

Risk Update • September 2023

Professional indemnity insurance (PII)

Approximately two thirds of solicitors in England & Wales will be renewing their insurance on 1 October 2023 and there are many areas where we advise firms on the legal issues relating to coverage as well as preparing professional risk reports, independent of ties to any particular insurers or brokers.

We have published three articles which are on www.legalrisk.co.uk/publications: *Solicitors' Professional Indemnity Insurance Renewal 2023*, *Block notifications – the Solicitors' PII renewal 2023*, and *Should solicitors change insurer?*

Mergers and acquisitions: Successor practices are not the only risks

With a number of firms closing, some high profile, firms looking to acquire practices or teams will be addressing the risks of doing so. While there is a reasonably high degree of awareness of some of the implications of being a successor practice under the Solicitors Regulation Authority (SRA) Minimum Terms and Conditions (MTC), this does not always extend to some of the ancillary risks where potential exposure does not necessarily follow the successor practice rules and can, on occasions, dwarf the MTC risks.

We have advised several hundred firms on how to address these risks. It is not always a question of avoiding successor practice liability: sometimes it is the right thing to do, and the desired outcome can usually be engineered. However, the approach adopted has consequences in either case, whether immediately or some years further down the line. This can affect adequacy of cover in circumstances where claims may not be made for many years, for example trust cases where an interest may not have vested and time may not have commenced running. Those who have taken personal appointments as executors or trustees are particularly exposed to delayed claims, but there are risks in other areas too.

Coverage

We have advised many firms on coverage issues arising from rogue partner activity, particularly in the area of trusts and probate. Often, there are issues around liability to return fees charged by the rogue.

In *Royal & Sun Alliance Insurance Ltd [2022] EWHC 2589 (Comm)* Northern Irish solicitors succeeded in a claim for indemnity from insurers in respect of claims for reimbursement of fees received. The decision has now been upheld by the Court of Appeal. (Link: www.legalrisk.co.uk/News)

The potential liability of insurers in the case of restitutionary claims for fees which were not properly due was not decided; there are additional considerations under the MTC which do not apply to the Northern Ireland scheme forming the basis of that decision.

Review of compulsory insurance

A paper was produced for the Legal Services Board meeting on 18 July 2023 on Financial protection arrangements for consumers. It is concerning that the topic should keep raising its head when there have already been a number of reviews by the SRA. The latest paper does not inspire confidence in the process as it repeats the point that 'there was considerable support for ongoing mandatory protection being at a lower level and cost, with consumers being offered top-up cover on an opt-out basis'. There is little prospect that consumers would understand the issues sufficiently to make an informed choice. Such an approach would be exposed to adverse selection and displays a lack of awareness of how insurance pricing and acceptance of risk works.

Reviews of compulsory schemes are not confined to the UK: we understand a review is pending in Ontario, and we have advised on others outside the UK.



In this Issue

- Professional indemnity insurance (PII)
- Anti-money laundering (AML)
- Artificial intelligence (AI)
- Costs law

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 this.

To sign up for Risk Update, email info@legalrisk.co.uk

Anti-money laundering (AML)

New Suspicious Activity Reports (SARs) Portal

The National Crime Agency has announced the new SAR portal will go live on 18 September 2023. Two user guides, two video guides and a FAQs document have been developed.

Business Owners Officers and Managers (BOOMs)

In the excitement of announcing newly promoted and lateral hire partners, recent requests for advice suggest that it is easy to forget that firms which are in the regulated sector for anti-money laundering purposes must obtain prior authorisation from the SRA; failure to do so is a criminal offence. Note that the definition of 'Managers' under The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 is not the same as under the SRA Standards and Regulations and will often include roles sitting below the Officers, including senior leadership team, heads of departments or practice areas.

SRA updates

Since our July Risk Update, the SRA has updated its Sectoral Risk Assessment to include reference to proliferation financing, and its AML Questions and Answers to include a further question on sanctions checking on counterparties.

See www.legalrisk.co.uk/News for links to documents referred to above.

Artificial intelligence (AI)

We identified some risk issues in our March and July 2023 newsletters. Concerns about confidentiality are being addressed, for example using closed systems, though smaller datasets may compromise outputs.

Many innovators in the sector are tech startups; doing business with them carries its own risks – they may lack financial backing, lose key players, or be taken over by larger companies which change the offering. Going forwards, ESG (environmental, social and governance) may also be a major consideration with intensive use of computers using precious metals and burning energy.

Costs law

We often advise on costs law and have two points of possible interest to report.

Interim statute bills

Whether an interim bill is merely on account or is a statute bill affects time limits for the client to have the bill assessed. In [*Ivanishvili v Signature Litigation LLP*](#) [2023] EWHC 2189 (SCCO) solicitors' bills were held not to be statute bills.

The Supreme Court torpedoes litigation funding agreements

Conditional Fee Agreements have been described as 'islands of legality in a sea of illegality' (Ian Burnett QC's submissions in *Hollins v Russell*). The point being made was that champerty (sharing in the spoils of the litigation) is still illegal. The same expression has been used of Damages-Based Agreements (DBAs), for example in *Zuberi v Lexlaw* [2021] EWCA Civ 16. DBAs might more accurately be described as near-uninhabitable islands in that sea of illegality, because the DBA Regulations 2013 are widely recognised as not being fit for purpose. However, with care it is possible to use a DBA successfully.

Until now, no-one has thought hard about where a litigation funding agreement stood vis-à-vis the sea of illegality, even where the funder's remuneration was calculated by reference to a percentage of the damages recovered in the litigation. It was, perhaps, regarded as a ship sailing legitimately over the sea. If so, it is a ship which has now been sunk by the Supreme Court's decision in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

The Supreme Court decided that litigation funding agreements are DBAs. The statutory definition of a DBA brings within the definition any agreement between a person providing 'claims management services' and the recipient of those services, if it provides that the amount of the provider's payment is to be determined by reference to the amount of financial benefit received. The Court decided that the provision of litigation funding amounts to the provision of 'claims management services'.

Most current litigation funding agreements do not comply with the DBA Regulations 2013. If the amount payable to the funder is referable to the financial benefit obtained in the litigation, then it is a DBA, and it will be unenforceable. We recommend that law firms which are relying on such funding agreements to finance their clients' litigation should address this without delay.