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RPC's Lawyers' Liability and Regulatory Update

31 October 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.

Solicitors entitled to insurance cover for liability for fees: *Royal Sun Alliance Insurance Limited & Others v Tughans (a firm)*

In a recent judgment, Foxton J held that a claim for damages against a firm of solicitors for fees which it was contractually entitled to was covered under the firm's professional indemnity insurance. He held that it did not matter if the fees were obtained through the solicitor's fraudulent misrepresentation provided that the solicitor had done what was required under the contract to earn the fees. The decision will not be welcomed by insurers.

Read our full article here.

Lien won't circumvent disclosure obligations

In the recent decision of *Mr David Ellis v John Hodge Solicitors (a firm)* EWHC 2284 (Comm), it was suggested that a firm of solicitors cannot exercise a common law lien over its file to circumvent its disclosure obligations in a claim for professional negligence brought by a former client. The firm had counterclaimed for fees owed and sought an order that the file only be disclosed to the Claimant's legal representatives. The Court refused to place any restrictions on disclosure of the file.

Read our full article here.

Belsner v CAM Legal Services Ltd and claiming the shortfall from your client?

Belsner v CAM Legal Services Ltd [2020] EWHC 2755 (QB) held that a lawyer must make sufficient disclosure so that their client can provide informed consent when it comes to recovering any shortfall in costs from them. It was held that, in this case, the defendant had not made sufficient disclosure to the claimant despite a seemingly detailed retainer letter. Following this decision, hundreds of similar claims have been intimated alleging clients did not provide informed consent and, as such, should be reimbursed their success fee and/or any shortfall in costs that they were required to meet.

Judges in the Court of Appeal found that the deductions made were "fair and reasonable" and, therefore, did not need to be paid back. However, solicitors ought to ensure that the client receives "the best possible information about the likely overall cost of the case" and are in a position to make an informed decision in order to comply with the SRA Code of Conduct.

Read our full article here.

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Fee claims against former clients: are they worth it?

Recently, we have seen an uptick in counterclaims made by former clients against firms taking action against them for non-payment of fees. Such counterclaims usually allege negligence in the carrying out of the work which the former client has not or will not pay for. Whilst such counterclaims are often retaliatory and sometimes baseless, there is a real risk that the former client will manage to unearth something that could form the basis of a claim against the firm, as we have seen recently in practice. Even if a breach or wrongdoing is not found, a counterclaim must be defended and the quantum can be large, often resulting in significant legal fees for the firm and their insurers.

To avoid this, firms should hold money on account for fees, or (as best as possible in practice) ensure payment is received for work already done before continuing with more. If it becomes necessary to take further action against a former client for non-payment of fees, all attempts should be made to negotiate before proceedings are commenced. Firms should seriously consider the potential of a counterclaim when, say, negotiating a discount or payment plan.

SRA breaks precedent in ground rent claim

The construction and sale of leasehold interest in new-build houses has become fairly commonplace over the last 20-odd years. Under a lease, the landlord would retain the freehold interest and benefit from a tidy income stream, in the form of ground rent. Historically, even freehold owners might have had to pay a token value (or "peppercorn") in ground rent but this was easily bought out and the homeowner would hold their property as "freehold and free".

Developers started implementing periodic increases to the ground rent, ranging from increases in relation to RPI every 25 years to doubling every 10 years (or sometimes even more frequently). As a consequence, down the line, leaseholders found difficulties with selling their leasehold interest and taking out loans.

Consequently, claims against solicitors for failing to advise on ground rent provisions in leasehold purchases have become familiar over the last few years. It was only in March 2022 that some judicial authority sought to clarify the situation. The case of *(1) Kelly Marie Snow (2) Iain Bews v Bannister Preston Solicitors LLP* 2022 involved conveyancing solicitors Bannister Preston Solicitors LLP (**Bannister**) acting in the purchase of a leasehold interest in a property within a new-build estate in Wrexham.

Ultimately, the Court held that ground rent issues were not a widely known concern until 2016 - 2017, which led to a change in the 2017 Conveyancing Handbook. As such, the Judge was not persuaded that a reasonably competent solicitor, at the time of the transaction in 2014, could have been aware of the risks associated with an escalating ground rent clause and found there was no breach of duty.

While solicitors' defence practitioners may look to this case as a useful tool to warn off potential claimants, it appears that the SRA may see it slightly differently. In a parallel investigation, the SRA heard that a precedent report on title had been used for 115 clients but the firm had failed to update the precedent in line with the developer's changes in rent review clauses, or otherwise take due care in ensuring adequate attention to detail went into each individual report. In many cases the rent review periods had changed from 25 years to 10 years, causing detriment to clients.

David Carter Hughes of Bannister admitted to the breach and cooperated with the SRA fully to ensure that tighter systems and controls were rolled out to safeguard future clients. A fine of £15,000 was ordered, alongside costs of £13,350.

The SDT's decision comes as a warning to those who rely on precedents without necessary regard for the individual client's circumstances. While a County Court judgment may prove

beneficial in defending allegations of negligent advice (albeit this is only first instance), care must still be taken by solicitors to ensure that even limited advice is still factually correct, otherwise they may find themselves with a hefty bill from the SRA.

SDT decision available here.

SRA in-house replacement for Solicitors Indemnity Fund

All regulated law firms are required to have indemnity insurance which covers them for any claims against them in the six years after they close. What is the best way to provide cover once that mandatory six-year run-off period has come to an end?

The SRA has been considering this question since 2013, when it announced it would remodel the Solicitors Indemnity Fund (**SIF**), the current provision, with a view to reducing operating costs. The SIF provides cover for negligence claims brought against solicitors' firms, but only after the primary run-off period has elapsed. It is an independent company with its own governance.

But is there a better way to protect consumers?

In consultation, the SRA received strong feedback that consumer protection in this area should not be removed. In August 2022, they put forward proposals and undertook a detailed analysis of the possible options, which included input from stakeholders and independent advice from Willis Towers Watson.

Last month, the SRA Board decided that running an in-house indemnity scheme would offer the most cost-effective and proportionate solution for remodelling the SIF. Willis Towers Watson estimates the in-house option could save £300,000 - £400,000 a year in claims-handling costs and upwards of £120,000 in infrastructure costs, compared to £100,000 - £175,000 and up to £48,000 respectively if the SIF was reformed but retained as an independent company.

The new indemnity scheme will come into effect in September 2023. In the meantime, the SRA is running a 12-week consultation period, until Tuesday 3 January 2023, to invite views on the draft rules for the scheme.

Hong Kong: Decision of joint tribunal resolving fee dispute between barrister and solicitor amenable to judicial review

In *Siu v Joint Tribunal of the Bar Council and the Law Society* [2020] HKCFI 1977 and 2199, the High Court held that:

- a decision of the Joint Tribunal, that determines fee disputes between barristers and solicitors in Hong Kong, was amenable to judicial review;
- the proper respondent was the Joint Tribunal, although the Councils of the Bar Association and the Law Society could be properly served as "interested parties"; and
- on the evidence, the Joint Tribunal had failed to provide adequate reasons for its decision when finding in favour of the barrister and the appropriate relief included a direction that a new tribunal be convened to consider the matter afresh.

The court's judgment is an interesting analysis of the public law duty of a decision maker to provide adequate reasons for their decision – particularly where serious allegations are raised that deserve appropriate consideration by the decision maker.

Of particular importance is the emphasis placed by the court on references to the Joint Tribunal being mandatory, pursuant to: (i) the respective Codes of Conduct of both branches of the profession in Hong Kong; and (ii) the "Terms of Reference and Procedure" agreed between the two governing Councils. The relevant provisions of the two Codes were described by the court as the "functional equivalent of subsidiary legislation", made pursuant to

sections 72AA(b) and 73(1)(a)(iii) of the Legal Practitioners Ordinance in the case of barristers and solicitors respectively.

In passing, it is worth noting that the solicitor was successful in the judicial review proceedings while the barrister was successful before the Joint Tribunal. The proceedings may end up being an expensive exercise; particularly, perhaps, for the barrister. Mediation could be a better option – especially where (unlike this case) a complaint does not raise such serious allegations.

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