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Washington DC. See Events below.

Events

[APRL's next meeting: Criss-crossing The Pond: Transatlantic Issues In Legal Ethics And Regulation](#)

Frank Maher will be speaking on GDPR in Washington DC on 9 November 2018.

Contact info@legalrisk.co.uk for further information on any of the above.

Legal professional privilege (LPP)

LPP features in much of the legal advice Legal Risk provides, frequently arising in the context of anti-money laundering (AML) reporting and disclosure issues, compliance audits, regulatory advice and insurance coverage.

The decision in **The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited** [2018] EWCA Civ 2006 (the ENRC case) has attracted much press coverage, but is not the only recent decision of importance. We will not rehearse the issues in the ENRC case in detail as many others have done so, but note the importance of the decision that litigation privilege can apply in the context of internal investigations into potential corporate wrongdoing, even where the prosecuting authorities have not made a decision to commence a formal investigation. This is a point which is potentially also relevant to investigations into regulatory breaches, and is a factor when firms instruct us to advise.

In **Financial Reporting Council Ltd v Sports Direct International Plc** [2018] EWHC 2284 (Ch), the High Court held that the Financial Reporting Council (FRC) was entitled to production of documents, which were subject to legal professional privilege, when exercising the FRC's statutory powers. Although privilege was a fundamental human right (a point emphasised in several other cases, including the ENRC case at first instance), it could be abrogated or overridden by primary legislation which so provided, either expressly or by necessary implication. **Parry-Jones v Law Society** [1969] 1 Ch. 1 was considered, and **R. (on the application of Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax** [2002] UKHL 21 applied.

DAC Beachcroft LLP v Revenue & Customs [2018] UKFTT 502 (TC) is a decision of the First-Tier Tribunal Tax Chamber identifying which of certain documents on a conveyancing file involving an offshore company were subject to privilege.

In **X v Y Limited** [2018] UKEAT 0261_17_0908, the Employment Appeal Tribunal held that privilege could not be claimed where the advice in the email was given for the purpose of facilitating an iniquity, in this case, seeking to disguise an act of victimisation or discrimination as a dismissal for redundancy.

Links to these four recent cases can be found at www.legalrisk.co.uk/news.

AML

An article in *The Sunday Times* (September 9, 2018) noted that "A key part of the government's response to the Salisbury attack is expected to be a crackdown on Russian oligarchs in Britain and the lawyers, accountants and lobbyists who advise them."

We understand that following the establishment of The Office for Professional Body Anti-Money Laundering Supervision (OPBAS), the supervisory regulator which oversees the Solicitors Regulation Authority (SRA) and other regulators for anti-money laundering, the SRA is expected to carry out more in depth AML supervisory inspections on law firms.

We continue to advise many UK and US law firms and property professionals, large and small, on AML issues, including independent audits for compliance with Regulation 21 of the Money Laundering Regulations 2017, dealing with difficult aspects of suspicious activity reports and production orders (often involving legal professional privilege).

We believe it is an important consideration that, as a law firm ourselves, our legal advice is subject to legal professional privilege. The leading textbook, *Thanki on Privilege*, notes that for privilege to apply, the lawyer must have a current practising certificate. (3rd edition, para 1.50.) In **R (Prudential plc) v Special Commissioner of Income Tax** [2013] UKSC 1 it was held that legal professional privilege did not apply to advice by accountants.

Some may consider deferring an AML audit with the intention of ensuring they are fully compliant first. That may be a fool's errand, as they are unlikely ever to reach that point. Meanwhile, they may be subject to a regulatory inspection, the likelihood of which, as noted above, is increasing.

An audit by qualified lawyers offers the opportunity to obtain privileged legal advice on compliance, and benchmarking with the firm's peer group, and may also identify opportunities to streamline processes and improve efficiency.

Data Protection

The General Data Protection Regulation (GDPR) came fully into force on 25 May 2018, but did not apply directly in the European Economic Area countries of Norway, Iceland and Liechtenstein until 20 July 2018. The Information Commissioner's Office has updated its guidance on international transfers to reflect this (following a call from us).

HM Government has published guidance on data protection in the event that there is no Brexit deal.

Links to both these items appear on www.legalrisk.co.uk/news.



Failed investment scheme. See Professional Indemnity Insurance.

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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.

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We have advised more than 20 US firms on GDPR. This is one of many topics on the agenda in Washington DC at 'Crisscrossing The Pond: Transatlantic Issues In Legal Ethics And Regulation', presented by the (US) Association of Professional Responsibility Lawyers (APRL) and the Law Society of England and Wales on 9 November 2018. Further details are at <https://www.legalrisk.co.uk/events/>. Partner Frank Maher, recently elected as a director of APRL, will be speaking on GDPR.

Border searches

We have previously mentioned guidance by the New York City Bar on US border staff searching smartphones, tablets and laptops, putting confidential and privileged client information at risk. (Risk Update, September 2017). After that, the United States Customs and Border Protection issued guidance on Border Search of Electronic Devices; some limitations on searches have been introduced which provide a measure of comfort in relation to clients' privileged and confidential information on lawyers' mobile devices, albeit not alleviating all concerns. A link to both guidance articles is on www.legalrisk.co.uk/news.

The Guardian reported on 24 August 2018 that a British-Australian citizen travelling through Sydney airport has had his devices seized and his digital files inspected by Border Force officers. He was a software developer. It is not clear what, if any, protections would be afforded if a lawyer were subjected to the same process.

Conflicts

US conflicts rules increasingly affect law firms in other jurisdictions, either because they have US offices themselves or, rather more often, because clients impose terms through outside counsel guidelines. They present challenges, because although consent may cure conflicts under US rules (which vary by state), they do not generally do so under the SRA Code of Conduct. Even where they are permitted, however, they may be subject to challenge, and they are one of the topics we cover when providing conflicts workshops for UK and international law firms.

The recent decision in the Californian Supreme Court in **Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.**, 2018 WL 4137013 (Cal. Aug. 30, 2018) (see www.legalrisk.co.uk/news) has been eagerly awaited by many. The Court held by a majority that advance conflicts waivers were ineffective where the law firm should have known that it had a conflict when the waivers were signed. The conflict also rendered an arbitration clause in the engagement unenforceable. The case was remitted for a further hearing on whether the firm was entitled to be paid anything for its services – if it were able to "show that the conduct was not willful, and its departure from ethical rules was not so severe or harmful as to render its legal services of little or no value to the client".

Professional Indemnity Insurance

There are very many large, multiple claims or potential claims arising from failed investment schemes, including hotels and student accommodation, and conveyancing fraud. We are advising a significant number of firms on coverage (including aggregation), block notifications, and related SRA investigations.

We have had another major success for a firm whose insurer collapsed, potentially leaving the firm uninsured without recourse to the Financial Services Compensation Scheme. The FSCS's £1 million turnover cap on eligibility is not necessarily the impregnable barrier that it appears to be, although persistence (even to the point of pursuing an application for judicial review) may be required.