

Lawyers' liability briefing

Spring 2016

Contents

Lawyers' liability claims: the current outlook

Page 1

The position on unrated insurers in the solicitors' PII market

Page 7

To arbitrate or not to arbitrate?

Page 8

Big Brother or Big Boss?

Page 10

Lateral hires: the challenges of protecting confidentiality

Page 11

Lawyers' liability: a global perspective

Page 14

Lawyers' liability claims: the current outlook

Richard Harrison

Across the lawyers' liability field, experience continues to be that claims volumes in general are down, although the severity of claims continues on an upward trajectory (albeit we are seeing a growing difference between the sums initially claimed and ultimate settlement or judgment values). What is driving the reduction in claims numbers, where are the claims still coming from, and what are the current issues which might give rise to future claims?

The economic climate

Our experience is that claims arising from the financial crisis have now largely worked their way through the system or become time-barred. The teams lenders put in place to review loan books and pursue potential claims are, we understand, being wound up, or are keen to dispose of the last remaining claims.

However, it remains to be seen how long this period of relative calm in terms of lender claims will last. We have started to witness once again some of the trends and behaviours in the residential property market which contributed to the last spate of claims: rapid price increases; significant lender appetite including willingness to lend at high loan-to-value ratios; and interest rates which many take the view can only go up. Against this backdrop, a fall in the property market, perhaps in the event of a Brexit (as to which see further below), could see a resurgence of this type of claim.

This is not the only sphere in which the economic climate might lead to vulnerabilities for lawyers. As oil and other energy prices fall, contractual arrangements entered into by companies in those industries may well come under scrutiny.

The funding landscape

It is difficult to assess to what extent the April 2013 Jackson reforms to litigation costs and funding, including the removal of the recoverability as against defendants of after the event (ATE) insurance premiums and conditional fee agreement (CFA) uplifts, have deterred claimants from pursuing claims. Nevertheless, these recoverability changes, now extended so as to apply also to proceedings brought by insolvency officeholders and companies in liquidation or administration (with effect from April 2016), have no doubt been a positive development for those on the receiving end of claims. Although significant numbers of cases involving pre-April 2013 CFAs and ATE policies are still

working their way through the system, so that the impact has not yet been fully felt, in more recent cases we are no longer facing the same kinds of pressures to settle from claimants who have effectively been able to divest themselves of risk and enter into arrangements whereby an unsuccessful defendant will ultimately have to pay a wholly disproportionate sum in costs. It also appears that in some cases the costs management process has caused some claimants to take stock of both their own potential legal spend and the extent of their exposure to adverse costs should their claim fail, leading to some welcome results from a defendant perspective.

Claimants' appetite to bring claims has also been impacted, principally at the smaller end of the scale, by the very significant increases in Court issue fees, which now stand at GBP 10,000 for claims of GBP 200,000 and above. This has also given rise to a spate of claims, both reported (for example, *Lewis v Ward Hadaway* (2015)) and unreported, in which claimants have issued claims with an inadequate issue fee, leading to satellite debates about whether claims should be struck out on these grounds, particularly where limitation is in issue.

It remains to be seen if and how claimants will overcome these funding issues. Will we, for example, see an increase in uptake of the hitherto little used damages based agreement (DBA)? Further, although we are not always made aware if a claim is being backed by a professional funder, our perception is that there is a growing interest in third party funding of professional liability disputes, attracted perhaps by the relative predictability of professional liability disputes brought by features such as the use of the pre-action protocol, the general availability of a matter file which eases the process of disclosure and therefore parties' understanding of the factual matrix, and the fact that judgments will usually be met by insurance. For example, it has been reported in the press that claimant law firms are using third-party litigation funding to sue other solicitors for professional negligence, with Augusta Ventures saying recently that 75% of the 56 cases it had funded since 2014 were for breach of contract or professional negligence, with more than half of the latter brought against solicitors. Since funders may well have different motivations from parties, their involvement can impact on the dynamics of a matter and the appropriate defence strategy.

Claims trends

Common causes of claims

Broadly speaking, the common causes of claims have not really changed for many years, though we are seeing these being shaped by changing business practices. For example, conflict of interest issues can arise in corporate matters from increasingly complex group structures.

Similarly, supervision processes can be challenged by new ways of working such as outsourcing, off-shoring and remote working, as well as cost-cutting in lean times or under client pressures which may lead to work being carried out by more junior staff such as paralegals. An interesting reported example of the latter issue was seen in *Dunhill v W Brook & Co* (2016), a case relating to an alleged under-settlement at Court of a personal injury action, in which it was held that, had the barrister acting been negligent in settling the matter, the solicitors would also have been held to be negligent because they had only sent to Court a trainee, who was described as "out of his depth" and would not have been knowledgeable or experienced enough to detect any negligent error on the part of counsel. Outsourcing is a trend which looks set to continue, with the outsourcing of major disclosure exercises having been given a boost in the UK by the recent case of *Pyrrho v MWB* (2016), in which the English Courts approved for the first time the use of predictive coding. Firms which outsource such tasks will need to think carefully about who will be carrying out the relevant work, how it will be supervised, the provider's data security measures, and what insurance the provider carries, as well as how to protect other clients' confidential information when the provider is given access to the data in question. That said, if advocates of predictive coding are to be believed, the concept carries significant potential benefits for firms in terms of increasing accuracy, which may reduce the scope for claims relating to the carrying out of disclosure exercises.

We have also noticed some pockets of claims arising in particular areas of work, including the following:

International work

As we have explored in previous editions of the Lawyers' Liability Briefing, as firms continue to expand into new and relatively uncharted territories, work with an international or cross-border element continues to prove a major source of claims. The internationalisation of firms' clients is also a driver, with law firms more frequently being asked to advise on issues such as sanctions – an area of great complexity and change, with significant differences in approach between the US and UK approaches which could prove a trap for the unwary. Sanctions issues are not only a claims issue but also a regulatory one, and views have been expressed that the new Office of Financial Sanctions Implementation, set up within the Treasury with effect from 31 March 2016, may show greater interest than the Treasury has previously done in professional services firms and their compliance with sanctions.

When claims with an international or cross-border element do arise they are frequently complex to defend because of issues which may arise in relation to, for example, which Court has jurisdiction over the dispute and what the governing law is (with expert evidence on foreign law often being required where there is a mismatch between the venue in which the dispute is heard and the applicable legal regime), operating under less familiar or conflicting procedural and regulatory regimes, and marshalling witness and documentary evidence in the face of legal, cultural and linguistic differences.

Our own experience in this area has been reflected in recent reported case law. For example, *Various Claimants v Giambrone & Law* (2016), in which an Italian lawyer giving advice to UK investors in relation to Calabrian property developments was held to have acted negligently in failing to advise them of the need for enhanced due diligence due to mafia involvement in the construction industry in the region, advice which in Italy it might not have been thought necessary to give. This case illustrates some of the issues which can arise when lawyers operating outside

their 'home' jurisdiction fail to appreciate differences between the understanding and expectations of clients in the different regions. Jurisdiction and choice of law issues are not only an issue when claims against lawyers arise but may also be the source of those claims: it is interesting to note that in the last year alone the Courts have reportedly been presented with at least two cases in which alleged failures of advice as to jurisdiction and/or choice of law clauses in international employment contracts have given rise to claims against lawyers (*Wright v Lewis Silkin LLP* (2015), where the claim was successful but which is under appeal, and a further claim by a former EY Moscow CFO against his lawyers, the making of which has been reported in the legal press.) The challenges for firms of trying to ring-fence the liabilities of particular offices or local firms from the rest of the business was also touched upon in the Courts last year in *Symrise AG v Baker & McKenzie LLP* (2015) where the (successful) defendant UK LLP conceded that the UK LLP's liabilities were not limited simply to selecting and instructing the local firm.

Litigation

We continue to see significant numbers of claims arising out of litigation, which continue to be time and labour intensive to defend, particularly where (as is increasingly the case) the underlying matter was a substantial piece of complex litigation, because of the need effectively to "re-live" the litigation. The growth of third party litigation funding (see also above) may contribute to the issues which arise in this area, as firms find themselves facing claims brought by funders, which are not their clients. For example, difficult issues may arise as to duty of care and privilege, including the question of what firms can say in their defence in circumstances where there has been no implied waiver of privilege in the matters on the client file.

In recent times we have seen significant numbers of claims relating to the alleged under-settlement of personal injury (including industrial disease) and matrimonial cases (in particular relating to pension-sharing orders), driven at least in part, we believe, by certain firms of claimant solicitors targeting this work in terms of advertising and the sourcing of claims.

To date, we have not witnessed the swathe of claims which some predicted arising out of post-Jackson breaches of Court deadlines and procedural rules to which the *Mitchell v News Group Newspapers* (2013) decision was applied leading to the striking out of claims or other draconian sanctions. This may be due to a combination of lawyers acting in a particularly cautious manner in light of the widespread publicity which *Mitchell* received, and/or the subsequent softening of judicial approach in later decisions such as *Denton v TH White Ltd* (2014).

However, in the last issue of our Lawyers' Liability Briefing we predicted that we might see more claims arising out of funding advice, and there have been some recent reports of costs issues arising in cases which have now worked their way through the Courts under the post-Jackson regime, for example relating to advice about funding which was given at around the time of the reforms (when there was something of a rush to get arrangements in place in advance of the 1 April 2013 commencement date). As more matters in which costs management has taken place come to a conclusion and final costs orders are made, we may also see an increase in claims arising out of work done in relation to costs budgets, although firms may opt to accept a reduced payment of fees from their client rather than risk facing a professional liability claim. If and when damages based agreements become more popular, we might see claims relating to whether or not these arrangements were adequately explained to clients.

Tax advice

Tax advice continues to be a source of claims and has come under the spotlight of the media and regulators once again – together with the issue of data security – in light of the Panama Papers leak. The activities of offshore firms are likely to be the subject of particular scrutiny.

It remains our experience that many of the claims we are seeing in the tax arena (and expect to continue seeing) relate to historic tax advice. This is perhaps because governmental and regulatory crackdown on large scale tax avoidance schemes has largely brought such activity to an end, but also because clients will often wait until any dispute with HMRC has finally been determined and they have had to make a payment to HMRC before considering

a claim against their advisors. It remains to be seen, for example, what impact the Supreme Court's recent ruling in favour of HMRC in the Eclipse 35 film partnership scheme litigation will have in terms of knock-on claims.

Against this backdrop, limitation defences are important: often, the primary six-year limitation period, running from entry into the scheme, will have expired, and the claimant will be seeking to rely on date of knowledge arguments pursuant to section 14A of the Limitation Act 1980, alleging that they did not have the requisite knowledge to bring a claim until (say) the HMRC assessment. The recent decision in *Iain Paul Barker V (1) Baxendale Walker Solicitors (A Firm) (2) Paul Baxendale-Walker* (2016), concerning the recommendation by a solicitor of an employee benefit trust as a tax avoidance scheme, illustrates the fact-sensitivity of such arguments: although obiter (because the issue in relation to which breach of duty was found failed on causation), the Court held that the claimant would have been able to rely on s.14A because, although he had questioned the advice received from the defendants on a number of occasions, his questioning was not on issues which were relevant to the reason for which the scheme ultimately failed.

We are also seeing a spate of disappointed beneficiary claims relating to inheritance tax advice and estate planning.

Pensions

Pensions is another area, like tax, where the sheer rate of change continues to give rise to the potential for claims.

We continue to see issues with the implementation of amendments to and consolidation of pension scheme rules. Along with alleged failures to effect equalisation of retirement dates for men and women following the *Barber* judgment (1990), which we continue to see, these sorts of issues can give rise to claims against those responsible for the documentation in question.

Another exposure for firms advising on corporate acquisitions, sales and restructuring arises from the powers of the Pensions Regulator to take action under the “moral hazard” provisions of the Pensions Act 2004 in relation to corporate changes or structures which have a detrimental effect on the security of the pension scheme. These provide for the Regulator to take various steps including, for example, issuing a contribution notice requiring a company or individual to pay monies to the pension plan or Pension Protection Fund or a financial support direction requiring a company to provide on-going support for a scheme. The circumstances in which the Regulator may exercise these powers is complex and there is relatively little case law about the scope of its powers. Moreover, our experience is that the Regulator is taking an increasingly interventionist approach and we foresee this trend continuing. These factors combine to make it more difficult for lawyers confidently to advise on transactions, including with regard to the risk that the Regulator might investigate and take steps further down the line, and therefore increase firms’ vulnerability to claims being made against them in this area.

Again, limitation issues can often be very live in pensions advice cases but are highly fact-sensitive.

“Friday frauds”, imposters and sham law firms

We continue to see firms, particularly in the property sector, falling prey to fraudsters, who are using ever-more sophisticated techniques to access and make off with client funds. “Friday frauds”, which seek to capitalise on the pressure of tight deadlines faced by solicitors handling large amounts of money on behalf of clients, continue to be prevalent and are growing in sophistication, with fraudsters using a combination of identity fraud and cyber techniques. It also continues to be a common scam for fraudsters to set up a bogus firm of solicitors and/or to impersonate the seller of a property (although sometimes the fraudster is a true owner with the threat of repossession looming), and again the increasing sophistication of the methods fraudsters use to “prove” their identity or make bogus firms seem authentic – for example, cloning websites and letterheads – make it all the more difficult for solicitors to detect frauds. This is both a

claims issue (with recent authority, *Purrunsing v A’Court & anor.* (2016), making it clear that viable claims for breach of trust may lie against solicitors acting for both purchaser and imposter vendor) and a regulatory one, since if money is lost due to a scam the firm will be in breach of the Solicitors’ Accounts Rules 1998 which oblige a firm to reinstate the missing monies immediately (and failure to do this risks regulatory sanction). The onus on firms to ensure that they have in place robust policies, procedures and training on money laundering and the identification of fraud more broadly is therefore greater than ever.

Parallel proceedings

We continue to see an increase in parallel civil and regulatory action and envisage that this trend will persist. Reasons for this trend include: the SRA’s increasingly proactive approach towards enquiries of firms and investigations, particularly in relation to high-profile matters; claimants approaching the regulator in the hope that this will enable them to obtain documents which they might not otherwise be able to obtain, or will elicit admissions, which will assist in a civil claim; and the fact that a civil claim may raise issues of misconduct which trigger self-reporting obligations on the part of the professional firm (indeed, we are seeing an increasing tendency on the part of claimants to assert regulatory infractions in pleading their civil claim, perhaps for this reason). Given the difficulty of achieving a stay of regulatory proceedings while related civil proceedings are disposed of or vice versa, dealing with claims with a parallel regulatory dimension continues to cause real issues for firms and their insurers, both practical (the strain of having to deal with both elements) and legal. One of the many issues which arise is the risk that documents created in the regulatory action may be disclosable in the civil proceedings. Insofar as concerns settlement discussions with a regulator, it is helpful that in *Property Alliance Group Ltd v Royal Bank of Scotland* (2015) the Court has recently confirmed that, as a matter of principle, communications genuinely aimed at a settlement with a regulator can be withheld from disclosure in civil proceedings on the basis of a rule akin to the “without prejudice” principle. The Court’s confirmation that privileged documents can be disclosed to regulators on

a “limited waiver” basis, without thereby losing privilege as against third parties, is also welcome. However, the decision also serves as a warning: in that case RBS lost its right to rely on privilege in these documents because it had put the basis and terms of its settlement with the FCA in issue by the way in which it had pleaded its defence in the civil proceedings (in broad terms, it had relied on the absence of any finding of misconduct by the FCA).

We are also seeing an increase in references to the Ombudsman, either instead of or often in tandem with beginning a claim by way of the Professional Negligence Pre-Action Protocol, and the attempted use of subject access requests under section 7 of the Data Protection Act 1998, which again have potential to divert attention and resources from the defence of a claim or complaint.

Other regulatory matters

The SRA continues to take a particularly keen interest in issues relating to money laundering, the use of client accounts as bank accounts and old client balances. Turning however to regulatory matters more broadly, it is an interesting time for regulation of the legal profession. We are currently awaiting the SRA's consultation on a new Handbook, which is likely to propose a significantly shortened rulebook which jettisons yet more of the non-mandatory guidance which currently appears. Such a move towards even more outcomes-focused regulation would require firms to reassess once again their compliance and risk management policies and procedures. The government's consultation on the structure of the regulatory framework, including further separation of representative and regulatory bodies, is also expected shortly. We are keeping a keen eye on these developments and will report on the consultations when they are published.

Risk management

As the common causes of claims remain relatively unchanged, so the key issues for risk managers largely remain perennial ones, albeit that (as discussed above) these are shaped by changing business practices. However, one area which has come into particular focus in recent times is the impact on firms of pressures from clients to agree to particular terms of business. This was the subject of the recent SRA-commissioned report “Independence, Representation & Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms”, which looks at the claims, regulatory and ethical implications of the perceived shift in the balance of power which has taken place between law firms and major clients. How law firms can and should address these issues is a very substantial and important topic, but on a day-to-day, claims-focused level, firms need to remain wary of requests to agree to, for example, uncapped liabilities, indemnities or responsibility for the work of third party providers.

What next?

In addition to the areas of current and future concern discussed above, there is of course a major event on the horizon: the upcoming referendum on the UK's membership of the EU. The legal work which would be necessary to implement changes following a Brexit would of course present great opportunities for the legal industry; it would no doubt also give rise to significant risks, as lawyers would be advising on uncharted territory in an uncertain and rapidly developing environment. The legal sector, like the rest of the UK, awaits 23 June with baited breath.

The position on unrated insurers in the solicitors' PII market

In recent years there has been a decline in the number of insurers without financial security ratings operating in the solicitors' PII market.

Many unrated insurers emerged in the wake of the 2009 economic crash providing affordable policies to smaller firms who were unable to secure cover from their more established competitors. The first half of the decade witnessed the collapse of a number of these newcomers, including Quinn, Lemma, ERIC and Balva, leaving thousands of firms across England and Wales uninsured and struggling to find replacement cover. The failure of these insurers highlighted the importance of obtaining cover from a financially secure insurer and the potential risks of making cover selection based solely on price.

The dangers have also been highlighted by the FCA's recent censure in February of the managing agents involved in issuing binding authorities for a number of PII schemes. In a decision which followed an investigation into the validity of solicitors' PII cover sold to some 1,300 firms, the watchdog fined five individuals and two firms a total of GBP 15.5 million, and banned four of the individuals for significant competence and integrity failings.

The FCA found that the insurance schemes in question were all linked to Shay Reches, a director of insurance intermediary Coverall Worldwide Limited with responsibility for a managing general agent, Aderia UK Limited. Reches used binding authorities issued by Aderia to various cover-holders, including to a specialist PII broker, Bar, which targeted solicitors. Security was needed from a number of insurers and reinsurers based in the UK, the rest of Europe and offshore. The principal risk carrier, Sinclair Insurance Company, was registered in the Comoros (an archipelago in the Indian Ocean) and owned and controlled by Reches.

The FCA concluded that failings in the management oversight throughout these distribution chains, and the failure of the reinsurance arrangements, contributed to three unrated insurers – Millburn, ERIC and Balva –

all entering administration and unable to honour the insurance they had offered to hundreds of law firms.

More broadly, a drop in premiums caused by increasing competition from rated insurers, coupled with growing scrutiny from the regulators, means that the PII market may no longer be as attractive for unrated insurers as it once was.

The decline in unrated insurers in the solicitors' PII market has continued into 2016 with the announcement, in February (coincidentally, in the same week as the FCA decision referred to above), that Elite Insurance (one of only three unrated insurers remaining in the market, and the only one based in the UK), will not be writing any new policies or offering renewal terms on its existing solicitors' professional indemnity book. The company cited a number of reasons for its decision, including an increased propensity to fraud on solicitors' client accounts, as well as falling premiums. Elite's exit leaves only two unrated insurers on the SRA's Qualifying Insurers panel – Alpha Insurance, based in Denmark and Enterprise Insurance, based in Gibraltar.

A market research report prepared for the Law Society and published in April this year shows that, of the 560 1-25 partner firms surveyed, 6% took out policies with Elite and Alpha (Enterprise did not appear). Just under a third of the firms surveyed listed financial security of an insurer amongst the top three factors when buying insurance with price being predominant.

It remains to be seen whether any further unrated insurers will emerge to fill the gap left by Elite, or whether Elite's withdrawal will lead to a reduction in capacity for 1-25 partner firms.

To arbitrate or not to arbitrate?

Richard Harrison & Nicole McKinnon

To paraphrase Shakespeare on the 400th anniversary of his death, we may ask: to arbitrate or not to arbitrate?

That is the question faced by law firms when considering whether or not to include an arbitration clause in their terms of engagement. Historically, law firms have tended not to do so. However, in recent times there has been a discernible shift, with more law firms viewing arbitration as a viable alternative to litigation in resolving disputes with their clients and former clients. So why has there been a shift? Perhaps it is due to the influx of US law firms, which have historically made greater use of arbitration clauses, bringing their business and offices to London; or perhaps it is due to the fact that some clients require the inclusion of arbitration clauses in the terms they agree with their legal advisors, such as many public sector clients. Whatever the reason, arbitration of disputes involving law firms appears to be an increasing trend and we consider in this article some of the pros and cons to be considered by law firms when deciding whether or not to include an arbitration clause in their terms of engagement.

The advantages

One of the most important and valuable assets held by a law firm is its brand and reputation. Therefore, the confidential nature of arbitration may be an attractive option, as it offers the potential of minimising reputational damage. This may equally be seen as a benefit to claimants, who may well have business interests which they would like to keep out of the public eye.

A further clear advantage to arbitration is the ease with which awards may be enforced in foreign jurisdictions. This is particularly important where one or more parties to the arbitration are based abroad. 147 countries (including China) have adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was adopted in New York on 10 June 1958 and which provides

a fast and cheap option for enforcing arbitration awards in member states. There is no equivalent for the enforcement of Court judgments, which can be a slow and costly process. However, where the place that any award is likely to be enforced is not a party to the New York Convention, it will of course be important to examine which (if any) reciprocal treaties it is party to, to ensure that the award may be enforced.

Other advantages of arbitration include: (i) the potential for greater neutrality – so that, in a cross-jurisdictional dispute, neither party is seen as having a “home advantage”; (ii) flexibility – as the parties can agree procedural rules, language, seat, venue, applicable law and so on; and (iii) expertise – as parties can agree to appoint arbitrators which have relevant market experience, or expertise in a particular industry in relation to which the dispute arises.

In light of these advantages, it is not immediately clear why professional liability disputes have not in the past been arbitrated more frequently. From our experience, arbitrations are still relatively few and far between for claims brought against law firms, in contrast to, for example, insurance policy disputes, where arbitration proceedings are commonplace. We think there are a number of reasons for this.

Disadvantages

Firstly, whilst the confidential nature of arbitration may be an attractive option when seeking to minimise reputational damage, as readers of the legal press will be aware, disputes can be “leaked” and reported by enthusiastic reporters, such that law firms may prefer the public vindication offered by the public Court system, in the face of highly-publicised weak or spurious claims.

A further reason why law firms may prefer not to include arbitration clauses in their terms of engagement is that firms are unlikely to want to have to arbitrate over fee disputes, given the higher level of upfront costs associated with engaging an arbitration institution and arbitration tribunal compared to the lower Court fees, and the expertise available in the Senior Courts Costs Office for dealing with such disputes. Further, while many believe that arbitration provides a cheaper option to litigation, in our experience that is often not the case. In the context of Court proceedings, parties are not required to pay for venue hire nor the judge's time, while in arbitration, costs will be incurred both for the venue and the arbitrator. In addition, whilst legal representation is not mandatory in arbitration, most parties do retain legal representation (particularly for complex cases), which means that the costs of preparing for and attending arbitration in complex professional liability disputes are likely to be comparable to the costs of preparing for and attending a trial (though, admittedly, the costs of arbitration can be lower in the context of small or less complex disputes).

In addition, professional liability disputes are often multi-party and law firms may prefer to have access to the powers of the Court system, which allow the joinder of third parties to Court proceedings. It is more difficult to join third parties to arbitration proceedings and there is therefore a greater likelihood of having to bring separate contribution proceedings. In addition, the powers of the Court system may assist to coerce uncooperative parties and, in suitable circumstances, may enable a case to be disposed of summarily. Furthermore, appeals from arbitration are more restricted – though this is a double-edged sword as this also provides the advantage of greater finality. It is also worth bearing in mind that arbitral awards do not have precedent value. In the context of professional liability disputes against law firms, binding legal precedent is often desirable – for example, to guard against firms having to defend the same kinds of claims repeatedly.

Concluding remarks

Arbitration clauses should be considered and utilised in the right circumstances. For example, arbitration will be the dispute resolution process of choice where a judgment may be more difficult to enforce than an award due to the client being located in a foreign state with inadequate reciprocal enforcement arrangements. Arbitration may also be preferred where the parties wish to avoid, for whatever reason, the Court system in the jurisdiction most likely to hear any dispute between them, such as where the judiciary is likely to have a quasi-political agenda or where the parties wish to avoid the uncertainty and lack of privacy of a jury trial. Arbitration will, in such circumstances, offer the option of a closed-door, confidential process over which the parties will have the freedom to choose the composition and location of the tribunal and the rules which would apply. However, where jurisdictional issues do not arise and it is desirable to retain the potential benefits of public vindication, creating a precedent, accessing coercive powers of the Courts, and a more flexible appeals process, then Court proceedings are likely to be more desirable.

Big Brother or Big Boss?

Kirsty Graydon

Employers must be careful not to believe everything they read in the press. Media reports on a recent decision of the European Court of Human Rights could lead employers to believe they have virtually unlimited powers to monitor private emails of their employees. Whilst this is not true, the case has highlighted the need for employers to understand the correct legal position, and provides an opportunity for employers to check they have the appropriate systems in place to meet their business needs.

Mr Barbulescu was employed as an engineer in charge of sales for a company based in Bucharest. His employer asked him to create a Yahoo Messenger account for the purpose of answering enquiries received from clients. Some three years into his employment, he was informed that the company had been monitoring his Yahoo Messenger usage during the previous week. Mr Barbulescu stated, in writing, that he had only used the account for professional purposes. In response, the company produced an extensive transcript which showed personal exchanges between Mr Barbulescu, his brother and his fiancée. Mr Barbulescu's employment was terminated for breach of the company's policy which stated:

"It is strictly forbidden to disturb order and discipline within the company's premises and especially... to use computers, photocopiers, telephones, telex and fax machines for personal purposes."

Mr Barbulescu was unsuccessful when he challenged his employer's decision in the Bucharest Courts on the grounds that his privacy had been violated.

In his appeal to the European Court of Human Rights, Mr Barbulescu relied on Article 8 of the European Convention: the right to respect for private and family life, the home and correspondence. Whilst they found that Mr Barbulescu's rights under Article 8 had been engaged, they concluded, by six votes to one, that there had been no violation of this right. The Court held that it was not unreasonable for an employer to want to verify that employees were completing work tasks during operating hours. Furthermore, the Yahoo Messenger account had

been created for business use and his employer accessed the account in the belief that it contained only work-related correspondence.

To what extent can employers monitor their employees?

The media's reaction suggests that the Judgment awards new infinite powers to employers to monitor their employees. Whilst Mr Barbulescu's case has perhaps made employers more aware of the channels which are available to them, it has not changed things from a legal perspective. Employers are entitled to monitor their employees; however, this should be limited in scope and should be proportionate. Employers should be made aware that their communications may be monitored. A fair balance must be struck between an employee's privacy rights and the business interests of the employer. Going beyond what is required could infringe employees' data protection rights.

Why a communications and monitoring policy is essential

It is worth bearing in mind, however, that there are numerous scenarios which were not explored in the present case, for example, if an employee accesses a personal email account from their work computer, can those emails be read? What if an employee is working on a case remotely from home, can personal messages sent from their work account late in the evening be read? What about personal messages sent in-between meetings from a work phone during working time? The advancements in technology have undoubtedly blurred the lines between personal and work life, and as a first step employers should ensure they have a clear policy on email use which takes the realities of modern working practices into account.

Our employment team has a long track record in advising professional services firms in relation to data protection and other policy issues. Please contact [Chris Holme](#) or your usual contact to discuss how we can help you.

Lateral hires: the challenges of protecting confidentiality

Gaby Kaiser and Stephanie Robinson

The challenges posed by lateral hiring have once again been brought to the fore by the replacement in February 2016 of litigation boutique Cooke Young & Keidan (CYK) by Bird & Bird in the highly anticipated GBP 30 million Libor dispute *Property Alliance Group* ('PAG') *v* *The Royal Bank of Scotland* ('RBS').

CYK represented the property investment company PAG in its derivatives mis-selling claim against RBS, which is due to be heard this month. PAG alleges that the bank's misconduct went beyond what has been made public by regulators and asserts that RBS made fraudulent misrepresentations about Libor at a time when the bank's senior executives were aware of problems with the integrity of the benchmark.

RBS served an injunction against CYK to have them removed as PAG's lawyers over alleged issues relating to confidential information arising out of CYK's hire of a junior associate who used to work at Clifford Chance. Michael Cumming-Bruce, a two-and-a-half-year-qualified associate, trained and qualified at Clifford Chance before moving to Carey Olsen for a short spell and was then recruited by CYK. According to reports, RBS alleged that Mr Cumming-Bruce had access to confidential documents concerning RBS while working at Clifford Chance, which it is presumably alleged would be material to the litigation. Commissioned by RBS, Clifford Chance had undertaken an independent review into RBS' global restructuring group (GRG) in 2013, in response to allegations that the GRG had been systematically running small businesses into the ground. The activities of the GRG will be one of the issues in the PAG litigation.

Interestingly, PAG took the initiative, faced with the injunction application by RBS, to replace its representation, perhaps taking the view that they would rather concentrate on preparation for trial than satellite issues (of which there have been many in the course of the litigation).

Although the full facts of the issue in PAG are not known, because the injunction application was never heard, the episode underlines the care around conflicts and confidential information which needs to be taken by firms when hiring not only partners but associates from other firms, and some of the potential consequences of getting it wrong. Often, a lateral hire is sought precisely because of the specific work/client base the individual has, yet this clearly poses a risk of disclosure of confidential client information and can have a ripple effect on a firm's ability to represent existing or prospective clients if an issue is not uncovered and the risks properly managed. Two particularly striking features of the PAG case are the junior level of the associate involved and the fact that his alleged access to relevant confidential documents took place not at his prior firm but at the firm by which he was employed even before that.

Destabilisation tactics

The injunction application could be viewed as a tactical manoeuvre by RBS in an attempt to jeopardise the impending trial date, and/or destabilise PAG at a key stage, and the ability to take such points can be a powerful tool in an opposing party's arsenal. Whilst, fortunately for PAG, the counsel team involved in this instance remains the same, it does still mean that Bird & Bird will have had some very significant work to do in a short space of time in order to prepare fully for the trial. In some circumstances, the cost of bringing a replacement firm up to speed, and/or dissatisfaction with the eventual outcome of the case as conducted by a firm parachuted in at a late stage, may give rise to knock-on claims or complaints against the ousted

firm by its former client. Interestingly, in other litigation against RBS relating to the activities of the GRG, it has recently been reported that a group of claimants, whose retainer of Enyo Law was terminated when Enyo switched to representing a different claimant group, had instructed solicitors to bring a claim over the switch, although the details of the proposed claim are not known; Enyo has reportedly now come off the record for the second group on grounds of conflict of interest relating to its previous relationship with another RBS claimant group.

A regulatory issue

Firms will be familiar with their regulatory duties to avoid conflicts of interest and protect client confidentiality. These include Outcome 4.4 of the Solicitors Regulation Authority ('SRA') Code of Conduct, which generally prevents a firm from acting for a party (party A) in a matter where that party has an interest adverse to that of another client of the firm (party B) about which the firm holds confidential information which is material to party A in the matter. There is an exception to this where (subject to the detailed provisions of Outcome 4.4, as well as the common law – see below) the information can be protected by the use of effective safeguards including information barriers. In the case of former clients, the issue is one of preservation of the confidentiality of the former client's information.

Subject to issues of safeguards, the party who seeks to restrain his former solicitor from acting for another client must show (i) that the professional is in possession of information which is confidential to him and to the disclosure of which he has not consented, and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. The burden on the former client is not a high one and the duty on a solicitor is unqualified.

Assessing potential client conflicts and safeguarding confidential information

The PAG litigation therefore highlights the possibility that, unless suitable safeguards are put in place, a lateral hire's knowledge of confidential information may effectively be imputed to all of the lawyers in the new firm and disqualify it from ongoing representation. This raises issues about how firms can best protect themselves against such difficulties.

Firms considering hiring laterals (of, as PAG highlights, any level of seniority) should ensure that full due diligence has been undertaken on each individual whom it proposes to hire. Detailed and precise questions should ideally be asked at interview stage or in a questionnaire. In principle, firms should seek, as far as possible, to ascertain:

1. The clients for whom the candidate worked while at prior firms (not just their current firm);
2. The nature of the work the candidate performed for each client; and
3. The identity of clients about whom the candidate learned information.

However, given the confidentiality obligations owed by candidates both to clients and to their former firm(s), in many (if not most) cases this information will be difficult to ascertain, and any questions asked should recognise this. Firms need to think about how to undertake checks which will uncover the risk of issues of the type experienced in PAG without asking candidates to reveal confidential information; for example, firms should consider what information is in the public domain. Consideration should also be given to specific matters which may be impacted: for example, is the hiring firm currently dealing with a matter in which a previous firm of the candidate has at a relevant stage been involved for another known party?

Firms may reach a stage in their due diligence where they cannot ascertain any further information without encouraging breaches of confidentiality. They will then need to stand back and assess whether such issues or potential issues as they have been able to identify can properly be addressed by the putting in place of safeguards including information barriers, and if so how these should operate.

This is no small matter. Whilst in some cases there may be scope for the use of information barriers, caution should be exercised and these should be used only in exceptional circumstances, where sophisticated clients are involved and with stringent procedures put in place. Firms and members of firms may be expected to give undertakings to the affected party, whereby failure to comply may lead to Court and/or regulatory sanctions.

The leading authority in this area is still *Prince Jefri Bolkiah v KPMG* (1998), in which the House of Lords considered that an effective information barrier needs to be an established part of the organisational structure of the firm, with no risk of disclosure or misuse of confidential information. Ideally, information barriers should involve the complete physical separation of the individuals holding the protected confidential information and may stretch so far as to include restrictions on the ability of those individuals to attend work-related social or business development events and internal meetings, and their ability to discuss matters with unrelated third parties. In some circumstances this may not be a logistical possibility. Examples given in the SRA Handbook of circumstances where it may be difficult to implement effective safeguards are where: the firm is a small one; the physical structure or layout of the firm restricts its ability physically to separate people and documents and thus preserve confidentiality; or clients are not sophisticated users of legal services (an issue potentially most relevant to boutique/mid-sized firms).

Bearing in mind the issues involved both in ascertaining the relevant information about a proposed lateral hire's former work and in implementing effective safeguards and information barriers, there may come a point in some proposed hires where firms may have to take a view as to whether the hire is one with which they can properly proceed, or indeed one which they wish to pursue from a commercial standpoint given the potential issues.

Firms beware

It is unclear whether the junior CYK associate had been involved in the Clifford Chance report, whether this was known about by CYK, whether once at CYK he was assisting with the PAG litigation, or (if so) whether there were any information barriers in place. It is therefore difficult to draw any "lessons learned" from the story. However, the episode undoubtedly shines a light on the importance for firms of checking a lateral hire's background as thoroughly as possible, and ensuring that any knowledge they do have about a potentially adverse client is able to be ring-fenced from the rest of the firm. Unfortunately, both tasks are easier said than done given duties of confidentiality and the rigours of the law on information barriers.

A further difficult question is where firms should draw the line. Should firms apply the same level of rigour to, for example, the hire of newly qualified associates who have trained at other firms, or even work experience students who may have had access to confidential information?

There are no simple solutions to these issues. However, what is clear is that it is becoming ever more important for firms to be aware of the problems that recruiting associates and partners at every level can cause. These should be kept in mind throughout the recruitment process so that all the issues can be considered as fully as possible, decisions both as to hiring and steps to be taken following a hire can be made on a fully informed basis, and potential repercussions (whether loss of a client, reputational issues, claims or regulatory action) can hopefully be avoided.

More broadly, it is possible that CYK's removal from the PAG litigation may have an impact on the appetite of firms for making lateral hires. Views on how welcome or unwelcome this would be are likely to vary. On one hand, some have commented that CYK's removal could have an effect on access to justice in cases against banks by restricting the movement of magic circle associates to litigation boutiques. More generally, associates might be concerned about the restrictive effect on their ability to climb the career ladder by moving laterally across firms. A counter-argument, however, might be that an increased focus on nurturing and training up "home grown" talent could be a positive development in terms of quality within both firms and the profession as a whole.

Lawyers' liability: a global perspective

Clyde & Co now has 45 offices across 6 continents. In this round-up we provide snapshots of the lawyers' liability landscape around the world.

France

David Meheut, Partner, Paris

The sections of the French Civil Code on contracts and liability will change this year. This reform will bring significant changes to the French legal landscape (eg new rules on duration of offers, material adverse changes, economic dependency, etc.) and will require adequate training of teams to ensure that adequate advice is provided, all the more so as the duty of advice imposed on lawyers is a very onerous one.

Cyber and data protection is still a growing issue for law firms and other professionals, who are more likely to face complaints in an increasingly tight legal environment. In that respect, law firms have been identified as a potential weak spot for the security of sensitive data.

Claims related to tax issues are another hotspot for all professionals, particularly lawyers. Exposures for professionals are heightened by the fact that the tests for liability are very broad in France. France has been relatively slow in fighting white collar crime compared to many other countries. However, things are beginning to change as evidenced by the recent creation of a new financial crime prosecutor office. Professionals are directly affected by this new trend. Recent illustrations include a tax lawyer being found guilty of assisting tax evasion and the validation by the Cour de cassation of taping of conversations between former president Sarkozy and his lawyer in connection with an investigation on attempted corruption. Many of the latest political scandals involve legal professionals involved at various degrees in tax evasion schemes.

Spain

Ignacio Figuerol, Partner, Madrid

A key concern for professional firms in Spain is the risk of becoming involved in criminal proceedings. We have seen big cases relating to financial scandals in which auditors and/or law firms have been a party to criminal proceedings. In Spain, damages can be claimed within

criminal proceedings, prejudiced parties can also join insurers to the criminal proceedings, accused parties may be ordered to post bonds to cover potential damages for large amounts and for long periods and plaintiffs are not ordered to pay costs even if they lose. Worryingly for professionals, there is also a trend towards strict liability and reversal of the burden of proof: "the firm could have done always better and avoid the damage" is becoming a usual expression in judgments.

A recent sanctioning by the law society of two partners of a well-known law firm for breach of conflict of interest rules because they represented adverse parties caused a stir in Spain. Such action is uncommon and could be an indication that the regulator could be more active in the future.

Hong Kong

Patrick Perry, Partner, Hong Kong

The current claims environment for solicitors in Hong Kong is relatively benign. Recent statistics show that solicitors are facing the second lowest number of claims on record over the last 20 years. Currently, most claims are directed against litigation solicitors and conveyancing solicitors. However, the frequency and severity of claims may change. Solicitors are often the "canary pigeons" of the professional world in terms of claim trends, and may be the first to experience a change in the litigation climate. The property market in Hong Kong has recently taken a dip, and some predict the "bubble" could burst. If that occurs, there will be a sharp increase in claims against solicitors' firms, as occurred following the last Asian financial crisis.

There is a split legal profession in Hong Kong, with trial work generally being carried out by barristers. Not infrequently, both the solicitor and barrister are sued as co-defendants. However, unlike the UK, advocates' immunity exists in Hong Kong for trial work, and advice intimately connected with trial preparations. Hong Kong has yet to follow the English House of Lords' decision of *Hall v Simons*. For the first time, we are however seeing signs that this may change. In *Wong Kam Kuen Catherine v*

The Bar Council [2015] 4 HKLRD 367, the court spent some time considering the need for reforms across the bar, and there does appear to be a change in climate regarding the need for such immunity to remain. If this occurs, this will change the claim dynamics between the solicitor's and barrister's practices and impact upon the ultimate liabilities which the solicitor may be found to bear.

Singapore

Ian Roberts, Partner, Singapore

In general, the regulatory burden on law firms has been on the rise. 2015 brought into operation a number of significant changes to the regulation of lawyers in Singapore. Prior to 18 November 2015, foreign lawyers practising in Singapore were not subject to the disciplinary procedures of the Singapore Law Society. However, with effect from 18 November 2015, the disciplinary procedures applicable to Singapore-qualified lawyers were extended to foreign-qualified lawyers practising in Singapore. A common set of codified rules governing the conduct of all lawyers practising in Singapore has been issued. The new professional conduct rules contain principles and rules of conduct applicable to all lawyers, as well as specific rules relevant only to those practising Singapore law or called to the Singapore Bar.

In addition, with effect from 18 November 2015, a new licensing regime for all law practices also came into effect under the administration of a newly-established Legal Services Regulatory Authority. The Legal Services Regulatory Authority is helmed by the Director of Legal Services, who has wide-ranging powers to investigate whether any law practice has breached or contravened any requirement or condition of its licensing.

Regulators are determined to clamp down on money laundering and, in this regard, revised anti-money laundering rules governing lawyers and law practices were issued in 2015. The surge in cyber-attacks in Singapore (on both private sector and government bodies) in recent years, leading to personal data being compromised, is a worrying trend. Singapore's Personal Data Protection Act, which came into force in 2014, requires organisations to make reasonable security arrangements to prevent unauthorised access to personal data under their control, and the regulator has the power to impose a fine of up to USD 1 million for non-compliance. The concern with cyber risks is exemplified by the inclusion of enhanced

coverage for privacy breach costs in the new 2016/2017 period compulsory professional indemnity scheme policy applicable to Singapore-qualified lawyers.

Australia

Jenni Priestley, Partner, Sydney

In addition to the traditional forms of action for professional liability (being for breach of contract or in the tort of negligence) Australia has strong consumer protection legislation containing provisions prohibiting persons and corporations from engaging in misleading or deceptive conduct in trade or commerce. In very general terms, in a commercial context, a person will have a statutory cause of action in respect of loss caused by the misleading or deceptive conduct of another resulting in loss or damage. In establishing a cause of action, it is not necessary to prove that the conduct concerned was fraudulent, intentional or negligent – simply that it was misleading or deceptive or likely to mislead or deceive. This enables many causes of action to be brought in Australia that could not be brought in other jurisdictions. In recent years the largest and most significant pieces of litigation either pursued or settled against professional services firms in Australia have all included claims for misleading and deceptive conduct.

Australia also permits litigation funding and class (or representative) action proceedings. The relative proliferation of these claims over the last decade resulting from favourable funding laws and an increasingly specialised plaintiff bar has changed the dynamic of many professional liability claims. There is little doubt that plaintiff lawyers in the class action context will look for ways to extend what might ordinarily otherwise be single defendant litigation to include professional advisors such as accountants, auditors and lawyers. With their extensive insurance programs, professional services firms are perceived as useful deep pocket defendants to add where possible. One of the most common claims against professional services firms in the class action (and particularly securities class action) context is a claim for misleading and deceptive conduct.

Canada

Trevor McCann, Partner, Montreal

Roderic McLauchlan, Partner, Toronto

The Ontario Court of Appeal's January decision in *Livent v Deloitte & Touche*, a landmark decision on auditor liability earlier this year, has broader implications for other professionals, including solicitors, on the question of who can bring a claim on behalf of an insolvent company, and for what. In *Livent*, the court rejected the auditors' argument that creditors of the company concerned could not bring a claim in *Livent's* name to recover their losses from the company's auditors. The Court also examined the illegality defence, which attributes the illegal conduct of a company's directing minds to the company itself and provides a defence to a claim by the company – fraudulent through the attribution – against merely negligent third parties. Although the Court was careful to indicate that it was not finding that the defence could never be applicable in any case, it rejected Canadian case law applying the defence in the circumstances, in part because it found that it must look through the company to the ultimate beneficiaries for this purpose, and that it could not deprive the innocent of a remedy. A leave application for an appeal to the Supreme Court of Canada is pending.

The Panama Papers story that has been reported on in the media across the world comes against the backdrop of increasing public and media scrutiny of tax planning, including allegations that the Canadian authorities have entered into relatively lenient confidential arrangements with wealthy/institutional tax payers whilst the smaller "easier win" tax payers have been treated more harshly. The spotlight has inevitably fallen on the role of professional advisors who have structured and advised on the tax arrangements concerned, and, more broadly, we have seen a number of individual and class actions brought against all tax advice professionals, including law firms.

Canadian law firms continue to face class action claims framed in negligence rather than as negligent misrepresentation. This important distinction allows such claims to pass through the scrutiny of class action certification. Such claims are especially brought in relation to allegedly negligent advice on tax strategies, on the basis that the advice assisted in bringing the strategy to market, even though the class members do not allege reliance on its terms and are not the lawyers' clients. This has led to large settlements in some instances and an increased appetite on the part of the class action plaintiffs' bar to bring these

claims. Absent special circumstances, certification of such claims on this basis is increasingly uncontested.

Another area of rapid development is conflict of interest law. The law surrounding legal conflicts, confidential information, and presumptions of communication absent ethical screens is 25 years old. However, the scope of the lawyer's duty of loyalty to clients and former clients has been the object of recent Supreme Court decisions, each of which has nuanced and clarified the law set out in earlier ones, and numerous lower court decisions across Canada. One branch in which this has developed, illustrated in the *McKercher* decision, concerns the scope of the lawyers' duty not to act adversely to a client or former client, even in an unrelated matter, and the replacement of the "professional litigant" exception to the "bright line rule" by a test focusing on the objective but contextually assessed reasonable expectations of the client. We are increasingly seeing claims brought against law firms alleging conflict of interest and breach of fiduciary duty, either independently or as part of a claim otherwise framed in professional negligence.

US

Jessica Kelly, Partner, San Francisco

As more U.S. law firms expand by acquisitions and mergers in order to contend in an increasingly international and highly competitive legal market, the complexities of effective risk management also are expanding. There are a number of factors which continue to impact risk management practices for global firms.

First, global law firms are managing an increasing amount of electronic information, both for clients and for their employees. And as law firms grow, the competing need to secure this electronic data while also providing a high level of access to information to accommodate travel and remote work becomes a greater challenge. In today's global firm, there can be a number of vulnerabilities, including unencrypted portable devices, phishing scams, weaknesses in "Cloud" security and cyber extortion, among others. Implementing strict controls for managing data and ensuring those controls are applied consistently across the entire firm is imperative to the security of today's global law firm.

The need for more detailed and thorough conflicts checks both pre- and post-merger also continues to be a challenge for many firms. Law firms have been disqualified from cases after potential conflicts were identified post-merger and inadequate or no conflict waivers were obtained from the clients pre-merger. Thus, the need for extensive conflict

check requirements within a firm remains a key to effective risk management.

Finally, as global firms seek to gain ground in emerging markets, the need for a heightened understanding of the regulation of law and local law and customs becomes increasingly important. Firms operating abroad cannot simply apply the same standards across offices and countries; there is a need to adjust their business model to the political, economic and cultural environments of each office.

The role of general counsel of a global law firm continues to evolve and the success of global law firms increasingly is dependent upon the firm's ability to adapt with the needs of clients, as well as the changing landscape of the practice of law.

Middle East

Mark Beswetherick, Partner, Dubai

Lawyers' PI claims have been relatively uncommon but we have seen an increase in claims over the last 18 months, possibly as the awareness of rights increases in the region generally. Despite this, lawyers' PI is generally considered a low risk area of business by PI underwriters operating in the Middle East because claims are not very common.

The reasons for the comparatively low volume of claims against lawyers in local courts includes the lack of recoverability of costs for successful parties, lack of clarity within the law as to the meaning of negligence and the lengthy litigation process (conducted in Arabic). The fact that some local firms are not required to and do not carry professional indemnity cover (unlike international firms operating in the region) also means that pursuing claims against them may not be commercially worthwhile.

The rise of specialist financial centres such as the Dubai International Financial Centre (DIFC) based on the Common Law model of the UK Courts has had an important impact. Negligence claims against international law firms and other professionals, such as auditors and financial institutions, in the DIFC Courts are more common. A recent DIFC Court decision, *Al Khorafi v Bank Sarasin Alpen (ME) Ltd* (a negligent mis-selling claim against a Swiss and DIFC Bank) in which a significant quantum determination (over USD 60 million) was recently made has also altered the landscape for DIFC firms. This case demonstrates that there could be liability, even if advice was given by a non-DIFC entity or outside the DIFC. In particular, it should be noted that this case is the first

example of a punitive damages award being made due to the particularly egregious conduct of one of the defendants.

In general, however, both in onshore UAE and in the DIFC, the claims environment in the region remains relatively low, for now at least.

South Africa

Daniel Le Roux, Partner, Johannesburg

Until recently, most liability claims against lawyers have been resolved efficiently through the Attorneys Insurance Indemnity Fund.

Several high-profile liability actions against lawyers arising from abuse of trust funds and overcharging in contingency fee arrangements have brought the profession into focus. An acrimonious case involving well-known father-and-son personal injury lawyers (who defrauded clients and fled to Australia shortly before their disbarment) has done the legal profession no favours.

The entry to the market of foreign-based litigation funders has driven the frequency of professional liability claims. An effective legislative framework for class action claims amplifies the risk of actions against professionals based on negligent advice or negligent discharge of mandate. The recent certification of a massive class action against mining houses in South Africa for tens of thousands of claims arising from silicosis and tuberculosis is a landmark development. It will worry professionals who advise in sectors vulnerable to mass tort litigation, and is of particular concern to law firms.

The downbeat South African economy is contributing to a greater number of liability actions in general. Auditing firms are regular targets for professional liability claims and are increasingly drawn into litigation conducted against companies and directors. This trend has yet to extend to law firms, but we have recently encountered cases against professional advisers for misplaced tax and Black Economic Empowerment structuring advice that may impact upon the transactional lawyers involved.

South Africa is one of the highest-risk jurisdictions in the world for cyber attacks. Cyber risk and information security is of particular concern to lawyers. South Africa has enacted data privacy and protection of personal information legislation that creates standards consistent with those in place in Europe and the United States. However, an effective regulator has yet to be established and compliance with the legislation is not yet widespread.

Further information

If you would like further information on any issue raised in this briefing please contact:

London

Richard Harrison

E: richard.harrison@clydeco.com

Andrew Blair

E: andrew.blair@clydeco.com

Fergal Cathie

E: fergal.cathie@clydeco.com

Sarah Clover

E: sarah.clover@clydeco.com

Neil Jamieson

E: neil.jamieson@clydeco.com

Gaby Kaiser

E: gaby.kaiser@clydeco.com

Garrett Moore (Ireland)

E: garrett.moore@clydeco.com

James Roberts

E: james.roberts@clydeco.com

Helen Rowlands

E: helen.rowlands@clydeco.com

Tom White

E: tom.white@clydeco.com

Leeds

Karen Eckstein

E: karen.eckstein@clydeco.com

Manchester

James Preece

E: james.preece@clydeco.com

Newcastle

Anthony Brown

E: anthony.brown@clydeco.com

Oxford

Clive Brett

E: clive.brett@clydeco.com

Tony Nurse-Marsh

E: tony.nurse-marsh@clydeco.com

Jim Taylor

E: james.taylor@clydeco.com

Edinburgh

Peter Anderson

E: peter.anderson@clydeco.com

Anne Kentish

E: anne.kentish@clydeco.com

Spain

Ignacio Figuerol

E: ignacio.figuerol@clydeco.com

Australia

John Edmond

E: john.edmond@clydeco.com

Jenni Priestley

E: jenni.priestley@clydeco.com

Jenny Thornton

E: jenny.thornton@clydeco.com

Hong Kong

Patrick Perry

E: patrick.perry@clydeco.com

Simon McConnell

E: simon.mcconnell@clydeco.com

Mun Yeow

E: mun.yeow@clydeco.com

Singapore

Ian Roberts

E: ian.roberts@clydeco.com

South Africa

Max Ebrahim

E: max.ebrahim@clydeco.com

Daniel Le Roux

E: daniel.leroux@clydeco.com

Shanghai

Ik Wei Chong

E: ikwei.chong@clydeco.com

Middle East

Mark Beswetherick

E: mark.beswetherick@clydeco.com

India

Sumeet Lall

E: sumeet.lall@clasislaw.com

France

Gildas Rostain

E: gildas.rostain@clydeco.fr

David Meheut

E: david.meheut@clydeco.fr

Canada

Jo-Anne Demers

E: jo-anne.demers@clydeco.ca

John Nicholl

E: john.nicholl@clydeco.ca

Trevor McCann

E: trevor.mccann@clydeco.ca

US

Bill Casey

E: bill.casey@clydeco.us

Joan D'Ambrosio

E: joan.dambrosio@clydeco.us

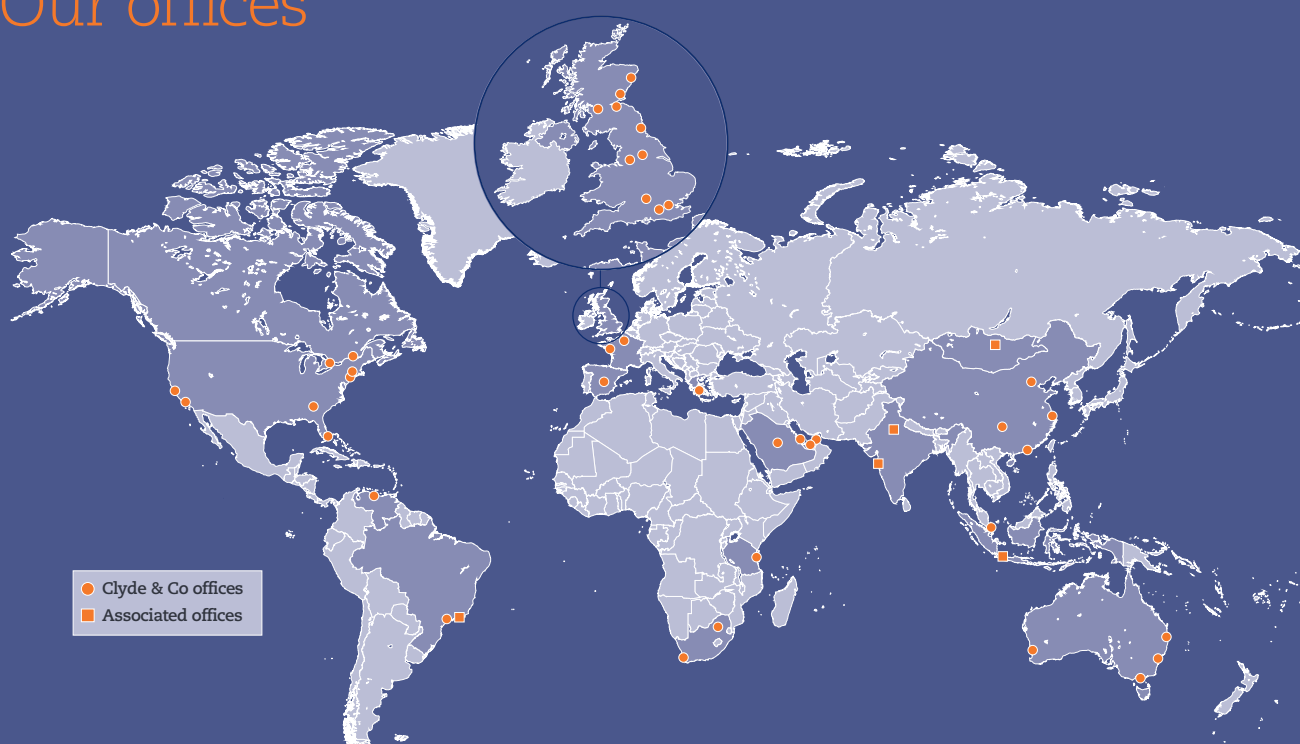
Jessica Kelly

E: jessica.kelly@clydeco.com

Eric Moon

E: eric.moon@clydeco.us

Our offices



45

Offices across
6 continents

360+

Partners,
over 1,800 fee earners
and 3,000+ staff

For full office details please refer to the Clyde & Co website
www.clydeco.com/locations/offices

Asia Pacific

Beijing
Brisbane
Chongqing
Hong Kong
Jakarta*
Melbourne
Mumbai*
New Delhi*
Perth
Shanghai
Singapore
Sydney
Ulaanbaatar*

Europe

Aberdeen
Dundee
Edinburgh
Glasgow
Guildford
Leeds
London
Madrid
Manchester
Nantes
Newcastle
Oxford
Paris
Piraeus

Americas

Atlanta
Caracas
Montreal
New Jersey
Newport Beach
New York
Rio de Janeiro*
São Paulo
San Francisco
Toronto

Middle East/ Africa

Abu Dhabi
Cape Town
Dar es Salaam
Doha
Dubai
Johannesburg
Riyadh

*Associated offices

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2016

Clyde & Co LLP

www.clydeco.com