SRA FINING POWERS INCREASE

With all the recent political activity, the announcement on 29 June 2022 that the Government had approved the increase in the SRA's maximum fining powers from £2000 to £25,000 may have escaped attention writes Jayne Willetts Solicitor Advocate of Jayne Willetts & Co Solicitors Limited.

Heralding the increase, the Lord Chancellor (Dominic Raab) said "We are freeing up the Solicitors Disciplinary Tribunal to focus on the most serious breaches such as those involving Russian sanctions". Mr Raab's attempt to link Russian sanctions to the daily workload of the Tribunal displays a lack of understanding of the regulation of the profession. Sanctions cases would be the exception not the rule. The Tribunal is well equipped to deal with such cases as it presently exists without any well-meaning assistance from our politicians.

This decision represents a sad day for the profession. Enabling the SRA to act as investigator, prosecutor and judge in its own cause with the power to impose crippling fines on High Street firms is in no-one's interests let alone the public.

The current system is that the SRA has a maximum fining power of £2000 for traditional law firms and solicitors. For alternative business structures the levels set by the Legal Services Act 2007 are £250m for an ABS firm and £50m for individuals owning or working within them. The SRA has been longing to increase its fining powers. It tried in 2012 and again in 2014 but was rebuffed on both occasions.

The SRA issued a consultation paper in November 2021 to which Birmingham Law Society; the City of London Law Society; the national Law Society; the SDT and other bodies responded objecting to the increase in fining powers. The SRA appears to have ignored these well-informed responses from the profession and its representative bodies. Instead, it relied, heavily, upon a response from OPBAS (the Office for Professional Body AML Supervision part of the Financial Conduct Authority). OPAS supported the proposed increase from an AML perspective, notwithstanding that AML breaches are a tiny minority of the cases which will be affected by the increase.
More concerningly, the SRA relied upon responses to surveys from members of the public who for obvious reasons were not asked to comment upon the consultation paper but were asked a series of carefully crafted questions, designed some may say to elicit support for the changes.

In support of the increase, the SRA stated that the advantages were a swifter turnaround of cases and fewer cases being referred to the Solicitors Disciplinary Tribunal ("SDT"). It was said that it took an average of 2.5 years from receipt of a complaint in the SRA to the date of the SDT order compared to just over 12 months if the SRA dealt with the case internally. As many will know, the main cause of delay is within the SRA itself, not once the case is referred to the SDT which generally concludes cases within an average of 6 months.

Whilst the fining power remained at £2000, the harm that the SRA could inflict was limited but with this massive increase to £25,000 there is concern for the smaller firms, particularly those from minority groups who are disproportionately represented within the SRA disciplinary system. The increased fining powers risk being disproportionate to the average incomes of most individuals in the profession which Law Society figures reveal are £43,000 in the North of England and £46,000 in the Midlands & Wales. Many cannot afford to source expert advice and submit to the will of the SRA whether the allegations are soundly based or not.

The current system is that when a complaint is made to the SRA, it is investigated by an SRA Investigation Officer who is a full-time employee of the SRA. That same Investigation Officer prepares a Notice and supporting papers recommending a sanction; either a financial penalty and/or a rebuke. The Notice and the evidence with comments from the person or firm under investigation are then submitted to an SRA Adjudicator for a decision.

The SRA Adjudicator is also an employee of the SRA – some are full time and some are part time. There was a time when the names and qualifications of the Adjudicators were listed on the SRA website. This is no longer the case. There is therefore a lack of transparency about the process which is unhelpful to the SRA maintaining the trust of the profession. Unless there is a change to the procedure, the investigation and then the quasi-judicial adjudication process will be undertaken by employees of the SRA. The SRA will be acting as investigator, prosecutor, judge and jury in its own interest in imposing these more significant fines.

One of the most important principles of natural justice is that no-one is judge in his own cause (Nemo judex in causa sua) or no person can judge a case in which they have an interest. This is a principle which appears to have been overlooked.

On the other hand, the fining powers of the SDT are unlimited. Often the first time that a case is considered by a legally qualified person is when it is considered by the SDT. The Tribunal is independent of the SRA. It is an expert Tribunal and its decisions can in the main be relied upon to be fair and proportionate. The SDT is trusted because it includes practising solicitors who are independent of the SRA and have knowledge of the profession, but there are costs implications. A respondent not only has to meet their own costs but also those of the SRA even if the allegations are found not proved.

What of the future? The SRA buoyed up by this recent success will no doubt be considering new rules and procedures to cope with the increased fining powers. The SDT on the other hand is likely to be considering how it will cope with the surge in appeals against decisions of the SRA.

For the profession, the subjective nature of the current Principles and Codes of Conduct needs to be borne in mind. The majority of investigations are brought on the basis of breaches of Principles, not on the basis of the breach of prescriptive rules. Except in the most obvious cases, there are arguments that can be raised against the regulator's definition of misconduct.

Unless the case is determined by the SDT and/or the Administrative Court there is no independent arbiter of what is and what is not misconduct. With so much at stake, it is worth considering specialist advice and in the long-term looking to insurance cover for such eventualities.