Accountancy forum

Welcome to Reed Smith's accountancy forum newsletter. This newsletter covers a range of issues affecting accounting firms, with a core focus on liability and regulatory risk. Please do get in touch with any questions. If there is a particular issue or case that you would like us to cover in an upcoming edition, we would love to hear from you.

The Brydon Report

Sir Donald Brydon's report, "Assess, assure and inform: improving audit quality and effectiveness", was published on 18 December 2019 (the Report). Despite Sir Donald suggesting audit "is not broken", but has simply "lost its way", the Report makes 64 recommendations over 138 pages which together propose a fundamental shift in both definition and approach.

Click here to read more.

Case Notes

Who dunnit? – the question of attribution within the scope of the Quincecare duty of care

Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd [2019] UKSC 50

The Supreme Court upheld the decisions of the Court of Appeal and the court of first instance to find that a claim for breach of the *Quincecare* duty of care cannot be defeated by attribution of the fraud perpetrated by a dominant individual at a company to the company itself.

Daiwa, the defendant bank, was found to have breached that duty by transferring large sums (eight payments totalling $204.5 million over the course of some six weeks) out of Singularis' customer account on the instructions of Mr Al Sanea (the sole shareholder, chairman and a director), who was fraudulently misappropriating the company's funds to the benefit of his wider business group. Daiwa was unsuccessful in the appeal on the question of attribution and its consequences in its attempt to defend the claim for breach of its *Quincecare* duty of care to Singularis.

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Drawing the line: recent rulings address liability

In this issue...

Our accountant's liability practice

From litigation and regulatory defence to reputation management, data security and insurance recovery advice, Reed Smith can help protect your interests. Our lawyers act for three of the Big Four accountancy firms, many of the mid-tier firms and the international networks of accountancy and business advisory firms to which they belong.

exclusions

Natixis v. Marex [2019] EWHC 2549 (Comm)

JP Morgan v. Federal Republic of Nigeria [2019] EWCA Civ 1641

The courts have recently tested contractual clauses excluding liability for negligence, emphasising the importance of effective drafting.

Natixis involved a bank (N) that claimed damages from a commodities broker (M) for losses arising from forged warehouse receipts for nickel. M sued the warehousing provider (AW) for negligence in turn. AW had limited its liability for negligence to a fraction of the value of the cargo through a non-contractual disclaimer. M challenged whether this was reasonable and Mr Justice Bryan applied the Unfair Contract Terms Act reasonableness test to AW's limitation of liability clause and found it to be reasonable. In particular, it was held that the limitation of liability was "neither an unusual or onerous clause, it accords with similar clauses in the industry and is reasonable in terms of the cap it imposes". Further, as this was not an unusual clause, the court also found that sufficient notice had been provided. A more outlandish provision may have required greater notice.

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'Dominant purpose' test ruling clarifies position for in-house counsel

The Court of Appeal's decision in *The Civil Aviation Authority v R (on the application of Jet2.com Limited)* [2020] EWCA Civ 35 has confirmed that a 'dominant purpose' test applies to legal advice privilege, not just litigation privilege.

Accordingly, a communication from the 'business' to a lawyer will only be privileged where the dominant purpose of the communication is obtaining or giving legal advice. If the purpose of the communication is mainly commercial or operational and the lawyer is copied in for advice 'just in case', then it will not be privileged.

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Know your limits: the relationship between investors, advisers and lenders

This case concerned an application brought by the defendant banks (the Banks) for strike out of or summary judgment against the underlying claims brought against them by a large number of claimant investors (the Investors).

In an exercise of the basic principles of duties of care, the Banks were successful in demonstrating that the Investors had no cause of action against them.

This case is a useful demonstration of the need to closely examine the boundaries of the parties' roles, their relationship and any duties which may be owed.

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Back to School: a hard lesson on the precise requirements of CPR 36 in making a part 36 offer

King v. City of London Corporation [2019] EWCA Civ 2266

The main issue before the Court of Appeal was whether a

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settlement offer exclusive of interest (the Offer) could validly be made under CPR 36 to then engage the costs consequences prescribed under that provision.

The Court of Appeal found that a Part 36 offer cannot generally exclude interest. It upheld the findings of the court of first instance: the Offer was inconsistent with CPR 36.5 in its true form and was therefore invalid as a Part 36 offer.

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Industry news

Cross-Atlantic reflection: Regulators undergoing contrasting changes

The U.S. Securities and Exchange Commission (SEC) recently proposed lighter-touch auditor independence rules, but conversely, in December 2019, the UK's Financial Reporting Council (FRC) issued revised auditing standards to strengthen auditor independence and improve overall audit quality.

After softer rules governing auditors' and funds' financial ties to the same lender were approved in June 2019, the SEC has released proposed further changes to auditor independence rules, and these changes are open for public comment for 60 days (until 28 February). The changes intend to relax regulation of audit firms where affiliates of their clients are involved, and in regards to preparations for initial public offerings. SEC Chairman, Jay Clayton, explained that "[t]he proposed amendments are based on years of Commission staff experience in applying our auditor independence rule set and responds to recent and longer term feedback received from a wide range of market participants".

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Anti-money laundering rules give rise to new role for accountants

On 10 January 2020, the fifth anti-money laundering directive (5MLD) became law. Its primary aim is to combat terrorist financing, including through enhanced checks and carefully regulated cryptocurrencies. Lettings agents and art dealers are now brought into scope of the rules. Under 5MLD, the role of accountants has evolved in regards to conducting due diligence to prevent organised crime.

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Other firm news

SFO v. Airbus: *Les Grands Remedes*

On Friday, January 31, anti-corruption authorities in France, the UK, and the United States announced penalties totaling 3.6 billion Euros against Airbus SE. In the world of anti-corruption law this is a historic case, and not just because of the money involved. Eoin O'Shea and Emma Shafton shed light on the case and discuss the future of the Serious Fraud Office.

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Novel coronavirus – Key considerations for financial institutions: business continuity and regulatory compliance

The fallout from the novel coronavirus and steps required to address it have become a priority agenda item for financial regulators in various jurisdictions. Regulated firms are questioning whether any precautionary measures or other practical consequences will affect business continuity and the firm's ability to comply with regulatory requirements. This publication discusses the key points for them to consider.

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Crisis Management Webinar Series: Legal Privilege

In an interconnected, multi-media world, news travels quickly. While companies used to have up to 48 hours to deal with a crisis internally before it became public knowledge, the advent of social media often reduces this to less than 24 hours.

In case you missed the third in our Crisis Management Webinar Series "Legal Privilege" on 28 January, it is now available on-demand.

Please join us for the next webinars in this series titled "Employment Liability" on 24 March and "Reputational Risk" on 21 April. The sessions are practical and designed to meet your questions and needs, with a real-world focus.

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