



PROFESSIONAL INDEMNITY FORUM

SOLICITORS NEGLIGENCE – A REVIEW OF RECENT DEVELOPMENTS

Ben Patten QC

4 New Square

3rd July 2013



BROWN v INNOVATOR ONE [2012] EWHC 1321

- - Hamblen J – 18 May 2012
- - tax avoidance scheme with a complex structure
- - solicitors act for the promoter
- - solicitors receive subscriptions from investors
- - were these monies held on trust ?
- - was there dishonest assistance in a breach of trust ?
- - were the solicitors part of a conspiracy ?
- Solicitors exculpated – but appeal proceeding in part



CHALLINOR v JULIET BELLIS & CO [2013] EWHC 347

- - Hildyard J – 25 February 2013
- - property investment scheme
- - solicitors act for the SPV
- - solicitors receive monies from investors
- - were these monies held on trust ?
- - were they subject to escrow conditions ?
- - were the claimants entitled to equitable compensation or restitution ?
- - Solicitors liable



NEWCASTLE AIRPORT v EVERSHEDS [2012] EWHC 2648

- - Proudman J - 2 October 2012
- - Airport agrees principles of new contracts with Exec Directors
- - Airport instructs Eversheds through Exec Directors to draw up drafts
- - they secretly exceed their authority
- - drafts not read properly before execution
- - did Eversheds owe Airport a duty to confirm the instructions ?
- - did any breach of duty cause loss
- - Solicitors not liable - no duty and no causation - but appeal decision pending



COSTS AND FUNDING POST 1 APRIL 2013 – A BRAVE NEW WORLD?

- CFA premiums no longer recoverable against defendants
- ATE premiums no longer recoverable against defendants
- new CFA and DBA structures



WHAT WILL HAPPEN TO “SMALL VALUE” SOLICITORS CASES?

- possibility 1: claimants find new ways to fund them
- possibility 2: claimants are unable to fund them and the number of claims diminishes
- possibility 3: claimants are unable to fund them and Government intervenes



FUNDING UNDER THE PRESENT ARRANGEMENTS

- neither DBA nor CFA provide attractive platforms for small value cases
- current indications are that ATE will never be sufficiently cheap
- current and anticipated schemes of judicially controlling costs will not bring them down to “proportionate” levels
- litigation market may be perceived as being skewed to favour those with resources



EXTENSION OF THE LEGAL OMBUDSMAN SERVICE?

- compensation levels raised from £50,000 (Rule 5.43) to £100,000 ?
- increasing time limits for claims (going back before 5 October 2010 – see Rule 4.5) ?
- adjust LeO's relationship with the Courts (for example Rule 5.7(g)) and Rules 5.8 to 5.11)
- adjust and codify procedures under Rules 5.21 to 5.30 and 5.33 – 5.35
- adjust and codify costs provisions under Rule 5.39



BUT HOW LIKELY IS AN EXTENSION?

- likely opposition from Lawyers and their insurers
- likely to become an increasingly legalistic process
- difficult to maintain both finality and absence of appeal
- LeO does not have the resources and will not get them



ALTERNATIVE COSTS ARRANGEMENTS?

- Qualified one way cost shifting – “QOCS”
- recently in force for personal injury and fatal accident cases
- CPR 44.13 – 44.17
- basic scheme is that unsuccessful claimants do not pay defendant’s costs
- Part 36 offers are an exception: costs can be enforced up to value of any award



ARE QOCS THE ANSWER?

- obviously unattractive to solicitors and their insurers
- open to abuse – CPR 44.15 and 44.16 inadequate safeguards
- practical difficulties in deciding which claims qualify
- no track record – will claimant's solicitors take them up?



BESPOKE SOLUTIONS – THE PNLA ADJUDICATION SCHEME

- aimed at providing parties with a “quick and dirty” resolution
- currently framed as a voluntary scheme – to be run as a pilot
- essential components
 - agreement
 - adjudication in event of ADR failure
 - adjudicator is a specialist
 - written reasons and power to award limited costs
 - not a bar to proceedings, but possible costs sanctions



PROBLEMS WITH THE PNLA SCHEME

- voluntary: only parties to take it up would settle anyway
- adjudication an unsuitable way of resolving this kind of dispute
- an additional layer of cost
- untested



CONCLUSIONS

- there is a problem or the perception of a problem
- whilst the status quo might remain in place, there are good reasons to think this will not last
- Government will be tempted to find the cheapest solution to it
- Insurers may have to come up with their own solutions



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