

### In this issue ...

- Anti Money Laundering
- IBA Best Practice guidelines
- Client care and costs: MasterCigars costs appeal
- Errors in practice
- Supervision - or lack of it
- Other conduct issues
- Partner objective setting
- Risk management in law firms
- Cross-border risk: US liability



Solicitors Disciplinary Tribunal:  
You don't want to go there ...

**RISK UPDATE is available electronically only.**

To subscribe and receive a free e-copy directly into your inbox, email us at [info@legalrisk.co.uk](mailto:info@legalrisk.co.uk). Alternatively download it from [www.legalrisk.co.uk](http://www.legalrisk.co.uk)



### Anti-Money Laundering

Most firms have been busy with the implementation of the Money Laundering Regulations 2007 and we have been advising several international and smaller firms on policies and procedures. The Law Society issued the revised version of its Practice Note on 15 December 2007. The revisions follow the consultation process and are few in number.

Key to compliance is the implementation of a risk-based approach, covered by chapter 2 of the Practice Note. This should include consideration of the client (including past history) and practice area risk, geographical issues (such as former non-co-operating countries which have been on the FATF list in the recent past), source of funds (particularly if third parties are involved).

Verification of client identity is occupying minds and many firms are considering online checks. These have a role to play but in certain instances will not be sufficient on their own – with a particular note of caution for residential conveyancers as **the Council of Mortgage Lenders Handbook does not list electronic verification as an acceptable method of identifying the client**. Where other identification is used, they may help satisfy the Enhanced Due Diligence requirements in appropriate cases, for example non-face-to-face clients. The Practice Note states that when using electronic verification, you are not required to obtain consent from your client, but they must be informed that this check will take place; firms may wish to amend their engagement letters or terms. Although there may be implied consent from clients to such checks, that is unlikely to assist when carrying out checks on beneficial owners.

The revised Practice Note contains changes in relation to the CDD requirements for partnerships, private and unlisted companies in the UK, public overseas companies and pension funds.

The Law Society will be seeking Treasury approval; if granted, this will require the court to consider compliance with its contents in assessing whether a person committed an offence or took all reasonable steps and exercised all due diligence to avoid committing the offence. Until then, it represents good practice. The Joint Money Laundering Steering Group's guidance received Treasury approval on 18 December 2007.

Transactional lawyers (not just residential conveyancers) would be well advised to read the Law Society's warning on mortgage fraud. Failure to take account of previous Green Card guidance is the subject of a number of disciplinary investigations by the Solicitors Regulation Authority.

Firms are advised to record their assessment of training needs and steps taken to address those needs: one firm discovered suspicious activity by property clients introduced by one source and to their alarm found they had not trained the conveyancing executive handling the work; she had joined 9 months earlier. Although her honesty is not in question, enquiries continue...

The definitions of the regulated sector in both the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 were changed by regulation with effect from 15 December 2007 to bring them into line with the Money Laundering Regulations 2007.

The tipping off provisions have been amended significantly from 26 December 2007 by the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 and the penalty reduced to two years imprisonment. Section 333 of POCA. s333 is replaced by 333A.

There are now provisions introducing a consent defence to sections 15 -18 of the Terrorism Act 2000.

*For advice on anti-money laundering policies, training and our helpline contact [sue.mawdsley@legalrisk.co.uk](mailto:sue.mawdsley@legalrisk.co.uk)*

*Continued ....*

## IBA Best Practice guidelines

The International Bar Association has published these. Those familiar with standards adopted by UK firms will note the emphasis on people rather than operational issues. [http://www.ibanet.org/images/downloads/ppid/Best\\_Practice\\_Guidelines2007.pdf](http://www.ibanet.org/images/downloads/ppid/Best_Practice_Guidelines2007.pdf)

## Client care and costs: MasterCigars costs appeal

Many will have been alarmed by the decision of the Costs Judge in **MasterCigars [2007] EWHC 2733 (Ch)** potentially restricting solicitors' costs to the amount of an estimate. The case has been appealed successfully but note that part of the reasoning was provision in the solicitors' terms which made clear that an estimate was just that and not a contractual cap on costs. See the article **All Change in New Law Journal – (2008) Vol 158 No 7302 pages 12-14**. Note the following –

*... when saying that an excess of the final bill over the estimate calls for an explanation, this reaction is heavily dependent upon the extent of the excess. A modest excess does not call for much explanation and a substantial excess calls for a great deal of explanation... If the final bill is a little above the estimate then a court might routinely hold that the excess does not prevent it being reasonable for the client to be expected to pay the full bill. Conversely, if the final bill is significantly above the estimate, a court might routinely feel that the bill had increased by too much so that it was no longer reasonable to expect the client to pay all of it. The court may then be required to exercise its judgment as to what figure could properly be added to the estimate so as not to exceed the sum which it would be reasonable to expect the client to pay. (paragraph 103)*

## Errors in practice

Solicitors must strictly follow procedural requirements, the Court of Appeal has reminded us in two cases. It is not enough to follow what some of us may regard as common sense.

In **Von Essen Hotels 5 Ltd v. (1) Roy Vaughan (2) Daphne Vaughan [2007] EWCA Civ 1349**, the Court of Appeal ruled that solicitors (or rather the party they represent) must comply with the service provisions in a contract to the letter. They must pay "due respect to the drafting." They must assume that a requirement for a particular mode of service "must have been inserted for a reason."

The contract provided that a notice was to be served by being delivered or sent to the Vendors (Mr and Mrs Vaughan) at their home address "with a copy to the Vendors' solicitors marked for the attention of RL Davies". The definitions provided that "Vendors' solicitors" meant "Kendall & Davies".

By the time the notice came to be served, the Vendors had changed their solicitors because a conflict of interests had arisen. The Purchaser's solicitors served the notice on the Vendors as required, and purported to serve a copy on the new solicitors, with whom they were corresponding. But that was not valid service, said the Court of Appeal: the copy had to be served on Kendall & Davies, even though they had ceased acting, and even though the new solicitors had received it.

In **Hoddinott v. Persimmon Homes [2007] EWCA Civ 1203**, the Court of Appeal looked at the procedure for disputing the court's jurisdiction when proceedings are served. The Claimant had obtained an order for an extension of time for service of the Claim Form, without notice to the Defendant. On learning of the extension, and before the Claim Form was served, the Defendant applied to set aside the order. Before the Defendant's application was heard, the Claimant served the Claim Form, and the Defendant filed an Acknowledgment of Service. Having already made its application, the Defendant did not see the need to make an application to dispute the court's jurisdiction within 14 days of acknowledging service, as required by CPR Order 11.

The Court of Appeal ruled that challenging the Claimant's extension was a form of disputing the court's jurisdiction. It went on to rule that once the Claim Form was served, the Defendant could only challenge the extension by making an application as required by Order 11, within 14 days of acknowledging service. The earlier application was not enough: an application under Order 11 had to be made in addition.

The cases highlight the very exacting nature of legal work, and the risks to which that exposes the profession.

**Contact:** [francis.dingwall@legalrisk.co.uk](mailto:francis.dingwall@legalrisk.co.uk)

## Supervision – or lack of it – and disciplinary action

We are seeing evidence which indicates that the Solicitors Regulation Authority (SRA) will take very seriously indeed Rule 5.01(a) of the Solicitors' Code of Conduct 2007. The rule requires partners to make arrangements to supervise staff, and to ensure adequate supervision and direction of clients' matters.

In one case, the SRA is recommending that the senior partner and supervising partner of a firm receive a severe reprimand for failing to supervise a conveyancing solicitor. She committed wholesale breaches of duty on numerous files she was handling for a property developer, ignoring all the mortgage fraud indicators in the "Green Card" warning on property fraud. There were no supervision arrangements in place, and in particular, no file reviews were ever conducted. If file reviews *had* been conducted, the breaches would have been immediately apparent.

In another case, the SRA is referring to the Solicitors Disciplinary Tribunal (SDT) a firm's senior partner (who was head of the probate department) and the managing partner (who had responsibility for supervision in his absence). An unadmitted probate paralegal stole £100,000 in dribs and drabs out of estates she was administering, over a 3 year period.

*Continued ...*

### Supervision – or lack of it – and disciplinary action (continued)...

The paralegal received no supervision. It was left to her to bring matters of difficulty to her supervising partner's attention. Given that she was committing a fraud, it is hardly surprising that she never took up the invitation.

The newly published version 4 of Lexcel stresses the need for "active" supervision. These two examples demonstrate that an open door policy is not enough. Lack of supervision is featuring increasingly in SDT cases. **Contact: [francis.dingwall@legalrisk.co.uk](mailto:francis.dingwall@legalrisk.co.uk)**

### Other conduct issues

We are advising firms on Solicitors Regulation Authority investigations into a variety of conduct issues including The Accident Group referrals, charges for telegraphic transfer fees which exceeded the bank's charge to the firm, accounts issues, supervision breaches and failure to heed the Law Society Warning Card on Property Fraud. **Contact: [frank.maher@legalrisk.co.uk](mailto:frank.maher@legalrisk.co.uk)**

### Partner objective setting

Tony Summers, our resident winning round-the-world yachtsman (as well as a solicitor), has been helping firms with partner objective setting following his keynote speeches at a number of conferences last year. He has drawn extensively on his experience as a former senior partner, the challenges of the race, and his involvement in developing the appraisal process for tribunals.

**Contact: [tony.summers@legalrisk.co.uk](mailto:tony.summers@legalrisk.co.uk)**

### Book: Risk management in the Legal Profession



The second edition of our book, by partner Frank Maher, has now sold extensively in 17 countries across Europe and around the world: Risk Management for Law Firms, published by Ark Group. <http://www.mpmagazine.com/Publication.asp?pubid=DC23642E-2DA8-45D1-8C2F-5A792145BA40>

ISBN: 978-1-906355-03-6

### Cross-border risk: US liability

We have previously mentioned the case of **Stoneridge v Scientific Atlanta** which was heard in the US Supreme Court in October 2007 and arose from potential accessory liability on parties (Risk Update, May and September 2007). The claim was brought by shareholders in Charter Communications against Scientific Atlanta for allegedly helping the seller of TV set top boxes inflate its revenues. There was real concern that an adverse decision would increase the risk on professional advisers.

The claim has been dismissed by the Supreme Court which ruled by five votes to three in favour of the defendants.

However, this does not mean an end to concern about US liabilities. We believe there are still many concerns, even for firms with no overseas practice but who may face claims by investors in other circumstances. The wide extra-territorial activity by the US Department of Justice may also find non-US advisers caught up in investigations in a variety of cases, including, for example, alleged bribery or price-fixing.

### US law firms

We are advising a number of US firms on UK insurance coverage issues and claims handling. **Contact: [francis.dingwall@legalrisk.co.uk](mailto:francis.dingwall@legalrisk.co.uk)**

### Our Practice Areas

#### Risk Management

- Audit
- Strategic planning
- Implementation
- Limiting liability
- Protection of partner assets
- 'Desktop' online testing

#### Regulatory Compliance

- Professional Conduct issues
- Conflicts
- Anti Money Laundering
- Disciplinary

#### Partnership

- Agreements
- Disputes

#### Professional Indemnity

- Defending claims
- Coverage
- Strategies
- Successor Practice, mergers, acquisitions

#### Training

- Risk management
- Anti-money laundering
- Professional conduct

THIS NEWSLETTER IS A GENERAL GUIDE. IT IS NOT A SUBSTITUTE FOR PROFESSIONAL ADVICE WHICH TAKES ACCOUNT OF YOUR SPECIFIC CIRCUMSTANCES AND ANY CHANGES IN THE LAW AND PRACTICE. SUBJECTS COVERED CHANGE CONSTANTLY AND DEVELOP. NO RESPONSIBILITY CAN BE ACCEPTED BY THE FIRM OR THE AUTHOR FOR ANY LOSS OCCASIONED BY ANY PERSON ACTING OR REFRAINING FROM ACTING ON THE BASIS OF THIS.

**Tel** 0845 330 6791  
**Fax** 0845 330 6792  
**International Tel** +44 151 231 6230  
**International Fax** +44 151 231 6231

28 Bixteth Street  
 Liverpool L3 9UH England  
**E-mail** [info@legalrisk.co.uk](mailto:info@legalrisk.co.uk)  
**Web** [www.legalrisk.co.uk](http://www.legalrisk.co.uk)

**Partners:** ,  
 Frank Maher  
 Sue Mawdsley  
 Francis Dingwall

#### Regulated by the Solicitors Regulation Authority

The firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have engaged to provide.