

A case of over-zealous prosecution: Solicitors fined for limiting liability in line with SRA guidance

Inevitably, there is a little more to this than can be encapsulated in a headline but the issue is of major concern because it may apply to the terms of business commonly used by most large solicitors' firms and many smaller firms.

The case (12262/2021) concerns fines imposed by the Solicitors Disciplinary Tribunal (SDT). The substantive basis for the Solicitors Regulation Authority (SRA) prosecution was a Stamp Duty Land Tax (SDLT) scheme which breached SRA Warning Notices. The solicitor was fined £7,000 and the firm £10,000 by the SDT under an agreed outcome. Each agreed to pay £15,000 costs.

It was alleged that on various dates between 2010 and 2014 the solicitor improperly sought to limit liability in respect of claims and/or limit the timeframe in which a claim could be made in breach numerous provisions of the Solicitors' Code of Conduct 2007 (the 2007 Code) and the SRA Code of Conduct 2011 (the 2011 Code).

The decision also raises significant questions about –

- A) reliance upon SRA guidance,
- B) the extent to which Solicitors Regulation Authority (SRA) can exercise its powers to put solicitors' personal assets on the line at a time when the extent of insurance cover is in the spotlight with widespread application of aggregation provisions, and as yet unresolved issues over the extent of cyber cover (quite apart from the number of insurers of solicitors which became insolvent in recent times), and
- C) the pending consultation on the closure of the Solicitors Indemnity Fund.

The writer is not aware of any other professional rules which are so onerous.

While the SRA's seemingly habitual practice of alleging breaches of multiple provisions was maintained, the allegations may essentially be distilled to the following two provisions –

Rule 2.07 of the 2007 Code (as amended) provided –

If you are a recognised body or a recognised sole practitioner, you must not exclude or attempt to exclude by contract all liability to your clients. However, you may limit your liability, provided that such limitation:

(a) is not below the minimum level of cover required by the Solicitors' Indemnity Insurance Rules for a policy of qualifying insurance;

(b) is brought to the client's attention; and

(c) is in writing.

Outcome 1.8 of the 2011 Code, superseding the 2007 Code, required that –

clients have the benefit of your compulsory professional indemnity insurance and you do not exclude or attempt to exclude liability below the minimum level of cover required by the SRA Indemnity Insurance Rules;

A similar provision now appears in rule 3.2 of the SRA Indemnity Insurance Rules 2019 which provides that -

An authorised body must ensure that its clients have the benefit of the indemnity insurance required under these rules and must not exclude or attempt to exclude liability below the minimum level of cover required under these rules.

The minimum level of cover per claim for these purposes under the SRA Minimum Terms and Conditions (MTC) is £3m for recognised bodies and licensed bodies, £2m for sole practitioners and partnerships.



The Statement of Agreed Facts contained the following –

100. ...In the Firm's client care letters prepared by and on behalf of the Firm and signed by the First Respondent the Respondents sought to limit claims from purchaser clients by requiring them to sign an engagement letter in which they agreed not to bring a claim against any staff or members of the Firm. It is submitted that no choice was provided to clients in this respect, although in fact it was not actually possible to limit a claim in law in the way the Respondents purported to.

101. In approximately ten client matters client care letters prepared on behalf of the Firm and signed by the First Respondent also sought to limit the time in which it was possible to make a claim against the Respondents to: "Three years from the date of the alleged act or omission or twelve months from the date you became aware of it as appropriate". It was not proper to seek to limit a claim for damages to half of the length of the Limitation Act 1980 in the way that the Respondents attempted to do.

The first of these allegations, relating to the exclusion of claims against staff or members of the firm, is extraordinary because guidance note 70 to the 2007 Code, replicating guidance published by the Law Society in June 2005, stated –

70. You will not breach 2.07 by agreeing with your client that liability will rest with your firm and not with any employee, director, member or shareowner who might otherwise be liable. However, any such agreement is subject to section 60(5) of the Solicitors Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.

All guidance to the 2007 Code was technically repealed by the 2011 Code, but the profession continued to make reference to it where there was no other guidance available: an example is the guidance on information barriers. No guidance has been published since which suggests that the requirements on solicitors have become more onerous.

In the writer's experience, the provision is common in the terms of business used by large law firms and many smaller ones. It is hard to see what is objectionable about it on any analysis, as substantial client protection is maintained through the firm and its insurance.

This appears, therefore, to be a case of over-zealous prosecution. Although this was an agreed Outcome, the SDT is nonetheless presumed to have satisfied itself that the admissions were properly made.

The position regarding the second allegation, relating to the reduction in time limit, is less clear-cut. The writer is aware of some firms using such time limits, but generally requiring proceedings within three years of the date of relevant knowledge, rather than 12 months as here.

The Agreed Outcome does not state whether or not the terms of business contained a 'failsafe' provision limiting the effect of any restriction in the terms to those permitted by law.

But again, putting to one side the rather short period which applied here, is it really objectionable in principle to limit the time for claims to be made? In some circumstances it may even benefit the client – if the accumulation of interest keeps the claim within the limit of insurance, or if a claim is made while an insurer remains solvent.

In any event, should the SRA, through conduct rules, prevent solicitors from limiting their liability to the mandatory insurance limit? There may be many circumstances in which that level of cover is not available to meet a claim, for example –

- A) Multiple similar claims may be subject to a single limit of indemnity due to the operation of the aggregation clause, as the SRA will be only too well aware, having intervened in the leading case on the point in the Supreme Court, *AIG Europe Ltd v Woodman* [2017] UKSC 18 – and the facts of the present SDLT scheme case involved multiple similar instructions;
- B) Other policy exclusions may apply – developments are currently awaited on the extent of any cyber exclusion;
- C) A firm switches regulator after engaging the client – no other regulator's compulsory insurance scheme is as extensive in policy limit or breadth of cover, and run off cover in particular is substantially less under other schemes;
- D) Solicitors may be exposed to liability for many years, even beyond the 15 year period provided by section 15B of the Limitation Act 1980, but insurance cover does not continue indefinitely – and the SRA has been resolute until now that the Solicitors Indemnity Fund must close.

By section 28 of the Legal Services Act 2007, the SRA is required to act in a manner which is proportionate. Can it be proportionate to prevent solicitors from limiting liability below the minimum insurance limit, when that figure is arbitrary because it may not in fact be available to meet a claim for any of a number of reasons, and adversely impacts a solicitor's right to protection of property under Article 1 of the First Protocol of the European Convention on Human Rights? And no such provision applies to freelance solicitors, indeed no insurance is required at all unless they are conducting reserved legal activities, and even then it will not be on terms equivalent to the MTC.

The time is now ripe for a review of the SRA restriction on limiting liability, and guidance on what is and is not considered appropriate.

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Frank Maher is a partner in Legal Risk LLP, solicitors specialising in professional regulation and professional indemnity insurance law.

Further information

Contact Frank Maher or Francis Dingwall on 0345 330 6791 or email info@legalrisk.co.uk