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Legal Matters

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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.

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Special point of interest:

"the Judge observed that an ATE policy might be disclosable in any event in certain circumstances, such as applications for costs capping/ security for costs."

See Disclosability of ATE Policy on pages 5 & 6

Duty to advise on issue outside scope of retainer

This Court of Appeal (CA) case featured in our **March 2008 newsletter** and addresses whether counsel are under a duty to investigate 'tangential' issues which may not be referred to specifically in instructions.

The Claimant solicitors, Pritchard Joyce & Hinds ("PJH"), having settled a claim from Mr and Mrs Fox ("F"), sought contribution from counsel, Peter Susman QC ("S") and David Batcup ("B") in respect of damages. Counsel appealed a first instance finding against them.

The complex hinterland centred on a failure to advise on limitation in a claim against F's former solicitors, Wellers, itself based on failure to advise on limitation in a claim against other solicitors, Lindars Leech ("LL"). LL's 1985 advice lost F a favourable settlement opportunity. Any claim needed to be brought against LL by the end of October 1991 and against Wellers by October 1997. PJH and counsel omitted to red flag the latter deadline.

Wellers were instructed from early 1991-1996 and retained B to advise on a claim against LL in respect of litigation but not on any claim relating to oral advice. PJH assumed conduct of the proceedings against LL in 1996 and retained S in 1997. The case against LL settled for £150,000 plus costs. Proceedings were then commenced against PJH over their failure to advise that a claim be brought against Wellers for not recommending proceedings against LL in relation to the settlement advice.

Below, the Court held that B should have known that the advice formed part of the claim from mid 1995; S, from August 1997. Accordingly, they were in breach of duty in not raising the issue before October 1997.

The lynchpin of the appeal was that the Judge failed to apply the test in **Moy v Pettman Smith [2005]**. The question was not whether the Judge or barristers in S and P's position would have given the advice but whether any reasonably competent barrister would have.

The CA stated that the Judge set too onerous a duty on Wellers to say they should have investigated the existence of a discrete claim against LL in relation to advice, when the focus was on LL's conduct of the litigation and their written advice was unimpeachable.

Having found that it was not arguable that any reasonable solicitor in Wellers' position in 1991 would have pursued enquiries further, it followed that neither counsel could be criticised for not appreciating before the end of October 1997 that there might be a real prospect of bringing a successful claim against Wellers either. This possibility would not have occurred to any reasonably competent junior and leading counsel at that time. The Judge was the first one to raise the spectre of a potential stand alone claim in respect of oral advice.

The CA concluded that the Judge set out an over-exacting standard for the professional duty owed by counsel.

The case highlights the dangers to lawyers who take conduct of a longstanding claim (particularly where there have been several changes in representation already) and emphasises the need to address all potential lines of enquiry afresh.

Pritchard Joyce & Hinds (A firm) v Batcup & Anor [2009] CA

Joinder of excess insurers to main action

This case featured in our **June 2008 newsletter**. The First and Second Claimants were subsidiaries of Erinaceous Group plc ("the Group"). The Second Claimant acquired the business of the First Claimant ("DHL") property consultants. The Defendant/Part 20 Claimant ("HPC") were insurance brokers instructed by the Claimants to handle professional indemnity insurance for group companies with primary layer cover of £10m per claim and excess cover for DHL for a further £10m. Alexander Forbes Risk Services UK Limited (Forbes) were sub-broker.

Forbes placed cover but the excess insurance limited cover to liability arising from commercial property management activities. The Claimants face valuation claims which may impact on excess insurers. The latter deny liability because claims arise from valuations.

In a claim against HPC for placing limited excess cover, HPC seek indemnity or contribution from Forbes. At first instance they failed to persuade the Court to have excess insurers joined as Defendants so they could be bound by decisions on construction and rectification.

The Court said CPR 19(2) conferred jurisdiction to make the joinder order notwithstanding that no party was in a position to make a claim against excess insurers. But, claims were weak and a stronger construction claim (that the policy was meant to cover DHL and valuations) had not been pursued by the holder of the right to make such claims.

Forbes failed to persuade the Court to strike out the claim against them or for summary Judgment. It was under primary contractual and tortious duties to exercise reasonable care in executing HPC's instructions and to advise on discordance between those instructions and the limiting condition. It also owed duties to HPC and an 'over-arching' duty of care to the Claimants.

Emphasising that rectification is a notoriously difficult remedy to obtain, the Court of Appeal (CA) referred to **Agip SpA v Naigivazione Alta Italia Spa (The Nai Genova and Nai Superba) [1984]** as setting out the established principles. Convincing proof will often be required to demonstrate the alleged common intention to override an agreed document.

But here the first hurdle of establishing a prior common intention was overcome since the original quote and, arguably the FONs (firm order noted endorsements) contracts, covered DHL's activities. There was also evidence that the leading underwriter considered that the slip contract continued on the same basis as the FON contract, ie that it would be providing excess cover for DHL.

Nevertheless, and crucially, evidence was not provided from a key figure within Forbes who might have shed light on key issues, although he was available. Without this input the CA said it was a strong thing to set aside the rectification claim at an interlocutory stage. This comment emphasises the need to marshal all relevant individuals to give evidence or to be able to explain why this has not been done.

The CA considered that there was reasonable evidence that a mistake had occurred, because the excess cover did not make commercial sense if it did not cover valuations. The Judge also relied on an authority at odds with the factual matrix – here there was no general re-negotiation of terms for the excess cover. He thus rejected the rectification claim on an erroneous basis and a Trial was needed to resolve it.

In the circumstances the CA did not regard the case as insufficiently strong as to prevent it being desirable to join excess insurers. If they were not parties to the Trial, then matters would have to be investigated without their documents and evidence being available and they would not be bound by the result. Similarly, it was desirable for them to be able to contribute to construction issues and be bound by their outcome.

Dunlop Haywards (DHL) Limited and Anor v Erinaceous Insurance Services Limited [2009] CA

Construction - when can insurers avoid for material non-disclosure?

This case is considered in our **December 2008 newsletter**. The Appellant, Templeton Insurance Company Limited ("Templeton"), provided Laker Vent Engineering ("LVE"), mechanical engineering contractors, with legal expenses insurance for construction claims for 3 years from late 2002, renewed annually.

Templeton declined cover for arbitration proceedings between LVE and a German company (GWUG) in respect of a dispute concerning works undertaken at a power station. It sought to avoid cover ab initio for (a) material non-disclosure and (b) alleged non-compliance with a notification provision asserted to be a condition precedent to liability.

Below, the court made the **following findings:**

- **on renewal, LVE owed the usual duty of disclosure in s 18 Marine Insurance Act 1906. This was also contained in the notification clause and was not a condition precedent to liability;**
- **on the issue of material knowledge about a dispute, material means a circumstance which would have an effect on the mind of the prudent insurer in estimating the risk. But, even if matters relied upon by an insurer are material, non-disclosure alone would not necessarily entitle him to avoid insurance see Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995]. He must also show that he was induced by non-disclosure to enter into the policy on specific terms;**
- **by renewal, LVE's relationship with GWUG was not a material circumstance requiring disclosure. To be disclosable there must be some features of the relationship which objectively showed a real risk of escalation to the point of formal dispute resolution procedures beyond the risk ordinarily inherent in complex construction contracts. On the facts there was no obvious indication that differences would lead to proceedings. Proper notification was given once it was clear that the matter was heading this way.**

Templeton challenged the Judge's interpretation of the facts and the application of the law to the facts relating to the defences they had raised.

The Court of Appeal (CA) observed that the Judge's conclusion that LVE was under no duty to disclose the discussions between it and GWUG because it was not a material circumstance

was a finding of fact – an exercise of judgement or evaluation weighing all relevant facts and factors.

The CA can draw any inference of fact which it considers justified on the evidence but it will not interfere with primary fact findings unless they were plainly wrong. However, it has greater latitude to challenge a judge's overall assessment of the effect of those findings. The more the first instance judge's assessment is dependent on oral evidence or the overall assessment of a number of factors, the less willing an appellate court is likely to be to interfere with the judge's conclusion.

This assessment of the CA's role is set out in **Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2003],** a case approved by the HL in **Datec Electronic Holdings Limited and ors v United Parcels Service Limited [2007]** and was therefore an approach which had to be adopted by the CA in this appeal towards findings of fact.

The CA held that the Judge's characterisation of the dispute could not be challenged nor could his finding that the dispute was not a material circumstance which needed to be disclosed. His view was both rational and sound. Neither could it be argued that Templeton had been 'induced' to enter the insurance because of non-disclosure, since no oral evidence was adduced from the underwriting team. As in the previous case emphasis was placed on the Court wanting to hear the totality of the evidence.

An objective test was correctly applied to determine whether the relationship between the insured and client had given or was likely to give rise to a construction claim and whether the dispute had reached the next level where formal dispute resolution proceedings would be required. The CA thus upheld the finding below that LVE was entitled to indemnity.

Laker Vent Engineering Limited v Templeton Insurance Company Limited [2009] CA

Quantum and apportionment of damages between Defendants

Nationwide Building Society ("Nationwide") advanced £10.5m to a company to purchase a commercial property in reliance on the advice of Mr McGarry of Dunlop Haywards ("DHL") who fraudulently valued the premises at £16m, although only worth £1.5m. Because of the fraud Moody's downgraded Nationwide's rating from stable to negative, retail funding (from members) declined and institutional funding (wholesale) became more expensive. Many members also withdrew funds.

Nationwide issued against its solicitors Cobbetts and DHL to recover its loss; contribution proceedings followed against Cobbetts. DHL went into liquidation making a pyrrhic victory of the summary Judgment awarded against it. Meanwhile, Cobbetts compromised its claim for £5,585,000 plus costs.

Nationwide pressed on with its assessment of damages against DHL, including in its claim a range of consequential losses such as funding costs.

The Court clarified that against DHL, Nationwide was entitled to be put in the position it would have been in had the statement not been made. It could thus recoup losses caused by the fraudulent statement. Dishonesty precluded a defence of contributory negligence.

DHL were thus liable for the following items totalling £21m:

1. **advances net of arrangement fees;**
2. **loss of interest from alternative advances;**
3. **cost of provable managerial and staff time;**
4. **loss of retail deposits;**
5. **loss of opportunity to make mortgage loans - £7.5m;**
6. **additional funding costs (backstops);**
7. **loss on a 12 month retail bond.**

Deducting the amount paid by Cobbetts, Nationwide was entitled to Judgment for £15,464,106 against DHL. As against Cobbetts. only the first 2 items were recoverable, since they were not responsible for item N° 3 and the other items were too remote.

What was damage for the purposes of contribution proceedings – Nationwide's total loss or the amount Cobbetts paid to Nationwide? The latter was reasonable and they would have been liable for it had the claim proceeded.

The Court can distinguish (and take account of when assessing contribution between Defendants), between the foreseeable loss for which both Defendants were responsible and the economic loss for which only DHL were liable because they were fraudulent.

The damage for which both Defendants were liable was £13,200,179 (the first 2 items minus the value of the property) reduced by 50% to take account of Nationwide's contributory negligence. The fact that Cobbetts had a clause limiting liability to £5m per claim was irrelevant firstly because of DHL's fraud and secondly, DHL did not have such a provision. It did not therefore reduce the contribution claim.

Liability was apportioned between the Defendants 80:20 taking account of the fraud.

Nationwide Building Society v Dunlop Haywards (DHL) Limited (t/A Dunlop Heywood Lorenz) (1) Cobbetts (A Firm) [2009] QB

Condition precedent to liability

How does the court approach assessment of damages where solicitors are negligent in the conduct of an action? Thomson Snell & Passmore ("TSP") admitted liability in respect of their conduct of a clinical negligence action by Mr Haithwaite ("H") against an NHS trust ("the Trust") for alleged delay in the diagnosis and treatment of a Subdural Haematoma in 1999.

TSP's negligence lost H the chance to pursue a claim. The Court's task was to value this – see **Mount v Baker Austin (a firm) [1998].**

The burden is on a claimant to show he has lost something of value, ie that the claim had a real and substantial rather than merely negligible prospect of success, not to show how the case would have been decided. The evidential burden is on the defendant to show the litigation was valueless. Courts tend towards a generous assessment of the claimant's prospects.

H's case was dependent upon the recollection of his girlfriend and the Court acknowledged the difficulty of reconstructing events years later. The Judge estimated the chances of H establishing negligence at 40%. This was not the same as establishing liability. On causation H needed to show some harm which was more than de minis or insignificant. If H had established negligence he would have had a good prospect of showing that this caused some loss which was more than minimal.

Expert evidence supported the view that delay exacerbated H's symptoms. A scan would have taken place speedily and an operation to remove the haematoma arranged or the situation monitored. There was a 75% chance of his proving more than minimal loss but overall prospects of establishing liability were 30%.

Taking account of the fact that non-tortious as well as tortious factors were in play, general damages would have been awarded of £11,000 plus net lost earnings at the time of the notional trial (January 2005) £52,000, future earnings £198,000, care costs £114,000, a Smith v Manchester award, (compensation for disadvantage in the labour market) £15,000 representing one year's income and future care £10,000. Together with interest the total award would have been £392,000, 30 % of which was £117,000.

Ashley Neil Haithwaite v Thomson Snell & Passmore (a firm) QB [2009]

Relevance of costs estimate

The underlying dispute between the Appellant Withers and Mastercigars Direct Limited ("MDL") was as to non-payment of fees. Two particular bills were the focus of the current appeals and cross-appeal. One hotly contended issue, which arose in the detailed assessment, concerned the effect of an estimate dated 6 May 2005. MDL argue that they relied on Withers' estimate and that this should translate into the amount ultimately deemed recoverable by Withers.

Upon receiving a draft Judgment on costs from Master Simons in July 2008 Withers, referring to **English v Emery Reinbold [2002]**, stated that certain reasons were inadequate and invited Master Simons to elaborate on specific matters. He did not do so. In an appeal against his decision Withers complained that (a) inadequate reasons were provided for some conclusions and (b) conclusions were expressed on matters on which they had not been heard.

Mr Justice Morgan set aside an order which had given rise to the July 2008 decision. He reiterated that the principles applying on an assessment between solicitor and client where the client asked the Costs Judge to take into account an estimate were those in **Leigh v Michelin Tyre plc [2004]**. He also referred to the more recent decisions of **Reynolds v Stone Rowe Brewer [2008]** which dealt explicitly with the question of explanations for the difference between the estimate and bill, plus the question of reliance. He spoke in approving terms of the Judge's approach. There the client had relied on the estimate and the Judge made findings as to the way he had done so arriving at a figure which, as a matter of Judgment, was reasonable rather than to add a margin to the estimated figure.

Addressing the substance of the decision below the court made the following findings:

- **it disagreed that the Costs Judge's reasons were inadequate or that he was wrong in law to conclude that MDL had shown how it relied on the estimate;**
- **as to the critique that it was wrong in law to find that it was not relevant to show that MDL had acted to its detriment, it was necessary to examine Leigh. In conclusion, it was unnecessary to prove detriment in the sense of showing on the balance of probabilities that a party would have acted differently and in a manner which would have been more advantageous to it;;**
- **whilst not agreeing with all the statements below as to detriment, the stance adopted was not sufficient to undermine essential findings of fact as to MDL's reaction to the estimate and what it would have done had they received more accurate figures. Nor could findings on reliance be undermined.**

There remained the important question of the effect of reliance on the assessment of the amount of costs it was reasonable to expect MDL to pay. Mr Justice Morgan stated that the court should determine how clients relied on an estimate but without conducting an elaborate and detailed investigation, deciding whether the costs need to be reduced by reason of its findings on reliance and by how much in order to do justice between the parties. The ultimate task is to ascertain the sum it is reasonable for the client to pay, having regard to the estimate and other relevant matters.

The Judge was overly critical of Withers' statement of reasons explaining the discrepancy between bills and the estimate and he was wrong to disregard it. Withers also challenged an allowance of a 20% margin above the amount of the estimate. The adoption of a margin approach is not an immutable one, although it can produce the correct answer. But, in any event, the Costs Judge gave inadequate reasons for selecting a 20% margin. This appeared to be arbitrary rather than calculated. Rather than refer the matter back to the Master the outstanding issues would be resolved by a report prepared by the Senior Costs Judge.

Mastercigars Direct Limted v Withers LLP (Ch) [2009]

Disclosability of ATE policy

This Judgment confirms that in certain circumstances a court will order disclosure of an After the Event policy ("ATEP").

In an important test case for the Defendant, Derrick Barr and others ("DB") brought claims in nuisance and negligence relating to the Defendant's land fill site. In an application for a Group Litigation Order ("GLO") under CPR 19, the Defendant sought disclosure of an ATEP from QBE Insurance (Europe) Limited ("QBE"), referred to in DB's witness statements, as a condition of agreeing to a GLO.

QBE intervened to make submissions.

Although the traditional view is that terms of an insurance policy are private - **West London Pipe Line Storage Limited v Total UK Limited and Ors [2008]** - analysed in our **September 2008 newsletter** - authority showed that the existence of an ATEP

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Disclosability of ATE policy

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can be a critical element of litigation because, as here, without it, no claim would be pursued. Did this justify a different approach to disclosure?

The Judge said that cases demonstrate that different considerations might apply to disclosure of an ATEP - **Marion Henry v British Broadcasting Corporation [2005]** and **Hobson v Ashdown Morton Slack Solicitors and ors [2006]**. Significantly an ATEP differs from liability insurance since it is not pre-existing but specifically taken out for litigation.

CPR 31.14 addresses disclosure of documents mentioned in documents - see **Expandable Limited and anor v Rubin [2008]**. Because the ATEP was referred to - deliberately in fact to secure the GLO, disclosure would be ordered under CPR 31 unless it was irrelevant or covered by litigation privilege.

The policy was clearly relevant because proceedings depended on it and should be disclosed to enable QBE to form its own view on its limits and exclusion clauses. The only aspect of the policy which might attract privilege concerned premiums but these details could be redacted.

Although 31.14 was decisive, the Court also assessed its position under its case management powers. Repeating that different considerations applied where an ATEP formed a vital component of litigation, the traditional approach to disclosure of liability policies was displaced.

Furthermore, reference in cases to "a cards on the table" approach to the CPR supports the argument for disclosure. Balancing competing interests and the effect of disclosure, it would ensure a level playing field for the Defendant to know that DB could meet their costs should they win. Importantly, neither DB nor QBE cited detriment. It was proportionate to the financial position of each party to order disclosure, absent any contrary provision of the CPR. The Practice Direction which required disclosure of the funding arrangement was a minimum level of disclosure and did not preclude further enquiry.

Finally, the Judge observed that an ATEP might be disclosable in any event in certain circumstances, such as applications for costs capping/ security for costs. Whilst these cases are fact-sensitive and it is dangerous to draw firm principles, there was precedent showing that sensitive matters or documents relating to funding are disclosable to allow the court to dispose of disputes fairly. Policy terms and even the success fee might be disclosable.

Derrick Barr and Others v Biffa Waste Services Limited and QBE Insurance (Europe) Limited (TCC) [2009]

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