

Monthly E-Briefing (Issue 46 – May/June 2014)

CLLS Twitter account

A reminder that all CLLS response papers are announced on Twitter as soon as they are published – follow us @TheCLLS.

Committee vacancies

The **Financial Law Committee** has one vacancy to fill and is therefore seeking applications from prospective new members ([click here](#) for details). To apply, please contact the Committee Chair before 31st August 2014.

The **Professional Rules and Regulation Committee** has two vacancies to fill and is therefore also seeking applications from prospective new members ([click here](#) for details). To apply, please contact the Committee Chair before 31st July 2014.

Court of Appeal decision in Fons HF (in liquidation) v Corporal Limited and Pillar Securitisation S.a.r.l. (“Fons”)

The CLLS wrote to the Economic Secretary to the Treasury in relation to the Court of Appeal's recent decision in the *Fons* case ([click here](#)). As the letter stated:

...the judgment creates uncertainty over the established understanding of the distinction between loans and debentures in English law. In holding that loan agreements are debentures in that, whether or not the relevant loan is drawn, the agreements acknowledge or create indebtedness, the judgment appears to have the effect of regulating loans in a matter not previously adopted. This may have serious implications for regulated and unregulated lenders, borrowers and loan intermediaries and cannot, we suggest, be consistent with the policy intention of HM Treasury in this area.

SRA consultation paper on multi-disciplinary practices

The CLLS also responded to the above paper ([click here](#)). The consultation sought views on policy changes and associated amendments to the SRA Handbook which were aimed at achieving a proportionate regulatory framework for the authorisation and supervision of multi-disciplinary alternative business structures providing legal and non-legal services. One driver behind the consultation was the SRA's concern that some of the rules in the SRA Handbook may have become an impediment to the effective licensing and regulation of some licensed bodies; and in particular, those rules that require all legal activity within an SRA authorised MDP to be SRA regulated. The CLLS response argued that if non-Reserved activity is not regulated when it is carried out by a non-Authorised person, then it need not be regulated when it is carried out by a better-qualified Authorised Person. The CLLS argued that this regulatory asymmetry means that solicitors, as Authorised Persons, are commercially disadvantaged in comparison with non-Authorised Persons, when doing the same tasks. The CLLS response raised some further concerns, (including the fact that the SRA's regulatory proposals in this area do not appear to be based on a comprehensive risk

analysis of the field), and responded to the specific consultation questions.

HMT consultation on the implementation of Bail-in powers.

The **Financial Law Committee** and **Insolvency Law Committee** recently produced a joint response to the HMT consultation on the implementation of Bail-in powers ([click here](#)). The consultation paper invited comments on three draft secondary instruments related to bail-in powers, and several other issues. The Committees' joint response commented in detail on a number of issues including the inter-relationship between the Financial Services (Banking Reform) Act 2013, statutory instruments made under that act and the Bank Recovery and Resolution Directive ("BRRD"); creditor hierarchy on Bail-in; preferential creditors; netting, set-off and protected arrangements; and valuations, bail-in and compensation. The response also commented on the Compensation Regulations and the Restriction Order.

City of London Law Society Land Law Committee's suggested community infrastructure levy drafting and explanatory notes

The **Land Law Committee** has produced the above document ([click here](#)).

Combar/CLLS specimen Agreement for the Supply of Legal Services by a Barrister in a Commercial Case (Version 2.1), and updated guidance note.

Version 2.1(dated 23 June 2014) of the specimen agreement has been published ([click here](#)), along with an updated guidance note ([click here](#)).

Further SRA consultation on proposed changes to the registered European lawyer regime

The **Professional Rules and Regulation Committee** ("PR&RC") responded to the above consultation ([click here](#)), as well as the SRA consultations listed below.

SRA consultation "Red Tape Initiative: Residual client balances"

The consultation sought views on proposals to amend the SRA Account Rules 2011 relating to how practitioners deal with client money they are unable to return to clients at the end of a matter (residual client balances), including the processes surrounding the withdrawal of such funds and the basis for distribution to charities. The Committee's submission in response ([click here](#)) stated that the CLLS supported a proposal to increase the level at which practitioners could self-certify transfers of residual client balances, although it noted that there were differing views within the CLLS about the level at which SRA authorisation should be required. The submission also expressed concern that a significant increase in the self-certification level should be balanced by appropriate but proportional checks and balances. Furthermore, it agreed with the SRA's view that the SRA ought not to restrict the charities to which residual balances should be transferred.

SRA consultation "Annual keeping of the roll exercise"

The consultation sought views on proposals to remove "the unnecessary and over burdensome process which requires solicitors who do not hold practising certificates to complete a yearly online application and pay a fee if they wish their name to remain on the roll of solicitors". The Committee's submission in response ([click here](#)) broadly agreed with the consultation proposal to stop the annual updating process while keeping the power for the SRA to carry out updates when it thinks these are needed. It also broadly agreed with the proposal's expressed purpose, being 'to remove the unnecessary and burdensome process' involved with solicitors who do not have Practising Certificates ('PCs') having to renew their roll applications annually. However, the submission also raised concerns about the failure of the consultation paper to address the impact of remaining on the roll in any

detail, including in relation to the status of undertakings given by non-practising solicitors who remain on the roll. It also raised concerns about some of the consequences that might arise were the annual renewal process to be dispensed with.

SRA consultation "Proportionate regulation: changes to reporting accounting requirements"

This consultation paper contained two proposals: that the mandatory requirement that firms must submit an annual accountant's report to the SRA be removed, and that COFAs be required to sign a declaration that they are satisfied that their respective firms are managing their client accounts in accordance with the SRA Account Rules. The proposals formed part of an SRA programme to reform its regulatory regime "to reduce unnecessary burdens and provide flexibility of approach to deliver good financial management". The submission ([click here](#)) responded to the specific consultation questions, and argued more generally that the consultation was premature, and that no changes should be made to the current reporting accountant regime until such time as the general review of the SRA accounts rules had been completed.

SRA consultation "Compensation Arrangements Review: the introduction of an eligibility criteria"

The consultation invited views on the SRA's arrangements for compensating clients who suffer financial loss due to dishonesty, failure to account or civil liability of uninsured practitioners. The Committee's submission ([click here](#)) responded to the specific consultation questions. The submission also expressed, more generally, a concern that the SRA was consulting on an important topic that may have significant implications, in particular for consumers who do suffer losses, without explaining (i) clearly what had driven the proposal or (ii) providing supporting evidence, that only the SRA could provide, about the impact of the proposal.

SRA consultation "Proportionate regulation: changes to minimum compulsory professional indemnity cover"

The Committee responded to the above consultation ([click here](#)). This consultation paper contained proposals which the SRA stated were aimed at reducing the regulatory burden, providing targeted regulation and increasing competition. The proposals formed part of a wider SRA review of the scope of cover under the Minimum Terms and Conditions. The CLLS submission in response supported in principle the idea of reducing the insurance costs burden in a manner which would allow firms to consider the appropriate level of cover they need (subject to a mandatory minimum). However, it expressed the view that the SRA needs to have consulted with the insurers before making specific proposals. It went on to state that the consultation paper had adduced no evidence that the proposals would in fact attract the costs reductions they are aiming for, and that a reduction in the minimum insurance requirement may well have no effect on the premiums charged by insurance companies. It stressed the need for the proposals to be evidence-based, and strongly recommended that any reform be delayed until the 2015 renewal.

Office of Tax Simplification's (OTS) "Competitiveness review: initial thoughts and call for evidence"

The **Revenue Law Committee** responded to the above consultation ([click here](#)). The OTS's paper formed part of its project to improve further the competitiveness of the UK tax administration for businesses. The paper presented what the OTS saw as the priority areas to review; set out some initial thoughts on how the UK's competitiveness could be improved; explained how the OTS will carry out the project and invited evidence and contributions. In its response, the CLLS raised several general concerns, including concerns about the difficulties that businesses face in interacting with the HMRC (especially those businesses

which are not large enough to qualify for the appointment of a Customer Relationship Manager (“CRM”) by HMRC), and the “confusion surrounding the policy and implementation” associated with the introduction of some taxation legislation. The paper went on to make recommendations in relation to certainty and the rule of law in the field of taxation, and in relation to various classes of tax including Corporation Tax, VAT, Income Tax/NIC, Stamp Duty and Stamp Duty Reserve Tax (“SDRT”), and Stamp Duty Land Tax (“SDLT”).

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