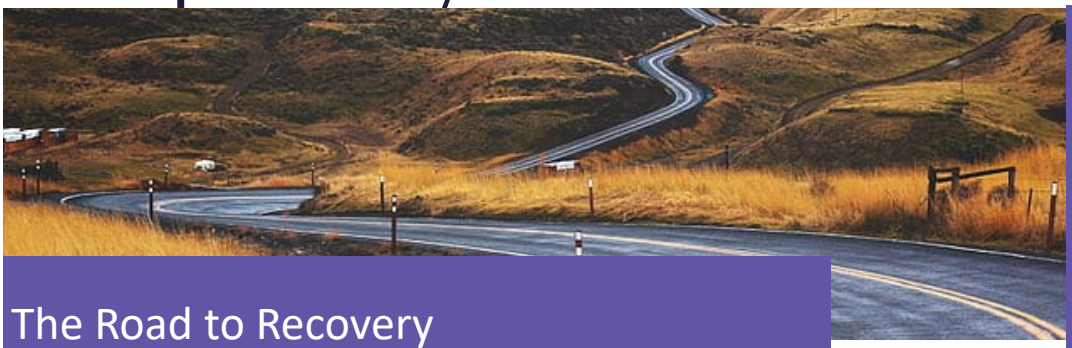
LEGAL RISK LLP
SOLICITORS

www.legalrisk.co.uk | 0345 330 6791 | info@legalrisk.co.uk

Risk Update • May 2020

Issue No: 93



In this Issue

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

The Road to Recovery

We shall attempt to keep this newsletter as virus-free as possible, most Covid-19 issues having been (more than) amply covered elsewhere.

However, we do need to think about the risk landscape after the lockdown ends. With the Bank of England predicting the worst financial slump in 300 years, there will be financial stress, indeed some firms are failing already. Attention may have to be given to reporting to the Solicitors Regulation Authority (SRA), restructuring, confidentiality issues in any negotiations with other firms, transfer of files, wills and deeds, client money and Conditional Fee Agreements (CFAs) to new entities or other firms, the insurance consequences, including successor practices, run-off cover, a variety of personal liabilities (not just premiums and excesses), and excess layer cover.

Many clients will also be stretched financially, giving rise to questions of whether you risk being unpaid, or sue for fees and risk counterclaims, and we may also see litigation of the type seen after the 2008 financial crisis (particularly by lenders).

We hope we shall not see the re-emergence of unrated insurers which appeared after that and then collapsed. That said, many firms would not be in existence now if they had not bought a (worthless) piece of paper in the form of an unrated insurer's certificate of insurance enabling them to continue in practice and fight another day; in the aftermath, we advised a number of firms on making claims on the Financial Services Compensation Scheme, finding a number of ways round the eligibility limits.

Fee earner response to pressure and stress may give rise to errors which raise issues of honesty and integrity, leading to regulatory action. Shortage of transactional work, in particular, may lead to dabbling in unfamiliar work types.

We have many years' experience of providing advice to firms on the legal aspects of issues such as those outlined above.

Anti Money Laundering (AML)

With the continuing attention dedicated to large firms' AML compliance (including regulatory action) by the SRA, itself under supervision by The Office for Professional Body Anti-Money Laundering Supervision (OPBAS), we are seeing a focus on a number of areas.

Internal controls

21.—(1) Where appropriate with regard to the size and nature of its business, a relevant person must—

(a) appoint one individual who is a member of the board of directors (or if there is no board, of its equivalent management body) or of its senior management as the officer responsible for the relevant person's compliance with these Regulations;

(b) carry out screening of relevant employees appointed by the relevant person, both before the appointment is made and during the course of the appointment;

(c) establish an independent audit function with the responsibility—

(i) to examine and evaluate the adequacy and effectiveness of the policies, controls and procedures adopted by the relevant person to comply with requirements of these Regulations;

(ii) to make recommendations in relation to those policies, controls and procedures; and

(iii) to monitor the relevant person's compliance with those recommendations.

Regulation 21: requirement for an independent audit function

One of these is independent audit under Regulation 21 of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. We have audited many firms, including US and UK based international firms and their overseas offices, and have experience of doing this remotely to address current restrictions.

Other areas of AML compliance where we have been assisting clients remotely include training, which can be provided even to staff who are furloughed. Areas of training to consider include focused sessions for the firm's AML compliance and client and matter inception team, others who may need to take over the duties of the Money Laundering Reporting Officers (MLROs) or their deputies in times of absences or illness, and new Money Laundering Compliance Officers and MLROs.

The Legal Sector Affinity Group (LSAG) has published an *Advisory Note: COVID-19 –and preventing Money Laundering/Terrorist Financing in Legal Practices*, and the Financial Action Task Force (FATF) has published *COVID-19-related Money Laundering and Terrorist Financing Risks and Policy Responses*. A European Commission press release on 7 May 2020 announced an Action Plan, including a new list of third countries with strategic deficiencies in their anti-money laundering and counter-terrorist financing frameworks; six countries have been removed and 12 added. The list should be confirmed in the next month.

Links to these and other AML news items are on www.legalrisk.co.uk/news, and there is an extensive collection of resources on www.legalrisk.co.uk/AML.

Conflicts and Confidentiality

A v B [2020] EWHC 809 (TCC) was a commercial dispute arising from two ongoing arbitrations. It was held that an expert witness owes a fiduciary obligation of loyalty which is not satisfied simply by putting in place information barriers to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and his interest may conflict.

There are few decisions of the courts in England and Wales on what constitute 'related matters' for conflicts purposes, particularly whether general knowledge of a client's strategy, policies and procedures, which American lawyers refer to as 'playbook conflicts', can be sufficient to prevent a firm from acting on the basis that they have confidential information.

An American case, *Persichette v. Owners Ins. Co.*, No. 19SA188 (Col. May 4, 2020), may be of particular interest to those involved in insurance defence work. This was a successful appeal against a District Court's refusal to disqualify lawyers from acting against their former insurance clients on the basis that they possessed confidential information in 'substantially related' matters.

The Court of Appeal dismissed an appeal in *Glencairn IP Holdings Ltd v Product Specialities Inc (t/a Final Touch)* [2020] EWCA Civ 609; we mentioned the first instance decision in our September 2019 issue. The Court refused to restrain solicitors from acting for a defendant where, in earlier similar litigation, the same firm had acted for another defendant against the same claimant in litigation which had been settled through a mediation and confidential settlement.

It held that the critical question was whether the information barrier put in place worked, which is a question of fact, in relation to which the burden of proof to show that it did not work was on the applicant. The proposition of law identified in *Bolkiah*, that an information barrier has to be part of the structure of the firm, did not apply as the solicitors were not in a fiduciary relationship with the applicant. Interestingly, in an era where there are ever more niche law firms such as our own, even though the case involved a small firm of solicitors, the information barrier was considered to be effective.

Links to these and other AML news items are on www.legalrisk.co.uk/news and there is an extensive collection of resources on www.legalrisk.co.uk/Conflicts.

Frank Maher will be speaking on *When things go wrong*, addressing the issues raised by the *SRA v Howell Jones LLP* decision in Case No. 11846-2018, at an online conference on 3 June 2020. See www.legalrisk.co.uk/Events.

Professional indemnity insurance

We are advising on coverage (and disciplinary) issues in several cases arising from failed buyer-funded development schemes where the sums at stake are eye-watering and in many cases may exceed limits of cover, depending in part on the success or failure of insurers' arguments that claims should be aggregated and subject to a single policy limit. Many of these fall to be dealt with under arbitration clauses in the policies, and the outcomes may not therefore be widely known.


A failed buyer-funded development scheme

In some of these cases, other coverage issues are raised, particularly allegations that solicitors turned a blind eye to egregious activity by developers. (We shall put it no higher than that for present purposes.)

Against that background, the decision of the Solicitors Disciplinary Tribunal in one recent case is of some interest. Despite the conviction rate of approximately 97 per cent (2018 figures), the Tribunal dismissed the SRA's allegation that the respondent should have known that the schemes were 'dubious'. Save for one discrete conflict issue on the facts, the prosecution failed.

Data protection and information security

The Information Commissioner's Office (ICO) has issued guidance on a number of issues arising from staff working from home. These include *The ICO's regulatory approach during the coronavirus public health emergency* and a blog article on *Video conferencing: what to watch out for.*

So far as the video conferencing is concerned, concerns have been expressed in the press over the security of Zoom. The New York Attorney General has reached an agreement with Zoom Video Communications on provision of improved privacy and security protection for the platform's users.

The Supreme Court decision in *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 allowing an appeal by WM Morrison Supermarkets, and holding that they were not vicariously liable for a data breach committed by a rogue employee, has received extensive coverage elsewhere.

Links to the above are on www.legalisk.co.uk/news and there are extensive resources on www.legalrisk.co.uk/Data.