



THE REPORT

CITY OF WESTMINSTER AND HOLBORN LAW SOCIETY NEWS

NO.27 APRIL/MAY 2004

THE PRESIDENT'S COLUMN



EDWARD SOLOMONS

Sir Howard Vincent (1849 - 1908) established the Criminal Investigation Division at Scotland Yard, and was its first Director. His department investigated numerous instances of fraud on the part of trustees. Regrettably, many of those fraudsters were solicitors.

The profession was not then burdened by the degree of regulation now imposed upon it. There was no compensation fund. There was no requirement for professional indemnity insurance. There was no mandatory audit of accounts. Indeed, there was no obligation to maintain accounts separating clients' money from that of a solicitor.

Sir Howard Vincent was outraged. He stood for Parliament as an independent member and on the day he was sworn in, in 1886, introduced a Bill to establish a public trustee. It was his vision, copied from a precedent in New Zealand, that members of the public could benefit from having the option of appointing a public official as administrator of their estate or trustee of any private trust, knowing that the state would stand behind that official.

His Bill failed, but he was nothing if not persistent. He tried again in 1887, 1888, 1889 and 1890. There was a government Bill in 1891 and further private Bills from Sir Howard Vincent in 1893, 1894, 1902, 1903, 1904 and 1905. Eventually, after a series of much publicised defalcations by solicitors in 1905, the government introduced a Bill in 1906 which became the Public Trustee Act 1906.

The new office opened in 1907 and was a great success. By 1914, the Public Trustee was responsible for funds valued at over £100 million. This was largely work which otherwise would have been handled by solicitors, since trust corporations had not yet been created. It is a stark example of the work that solicitors can lose to competitors at the behest of Parliament, if regulation is not regarded as adequate to protect the public interest.

The modern day analogy with the review of regulation of our profession by Sir David Clementi is manifest. Serious progress has been made by the Law Society in improving complaints handling, both in relation to professional conduct issues and inadequate professional service claims. There is much further work to be done. There remain those amongst us who resent the role of the Law Society in complaints handling. They resent the expense contained within the practising certificate contribution, and they resent the inconvenience when having to handle complaints made about themselves. They harbour the thought that a way out of the morass would be for the "voluntary" conduct and complaints work of the OSS to be abolished. Clients who were dissatisfied would be told that they could sue us in the courts.

The consultation paper issued last month by Sir David Clementi will give such of our colleagues a rude awakening. The choice is not between existing complaints handling, and other forms of regulation, abolishing them completely, or abolishing them partly. Retaining the existing scheme does not appear to be seriously contemplated by Sir David. The choice, for him, is between one or more improved, or at least different and more rigorous, forms of regulation and complaints handling.

This should not be surprising. As consumers, we are used to having arbitration schemes and Ombudsmen available when we are dissatisfied customers. They apply to those in the financial and banking industries, travel companies, central government, local government and most areas of commerce. When we are dissatisfied customers we do not usually expect to have to incur the expense of bringing legal proceedings. Why should our clients expect this, when they are dissatisfied with our services?

A crucial issue in forming the responses this society, other local Law Societies, firms and the national Law Society,

together with consumer groups, will all be preparing, must be the effect on the shape of legal services. Opinions, even within our society, differ upon the question whether it is preferable for the Bar to remain a referral profession but the identifying characteristics of the Bar, as opposed to our own branch of the profession, are essentially defined by the procedures for admission to the Bar, the rules of conduct, and the complaints mechanisms. If the result of the Clementi Review were to be a single Legal Services Authority regulator for the Bar and ourselves, it is not easy to see how the separate identity of the branches of the profession would be maintained. Some may not weep at that, but what of those others who might be regulated by the Legal Services Authority, licensed conveyancers, will writers and the rest? Whatever our differences of view, I am sure we will all agree that the result of the Clementi Review should not be for solicitors and others to lose their identity.

DIARY 2004

MAY

- 13 Lecture: The Finance Bill 2004
- 26 Committee meeting followed by dinner

JUNE

- 16 LEGAL CHARITIES GARDEN PARTY
- 17 Lecture: Landlord and Tenant Law
- 23 Risk Management Seminar
- 30 Committee meeting

JULY

- 1 INTERNATIONAL RECEPTION
- 8 Lecture: Wills and gifts in the court of Protection
- 21 Committee meeting followed by dinner

Any member who would like to attend one of the dinners after a Committee meeting will be very welcome. Please contact the Administrator not later than the Friday beforehand.

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The deadline for all copy for the June edition of THE REPORT,
is **Monday, 10 May 2004**

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FUNDING ISSUES

JOANNA KENNEDY



In the course of the debate about the pros and cons of the various funding options currently available I have not seen much comment on the administrative burden that is involved in all other forms of funding apart from the traditional privately paying arrangement. For example:

LEGALLY AIDED WORK

My own experience of this is only in substantial cases. For those matters very detailed costs plans have to be prepared and authority has to be obtained in advance for every step that is taken. The Legal Services Commission is obviously very overburdened and so there can be substantial delays whilst it considers applications for prior authority and/or increases in costing. A great deal of chasing needs to be done and the issues often have to be explained again to different people at LSC who have no knowledge of the file or the background. Obviously the costs incurred in dealing with the funder are not claimable from the other side on assessment. They may be claimable against the LSC on legal aid assessment but of course only at the very reduced rates payable for legally aided work as opposed to the enhanced rate obtainable on a party and party basis.

LEGAL EXPENSES INSURANCE

The rates set by these insurers are uneconomically low for any central London firm, in particular, for example, in employment matters where the level of expertise required may be quite high. Again prior

authority needs to be obtained for every substantial step in the conduct of the dispute and such authority is given by those with a limited level of understanding of the case and sometimes an apparently limited grasp of the appropriate management of the kinds of cases in question. In order to obtain payment it is necessary to prepare a very detailed and time consuming form of cost report following which the file is assessed by a costs draftsman, which delays payment way beyond even the conclusion of the case. It is very rarely the case that these insurers will pay anything until a case is finished but at the same time they contribute nothing towards the cash flow cost incurred by the firm in funding the litigation whilst it is going on.

AFTER THE EVENT INSURANCE

Despite the headline promises and the rhetoric there is only a limited range of cases for which after the event insurance is readily available. For any kind of difficult case huge amounts of research into the various providers has to be done. When one has been found that seems likely to provide cover, lengthy application forms have to be completed which include requests for information about the firm and its practice which in my experience is very difficult and time consuming to provide. A payment almost invariably has to be made for an assessment of the case and then eventually either cover is offered at a premium which is prohibitively expensive or the case is

turned down altogether for reasons which could have been identified in the first place so that the time consuming task of preparing the application forms could have been avoided. For example, I had a recent case when I went through all of the hoops to try to obtain cover for a substantial trial of a preliminary issue which was likely to have disposed of the case either way. The eventual response was that the insurers never provide cover for a preliminary issue. As it was always clear from the very first enquiry that this was what was being sought it was unfortunate that that apparent principle was not pointed out in the first place.

CONDITIONAL FEES

It is notorious that the continued operation of the indemnity principle has led insurers to mount very fierce attacks on the terms of any conditional fee arrangement. I appreciate that the Courts are rolling back the circumstances in which such challenges are appropriate but it remains the case that extreme vigilance is required so as to ensure both that the client fully understands some complicated principles and arrangements and at the same time that the arrangement is not capable of being attacked by a losing defendant. However, if the minefields are negotiated successfully at least the conditional fee arrangement provides solicitors with a premium to compensate for both the risks and the administrative burden, which is not the case with any of the other forms of funding described above.

BERLIN

JEFFREY FORREST



On 23 March, the President and Mrs Solomons, together with the Senior Vice President, were the guests of the Berlin Bar at a dinner in Berlin to mark the end of Kay-Thomas Pohl's Presidency.

Questioned as to the length of a Presidential term, Kay-Thomas Pohl explained that, in principle, it was two years but that, nevertheless, there had only been five Presidents since the end of the Second World War. It seems that, as in his case, Presidential terms tend to be for more than two years.

We were received, as usual, with great warmth and although our limited (very limited) grasp of the German language meant that we were unable to appreciate every nuance of every speech, it was evident to us that Kay-Thomas Pohl is held in very high regard, not only by his professional colleagues, but also by the City and Federal officers who attended

the dinner. The dinner was a gourmet occasion in Hugo's Restaurant, one of Berlin's finest, atop the Intercontinental Hotel, from where there are stunning night time views, to the west over the Zoo and Kurfurstendamm, and eastwards towards the glittering new Potsdamer Platz area.

The dinner was essentially social and was an opportunity to get to know the

new President, Margarethe von Galen, the first female President in the Berlin Bar's history. She, too, is clearly held in high esteem by her professional colleagues and we look forward to collaborating with her on future joint ventures between the Berlin Bar and CWHLS. We briefly discussed the possibility of another visit to Berlin, perhaps towards the end of this year.

The topic of the working sessions remains to be decided.



INTERNATIONAL COMMITTEE

The International Reception will be held, jointly with the Law Society, on Thursday 1 July. It will take place at the Law Society. Details will be given nearer the date.

More information from Stephen Rayner: sar@droyds.com

REVENUE COMMITTEE

JEREMY DE SOUZA



This has had to be written in the interval between Budget Day and the publication of the Finance Bill.

SCHEME REGISTRATION

This year, the Chancellor has announced a major change in our terms of business. From 18 March we must take a note of all “schemes” which we have “marketed” to any client, with a view to reporting them in due course and, subsequently, supplying the client with a reference number for inclusion in any Return he has to make. What are the long-term implications for us?

1. Predictably, this is yet another overhead, on top of PAYE, students’ loans, money laundering etc.
2. But in the longer term, this may be helpful in relation to private clients, because some may turn out to be disappointed if they come for advice and are not provided with a reference number at the end of the day. After all, our rivals, the High Street IFAs, will be doing so automatically!
3. And this may even be helpful for money laundering purposes, because concern has been expressed by a tax Leader that the latest development in “purposive” construction, when applied to gibberish legislation may mean that unsuccessful taxpayers and their advisers may be guilty of that offence. Having used a registered scheme will, presumably, preclude any possibility of prosecution.

Has the Chancellor’s propaganda machine missed a trick by failing to point out that the new arrangements will avoid professionals ending up “helping” the CPS?

Furthermore, how come that the Customs have not publicised the set-back, administered by means of Lightman J.’s reference, on 18 February, of Value Added Tax Act 1994, section 77A to the ECJ? (As to the import of this, see my July/August 2003 article).

WATCH FOR NEW SIS

It is difficult to think of a more unreasonable regulatory requirement than that invented by SI 2004/779. The Explanatory Note says that it will have a negligible impact on the costs of business, charities or voluntary bodies. It will, however, impede them bidding at auctions!

Vendors at auction normally require the deposit to be paid to the auctioneer as their agent. But where the vendor has waived VAT exemption, for a purchase to qualify as a TOGC, the bidder has to have notified his own election to Customs in Glasgow before the auction. This requirement is strictly enforced.

Now another pre-condition has been invented. From 18 March 2004, the bidder also has to have notified the vendor that the 1997 waiver anti-avoidance provisions (as, needless to say, “improved” by SI 2004/778) do not apply to him. It is unlikely that they will, but his solicitor now has to operate under “POCA” and will not therefore be willing to take a flier on this. The matter will have to be referred to a tax partner/Counsel for confirmation.

The problem would not arise, of course, if the lot failed to reach £250,000, but it is of the essence of an auction that one cannot assume what price will be reached. Furthermore, the SI does not provide that notification to the auctioneer as the vendor’s agent will be allowed. How many bidders are therefore going to drop out before the “off”?

Public “ownership” of development rights?

Despite clear evidence that the 1947, 1967, 1974 and 1976 attempts to confiscate the bulk of development value failed because vendors think in terms of “net” acceptable prices, the Barker Report recommends that a tax charge “on the vendor” should arise at the point when detailed planning consent is granted. But quite how an owner is expected to be prepared to fund a tax charge without any sale

proceeds was not explained, and even the Chancellor seems not to have been convinced.

But when one reads on, one discovers that the reason for all this is that country-wide the funding of social housing through s.106 Agreements (which are, of course, levied on the developer) is not being done on a consistent basis. But, rather than set up another loss-making bureaucracy [vide Lloyd George’s Land Tax], is the appropriate answer to this problem not either:

- for the ODPM to clarify the rules; and/or
- for District Auditors to be instructed to examine a selection of s.106 Agreements?

In the meantime, those acting for farmers and others entering into option agreements will need to try and ensure that draw down pricing is set in such a way as to retain the developer’s responsibility for bearing the cost of the social housing levy.

SDLT

While turnaround times at Newcastle/Netherton have improved considerably, problems are still being experienced ascertaining the official view as to the treatment of some “normal” transactions. Practitioners must now get their internal procedures in order for the termination of the “light touch”, e.g. by ascertaining UPRNs where they exist. Compliance is, however, still a problem, with some firms having to resort to sending out black bios to enable clients to sign the returns in the prescribed colour ink!

FOREIGN TAX CREDITS

As I read the Opinion of Advocate-General Kokott in Manninen, C-319/02, a British resident shareholder of Royal Dutch should be able to claim a credit against HRT for the Dutch equivalent of what we used to call underlying mainstream corporation tax. Holders of EU equities could need to file a “correction” to their 2002/03 SARs if the ECJ adopts this amazing hypothesis.

PROFESSIONAL MATTERS COMMITTEE CONSIDERS CLEMENTI

JULIAN AYLMER

The Professional Matters Committee is actively studying the Clementi Review of the Regulatory Framework for Legal Services in England and Wales. If anybody does not have a copy, it can be downloaded from the Law Society website.

The review is of enormous importance to the future of our profession. We would like to feel that as many members as possible are contributing to our response. We have set up a small sub-Committee to consider this. We would very much welcome your input on this.

If you have any views could you please contact me at Reynolds Porter Chamberlain (e-mail aja@rpc.co.uk).

LEGAL CHARITIES GARDEN PARTY

WEDNESDAY 16 JUNE 2004 –
NORTH LAWNS, LINCOLN'S INN

Members of CWHLs are encouraged to support this traditional annual fun event, the proceeds of which benefit all the principal legal charities (The Solicitors Benevolent Association, The Barristers Benevolent Association, The Institute of Barristers' Clerks, United Law Clerks Society, The Institute of Legal Executives Benevolent Fund and LawCare).

This year there will be a strolling Jazz Band alternating with a perambulating Steel Band, and substantial canapés are included in the price of the tickets (£8 in advance, £10 on the gate).

In 2003 nearly 2000 people attended the party – there is room for more! Over £26,000 was raised last year, all of it distributed to the participating charities, which need the money.

Once again The St. Paul Insurance and Risk Management has agreed to be the principal Sponsor.

A promotional poster is being distributed.



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- **LawCare**
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- **Young Solicitors Group**
Assistance to Young Solicitors, up to 10 years ppe)
- **Trainee Solicitors Group**
Assistance for trainees, junior paralegals & students)
- **Black Solicitors Network**
Advice for black/Afro-Caribbean solicitors)
- **Solicitors' Sole Practitioners Group**
Support for sole practitioners)
- **Association of Women Solicitors**
(advice/re-training/mentoring for women Solicitors)
- **Group for Solicitors with Disabilities**
(Assistance for disabled lawyers)
- **Solicitors in Local Government**
(Assistance for local government lawyers)
- **Commerce and Industry Group**
(Assistance for in-house lawyers)

MANAGING THE RISK OF SENIOR LATERAL HIRES

THIS COLUMN WAS PREPARED BY **AFP CONSULTING**, A DIVISION OF **ALEXANDER FORBES RISK SERVICES UK LTD.** A MEMBER OF THE GENERAL INSURANCE STANDARDS COUNCIL; A LLOYD'S BROKER.



Many law firms see lateral hires as an excellent way to build up their client base and increase the knowledge and skills within their practice. When these appointments work well, they are immensely valuable to a firm, bringing increased fee income, enhancing reputation and developing the business. Unfortunately the opposite can be true and firms need to treat senior appointments carefully and ensure they manage the risk inherent in such appointments.

The recruitment process of senior staff is very different from the normal everyday recruitment process, the main difference being that firms are employing individuals who have years of experience and have proved their capabilities. Positions are nearly always filled by word of mouth and the main attraction to the employing firm is the list of clients with whom the newcomer has previously worked. This means that the candidate's practice skills could well take second place to their client list.

The applicant's abilities can be established through interviews and references, but it must be remembered that interviews and references can be very unreliable. It is only when the candidate is actually working within the firm that one can truly judge whether he or she is up to the job in

question. Poor choice in candidate can have huge consequences.

As with all jobs, an induction period is necessary in order to minimise risk. It is advisable for this period to be supervised, but this in itself presents a further problem when it comes to employing senior staff. Who should supervise them? Usually the firm's partners are reluctant to take on this role, especially if the newcomer has been employed as a peer into partnership or senior lawyer status. Equally, a newly appointed but highly experienced lawyer may take umbrage at the idea that he or she needs supervision.

Yet supervision remains essential if the risks inherent in a senior appointment are to be minimised. In particular there are several questions which should be asked by the supervisor:-

1. Have the new clients been checked for anti-money laundering identification and credit worthiness? Will all the new work be in line with the firm's business objectives?
2. Have Rule 15 and retainer letters been sent out to the new clients in the name of the new firm and is costs information being kept up to date?

3. How adept is the newcomer at using IT? Does he/ she need further training?
4. Is the newcomer using the firm's systems and precedents or clinging to former practices?
5. Are the files and documents kept in an orderly fashion and file notes recorded?
6. If the recruit is to supervise others, do they need training for this?
7. How will the supervisor and recruit review work and deal with problem files?
8. Is the newcomer giving good quality legal advice in a timely manner?

It is standard practice for a supervision period to last for three months, but this can be extended should the supervisor feel it necessary. If the new senior solicitor is reluctant to participate in a supervision period then the firm employing should be cautious and may need to reconsider whether the candidate is the right choice in the first place.

On the whole, firms employing usually do make the right decision and new senior staff bring with them a wealth of experience and ideas that can often improve the running of the firm.

EDITOR'S NOTE

The Crossword Saga continues (see January/February issue). I have received one correct answer, unfortunately with no identifying information except for a postmark "SW8 5BR". It is in time, so if the person or persons responsible will send me a copy of his/her/its/their answer, or otherwise convince me that the Prize should go to him/her/it/them, it will be duly awarded.

NEW MEMBERS

**Dawsons
Peters & Peters**

Martin Codd
Simon Burke, Lawrence Evans,
Stephen Haydon-Khan, Michael O'Kane,
Ben Summers, Ms Janine Vaughan-Brown

ASSOCIATE MEMBERSHIP - OUTSIDE THE AREA:

**Bond Associates Limited
John Singh & Co**

Ms M J E Bond
John Singh

ASSOCIATE MEMBERSHIP - TRAINEES:

**Dogs Trust
Peters & Peters**

Ms Chrissie Paphiti
Luis Campbell, Miss Helen Rutherford,
Miss Cherie Spinks

CWHLS SUMMER LECTURES 2004

THE FINANCE BILL 2004 – TAX AVOIDANCE, THE TAXPAYER AND MR BROWN: CHRISTOPHER SOKOL - 13 MAY

Christopher Sokol will deliver a lecture on the 2004 Budget proposals as they affect tax planning for the private client. He will concentrate upon the following points:

- Tax treatment of “pre-owned” assets
- “Modernising” the tax system for trusts
- Other topics of potential interest
- “Tackling tax avoidance”

Called to the Bar in 1975, Christopher Sokol has practised from 24 Old Buildings, Lincoln’s Inn since 1977 where he specialises in Revenue Law. He is a member of the Chancery and Revenue Bar Associations, a contributor to “Taxation” and a Master of the Bench of Lincoln’s Inn.

LANDLORD AND TENANT LAW: MICHAEL FRANKS AND ELIZABETH TEAR OF WILLIAM STURGES & CO - 17 JUNE

The lecture will look at the major changes made to Part 2 of the Landlord and Tenant Act 1954 by The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The amendments to the Act, which are the first major changes for fifty years, include the abolition of exclusion orders, new section 25 notices and the ability to extend the period within which an application to the Court has to be made. The changes take effect on 1 June 2004 so the talk will be essential to ensure that your Landlord and Tenant Law is up to date.

WILLS AND GIFTS IN THE COURT OF PROTECTION – “I WANT TO GIVE IT TO YOU, DEAR!”: KEITH LOCK - 8 JULY

The Court of Protection can sometimes consider what should be done about wills or gifts made by vulnerable individuals in controversial circumstances, other than pursuing actions for recovery in the case of gifts. In this context, the presentation is intended to demonstrate how the jurisdiction of the Court of Protection can be used to authorise disposals of a patient's property for the benefit of persons other than the patient, whether by lifetime gift or by will, with the intention, if possible, of avoiding expensive post death litigation.

Since qualifying as a solicitor in 1973 Keith Lock has undertaken many of the functions performed by the Official Solicitor, from representing children in disputes about their care and welfare, through to managing the office's probate and trust department. His current job is concerned with proceedings in the Court of Protection.

These lectures will be held at the offices of Lawrence Graham, 190 Strand, WC2. They begin at 6.15 pm with a drink available from 6.00 pm. One hour of CPD is available (ref: JC/CWHLS) – please give your roll number when attending.

TO: Mrs E J Beesley, CWHLS, 25 Rotherwick Road, London NW11 7DG DX 33801 Golders Green

Please send tickets for the following lectures: £18 per ticket for members and £25 per ticket for non members

	Member	Non member
THE FINANCE BILL 2004
LANDLORD AND TENANT LAW
WILLS AND GIFTS IN THE COURT OF PROTECTION

I enclose a cheque for £ payable to the City of Westminster and Holborn Law Society

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