RPC's Lawyers' Liability and Regulatory Update

30 September 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.

The SRA's proposals for the use of its new fining powers

In July this year, the SRA acquired increased fining powers. They are currently consulting on their new approach to imposing financial penalties on regulated firms and individuals. The SRA stated in this consultation they believe certain types of behaviour should not normally attract an SRA fine. Instead, more serious issues should be sent to the Solicitors Disciplinary Tribunal to utilise more serious sanctions or controls to protect against risk or maintain public confidence in the profession. The SRA considers that sexual misconduct, discrimination and any form of harassment falls into this category; financial penalties will only be considered in exceptional circumstances in these instances.

The SRA are consulting on how these greater fining powers should be used. They are proposing changes to their Enforcement Strategy and a more rigorous (some might say formulaic) approach to calculating the size of a fine. The consultation is open until 14 November 2022.

In this article we explore the SRA's proposals and consider the subsequent challenges that may arise.

Revisiting Duty of care

The recent decision in the High Court case of ***Miller v Irwin Mitchell* (2022) EWHC 2252** provides a helpful guide to the often complicated and difficult question of when a duty of care has arisen.

The judgment is particularly useful in providing a detailed re-cap and analysis of the case law on the ingredients necessary to establish a duty of care. Care needs to be taken by solicitors when speaking to prospective clients during the information gathering stage. This is to ensure that no implied contractual or common law duty of care arises before a formal retainer is in place (given that a lawyer often does not have all the relevant information at that stage).

Click here to read our in-depth analysis of the case.

Buyer-funded development claims in the rear view mirror?

The SRA has decided to reduce the profession's contributions to the SRA Compensation Fund (**SCF**) next year because an expected spike in pay-outs to investors in buyer-funded development schemes did not transpire.

SCF had built up a reserve from 2017/18 due to the SRA's concern about expensive claims arising from solicitors' involvement in

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advising on what the SRA term dubious investment schemes. Since 2017, the SRA had become increasingly concerned about solicitors being used to lend credibility to high risk, sometimes fraudulent, investment schemes and has issued a number of warning notices aimed at raising the profile of such schemes and encouraging firms to pay attention to any red flags.

According to the LSB's decision notice approving the reduction in compensation fund contributions for the fourth year running, the SCF did not make the level of grants anticipated as many claims fell outside the scope of the fund. The SCF is a discretionary fund set up to compensate claimants who lose money due to a solicitor's dishonesty or failure to account. SCF is a fund of last resort, so usually only becomes involved where the claim is not covered by the firms' professional indemnity insurance.

The SRA explained that the considerable compensation fund reserves which had been built up had been "driven by a specific set of cases"; conditions that the SRA does not expect to be repeated.

Many insurers have identified buyer-funded development work as high risk from a claims perspective as the fallout from a number of high profile failed schemes has driven up premiums in recent years. While the market is softening, many insurers remain concerned about these claims; however, the SRA's optimism will hearten solicitors, brokers and insurers.

The future of the Solicitors Indemnity Fund (SIF)

The SRA has announced it will continue SIF cover until September 2023.

The SIF provides cover for negligence claims brought more than six years after a firm has closed. The SRA initially announced it would remodel the SIF in 2013 with a view to reducing operating costs. The regulator received strong feedback in consultation that consumer protection in this area should not be removed.

Proposals for the remodelling of the SIF were put forward in a Discussion Paper dated 3 August 2022, which ended on 31 August 2022. The proposals include the retention of the SIF with changes to reduce operating cost, or a replacement of the SIF with a new consumer protection arrangement within the SRA. This could be by way of an indemnity scheme or a compensation fund.

The Discussion Paper stated the regulator was still exploring the cost and funding requirements of these options, although they considered a new SRA arrangement was likely to be more cost effective on an ongoing basis than retaining the SIF. The regulator noted this should be able to provide broadly the same consumer protection as the SIF at a cost proportionate to the benefits of the protection provided.

The Law Society and the Sole Practitioners Group (**SPG**) released responses to the Discussion Paper. Law Society president I. Stephanie Boyce said, “*In principle, we could support an SRA-run consumer protection fund, but only if it provided the same like-for-like protection as SIF*."

The SPG also broadly welcomed SRA's proposals but ruled out the proposal for a "discretionary arrangement similar to the compensation fund".

The SRA will publish a further update on the future of SIF following its board meeting this month (September 2022).

Lawyers' Risks in acting for corporate clients without authority

In last months' edition, we covered the case of *Rushbrooke UK Ltd v 4 Designs Concept Ltd* [2022] EWHC 1687 (Ch), discussing the dangers of acting for clients, such as directors, that do not have the authority of the company. Nick Bird and Georgia Durham have provided further in depth-analysis on this important issue.

Click here to read what they say.

Hong Kong/Asia - Anti-money laundering update for lawyers in Hong Kong

The Financial Action Task Force's (**FATF**'s) last anti-money laundering mutual evaluation for Hong Kong was conducted in November 2018, with the report published in September 2019. The next mutual evaluation is anticipated to be in the next couple of years and, encouraged by the government, regulators in Hong Kong are making preparations. This includes the Law Society of Hong Kong which regulates solicitors and foreign lawyers.

As part of the FATF's previous mutual evaluation, designated non-financial businesses and professions (among others) were singled out for attention – in particular, lawyers, accountants and estate agents. In March 2018, the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (**AMLCTFO**) was extended to cover lawyers, accountants and estate agents. As a result, the AMLCTFO's mandatory customer due diligence and record-keeping requirements became applicable to these sectors.

Against this background, the Law Society has been particularly active recently. For example:

- In February 2022, the Law Society announced that it was launching an "AML Review" of all law firms, sole proprietors and registered foreign law firms in order to (among other things) develop a financial crime risk assessment of the legal profession in Hong Kong;
- On 14 September 2022, the Law Society wrote to its members notifying them that "the Law Society is sharpening its supervisory oversight of member firms in relation to AMLCTF compliance". Pursuant to the AMLCTFO, the Law Society is the designated regulator for this purpose;
- In September 2022, the Law Society launched a new dedicated AML webpage on its website, which includes (among other things) – guidance information, policy and procedure templates, sample client due diligence forms and FAQs; and
- In the beginning of October 2022, as a part of a risk-based supervisory approach, the Law Society will send an electronic AML questionnaire to all law firms, having already trialled a pilot earlier in the year.

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