LEGAL RISK LLP
SOLICITORS

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Events

Ark Risk and Compliance for Law Firms – Amsterdam

21 June 2016

Frank Maher will be chairing, and both he and Sue Mawdsley will be speaking at this one day international conference

Further details can be found here https://goo.gl/1JYTuF.

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

What does 'integrity' mean? Scott v SRA

On 27 May the High Court delivered its decision in Scott v SRA [2016] EWHC 1256. It was hoped that it would shed light on the meaning of 'integrity' after the Court of Appeal in SRA v Chan unhelpfully said "it serves no purpose to expiate on its meaning." Unfortunately, the Court agreed with that approach: you will know it when you see it.

Mr Scott's misconduct met the objective limb of the dishonesty test under Twinsectra, but not the subjective limb. That will usually be enough to establish lack of integrity. His lack of integrity consisted in recklessness: "he neither thought nor cared about what was required by the rules governing his profession, of which he was aware."

SRA's proposed reforms, and the CLC's bid to steal its thunder

We understand that the publication date may be early June 2016 (or July) for the SRA's consultation on slimming down the SRA Handbook, presenting the new much shorter draft Code of Conduct. This would provide the third new Code in 10 years, perhaps inducing a sense of a Trotskyist state of permanent revolution. In the meantime, there is a current of thought emerging that the profession should focus on ethics; we are developing some training packages on ethics with a view to tailoring them as we have our conflicts training.

The SRA is also due to publish a consultation on its second attempt at rewriting the Solicitors Indemnity Insurance Rules. They have declared their desire to limit the insurance requirements to the minimum needed to protect consumers. For good or ill, that may deprive the profession of the collective bargaining power which has led to the gold-plated Minimum Terms & Conditions being underwritten year after year.

Solicitors who cease practice are currently required to buy 6 years' run-off cover of £2m (or £3m for LLPs or companies) on an 'each and every claim' basis, at a premium typically twice or thrice the annual premium, unless there is a successor practice. The Council for Licensed Conveyancers is now proposing a scheme under which insurers will provide 6 years' run-off cover of £2m in the aggregate (i.e. not 'each and every claim') at no cost (or rather, the cost is factored into the annual premium). For anyone who fears a 'race to the bottom' in regulation, this may be perceived as the report of the starting pistol.

Aggregation in Professional Indemnity Insurance: making it stick

Under the current Solicitors' Minimum Terms & Conditions, all claims arising from "similar acts or omissions in a series of related matters or transactions" are to be treated as one claim. If there are a string of small claims, the Insured may argue that they are to be aggregated, so as to pay one policy excess only. If there are a string of large claims which together exceed the policy limit, the Insurer may argue for aggregation.

How "related" do the matters have to be? Answering that question is like trying to nail jelly to the ceiling. Last month, the Court of Appeal said ([2016] EWCA Civ 367) there must be an 'intrinsic' relationship, not an extrinsic one with a third factor. That narrows the issue, but begs the question what degree of relationship amounts to one which is "intrinsic". We are already dealing with a dispute on the point, that has arisen in the short time since the judgment was delivered. We have seen an upsurge in aggregation issues on topics as diverse as hotels, film finance, property development and SDLT.

SRA: don't be the low-hanging fruit

In Spector v SRA [2016] EWHC 37 (Admin), the High Court has reversed an order made by the SDT granting the respondent's application for anonymity, even though the respondent had been found guilty of an offence (albeit minor). The very fact that the SDT was prepared to make the order in the face of the principle of open justice demonstrates that they try to be fair to solicitors. The perception that the SRA is 'softer' on bigger firms than on smaller ones may result from the fact that big firms put energy and resources into the defence of allegations, presenting a coherent case that may deter the SRA in the face of the SDT's attitude towards solicitors. Contact info@legalrisk.co.uk for our track record on persuading the SRA to withdraw allegations.

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Note

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.

Cyber: no cover?

At a recent meeting between the Bank of England, banks and GCHQ, one of the suggestions was that customers who ignore warnings on cyber crime should be "frozen out of the banking system and will not benefit from current practices where banks foot the bill, irrespective of blame."

It is estimated that cyber fraud has given rise to PII claims of between £70 - £85 million over the last 18 months, to replace money stolen from client account. There is a real issue whether it presents a risk that is too big for the insurance market.

In the meantime, firms should be taking steps to protect themselves: no-one leaves their car unlocked with the key in the ignition just because it is insured. If a firm falls for a scam which has been well-publicised, and has failed to provide training for its staff, an insurer may even ask whether the firm was reckless to the point of dishonesty in parting with the money (with the result that the insurer may decline to indemnify). We have provided online training to many national and international firms: contact info@legalrisk.co.uk for details.

Preparing for renewal of Solicitors' PII

Because of the insurers' losses from cyber crime, you will need to be able to demonstrate that you are taking adequate steps to address the risks.

Most firms now have risk management embedded into the firm, and can demonstrate it on the proposal form, but firms need to reconcile it with their claims history. Can you show that you have tackled the factors that caused the claims? Claims may arise from historical issues (perhaps a departed partner) which current risk management will not cure, and if there is any possibility of further claims from the same source, consider auditing questionable files and making a block notification of the circumstances prior to renewal. We regularly advise on block notification (as well as risk management).

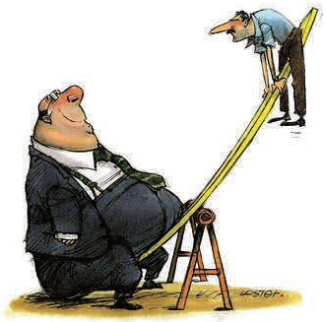
Panama Papers

There are a host of reasons why the theft of data from Mossack Fonseca should give us all sleepless nights for many a month to come. On your list, you will have included a review of your firm's own encryption, its policy towards BYOD ('bring your own device'), and the question of cyber cover, as to which see Frank Maher's article 'Should we buy cyber insurance' here.

But you should also carry out checks on anyone to whom you outsource work or functions, including foreign law firms. Are their systems adequate (it has been suggested that Mossack Fonseca's were outdated and riddled with security flaws) and have their staff received regular training?

Assignment of CFAs – See saw, Margery Daw

On appeal, the Court has decided that CFAs can be assigned. At first instance, it was decided that they could not.



The see-saw that is the English judicial system has reversed the decision of District Judge Jenkinson in Denise Jones v Spire Healthcare Ltd, with a judgment from HHJ Graham Wood. The judge felt bound to follow the way the see saw went in the High Court in Jenkins v Young Brothers Transport Ltd [2006] EWHC 151, even though Jenkins was queried in the Court of Appeal. It therefore appears that the combined weight of three Lord Justices of Appeal will be required to decide which side the issue comes down on.

It is a tricky issue, and an important one in relation to CFAs entered into pre-1st April 2013, because it is the only way to ensure that the success fee etc remains recoverable from the opponent. Quantities of such CFAs have been assigned in the past and if the assignment is invalid the costs will be irrecoverable altogether. Where CFAs have been entered into post-1st April 2013, the problem does not arise.