Fishburns solicitors

LAWYERS' LIABILITY UPDATE

OCTOBER 2010

In this Update we set out the changes made to the Qualifying Insurers Agreement and Minimum Terms and Conditions for 2009 to 2010 and report on other developments affecting the legal profession including the root and branch reform of client financial protection by the SRA and the proposed move from rule based regulation of solicitors to principles based regulation.

CHANGES TO MINIMUM TERMS AND CONDITIONS AND QUALIFYING INSURERS AGREEMENT

There are five principal changes as follows:

(1) ARP

Following exasperation on the part of Qualifying Insurers as to the cost of and lack of control over the ARP (28 firms were in the ARP in the 07/08 indemnity year and 259 in 09/10 with loss ratios running at 600%) and after consultation earlier this year, new firms will not be allowed to enter into the ARP and firms will only be able to stay in the ARP for 12 months. Transitional provisions will apply to firms already in the ARP.

(2) SUCCESSOR PRACTICE

After considering evidence that some practitioners could not retire because other practices would not acquire their business due to the successor practice liabilities, a measure has been introduced allowing firms which are ceasing due to a succession to buy run off cover for their businesses before cessation of the practice rather than being covered under the acquiring practice's PI policy.

(3) NO COVER FOR DEFENCE COSTS OF DISCIPLINARY PROCEEDINGS BROUGHT BY THE SRA

At present the MTC provide cover for the costs of disciplinary proceedings brought by the SRA (in the SDT) provided these relate to a claim made or circumstance notified under the Policy. The proposed change to the MTC removes this obligation but still provides that the costs of an inquiry or investigation must be covered. It is also proposed that Insurers can add back in the SDT costs cover by way of an endorsement for an additional premium. There are also standalone policies offering such cover and the prevalence of these may increase. The Law Society oppose this proposed change.

(4) CLARIFICATION OF WHAT IS PAYABLE IN RELATION TO AN AWARD BY A REGULATOR

Most Insurers wanted the awards made by the regulator removed from cover. These are principally awards made by the Legal Complaints Service ('LCS') for inadequate professional service and with effect from 06/10/10 these will include awards made by the Legal Ombudsmans Service ('LOS') part of the Office for Legal Complaints. The amendment to the MTC and the relevant provisions of the Legal Services Act make clear that awards for loss, inconvenience, distress and interest are within the scope of cover for civil liabilities but that an award for a refund of fees paid to an insured is not covered. LOS wanted there to be an exception for cases where solicitors were no longer trading but this is not presently included in the wording.

(5) TRADING DEBT

The MTC have been slightly amended to clarify that Insureds will still be entitled to cover if liability arises from the recently introduced Land Registry Access Agreement whereby solicitors had to sign a contract with the Land Registry to use its facilities (but not for outstanding fees due to the Land Registry).

THE LEGAL OMBUDSMAN

- The LOS went live from 6 October 2010. It replaces the LCS and will handle all consumer complaints about legal services provided by solicitors, barristers, legal executives, licensed conveyancers, patent agents, trade mark attorneys and notaries.

Fast Facts:

- **Investigative Powers:** LOS has broad powers of investigation including the ability to give directions for the provision of evidence or the option to hold a public or private hearing. It will have jurisdiction to award up to £30,000 in compensation but can also order interest and/or reimbursement of legal fees paid to legal service providers about which a complaint has been made.

- **The New Standard:** In coming to a decision whether to uphold a complaint, the Legal Ombudsmen will make its determination by reference to what is, in his or her opinion, fair and reasonable in all circumstances of the case. In coming to this decision the Legal Ombudsmen may consider good industry practice and what a Court might order (but does not have to).

- **Funding LOS:** The Birmingham-based scheme will be paid for using a levy (collected through practising certificate subscriptions) and also by making a £400 case charge for each complaint accepted for investigation by LOS. The case charge will only be incurred if a firm has had at least two complaints in the previous 12 months.

- **LOS Approach:** The Chief Ombudsmen has stated that LOS will take a "*defiantly non-legal approach*" to the investigation of complaints with the emphasis being user friendly and providing expedient decisions. It is hoped that a single independent ombudsman body will enhance confidence in the profession and improve standards.

- **Impact on Standards for Legal Services:** A new requirement has been introduced that all solicitors are under a duty to resolve complaints within an eight-week period and inform complainants of their right to refer matters to LOS (which will replace the LSC).

LEGAL OMBUDSMAN SEEKS VIEWS ON PUBLISHING COMPLAINTS

The Legal Services Act gives the Legal Ombudsman the power to publish reports of their investigations. In a recently published discussion paper the Legal Ombudsman is seeking views on whether it should publish the names of firms when it reports details of consumer complaints.

The paper asks whether the Legal Ombudsman should only publish anonymised cases, or if naming the lawyers would benefit consumers, whether identifying lawyers could have a disproportionate impact on certain areas of the law, how long the information should remain in the public domain, or whether it should only identify lawyers if they receive a certain number of complaints in a year. The closing date for responses is 23 December 2010.

A copy of the paper can be found at:
http://www.legalombudsman.org.uk/downloads/documents/consultations/Publication-Discussion-Paper_Final.pdf

WHERE THERE'S A WILL?

Currently amidst research suggesting not inconsiderable incompetence in will drafting by unregulated will writers, the Legal Services Board and OFT are considering whether non lawyer will writers should be regulated. Evidence of consumer harm is being looked for and a costs benefit analysis is being carried out. Meanwhile the Scottish Government is pressing ahead with a regulatory framework for non lawyer will writers.

REVIEW OF CLIENT FINANCIAL PROTECTION

The SRA are said to be carrying out a complete review of "*client financial protection*" i.e. Insurance/ARP/Compensation Fund in the coming indemnity year before the introduction of Alternative Business Structures ("ABSs") presently intended for October 2011.

OUTCOMES-FOCUSED REGULATION (OFR)

The SRA is seeking to implement and embed OFR by October 2011 in time for the introduction of ABSs. In achieving OFR, the SRA hope that "*Regulation should focus more on the quality of what a solicitor is delivering to the client, rather than prescribing how they reach that stage*". Plans include introducing a new principles-based Solicitors Handbook (due to be issued in April 2011). There will also be an announcement for improved supervisory arrangements for large corporate firms.

Despite a lack of apparent interest from law firms generally (only 23 replies to the SRA consultation on OFR were received), the introduction of OFR could have far-reaching consequences for the legal profession. According to the SRA's consultation:

"*The … move to OFR will require the majority of firms and individuals to take responsibility for identifying and managing the risk of not delivering the required principles and outcomes, acting ethically and professionally, exercising judgement on how to deliver good outcomes and engaging positively with us when difficult issues emerge. Firms that can do this will then be allowed to get on with running their businesses, leaving us free to focus our resources on the small minority of firms and individuals that cannot or will not comply*".

The movement towards OFR will require a replacement of the existing rules-based structure with a high-level principles-based structure utilised by other industry regulators such as the FSA. The change is however not without its tensions and controversies. The traditional view on rules-based regulation is that, whilst it allows for enhanced certainty about applicable standards it can sometimes be inflexible and unhelpful as a measure of effective industry control.

Using high level principles-based regulation can certainly allow flexibility and freedom to regulators to police standards and focus on what are considered "*high risk*" activities. Further, a principles based system can often result in practitioners having to take a more careful approach to try to ensure compliance with applicable standards however the corollary of this is that it inherently creates uncertainty about how the rules will be applied in a particular case.

In addition, recent criticisms of the FSA's inability to handle and avert recent crises in the financial services industry using principles-based regulation begs the question whether it is wise to move over completely to this new method of regulation particularly with the introduction of entirely new vehicles for conducting business and the seeming trend exposed this year for criminal gangs to have "*hijacked*" failing practices for their own ends (see Financial Times 6 September 2010).

At present, according to the consultation, "*The new Code of Conduct will set out the key principles and outcomes which must be achieved and the objective is to remove or rationalise much of the detail contained in the current Code. The core of the Accounts Rules is likely to remain much the same, reflecting our judgement of what is necessary to manage risks to client money. However, these are being re-drafted in a more outcomes-focused way and the guidance in these rules will not be mandatory*". A successful regulatory system will however ideally balance both rules-based and principles-based systems to create a hybrid standard which can protect the public and provide certainty of industry standards for the consumer and the profession rather than going too far in either direction. It is to be hoped that the new Code of Conduct for solicitors will meet this challenge but it will be very important for solicitors to engage fully in the consultation process.

DECLINE IN REGULATORY REFERRALS AND INTERVENTIONS – A TREND?

Following an increase over recent years, SRA figures show that the number of allegations received by its compliance unit which led to risk assessments by the SRA fell 15% in the three months to 30th June 2010 to 2,783 and the number of allegations made by lenders and other bodies in relation to mortgages and other property fell 43% to 146. The number of interventions related to suspected dishonesty in firms has fallen. SRA figures in the 12 months to 30th June show that 27% of interventions related to suspected dishonesty compared to 35% in the previous year. In the three months from March to June only 7% of cases involved suspected dishonesty. However, the total number of interventions carried out by the SRA did increase by 22% in the 12 months to 30th June to 90.

It is speculated that the decline in referrals and interventions in relation to property related matters mean that the worst of the issues revealed by the recession are over.

LSB BAN THE BAN

In a recently published consultation paper the Legal Services Board has effectively ruled out banning referral fees but has suggested that concerns about their use should be addressed by arrangements being subject to much greater transparency with lawyers showing consumers how much has been paid to whom and for what.

FINES FOR SOLICITORS – LOWER STANDARD OF PROOF

Under new rules introduced by the Legal Services Act whereby solicitors can agree to have regulatory or conduct issues determined by the SRA with a fine of up to £2,000 being imposed by the SRA, the SRA has determined

that the standard of proof is to be the civil standard of the balance of probabilities rather than the criminal standard currently used by the SDT. Not having to appear before the SDT will significantly decrease the costs of the investigation for the solicitors (or possibly their Insurers) and there is a right of appeal to the SDT.

PROVIDER OF SERVICES REGULATIONS 2009 – SOLICITORS REQUIRED TO MAKE MORE INFORMATION AVAILABLE TO CLIENTS

The Law Society has issued a practice note in relation to the above regulations which implement an EU Directive requiring service providers including solicitors, to make available information to clients. The information which must be made available includes details of professional indemnity insurance and complaint resolution procedures. The solicitor has to make available the name and contact details of the Insurer and the territorial limits of the policy. This is in addition to the insurance information about compulsory PI insurance the solicitor has to make available to a client on request under the solicitors indemnity insurance rules in the event that a complaint or claim arises. The link to the practice direction issued by the Law Society is below in case it is of use.

http://www.lawsociety.org.uk/productsandservices/practicenotes/servicesregs/4346.article#sr2_2

IT'S A PRIVILEGE

The topic of privilege has featured in a number of cases over the last few months.

The Prudential case

The Law Society has been given permission to intervene in the case of *Prudential PLC v Special Commissioner of Income Tax* which is to be heard by the Court of Appeal. At first instance the High Court Judge found that legal advice privilege does not extend to advice from and communications with accountants even if these related to specialist professional advice about tax law. He referred to cases in which privilege was only found to apply to legal advice and assistance given by a member of the legal profession. The judge's view was that provision had to be made by Parliament if the privilege was to be conferred on other professionals. The Law Society is however concerned that the scope of legal advice privilege as set out in *Three Rivers (no 6)* may be re examined in the appeal following the judge's suggestion that the need for absolute confidentiality in relation to legal advice may need revisiting.

AZKO NOBEL

The European Court has recently faced criticism following its decision in the *Azko Nobel Case* to the effect that communications between a company and in house lawyers were not protected by privilege during the course of an investigation by the Competition Commission.

Quinn Direct Insuance Ltd v Law Society of England & Wales [2010] CA (Civ Div) 14/7/2010

In this case where the Law Society had intervened in the practice of a firm of solicitors and had taken possession of the firm's documents which were subject to client privilege, it was not appropriate to imply into the scheme for the regulation of solicitors a provision or term entitling or obliging the Law Society to produce those documents to the firm's professional indemnity Insurer.

The Court of Appeal upheld the decision of Peter Smith J that Quinn were not entitled to inspect all of the files of a practice which had been intervened into. There is a wider suggestion (not strictly relevant to the judgment) that Insurers are not within the "*circle of confidence*" and so are not entitled to be shown privileged information unless a claim has been made by the client or the client has agreed to waive privilege.

CHANGES TO THE SOLICITORS CODE OF CONDUCT IN RELATION TO CONFLICTS AND CONFIDENTIALITY

As reported in previous editions of this Update, following lobbying by the large City Firms carrying out corporate work, a few years ago the rules on conflicts and confidentiality were changed. No sooner than they had been changed than the large City firms began lobbying again on the grounds that the changes did not go far enough. The newest rule changes to Rule 4 of the Solicitors Code of Conduct came into effect in July. These extend the circumstances (via information barriers) in which a firm can act for a new client whose interests conflict with the interests of a former or existing client or where confidential information which may be of interest to the new client is held on behalf of the existing or former client. Most firms will not have the infrastructure necessary to set up legally compliant information barriers so they should be used with extreme caution.

FURTHER CHANGES TO THE SOLICITORS CODE OF CONDUCT

Publicity materials and SRA number

Rule 7.07 amended last year provides that the letterhead, fax heading, website and emails of a firm must state its SRA number. A straw poll of various letter heads suggests that not all firms are aware of this change.

Guidance to Rule 7.05 provides where there is a breach of Rule 7 (publicity) a firm should take reasonable steps to have publicity changed or withdrawn.

Identifying managers as non-lawyers and making clear that managers are not partners

Rule 7.07(3) provides that if the managers include persons other than solicitors, publicity materials must identify any individual non-lawyer as a non-lawyer and must make clear that managers are not partners.

CLAIMS MINING

Industrial disease claims and particularly those brought by miners against solicitors under the occupational health compensation scheme have featured in recent reports from the SDT where a number of firms were disciplined and ordered to repay fees. Groups of miners have now brought proceedings against certain firms of solicitors alleging that their statutory claims for compensation for industrial disease were undersettled.

THE END OF THE LINE?

The decision of the Court of Appeal in *Buxton v Huw Llewelyn Paul Mills-Owen [2010] EWCA Civ 122* came as welcome clarification to those solicitors dealing with clients who wished to pursue a case which both the solicitors and counsel considered hopeless. Rule 2 of the Solicitors Code of Conduct provides that a solicitor must not cease acting for a client except for good reason and on reasonable notice. In the *Huw Llewelyn* case the client wished to pursue a case which his legal team considered hopeless. At first instance the judge found that the solicitor had to continue with the retainer regardless. The Court of Appeal clarified that each case had to be considered on its facts. In this case the legal team should not be compelled to argue points which they knew would fail. The Court of Appeal stressed that a solicitor should take great care in deciding to terminate a retainer and should not do so lightly. Assuming the retainer was terminated for good reason the solicitors fees were payable.

THE JACKSON REVIEW

The conclusions of "*Review of Civil Litigation Costs*" by Lord Justice Rupert Jackson including the proposals to abolish Conditional Fee Agreements and the payment of ATE premiums by Defendants, introduce fixed fees for certain claims and contingency fees have been widely publicised. Perhaps less widely publicised has been the detrimental economic impact on many firms of solicitors if the reforms are introduced (their business models are predicated on recovering a premium on their base fees) and the potential conflict issues raised by contingency fees.

The introduction of contingency arrangements would reduce (or extinguish) exposure to the claimant's legal costs and also shift the financial burden of funding litigation onto the legal profession. It is thought in particular that small to medium sized commercial enterprises will be encouraged to pursue claims to resolve disputes, as the risks and costs of litigating will be reduced. This may therefore result in a significant increase in the number of claims being brought generally. Furthermore, there are concerns that contingency fee arrangements may give rise to greater conflicts of interest between lawyers and clients given that the solicitor will have a direct financial interest in the outcome of the case or the terms on which it is settled.

The report was published in January of this year (prior to the election) and was commissioned by the former Master of Rolls, Sir Anthony Clarke. The Judicial Executive Board has agreed to support the Jackson's recommendations and a Judicial Steering Group has been established to produce court directions giving guidance on the proposals which can be implemented by the Courts immediately (via pre-existing case management powers). This move is being made in advance of anticipated legislative reform by the government, however, since the election; there has been no indication of the extent to which the government will implement the Jackson recommendations.

FINES AND BAN OF SOLICITOR BY SRA

The senior partner of a firm of solicitors has been banned from working in financial services and was fined £200,000 for recklessly signing off adverts for what was a boiler room fraud despite seeing consumer complaints and press articles casting doubt on the integrity of the company being advertised. His firm was also fined £200,000.

CASE LAW

Limitation has continued to feature as an issue in cases involving solicitors liability with two reported cases being decided in the solicitor's favour.

In ***AXA Insurance Ltd (formerly Winterthur Swiss Insurance Co) v Akther & Darby Solicitors & Others*** CA (Civ Div November 2009) causes of action against solicitors for alleged negligent failure to properly vet claims under a legal expenses insurance scheme were found to have accrued when the insurance policy was issued and not only when the claim could have been made under the policy. Similarly causes of action in respect of claims for alleged negligent conduct of the claims arose when, as a consequence of the breach, there had been a material diminution in the prospects of success.The Court of Appeal upheld the decision of the first instance judge that £20 million of claims in the CLE litigation were statute barred. It is thought that this decision is likely to be appealed to the Supreme Court.

Nouri v Marvi and Others [2009] EWHC 2996

Mr Nouri let his friend Mr Marvi occupy his property. Mr Marvi impersonated Mr Nouri and sold the property to himself. Exchange and completion took place on 2nd April 2001 but the transfer was not registered until 4th July 2001. In January 2003 Mr Marvi sold the property to a third party. Proceedings were issued by Mr Nouri against Mr Marvi, the Land Registry and the solicitors who acted for Mr Marvi (impersonating Mr Nouri) on 2nd July 2007. The claim was in tort. It was alleged that the solicitor ought to have appreciated that Marvi was an imposter. The limitation issue was whether damage was suffered by Mr Nouri at the date of completion when he remained the registered owner of the property or on registration when the registered title was transferred. The judge decided that damage was suffered on completion. Although it might have been possible to prevent registration or rectify registration there was an immediate blot on the title so that Mrs Nouri's remedy against the solicitors was time barred.

This decision was appealed to the Court of Appeal in July this year and judgement has been reserved.

Land Registry Campaign to prevent property fraud

The Land Registry has begun a campaign to alert owners whose properties are vulnerable to property fraud to ensure that their addresses for service of any documents are up to date. This encompasses any owner who does not live at his or her property including people living abroad, people with buy to let properties and anyone in care. This is to try to avoid situations which have occurred in the past in which a property has been remortgaged or sold by a fraudster who has been able to deal with the property without the real owner having any knowledge of the dealing.

Dishonesty, condonation of dishonesty and recovery

There have been a number of cases involving allegations of mortgage fraud following the dip in the property market over the last year or two and the consequences have been that Insurers have asserted that some solicitors were dishonest or condoned dishonesty. One such example is:

Goldsmith Williams (a firm) v Travelers – condonation of dishonesty [2010] ALL ER (D) 171

In this case X a partner in a two partner firm of solicitors made an application for a mortgage to a lender.The lender appointed Goldsmith Williams ("GW") to act. The other partner in the firm Y witnessed X's signature on the mortgage deed and certified a copy of his passport. The mortgage monies were released to X but rather than buy the property he stole the money. X's wife made a similar application to the same lender and again Y was involved in relation to the documentation and GW acted again the monies were stolen. The lender assigned its rights to sue the firm to GW and GW obtained judgement against it. GW then proceeded under the Third Party Rights Against Insurers Act 1930 asserting that the Insurer, Travelers, was obliged to indemnify the "*innocent*" partner Y in relation to these claims cover having been declined to X.

The Court held that on the facts Y had condoned X's dishonesty so that Travelers were entitled to decline indemnity to Y in relation to these claim. It reiterated that dishonesty in a civil context will be looked at objectively (following *Twinsectra v Yardley*).

Restitution – knowing and or dishonest assistance in a breach of trust – recovery of monies from third parties following mortgage fraud

Norris J was busy this summer in handing down decisions in cases brought by the Law Society's intervention agent under the Solicitors Act 1974 concerning the basis on which monies, being the proceeds of a mortgage fraud were received by third parties and their consequent liability to repay those monies. *The Law Society v Isaac and Isaac and Others* decided in July related to the multi million pound receipts of fraud in which two firms of solicitors were complicit. In June in *The Law Society v Habitable Concepts Limited and Onyekechi Onuiri,* a company and its sole shareholder/ director were liable to account as constructive trustee for monies knowingly received by them in breach of trust from the client account of a firm of solicitors.

Loss of a Chance – burden of proof of non reliance on advice by client shifting to solicitors

Many cases involving allegations of professional negligence against solicitors involve the argument by the solicitor's former client of a lost opportunity to achieve a different and better outcome. One of the issues which commonly arises is who has to prove what in order to satisfy the burden of proving that a different and better outcome would have been achieved. In *Evcom International Holidings BV (2) Levicom Investments Curacao NV v Linklaters* (A Firm) [2010] companies (L) appealed against a decision ([2009] EWHC 812 (Comm), [2009] Lloyd's Rep PN 156) that they were entitled to nominal damages only for the negligence of the respondent solicitors. L had interests in telecommunications businesses in the Baltic States. Swedish companies (S) had agreed to acquire 90 per cent of the shares in L's Estonian company (C) which owned a cellular telephone business in Estonia. A shareholders agreement provided in clause 9 for L's 10 per cent interest in C to be maintained at S's expense and contained a covenant in clause 13 not to carry

on in any of the Baltic States any cellular network business which was the same as or competitive with any business carried on by C as at the completion date. The following year S acquired a Latvian company (B) which was a mobile telephone network operator in Latvia. L considered that by acquiring B, S were in breach of the shareholders' agreement. L considered that B ought to have been acquired through C at no cost to L and that L were therefore entitled to 10 per cent of the purchase price or to 10 per cent of the value of B. L instructed the solicitors to advise. The advice was that S was in breach of clause 13. After further negotiations with S and advice from the solicitors, L began arbitration proceedings against S which they later settled. L then brought proceedings against the solicitors alleging that their advice had been negligent; that L had relied on it in the negotiations and in deciding to begin the arbitration; that they had settled the dispute on worse terms than they could have done and had incurred the costs of bringing proceedings. The judge held that the solicitors were probably right on their construction of clause 13 but had wrongly advised L that damages would be substantial. However he held that L would not have acted differently if they had received non-negligent advice. Therefore L were entitled to nominal damages only.

L argued on appeal that

(1) the solicitors' advice concerning clause 13 was wrong

(2) the judge had been wrong in his conclusions as to what would have happened if non-negligent advice had been given.

The Court of Appeal held that:

(1) It was not necessary to resolve the issue as to the correct interpretation of clause 13 but the solicitors were negligent in advising that the breach of clause 13 was "*clear*". It was particularly necessary to give a balanced view in the context of potential arbitration proceedings, since if the arbitration tribunal were to arrive at a different interpretation, it could not, save in rare circumstances, be the subject of appeal, even if objectively that interpretation might be incorrect. The solicitors' negligence was more striking in respect of remedies. The solicitors failed to address the difficulties of a damages claim. The question of L's loss was not addressed. There was no attempt to quantify damages.

(2) The judge's finding that L would in any event have proceeded as they did was flawed. When L sought the solicitors' advice, they believed that they had a strong case. Their views were reinforced by the advice they received. It was not surprising that they were then wholly convinced of the strength of their position. Nor was it surprising that they did not question the optimistic advice they were given. However, there was no point in their seeking and paying for advice if it was not to influence their conduct of the dispute. There was evidence which indicated that L sensibly considered the solicitors' advice to be crucial. The evidence that a client did not act on advice in a case such as this one would have to be stronger than that which persuaded the judge. The judge should have approached the case on the basis that the evidential burden had shifted to the solicitors to prove that their advice was not causative. Such an approach would have led him to a different result. L's appeal was allowed on the issue of causation. L established that, had they been properly advised, they would have settled their claim against S earlier and on better terms and would have saved the costs of the arbitration proceedings.

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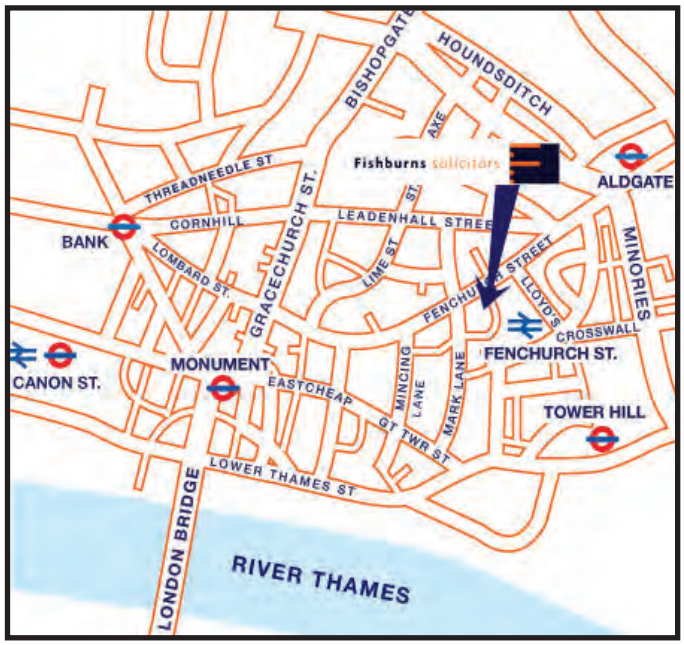

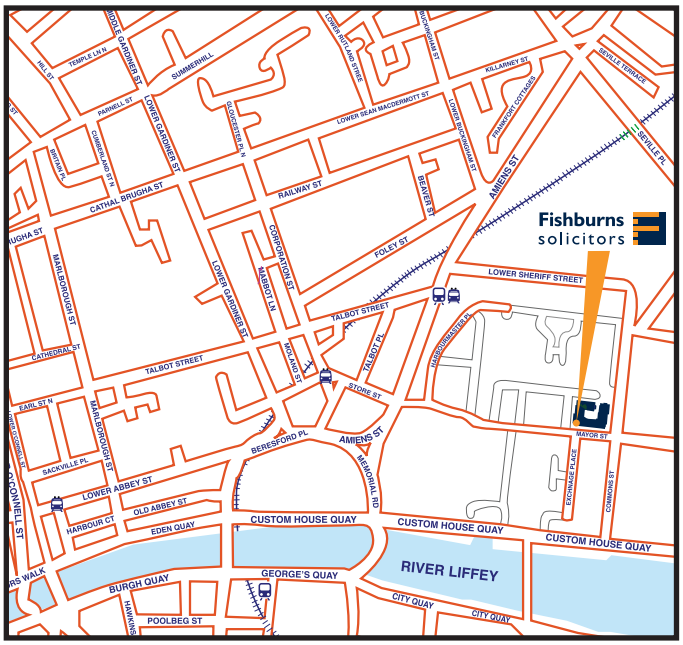

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