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RPC's Lawyers' Liability and Regulatory Update

26 May 2022

Welcome to the latest edition of our Lawyers Liability & Regulatory Update, in which we look back over the last month at key developments affecting lawyers and the professional risks they face.

Beware the client who is too busy to litigate

Clients need to understand from the outset of litigation not only how significant the cost of litigation can be, but also the time commitment. Readers may well be used to advising their clients of the time involved if their case runs to trial, including giving evidence, hearing opponents' evidence and attending pre-trial conferences. But, do clients really understand that they will be required to invest significant time in the litigation long before a trial comes around.

For busy and wealthy clients, in particular, who are used to delegating, the necessary time commitment can be a very unpleasant surprise and cause great difficulties for the solicitors, leading to a spiral of increasing costs and tension in the relationship. To avoid that, clients need to understand (i.e. solicitors need to explain) from the outset that there are some aspects of the litigation process which simply cannot be delegated, no matter how busy (and important/wealthy) they may be.

In this article, we offer some guidance on how to foster client engagement and maximise the chances of engagement when it is really required. If a client is reluctant or too busy to engage when they need to, there are going to be problems. If they are thinking of bringing a claim, are they really prepared to make the required sacrifices and do you really want to act for them if they aren't? If they are a defendant (and therefore have no choice about being involved), do they really understand how their prospects are impacted if they do not commit to the process? Since these are the clients that tend to make complaints or bring claims against their lawyers when things don't work out, careful thought should be given at the outset to explaining their role, obligations and the expectations you and the Court have of them, in order to maximise the chances of a successful relationship and outcome. Click **here** to read more.

Setting Aside Default Judgment

In, *C v Richmond Borough Council* (RBC) a personal injury claim was brought against RBC, alleging it was responsible for the Claimant's mesothelioma when exposed to asbestos at Richmond ice rink in the 1980s. Losses were advanced in excess of £6million. RBC did not respond to the proceedings which were served in June 2021 and the Claimant obtained judgment in default. RBC applied to set judgment aside nine months later.

CPR 13 prescribes the grounds for setting aside a default judgment, which include that the defendant must have a real prospect of successfully defending the claim. RBC argued there were good prospects of defending the claim because it had not owned the ice rink or employed the Claimant.

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The Claimant argued that, in addition to CPR 13, RBC had to apply for relief from sanctions in accordance with the three-stage test in *Denton v TH White Limited [2014] 1 W.L.R. 3926*. These three stages are to consider: (1) the seriousness of the breach; (2) why the default occurred; and (3) consider all circumstances of the case. RBC argued that the *Denton* test did not apply in addition to CPR 13.

Deputy High Court Judge Dexter Dias QC considered whether an application to set aside default judgment constituted an application for relief from sanctions, and therefore came within the Denton test. He concluded that, CPR 13 was a self-contained procedure, and therefore RBC did not need to additionally apply for relief from sanctions. Although a defendant's delay could cause an application to set aside default judgment to fail, delay was not necessarily fatal to the application. He considered that, as a default judgment was an administrative act, the applicant was required to show a real prospect of a successful defence. As RBC had adduced sufficient evidence that the ice rink was not its responsibility, the judge found it was in keeping with the overriding objective and fairness to all parties for default judgment to be set aside.

We understand that the Claimant is appealing this decision as it is inconsistent with earlier authorities. In the meantime, defendants should continue to comply with deadlines following the service of proceedings.

Brevity is best

Judges have been urged to penalise litigants in costs for the time their lawyers spend preparing unnecessarily long and complex documents. In **his recent speech to the British Irish Commercial Bar Association**, Sir Geoffrey Vos brought to mind the famous quote attributed to Mark Twain (taught to some of us as trainees): "*I apologise for such a long letter – I didn't have time to write a short one.*"

Vos encouraged judges to "*think carefully before rewarding incompetence*" by allowing the costs of preparing long documents to be recovered on the basis of hourly rates. He took aim at long witness statements, "*unnecessarily complex*" expert reports, "*now often incredibly fleshy so-called "skeleton" arguments*", over-lengthy lists of issues and "*often rambling and unfocused*" pleadings. The preparation of witness statements has recently been the topic of a consultation, which resulted in guidance encouraging solicitors to resist drafting statements themselves, and instead to ensure that the statement is in the witness' own words. It can be difficult to strike the right balance between allowing the witness to prepare the statement themselves and ensuring that it covers the key issues. Similarly, many solicitors will be wary of encouraging an expert to substantially amend their report due to a concern about the appearance of impropriety. However, **the CJC Guidance on instructing experts** states that, whilst "*experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion*", they "*may be invited to do so to ensure… clarity...*" This too can be a frustrating process (depending on the expert), but the ideal expert is not only a subject-matter expert, but someone who can easily explain something niche to a wider audience.

The wider context of Sir Geoffrey Vos' comments was a call for radical reform to the civil justice system by the introduction of an online justice system for all cases. Only time will tell whether such sweeping reforms will be implemented, but in the meantime, practitioners would do well to heed the warnings concerning costs. Brevity might simply be unachievable in a small minority of cases (for example, where certain non-central issues are nevertheless important to the client) and arguably such an approach is unsuited to an adversarial system, where dropping a peripheral point to focus on a more important issue feels like a concession (and might itself have costs consequences). However, in the majority of cases, it is possible to adopt a more concise approach and Vos' frustrations at overly lengthy documents are shared by many others in the judiciary.

Judge proposes use of summary process for regulators to dismiss vexatious claims

Mr Justice Saini has said that regulators should look to use summary processes in order to deal with vexatious litigants.

Renewing a general civil restraint order (GCRO) against a former nurse, Saini J was critical of the Bar Standards Board (BSB) for taking almost a year to investigate and respond to a complaint against a QC.

The former nurse had lost her job in 2005, and was subsequently struck off by the Nursing and Midwifery Council (NMC) in 2009. The High Court rejected her appeal in 2016. Following her striking off in 2005, the nurse had been "*litigating or attempting to litigate*" about the facts and related matters. Claims were brought against the NMC and North Bristol NHS Trust (her former employer), and their legal advisors. Against the lawyers, she made a number of serious allegations including repeated allegations of dishonesty and misleading the court. Complaints were made to the law firms and chambers as well as their respective regulators, the BSB and the Solicitors Regulatory Authority (SRA).

The SRA and BSB took different approaches to the former nurse's complaints. While the SRA dismissed the complaint on the basis that they could not identify a breach of the rules that would warrant a regulatory investigation, the BSB took almost a year to investigate the complaint, despite the former nurse having made two earlier complaints against the same QC that were dismissed. Saini J was surprised that the BSB had not summarily dismissed the complaint on the basis that there had been previous vexatious complaints and a warning had been given that further complaints would be made.

Saini J, while extending the GCRO for a further two years (it having previously been made in 2016 and renewed several times), did not go so far as to extend the GCRO to the legal regulators. For details of the decision, click **here** .

Ex-solicitor to face 6 years in prison for stealing £340,000 from client

Former solicitor, Stephen Acres, has been sentenced to six years in prison for stealing £340,000 over three years from an elderly client. Acres was a partner at Stanley De Leon Solicitors (now closed) in Potters Bar, Hertfordshire, and acted as the attorney for an elderly client with dementia. He became the sole attorney following the death of a family member of the client in 2013 and over the following three years, Acres withdrew cash using a debit card issued to him by the client's bank. His offences first became noticed in 2015, when the SRA was alerted to Acres attempting to pay a personal debt using a cheque drawn from the client's bank account. He claimed it was an error and the case was adjourned. However, suspicions were raised again the following year when the proceeds of the sale of the client's house were sent to an unknown bank account, later discovered as belonging to Acre's former partner. The Court of Protection removed Acres as attorney and investigations by the new firm appointed as attorney uncovered the extent of the theft.

The Solicitors Disciplinary Tribunal stuck off Acres in 2017 and referred the matter to Hertfordshire police. Acres admitted stealing the proceeds of the client's house, amounting to £225,000, but denied the theft of other monies belonging to the client. He was found guilty of theft totalling over £340,000 by St Albans Crown Court and was jailed for six years. This is a stark reminder that solicitors who breach the trust of their clients, particularly those who are vulnerable, will not only face disciplinary action, but will be severely punished by the criminal courts for abusing their power and harming the reputation of the profession.

Hong Kong – Law Firms look for opportunities in China's "Greater Bay

Area" with an eye on insurance

The Guangdong-Hong Kong-Macao Greater Bay Area (GBA) comprises Hong Kong, Macao and nine cities in Guangdong Province (southern China). The GBA's combined growth domestic product is approximately US$1.8 trillion, with a population over 85 million people.

Given Hong Kong's status as an international financial centre and gateway to Mainland China, professional service providers in Hong Kong are keen to pursue opportunities in the GBA. Since 2021, Hong Kong lawyers who are at least five-years qualified, permanent residents of Hong Kong and Chinese citizens have been able to sit a GBA legal examination. Approximately 600 Hong Kong lawyers enrolled for the GBA legal examination in 2021. The pass rate is not known but is thought to be approximately 60%. The 2022 examination takes place in June.

On passing the examination, completing certain training and being registered in the GBA, a Hong Kong lawyer is able to advise on certain civil and commercial legal matters in the nine Mainland cities of the GBA. Hong Kong “GBA lawyers” can be employed by Mainland China law firms or partnership associations between Hong Kong law firms and Mainland law firms in the nine Mainland cities of the GBA. The first batch of Hong Kong "GBA lawyers" are expected to start practising in the next few months.

In light of these developments, law firms in Hong Kong should consider their insurance cover. Law firms in Hong Kong are required to have minimum insurance cover as part of a professional indemnity scheme (PIS). The PIS would not cover practice outside Hong Kong. The PIS should (on a case-by-case basis) cover civil claims against a Hong Kong lawyer who is qualified and competent to advise on matters of foreign law (including Chinese law), provided such advice forms part of the practice of a Hong Kong law firm.

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