RPC

What's gone wrong with putting things right?

Solicitors are becoming concerned about their ability to put things right when they make mistakes. We do not consider that much has changed in this area. It is as important as it has always been for a solicitor to realise if he or she has made a mistake and to think carefully about how to remedy it. This is not an easy task. We hope this article will assist in guiding solicitors and their insurers through this complex area.

A new SDT case, a new rule

A starting-point for this article is the recent Solicitors Disciplinary Tribunal decision in *Howell-Jones LLP* (Case No. 11846-2018). Some have expressed worries that this case has made it all-but-impossible for solicitors to cure their mistakes without breaching the prohibition against acting in a position of own interest conflict. Another concern on the horizon is the new SRA conduct obligation coming into force in November 2019. It says "You are honest and open with clients if things go wrong, and if a client suffers loss or harm as a result you put matters right (if possible) and explain fully and promptly what has happened and the likely impact..." This rule appears to pull solicitors in a direction completely contrary to that suggested by *Howell-Jones*.

We do not believe that things are quite as bad as all that. We acted on the *Howell-Jones* case so we cannot comment in detail on it. We can say however that it is not a fully argued or reasoned decision of the Tribunal but rather an agreed outcome, based on the parties' agreement as to certain facts and admissions. It is highly fact-specific and should not be treated as a precedent in the same way that a decision of the Divisional Court might (on appeal from the SDT).

What the case does provide, importantly, is a window into the SRA's thinking on own interest conflicts. It serves as a reminder of the importance the SRA places on the requirement to avoid own interest conflicts, even where one pursues remedial steps with the best of intentions.

As for the new duty to put things right, we acknowledge that it is a rather vaguely worded rule but the sentiment it addresses is a helpful one. It is obviously important for solicitors to be honest and open in their communications with clients. We doubt however this new rule changes the legal entitlements of solicitors. The general principle is that professional conduct rules do not dictate or fundamentally alter legal rights and remedies[1]. We also do not expect the SRA to interpret it as requiring, for example, a solicitor fully to compensate a client where the liability case is only arguable. We do not believe it requires admissions to be made where liability is arguable, or the significant expenditure of money or time on the part of the solicitor (and there's always the words "if possible" to be invoked as well...).

Putting it right...if possible

The fundamental problem is that it is simply not always easy to put right mistakes. All too

Any comments or queries?

Graham Reid
Legal Director
+44 20 3060 6598
graham.reid@rpc.co.uk

Nick Bird
Partner
+44 20 3060 6548
nick.bird@rpc.co.uk

1. See for example *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58 at paragraph 75, and *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 at paragraphs 107 to 111).

often solicitors approach such situations with too much optimism, not enough caution and perhaps too great a desire to keep the client relationship sweet.

Every potential remedial situation will of course be fact-specific. We therefore cannot provide hard-and-fast rules as to whether or not a firm will be able to put right its mistake without falling into an own interest conflict. What we can say is that this complex area is amenable to careful analysis, based on a clear understanding of the law and rules and past experience of similar situations. In particular we believe it is possible to develop a framework for assessing the risk and benefits of trying to cure the consequences of a mistake. Such a framework will go a long way towards identifying and mitigating own interest conflicts. In this article we have outlined the shape of such a framework.

Telling the client

The first step on the path to putting things right is to recognise that something has gone wrong (and then tell someone). If that mistake "could give rise to a claim by [a current client] against you" then it is likely that Outcome 1.16 will be triggered and the solicitor will need to tell the client. We doubt the SRA will see the situation any differently under the new rules coming into force in November 2019.

Outcome 1.16 situations are usually not difficult to analyse and advise upon. In most cases, it is fairly obvious whether or not the act or omission "could" give rise to a claim. Often if one finds oneself agonising over the decision to inform the client, then the chances are that one should be doing so. After all, carrying the burden of an undisclosed error is a rapid way of finding oneself in an own interest conflict. Solicitors should also have in mind that if Outcome 1.16 needs to be discharged then it is likely that a notifiable "circumstance" has arisen for the purposes of their professional indemnity insurance policy.

What does the cure look like?

Having spotted the problem, the next step is to assess what can be done to cure it. This assessment stage is critically important to what follows. Some cures are simple to effect, sure-fire and cheap. Others most definitely are not. Solicitors and their insurers need to think through all the possibilities here. The skills of a clairvoyant are definitely required. What will the remedial path look like? Will it involve the decisions of other person eg a court or the other side of a contractual counterparty? How much will it cost? Could the pursuit of the cure leave the client worse off?

The ultimate object of this assessment stage is to decide how the issue can be presented to the client (if at all). Specifically, is this a situation where the remedial steps can be proposed to the client by the firm-at-fault and pursued on the client's behalf without an own interest conflict? Or must the firm cease to act and inform the client that he or she needs to seek independent legal advice from elsewhere?

Own interest conflicts

The SRA defines an own interest conflict as a situation where "... your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter". Outcome 3.3 prohibits a solicitor from acting where "...there is an own interest conflict or a significant risk of an own interest conflict".

Assessing the existence of an own interest conflict has never been easy. There is little case-law or guidance about what counts as a "significant risk". Many commonplace situations that could engage a clash between a solicitor's interest and duty don't appear to register on the regulatory "Risk-O-Meter". Even charging by the hour, in theory, gives an incentive to the solicitor to take as long as possible on the job. Solicitors are of course required to avoid such temptations but our

point is a different one: not all apparent self-interests are treated the same when it comes to own interest conflicts.

This means the solicitor will have to exercise his or her professional judgment with care and caution when considering whether or not proposed remedial steps can be pursued without an own interest conflict. It always helps to document one's decision-making as well, especially if one ever needs to invoke the "Connolly defence".[2]

A framework for the risk assessment

In this section we provide some pointers to risk-assessing a proposed remedial path.

- **Don't indulge in wishful thinking**. It is all too easy to look solely at the positive aspects to a remedial path. Of course the firm and the client share a common interest in seeing the mistake put right. If they can agree who bears the costs of the process, it is easy to believe that everything will be fine. The problem with this approach is that the prohibition under Outcome 3.4 is largely focused on the negative, the risk that there is a conflict, not the possible benefits of achieving the cure.
- **Are there disputed liability issues?** It will make a cure simpler to pursue and will reduce risk if the solicitor can admit breach of duty and causation as regards his or her mistake. Clearly, insurers will have to be consulted on any admissions before they are made.
- **When the cure can make things worse.** Near the top of the list of concerns is the risk that the pursuit of the remedial steps could make the client's position even worse (and this assumes the firm is paying for the cost of pursuing those steps). For example, suppose that the problem concerns a strip of land that may have been accidentally excluded from a conveyance but the plans are not that clear. There's a concern that if the purchaser-client approaches the vendor to seek clarification of the scope of the title then that could trigger a ransom situation. Of course, the vendor might also swiftly agree to the formalities of rectification. Here, the very first step in the remedial path runs the risk of making the client's position worse. Unless the firm promises to make good that potential worsening, it is difficult to see how the firm could act.
- **An open-ended cure or one with a highly variable cost.** Some remedial steps can be expected to be cheap but might, in some situations, become very expensive. A classic example is the application to cure the formal defect in proceedings that is met with unexpectedly vigorous resistance on the part of the opponent. The issue here is whether or not the firm and its insurers are willing to cover all conceivable costs or only some. If the answer is only some, then it is difficult to see how the client can receive sufficient advice from the firm-at-fault on decision-making without that firm landing itself in a position of own interest conflict.
- **The toe-curling factor.** Some remedial steps are simply embarrassing for the firm-at-fault to put into effect eg because their pursuit involves the firm advertising that it messed up. Suppose for example the best way to achieve rectification for a client is to show the other side that completely mistaken advice was given to the client. Are you really going to be comfortable about characterising your earlier work in this manner to some third party's solicitor who will take every chance to crow over your failing? Even worse, how are you going to react when the other side accuses you of acting in a position of conflict? As a rule of thumb, we suggest that if the quality of a firm's mistaken conduct can be expected to become a contentious issue in the remedial path, then the firm probably has an own interest conflict on its hands when acting for the client on that remedy.

2. See *Connolly v Law Society* [2007] EWHC 1175. "I accept that generally the honest and genuine decision of a solicitor on a question of professional judgment does not give rise to a disciplinary offence. But that does not mean that for a solicitor to act where there is a significant risk of a conflict of interest cannot be a disciplinary offence. If a solicitor does not honestly and genuinely address the issue, he may be guilty of an offence. And if his decision is one that no reasonably competent solicitor could have made, it may be inferred that he did not (or could not) properly address the issue. That inference may well be appropriate where, as in the present case, the reason given for the solicitor's professional decision is manifestly unsustainable."

- **Cure or sue?** Another difficult factor is the possible need for the client to compare the pros and cons of a proposed remedial path with other options such as suing the firm-at-fault. Solicitors' negligence case-law can be quite generous to clients, especially as regards lost litigation claims. Clients are not necessarily obliged to embark upon risky mitigating steps. A client might well be better off pursuing a lost chance claim against the firm rather than following a complex and costly remedial path. The issue can be encapsulated as follows: "Does the client need advice about the comparative merits of suing the firm and pursuing the remedial path in order to make a proper decision?" If the client does, the firm will not be able to provide it for obvious reasons and without such advice the client may be unable to make a properly informed decision about the remedial path.
- **Liability entanglement.** Another no-go area arises where the firm has not admitted breach of duty and the pursuit of the remedial path is at risk of becoming entangled with issues such as whether or not proper advice was given at the material time. If the extent of the firm's earlier fault is disputed, or if there is a live issue of client contributory negligence and this is likely to become a contentious issue in the pursuit of remedial steps, then it is difficult to see how it can act without an own interest conflict arising.

The output of this assessment stage will inevitably reveal how complex and messy the remedial path could become. This is an assessment that is best undertaken with the firm's PI insurers and, if needed, external legal advisers. It should be done before discussion with the client and may well need to be pursued at great speed and possibly on an anonymised basis.[3] The requirement for speed arises because the firm is in a position where the actual or potential conflict has already arisen. The firm needs to take steps to eliminate the actual or potential conflict or cease acting. If it does neither then it will be acting in breach of Outcome 3.4 and in breach of fiduciary duty.

The next stage involves simplification. To what extent can the solicitor simplify a complex remedial path eg by offering the client a full indemnity as to costs and any worsening of position, or by admitting breach of duty and causation? Both steps can of course greatly reduce the potential for an own interest conflict but neither should be seen as a panacea. One must still step back and assess whether, even post-simplification, the remedial steps are simply too risky for the firm to pursue on behalf of the client.

Here are some further issues to have in mind when addressing the possibility of simplifying the remedial path and thereby reducing the risk of an own interest conflict risk:

- **Independent legal advice on the decision to pursue remedial steps.** It may be possible to get the client through the difficult stages by enabling him or her to access, no doubt at the firm's expense, independent legal advice limited to the issue whether or not to pursue the remedial steps. Once the decision has been made with the benefit of independent input, perhaps the firm-at-fault can then continue to act on the cure. However, if the decision to pursue the cure is that sensitive and difficult, the chances are that the client may need continuing independent advice to monitor the situation. This needs to be flagged with insurers as they may not necessarily relish the prospect of paying for two sets of legal advisers.
- **Counsel as a means of mitigating own interest conflict risk.** Getting independent counsel involved in advising the client on the remedial path can also help (as long as the barrister had nothing to do with

3. Having regard to the requirements of *Quinn Direct Insurance Ltd v The Law Society of England and Wales* [2010] EWCA Civ 805.

the original mistake). This can provide the client with a permanently on-tap source of independent legal advice during the pursuit of the remedial steps. The barrister and the client will still need to be comfortable with the arrangement however and the barrister will need to have a clear understanding that he or she is solely looking after the interests of the client.

- **Are you willing to pay the cost in terms of time and effort?** Another sensitive issue that is frequently overlooked in the rush to keep the client happy is the cost to the firm – in terms of time and effort – of pursuing the remedial path. Its insurers may not want to pay the firm an hourly rate for its fee-earners' time (reimbursements of expenses may be different, provided they are proper "defence costs" as defined in the policy). Are you really sure you will be happy to provide your services to the client for free? And what about the situation where someone else is to blame for the mistake and, perhaps, to pass on the costs of cure? How will the firm be able to do so where it was its own staff's time involved?
- **Privilege and curing mistakes:** As soon as a solicitor appreciates that a significant mistake has occurred, we suggest he or she should consider the issue of acquisition of own legal professional privilege. The internal deliberations of the firm concerning the implications of its mistake may attract legal advice privilege but care is needed to ensure that the correct people within the firm are wearing their "legal spectacles" in this regard. Notifications to insurers may attract litigation privilege but one needs to think carefully about the extent to which litigation really is in contemplation, especially if the client doesn't even know about the error. And, of course, efforts by the firm to achieve its own privilege must not result in breaches of its duty to protect client confidentiality nor must they interfere with the job at hand – acting for a client – such that they become a source of own interest conflict.

Conclusion

It has never been easy for a solicitor to cure his or her mistakes whilst avoiding an own interest conflict. A case like *Howell-Jones* is a reminder of the difficulties involved and the attitudes of our regulator. What really matters in our view is a careful assessment of a given situation and the extent to which the risks of an own interest conflict are understood and can be fully mitigated. The complexity of pursuing remedial steps should not be under-estimated. It is not for the faint-hearted or the incautious. But with care and foresight we consider that it is possible in some situations to put things right for the client **and** keep the SRA and insurers happy.

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- Best Legal Adviser status every year since 2009
- Best Legal Employer status every year since 2009
- Shortlisted for Law Firm of the Year for two consecutive years
- Top 30 Most Innovative Law Firms in Europe

We have also been shortlisted and won a number of industry awards, including:

- Winner – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17
- Winner – Law Firm of the Year – The British Legal Awards 2015
- Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015
- Winner – Law Firm of the Year – The Lawyer Awards 2014
- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014

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19107

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000