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# RPC's Lawyers' Liability and Regulatory Update

28 April 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 Court of Appeal clarity on the operation of s1(4) of the Civil Liability (Contribution) Act 1978

A recent CoA decision (in which RPC acted for the successful barrister Appellant) provides important clarification on the operation of section 1(4) of the Civil Liability (Contribution) Act 1978 (the **Act**). Although the matter concerned a contribution claim by a solicitor against a barrister brought pursuant to the Act, the decision is of wider relevance/application for litigation practitioners and the Insurance market.

**You can read our full update here.**

## Court of Appeal sends clear message on above guideline hourly rates

In ***Samsung Electronics Co. Ltd & Ors v LG Display Co. Ltd & Anors (Costs)* [2022] EWCA Civ 466**, the successful respondent in an appeal, LG, submitted a costs schedule totalling £72,818.21. This included the costs of LG's solicitors, who billed in US dollars, with an equivalent hourly rate totalling between £801.40 and £1,131.75 for Grade A and between £442.27 and £704 for Grade C. The costs resulted from a one-day appeal (which, the court observed, was not document heavy) where the sole issue was the appropriate forum for trial.

Samsung (the appellant), argued that these were well above the **guideline hourly rates** – which, for London, are £512 for Grade A (solicitors and legal executives with over eight years' experience) and £270 for Grade C (solicitors and legal executives with less than four years' experience). Whilst LG's solicitors did not try to justify charging rates substantially above the guideline, they did say that doing so was "*almost always the case in competition litigation*".

The CoA was unsatisfied with LG's position. They made clear, if the successful party is charging the paying party above guideline rates, a "*clear and compelling justification must be provided*". The CoA held it was not enough to say that a case was a commercial case, or a competition case, or that it had an international element, "*unless there is something about these factors in the case in question which justifies exceeding the guideline rate*".

The CoA's decision is a useful reminder that, if solicitors are charging above guideline hourly rates, they will need to provide clear justification to the court as to why those rates are appropriate. In this case, the CoA said it was important "*to have in mind that the guideline rates for London 1 already assume that the litigation in question qualifies as "very heavy commercial work*". Firms charging above guideline rates should also be mindful of advising clients that, when the court assesses a successful party's costs, there is no guarantee that the court will allow the full hourly rate claimed if that rate is above the guideline, leaving a shortfall which they may have to pay.

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## “You get what you pay for”? Court agrees scope of conveyancer’s duty was limited in low fee, time-pressured instruction

A claim against a conveyancing firm was dismissed at trial on the basis that the scope of the firm’s duty was strictly limited to the terms of the written retainer.

The claimant was purchasing a new house, close to which a proposed new link road would run. Her conveyancer agreed to carry out local authority searches, but the search missed the new road. The claimant sued her conveyancer on the basis that she would not have bought the house had she known of the plans for the new road. Her conveyancer argued that they were entitled to rely on the results of the search, and the court agreed. Significantly, the court agreed with the defendant that its duties were limited to those set out in its engagement letter. Due to the low fee agreed with the claimant, the defendant was not obliged to make any further enquiries or read the hundreds of pages of planning documents relating to the development.

As the barrister instructed at trial, Francesca O’Neill, observed, paying a low fee does not alter the standard of care to which a solicitor is held; but in this case, it did limit the scope of the work to be done. Although unreported, this will be a welcome decision to law firms and their insurers and brokers. It is also instructive to those drafting engagement letters, the terms of which are often crucial in disputes.

**Ms O’Neill’s full note can be read here**.

## Software update recommended… Remind me in 4 months(!)

The Information Commissioner's Office (**ICO**) has fined criminal defence firm Tuckers £98,000 after a cyber-attack exposed data security flaws left untreated for months. **ICO's decision can be found here**.

Tuckers informed ICO in June 2020 that hackers had accessed and placed on the dark web around 970,000 highly sensitive client documents. These included medical records, details of witnesses and victims and information on alleged offences.

While ICO acknowledged the cyber-attacker bore primary responsibility for the data breach, Tuckers' breaches of data processing rules under GDPR "*gave the attacker a weakness to exploit…*" and put highly sensitive personal data at risk.

ICO identified three main data security failings:

1. Patch management

   Tuckers' IT provider identified a critical software flaw in December 2019. They released a patch in early January 2020 and urged their customers to install the patch or upgrade their systems. This was followed by an alert that malicious actors were exploiting the flaw in late January 2020, and a general warning from cyber-security authorities that hackers were taking advantage of the COVID lockdown to exploit weaknesses highlighted by the transition to remote working.

   Industry standards and ICO's own guidance state that patches to critical flaws should be installed within 14 days of release. Despite this, Tuckers failed to install the patch for over four months. Given the relatively low cost of installation and testing, and especially given the high sensitivity of the data, ICO described this delay as a "*significant deficiency that created a risk of serious incidents*".

2. Lack of multi-factor authentication

   ICO also criticised Tuckers' failure to establish multi-factor authentication (**MFA**) on its systems. MFA is a low-cost

measure that Tuckers could have used to prevent data breaches occurring and the lack of MFA "*created a substantial risk of personal data being exposed*" to cyber-attacks.

3. Failure to encrypt

ICO noted with concern some of the hacked documents were in **unencrypted, plain text format**. This posed a major security risk. Encryption places a further obstacle in a hacker's path, such that even if they access a firm's system, they cannot necessarily open or view any documents. Failure to encrypt these sensitive documents was a serious GDPR breach.

**Lessons for law firms – don't ignore software updates**

Firms should ensure their systems are regularly patched with the latest updates and that basic data security measures (MFA/encryption) are in place. Tuckers was arguably fortunate to escape a greater fine for this serious loss of data, which could have been avoided had the firm kept its systems up-to-date.

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## High Court orders security for costs be paid in cash in claim against law firm

A property company was ordered to pay security for costs in cash after the High Court denied the company's request to provide security in the form of a personal indemnity, backed by legal charges, from its owner, Mr Saurymper.

The claimants sought damages for breach of contract and/or negligence against the defendant law firm, Fishman Brand Stone, in relation to a property transaction.

The defendant applied for security for costs on the grounds that there was reason to believe the property company would be unable to pay the firm's costs if ordered to do so and it was just in the circumstances to make such an order.

According to Deputy Master Teverson, Mr Saurymper is a wealthy individual, able to provide conventional security but who sought to avoid "*tying up a significant sum in cash for a year or more…in effect seeking to put his own business interests ahead of those of the defendant*".

The Deputy Master noted ambiguity as to whether the indemnity offered included "*readily realisable assets*" and so concluded, "*The balance of injustice to the claimant in having to tie up some of his cash until trial and the injustice to the defendant in being without readily realisable security falls in favour of the defendant*" and ordered security be provided in conventional form.

**The judgment can be found here.**

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## SRA update – client confidentiality recap

The **SRA has issued updated guidance** to help solicitors and law firms understand their obligations to clients in respect of confidential information.

The guidance is a useful recap of a solicitor's and law firm's obligations under paragraph 6.3 of the Code of Conduct for Solicitors and the Code of Conduct for Firms. These codes require the affairs of current and former clients are kept confidential unless disclosure is required or permitted by law or the client consents.

The courts have made it clear that the duty to preserve confidentiality is unqualified – the duty is to keep the information confidential rather than merely to take reasonable steps to do so, and incorporates a wider duty not to misuse that information (***Prince Jeffrey Bolkiah v KPMG* [1998] UKHL 52**).

We set out the key points to note below:

- The duty of confidentiality continues despite the end of the retainer or death of the client;

- Confidentiality attaches to all information given to you by a client or third party in connection with the retainer in which the solicitor/firm is instructed;
- There is no such duty if a client is using the solicitor to perpetuate a crime;
- It is important to distinguish between information that is confidential and information that is privileged by way of legal professional privilege (**LPP**) (privilege is absolute and can only be waived by the client);
- Care must be taken not to disclose confidential information without consent e.g. when providing information to law firm directories; and
- Sensible precautions should be taken to limit the amount of information obtained prior to a conflict search.

There are certain times when confidential information can be disclosed.

- With client consent – make sure the request for consent is clear so the client knows what information is going to be made available and why;
- When permitted by law – e.g. where there is a concern of money laundering; and
- Where the situation justifies the disclosure (noting that where the disclosure is not with consent or permitted by law, disclosure could lead to disciplinary action by the SRA or a civil claim for misuse of confidential information). Examples of justification include preventing: harm to children; a risk of serious self-harm; or the commission of a crime.

The note deals with are a number of more specific situations where the question of confidentiality should be considered carefully in a wider context:

- Complex group structures where firms have overseas or connected offices which might wish to share information;
- Firm mergers/acquisitions;
- Outsourcing;
- Conflict situations and the use of information barriers;
- Third party complaints to the Legal Ombudsman – which can bring into conflict the two competing obligations to co-operate with LeO and the duty of confidentiality. Whilst client consent should be sought, it is clear that LeO can obtain a notice under section 147 of the Legal Services Act which will override the duty of confidentiality (although not LPP).

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## New SRA Compensation Fund figures suggest fraud losses are on the increase

The SRA Compensation Fund's (**SCF**) recently released draft financial statements for the year to 31 October 2021 indicate that the SCF paid out £27m in 2021 – more than twice the amount paid out the year before (£10.3m), despite receiving fewer claims (1,260 for 2021 compared to 1,360 in 2020). The SCF was able to recover £10m, giving a net outlay of £17m (compared to a net £5.6 outlay in 2020). As the number of claims has not increased, these figures suggest that dishonest practitioners are misappropriating larger sums per matter than previously.

The SCF, a fund of last resort, makes discretionary grants to claimants who have lost money or suffered hardship as a result of the dishonesty of a solicitor (or an employee or manager). The majority of these grants arise from claims made following the SRA's intervention into a solicitor's practice. The majority of recoveries are made from the money (if any) in the intervened firm's client account.

All solicitors contribute to the fund through a levy added to the practising certificate fee. This is currently split between regulated individuals, who pay a flat fee, and firms holding client money, which pay a larger flat fee. In some years, contributions from solicitors and firms have risen to ward off potential spikes in high

value claims. They currently stand at £40 for individuals and £760 for firms that hold client money (down from £50 per individual and £950 per firm in 2020/21).

The funding and burden of the fund has been a contentious issue in recent years. The balance of the fund has, until recently, been deliberately increased to allow the payment of high value, exceptional claims. However, reserves are expected to fall during 2021/22. Current assets in the fund fell overall by about £10m, compared with 2020, leaving £50.6m in reserve. The increase in payments resulted in the deficit for the year ending 31 October 2021 rising 67% to £10m, once contributions from the profession were taken into account.

In 2021, grant recoveries from solicitors found to have been dishonest were just £1.1m – a 79% decrease from 2020. As with insurance claims, there can be a delay in payment of claims while the SCF investigates, and recoveries can also take months or years so may not relate to payments made in the same financial year. However, SCF claims can often be processed faster than insurance claims as investigations have sometimes already been carried out by insurers (leading to a declinature, thus making the claimant eligible to claim on the fund).

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## Hong Kong

### General adjournment of court proceedings ends with more guidance for remote hearings

As we reported in our March 2022 update, court proceedings were generally adjourned between 7 March and 11 April 2022 owing to the severity of "Wave 5" of the COVID-19 pandemic in Hong Kong. This was the second such adjournment – the first having been between January and May 2020. The number of infections reached approximately 75,000 reported cases per day at their peak in March 2022 (in a city of approximately 7.5 million people). At the time of writing, daily reported cases have decreased to approximately 1,000 per day.

Against this background, on 31 March 2022 the judiciary announced the end of the "general adjourned period". The courts gradually resumed business on 12 April 2022. The **judiciary's press release** and "**Notification for Stakeholders**" confirm details of the resumption. As yet, there appears to be no reliable information on the number of court hearings that have been delayed because of the second general adjournment. During the first general adjournment it is thought that approximately 25% of the courts' annual caseload was affected.

To mitigate the effect of the pandemic on the courts' business, on 25 March 2022 the judiciary announced another "**Guidance Note for Remote Hearings for Civil business in the High Court**". This is the fourth guidance note pursuant to the courts' incremental approach to the use of remote hearings. The guidance note recognises that the severity of the pandemic could impact on the ability of judges to attend court in person. Therefore, on 3 March 2022, the Chief Justice issued a direction, pursuant to s. 28(1) of the High Court Ordinance, that appointed a judge's residence "as a place where he/she may sit for the purpose of exercising the civil jurisdiction of the High Court". All stakeholders (including, legal representatives) have had to familiarise themselves with developments.

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