LEGAL RISK LLP
SOLICITORS

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Anti-money laundering

The Barclays Bank £72m fine imposed by the Financial Conduct Authority for inadequate procedures raises some useful lessons for law firms, which will need to up their game to achieve a demonstrable risk based approach in time for the implementation of the Fourth EU Anti-money laundering directive in 18 months' time.

The transaction was the "the deal of the century", involving secrecy, complex structures, multiple jurisdictions, Politically Exposed Persons, and withdrawal of an instruction to pay a large sum in US dollars when questioned about the rationale for it. It was unclear who was responsible for providing the requisite senior management approval. The bank did not want to "irritate" the Clients with multiple requests for due diligence information. The bank failed to follow its own procedures.

Planning for the Fourth Directive needs to start now, if it has not already been started, particularly in relation to achieving a proper risk based approach: we are advising firms on risk assessment, consequent policies and procedures as well as monitoring, which will be a significant feature for compliance. We can also provide face-to-face training by practising solicitors for staff and risk teams, and online training which is tailored to the firm's own procedures, practice areas and personnel. We believe that criticism of standards of training may be a feature of the SRA's findings on their AML thematic review.

The Financial Action Task Force mutual evaluation of the UK due in 2017 is expected to focus on the effectiveness of the regime, rather than just the framework itself.

Independence, Conflicts of interests, and more

The SRA-commissioned research into Independence, Representation and Risk addresses the extent to which client pressures, including the application of outside counsel guidelines, can impact on the independence of City firms. Its relevance is not, however, confined to City firms. Even small firms face pressures from institutional clients imposing terms on them, particularly in conveyancing.

There are also significant issues affecting independence outside the scope of this research and as yet unexplored, e.g. the impact of banking covenants, the dependence of an individual partner or fee earner on a single source of work, externally owned ABSs, and the influence of referrers or clients responsible for, say, 20% of fees for a firm with a 15% profit margin, to say nothing of the dynamics affecting in-house lawyers who are wholly dependent on one client, their employer.

The report identified a lack of systematic training and development on professional obligations: 'Very few firms were able to point to regular, and in many cases any, professional ethics or professionalism training programmes for associates that covered matters such as the principle of lawyer independence'. Conflicts training is encouraged by Indicative Behaviour 3.1 in the SRA Code of Conduct 2011.

We have provided workshops for partners, associates and risk teams on conflicts of interests, including detailed consideration of outside counsel guideline issues, in several global and international firms (UK and overseas), as well as a variety of national and regional practices.

SRA Consultation on Professional Indemnity

Following the recent discussion paper, the SRA will launch its consultation on reform of professional indemnity insurance requirements and the compensation fund in Autumn 2016 avoiding the risk of repeating the disruption caused by the timing of previous engagement with the profession and insurance industry.

Email risk

The Solicitors Disciplinary Tribunal fines on three partners for inappropriate but private internal emails is a reminder of email risk. This is but one of many issues we have uncovered on file audit. We audit files for City firms and a variety of other practices.

Cyber-attacks and fraud risk

These continue unabated and affect the full cross-section of the profession. There have been many examples of impersonation of internal partner emails requesting payment. Training for staff is critical, and we have provided our short low cost online training course, *Phishing for Trouble*, to firms internationally.

Some firms will be considering insurance against cyber risks. Although professional indemnity policies will generally cover client-related losses, this will be subject to an excess and will affect the firm's claims record. There is also a risk that the terrorism exclusion may apply. This is a potential issue of concern because the Financial Action Task Force's recent report on Emerging Terrorist Financing Risks (October 2015), citing examples in the UK, noted that vishing frauds have been seen as a terrorist financing method. The funds have been used to finance travel to Syria and Iraq and also to sustain individuals who have travelled to these areas to fight with ISIL.

This is relatively inexpensive at the moment, though claims experience may change that. In general terms, a cyber policy will have a lower excess, and will provide cover for the firm's own losses, as opposed to client losses. Policies under the SRA Minimum Terms and Conditions may, and usually will, contain a terrorism exclusion.

Policies need careful consideration, however, as this is a nascent market and there are no standard terms for cyber cover.

Data protection principle 7 is also key as that requires that organisations apply appropriate technical and organisational measures against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

We provide legal advice on data protection as well as bespoke workshops for law firms.

Recent articles

A taste for risk: what is your risk appetite?

Frank Maher discusses the importance of risk appetite statements as part of a risk framework and offers guidance for assessing a company's risk appetite.

First published on lawsociety.org.uk September 2015.

It's not all her fault—it's them too

Francis Dingwall asks 'Do the principals in a firm need to look more carefully at whether they are putting staff—or individual principals—under too much pressure?'

First published in Legal Compliance Bulletin September 2015.

Events

Ark Group's Risk Management for Law Firms & Regulatory Compliance for Law Firms Conference 1-2 December 2015

Frank Maher will be chairing the conference and Sue Mawdsley will be giving an AML and financial crime update

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

Law firm mergers

We have advised on professional indemnity aspects of a number of significant law firm mergers, including due diligence, structuring, and a variety of challenging successor practice issues, including the vexed question of splitting successor practice liability when a firm is splitting.

Limiting liability and asset protection

There is little point having the best drafted limitation of liability clause in your terms of business if you have the terms agreed by someone who does not have the requisite client authority, as happened in **Hawksford Trustees Jersey Ltd v Halliwells LLP** (In Liquidation) [2015] EWHC 2996 (Ch). Although obiter, the judge's comments on the £3m limit in the context of a firm with £150m cover were of interest, and it was not inherently unreasonable to limit liability to this sum.

Another issue was the defendants' failure to adduce any evidence in support of the reasonableness of the clause for the purposes of the Unfair Contract Terms Act 1977, a point which also arose in **Hirtenstein** [2014] EWHC 2711 (Comm).

We have advised many leading firms on their limitation of liability and on asset protection, and have also provided expert evidence on a large law firm's limitation of liability for purposes of High Court proceedings.

Client engagement

We mentioned the lack of client authority to instruct in relation to limiting liability. This is not the only case in recent times involving issues over authority to instruct, **Newcastle International Airport Ltd** [2013] EWCA Civ 1514 being another.

The client engagement process raises a host of other issues too, including anti-money laundering, conflicts, risk assessment, and terms. We advise leading UK and non-UK firms on these issues.

Law firm insolvency

The Government's proposed changes to claims under £5,000 may have a catastrophic effect on the finances of many personal injury firms. An additional pressure may emerge due to new provisions in section 118 of the Small Business Enterprise and Employment Act 2015 which permit Administrators to bring actions against directors and to assign such actions to third parties. These may, for example, include wrongful trading or transactions at an undervalue.

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