

■ How would your business cope if defrauded, defamed, or faced with insolvency? Experts at last week's Crisis? What Crisis? seminar, organised by Mishcon de Reya and sponsored by Property Week, gave their advice. **Michael Lane** reports. Photographs by **James Winspear**

Watch the event at www.propertyweek.com/crisisseminar

CARRY ON, DON'T LOSE YOUR HEAD



10 TIPS FOR FRAUD FIGHTERS

'Fraud is the "mother of all crises". As a fraud victim you're going to be overwhelmed by the emotions of betrayal, humiliation, retaliation and anger at having someone rip you off.' This was the message from Gary Miller, partner at Mishcon de Reya (above), to the 100-strong audience at the Crisis? What Crisis? seminar in London last week.

But if victims keep a cool head and follow Miller's 'Ten commandments for fighting fraud' they could prevent a bad situation becoming a catastrophe.

1 Thou shalt investigate before thou shalt interrogate You can lawfully place suspects under email, phone and video monitoring, have them physically watched or even go through their rubbish without warrant or court order. The most useful evidence is often under your own noses on company computers.

2 Thou shalt not make wrongful use of the Old Bill There is no obligation to call the police in case of fraud. Do not involve them until you have recovered assets. 'The Old Bill's objective is a collar. Yours is to find the dosh,' said Miller.

3 Thou shalt not confuse experience with expertise 'You wouldn't go to your GP for a quadruple bypass,' Miller said. A company's existing lawyers may not be right for the job, no matter how trusted they are.

4 Thou shalt 'Norwich' thy neighbour as he would 'Norwich' you A Norwich Pharmacal order allows companies to obtain sensitive information about the suspect from banks or internet service providers. The order also gags those providing the information from notifying the suspect.

5 Thou shalt freeze first and litigate later Courts can grant a worldwide freezing order on a suspect's money transfers and force them to

disclose all the assets in their possession at a company's request.

6 Thou shalt search and seize while thou freeze To make evidence 'bullet-proof', firms should obtain a search order to search a suspect's home and any data-storing media.

7 Thou shalt keep thy friends close but thy enemies closer A 'passport delivery up' order forces suspects to hand over their passport to a company's lawyers, preventing escape abroad, until they have complied with an investigation.

8 Thou shalt use thy windows In every fraud investigation there will be opportunities to do a deal with the fraudsters, allowing companies to get their money back or reduce losses. Deal with the crooks and their lawyers directly or risk years of litigation and legal cost.

9 Thou shalt get in, get out and get on with life Get your money and walk away or, as Miller put it, 'find yourself in the never-ending story that has sucker written all over it'.

10 Thou shalt honour thy spouse ... and thy lovers A quarter of all frauds are tipped off by disgruntled partners or lovers.



COMMUNICATION →

HOW TO HANDLE A SCANDLE

'It's not the thing that's announced. It's your reaction to it – it's what happens next,' said Lord Tim Bell, former PR supremo for Lady Thatcher and British Land, among others, and chairman of Chime Communications (above). The greatest political crisis this country has ever seen involved John Profumo. What destroyed him was not the fact that he got caught with a prostitute who had a close relationship with a Russian spy, but that he lied to parliament.

Bell's first piece of advice was that, in a crisis, two wrongs do not make a right. 'It doesn't make your problem better by saying somebody else has done the same. Don't play the blame game. It may make you feel better, but no one else does. It's a complete waste of time because while you're busy trying to find out whose fault it is, you're not solving the problem.'

Instead, your time should be spent consulting lawyers and PRs, and thinking rationally about your response. Bell qualified this by warning that a crisis must be dealt with rather than talked about endlessly.

Presentation is also crucial when handling a crisis. The key figure in the crisis should stay indoors until a strategy has been devised. A spokesperson should

ideally be good looking and have a safe voice, void of regional twang or BBC received pronunciation.

Bell suggested the root of George Osborne's problem in dealing with accusations that he procured a donation from a Russian billionaire is that 'it is unforgivable to be a toff', and, regardless of whether he was guilty, he was trapped in a cycle of 24-hour news updates.

'The long-term damage is always to reputation and in today's world your reputation will be damaged simply by the fact that the story ran,' he said.

The choice of words is as important as how they are delivered. Bell referenced Gordon Brown's recent use of the word 'novice', which flummoxed David Cameron. He also suggested that US Treasury secretary Hank Paulson could have softened his bailout plan for banks by labelling it a 'rescue plan' or 're-injection'.

Bell feels that the current crisis in the City has been misinterpreted. 'The first thing to remember is that your share price is not the crisis, it's the symptom of the crisis,' he said.

This proves his point that a crisis can be only be defined if sentiment is separated from fact. Bell said that companies' shares have fallen not because business is bad but because everybody is in a panic. →



YOU'VE BEEN DEFAMED

The law can be deployed in two ways to protect a company's reputation, said Ramona Mehta, partner at Mishcon de Reya (above).

'People think the laws on privacy and defamation are only there for celebrities, but that's not true. They're very, very useful to businesses when used effectively and properly.'

The laws of confidence will protect companies' information from going into the public domain, unless it is deemed in the public interest, while the laws of defamation can prevent the publication of false and potentially damaging claims.

Mehta stressed that it is not only journalists who pose a threat to a company's reputation but also 'well-wishing' NGOs and competitors.

The legal steps a company should take depend on what stage the crisis is at. Even if there is no immediate problem, Mehta advises companies to identify and safeguard confidential information, such as client lists or financial strategy.

Companies should ensure that employment contracts include confidentiality agreements. This should also be considered within third-party contracts. With these in place, a court will invariably grant an injunction to prevent anyone from publishing confidential information, thus preventing any looming crisis.

When faced with a defamatory article, a company can go to court and try to prevent publication, but Mehta does not recommend this because of low success rate. The best solution is to initiate a dialogue with the editor, with a PR and lawyer present, to talk through the allegations.

There is only a crisis once allegations are published. A company can sue for defamation, but protracted legal proceedings will usually end with big legal costs and a small damages award, as in the recent Max Mosley case.

THE LEXICON OF ILLIQUIDITY

'I am your worst nightmare – the person you never wish to see.'

'I am an insolvency lawyer. I plumb the depths when the crisis has turned into the ultimate drama,' proclaimed Mike Stubbs, partner at Mishcon de Reya (below). 'We've forgotten what insolvency is all about.'

There are two definitions of insolvency. One is having more liabilities than assets, but the real test is whether a company can pay off its debts as they fall due.

When a company becomes insolvent, the directors' duty transfers from maximising benefits for shareholders to minimising the loss to creditors.

Stubbs outlined the other legal concerns for directors in the 'twilight' of insolvency:

Preference A company cannot prefer one creditor over another, although if a threat is made by the creditor this is adequate defence.

Transaction at undervalue Companies must beware of assets slipping away, probably into the hands of directors, at a monetary value lower than its worth.

Wrongful trading Continued trading during insolvency.

Misfeasance Described by Stubbs as 'any other naughtiness'.

Disqualification Once directors know they cannot avoid liquidation they must take every step to protect creditors from that point on. They must be seen to be in this mindset.

Stubbs also said that insolvent companies and their creditors are at risk from opportunity fraud, particularly from directors who decide to take the money and run.

He then summarised the different types of insolvency process and the implications for creditors:

Liquidation Creditors might pick up some assets, but essentially the company is gone.

Compulsory liquidation If creditors issue a petition to have a company wound up and advertise it in the *London Gazette*, the company's bank account will be frozen by law and all transactions before the petition was issued will be void. The threat of advertisement is a good method of debt recovery.

Administration Administrators have the power to prevent any person from continuing or commencing proceedings against the company. This allows breathing space to sort out creditors, sell off assets and get a better value than in liquidation. Creditors must keep an eye out for companies that are in rolling administration, which could be abusing the protection to shift assets out of the back door before an insolvency practitioner is appointed.

Corporate voluntary arrangement

If a company admits that it cannot pay a creditor it may offer to work for them and pay back a percentage of every pound it owes. However, according to Stubbs, 95% of such arrangements fail.

Personal insolvency An arrangement or contract can be made between an individual and creditors behind closed doors to avoid public bankruptcy.

Prepack administration An insolvency practitioner lines up a buyer for a business when it goes into administration. The emergence of this solution is both good and bad for creditors. Banks and landlords can call the shots during this unrestricted process before the administrators come in. Equally, it could be used as a smokescreen for asset stripping. ■

