plexus LAW
Part of the Parabis Group

Legal Matters

Professional Indemnity

Issue 7

November 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:

Solicitors - perils of giving advice as specialists

This case highlights the risks to practitioners advising on new and evolving areas of law particularly where there is a foreign dimension.

Lawyers should be encouraged to (a) discuss the approach to uncharted territory with colleagues and (b) consider instructing counsel especially if the sums at stake are potentially substantial. Partners should also satisfy themselves that adequate supervision is given to advice provided by more junior personnel.

Mr Berry ("Berry") sought advice from Laytons Solicitors, on compensation due to Electronic Interconnection Services Associates ("EIS"), upon termination of its lengthy, exclusive and lucrative agency relationship with Polamco Limited ("Polamco"). Laytons specialised in advising on the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations") which imported into domestic law the more generous approach to termination of agencies seen in France.

Laytons were asked to advise on what Berry might properly claim from Polamco, not limited to contract, but also under the Regulations. A key letter, written by an assistant solicitor, conveyed the message that litigation was not viable and that agreed modest pre-estimates of compensation might be upheld by the courts.

In reliance, EIS accepted compensation under clause 12.2 of the contract rather than advance a claim under Regulation 17. However a principal's obligation to pay statutory compensation trumped contractual liability, and could not be derogated from (Regulation 19). For a recent decision on assessing compensation see **Lonsdale v Howard & Hallam Ltd.**

Laytons owed a contractual and tortious duty to give clear advice with reasonable skill and care. As experts, the requisite standard was that reasonably expected of solicitors with such standing and expertise at that time, ie May 2000. (See too **Hicks v Russell Jones & Walker**.

In 2000 it was known that:

- **Regulation 17(6) derived from French law, reflecting a desire to provide 'downtrodden' agents with genuine compensation (King v Tunnock);**
- **guidance could be taken from French law and practice which interpreted loss as an agency's value;**
- **damage was deemed when termination deprived agents of commission which performance of the contract would have yielded**.

Accordingly, Laytons should (a) have realised that EIS could expect substantial compensation - no reasonably careful solicitor specialising in this field could have concluded otherwise and (b) have considered whether clause 12.2 was void. No non-negligent solicitor could have viewed the prospects of challenging this provision as less than reasonable.

Thus Berry received negligent advice that clause 12.2 could survive Regulation 19 and as to implications for the outcome of litigation if it did not. EIS should have been advised that there were reasonable prospects of winning on liability and strong prospects of recovering substantially more under Regulation 17, although not that the claim was risk free. Accordingly, a claim under Regulation 17 succeeded.

Damages for loss of chance were valued at £240,000 representing 60% of the lost value to the agency.

No loss was established under Regulation 8 (commission on transactions entered into post termination if mainly attributable to the agent's efforts). Parties can exclude these rights. Since it was also unlikely that additional monies would have been obtained this aspect of the claim failed.

Alex Berry v Laytons (1) B.G. Jones (2) [2009] QB

Lonsdale v Howard & Hallam Ltd [2007]

Hicks v Russell Jones & Walker [2007]

King v Tunnock [2000]

Solicitors - duty to disappointed beneficiary

This case examined the rights of a beneficiary, Alison Martin ("Martin") against solicitors, Triggs Turner Bartons, Triggs Wilkinson Mann, Judith Wedderspoon and Timothy Caton, ("the Solicitors") who drafted her late husband's will. The Solicitors were also Executors.

The will contained a discretionary trust giving a power of advancement to Martin of up to £100,000. She said it was meant to allow advancement of everything save £100,000 ring fenced for charity and duly sought rectification against the Executors and charities entitled in remainder. The claim compromised with the fund being partitioned 66.5% to her and 33.5% to charity.

In the present action Martin alleged that (1) the error undermined the rectification claim and (2) qua Executors that the Solicitors gave negligent advice in relation to pension benefits and National Savings Certificates.

The decision serves as a reminder to make detailed attendance notes. Martin's evidence was preferred to the solicitors partly because of the absence of corroborative evidence of all instructions. The will was also prepared shortly before Mr Martin died when his precise wishes would have been clear to Martin – contrasting perhaps with routine cases where wills are made long before the testator's death.

The Judge held that the will was not drafted in accordance with Mr Martin's instructions. A duty of care was owed to Martin to prepare it in so far as the intention was to benefit her **(White v Jones)**. This was breached. Despite the discretionary character of the power, loss occurred on death when the value of the benefit actually received was reduced compared with what was intended. It was fair that loss mirrored the percentages agreed in the rectification proceedings. Costs of those proceedings were recoverable including the Trustees' costs which had depleted the estate.

In relation to post-death advice, ordinarily no duty is owed by executors to beneficiaries absent an assumption of responsibility and reasonable reliance **(Cancer Research Campaign v Ernest Brown)**. On the facts, the threshold criteria were satisfied and an ancillary claim for this advice also succeeded.

Alison Martin v (1)Triggs Turner Bartons (a firm) (2) Triggs Wilkinson Mann (a firm) (3) Judith Joyce Wynn Wedderspoon (4) Timothy John Marshall Caton [2009] Ch

White v Jones [1995]

Cancer Research Campaign v Ernest Brown [1998

Solicitors - remedy for breach of undertaking

This decision illustrates the risk of providing undertakings which cannot be honoured. Solicitors should be conversant with relevant provisions of the Solicitors' Code of Conduct and associated guidance.

The Claimants, Mr and Mrs Clark, obtained an order against the Defendant Solicitors, Lucas, for specific performance of their undertaking to discharge a charge on completion of their purchase of a property for £560,000, notwithstanding that this necessitated a payment of nearly twice this figure.

The property was on a development site owned by Lucas' client, Gainsborough Homes Limited ("Gainsborough"). Two charges were secured over the site, one in favour of NatWest Bank plc ("NatWest"), the other in favour of Mr Kenny ("Kenny") who loaned funds to Gainsborough. NatWest's charge took priority - it could set off Gainsborough's indebtedness against any credit balance it had with the bank. NatWest applied the completion funds in set-off rather than remitting monies to Kenny. Even if monies had been sent to him it is speculation though whether he would have released his charge since the terms of advance did not oblige him to do so when individual properties were sold. But, had Lucas obtained a redemption statement from Kenny, they would have appreciated the conundrum.

Whilst accepting their breach of undertaking, Lucas argued for an inquiry of loss and payment of compensation.

Undertakings are usually ordered to be performed unless they are impossible or inappropriate to perform – see **Udall v Capri Lighting Limited**. See too **Angel Solicitors v Jenkins O'Dowd & Barth** in our March 2009 newsletter.

Impossibility did not arise. The standard form undertaking was to pay charges on completion and complications should have been addressed before giving it. As for the amount outstanding, this was large but clear and, being a development site, its size was unsurprising. Again such issues should have been contemplated. Discharge was not unreasonable or disproportionate.

(1) Adrian Paul Clark Heather Jane Clark (2) v Lucas Solicitors LLP [2009] Ch

Udall v Capri Lighting Limited [1988]

Angel Solicitors (a Firm) v Jenkins O'Dowd & Barth (a Firm) [2009]

Limitation - post limitation amendments allowed as new head of loss

Harland & Wolff Pension Trustees Limited ("Harland") sought to amend its Particulars of Claim after the expiry of the limitation period in proceedings against Aon Consulting Financial Services Limited ("Aon"), pension advisers to its pension scheme ("the Scheme"), in respect of a failure to effect 'equalisation' of retirement ages for men and women.

The original claim concerned advice leading up to an equalisation amendment but did not allege negligence about events in late 1993. Alleged loss included contributions which Harland would have obtained from the Scheme employer had additional liabilities been appreciated in early 1993.

The amendment pleaded that Aon should have realised that (i) equalisation was ineffective (ii) there were extra liabilities and (iii) increased pension payments (worth £6.5m) should not have been made.

In approaching a request to amend pleadings after the expiry of the limitation period the legislative purpose behind s 35 Limitation Act 1980 must be considered, namely the need to avoid requiring defendants to investigate matters unrelated to existing matters already investigated.

Could the pension losses be treated as following from the original advice and sufficiently caused by it to be recoverable? New heads of loss arising from existing breach of duty do not by themselves constitute new causes of action – **Aldi Stores Ltd v Holmes Buildings Plc**.

The amendment alleged a consequence of an existing breach of duty. The cause of action to recover loss incurred as a result of pension increases was identical to that to recover loss originally claimed and could be pleaded as consequential loss flowing from original advice. As a corollary it was unnecessary to refer to later breach of duty. Based on breach of contract, the pleading introduced a new head of damage, as in Aldi, not a fresh cause of action.

Likewise, there was no new cause of action in negligence because the new claim arose from the same or substantially the same facts as the new claim based on the original breach of contract.

Thus amendment fell within CPR 17.1(2)(b). Amendments which would have introduced a new breach of duty were refused because this fell outside s 35 Limitation Act 1980.

Harland & Wolff Pension Trustees Limited v Aon Consulting Financial Services Limited [2009] Ch

Aldi Stores Ltd v Holmes Buildings Plc [2003]

Limitation - when time begins to run

Lishman, Sidell, Campbell & Price ("L") and Northern Financial Management Limited ("N") successfully applied under CPR 3 and 24 for the claim against the former and part of the claim against the latter to be struck out or dismissed as statute barred.

Mr and Mrs Williams sought damages against L and N for recommending in 1997 that they transfer pension funds to personal income Drawdown Plans and failing to advise them on stemming their losses.

In October 2003 Mr Williams performed calculations showing that they should have maintained the status quo.

The claim was issued in October 2006. Particulars of Claim cited negligence against L up to April 2001 and beyond this date against N. N accept that alleged breaches against them after October 2000 cannot be statute barred.

The cause of action accrued upon the transfer of funds **– Shore v Sedgwick Financial Services Ltd** (see our bulletins December 2007 and March 2008) or before when early surrender charges applied. But the Williams' invoked s 14A and/or s 32 Limitation Act 1980 to support an argument that they lacked requisite knowledge to bring a claim until October 2003, on which point see **Haward v Fawcetts** and our April 2006 E-alert. The Rubicon is crossed when you know enough for it to be reasonable to begin to investigate further.

The Williams' were advised from the outset that they would be no worse off under the new arrangements so, given falling fund values, they were deemed to possess requisite knowledge by the end 2002/mid 2003 when they should have carried out computations and sought independent expert advice – ie not from L and N. Finding in favour of L and N, the Judge found that the date of knowledge pre-dated October 2003.

L could not be regarded as advisers after December 1997 so no question of continuing duty arose. An argument to advance the date of knowledge based on deliberate concealment of cancellation charges under s 32 was a red herring being a different loss to that sought in the present claim.

(1) John Williams (2) Judith Ann Williams v (1) Lishman, Sidell, Campbell & Price Limited (2) Retirement Asset Management Limited (3) Northern Financial Management Limited (4) Solicitors Financial Management Limited [2009] QB

Shore v Sedgwick Financial Services Ltd [2008]

Haward v Fawcetts [2006]

Evidence - admissibility of pre-contract negotiations

Lord Hoffman delivered the leading Judgment in a House of Lords ("HL") case which featured a challenge to the established doctrine that evidence of pre-contractual negotiations is inadmissible in resolving construction issues, a rule re-affirmed in **Prenn v Simmonds**.

The context was a dispute concerning the construction of a term in an agreement between Chartbrook Ltd and Persimmon Homes Ltd ("Persimmon") ultimately resolved in Persimmon's favour. The facts may be of limited interest save to emphasise the wisdom of documenting dialogue leading up to a contract and checking the minutiae of the final draft to ensure its accuracy and workability.

For the principles on which contracts should be interpreted see **Investors Compensation Scheme Ltd v West Bromwich Building Society**. It requires a strong case to persuade a court that something has gone wrong with language. The salient consideration is what a reasonable person would have understood the parties to have meant by using the language they did. In establishing whether there has been a clear mistake, background and context must always be taken into consideration.

In determining contractual meanings the HL stood by the exclusivity rule. The contract represents the consensus, albeit words can convey different meanings to different people and brings the guillotine down on disputes as to interpretations gleaned from a plethora of sources.

The HL further stated that contract law is designed to enforce promises with a high degree of predictability. To allow conventional meanings or syntax to be displaced by inferences drawn from background would undermine certainty of outcomes in disputes, lengthen hearings and increase costs.

It acknowledged that previous negotiations may be relevant and admitted in evidence on pragmatic grounds. Hence safety nets to the 'exclusivity' rule in rectification and estoppel by convention. These are not exceptions to the rule but operate outside it.

The only recognised 'departure' to the rule is the 'private dictionary' rule which permits parties to give evidence of special and habitual linguistic uses which they shared.

Chartbrook Limited v Persimmon Homes Limited and ors and anor [2009] HL

Prenn v Simmonds [1971]

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998]

Insurance - ambiguous question in proposal form?

How do you approach ambiguous questions in a proposal form? One practical answer might be to make enquiries of the broker/insurer. But, what if the insured just completes the form and his interpretation is challenged?

R&R Developments Limited ("R&R") took out a Commercial Combined and Contract Works policy with AXA Insurance UK plc ("AXA"). The proposal was incorporated in and formed the basis of a policy voidable for non-disclosure of material particulars.

AXA asserted non-disclosure by R&R - that a director was director of (a) a company in administrative receivership and (b) a group where three companies went into liquidation. Were Axa seeking information about insolvency of R&R/management as well as insolvency of companies/legal entities in which they had been involved?

It was unnecessary to ask what the correct construction of the question was, but whether an answer was correct on the basis of the meaning which could reasonably be attributed to it, ie the objective meaning, where appropriate, applying the contra proferentem principle.

With genuine ambiguity (see **Doheny v New India Assurance Co Ltd** in our November 2004 and February 2005 E-alerts) the contra proferentem principle applies to both representation and, where it becomes a term, the insurance term.

Here, the thrust of Axa's questions was plain. A sensible construction showed that enquiry was directed at the directors' personal position arising from their personal affairs or any business they were involved in, not the position of companies.

Without applying any contra proferentem presumption, the Judge found in R&R's favour adding that, even had the question been ambiguous, he would have said that their understanding was fair and reasonable.

Insurers might also waive their right to seek material information if the wording makes it clear that it has no interest in that information. On this basis R&R could infer that AXA had no interest in insolvency of any party beyond R&R and its directors.

As a footnote, insurers wishing to place a wide scope on questions must ask questions clearly and explicitly.

R&R Developments Limited v AXA Insurance UK plc [2009] Ch

Doheny v New India Assurance Co Ltd [2005]

Costs - cost capping orders

This case featured in our previous newsletter (July 2009).

Under a Group Litigation Order ("GLO") 163 claimant households ("the Claimants") brought claims in nuisance and negligence against Biffa Waste Services Limited ("Biffa"). Biffa sought a costs capping order ("CCO") CPR 44.18 at a level equal to the limit of the Claimants' ATE policy (£1m).

The application was unusual, focussing upon disproportionality. Biffa contended that the Claimants' costs were a significant factor in the uneven playing field since, win or lose, they were significantly exposed on costs. If successful they faced difficulties in recovering beyond the ATE cover because the Claimants were severally liable for costs. If unsuccessful the Claimants' solicitor's 100% uplift meant a potential exposure of £4m.

Only exceptional cases are likely to satisfy costs capping criteria in CPR44.18 (5) and (6).

The critical issue was what did disproportionate mean? The starting point is **Musa King v The Daily Telegraph Group Limited.**. The mere presence of a CFA but no ATE does not entitle a defendant to a CCO. Likewise, if ATE cover is limited. But the absence of ATE cover or one with inadequate cover is relevant. CCOs may be more common where there is a GLO.

Focussing on the Claimants' base costs (the uplift must be ignored) and asking if they were disproportionate to the claim value or Biffa's costs, the answer was in the negative. Furthermore, the GLO's terms might be modified and/or the ATE limit raised.

In summary, the 'blackmailing effect' of costs was very present but no CCO would address the inequality because this was not caused by future costs but by the terms of the GLO, CFA and ATE policy.

In these circumstances case management directions and costs assessments, the court's preferred methods of controlling costs, were appropriate. And, to give Biffa some certainty, an order was agreed (with liberty to apply) that the Claimants' eventual costs recovery in respect of future costs would not exceed their recent costs estimate – see **Leigh v Michelin Tyre**.

Derrick Barr & Others v Biffa Waste Services Limited (no2) [2009] TCC

Musa King v The Daily Telegraph Group Limited [2005]

Leigh v Michelin Tyre [2003]

Costs - are pre-action mediation costs recoverable as part of action?

This case revisits the recoverability of pre-action mediation costs in proceedings considered in **Lobster Group Limited v Heidelberg Graphic Equipment Limited** (see our September 2008 newsletter). The general rule is that costs of a stand-alone ADR process are not usually litigation costs.

Roundstone Nurseries Limited ("Roundstone") brought proceedings against Stephenson Holdings Limited ("Stephenson") over a defective floor slab. Stephenson blamed Bridge Greenhouses Limited ("Bridge").

Proceedings were stayed to facilitate compliance with the Construction and Engineering Pre-Action Protocol into which the parties wished to incorporate mediation. Bridge declined to attend because of Stephenson's late service of an expert's report, prompting them to withdraw at the eleventh hour. Thereafter, Roundstone entered Judgment in default of defence, the stay having expired.

Pending mediation the stay was 'rain checked' although Roundstone could be said to have agreed that it needed extending. So, whilst entitled to enter Judgment, this was unreasonable, particularly when they had not updated the court on settlement. Judgment was set aside with costs.

It is contrary to the CPR to enter default Judgment for some technical reason when a defendant has a real prospect of successfully defending the claim.

Roundstone also sought mediation costs because of (a) the cancellation and (b) Stephenson's failure to respond to the letter of claim. As to (b) a response in the mediation position paper was considered sufficient and not a breach of the Pre-Action Protocol

Costs incurred during the Protocol process may be recoverable as incidental to litigation if they form part of the Protocol process rather than a separate stand-alone attempt at ADR.

Mediation was treated as an integral part of an agreed approach to compliance with the Protocol which required a without prejudice meeting. This could be at mediation. Certainly no other meeting was mooted. Nor were costs discussed so they could be sought in the proceedings.

Limiting costs thrown away to the standard basis, the Judge noted that Bridge's absence was down to Stephenson. Stephenson was also obliged to participate in mediation as part of the protocol process and to enable compliance with it.

Roundstone Nurseries Limited v Stephenson Holdings Limited [2009] TCC

Lobster Group Limited v Heidelberg Graphic Equipment Limited [2008]

Costs - whether dishonesty displaces costs follow the event rule

This Judgment considered to what extent the Court should, in exercising discretion to award costs under CPR 44.3, penalise a successful party if they deliberately advance a false case about a central issue in the litigation.

It is plain that an otherwise successful party should not normally obtain costs incurred in advancing a false case and, additionally, might be subject to penalty exceeding the purely remedial consequences of usual orders.

The 8th-11th Defendants ("Ferrero") successfully defended serious conspiracy claims by the Bank of Tokyo-Mitsubishi UFJ Ltd and KBC Bank NV ("the Banks"). Despite having advanced a deliberately false case on aspects of the claim they sought indemnity costs maintaining that the conspiracy allegations were unreasonably pursued.

Ultraframe (UK) Limited & ors v Fielding and ors identifies the Court's approach to a party who advances a dishonest case on a particular issue by an otherwise successful party:

- except **for grave cases featuring an abuse of process there is no general principle that the follow the event rule is wholly displaced;**
- **available sanctions include disallowing costs of advancing that case, ordering a party to pay the opponent's costs attributable to proving dishonesty and imposing additional penalty such as disallowing all that party's costs or paying all or part of the unsuccessful party's costs;**
- **the Judge must anticipate the effect of his order on detailed assessment to avoid double jeopardy;**
- **there is no general rule that a losing party who establishes dishonesty must receive all costs of establishing dishonesty however disproportionate they may be.**

The Judge clarified that indemnity costs are not automatically given where serious allegations fail. Account is taken of range of factors including: whether conduct takes the case out of the norm, the (un) reasonableness of claims and whether allegations were pursued aggressively or without foundation. Merits must be reviewed constantly.

He also addressed the relevance of pre-action conduct. This is highly material to costs orders and the court is not limited to asking whether conduct caused the bringing of the claim or increased costs.

Ferrero took a high level decision to act dishonestly which was an abuse of process. Whilst there was no relevant pre-litigation dishonesty their conduct during the proceedings added to the trial length and fuelled the Banks' suspicions. It was serious misconduct meriting substantial costs consequences to prevent the Banks being out of pocket and penalise Ferrero. Such conduct outweighed the Banks' unreasonableness although it was insufficient to impugn their entire defence as an abuse.

Ferrero's costs referable to the false claim were disallowed. The Banks' costs incurred in that claim were also deducted giving an aggregate deduction of 14% from the total. One other issue took the disallowance to 15%. But for Ferrero's dishonesty they would have qualified for some indemnity costs but this element was forfeited. Additionally, a higher penalty was warranted to mark the Court's disapproval. The disallowance of Ferrero's costs was increased to 30% leaving the Banks to pay 70% of their costs. The effect of the adverse costs consequences was £3.24m.

(1) The Bank of Tokyo-Mitsubishi UFJ Ltd (2) KBC Bank NV v (1) Baskan Gida Sanayi Ve Pazarlama AS and ors [2009] Ch

Ultraframe (UK) Limited & ors v Fielding and ors [2006]

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