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RPC's Lawyers' Liability and Regulatory Update

31 January 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.

Costs court slashes barrister's brief fee following pre-trial settlement

The question of whether an opponent's brief fee has already been incurred is often in a party's mind when considering settlement in the run up to trial. In ***Hankin v Barrington & Ors*** [2021] EWHC B1 [Costs] Deputy Master Campbell considered whether a brief fee was recoverable where proceedings were settled three weeks before trial.

The claimant was a professional rugby player who suffered a severe head injury. He commenced proceedings seeking £3.16m in damages. A trial of 13 days was listed to start on 15 March 2021 but the claim settled on 24 February 2021 following a mediation. The only outstanding issue between the parties was whether the claimant could recover from the defendant a trial brief fee of £110,000 plus VAT.

The claimant's counsel, Robert Weir QC, had been reserved to attend the trial and 16 preparation days were also blocked out in his diary. He received the trial brief on 22 February 2021. Mr Weir had previously been involved in the claim, which was described by Deputy Master Counsel as difficult and complex. He was informed of the settlement on 1 March 2021 and the trial date was removed from his diary. He was able to undertake some alternative work over the course of March.

The defendant argued at the detailed assessment that no brief fee was recoverable in the circumstances of settlement three weeks before trial, or alternatively it should be reduced by at least 50%. The claimant argued that Mr Weir had already turned down work because the trial and preparation had been in his diary, although the claimant accepted that the fees for the alternative work in March 2021 should be credited to the defendant. The claimant argued for a reduction of no more than 25%.

Deputy Master Campbell found that the £110,000 brief fee was excessive in any event and reduced it to £75,000. He reduced it by a further 50% to take account of the circumstances and timing of the settlement. He then reduced the £37,500 by an additional £10,000 as compensation for the other work that Mr Weir undertook in March, resulting in a fee of £27,500 plus VAT.

It is interesting that the defendant complained that the claimant had not warned it about the impending delivery of the brief fee. Deputy Master Campbell rejected this, placing the onus on the defendant to request such information. The defendant also complained that the claimant had not staged the brief fee in tranches as the defendant had done. Again, the Deputy Master rejected the criticism.

This decision serves as a warning for any party conducting negotiations in the lead up to a trial or hearing. Parties may wish to make enquiries regarding an opponent's brief delivery date and take account of this in the negotiations and/or hold any mediation earlier. The recoverability of brief fees is likely to have a significant impact on the timing of negotiations and the settlement sum.

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Money in suspense - check your account processes

A firm holding more than £100,000 in a client account suspense ledger has agreed with the SRA to a £15,000 fine and a £15,000 costs order after using a suspense ledger to record over 1,200 payments that they were unable to allocate to specific client matters.

The firm, who primarily acts in debt recovery, allowed third party debtors to pay using the firm's automated payment line. Each payment was investigated on receipt, but if an incorrect reference number had been provided, the payment was left on the suspense ledger. The firm's automated telephone payment line did not provide a receipt and accepted payments even if the reference number was wrong. Despite the firm's policy to refund payment to the payment card within 14 days, some entries had remained in the suspense account for over 3 years.

The delay in addressing unallocated payments led to at least one CCJ being issued against a third-party debtor who had, in fact, settled their debts via the automated line. The firm were unable to refund £35,582.22 to debtors who could not be traced, and ultimately paid the sum to charity. The SDT found that the firm should have had effective arrangements, systems and controls in place that ensured compliance with the SRA's regulatory requirements.

The firm should have been alive to the issues associated with their automated payment line and ought to have known that the system did not allow them to allocate the payments to specific client matters. The firm had also delayed investigating the payments and ledger in a timely manner.

Having ineffective systems and delays in processing payments is rightly cause for concern and a firm that fails to handle transactions and payments responsibly fails to maintain trust and confidence in the profession, but firms must also act in a timely manner once they are aware of any breach.

SDT judgment can be viewed **here**.

Good faith does not go both ways

It is common knowledge that solicitors owe fiduciary duties (i.e. duties of good faith) to their clients but what about the other way around? Do clients owe a duty of good faith to their solicitors (as an implied term of the retainer)? The answer is "no" – according to the High Court judgment in *Candey Limited -v- Bosheh & Anor* [2021] EWHC 3409 (Comm), an unusual dispute about the terms of a solicitor's retainer that also includes an interesting ruling on how the fraud exception to privilege may operate (or not) when a solicitor alleges fraud against their former client.

For more information, please click **here** for our blog on this case.

Mishcon de Reya fined record sum for breaching money-laundering rules

Mishcon de Reya has been fined by the SRA over failings in its efforts to curb flows of dirty money. The **Law Society Gazette** reported that the top UK law firm *"admitted failing to secure adequate due diligence on four related clients and misplacing the evidence of diligence it had carried out."*

In its decision, **published on 5 January 2022,** the regulator announced that the London-based firm had agreed to pay a fine of £232,500 (0.25% of the firm's £155m turnover - equating to £387,500 but reduced by 40% to take account of mitigating factors), plus a further £50,000 towards the costs of the investigation. The firm was also forced to pay £25,000 by the Solicitors Disciplinary Tribunal in October 2021 for breaking rules that prevent law firms from being used like banks, when it allowed payments to agents involved in football transfer deals to be routed through its client account.

The SRA investigation concerned work Mishcon de Reya carried out for two unnamed individual clients, between September 2015 and April 2017, and corporate vehicles connected with the same two individuals. Among an extensive list of findings, the regulator found that the law firm had failed to properly scrutinise the proposed acquisition of two separate entities that had *"higher risk of money laundering or terrorist financing"* under relevant money-laundering legislation, because they involved companies in high-risk jurisdictions. This should have triggered enhanced customer due diligence and ongoing monitoring which was not adequately applied. The firm also failed to retain copies of customer due diligence on the two clients and allowed four payments to come in (one payment of £965,000) and out (three payments – the highest of $1,099,015, equivalent to £810,000) of its client account between July 22 and July 28, 2016, none of which related to the delivery of services by the firm, contrary to SRA rules that forbid client accounts being used *"as a banking facility"*. In addition, the former partner advising the two clients had not received mandatory anti-money laundering training.

Through this settlement, Mishcon de Reya will avoid the investigation looming over it as it works with JPMorgan on a London Stock Exchange listing that could value the business at around £750 million and make the firm the most valuable public-listed law firm in the UK, with every member of staff becoming a shareholder.

The involvement of solicitors can be used to give an air of legitimacy to illegitimate schemes and transactions. The outcome of this SRA investigation serves as a reminder of the need for law firms to have adequate procedures in place to prevent money laundering, particularly as it relates to ongoing monitoring of customer relationships. Adequate risk-based due diligence and monitoring of client relationships must be an ongoing exercise for law firms who wish to safeguard themselves in the face of closer regulatory scrutiny and what promises to be a belligerent prosecutorial landscape.

Silent cyber gets loud… or, at least, just about audible… SRA confirms cyber wording to be added to MTC

Following a short consultation in April-May 2021, the SRA has finally confirmed the wording to be inserted into the SRA Minimum Terms and Conditions targeting cyber liability. The new wording (adapted from the International Underwriters Association model PII clause) simply re-iterates that claims for civil liability, defence costs and Legal Ombudsman awards are covered and allows insurers to exclude any cyber claims which fall outside of those parameters. So nothing revolutionary and, arguably, no change to the previous position at all. It remains to be seen whether the new wording will achieve the objective set by Lloyds to make policies more specific about what cyber-related losses are, and are not, covered.

Many firms will wish to have additional cyber-specific cover in addition to their professional indemnity insurance in any event, but the SRA have not yet made this a requirement; nor does their response to the consultation suggest that they are considering doing so. However, the Council for Licensed Conveyancers (CLC) are this month consulting on professional indemnity insurance and whether to make additional cyber cover mandatory is on their agenda. This is perhaps a more pressing issue for firms regulated by the CLC because their Minimum Terms and Conditions already contain a number of exclusions targeting cyber-type incidents, including for loss of electronically stored documents, damage caused by viruses or fraudulent use of the insured's email systems (although loss caused before an insured discovered or should have discovered the virus or fraud is covered). Like the SRA's, their amendment to the MTC also involves a re-iteration that covered claims are covered, even if they arise from a cyber incident. The terms of the CLC's consultation paper suggest that the CLC is hoping that they can rely on insurers to require insureds to take out cyber cover "without regulatory intervention". They are also consulting on whether run-off provisions similar to the SRA regime should be adopted and on whether insurers should be permitted to charge a higher excess in cases where this is justified.

The CLC consultation can be found **here** and closes on 25 February 2022.

SCCO provides guidance on the scope of its jurisdiction

In the recent case of ***Jones-v-Richard Slade & Co Ltd* [2021] EWHC B28** (Costs), the claimant (Ms Jones) issued Part 8 proceedings against her former solicitors, Richard Slade & Co Ltd (the defendant), who had represented her in a dispute involving a will. She sought to set aside a compromise agreement on the grounds of undue influence and economic duress and obtain an assessment of the solicitor's bills of costs totalling £22,090.01 under s.70 Solicitors Act 1970. Following a directions hearing, the district judge transferred the case to the Senior Courts Costs Office (SCCO).

The defendant applied to have the parts of the claim concerning setting aside the compromise agreement struck out or stayed on the grounds that the SCCO did not have jurisdiction to set aside the agreement in proceedings under the Solicitors Act 1970. This application was dismissed, and Costs Judge Rowley provided some guidance regarding when a case should be dealt with by the SCCO and when it should be dealt with by the Chancery Division of the High Court.

He concluded that disputes over solicitors' bills of costs often tread a fine line between a complaint about the costs themselves and a complaint about the advice given and the SCCO now regularly deal with allegations of breaches of fiduciary duty, negligence or breaches of retainer. The question of whether a case should be heard in the SCCO or the Chancery Division of the High Court is very fact-dependent. The facts in this case meant that it was suitable to be heard by the SCCO. First, the parties had consented to the case being transferred to the SCCO. Second, the remedy of setting aside the compromise agreement was simply a means to obtaining an assessment under s.70, and the claimant was not seeking any further equitable remedies other than setting aside that agreement. Accordingly, the expertise of a Chancery judge was not required. The mere fact that there was a question of setting aside a contract did not make the case unsuitable for the SCCO, especially as costs officers are required to assess non-contentious and contentious business agreements as part of their role. It was also held that previous cases that had considered where the line should be drawn regarding appropriate jurisdiction did not 'attempt to delineate an exact line', except for cases which clearly concerned professional negligence.

Hong Kong

A year on – Intervention in Hong Kong law firm could have profound effect on residential conveyancing

As reported in the October 2021 edition, the Law Society of Hong Kong undertook its largest ever intervention in the practice of a law firm in December 2020, further to which the High Court approved the Law Society's application to distribute monies to clients of the former firm.

The intervention, when it happened, was swift and necessary. A year on, and we are starting to see its substantial impact on the practice of residential conveyancing.

In December 2021, the Hong Kong Monetary Authority issued a circular to all authorised financial institutions setting out proposals for an "alternative payment mechanism" (APM). In brief, the APM would require all financial institutions lending money on secondary residential property purchases to ensure that mortgage loans are paid by buyers' mortgage institutions directly to sellers' mortgage institutions through "CHATS" (Clearing House Automated Transfer System) where there are outstanding mortgages over the property.

The proposals are intended to replace the current mechanism whereby the purchase proceeds are transferred between the parties' lawyers pursuant to undertakings and solicitors' cheques or telegraphic transfers. The proposals are intended to cut out law firms from the payment mechanism for secondary residential property, while retaining their services for investigating and transferring title – land title is unregistered in Hong Kong, pending the coming into effect of a Land Titles Ordinance.

The proposals are being reviewed by interested stakeholders and appear to have the support of the Financial Services and Treasury Bureau (of the government). According to media reports, the APM is likely to take effect sometime in the second half of 2022, after further consultation and a trial period.

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