- Continuing to act for both with informed consent: The merged firm may continue to act for both clients if both clients have been informed of the situation and consented to the merged firm continuing to act. For informed consent the client must be aware that the firm might hold material information in relation to their matter which the firm cannot disclose. In addition, it must also be reasonable in all the circumstances of the case for the firm to continue acting.

- Where the firm has been acting for two or more clients in compliance with para.6.2 Code for Firms and can no longer fulfil these requirements, the firm may continue to act for one client with the consent of the other, provided that the firm complies with para.6.5 Code for Firms.
- New instructions received for clients of the merged firm will be subject to the provisions of para.6.1 and 6.2 Code for Firms.

# Solicitor who moves to another firm

Client's pending business is taken over by the new firm

- Where a client's pending business is taken over by the new firm, the solicitor may find that his new firm is already acting for the other party to the transaction and a situation analogous to that which occurs on a merger of firms pertains. The provisions of para.6.3 to 6.5 Code for Solicitors must be complied with.
- On moving to the new firm, the solicitor may find he is now acting for the buyer in a transaction where he had previously been acting for the seller in the same transaction (or vice versa). Although in this situation there is no question of the same solicitor or same firm acting for both parties, the solicitor, while working for his previous firm, will have acquired information which is confidential to his (now) former client and which may affect or prejudice the way in which he handles the transaction for the client of the new firm. In order to preserve his duty of confidentiality to his former client, the solicitor should not act for the client of the new firm in this transaction, but there is no objection to the matter being handled by another fee earner in the solicitor's new firm provided that adequate safeguards are put in place to ensure that the confidential information is safeguarded.

# Joint borrowers

- General principle: Where joint borrowers are obtaining a mortgage for the purchase of property, there is no objection to the same solicitor advising both of them, provided that their interests coincide.
- Where, however, one party is acting as **surety** for the other's debts, e.g. a wife who is guaranteeing her husband's mortgage of the MH to secure the husband's business debts, the parties' interests will almost certainly be in conflict with each other.

- Wife acting as surety: In these circumstances, separate and independent advice must be given to each party. It may be possible for the same solicitor to advise both clients in these circumstances, but each client should be seen separately and the advice given to each party must be consistent with that party's interests.
- **Barclays Bank plc v O'Brien** [1993] 4 All ER 417
- **Midland Bank v Serter** [1994] EGCS 45
- **Clark Boyce v Mouat** [1993] 3 WLR 1021
- **Banco Exterior Internacional v Mann** [1995] 1 All ER 936
- **Royal Bank of Scotland plc v Etridge (No.2)** [2001] UKHL 44
- **Bank Melli Iran v Samadi Rad** [1995] 2 FLR 367

- When instructions are being carried out under the terms of the UK Finance Mortgage Lenders' Handbook, para.8 of the Handbook will normally prohibit the same solicitor from advising any borrower who does not benefit personally from the loan or any guarantor or any non-owning occupier. Such persons must have independent advice. The BSA Mortgage Instructions contain similar provisions in paras.B.24 and B.25.

# Mortgages: acting for lender and borrower

- General principles
- Conflict of Interests
- Examples of conflict
- Confidentiality
- Non-standard mortgages
- Sureties
- Mortgage fraud
- Ownership of documents and confidentiality
- The UK Finance Mortgage Lenders' Handbook for England and Wales
- BSA Mortgage Instructions

# General principles

- The buyer's lender will frequently instruct the buyer's solicitor also to act for him in connection with the grant of the mortgage. The same situation commonly occurs in relation to the discharge of an existing mortgage when acting for a seller client. A lender will only instruct a firm of solicitors which is a member of its conveyancing panel.
- As soon as the solicitor accepts instructions to act for the lender he is acting for both parties in one transaction (i.e. for both lender and borrower) and owes a duty to both clients (**Mortgage Express Ltd v Bowerman & Partners** [1996] 2 All ER 836). Their respective interests are not necessarily identical and need to be separately considered.



- Subject to slides 17 – 21 above, acting for both parties is permissible provided that no conflict of interest arises between the two clients. However, it may be possible to act under para.6.2 SRA Code for Solicitors, RELs and RFLs and under para.6.2 SRA Code for Firms where there is a conflict of interest but the clients have a **substantially common interest** in relation to a matter or a particular aspect of it. A “**substantially common interest**” is defined as ‘a situation where there is a clear common purpose between the clients and a strong consensus on how it is to be achieved’.

- The lender's instructions to act and (in the case of a purchase) terms of offer must be carefully scrutinised to ensure that there is no conflict or potential conflict between the interests of the lender and the buyer/seller.
- In many cases the lender's instructions will require the solicitor to observe the terms of the UK Finance Mortgage Lenders' Handbook or the BSA Mortgage Instructions.

## Conflict of Interests

- If a conflict of interests occurs the solicitor **must** decline to act (or to continue to act) for both parties unless he can, with the consent of one party, continue to act for the other.

## Examples of conflict

- Conflict may arise if, for example:
  - (a) the terms of the mortgage offer are inequitable;
  - (b) instructions reveal that the buyer would be in breach of one of the terms of the offer;
  - (c) the buyer/seller is unable to comply with the lender's terms;
  - (d) the buyer is offering inadequate security.

- Buyer misrepresenting the purchase price: A conflict will also arise if the buyer's solicitor becomes aware that the buyer is misrepresenting the purchase price to the lender, e.g. where the buyer and seller have agreed that the actual purchase price of the property will be lower than that shown in the contract and purchase deed, or where the buyer receives an inducement such as a free holiday to persuade him to buy the property.
- Duty of confidentiality: Solicitors have a duty of confidentiality to their clients, but this does not affect their duty to act in the best interests of each client. Subject to the instructions received from the particular lender concerned, any information regarding variations to the purchase price should be forwarded to the lender with the consent of the buyer. If the buyer will not consent to the information being disclosed to the lender, the solicitor must cease to act for the lender and must consider carefully whether he is able to continue to act for the buyer. Any attempt to defraud the lender may lead to criminal prosecutions of both the buyer and the buyer's solicitor. The solicitor would also be guilty of unprofessional conduct. If a solicitor is aware that his client is attempting to perpetrate fraud in any form, he should immediately cease to act for that client.

# Confidentiality

- All information received by the solicitor from his client is confidential and cannot be disclosed to the lender without the client's consent. Knowledge acquired in the course of acting for the client is not imputed to the lender (**Halifax Mortgage Services Ltd v Stepsky** [1996] Ch 1 (affirmed on appeal: see [1996] Ch 207)).
- Borrower intending to breach terms of the mortgage: Where, for example, the solicitor is told by his borrower client that the client intends to breach the terms of the mortgage offer by letting the premises to a tenant, the solicitor, when informing the lender that he can no longer act for him, must tell the lender that the reason for the termination of the retainer is because a conflict of interests has arisen, but is not at liberty to disclose the nature of the conflict without the borrower client's consent.

# Non-standard mortgages

- There is likely to be an increased risk of a conflict of interests if the mortgage is at arm's length and is not a standard mortgage as the terms of the mortgage may be prejudicial to one party or may involve negotiation.
- A standard mortgage will be one on standard terms provided in the normal course of the lender's activities, where a significant part of the lender's activities consists of lending and the mortgage is on standard terms.
- Subject to the general principles of conflict of interests it would be possible to act in a non-standard mortgage which is not at arm's length (e.g. a loan between father and son), but it is advisable to ensure that the borrower receives independent advice about the terms of the loan.

# Sureties

- Wife acting as surety: Where the lender requires a surety to enter into the transaction, the surety should be advised to take independent advice before signing the security document. This is of particular importance where the intended surety is the wife of the borrower since the courts take the view that a security should not be enforced against a married woman unless the lender can show that he has taken reasonable steps to show that she understood the transaction.
- **Barclays Bank plc v O'Brien** [1994] 1 AC 180
- **CIBC Mortgages v Pitt** [1994] 1 AC 200
- Under the terms of the UK Finance Mortgage Lenders' Handbook (para.8), a solicitor cannot act for both the borrower and a surety without the lender's consent and the surety must have independent advice. The BSA Mortgage Instructions contain similar provisions in paras.B.24 and B.25.
- If the proceeds of a life policy fall into the deceased's estate (e.g. because the policy was not formally assigned to the lender) the surety has no claim against the deceased's estate.



# Mortgage fraud

- Mortgage fraud can occur in either a residential or commercial transaction and can assume many different guises. Solicitors must be alert to the possibility of fraud and should be careful not to participate, even unknowingly, in a transaction where such a fraud is being perpetrated. The courts may be less willing to accept claims that the solicitor was unwittingly involved if he has not applied appropriate due diligence.

# Ownership of documents and confidentiality

- The following guidance relates to the position where the same firm of solicitors acted for the buyer/borrower and for the lender on a contemporaneous purchase and mortgage and the lender asks to see documents on the 'conveyancing file'.
- Ownership of papers: Where all the documentation is kept on one file, the solicitor will have to sort through the file to determine ownership of the various papers.

- Documents lender entitled to see: The documents which the lender will be entitled to see fall into two categories:
  - ❑ documents prepared or received by the solicitor on behalf of the lender;
  - ❑ documents prepared or received by the solicitor on behalf of the borrower which, it is considered, the lender is nonetheless entitled to see.
- The rationale is that these second category documents relate to that part of the solicitor's work where the lender and borrower can be said to have a common interest, i.e. the deduction of title, the acquisition of a good title to the property and ancillary legal issues, such as the use of the property. Examples of the most common items in these two categories are set out below.

- Documents held by the solicitor on behalf of the lender are:

- (a) the lender's instructions to the solicitor;

- (b) copy mortgage deed;

- (c) copy report on title;

- (d) any correspondence between the solicitor and the lender or between the solicitor and a third party written or received on the lender's behalf.

- Documents held by the solicitor on behalf of the borrower which the lender is entitled to see include:
  - (a) contract for sale;
  - (b) property information form/enquiries before contract;
  - (c) results of pre-contract searches and related correspondence;
  - (d) official copies of the title/abstract or epitome of title;
  - (e) requisitions on title;
  - (f) draft purchase deed;
  - (g) draft licence to assign (where appropriate);
  - (h) HMLR application forms.

- Waiver of legal professional privilege: Where a borrower signs a mortgage application form which contains a declaration consenting to the whole conveyancing file being handed over to the lender on request, the borrower will be deemed to have waived his right to legal professional privilege over those documents in the mortgage files that may otherwise have been privileged (**Mortgage Express v Sawali** [2010] EWHC 3054 (Ch))

# The UK Finance Mortgage Lenders' Handbook for England and Wales

- Handbook forms the contract: The UK Finance Mortgage Lenders' Handbook forms the contract between the solicitor (or licensed conveyancer) and lender where the solicitor (or licensed conveyancer) is representing a lender who has agreed to be a party to the Handbook. A number of major lenders have agreed to be parties to the Handbook. Other mortgage lenders may also instruct solicitors to act on the terms of the Handbook. The instructions apply whether or not the solicitor is acting for both borrower and lender or for the lender only.
- Specific instructions to the particular transaction in hand: Modifications of the instructions specific to the transaction in hand are notified to the solicitor in the lender's written instructions to the solicitor and/or in Part 2 of the Handbook.

- It is the solicitor's responsibility to ensure that the property has a good and marketable title which can safely be accepted by the lender as security and that the property is validly charged to the lender to secure the advance made to the borrower.
- Communications between the solicitor and the lender must be in writing (or confirmed in writing) and must quote the mortgage account or roll number, the borrower's name and initials, the address of the property and the solicitor's reference.



- Documents contained in the '**joint file**' (as defined in the Handbook) must be retained by the solicitor for at least 6 years from the date of the mortgage. The borrower is not permitted to have documents from the file without the lender's consent. Equally, the lender is not permitted to have documents from the file without the borrower's consent. Each would be entitled to certified copies, but the lender only to those documents relevant to its retainer because of the right of the borrower to confidentiality.
- The solicitor must use the lender's standard documentation, the wording of which must not be varied without the lender's consent.
- Part 3 of the Handbook contains a set of standard instructions for a solicitor who is representing the lender separately from the borrower in a residential conveyancing transaction. Part 3 should be read in conjunction with Parts 1 and 2 where it applies.

# BSA Mortgage Instructions

- Instructions form the contract: The BSA Mortgage Instructions form the contract between the solicitor (or licensed conveyancer) and lender where the solicitor (or licensed conveyancer) is representing a lender who is a member of the Building Societies Association and who has agreed to use the BSA Mortgage Instructions. A number of building societies and other lenders have agreed to use the BSA Mortgage Instructions. The instructions apply whether or not the solicitor is acting for both borrower and lender or for the lender only. The instructions comprise two sections: a core set of mortgage instructions and specific requirements setting out individual lenders' policies.
- Instructions specific to the particular transaction in hand: Modifications of the instructions specific to the transaction in hand are notified to the solicitor in the lender's written instructions to the solicitor and/or in the lender's specific requirements.

- It is the solicitor's responsibility to ensure that the property has a good and marketable title which can safely be accepted by the lender as security and that the property is validly charged to the lender to secure the advance made to the borrower.
- Communications between the solicitor and the lender must be in writing (or confirmed in writing) and must quote the mortgage account or roll number, the borrower's name and initials, the address of the property and the solicitor's reference.

- Documents contained in the '**joint file**' (as defined in the BSA Mortgage Instructions) must be retained by the solicitor for at least six years from the date of the mortgage. The borrower is not permitted to have documents from the file without the lender's consent. Equally, the lender is not permitted to have documents from the file without the borrower's consent. Each would be entitled to certified copies, but the lender only to those documents relevant to its retainer because of the rights of the borrower to confidentiality.
- The solicitor must use the lender's standard documentation, the wording of which must not be varied without the lender's consent.

# Acting for joint buyers

- General principle: A solicitor can usually act for joint buyers if there is no conflict of interests.
- Mere cohabitees: Where the buyers of residential property are neither married to each other, nor in a civil partnership, separate advice about their rights in the property may be necessary.

# Acting for two or more joint borrowers

- General principle: A solicitor may act for joint borrowers provided that there is no conflict of interest.
- Common H & W situation
- **Royal Bank of Scotland v Etridge** [2001] UKHL 44
- Burden of proof
- Where the lender is put on inquiry .....
- What advice should the solicitor give?
- The nature and extent of the advice given will depend on the facts of the case in question but .....
- The lender should, with the consent of the H, supply the solicitor with the following financial information:

- The lender should, with the consent of the H, supply the solicitor with the following financial information:
  - (a) the purpose for which the loan is being made available;
  - (b) the current amount of H's indebtedness;
  - (c) the amount of the current overdraft facility;
  - (d) the amount and terms of the new loan;
  - (e) a copy of any written application made by the H for the loan.
- If the H does not consent to the release of this information, the transaction cannot proceed.

# Acting for seller and lender

- General principle: It is usual for the solicitor acting for the seller to be instructed by the seller's lender in connection with the discharge of the seller's mortgage.
- Normally, there is no problem with this.



# Undertakings

- The vital importance of undertakings generally
- At various stages during a conveyancing transaction, a solicitor may be required to give an undertaking, which is a promise by that solicitor to do or not do something. For example, undertakings may be given:
  - (a) when obtaining the title deeds from a building society;
  - (b) to repay a bridging loan;
  - (c) to discharge a mortgage on completion.
- Solicitor personally bound – professional misconduct & enforcement by the Court
- Qualified undertakings
- Should always be given in writing or at least confirmed in writing
- Drafting of an undertaking
- Timescale

# Dealing with persons other than solicitors

- Party represented by a licensed conveyancer
- Unqualified persons
- Unrepresented party

## Client confidentiality

- Para.6.3 of the SRA Code of Conduct for Solicitors, RELs and RFLs and para.6.3 of the SRA Code of Conduct for Firms provide that a solicitor **must** keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by the client or former client.



# Money laundering

- Money laundering is the process by which the proceeds of crime, and the true ownership of those proceeds are changed so that the proceeds appear to come from a legitimate source.
- Solicitors involved in conveyancing transactions are at risk of being involved in money laundering because property transactions can involve any stage of the money laundering process.
- **Proceeds of Crime Act 2002**
- **Terrorism Act 2000**
- **Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692)**

# Part 7 of the 2002 Act

s.327: Concealing etc

s.328: Arrangements

s.329: Acquisition, use and possession

s.330: Failure to disclose: regulated sector

s.331: Failure to disclose: nominated officers in the regulated sector

s.332: Failure to disclose: other nominated officers

s.333: Tipping off (Repealed)

s.333A: Tipping off: regulated sector

s.333B: Disclosures within an undertaking or group etc

s.333C: Other permitted disclosures between institutions etc

s.333D: Other permitted disclosures etc

s.333E: interpretation of sections 333A to 333D

s.334: Penalties

## R v Jonathan Michael Duff

(18, 6 months, Manchester CC)\*

[2002] EWCA Crim 2117, [2003] 1 Cr App R (S) 88

CA (Crim Div): A sentence of six months' imprisonment for a solicitor who had pleaded guilty to failing to disclose knowledge or suspicion of money laundering was **not**, in the circumstances, excessive.

Paul Winter Morris (28, 5 years, Birmingham CC)\*

Andrew Young (14, 2 years, 3 months, Sheffield CC)

Peter Obidi (4, 6 months, Southwark CC)\*

Brian Dougan (unknown, 3 months, Liverpool CC)

Philip Griffiths (21, 6 months, Warwick CC)\*

Gerard Hyde (29, 42 months, Southwark CC)\*

Jonathan Krestin (31, fine, Isleworth CC)

Mohammed Jahangir Farid (unknown, 4 years, Bradford CC)

Rachel Taylor (5, suspended sentence + community work + fine, Luton CC)



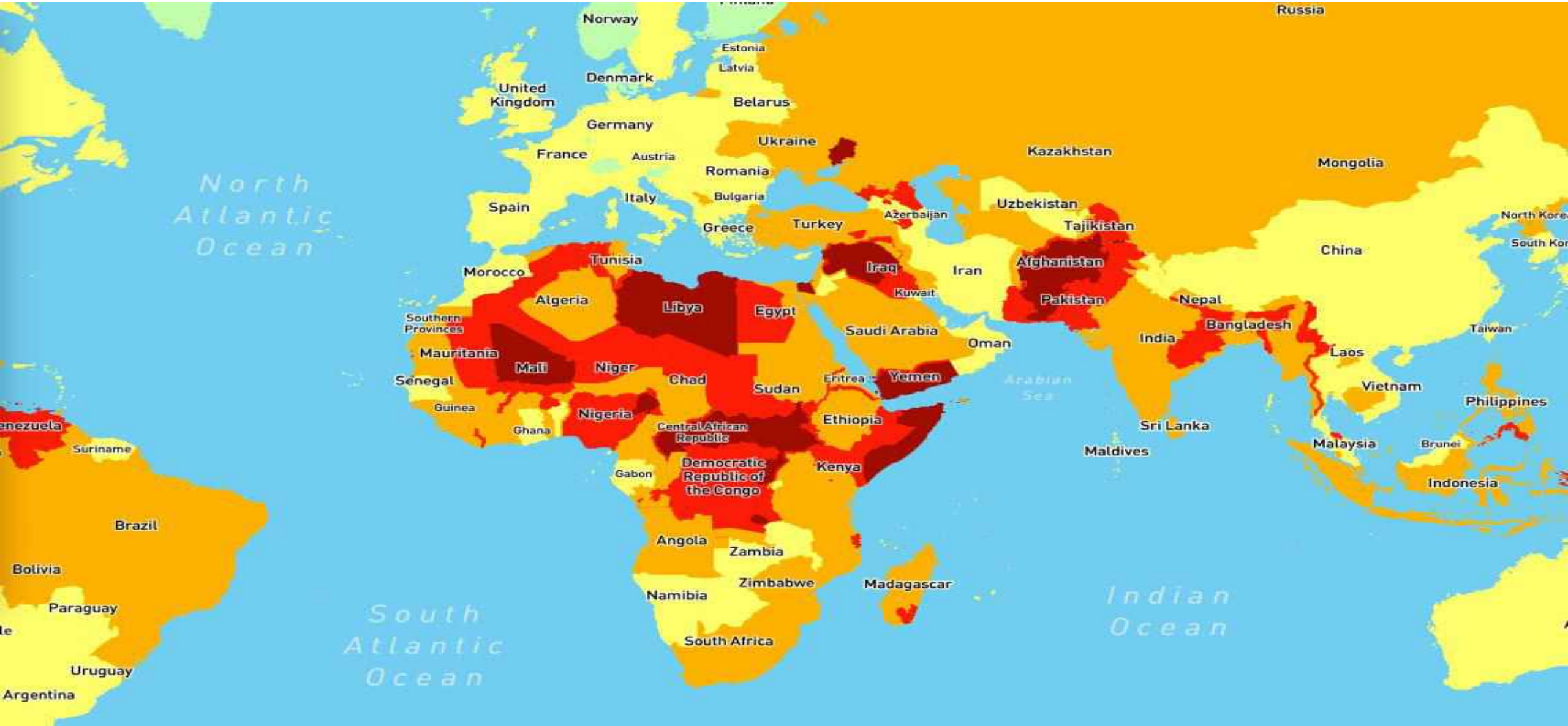
- Anthony Block (49, 4 years, Croydon CC)
- Aminat Afolabi (2, 18 months, Inner London CC)\*
- Shadab Khan (12, 4 years, Leeds CC)\*
- Martin Wilcock (11, fine, Preston CC)
- Bhadresh Gohil (18, 10 years, Croydon CC)\*
- James Thorburn-Muirhead (37, 16 months, Kingston CC)\*
- Nicholas Heywood (21, 12 months, Warrington CC)\*
- Andrew Tidd (27, suspended sentence, Burnley CC)
- Richard Housley (unknown, 4 years, Edinburgh High Court)
- Andrew Wormstone (20, 30 months, Leicester CC)\*

\* = struck off

- The 2002 Act establishes a number of money laundering offences:
  - (a) the principal ML offences,
  - (b) offences of failing to report suspected ML,
  - (c) offences of tipping off about a ML disclosure, tipping off about a ML investigation and prejudicing a ML investigation.
- The Terrorism Act 2000 (as amended) contains offences relating to engaging in or facilitating terrorism, as well as raising or possessing funds for terrorist purposes. There are also tipping off offences.
- Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017 apply to all legal professionals acting in any real property transaction and set out the requirements for the AML regime and outline the scope of customer due diligence.
- Customer due diligence (risk based approach)
- Nominated AML officer

- Guidance on AML: particular signs to watch out for:
  - (a) unusual instructions, in particular from people who live far away and who could use a solicitor nearer to them;
  - (b) a client who asks you to hold a large amount of cash in your firm's client account;
  - (c) a client who asks you to hold a large sum of cash and then asks you for a cheque from your firm; and
  - (d) a secretive client who is reluctant to provide details of his identity.
- **Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511**

# High Risk Countries



The list of high risk countries is set out in schedule 3ZA of the 2017 Regulations but was amended on the 29.3.2022 by the **Money Laundering and Terrorist Financing (Amendment) (High-Risk Countries) Regulations 2022**.

• The current high-risk countries are as follows:

- Albania
- Barbados
- Burkina Faso
- Cambodia
- Cayman Islands
- Democratic People's Republic of Korea\*

- Haiti
- Iran\*
- Jamaica
- Jordan
- Mali\*
- Malta
- Morocco
- Myanmar\*
- Nicaragua\*
- Pakistan
- Panama
- Philippines

- Senegal
- South Sudan\*
- Syria
- Turkey
- Uganda
- United Arab Emirates
- Yemen\*

- UAE added to the list but Zimbabwe removed

\* = these jurisdictions are subject to financial sanctions measures which require firms to take additional measures

# Mortgage fraud

- Mortgage fraud occurs where a person defrauds a lender through the mortgage process. All solicitors who do conveyancing involving a mortgage must be alert to mortgage fraud.
- Criminal liability.
- **Fraud Act 2006**
- AML – Proceeds of Crime
- **The Law Society's Mortgage Fraud Practice Note (13.1.2020)**



# Property and title fraud

- The Law Society's Property and Registration Fraud Practice Note (26.6.2020)
- **P&P Property Ltd v Owen White & Caitlin LLP**  
**Dreamvar UK Ltd v Mishcon de Raya [2018] EWCA Civ 1082**
- 2019: New edition of Law Society's Code for Completion by post





**RUSSIA**

**SANCTIONS**

# 2022: Ukraine and the Russian dimension

“We stand in solidarity with the Ukrainian people, the Ukrainian National Bar Association and the Ukrainian Bar Association.

We also stand with the Russian people who oppose their government’s illegal invasion of Ukraine, and lawyers who are defending the rule of law in the region.

We condemn the actions of the Russian Federation, which are in contravention of international law. There is no doubt that these actions are a direct threat to the rule of law.”

**Stephanie Boyce, President of the Law Society**

## “Lawyers’ challenges regarding Russia sanctions”

- What about working with clients in the framework of the new sanctions packages introduced after the Russian invasion of Ukraine
- **Law Society Gazette: 21.6.2022 ..... Jonathan Goldsmith**
- Solicitors are clearly able to continue working for sanctioned clients if they have a licence from OSFI (the Office of Financial Sanctions Implementation). The SRA has issued guidance, but it is of the “do not break the law” variety.
- “When someone not surprising asked at the seminar the obvious and ultimate question – ‘What can a lawyer do and not do for a client who has been sanctioned?’ – the official answer was that there was no clear answer.”

- The Guidance highlights that the SRA are commencing a process of spot checks on firms to assess compliance with the financial sanctions regime. It's important that all firms ensure that they immediately review their policies, controls, procedures and sanctions compliance.”
- The Guidance sets out:
  - the criminal offences under the regime,
  - how to carry out a risk assessment,
  - obligations to check clients against a sanctions list,
  - how to apply for a licence to act for a client on a sanctions list,
  - your reporting obligations.

# Indicators of sanctions evasion risk

- Russian clients communicating changes to the beneficial ownership of their private investment companies to non-Russian or dual national family members
- Requests to transfer assets between Russian national / dual national family members
- Use of trust arrangements, with circumstances of transfers calling into question whether the original owner retains indirect control or otherwise could retain a benefit from the assets transferred
- Assets transferred have usually been shares in companies, both UK and overseas, including both minority and controlling stakes in these businesses

- Payments from venture capital and private equity vehicles, many located in offshore jurisdictions or the Far East
- Clients seeking to move all their assets to other financial institutions and closing their accounts in London
- Clients domiciled in Russia asking whether they can make transfers to their London account
- Attempts to purchase sanctioned Russian securities, which have drastically fallen in price
- Increased volume of transaction monitoring alerts resulting from Russian and Ukrainian clients making and receiving larger transfers than is typical
- Payments received by UK businesses, often in innovative areas, also with some elements of ownership by Russian nationals
- Payments via Fintech with Russian investor nexus



- Research on private equity / venture capital vehicles and some people with significant control / officers of UK businesses showing individuals connected to Russian industry previously subject to sectoral sanctions and on occasion politically exposed persons
- Russian high net worth individuals who are already on international sanctions lists (but not UK list) and/or who anticipates that they may become a sanctions target, transferring assets to family members and/or close associates such as employees
- Change in address and names for Russian entities one day prior to invasion
- Change of ultimate beneficial owners from Russian to other nationalities
- Circumvention attempts through open account trade-based money laundering typology – for example, increase in third-party open account payments.

# Answering your sanction questions

- My firm has updated its practice-wide risk assessment in relation to financial sanctions. I'm reviewing my files and updating the client matter risk assessments. What should I do if I find a retainer that involves a sanctioned individual?
- Do UK sanctions only apply to work that falls within scope of the AML regulations?
- My client account received client funds from a Russian-owned business that's now been designated for sanctions. Should I hold onto the funds pending further enquiries or am I permitted to pay the client?
- How do I contact OFSI and keep up to date with changes to the sanctions list?

- We've received instructions from a sanctioned individual, who is a Russian national, to advise on an employment matter. I know that it's a personal decision for my firm whether we accept instructions but if we do, will we be able to accept monies from the individual in respect of legal fees?
- I am a money laundering compliance officer in the process of reviewing our firm's sanctions training. Does OFSI provide any guidance on receiving payment for legal services and disbursements?
- We've refused instructions to act in a litigation matter as we suspect a party is a designated person. As we did not provide any legal services, are we still obligated to make a report to OFSI?

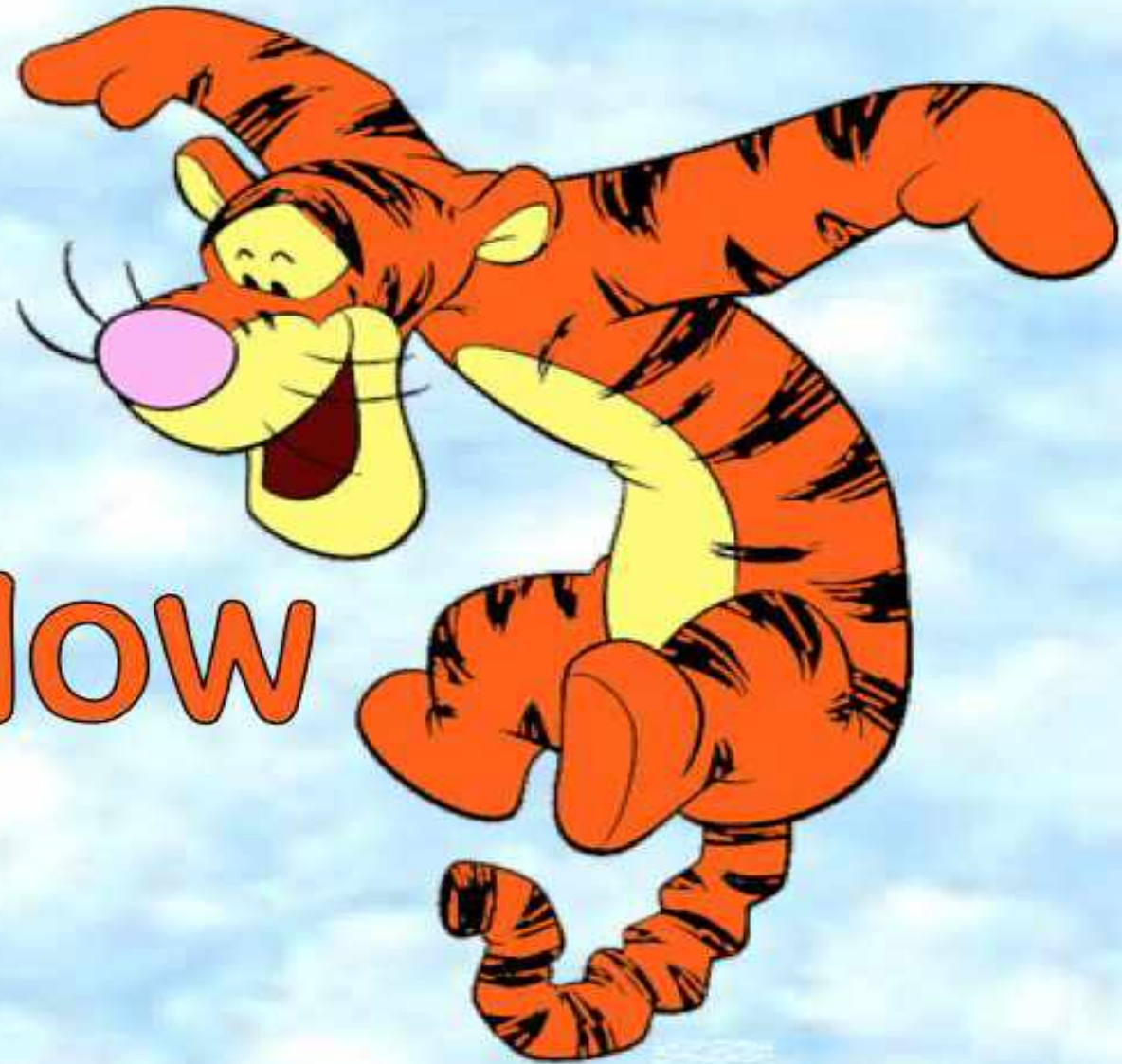
**Thank you .....**

And enjoy the remainder of your Conference

Questions? Queries?

[grahamsellers@atlanticchambers.co.uk](mailto:grahamsellers@atlanticchambers.co.uk)

TTFN:  
Ta Ta For Now





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# Ashley Wynne

Senior Counsel, No 5 Chambers Birmingham



# Death Traps

Common Errors and Omissions in Will Drafting and How to  
Avoid Them

**Ashley Wynne**

**No.5 Chambers**

# Potential Pitfalls

- Five areas of potential negligence when drafting wills:
  - 1. Delay;
  - 2. Tax Advice;
  - 3. Capacity;
  - 4. Inheritance Act Claims;
  - 5. Co-ownership of Property.

# General Duty

- Extent of the Duty;
- Ross v. Caunters.

# 1. Delay

- 'Reasonable' Timeframe;
- White v. Jones [1995] UKHL 5;
- Society of Trust and Estate Planning - 14 days;
- Extent of the Duty.

## 2. Tax Advice.

- General Duty;
- Extent of Duty;
- Expert Financial Advice.

# 3. Testamentary Capacity.

- Test for Capacity: Banks v. Goodfellow (1870);
- Re Simpson [1977] - 'The Golden Rule'
- Feltham v. Freer Bouskell [2013].

# 4. Inheritance Act Claims

- Mitigation of Risk - instructions;
- Consequences of Negligent Omission.

# 5. Co-ownership of Property.

- Joint Tenants - Right of Survivorship;
- Severance.



# Rectification.

- S.20 Administration of Justice Act;
- Marley v. Rawlings [2014] UKSC 2;
- Walker v. Medlicott & Sons [1999].

# Limitation

- Testators;
- Beneficiaries.



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# **Victoria Roberts**

**Counsel, 18 St John Street Chambers**

# SECRET COMMISSIONS CLAIMS

by Victoria Roberts



ST JOHN STREET  
CHAMBERS

# Introduction

- Very common for lenders to pay generous commissions to introducers
- Commissions are sometimes called “marketing fees” or “broker fee” etc., but label does not matter
- Can be various types of commissions including “loan commission” and “volume override commission”
- No problem as long as commission was fully and frankly disclosed to client before the transaction and client gave informed consent
- If this did not happen, a claim for bribery and/or breach of fiduciary duty should be considered

## Liability

- The basic definition of a bribe was given in *General Mortgage Co v Lewis* [1949] 2 All ER 573:
  - (1) *that the person making the payment makes it to the agent of the other person with whom he is dealing;*
  - (2) *that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing;*
  - (3) *that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person’s agent.’*



- No defence for broker etc. to say he provided the customer with valuable services; there will still have been a conflict of interest: *Boston Deep Sea Fishing and Ice Company and Ansell* (1888) 39 ChD 339 at 363
- *Hurstanger v Wilson* [2007] 1 WLR 2351: introduced possibility of a “halfway house” case.
  - Mortgage broker received £250 commission from mortgagee
  - Only disclosure was a term in mortgage agreement saying that commissions might be paid.
  - The commission was “half secret”, which made out breach of fiduciary duty but not tort of bribery/deceit (a species of fraud)
  - A “half secret” scenario is where there has been sufficient disclosure to negate secrecy but insufficient disclosure to obtain borrower’s informed consent.
- *Wood v Commercial First Business Ltd; Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471
- Broker’s terms of engagement said, ‘*We may receive fees from lenders with whom we place mortgages. Before we take out a mortgage, we will tell you the amount of the fee in writing.*’
  - Commissions were paid but not disclosed.
  - This was a case of fully secret commissions: lack of disclosure in accordance with term implied that no commissions were paid
  - No need for extensive debate over fiduciary relationship; key is that recipient of commission must owe a duty to provide disinterested advice or recommendations or information (at [93]).
  - This case establishes that disclosing the prospect of, and actual payment of, a commission will not negate fiduciary status
  - and will unlikely constitute informed consent unless further details, including quantum, are provided.



# Legal framework – Regulatory

## Limitation

- Ordinary time limit is six years
- BUT...
- Argument for s. 21(1) LA 1980 limitation exemption as commission held on constructive trust (untested in this context)
- Argument for s. 32(1)(a)/(b) postponement of limitation period:
  - Need fraud or deliberate concealment; the latter includes deliberate breach of duty where unlikely to be discovered for some time
  - Deliberate breach of duty includes advertent recklessness: *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339
  - Time runs from when the claimant discovered the fraud etc. or could have done so with reasonable diligence
  - It is unlikely that the claimant will be found to have acted without reasonable diligence unless there was something to put him on notice that his broker might have received secret commissions





# Recent commissions case law

- *Edwards v Slater and Gordon (UK) Limited [2022] EWHC 1091 (QB)*
- Case concerned 144 Solicitors Act claims that challenged the sign up process and considered whether the clients gave informed consent to their retainers.
- Clients argued that 140 former clients of Slater and Gordon received a secret commission from the ATE insurer it used.
- Richie.J held that Part 18 requests in relation to alleged secret commissions should be answered before Part 7 claims were issued [224].

# *Suleman and ors v Vauxhall, BMW, Volkswagen and Black Horse (unreported) HHJ Khan*

- This case involved the question of what secret commissions had been paid in PCP cases.

Commission structures for such cases can be:

- Difference in charges model (allows car dealer / lender to increase interest rate to increase car dealer's commission)
- Scaled commission (e.g. car dealer is paid a fee which varies according to the interest rate).
- Customers applied for pre-action disclosure of commission documents.
- All lenders resisted such disclosure arguing that only the amount of commission should be disclosed rather than the method of calculation and any documents. BMW argued that being required to disclose such documents would place a "disproportionate strain" on its resources.
- HHJ Khan held that:
  - all commission documents which go to the nature and method of calculation of commission should be disclosed.

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