LEGAL RISK LLP
SOLICITORS

Protecting partner assets: insurance is not enough (Part 6)

This is the final part of the series, aimed at solicitors in England & Wales, which looks at gaps in insurance cover and how to protect partner assets. In the last part we looked at contractual limitation of liability. We now turn to incorporation of the practice.

Solicitors have been able to incorporate their practices as limited companies for over 30 years, and as limited liability partnerships (LLPs) for 12 years. 52 per cent of practices have incorporated according to the Solicitors Regulation Authority (SRA) annual report for the year to 31 October 2021. That still leaves a lot of sole practitioners and partners without this added layer of protection, albeit such protection may not provide a complete guarantee as we shall see.

Employees can be exposed to the risk of a claim against them personally, as happened to a valuer in the case of *Merrett v Babb* [2001] EWCA Civ 214. The valuer's former employer was insolvent and uninsured. Regrettably, the Court of Appeal declared that '[prudent] professional employees will obviously want to ensure that they are covered personally by their employers' insurance and may need to take steps to obtain personal insurance if that cover does not continue after their employment ends'. In fact such cover is rarely obtainable in practice.

It follows that it is prudent for professional firms to incorporate, and also to include provision in their terms excluding personal liability on LLP members/directors and staff. It is important for SRA compliance purposes that the term is brought to the attention of clients and agreed in terms: a solicitor and her firm were fined in one recent case, though it was only a small aspect of the case against them. The term was mentioned in the client care letter, but despite clear guidance (to the Solicitors' Code of Conduct 2007) that such a provision was acceptable, the SRA's position, rather surprisingly, was that it had not been brought to the client's attention.

As noted earlier, for a number of reasons this still does not provide complete protection for several reasons. First, solicitors often take personal appointments as executors and trustees (which larger firms may address by setting up a trust corporation to take the appointments). Secondly, an issue we often see in practice is that there may be a host of pre-incorporation liabilities, given the long tail on professional indemnity claims (as to which see part 4 in this series). Thirdly, in the event that there is some problem in relation to insurance, a claimant may allege that a named individual has in some way and on the facts assumed personal responsibility, for example in an email saying '*I* advise…'

This concludes our review of the risks to partner assets. Addressing them requires a strategic approach and attention to detail, such as the terms of business, and how they are used in practice. We have advised many firms on this, including drafting terms of engagement. We have also acted for many law firms facing claims over the limit of indemnity or where they are in dispute with insurers on coverage.

Frank Maher is a partner in Legal Risk LLP, solicitors specialising in professional indemnity insurance and professional regulation. The firm acts for law firms in policy coverage disputes and in relation to their mergers and acquisitions.

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Further information

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