

**- RISK MANAGEMENT FOR  
SURVEYORS -**

***Top Tips to Avoid Claims and other issues***

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# Agenda

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- I. Complaints and Claims
- II. Managing Debt
- III. Ownership Structures
- IV. Engaging with Employees
- V. Questions

# I. Complaints and Claims

## *Monitoring, Investigation and Disciplinary Procedures*



- ❑ *Complaints Procedure:*
  - ❑ *Complaint, Allegation or Relevant Information*
  - ❑ *Director of Regulation*
  - ❑ *Fixed Penalty or referral to Professional Conduct Committee*
  
- ❑ *Reviewer:*
  - ❑ *Reviews administrative decision of Director of Regulation*
  - ❑ *Request Review within 14 days*
  
- ❑ *Professional Conduct Committee:*
  - ❑ *Hearings usually in private*
  - ❑ *Power to impose Interim Measures and/or Sanctions*

# I. Rules and Procedures:

## *Professional Conduct Committee*

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- Sanctions that may be imposed by Professional Conduct Committee on a Member:
  - **Caution** the Member against repeating the conduct or action which has resulted in the liability to disciplinary action
  - **Reprimand** the Member
  - **Suspend** the Member for a period not exceeding 12 months
  - Require the Member to give one or more **undertakings** as to future conduct

# I. Rules and Procedures: *Professional Conduct Committee*

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- **Fine** the Member up to a maximum figure specified in the Sanctions Policy (Fines, Costs and Administration Fees approved by SCoR)
- Impose **conditions** on the Member's continued membership of the Society
- **Expel** the Member from membership of the Society
- Make an order requiring a Member to take a **specified action** (which shall include but shall not be limited to directing that the Member makes restitution in such manner and to such person as the Professional Conduct Committee directs), and stating the penalty imposed if the Member fails to comply with that action

# I. Rules and Procedures

## *Appeal Board*

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- ❑ Appeals must be **in writing**, specify **grounds** and be received within **28 days** of date of notification of decision to Member;
- ❑ Usually sit in Public;
- ❑ No new Evidence;
- ❑ Appeal Board hears appeals arising from Professional Conduct Committee decisions and it may either:
  - **Set aside** the Professional Conduct Committee finding that the Member was liable to disciplinary action
  - **Vary** the penalty or sanction imposed by the Professional Conduct Committee to one of greater or lesser severity
  - **Refer** the matter back to a Professional Conduct Committee for a new hearing or consideration.

# I. Complaints and Claims

## *Professional Liability Claims*

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- **How to sue a Professional:**
  - Establish the Relationship;
  - Demonstrate that Professional fell below industry standard;
  - Demonstrate deviation from reasonable care;
  - Demonstrate loss due to the professional's negligence.

# I. Complaints and Claims

## *Litigation Environment*

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- **Sudden jump in negligence claims against surveyors;**
  - **More demanding Clients;**
  - **Lack of Risk Management;**
  - **Lack of effective system to deal with claim when arise.**
  
- **Most claims relate to valuation**
  
- **Most cases settle**

# I. Complaints and Claims

## Types of Cases

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- **Professional Valuation falls below “red book” standard/Negligent Valuation**
- **Failure to discover/warn of defects**
- **Dishonesty**

# I. Complaints and Claims

## *Recent Cases...*

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### 1. Ellis Hotels Case (2010)

- ❑ Claim that the Defendant valuer had over-valued four hotels
- ❑ The English High Court found that the Defendant was not negligent, notwithstanding that they had used a method of valuation which fell below the standard of care, as the valuation was within an acceptable “*margin of error*”.
- ❑ The Court indicated that as a general principle, the permissible margin of error was:
  - Standard residential Property - +/- 5%
  - Unusual Property - +/-10%
- ❑ Courts will ultimately focus more on the figures involved, and less on the methodology of the valuation.

# I. Complaints and Claims

## *Recent Cases...*

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### 2. Scullion -v- BOS (2011)

- ❑ English Court of Appeal overturned a High Court decision allowing a Buy-to-Let Investor recover against a surveyor who had been retained by the lender.
- ❑ Court found that the duty owed by a valuer instructed by a lender to the purchaser in a residential transaction did not extend to a purchaser buying a property for investment purposes.
- ❑ Reasoning - property investors are more likely to be able to afford their own valuation and should not be entitled to rely on the lender's valuation.

# I. Complaints and Claims

## *Recent Cases...*

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### 3. Paratus AMC limited -v- Countrywide Surveyors

- ❑ Case concerned the valuation of a buy-to-let flat in New York.
- ❑ Claimant's argued that the valuation provided by the Defendant valuer was outside the "acceptable margin of error" for a valuation, which they argued should be plus or minus 4%.
- ❑ Defendant's expert argued for a range of error which was not percentage driven, but which ultimately worked out at about 11.4%.
- ❑ Valuation was not deemed negligent.
- ❑ Interestingly, the Court noted the modest fee charged by the Defendant valuer and commented;

*"the fee sets some parameters as to what is reasonably to be expected" [of a valuer]*

# I. Complaints and Claims

## *Recent Cases...*

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- ❑ Accordingly, this had a bearing on the level of enquiries which the Defendant valuer can reasonably be expected to make.

Comment:-

- ❑ Court used its own discretion in deciding the acceptable “margin of error” – they did not accept the margin proffered by the experts engaged by either party.
- ❑ Decision seems to suggest that the fee charged for a service has some bearing of the scope of duty owed by a professional to their client.
- ❑ English Courts appear willing to examine a lender’s own procedures in approving the loan when assessing damages in claims against professionals, and reduce damages accordingly.

# I. Complaints and Claims

## *Recent Cases...*

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### 4. **Dhamija & Anor –v- Sunningdale Joineries & Ors**

- ❑ Claimants pursued entire construction team including quantity surveyor over defects to newly constructed house
  
- ❑ Part of claim against QS was breach of duty to only value work which was “not obviously defective”
  
- ❑ Technical and Construction Court found that it was Architect’s role to inform QS as to what works had been properly executed – not up to QS to determine

# I. Complaints and Claims

## *Recent Irish Case...*

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### 4. **Brownrigg -v- Leacy (2013)**

- ❑ Plaintiff wished to purchase certain land; but in order to do so, he had to sell certain land
- ❑ First defendant valued the plot at over €10m in a *letter* 18/6/07.
- ❑ Second defendant valued the plot at €6.9m in a *letter* 20/6/07.
- ❑ First defendant was aware that the plaintiff would rely upon the letter 18/6/07 as a valuation.

Findings of the Court:-

- ❑ Rejected the first defendant's contention that it was no more than a "thinking of selling letter" in response to a vague interest by the receiver in selling.

# I. Complaints and Claims

## *Recent Irish Case...*

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- ❑ Letter was intended to be a valuation. The court pointed to the express wording of the letter and its failure to state that it was not a valuation.
- ❑ The valuation was prepared negligently. The valuation was not in compliance with "the red book." The court relied heavily on the expert called by the plaintiff.

### Comment:-

- ❑ The fact that a letter is short and not detailed does not prevent the court finding that it was a valuation which was relied on by a plaintiff.
- ❑ Where a defendant cannot show compliance with the red book, it may be difficult for a defendant to argue that the valuation was not negligent.

# I. Complaints and Claims – *Top Tips to Avoid Claims!*

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- Leadership from the top –  
viewing **risk management** as an essential asset for the practice: -
  - Must be regarded by Management as a High Priority!
  - Management must display a pro-active attitude that filters through all layers of the practice.

# I. Complaints and Claims – *Top Tips to Avoid Claims!*

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## ○ Be Client-Smart

- **Unprofitable Clients** – can be sometimes more trouble than they are worth.
- New instruction – is the work **high risk**? Does the practice have **capacity** to take on the instruction?
  - **BE ALERT** – if a client: -
    - Becomes bankrupt/insolvent;
    - Disputes a fee;
    - Is being purchased or floated;
    - Is switching professional advisors;
    - Is being investigated/prosecuted by a regulatory body;
    - Is being sued.

# I. Complaints and Claims – *Top Tips to Avoid Claims!*

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- Waste no time - issue the right documents!
  - **Engagement Letter** – must be sent ASAP after new instruction is received and should include: -
    - What you understand your instructions to be;
    - any key deliverables;
    - Fee or basis for charging;
    - Terms and Conditions of Business – including a limitation on liability!

# I. Complaints and Claims – *Top Tips to Avoid Claims!*

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## ○ Keep it under Review!

- **File Review**: Practitioners should review all of their files regularly, once a month if at all possible
- **Peer Review**: Each partner/director in a practice should conduct a random review of other partners'/directors' files – to ensure best practice measures are actually being followed throughout.
- **Key Date Management**: Effective Diary Management of Key Dates and deadlines should be incorporated into file reviews.

# I. Complaints and Claims – *How to Deal with a Complaint/Claim*

- **And if a complaint does come in...?**
  - Do not panic
  - Investigate the facts – ASAP from all sources;
  - Evaluate issues and evidence – as independently as possible;
  - Assess the potential liability;
  - Compile a full Report in respect of the investigation.
  - If there is any possibility of a claim being made, **notify insurer/broker IMMEDIATELY;**
  - Be completely frank with Insurer and **disclose** all relevant facts;
  - **MAKE NO ADMISSIONS** - attempt no negotiation or settlement unless authorised by Insurer or their Solicitor.

## II. Debt Management

### *Debt Recovery in the Irish Courts*



- Debt Recovery in Ireland
  - First Steps: -
    - Engage with the Debtor/Debt Management Protocol
    - Demand letter
    - Escalate to legal proceedings?
      - Likelihood of success?
      - Will it be contested?
      - Value and nature of the case?
      - Cost/benefit analysis

## II. Debt Recovery

### *Debt Recovery in the Irish Courts*



- **Post 3 February 2014 changes**

- **District Court**

- Debts up to €15,000
  - If uncontested: -
    - Serve Debt Claim Notice on Debtor (formerly summons)
    - Affidavit of Debt sworn by Creditor - filed in Court Office
    - Judgment – usually issued within 20-60 days.
  - If contested:-
    - Serve Debt Claim Notice on Debtor
    - Defendant delivers “Notice of Intention to Defend”
    - Date of Court Hearing fixed
    - Both parties submit their cases to the Court.
    - If successful, judgment issued in 10-13 days after hearing.

## II. Debt Recovery

### *Debt Recovery in the Irish Courts*



#### ○ Circuit Court

- Debts between €15,001 - €75,000
  - If uncontested – similar to District Court
  - If contested: -
    - Civil Bill Served on Debtor
    - Appearance submitted by Debtor
    - Written Defence submitted by Debtor
    - Notice of Trial – served by Creditor after receipt of Debtor’s defence, can be 2-3 months away.
    - Court Hearing - Both parties submit their cases orally to the Court.
    - If successful, judgment will issue.

## II. Debt Recovery

### *Debt Recovery in the Irish Courts*



#### ○ High Court

- Debts greater than €75,001
  - If uncontested: -
    - Summons served on Debtor by personal service on an individual or by ordinary certified post on the registered office of a limited Company.
    - No Hearing – judgment issues as in smaller courts.
  - If contested: -
    - Summons served on Debtor as above.
    - Debtor enters an Appearance.
    - Creditor applies to Master of the High Court and parties submit their cases in writing by way of Affidavit.
    - Master of the High Court may give judgment or may refer the matter to a Judge of the High Court for full hearing – with oral evidence or by Affidavit again.

## II. Debt Recovery

### *Debt Recovery in the Irish Courts*



#### ○ Points of Interest –

- **Interest:** can be claimed at the contractual rate or if no such rate the Court will apply its discretion. If judgment is awarded, interest is applied to the judgment debt at a statutory rate of 8%.
- **Costs:** awarded on the basis of the scale of costs associated with the Court in which the action is taken – will very rarely cover all legal costs.

## II. Debt Recovery

### *Debt Recovery in the Irish Courts*



#### ○ Enforcement – post judgment...

- Publication – gazette etc.
- Sheriff – nulla bona
- Installment Order – Order that debtor pays in installments according to means.
- Garnishee Order – Order granting Creditor net proceeds of asset belonging to debtor
- Judgment Mortgage – registered against property of debtor – asset cannot be sold until cleared.
- Winding Up of a Limited Company – s.214 Notice.
- Bankruptcy

# III. Ownership Arrangements

## *Partnership –v- Incorporation*



- **PARTNERSHIP –**  
***“the relationship which subsists between persons carrying on a business in common with a view to profit”, s.1(2) of the Partnership Act 1890 (the “1890 Act”).***
  - Therefore, where business is carried out with a view to profit, without incorporation, a partnership will be deemed to exist – even if **UNINTENDED!** E.g. an informal family arrangement could constitute a partnership and have the effect of joint liability, equal division of profit etc.
  - No requirement to have a written partnership agreement (but wise to do so!).

# III. Partnership/Shareholders Agreements

## *Partnership –v- Incorporation*



	ADVANTAGES	DISADVANTAGES
Partnership	<ul style="list-style-type: none"><li>• Not public – avoids most disclosure requirements.</li><li>• Tax Transparent.</li><li>• Easier to invest and withdraw capital.</li></ul>	<ul style="list-style-type: none"><li>• Partners can be sued in their own name.</li><li>• Liable for the debts of the partnership without limit (in a large partnership – technically responsible for the actions of partners you may not even be familiar with!).</li><li>• Cannot create a floating charge over assets.</li><li>• May not transfer a partner’s “share” as in a Limited Co. – partner’s share if regarded as personality can only be transferred to another partner in the firm.</li><li>• Creditors have a right of action against individual partners – personal assets are not excluded from a claim against the partnership.</li><li>• No separate legal personality – partnership cannot own property, must be in an individual’s name.</li></ul>

# III. Partnership/Shareholders Agreements

## *Partnership –v- Incorporation*



	ADVANTAGES	DISADVANTAGES
Incorporation	<ul style="list-style-type: none"><li>• Ease in transfer of Shareholding.</li><li>• Tax at corporation rates.</li><li>• More flexible pension planning.</li></ul>	<ul style="list-style-type: none"><li>• Limited Liability? Is breach of contract covered only?</li><li>• Transfer of assets to Company may incur:-<ul style="list-style-type: none"><li>○ Stamp Duty; or</li><li>○ CGT Tax etc.</li></ul></li><li>• Not a 'one size fits all' process – must consider benefits of incorporation in light of Practice needs.</li></ul>

### III. Partnership v Shareholders' Agreement

*Partnership - Is a written partnership agreement necessary?*



- Table A of the Partnership Act 1890 sets out basic terms of the partnership agreement – acts as a **DEFAULT** that applies to all partnerships unless modified or excluded.

**Default Table A of the 1890 Act** is not always appropriate. It provides: -

- **No right to expel** a partner;
  - Any partner can dissolve the partnership by notice pursuant to s.26 and s.32(c) of the 1890 Act.;
  - A partner's death will dissolve the partnership;
  - No power to retire – must dissolve the partnership.
- Can set out roles of partners e.g. **Salaried v Equity Partners**
    - Who is a salaried partner? – in essence an employee who is “held out” as a partner and is normally paid a salary – enjoys rights of an employee, PRSI contributions etc.
    - Who is an equity partner? – self-employed person, taxed under Schedule D

# III. Partnership v Shareholders' Agreement

## *Partnership*



- **Typical Partnership Agreement** should include: -
  - Duration.
  - Time to be devoted to the business.
  - Annual Accounts – deadlines for review and challenge.
  - Division of Profits and Losses.
  - Personal Guarantees.
  - Conduct of the Partnership – e.g. powers and prohibited acts.
  - Voting Rights – minority rights.
  - Process for Early Termination – by expulsion or retirement.
  - Process when Partner leaves or joins the firm.
  - Retirement of a Partner e.g. age
  - Remuneration and Expenses.
  - Restrictive Covenants.
  - Dispute Resolution

# III. Partnership v Shareholders' Agreement *Incorporation*



- ❑ **Practical Steps** for incorporation: -
  - ***Formation*** of a company e.g. structure, name, shareholders, directors.
  - ***Business Transfer Agreement*** – transfer of assets, novation of contracts, TUPE Regulations 2003.
  - ***Shareholders' Agreement***.
  - ***Advise PI Insurance provider***
  - Register any ***trading names*** for the firm.
  - Design and print new letter head.
  - Legal status of new firm – may have to resign as previous auditor to clients and be reappointed as new firm.
  - **NEW** - engagement letters/employment contracts/training contracts/banking arrangements etc.

# III. Partnership v Shareholders' Agreement

## *Shareholders' Agreement*



- ❑ Advantages of implementing a Shareholders' Agreement
  - Binds some or all shareholders
  - Regulates how a company is governed e.g. management, sale of shares, shareholder's exit etc.
  - Sets out the parameters of the business [N.B. for start-ups];
  - Articles address the objects and powers of the company
  - – NOTE: Articles are public; can overlap with terms of the shareholders' agreement; usually in standard format of Table A, Companies Act 1963 (should be amended where inconsistencies exist with SA and/or actual objects/activities of the Company).
  - Sets out Directors/Members and/or the Company ownership structure.
  - Confidentiality – can set out confidential terms not in M&A of Co.
  - Can put in place minority rights
  - Can be put in place a time frame for agreement – standard Co. Articles are indefinite.

# IV. Engaging With Employees

## *First Steps*



- **All staff must have an Employment Contract.**
- **Minimum Notice and Terms of Employment Act 1994 – Legal obligation to provide a Statement of Employment.**
- **Contract of Employment generally contains more than the minimum terms.**
- **Always include probation period – maximum one year (recommend six months with option to extend to a maximum one year).**
- **Policies should be contained in the staff handbook which can be updated from time to time (avoids needs for individual change of contracts every time you update a policy).**

# IV. Engaging With Employees

## *Key Characteristics of the Contract*

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- **Non-compete and non-solicit clause (maximum six months).**
- **Confidentiality arrangements.**
- **Mention of staff disciplinary and grievance policies (contained in handbook).**
- **Probation period.**
- **Notice periods for termination (key staff should have longer notice periods).**

# IV. Engaging With Employees

## *Training Contracts*



### Specific rules relate to training contracts:

- **These are fixed term/specific purpose contracts which should be terminated once they conclude.**
- **Make sure the staff expectations are managed so that they do not have an expectation of permanent employment on termination of their training contract.**
- **Very important that the training contract sets out specific detail in relation to finances and costs. Low level employees are particularly concerned about these issues and they must be very clear.**
- **Maximum four years on fixed term contracts before having to offer someone a permanent position.**

# IV. Engaging With Employees

## *Leave Policies*



- Typically in professional practices leave issues can cause upset (client facing, continuity issues).
- Benchmark maternity leave policies against competitors (e.g. require minimum amount of service to be accrued before maternity benefit is granted).
- Sick leave policies should be closely monitored – make sure a log is retained and monitored regularly. No statutory entitlement to sick pay. This is all governed by the staff policy handbook.
- Issues such as parental leave, adoptive leave, force majeure leave can all be dealt with in the staff handbook and there are statutory minimum protections which you must provide. [www.nera.ie](http://www.nera.ie) will provide you with the detail you require.

# IV. Engaging With Employees

## *Performance Management*



- **Perception is that it is impossible to get rid of bad staff. This is untrue.**
- **Use the probation period in a contract. If it is not working out terminate.**
- **After one year staff are protected from unfair dismissal and dismissal can be difficult.**
- **Make sure your contracts/policies contain performance management options i.e. possibility to introduce a performance improvement plan and a clear disciplinary procedure.**
- **Managing underperformance is critical for professional practices. It can be done, it just takes guts.**

## V. Questions?



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**Thank you for your kind attention.**

*Any Questions?*