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Confidentiality

The unmasking of popular author J K Rowling, of Harry Potter fame, as the author of a crime novel under the pseudonym Robert Galbraith, has been found to be due to her solicitor revealing the fact to a friend of his wife. It is a useful illustration for training staff as to the absolute duty of confidentiality by which solicitors and their staff are bound.

Confidentiality is a significant part of Legal Risk's online training package in the SRA Handbook. This takes an hour and is accredited for Solicitors Regulation Authority ("SRA") purposes.

PII: an impending crisis?

One hesitates to be too alarmist, against the background that the Gazette reported on 26 August 1987 that the Law Society and other leading professional bodies had made representations to the Secretary of State for Trade and Industry on the perceived difficulties of the professions in obtaining indemnity insurance. Yet still we have a profession which is managing to buy insurance. It is, however, the quality of that insurance which is now in issue, following the closure of three insurers of solicitors in the last three years, as highlighted in our May 2013 Risk Update, in which we commented on the state of the insurance market for the forthcoming renewal on 1 October 2013.

We believe there will be a significant increase in the number of firms, mainly small, choosing unrated insurers at the renewal. At least one rated insurer is pushing for substantial increases in rates and there is talk of a significant increase in unrated capacity.

The Law Society has encouraged firms to consider carefully the risks of using unrated insurers, but firms which have been subject to unprecedented financial pressures may have little choice. In 2012-13, 16% of firms used unrated insurers, compared with 9% the previous year, according to the Law Society's 2012-13 PII survey. It seems almost inevitable that that figure will increase substantially again.

Since our last issue, the Financial Services Compensation Scheme has revealed that the collapse of Lemma is estimated to cost it some £25m.

Many firms will be pushed to close, though even that carries risks if it means they will rely on run-off cover from an unrated insurer. The 'successor practice' rules in the Minimum Terms and Conditions of Insurance loom large for those who may consider taking over firms or parts of firms; the rules can make firms liable for the cost of insuring a failed firm, which in some cases may render the successor firm uninsurable.

We have considerable experience of advising firms on avoiding the impact of the successor practice provisions, and on the full spectrum of professional indemnity issues, including coverage disputes. We also provide risk reports and file audits for firms and for insurers.

Closing down

The successor practice rules mentioned above are not the only issue to address when closing. Law firms, and insolvency practitioners, often think they have realisable value in their will bank or files, but these are confidential, client documents, and it is not the same as selling the assets of an industrial concern. The SRA has revised its guidance on [Closing your practice](#), with greater emphasis on the need to preserve client confidentiality.



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Money laundering and Anti-Bribery

Transparency International has released its [Global Corruption Barometer 2013](#), reporting an increase in people claiming to have paid bribes to public officials in Britain.

The Joint Money Laundering Steering Group ("JMLSG") has released [proposed amendments](#) to the JMLSG Guidance. Note the following proposed amendment to Part II –
"7.54 3. If the firm determines that the risk of the business is increased further by the customer and/or payment and/or location (e.g. the customer is a PEP in a high risk country), the firm should consider whether the information regarding source of wealth should be validated. For example, for source of wealth from inheritance, a copy of the Will could be requested."

The Financial Action Task Force has published [Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals](#), containing typologies of scenarios in which legal services are vulnerable. It will however contain few surprises for UK solicitors who have received adequate money laundering training.

We have reviewed and audited many firms' anti-money laundering systems with a view to both enhancing their compliance and streamlining their processes. We also provide tailored training for compliance teams and fee earners.



Articles

[Client Protection - too good to be true?](#)

[The big insurance renewal](#)

[PII renewal - insurance issues facing law firms](#)

A medley of large risks

Our March 2011 Risk Update reported on the lost remedy for trust tax mistakes, following the decision of the Court of Appeal in **Pitt v Holt** [2011] EWCA Civ 197, limiting the application of the principle in **Re Hastings-Bass** [1975] Ch. 25 under which it was previously possible for trustees to apply to the court to have trust documents set aside where the trustees had failed to appreciate the tax consequences.

The Court of Appeal decision was upheld in the Supreme Court in **Futter v Revenue & Customs Commissioners** [2013] UKSC 26, while leaving open the issue of jurisdiction to reverse a voluntary transaction on the grounds of equitable mistake. The decisions related to private family trusts, but the principles are equally applicable to large occupational pension schemes, where there have been some large potential exposures to claims. The Supreme Court held that there was no strict liability on trustees where they acted on professional advice, even if that advice turns out to be incomplete or wrong - unless the trustees had exceeded their powers or acted contrary to the law – which may increase the focus on the advisers.

Our May 2008 and March 2010 Risk Updates contained reminders of the ultra vires doctrine and its particular significance in the context of public contracts. A further reminder appears from the decision in **Intesa Sanpaolo S.p.A v Regione Piemonte : Dexia Crediop S.p.A v Regione Piemonte** [2013] EWHC 1994 (Comm) in which the Piedmont Regional Council failed in its attempt to set aside a default judgment in relation to three derivative transactions, having missed a three year time limit under Italian law to avail itself of a means of declaring the transactions void without the need to obtain a declaration from the courts. The claims related to Euro Medium Term Notes in an aggregate amount of €2 billion.

The Financial Times reported on 15 July 2013 that defaults among European commercial mortgage-backed securities ("CMBS") have more than doubled, highlighting the widespread problems facing the region's moribund commercial property market. Dropping prices for shopping centres and office blocks outside major cities have led to defaults on maturity of loans to support CMBS bonds arranged in the boom years of the last decade. Some of this may be expected to land at the door of professional advisers.

Review of professional indemnity schemes

The Legal Services Consumer Panel report to the Legal Services Board entitled '[Financial protection arrangements](#)', challenges the disparities between the schemes of the various branches of the legal profession. We have undertaken reviews of compulsory professional indemnity schemes run by law societies in other jurisdictions.

SRA Risk Outlook

This outlines how the SRA views the key risks to its regulatory objectives. It follows a consultation process in which Legal Risk partner Frank Maher participated. See [here](#).



RISK UPDATE

For further information on any of the above, please contact info@legalrisk.co.uk