



## RPC's Lawyers' Liability and Regulatory Update

29 November 2022

Welcome to the latest edition of our Lawyers Liability & Regulatory Update, in which we look back over the last month at key developments affecting lawyers and the professional risks they face.



### Important changes to Legal Ombudsman Scheme Rules from 1 April 2023

In our **June** and **November** editions, we confirmed the Legal Ombudsman (LeO) had published a recovery plan to address the lengthy delays that consumers faced when making complaints. LeO carried out a review of its Scheme Rules to try to enhance its operational efficiency.

On 28 October 2022, LeO confirmed it will be implementing significant changes to its Scheme Rules, coming into effect on 1 April 2023 (see [here](#) a link to the changes). The main changes are detailed in our article [here](#).



### Solicitor siblings fail to overturn SDT findings on dishonesty and conflict

In *Hetherington and another v Solicitors Regulation Authority [2022] EWHC 2722 (Admin)* the High Court considered the appeal of two siblings who had been struck off the roll following findings of dishonesty by the Solicitors' Disciplinary Tribunal ("SDT"). Mrs Justice Lang considered whether brother and sister Margaret and Patrick Hetherington (practising as The Hetherington Partnership Limited) had failed to properly heed SRA warnings on fraudulent investment schemes.

The subject of the SDT proceedings was an investment scheme comprising around 6,000 acquisitions of car parking spaces or storage pods within airport car parks or storage facilities. The Hetheringtons undertook the conveyancing work for the purchasers, who were either individuals or providers of Self Invested Personal Pensions. The scheme was operated by companies linked to an entity called "Group First". The purchasers were referred to the firm by Group First entities, and sometimes the firm's fees were paid by Group First.

The Solicitors Regulation Authority ("SRA") commenced an investigation into the Hetheringtons and the firm in May 2017 in connection with the scheme. On 16 October 2017 it took steps to intervene into the practice. The SRA alleged that the firm had failed to give its clients adequate advice on the investment transactions, including failing to advise on the meaning and effect of the contractual documentation. This included that Mrs Hetherington had failed to properly advise on an onerous contract of sale which required the clients to pay the entire purchase price on a non-refundable basis, and where the clients had no entitlement to enforce any return of the funds. It was further alleged that she did not properly advise on the terms of an onerous buyback option.

On 27 September 2021 the Solicitors' Disciplinary Tribunal ("SDT") found that the Hetheringtons had acted dishonestly. It found that they had failed to take any action to investigate the Group First investment scheme despite express warnings from the SRA

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regarding the legitimacy of such transactions. It found that the motivation for these failures was to protect the firm's fee income generated by the scheme. This motivation had created an own interest conflict. The SDT found that, pursuant to the overriding objective to maintain public confidence in the integrity of the profession, the Hetheringtons should be struck off the roll. The Hetheringtons appealed, arguing that the advice provided in their short reports to their clients was adequate.

The appeal was heard by Mrs Justice Lang, who agreed with the SDT that the failings of the Hetheringtons were more than negligent and had crossed into professional misconduct. She agreed that the Hetheringtons had not taken proper account of the SRA's Warning Notices on fraud, and that they had failed to provide their clients with full advice on the meaning and effect of the contracts. Mrs Justice Lang agreed that the SDT was entitled to reach its findings based on the evidence it had heard, including that the Hetheringtons had put their own interests before their clients'.

This decision is a warning to solicitors to take proper notice of any SRA Warning Notices on potentially fraudulent schemes or transactions. Solicitors should provide proper advice on onerous provisions in contractual documents, in circumstances where such advice may risk a client's withdrawal from a transaction resulting in lost fee income.

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### Consultation on costs re-opened in light of Belsner

Following the judgment in *Belsner v CAM Legal Services Ltd* we have now been advised that the Civil Justice Council (**the CJC**) has re-opened its consultation on costs for the sole purpose of allowing further comment on the implications of *Belsner*. A link to our article on *Belsner* can be found [here](#).

The CJC's costs working group had held a public consultation, which ran between June and October 2022 (closing just prior to the Court of Appeal's judgment). The CJC had agreed that the Working Group would focus on four areas: (i) Costs Budgeting; (ii) Guideline Hourly Rates; (iii) Costs under pre-action protocols/portals and the digital justice system; and (iv) Consequences of the extension of Fixed Recoverable Costs. The consultation is now open to all and respondents are welcome to submit a response (limited to the implications of *Belsner*) until 12pm on 15 December 2022. Responses to the consultation should be submitted online by file upload at [Survey Monkey \(external link\)](#).



### Invest in due diligence for dubious schemes

We previously [wrote](#) about the importance of investing in due diligence for dubious investment schemes. Now, the SRA has doubled down on their appeal for firms to take their AML obligations seriously.

We explain the latest report from the SRA on this issue in our latest articles [here](#) and for further information and the full report, click [here](#). The SRA's annual AML report provides guidance for firms.



### The High Court prohibits a former barrister rights of audience

In the recent case of *Malik v Governor of HM Prison Hindley (No. 2)* [2022] EWHC 2684 (Admin), the Administrative Court dismissed an application for the rights of audience of Michael Shrimpton, a disbarred barrister, because it was not in the interests of justice.

The applicant, Rehan Malik, acting as a litigant in person (whilst serving his prison sentence) asked Mr Justice Fordham to consider his application, pursuant to Schedule 3.1(2)(b) of the Legal Services Act 2007, to allow Michael Shrimpton to act as an

advocate in connection with his habeas corpus and bail applications.

In 2018, Michael Shrimpton had been disbarred from practising as a barrister due to criminal convictions and in 2019 the Solicitors Regulatory Authority barred him from working for law firms.

Mr Justice Fordham recognised the positive contribution by Michael Shrimpton to the legal system and the courts; however, despite him previously being given permission to act as an advocate in earlier proceedings, it was held that it was not appropriate to grant rights of audience for the substantive hearings.

Mr Justice Fordham warned that: "If the Courts are to embrace granting 'ad hoc' advocacy rights to an individual who has been disbarred as a barrister (or suspended or struck off as a solicitor advocate), there is a real and substantial risk of a systemic bypass of the regulatory regime and the regulatory protections emphasised in the authorities. The consequence would be that a disbarred barrister or suspended/struck-off solicitor advocate would, in effect, be able to operate (by offering lower rates), without regulatory underpinning, and without insurance, by pointing to the constituency of litigants who can be assisted in that way."

The Legal Services Act 2007 was enacted to provide protection for clients and to ensure only those that have the requisite qualifications and are regulated by the Solicitors Regulation Authority are able to carry out reserved legal activities and have adequate insurance. This judgment is a reminder to law firms to ensure the advocates they are instructing have the relevant authority to act on their behalf, particularly in the case where there has been a previous disbarment. It is important to carry out checks on those instructed to avoid the situation whereby the client (or law firm) is left without any insurance to call on, should anything go wrong.



### **Hong Kong: Important update on ad hoc admission of Overseas Advocates (King's Counsel) in Hong Kong**

At the time of writing, *Re Owen KC* [2022] HKCA 1689 is the most recent reported judgment in Hong Kong on ad hoc admission of overseas advocates pursuant to section 27(4) of the Legal Practitioners Ordinance. The High Court's discretion to admit overseas advocates is determined according to well-established legal principles arising from local case law, with the public interest being paramount.

Ad hoc admission in Hong Kong has traditionally been regarded as a mark of distinction among many leading King's Counsel in the UK. Ad hoc admission is not easy to obtain and is reserved for eminent overseas King's Counsel seeking to appear in complex cases involving legal issues that will impact substantially on the development of local jurisprudence.

What makes *Re Owen KC* notable is that the applicant is the first overseas advocate to apply for permission to represent at trial in the High Court a defendant who is charged with an offence arising out of the National Security Law (NSL). The applicant's ad hoc admission was approved by the first-instance court. In an unusual move, the Secretary for Justice (whose role is to act as the guardian of the public interest in such matters) appealed the court's decision to the Court of Appeal – in essence, arguing that in the unique context of the NSL ad hoc admission of overseas King's Counsel was inappropriate.

In a robust judgment, the Court of Appeal has dismissed the Secretary for Justice's appeal on all grounds and, in an equally robust decision, refused to grant permission to appeal to the Court of Final Appeal. The Secretary for Justice has applied to the Court of Final Appeal for permission to appeal and the "top court's" decision is expected at the end of November 2022.

**STOP PRESS: At 4.00 p.m., on Monday, 28th November 2022, the Appeal Committee of the CFA dismissed the application for permission to appeal. Watch this space.**

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