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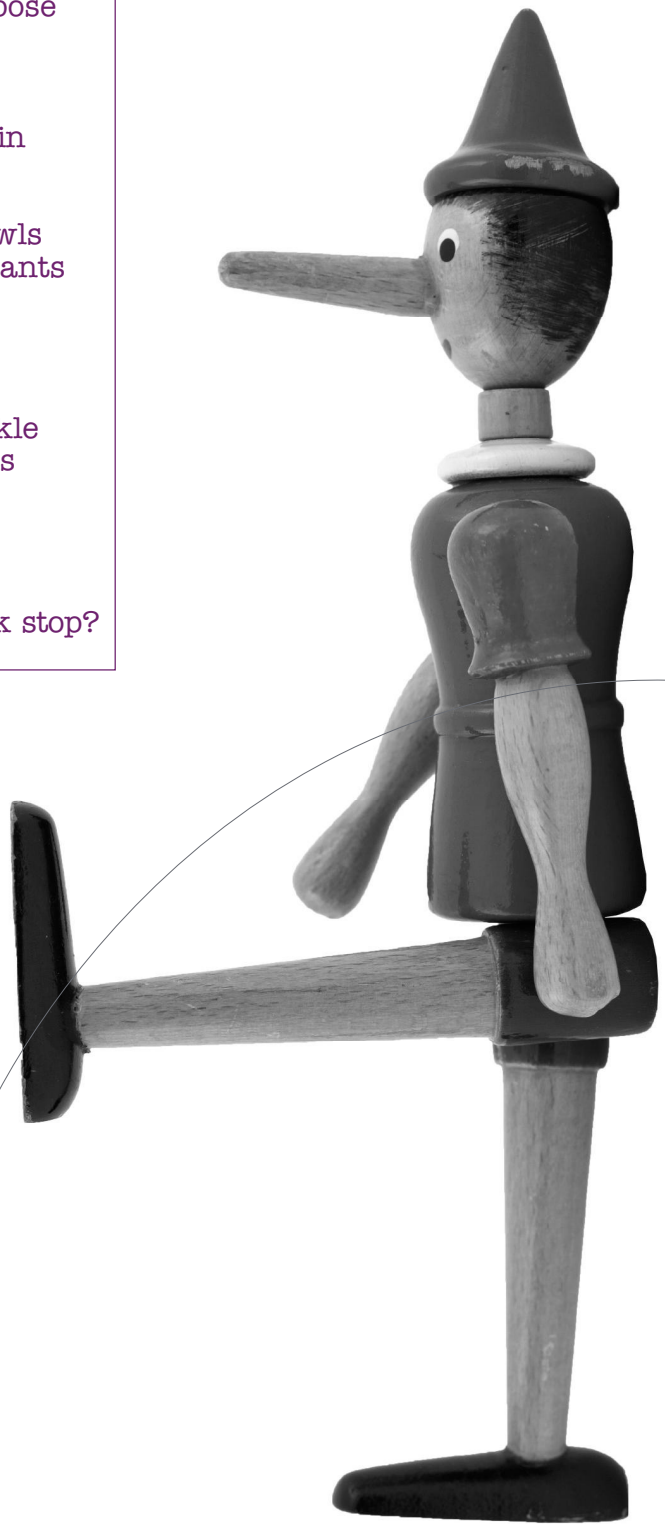

hello

welcome to the second edition of *Covernote* for 2011

contents

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the dominant purpose test

Lessons about privilege to be learnt from *Axa Seguros v Allianz Insurance plc*

Very often an insurer will commission reports from an "expert" to assist with their assessment of whether a claim, and how much of it, is covered by the policy. These reports are potentially dynamite. A question which often arises is whether the policyholder is entitled to see them.

This question was considered recently by Christopher Clarke J in the context of the reinsurance of a Mexican highway which suffered substantial damage as a consequence of a hurricane.

Factual background

The highway was insured by Axa which in turn reinsured it with a number of reinsurers under a facultative reinsurance contract. The reinsurance was not "back-to-back" with the original in that it covered the highway only on condition that it was built to "internationally acceptable standards".

Before inception of the reinsurance, the reinsurers had asked for surveys confirming the acceptability of the highway. When this was not forthcoming to the level of detail required by the reinsurers they imposed a "reverse onus of proof" clause. In essence, Axa was required to satisfy the condition in the event of a claim.

Following the loss, reinsurers commissioned their own reports from an engineer who was asked to advise on the extent of the damage (quantum) and the general nature of construction of the highway (liability). Axa asked for sight of the reports but the reinsurers refused on the basis of litigation privilege.

The law

The law in this area is well settled. Litigation privilege attaches to a document where (1) at the time it was created litigation was reasonably in prospect and (2) the document was produced for the dominant purpose of the litigation in prospect.

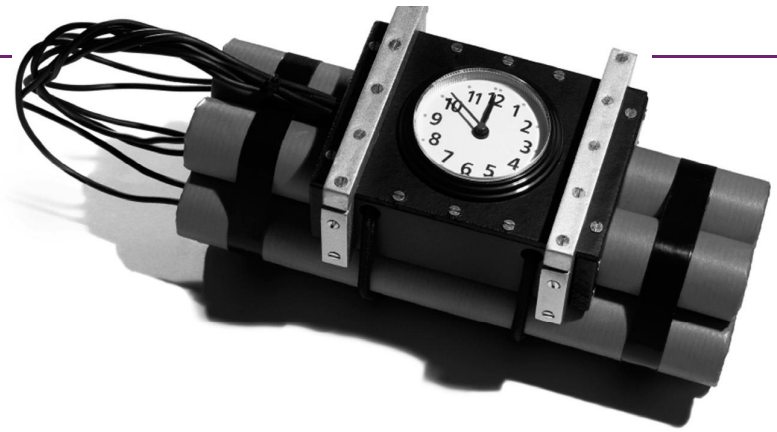
Litigation reasonably in prospect

Often the dividing line between the circumstances where litigation is reasonably in prospect and where it is merely a possibility is not always clear. This was recognised by the judge who thought this was a "borderline case".

He held that at the time the reports were produced litigation was reasonably in prospect because Axa had failed to provide surveys confirming the acceptability of the highway and the likely reason for this was that they had not been built to an acceptable standard. Equally, if the engineer's report left the issue unclear, this too would have given rise to a reasonable prospect of litigation (because of the operation of the "reverse onus of proof" clause).

Dominant purpose

The reinsurers failed to convince the judge that the reports were produced



what's new

for the dominant purpose of providing advice for the litigation in prospect. While they had been obtained for the purpose of assessing whether the highway had been built to the requisite standards ie, advice on the litigation in prospect; there was a separate and distinct purpose of assessing the extent of the damage caused and the correctness of the figures supplied for the remedial works ie, quantum. In the context of a reinsurance contract, Axa and the reinsurers shared a common interest.

The judge did not consider either purpose was predominant and the material contained in the reports was not separable. Therefore reinsurers' claim for privilege failed.

Comment

The test of whether litigation is reasonably in prospect is an objective one and a court will consider all the contemporaneous documents. Subjective endorsements/scratches by (re)insurers are "without prejudice" to cover, although relevant, are not conclusive as to whether litigation was in prospect.

One way round this outcome may have been for the reinsurers to address the issue of the construction of the highway in a separate report since it was obviously the battleground between the parties (given reinsurers' suspicions about the quality of the roads and Axa's failure to provide surveys to confirm the position). They could then have addressed separately the issue of quantum in relation to which there was a community of interest.

Beware that the claim for privilege could be diluted if the "expert" producing the report is subsequently to act as the expert in the proceedings, since in discharging his duty to the court he will almost inevitably have to disclose details of earlier inspections if they cast doubt on his formed view.

We are delighted to announce the promotion of insurance associates David Gooding and Neil Howes to the partnership, bringing the total number of insurance partners to 12 as of 1 June 2011.

David is based in the firm's Birmingham office and specialises in handling the defence of professional negligence claims against a wide variety of professionals David recently managed one of the firm's largest pieces of insurance litigation involving a multi-party £27 million lenders' claim.

Neil has been appointed to lead the firm's insurance team in Leeds and is spearheading the growth and development of the firm's insurance practice to the east of the Pennines. Neil specialises in defending professional negligence claims.

Since September we have also welcomed barrister Selina Watts and solicitors Andrea Lynch, Elaine Mitchell, Chris Wragg, Laura Bennett, Joe French and Lisa Marshall to the insurance group.

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when is a solicitor providing services in private practice?

Law firms have the benefit of insurance cover which is governed by the Minimum Terms and Conditions. This does not mean that they are covered for all claims they face and, while it is stating the obvious, they are only covered for civil liability arising from services provided in private practice as solicitors.

Guidance from case law

Historically, law relating to this issue has been found in cases relating to the provision of undertakings. However, the case of *Zurich Professional Limited v Brown & Barnes* considered the meaning of the phrase "private legal practice" in a professional indemnity policy and identified a two-stage approach.

Looking first at whether the solicitor was providing services as a solicitor in private practice, the court stated that "its task is to establish objectively by reference to all of the admissible documentary and other evidence, taking due account of the regulatory background, the capacity in which (the solicitor) acted". Second, if the answer was positive, the court should consider whether the solicitor was doing so in connection with the legal practice carried on by the insured firm.

As regards the cases relating to undertakings, the case of *Ruparel v Awan* summarises the key issue as follows (**our emphasis**):

"The essential requirement is that the undertaking should have been given by the solicitor **in his capacity as a solicitor** ... since that is the element which attracts the supervisory jurisdiction of the court. **The mere fact that the giver of the undertaking happens to be a solicitor is not enough**. The undertaking must therefore be given as part of or in connection with a transaction or activity which is 'solicitorial'."

In addition, in this context it is worth also noting the decision in *Antonelli v Allen* where the court held that receiving and holding monies, without instructions, did not amount to acting within the ordinary course of business of a solicitor.

Halliwells LLP v NES Solicitors and Quinn Direct Insurance Ltd

This recent decision looks specifically at the question of what constitutes the provision of services in private practice, and is highly relevant because of it.

The facts of the case are quite complex and it is not proposed to set them out here. In summary, there were two partners in the firm and it was found that they both acted dishonestly/condoned the dishonesty in giving an undertaking which they knew contained a lie. The lie centred on whether or not the firm held substantial cleared funds (£1.5 million).

In addition to seeking to exclude cover on grounds of dishonesty, Quinn also sought to exclude cover on the basis that the firm's actions did not amount to "the provision of services in private legal practice as a solicitor" under the policy. Against this argument, it was found that there was evidence of a retainer between the firm and the "client", and the firm was to be paid a fee for providing the undertaking.

However, the court (rightly in our view) agreed with Quinn and found that the firm had only acted on the provision of the undertaking requested by the client and for no other purpose – it had no involvement in any underlying transaction whatsoever. As such, the court determined that the claim did not arise from the provision by the firm of services in private legal practice as solicitors, and therefore cover was successfully excluded on this second ground also. It was not given in a solicitorial capacity.

Summary

Insurers of law firms can take some considerable comfort from this recent decision. It can only be right that courts do not interpret “solicitorial” capacity, or activity, too widely. If that were not the case, it would be an affront to common sense, and would make insurers’ lives very difficult indeed given the scope of claims that would otherwise fall to be covered by a policy where this is inherently not its purpose.

Often in cases where this issue arises there is also underlying dishonesty on the part of the solicitor concerned, but that will not always be the case. Given the changing world within which we live, the speed of such change and the way business is conducted, it is absolutely vital that insurers are protected from any exposure to claims arising from situations which never formed any part of the bargain they entered into.

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the High Court bowls one for the defendants

Limitation was considered in the recent decision of *Bowling & Co v Edehomo* and the outcome was crucial to whether the claim would be time-barred

The court in this case considered the date upon which the cause of action would accrue for a property owner in her claim against solicitors who had breached their duty by acting in a fraudulent transfer of the property. The first instance decision was that the cause of action accrued on completion, meaning that the claim was within time. The defendant solicitors successfully appealed to the High Court.

The facts

The facts are relatively simple. In 1989 Mr and Mrs Edehomo bought a property in East London. They held it as joint tenants. Three years later Mr Edehomo, by that time estranged from his wife, instructed Bowling & Co to act for him in the sale of the property to a third party. Contracts were exchanged on 21 November 2002 and completion took place on 2 December 2002. Mr Edehomo received the sale proceeds.

Mrs Edehomo was unaware of the sale and played no part in the transaction. "Her signature was forged, it would appear by Mr Edehomo, on both the contract and the TR1 form of transfer," Roth J said.

On 1 December 2008 Mrs Edehomo issued a claim against Bowling & Co. This alleged that the firm was in breach of its duty of care to her to take reasonable steps to establish her husband's identity and the identity of the woman who had apparently impersonated her and to carry out the conveyancing transaction with skill and competence. Although pleaded in both contract and tort, it was proceeded with only in tort as on Mrs Edehomo's own case there was no contract between her and the firm.

Bowling and Co sought to strike out the claim on the basis that it was time-barred, being more than six years since exchange of contracts.

Was Mrs Edehomo's claim brought in time?

Section 2 of the Limitation Act 1980 provides that "... an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." A cause of action accrues in tort at the date when the claimant suffers damage. Therefore the question to be answered by the court was when, for the purposes of limitation, Mrs Edehomo suffered damage, so as to give rise to a cause of action, arising from Bowling Co's breach of duty.

On Mrs Edehomo's case, damage was suffered, and the limitation period therefore started to run, from the date of completion of the sale of the property, on 2 December 2002. Her claim form was issued on 1 December 2008 and so on her case she had brought her claim in time, within the six year limitation date (albeit only by one day). However, Bowling & Co maintained that damage was suffered on exchange of contracts.

What is meant by "damage"?

The High Court considered the decision in *Forster v Outred & Co*, where the Court of Appeal held that the plaintiff suffered damage caused by her solicitors' alleged negligence at the time when she executed a mortgage on her freehold property as security for a loan, and not only at the later time when she was required to pay on that security. The court in that case said that actual damage:

"... is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control ..."

Was damage suffered on exchange of contracts or completion?

The judge agreed with counsel for Bowling & Co who advanced the same analysis applied in another recent decision (*Nouri v Marvi*) that Mrs Edehomo suffered damage on exchange of contracts. Critical to the reasoning of the Court of Appeal in *Nouri v Marvi* was the finding that on the date of simultaneous exchange and completion, as opposed to the date of registration, there was a blot on Mr Nouri's title that significantly decreased the marketable value of the property. Counsel in this case said that "if Mrs Edehomo had sought to sell her share in the property after 21 November 2002, and for this purpose is presumed to be aware of the fraud, she would have had to disclose to a potential purchaser the existence of the forged sale by her husband and the value of her interest in the property was therefore significantly diminished."

The judge therefore held that Mrs Edehomo did indeed suffer loss on exchange, such that she could then have started proceedings against Bowling & Co. It follows that she had a cause of action against them in tort which accrued more than six years before the commencement of proceedings.

What about a continuing duty?

A question asked by the judge was whether there was a continuing duty on Bowling & Co to verify the identity of their clients up to the date of completion. If so there would have been a further breach at completion, the consequence of which being that the claim would not have been time barred. This had not been raised by the court below and so was not a question considered in the appeal. However the judge gave permission to Mrs Edehomo to amend her case to include this. It is not known whether Bowling will appeal.

Comment

Although it remains to be seen whether Mrs Edehomo will successfully pursue the continuing duty argument, as it stands this is another decision in favour of the defendant professional. It reinforces the message given in *Nouri* and confirms that, for the purposes of limitation concerning a sale of property, damage arising from a solicitor's breach of duty is suffered at the time contracts are exchanged rather than at completion. While the outcome of this case and *Nouri* is encouraging, the outcome of the continuing duty point is critical to the applicability of both of these cases. Guidance from the court is needed to clarify this issue.

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solicitors in the firing line

While negligence claims against law firms are a fact of life, recessions cause a spike to occur both in terms of number and size of claim

The current economic cycle has been no different, and the first half of 2011 has seen significant activity in this arena. In particular, a number of new claims have made the press recently, the most prolific of which being reports in February that Linklaters is facing a £115 million claim from Credit Suisse relating to advice given on a transaction which allegedly resulted in a better outcome being lost. This has lead to Linklaters pursuing an Italian firm who it is understood was an alliance partner at the time. Another recent example of a large loss claim is the £50 million loss sought from Mace & Jones which was successfully defended at trial.

Predicting claim trends is a critical part of the insurance equation, and some are easier than others to spot, for example lender and fraud based claims. However, what is both telling, and concerning, for insurers about a number of the decisions we have seen, or indeed the claims that have recently made the press, is that they appear to be both "one off" and yet significant in terms of loss. The worst of both worlds.

As for recent court decisions, it is useful to look briefly at four, and what lessons (if any) can be gained. Mills & Reeve features in one of them, and so it is probably best to deal with that first.

Swain-Mason v Mills & Reeve

The core allegation faced was that the firm ought to have advised Mr Swain and his daughters as to the tax consequences of the transaction should Mr Swain die during a routine heart procedure. After the recusal of the first trial judge (via the Court of Appeal), the claim was dismissed. In short, no duty arose to advise on the tax consequences, and the claimants were found to have "no coherent case" on causation.

Importantly, the firm's retainer letter limited the role played. That said, an obiter finding was made that a clearer statement as to the full extent of the limits of the retainer should have been given (and in particular what was not to be covered). This aspect of the decision is considered to be wrong, and the better view is that a solicitor who has defined his retainer should not be required to state all those matters on which advice is not being given.

However, the decision provides a strong example of how critical it is to ensure that an appropriate retainer letter is in place, and even if it is, how courts may still be quick to criticise law firms bearing in mind the hindsight they are by then able to apply to a situation.

Amalgamated Metal Corporation plc v Wragge & Co

This claim arose from advice given on settlement of the claimant's tax claim with HMRC, and also from the fact that it was alleged the firm acted without authority. The court found that there was no evidence to support the contention that the firm had been authorised to settle, and in fact found that it was "almost overwhelming that (the firm) was instructed not to settle …".

Further, while academic, the court found that negligent advice arose as to issues concerning quantum assessment, and that the retainer was not limited in this regard. Judgment was awarded for £7.65 million. The firm relied on the witness evidence of a solicitor who had left in 2005. The court commented that whilst it was not seeking to suggest that the solicitor was seeking to mislead, the events had taken place a long time ago and her account of relevant telephone conversations "is based more on reconstruction rather than recollection".

Yousefi v SJ Solicitors

While not a particularly notable case, it does demonstrate the importance of witness evidence, and arguments around the extent of the retainer. The allegation faced was that the firm had

failed to exchange on an acquisition by a given date and the court found that it was incontrovertible that the firm knew that. As such, negligence was established. Of note, however, is the fact that the court was "deeply unimpressed" with the solicitor's evidence and concluded that "he was simply making up his evidence in the witness box".

Thorpe v Fellowes Solicitors LLP

The issue in play here was a solicitor's duty to check capacity. This is a regular source of claim and the decision is good news for the profession as it exudes common sense. Again, witness evidence appears to have played a critical role and the court found the solicitor to be "an obviously honest witness and ... a careful and responsible solicitor who ... was fully aware of her obligations ...".

In contrast, the court found that the motivation for the claim was not to redress any wrong, but the fact that the claimant was angered by the sale of a family home with the proceeds passing to his sister. While not relevant given the conclusions reached, the court expressed the view that there was no evidence to establish loss in any event.

Summary

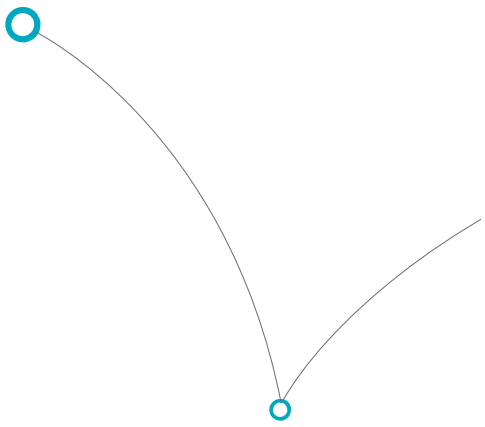
There are four clear themes that emerge from the above cases, when looking at claims against law firms:

- the importance of documenting in clear terms the extent of any retainer;
- the importance of documenting both any changes to that retainer, and the advice given generally;
- the critical role played by a witness's performance at trial; and
- causation as a complete defence.

There is nothing new about any of the above, but the collective nature of the decisions does provide a bed-rock for testing any risk assessment made on a particular claim.

Further, while of course law firms should always ensure their retainers are clear (and the profession as a whole has improved significantly in this area), it should equally not be taken as read that if, on occasion, this is not the case then additional duties of care automatically arise. Law firms do not exist to underwrite every conceivable negative outcome arising from a particular retainer, and clients do have minds of their own (even if subsequently they maintain the opposite).

Taking any case to trial inevitably involves an element of risk, and of course it is not known what strategies were adopted by those involved to seek resolution prior to reaching that point. However, in order to have the best possible chance of success, the strength of the witness evidence put forward in support plays a critical role, as the judgments in each of the above cases illustrate.



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CFAs – how to tackle inflated cost claims

Where are we now and what can we do to minimise the impact of conditional fee agreements prior to the anticipated reform?

What reforms can we expect?

Kenneth Clarke has famously said "It cannot be right that regardless of the extreme weakness of the claim, the sensible thing for the defendant to do is to settle, and get out before the legal costs start running up. This is precisely what has happened and it is one of the worst instances of this country's compensation culture."

This is hardly surprising given the result of the Jackson Review, in which an unidentified general liability insurer informed the Government that:

- In 1999 claimant solicitors' costs amounted to 56 per cent of damages awarded or agreed.
- By 2004, the average claimant's costs were 103 per cent of damages.
- By 2010, the average claimant's costs represented 142 per cent of the sums received by injured victims.
- Since 1999, the average damages paid have increased since by 33 per cent, but the average claimant's costs (including disbursements and ATE (after the event) premiums) have increased by 234 per cent!

The Ministry of Justice has therefore proposed the following main changes in response:

- CFAs will still be available **but** success fees and ATEI premiums will not recoverable from the losing party (with the exception of premiums to cover the cost of expert reports in clinical negligence cases).
- The introduction of a package of "associated measures" which will include:
  - one way costs shifting in personal injury and clinical negligence claims;
  - a 10 per cent increase in general damages (this **only** applies to personal injury claims);
  - a 10 per cent increase in damages awarded to claimants who beat their own Part 36 offers (in addition to the usual costs advantage);
  - contingency fee agreements (Damages Based Agreements or 'DBAs') will be allowed in civil litigation;
  - a new test of proportionality in costs assessments; and
  - increased rates for successful litigants in person.

Such changes will require both primary and secondary legislation, and the timing is uncertain – we consider it to be highly unlikely to go through before the year end in July.

Strategy in the meantime

The pendulum has now started a decisive swing back towards the benefit of the paying party, particularly following the Jackson Review and the recent cases of *Yao Essaie Motto and Other v Trafigura Ltd*, *Pankhurst v Lee White Motors Insurance Bureau* and *Redwing Construction v Charles Wishart*.

It is also the case that after 1 October 2009, a party failing to notify the existence of a CFA will not be entitled to claim the success fee (whether pre or post issue). Paying parties should therefore be strategically planning how to minimise the impact of CFAs on the claim strategy itself, rather than waiting until the claim is settled and the issue of costs falls to be dealt with.

We recommend the strategies below for dealing with claims to recover success fees and ATE premiums.

Success fees

- Admit liability and/or settle the claim at the earliest possible stage. This may support an argument that the success fee in the CFA was too high and did not accurately reflect the risk involved. At the same time as making an admission, ask the claimant's solicitors to review any success fee downwards to reflect the reduction in risk.
- Ask to see the risk assessment where the success fee looks too high eg, where CFA entered into after liability admitted. In *C v W* the court scrutinised this closely before knocking down the success fee from 98 per cent to 20 per cent.
- Requesting sight of the funding costs calculation – this part is not recoverable and should be identified by the claimant as a distinct part of the success fee.

- Where quantum is the only matter in dispute, write to the claimant early, noting that you will be requesting the assessment calculation and challenging it if appropriate, with the aim of putting them on notice that costs will be in issue, encouraging earlier settlement and/or frugality.
- If you are dealing with a discounted fee CFA, you may be able to challenge the reasonableness of the success fee if the risk to the solicitor has not adequately been taken into account.
- A failure on the part of the claimant's solicitors to make adequate checks about other available methods of funding such as legal aid and BTE (before the event) insurance may indicate that recovery of a success fee and/or ATE premium is unreasonable. Request details.
- Check that the notice of funding was given properly and whether the CFA is backdated or retrospective. We have seen claims where the CFA was taken out as long as a year ago – the success fee can only be claim from the date notice was given.

ATE premiums

- Defendants should admit liability at the earliest possible stage in order to justify a refusal to pay for the premium.
- Check the date at which the insurance was taken out - could it be argued that there was no justification for obtaining the insurance because the defendant had already admitted liability?
- Request as much information as possible from the claimant about other funding options and what investigations they made at the time.
- Where ATE insurance is not accompanied by a CFA, perform the comparison of the two methods of funding carefully, especially where it covers both sides' costs. Although this is required by the Costs Practice Directive, in practice it does not appear to be happening.
- Check whether the premium is disproportionate to the risk when compared with other insurance products. Is the proportion of the premium representing a particular risk too large? Is the cover unnecessarily large?

Summary

CFAs with recoverable success fees are with us for a while. Paying parties can use the above decisions and recommended strategies at the outset of a claim, making it clear to the party with a CFA that we will not be afraid to challenge the success fee/premium, hopefully preventing the racking up of costs and disproportionate damages/costs scenarios that we have all seen over the last few years.

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what is the test for dishonesty?

Woe betide any insured who is dishonest...

The recent decision in *Aviva v Brown* is notable for two reasons – it appears to ignore recent decisions on the test for dishonesty and it serves as a useful reminder of the onerous consequences a fraudulent act can have upon a contract of insurance.

The law on dishonesty

Brown is set against a backdrop of recent case law on the assessment of dishonesty, the majority of which has had the effect of diluting the "combined test" detailed in *Twinsectra v Yardley.* This test stated that to be dishonest:

1) it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people; and

2) the defendant must realise that by those standards, he was dishonest (the so-called subjective element)

In *Barlow Clowes International v Eurotrust International* (most recently followed by the Court of Appeal in *Starglade Properties v Nash*) the Privy Council attempted to remove the subjective element, such that dishonesty could be established if the party's "knowledge of the transaction (was) such as to render his participation contrary to normally acceptable standards," without the need to have "reflections about what those normally acceptable standards were."

The facts of the case

Mr Brown claimed under his insurance for work to repair subsidence to his property, as well as for rent to live in an alternative property while repairs were ongoing. He was asked to locate a suitable replacement property and suggested two properties, both of which he owned.

Mr Brown was found to have acted fraudulently by representing in correspondence with his insurers that one of the properties was owned by a third party, rather than by him. Indeed, he did not ultimately seek any rental contributions for this particularly property, but his actions were nevertheless deemed fraudulent. As a consequence, not only was he forced to pay back the rental contributions received from insurers, but he was also made to pay back to insurers the cost of correcting the subsidence to his property – a genuine claim.

Rather than follow the recent Court of Appeal decision in *Starglade* mentioned above, the court, with the agreement of the parties, assessed dishonesty on the basis of the *Twinsectra* combined test, taking into account the "high degree of probability that Mr Brown himself realised that what he was saying was dishonest by the standards of reasonable and honest people." While this did not affect the outcome of the case, the reliance on the *Twinsectra* approach and ignoring of *Starglade* serves to compound confusion as to how dishonesty is to be assessed.

Key issues

- Debate about the method of assessing dishonesty and how to interpret *Twinsectra* continues to confuse practitioners.

- *Aviva v Brown* unequivocally voices support for the concept that a fraudulent insured should not be able to recover under a policy of insurance. The fact that the fraudulent representations were made in relation to a property for which ultimately no rental contributions were sought demonstrates the onerous burden on insureds to be scrupulously honest.

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where will the buck stop?

The recent judgment of the Supreme Court in *Jones v Kaney* abolishing expert's immunity from suit has been well publicised but what impact could it have on claims against solicitors?

The claim arose from Dr Kaney's instruction to act on behalf of a claimant in a personal injury claim. Dr Kaney, a consultant clinical psychologist, was instructed to report on the psychiatric consequences of the claimant's accident.

Dr Kaney signed up to a joint statement following a telephone conference with the opposing expert. The claimant alleged this was damaging to his claim and forced him to settle it at an undervalue. The issue before the Supreme Court was whether Dr Kaney, and more importantly expert witnesses in general, should continue to enjoy immunity from suit.

Giving the lead judgment, Lord Phillips (Lord Hope and Lady Hale dissenting) held that:

- An expert witness owes duties in contract and tort to act with reasonable skill and care.
- An expert has an overriding duty to the court. Since the expert is usually instructed to perform their duties in accordance with the CPR, duties to the court and the client co-exist.
- Clients rely on their expert to give skilled opinion in determining whether to bring or defend proceedings, in considering settlement values and in appraising the risks of proceeding to trial.
- Traditional justifications for maintaining experts' immunity (such as experts' reluctance to provide evidence, ensuring experts give full and frank evidence and providing protection from vexatious litigants) are no longer viable.
- Anyone providing professional services is at risk of being sued and they customarily insure against that risk. Experts should be no different.

To be found to have acted negligently an expert must fall below the standard of care of a reasonably competent expert. The circumstances of *Jones v Kaney* were particularly extreme. We anticipate that it will be difficult for claimants to establish negligence in many cases. For example, the court encourages joint discussions between experts to narrow issues. It is not negligent for an expert to change his or her view on a particular point, provided there is good reason to do so.

What are the implications for solicitors and their insurers? Where allegations are made against an expert, there is a certain inevitability of subsequent attacks on the rest of the client's legal team, particularly the instructing solicitors. Claims for contribution against solicitors could arise from:

- Failure to identify an expert with the correct expertise.
- Inadequate instructions.
- Failure to pass on relevant information.
- Failure to thoroughly check and test an expert's evidence before advising the client to rely upon it.
- Failure to provide the expert with sufficient time to prepare a report, joint meeting or trial.
- Failure to advise the client about any restrictions on the expert's level or scope of insurance cover.

While this list is not exhaustive, it is illustrative of how the decision may increase claims against solicitors. However, the corollary is also true with the door now being opened for solicitors to bring contribution claims against their experts. Only time will tell if a flood of claims will follow. What is clear is that the court's decision in *Jones v Kaney* has potentially far-reaching consequences.

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we need to talk

Mediation and county court reforms

Three in four claims allocated to the fast and multi-tracks settle between allocation and trial. Parties could soon be forced to consider mediation far earlier if proposals to reform the county courts go ahead.

Alongside the Jackson reforms to civil litigation costs, the Government has begun a consultation to reform county court administration. A key aim is to encourage earlier settlements through mediation and therefore reduce the number of cases that go to court unnecessarily. This vision for a new civil justice system is one where more parties "collaborate rather than litigate".

Four-stage process

One proposal is for the introduction of mandatory pre-action directions for money claims under £100,000 before they reach court. This could involve the following four-stage process with fixed costs at each stage:

1) A triage of the initial options for resolving the dispute.
2) Evidence gathering.
3) Negotiation/settlement.
4) Trial.

At the settlement stage, the parties would be required to try settling the claim via mediation or another dispute resolution process, such as conciliation or arbitration.

If the claim cannot be resolved at the settlement stage, the parties would enter the trial stage at which they would produce joint evidence packs. These packs would include not only the evidence the parties wish the court to consider, but also details of the efforts made to settle the dispute.

Small claims cases

The four stage process described above is a longer term proposal. An interim proposal is for the introduction of automatic referrals to mediation in small claims as part of the current court process. Parties would be required to attempt mediation before the claim can be considered for a hearing.

A potential model for the mediation stage is the telephone mediation service, similar to that offered by the current small claims mediation service. The mediator would "shuttle" between the parties, phoning one party and then the other until agreement is reached. Under the current mediation service, approximately 98 per cent of all mediations are conducted on the telephone. In the past two years, there have been 10,000 mediations each year with a settlement rate of 73 per cent. The current in-house service could even end up working alongside private sector and non-profit organisations.

There would be a fee for using the service. However, it is envisaged that in the majority of cases the fee will be more than offset by savings that parties make from earlier settlement and the costs associated with a small claims hearing.

Fast and multi-track claims

A further shorter term proposal is for the introduction of compulsory mediation information/assessment sessions for fast and multi-track county court cases worth up to £100,000.

The sessions would be held at the allocation stage and replace the current process which allows parties to request a stay for settlement. The Government hopes that many of these information sessions would be converted into actual mediation appointments.

There may be a fee for the information session. However, as with the proposed mediation stage in small claims cases, it is envisaged that the cost would be more than offset by savings that parties make from earlier settlement.

Consultation

The consultation closes on 30 June 2011. For details, see www.justice.gov.uk/consultations/solving-disputes-county-court

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regulated regulators

The post-FSA regime

On 16 June 2010 the Government announced that the FSA (Financial Services Authority) would be scrapped and its responsibilities transferred back to the Bank of England. The change arises from the Government's concerns that under the previous regime no one body had power to tackle systemic stability issues, with the result that "steps must ... be taken to ensure that financial firms are never again allowed to take on risks that are so significant and so poorly understood, resulting in such severe economic consequences for businesses, households and individuals."

Insurers are understandably concerned about how the new regime will affect them, but there are also implications from a claims perspective.

The new regime will consist of:

- a new Financial Policy Committee within the Bank of England, which will look at wider economic and financial risks to the system;
- a Prudential Regulation Authority which will have day-to-day supervision of individual financial institutions and their stability; and
- the Financial Conduct Authority, which will regulate how firms conduct their business and secure consumer protection.

What does this mean in real terms for Insureds (such as IFAs) operating in this system?

The Government has repeatedly said that the new Financial Conduct Authority will have the ability to take tough action in regulating firms and give greater protection to consumers by "building on progress the FSA has made in recent months through more intensive, issues-based supervision, earlier and more proactive intervention, and credible deterrence through enforcement."

Although one of the new principles is that consumers of financial services are ultimately responsible for their own decisions, the Financial Conduct Authority will have a lower risk tolerance and wider powers to take decisive action, such as banning products and ordering past business reviews. It is hoped that earlier intervention will reduce the number of consumers who are harmed by products. If this operates as the Government envisages, it could potentially reduce the number of claims. Alternatively, if it simply sets the standards too high, this will feed through to higher numbers of successful claims through the FOS (Financial Ombudsman Service).

A formalised co-operation arrangement is being introduced with FOS, which will now be obliged to provide information to the Financial Conduct Authority. Although the FOS has alerted the FSA of multiple complaints in the past, this was discretionary. The new regime will make it mandatory for FOS to do so.

Likewise, from 1 January 2012 FOS's award limit will increase from £100,000 to £150,000.

We know that individuals currently employed by the FSA will transfer to the new bodies. What remains to be seen is how effectively the new system will change approaches that have been ingrained in staff for a number of years. This is not, however, without precedent: in 2000 and 2001 staff transferring from the Personal Investment Authority to the FSA were trained to adopt a less "tick box" approach towards regulatory supervision. The current convulsion of the regulatory regime is therefore not without precedent.

The Government intends to introduce the legislative framework during this Parliamentary session and says that the new regime should be operational by Autumn 2012.

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Acceptance of offer pre-action

Where a Part 36 offer is made by the defendant and accepted by the claimant before proceedings are commenced, the claimant is unable to claim costs on the standard basis in accordance with CPR 36.10 because there are no proceedings. Where there is a disagreement about the costs to be paid by the defendant, the claimant's Part 8 claim to recover costs falls to be dealt with under CPR 44.12A (costs-only proceedings) and not under the Part 36 regime (*Udogaranya v Nwagw*).

Dishonesty

In a subsidence claim, a policyholder had acted fraudulently by seeking to claim from his insurers the cost of renting alternative accommodation when he owned the accommodation and could have lived there for free. His whole claim was forfeited including the genuine cost of repairs (*Aviva Insurance Ltd v Brown*).

Trustees

The principle known as the rule in *Re Hastings-Bass* is not a correct statement of the law. In consequence, the scope for trustees to unscramble mistakes that have resulted in unintended consequences is restricted. Where, for example, a loss has been caused to a pension scheme because the trustees' professional advisers gave incorrect advice, the trustees may now seek to recover their losses from those advisers (*Pitt v Holt*).

Limitation and continuing duty

The limitation period for a negligence claim against solicitors relating to a conveyance commenced on exchange of contracts and not on completion of the sale of the property. The judge left open the question of whether there was a continuing duty on the defendant firm up to the date of completion to verify the identity of its clients as the point had not been raised in the court below (*Bowling & Co Solicitors v Edehomo*).

Limitation and contingent rights

The Court of Appeal rejected a contingency argument (applying *Law Society v Sephton*) relied upon by the defendant solicitors concerning negligent advice about the administration of an estate (*Lane v Cullens Solicitors*).

Recovery of success fees

Insurers pursuing subrogated claims can enter into conditional fee agreements and recover reasonable success fees in the same way as other litigants. A claimant pursuing a subrogated claim as instructed by his insurer is in the same position as a union member taking advantage of the funding provided by his union under its collective conditional fee agreement (*Sousa v London Borough of Waltham Forest Council*).

Experts' immunity from suit

The Supreme Court has abolished an expert's immunity from suit concerning breaches of duty, whether in contract or tort, in connection with their participation in legal proceedings. An expert can now be sued for negligence concerning pre-trial work intimately connected with the case, his oral evidence in court, the contents of a report adopted in evidence and concessions made in an experts' meeting or a joint statement (*Jones v Kaney*).

Solicitors' professional indemnity cover

A solicitor is only covered for civil liability arising from services provided in private practice as a solicitor. Providing an undertaking without any involvement in the underlying transaction is not within the scope of the cover (*Halliwells LLP v NES Solicitors and Quinn Direct Insurance Ltd*).

Litigation privilege

The defendant reinsurer was unable to claim litigation privilege as against the claimant insurer over expert reports obtained in 2002 on the ground that, although litigation between them was reasonably in prospect at the time, the reports had not been obtained for the dominant purpose of the anticipated litigation between the parties (*Axa Seguros SA v Allianz Insurance plc*).

Privilege and accountants

The Supreme Court has granted leave to appeal from the Court of Appeal's decision in *R* (*Prudential plc*) *v Special Commissioner of Income Tax* that legal professional privilege does not apply to professionals other than qualified lawyers.

County court reforms

The Government has begun a consultation to reform litigation in the county courts. Proposals include increasing the financial limit below which claims cannot be commenced in the High Court from £25,000 to £100,000. The consultation closes on 30 June 2011.