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RPC's Lawyers' Liability and Regulatory Update

28 February 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.

It's not time to change the PAPs, says Law Society

In a previous edition of this newsletter, we reported on the (somewhat alarming) news that the Civil Justice Council (CJC) is considering halving the time allowed for Letters of Response under the Pre-Action Protocol for Professional Negligence (from three months to six weeks). The proposal is part of the CJC's wider review of all the Pre-Action Protocols, which was recently the subject of a public consultation.

The Law Society has published its response to the consultation. The Law Society's response is "high-level"; it doesn't address the CJC's proposals to make specific changes to certain PAPs (including the PAP for Professional Negligence). In summary, the Law Society says that whilst the CJC's vision for PAP reform is "*commendable in theory*", it has "*strong reservations*" about implementing any of the proposed reforms at this time because of the number of other anticipated changes to the civil justice system that are currently in the works.

Our view that the proposed shortening of the period for Letters of Response under the PAP for Professional Negligence, as well as a number of the other proposed changes, is highly undesirable and have made representations as part of the consultation. The outcome of the public consultation and the CJC's further proposals for reform are keenly awaited and we will be following developments closely in this newsletter.

Who owns the file?

The Law Society has published updated **guidance** on the perennially thorny issue of which documents on a solicitor's file belong to the client and which belong to the solicitor. Whilst the guidance contains little in the way of new information, it does draw together a number of strands previously set out across a number of guidance notes, so it now serves as a one stop shop for any solicitor looking for advice on the subject.

You can read our blog **here** for a handy summary of the guidance and some hints and tips on responding to a file request.

Solicitors not negligent after passing on counsel's advice orally

A firm which passed on counsel's advice to its client orally, rather than in writing, was found not to be negligent in a recent decision of the High Court.

The claimants had instructed the defendant law firm in relation to a claim which was ultimately unsuccessful. In a subsequent

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negligence claim against their solicitors, the claimants alleged that they had not been provided with accurate advice about the prospects of success. Crucially, they claimed that, had their solicitors told them of Counsel's views on the case, they would not have pursued the claim.

The claimants contended that Counsel's advice had not been passed on at the relevant times and, further, that even if the defendant had passed on the 'tenor' of the advice, this was insufficient; the defendant was required to actually forward on Counsel's emails containing the advice.

As a matter of fact, the Court found that the substance of Counsel's advice had been orally conveyed to the claimants. As a matter of law, the Court did not accept that no reasonably competent solicitor would have conveyed the advice orally and, accordingly, found that the defendant was not negligent.

Lawyers will no doubt welcome a decision which reflects that solicitors may act imperfectly without being negligent (it often seems that courts equate those concepts where solicitors are concerned). That said, solicitors who don't give advice in writing would be wrong to take comfort - any substantive advice given orally should be followed-up in writing if you want to avoid trouble later on. Indeed, the presiding judge in this matter concluded with a salient reminder that *'with the benefit of hindsight, things could have been done differently and that advice and other information that was conveyed, on occasions, orally could have been provided in writing. That may have avoided this litigation.'*

The judgment can be found **here**.

SRA plans to expand its fining powers and names toxic workplace culture as its next target

The SRA is aiming to extend its disciplinary reach by increasing its powers to impose a maximum fine of £25,000 – up from £2,000 – without reference to the Solicitors Disciplinary Tribunal (SDT). In a consultation which closed this month, the SRA also proposes to take into account the turnover of firms or income of individuals when deciding what level of fine to impose and to introduce a schedule of fixed penalties (two seemingly contradictory proposals).

In raising the threshold for its fines, the SRA considers that this will enable more cases to be dealt with quickly, by removing the need for a referral to the SDT. Although a modest increase in the limit may be beneficial to enable simple cases to be resolved quickly, raising the threshold so significantly means that more serious cases will fall within the SRA's remit. As such, the Law Society has raised its concern that this enables the SRA to act as "investigator, prosecutor and judge without independent scrutiny": a concern likely shared by many solicitors. The Law Society has suggested an increase of the SRA's maximum fining power to £5,000 or £7,500.

The SRA's other proposals include a blanket policy that fines are not appropriate for sexual misconduct, discrimination and non-sexual harassment cases in any circumstances, leaving suspensions and/or striking off as the only available penalties. Whilst acknowledging the seriousness of these issues, the Law Society points out that this will cause difficulty in borderline cases, which will either not result in a penalty or will have arguably too harsh a penalty imposed.

The SRA has now shifted its focus to tackling toxic workplace culture and has this month published resources to support firms with this. One has to wonder whether requiring solicitors to attend training or take assessments on topics the subject of their misconduct might help to reform behaviours, rather than imposing fines, as many instances of less serious misconduct tend to stem either from a lack of understanding of the rules or a lack of confidence in speaking up (for example, by requiring more CDD from clients or calling out inappropriate remarks by colleagues).

Rare solicitors' policy coverage decision: sums due under law firm's

funding agreement not covered by professional indemnity insurance

For those of us specialising in solicitors' policy coverage, a decision on the minimum terms is a rare highlight (we know – we should get out more). AIG obtained summary judgment this month against a law firm funder who sought to recover sums due under the funding agreement in a claim under the Third Parties (Rights Against Insurers) Act 2010, following the firm's insolvency.

The funder had agreed to provide working capital to the insured in exchange for an assignment of debts owing to the insured, such as unpaid client bills and costs recoveries in litigation. As part of the agreement, the funder appointed the insured as its agent and expressly stated that: (i) the insured would hold funds on trust for the funder in its client account; and (ii) the insured would owe the funder fiduciary duties. The insured allegedly defaulted on the agreement and entered administration.

The funder claimed that it was entitled to judgment against the firm's professional indemnity insurer (AIG) on the basis that it was a "quasi-client" of the firm and its claim was therefore covered by the PII policy. The High Court disagreed and found that the claim fell outside the insuring clause and that, in any event, it would be excluded by the trading debts & liabilities clause. Although the claim appears to fall squarely within the exclusion, the fact that the firm was appointed as agent, trustee and fiduciary of the funder, held funds in its client account, and performed some work (in the form of calculations of the sums due) arguably brought the claim close to arising from the insured's professional business (and therefore falling within the scope of the insuring clause).

This decision – together with the Supreme Court authority of Impact Funding v AIG [2016] UKSC 57 (which analyses a similar fact pattern) – provides valuable guidance on construing solicitors' policies in similar circumstances. Read more about the arguments and the decision from Laura Stocks **here**.

Hong Kong – Giving of reasons not to proceed with complaint of professional misconduct

Whether a regulator should give reasons following the outcome of an investigation into a complaint of misconduct, and the adequacy of such reasons, has been a topical issue for some time and the subject of recent judicial comment. The issue is important for the legal profession in Hong Kong, where law firms, sole proprietors, solicitors, trainees and foreign lawyers are regulated by the Law Society.

In *Wah v Law Society of Hong Kong* [2021] 5 HKLRD 413, the Court of First Instance of the High Court accepted that the common law in Hong Kong has not yet developed to a position where there is a general duty on the part of an administrative body to give reasons for their decisions. *Re Wah* was soon followed by *Wai v Hong Kong Institute of Certified Public Accountants* [2021] HKCA 1920, which considered the adequacy of reasons given by the respondent's professional conduct committee – a case in which RPC successfully defended the respondent in judicial review proceedings and on appeal to the Court of Appeal. Both professions' procedures to investigate complaints of professional misconduct are similar.

In both cases, the application for judicial review was dismissed, albeit for different reasons. In *Re Wah*, the applicant had not exhausted an alternative remedy before applying for judicial review with respect to the respondent's investigation committee's decision not to give reasons for the dismissal of a complaint of professional misconduct against a law firm. In *Re Wai*, the reasons given by the respondent that no prima facie case had been made out were found to be adequate.

This is a developing and important area of the law. Much depends on the legal framework and context within which a regulator makes

a decision. We anticipate further significant regulatory and case law developments.

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