

# Legal Matters

## Professional Indemnity

Issue 5  
Spring 2009

Our quarterly newsletter aims to highlight developments and new case law affecting the liability of professionals in a concise and readable style. We hope that you find it informative and useful.

### Inside this issue:

Duty to advise lay client about pending change to the law	2
Costs - pre-action loss adjusters' fees not recoverable as costs	3
Costs - security for costs against counterclaiming defendant	4
Condition precedent to liability	5
Contact details	5

## Enforcement of solicitors' undertakings

This case concerned the enforcement of routine solicitors' undertakings in transactions involving the sale of residential properties. The case exemplifies the risks of giving undertakings to redeem charges without obtaining redemption statements and the mortgagees' agreement to release properties from charges upon payment of specified sums. It further highlights the repercussions of delaying payment.

Solicitors Angel and Jenkins O'Dowd & Barth ("JOB") represented respectively, the purchaser and seller of three properties each subject to an all-moneys charge as part security for loan facilities exceeding the property's value. There was no evidence that JOB made enquiries (as to sum required to be discharged, consent to release and authority to represent the mortgagees on the release of the charge) before giving undertakings or completing.

Having failed to secure performance of the undertakings without litigation, Angel, by Part 8 claim, invoked the Court's summary jurisdiction to enforce the undertakings under its inherent supervisory jurisdiction over solicitors.

The purpose of the undertakings was to secure

for the purchasers the discharge of existing mortgages. This could only be done by paying over monies sufficient to obtain forms of discharge. The fact that the amount required would have been less if paid at the right time or, for that matter, that mortgagees might have accepted less had they been approached earlier, was irrelevant.

Delay in bringing an application to enforce a solicitor's undertaking is relevant to exercise of the court's discretion to enforce it summarily – see **Taylor v Ribby Hall Leisure Ltd [1998] CA**.



The time frame here was that completion occurred in early 2007, Angel were in contact with the Law Society in September 2007 and issued the Part 8 claim in October 2008. No criticism could be made of Angel since courts are keen to discourage premature resort to litigation before alternatives are exhausted.

Accordingly, summary Judgment was given against JOB for enforcement of the

undertakings and an application to join the banks to the proceedings was dismissed. It was unnecessary to make an order to join the only solvent seller - it was for JOB to take appropriate steps to obtain reimbursement of monies it has to pay to obtain the discharge of its security over the relevant property.

In a noteworthy obiter remark, the Judge acknowledged that, if mortgagees insisted upon an entitlement by redemption of a payment considerably greater than any sum it could reasonably have contemplated at the time the undertaking was given, and also the present unencumbered open market value of the property, the court might refuse summary enforcement of the undertaking and order payment of compensation for breach instead. In this case the banks had been pragmatic stating they would be satisfied effectively with the net sale proceeds.

**Angel Solicitors (a firm) v Jenkins O'Dowd & Barth (a firm) and Barclays Bank plc (1) Close Brothers Limited (2) and Ellenwell Properties Limited (3) [2009] CH.**

### Special point of interest:

"This was a simple case of insurers contracting out part of their routine work to investigate claims."

See "Pre-action loss adjusters' fees not recoverable as costs" article on page 3.

## Duty to advise lay client about pending change to the law

In late October 2000 the landmark House of Lords (“HL”) decision in **White v White** was handed down making equality of assets the starting point for financial provision on divorce under s25 Matrimonial Causes Act 1973.

In August that year the Claimant, Mrs Williams (“W”), advised by solicitors, Thompson Leatherdale (“TL”) and counsel, Mr Francis (“F”), an ancillary relief specialist, signed a settlement agreement for financial provision from her husband. This was worth approximately £1.4m and W was palpably anxious to conclude matters quickly to achieve a clean break.

F advised on pre-White law notwithstanding that, by mid June, he knew that both parties in White had leave to appeal to the HL and, in August, that appeals had been argued. When the White decision appeared, one of the two solicitors handling W’s case at TL was on holiday, the other ill. Neither heard about the decision before W’s consent order was made in November. Coincidentally, Mr Williams’ barrister represented Mr White.

W claimed that (a) F should have advised her about White and (b) TL should have recommended that she withdraw an application to have her settlement agreement finalised.

The relevant standard of care was that expected of a competent barrister of F’s seniority in 2000 representing himself as an expert in ancillary relief. The Court held that there was no duty to allude to White in March or when F ‘speed read’ papers in June. Indeed in March leave to appeal had only recently been given and F did not know this.

However, once leave was given to W to cross-appeal and the appeal heard, there was a real possibility that the law would be more favourable to wives irrespective of contribution, particularly in substantial cases where assets exceeded their reasonable requirements. The Judge said it was therefore negligent not to advise W in August on the implications of the case to enable her to decide whether to suspend negotiations. This was no mere error of judgement.

Although the point was not considered, had no conference been arranged with the lay client in August, it would presumably have been prudent for F to have raised White with his instructing solicitors.

The correct advice was that there was a real, but far from certain, possibility that White would benefit W, to be weighed against downsides of abandoning negotiations. There was no duty though to recommend suspending talks, merely to examine the pros and cons, leaving the decision to W.

W, whom the Court considered to be an unreliable witness, gave no evidence about what she would have done if properly advised. Concluding she would have acted no differently, there was no recoverable loss.

As for TL, they had no duty to (i) withdraw the application for a consent order (ii) advise on White or (iii) instruct F to advise on it unless they knew about the case before the order was made. They were entitled to rely on F’s advice. Nor were they obliged to operate a system alerting them to appellate judgments or, if absent from the office, to scan the press for changes to family law.

Had TL heard about White, they would have needed to seek advice before withdrawing their application.

“if a solicitor hears about a pending case they would need to monitor its progress”.

One interesting aspect arising from the case is the extent to which specialist practitioners must track important cases. It would be risky to infer that this is unnecessary or that complete reliance can always be placed on counsel. Here TL had no knowledge of White’s passage through the HL. But, if a solicitor hears about a pending case they would need to monitor its progress. This also begs a more general question as to what a solicitor needs to do in order to keep abreast of developments, legislative changes and case law, particularly if he is representing himself as a specialist in a particular field. See **Locke v Camberwell Health Authority [1991] CA** - solicitors are not a ‘post box’ for counsel.

Williams also explains what to do if settlement is entered into but no consent order has been made when a landmark decision is handed down. There may be scope for setting agreements aside although here W might have struggled to persuade a court to release her - see **Edgar v Edgar [1980] CA**.

**Carol Christine Williams v Thompson Leatherdale (1) Nicholas Francis QC (2) [(2008) QB**



## Costs...

### Pre-action loss adjusters' fees not recoverable as costs

This was an appeal under Civil Procedure Rules (CPR) Rule 47.20 from a costs decision in a detailed assessment focussing on the recoverability of pre-action loss adjusters' fees.

The Appellant brought personal injury proceedings following an accident at the Respondent's premises. After filing Notice of Discontinuance, costs could not be agreed and the Defendant requested detailed assessment of their bill.

On appeal the Claimant challenged one item claimed and allowed as a disbursement, namely fees incurred pre-litigation by loss adjusters, Questgates, in respect of pre-action protocol investigations and correspondence with the Claimant's solicitors, carrying out further enquiries/investigations and taking statements.

It was common ground that Questgates were engaged by the Defendant's insurer to investigate the case at a stage before solicitors were formally instructed. There were two invoices; the first relating to a period prior to solicitor instruction; the second spanning the time when solicitors were instructed on the Defendant's behalf.

S51 Supreme Court Act 1981 provides that costs of and incidental to proceedings shall be at the discretion of the court. Costs of litigants in person fall within CPR Rule 48.6(3).

The Claimant argued that Questgates' fees were not properly described as a disbursement in the bill since no solicitor was instructed when the costs were incurred - analogous

to the position in **Agassi v Robinson [2005] CA**. A person who acts without a solicitor cannot recover as a disbursement fees and expenses paid to a third party for work of a kind which a solicitor could have done. It was argued that this was a simple case of an insurer contracting out part of its work to a third party which it could have undertaken in-house. The Defendant had no direct liability either through insurers or directly to Questgates for these costs. Inter partes recovery thus breached the indemnity principle.

The Judge said that work performed by Questgates would normally have been carried out by a solicitor in this type of litigation. In relation to the first invoice, no solicitor was instructed when the costs were incurred. Applying the Agassi principle - that a person acting without a solicitor may not recover as a disbursement fees and expenses paid to a third party for work of a kind which a solicitor could have done - it followed, in the light of the court's finding, that a legal representative would not have needed to incur the Questgates expenses as a disbursement because it was the very work that the legal representative would have been doing. The limit on recovering disbursements under CPR 48.6(3) requires it to be one that would be allowed if the work had been done by a legal representative. This was not the case.

As to the second invoice, the issue was whether the relationship between the Defendant's solicitors and Questgates was one of principal and agent with the former

instructing the latter to act for it in certain aspects of the case.

Had the solicitors engaged Questgates on an agency basis they could have recovered the expense as a profit cost. But, the documents did not support this conclusion - the only item, the invoice, was addressed to insurers.

Was there any contractual nexus or liability by the Defendant to discharge Questgates' invoices? The subrogation clause between the Defendant and her insurer did not amount to assignment of the cause of action from the Defendant to the insurers.

The law allows insurers to recover only the insured's losses. Since the Claimant had no direct liability to Questgates for fees she suffered no loss for which insurers were entitled to be subrogated. Thus the inter partes recovery was in breach of the indemnity principle.

Nor did loss adjusters' work qualify as 'expert assistance' falling within the exception in **Re Nossen's Letter Patent (1969) Ch** which permits recovery of reasonable and non-profit overhead bearing costs of in-house expertise. This was a simple case of insurers contracting out part of their routine work to investigate claims.

**Susan Elizabeth Cuthbert v Stephen Ronald Gair and Wendy Isabell Gair trading as The Bowes Manor Equestrian Centre [2008] SCCO**

## Costs...

### Security for costs against counterclaiming defendant

The Defendants sought indemnity from the Claimant insurers for fire damage. In proceedings begun by the Claimant insurers the Court considered as preliminary issues the circumstances in which insurers can obtain security for costs from a defendant in respect of a counterclaim, there being a rule of practice that security will not be ordered against defendants merely defending claims.

The two issues were:

- ❑ whether the counterclaim had an independent vitality of its own within the meaning of **Hutchinson Telephone (UK) Limited v Ultimate Response Limited [1993] CA**; and
- ❑ if costs of the counterclaim were confined to those exclusively referable to the counterclaim or included those relating to issues common to both claim and counterclaim.

The Second Defendant was a trading company operating an electrical goods and waste recycling plant; the First Defendant, its holding company.

To pre-empt proceedings by the Defendants out of the jurisdiction, insurers issued against the Defendants seeking a declaration of entitlement to (i) avoid the policies for non-disclosure, alternatively, (ii) damages representing the amount they might otherwise have become liable to pay for claims arising on or after the date when the policies would, but for breach, have been cancelled.

By counterclaim the Defendants sought damages/a declaration that they were entitled to cover. Insurers' application for security included all costs, not limited to

the counterclaim, on the grounds that they satisfied CPR rule 25.13(2)(c) namely, there was reason to believe that the Defendants would be unable to pay insurers costs if so ordered.

Mrs Justice Gloster said the real question was whether it was just, having regard to all the circumstances, to make an order that the Defendants provide



security for costs of the counterclaim and, if so, in what amount. She emphasised that the determination was heavily fact dependent. There is no simple rule of thumb to determine whether a defendant is doing more than simply defending himself when he counterclaims.

The authorities emphasise that even once the condition in 25.13(2)(c) is satisfied, the decision whether it is just to make an order is largely discretionary. Thus the judge's decision on the preliminary issues would not pre-empt the court's discretion at any restored hearing of the application.

Addressing the first preliminary issue, it was true in one sense that the counterclaim was the counterpart of insurers' claim. But the substance of the matter was that the Defendants had to bring the counterclaim to recover indemnity.

Even if insurers discontinued their declaration claim, they

would have to address the counterclaim unless abandoned. It was also chance which party issued first. This fortified the inference that the counterclaim had an independent vitality of its own and was not a mere matter of defence - see **The Silver Fir [1980] CA**. That insurers issued first, had the burden of proof of establishing entitlement to avoid and had not discontinued their claim did not undermine her analysis.

Accordingly, it was just that security be provided. Whether this was because the real substance of the matter was that the Defendants' claim was for indemnity or because the counterclaim had an independent vitality of its own or a combination of these factors, was unimportant.

On the second issue, it followed from *The Silver Fir*, as a matter of law, that all costs of the counterclaim could be included in an order including costs relating to issues common to both claim and counterclaim. There is nothing to prevent courts from awarding security in respect of entire costs of a counterclaim notwithstanding common or related issues arising on both claim and counterclaim.

Further, where it is chance which party begins proceedings and both claim and counterclaim arise from the same facts, there is no justification for confining the claimant's costs to additional costs of the counterclaim – see **Petromin SA v Secnav Marine Ltd [1995] QB**.

**Nicholas G Jones v Environcom Limited (1) and Environcom England Limited (2) [2009] QB**

## Condition precedent to liability

The Defendant contractor had liability insurance with the Claimants. In 2004 it was engaged as sub-contractor to AMEC to work on a tunnel facility when a serious fire broke out on 29 March.

The Claimants sought a declaration that they had no liability under the policy on grounds of late notification and whether the notification provision was a condition precedent to liability to indemnify was tried as a preliminary issue. An ancillary issue about when work commenced does not merit attention.

Clause 4(a) of the Policy Conditions required 'immediate written notice with full particulars of any occurrence which may give rise to indemnity under this insurance'.

'Immediate' meant 'all reasonable speed considering the circumstances' – **Re Coleman's Depositories (1907) KB**. Risk of an occurrence giving rise to indemnity meant a real as opposed to fanciful risk. This involved an objective test factoring in the insured's knowledge to determine the extent to which he knew of and hence was capable of notifying occurrences – **HLB Kidsons v Lloyds Underwriters (2008) QB**.

The Defendant received a letter

from AMEC in early 2007 recommending that it notify insurers, but only did so in late March.

Far earlier than this the Defendant realised from the fire investigations which were undertaken that its role was being analysed. It followed that the fire was an occurrence giving rise to a real risk that the Defendant might claim indemnity under its insurance. The risk would have been recognised by a reasonable man having the Defendant's knowledge. By early April 2004 the Defendant was obliged to give written notice of the fire and possible claim with a possible 'fall back' date of November 2004.

Substantial claims (here, £15m) such as this serve as a reminder to those at the head of the corporate chain to ensure that there has been compliance with policy terms.

It is a matter of policy construction whether notification is a condition precedent or gives rise to damages – **Cox v Bankside (1995) CA**. See too **Alfred McAlpine v BAI (1998) QB** - non-compliance may have little impact on insurers. There must be a 'conditional link' between the obligation to give notice and underwriters' obligation to pay claims – see **Friends Provident v**

### Sirius International (2006) CA.

Clause 13 said insurers' liability was conditional on 'the Assured paying in full the premium demanded and observing the terms and conditions of this insurance'. Read in conjunction with 4(a) a conditional link between the corresponding obligations of insurer/insured was plain.

The underlying commercial purpose justified compliance being a condition precedent, notwithstanding uncertainty as to compliance, but breach only relieved underwriters from liability in respect of which there was a failure to comply with condition 4(a).

Finally, the entire policy had to be construed. No other provision led to a different conclusion though and therefore condition 4(a) was a condition precedent to liability entitling the Claimants to decline liability.

**Aspen Insurance UK Limited (1) Brit Insurance Holdings Limited (2) David Andrew Constable (suing on his own behalf and on behalf of all other members of DA Constable Syndicate 386 GT The 2004 Year of Account (3) v Pectel Limited [2008] QB**

### Contact details:

**Peter Court**  
T: 0870 084 8208  
E: peter.court@plexuslaw.co.uk

**Nigel Plant**  
T: 0870 084 8251  
E: nigel.plant@plexuslaw.co.uk

**Jeremy Newman**  
T: 0870 084 8262  
E: jeremy.newman@plexuslaw.co.uk

[www.plexuslaw.co.uk](http://www.plexuslaw.co.uk)

The content of this newsletter is merely informative and should not be relied upon as a substitute for legal advice.

We hope you have enjoyed this issue of Legal Matters. However, if do not wish to continue receiving the publication, please email : [anna.pickles@parabis.co.uk](mailto:anna.pickles@parabis.co.uk), providing your name, company name and address.