

+ Letter to the Editor

Trust issues

I have read with interest the cover article in Issue 19 of *Law News* dealing with the new anti-money laundering regime.

Like anyone having to deal with this new legislation, I have had to analyse it from the ground up and do not profess to be an expert; unlike – for example – some of the big four accounting firms offering advisory services in this area, who appear to have become experts overnight.

There are a couple of items in the article which I took issue with, included in the boxed item on page 2 of the *Law News* issue, entitled “What does this mean for you?”

In paragraph 2 of that item it states:

“Law firms having trust administration and mortgage nominee companies may not have ANY exemption from the activities those subsidiaries perform – even after publication of the further regulations (25 May 2013). If there is any external ownership of those subsidiaries (e.g. partners’ spouses), the exemption will almost certainly not apply.”

I have not had cause to look at the position of mortgage nominee companies, but the remainder of that quotation is, in my opinion, incorrect.

Regulation 20 of the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Amendment Regulations 2013, which was enacted on 27 May 2013, provides an exemption to (inter alia): lawyers; executors/administrators/trustees of a deceased estate; and trustees “in respect of services provided to beneficiaries of a family trust”, if those parties carry out any “relevant service” (i.e. regulated activity) in the ordinary course of the person’s business as a lawyer or trustee etc.

As far as lawyers are concerned, clearly the provision of service as an executor or trustee (even if this was a “relevant service”) is in the ordinary course of the lawyer’s business, and would be exempted.

Regulation 20(2) extends the law firm exemption to “any director, employee, agent, or other person while acting in the course of, and for the purposes of, [the law firm business]”.

Therefore it seems to me that a law firm trust company providing services in the ordinary course of the law firm’s business will be exempted as an “agent or other person”. Even if the trust company charged fees in its own right and was not therefore arguably within the scope of the legal practice exemption, it would get the benefit of the ‘trustee’ exemption in Reg. 20.

So to suggest that law firms may be captured by the new regime by virtue of administering trusts is, in my view, quite incorrect.

Secondly, the suggestion that ownership of a law practice trust company by third parties such as partners’ spouses would disentitle that entity to the law firm exemption is also wrong.

There is no ownership test in Reg. 20 for the “agent or other person”, and even if there was, or if the trust company was charging fees in its own right, trusteeship is an exempted service.

I would concede that non-trustee law practice companies (e.g. a mortgage nominee company) which generate revenue on their own account are unlikely to get the benefit of the law firm exemption, but only if they are carrying on a regulated service – for example under Reg. 17, or if they fall within the “financial institution” definition in the AML/CFT Act.

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