

Dishonest or incompetent? cont.

- ▶ did the solicitor understand his obligations to the lender?
 - often a pivotal issue
 - see Mortgage Express Ltd v. S Newman & Co and SIF [2001]
 - if an admission can be obtained on this issue, it may prove significant
- ▶ evidence of involvement in the relevant transaction(s)
- ▶ motive
 - was the solicitor benefiting personally?
- ▶ relationship with fraudster/mortgage broker?
- ▶ evidence of disregard of professional obligations?

Dishonest or incompetent? cont.

- ▶ where there has been more than one fraud, is there a cumulative picture?
- ▶ timescale of the transaction
 - was it undertaken in constrained circumstances?
- ▶ post-problem conduct
 - not strictly relevant to application of exclusion but goes to credibility generally
 - lies, obfuscation and attempts to create a “smokescreen”?
- ▶ how credible is the solicitor’s explanation for what occurred?

Dishonest or incompetent? cont.

- ▶ deliberate disposal/sanitising of files
 - is there a lack of any credible explanation for missing files or documents?
 - see the findings of Irwin J in Zurich Professional Limited v. Karim [2006]

- ▶ other potential indicators of dishonesty
 - lack of co-operation in the investigation
 - attempts to deflect responsibility elsewhere at all costs
 - ledger “lost” or reconstructed

Dishonest or incompetent? cont.

- flagrant disregard of obligations to Insurers
- attempts to increase levels of insurance cover after a problem began to emerge
- initial denial of the existence of any fraud
- ▶ more generally, note the availability of Law Society Guidance since March 1991 and much greater awareness within the profession of mortgage fraud
- ▶ ultimately, a solicitor's performance in the witness box may prove determinative

Are there “innocent” partners?

- ▶ one sole practitioner may allow his name to appear on the notepaper of another sole practitioner in the knowledge that two partners are required in order to attract work from lenders
- ▶ does a partnership, in fact, exist or is it a sham?
 - see past accounts and partnership documentation
- ▶ “holding out” issues may arise

Are there “innocent” partners? cont.

- ▶ in terms of an individual’s knowledge of dishonesty or suspicious circumstances, consider:
 - evidence of their involvement in the relevant transaction or transactions
 - whether they have any association with the fraudster
 - the scale and number of frauds committed
 - the nature and size of the firm
- ▶ see Zurich Professional Limited v. Karim [2006]

Further potential sources of information/ enquiry

- ▶ enquiry agents
- ▶ Law Society
- ▶ handwriting experts and accountancy experts
- ▶ the lender's documents
- ▶ present or former members of staff
- ▶ the firm's accounting documents and bank statements etc
- ▶ the firm's electronic documents and records
- ▶ enquiries of previous Insurers

Considerations for Insurers

- reservation of rights to avoid arguments of waiver, affirmation or estoppel
- obtaining access to documents and other evidence
- investigation of coverage issues
 - independent advice required on coverage
 - no short cuts: detailed analysis required
 - the Insureds must have a proper opportunity to make representations before a decision is made
 - indemnity conference
- Insurer's qualified obligation to fund defence costs and interaction of MTC clauses 4.8 and 4.10
- preservation or recovery of assets
- Compensation Fund for private individuals

Insurer's right to reimbursement under MTC clause 7.2

“The insurance may provide that each Insured who:

- (a) committed; or*
- (b) condoned (whether knowingly or recklessly):*
 - (i) non-disclosure or misrepresentation; or*
 - (ii) any breach of the terms or conditions of the insurance; or*
 - (iii) dishonesty or any fraudulent act or omission,*

will reimburse the Insurer to the extent that is just and equitable having regard to the prejudice caused to the Insurer's interests...”

Insurer's right to reimbursement cont.

- “fall back” position for Insurers if they are unable to repudiate liability under the fraud or dishonesty exclusion against all Insureds
- upheld in Manolakaki [2004] (although the dishonesty exclusion applied in any event)
- condonation:
 - *“to forgive or overlook an offence, so as to treat it as non-existent; especially to forgive tacitly by not allowing the offence to make any difference in one’s relation with the offender”*
 - an Insured must know about the non-disclosure, misrepresentation, breach of policy terms and conditions, dishonesty or fraudulent act or omission in question to be brought within the scope of clause 7.2(b)

Surveyors – RICS Minimum Terms

- ▶ composite policy – see *Arab Bank v. Zurich Insurance*
- ▶ Special Institution Conditions

Aggregation – general observations

- ▶ much of case law is fact sensitive and reflects broader policy considerations – see the attached summary of aggregation cases
- ▶ it is necessary to ascertain the detailed facts and then exercise a judgment. Essentially “a *matter of intuition*” per Rix LJ in *Scott v. Copenhagen Re Insurance Co (UK) Limited* [2003]
- ▶ the courts have not always spoken with one voice

Aggregation – 2006 RICS Series clause

- ▶ Clause 1.9 of Section G the 2006 RICS policy wording defines a “*SERIES OF CLAIMS*” as “*a number of CLAIMS...that arise directly or indirectly from the **same originating cause***”
- ▶ opens up the widest possible search for a unifying factor between the claims (per Lord Mustill in Axa)
- ▶ the words “*directly or indirectly*” also suggest a weaker causal link or connection, thereby increasing the ability to trace the claims back to a single unifying cause

2006 RICS Series clause cont.

- ultimately a question of fact but the valuer's dishonesty will be a central factor and aggregation arguments will be strengthened further if evidence can be found to link the fraudulent valuations themselves
- consider also the possibility of systemic failures in systems and controls which, if properly maintained, would have prevented the frauds occurring. See Municipal Mutual Insurance Ltd v. Sea Insurance Co Ltd [1998] and Countrywide Assured Group plc v Marshall [2003]

Aggregation – solicitors

MTC wording from 1 October 2005

- a) *“all Claims against any one or more Insured arising from:*
- (i) one act or omission;*
 - (ii) one series of related acts or omissions;*
 - (iii) the same act or omission in a series of related matters or transactions;*
 - (iv) similar acts or omissions in a **series of related matters or transactions***

and

- b) *all Claims against one or more Insured arising from one matter or transaction will be regarded as one Claim”*

General observations

- ▶ “*related acts or omissions*” not originating cause
- ▶ what is the operative act or omission?
- ▶ what are the connecting factors which make the matters or transactions “*related*”?

Clause (a) (iv) – “*similar acts or omissions in a series of related matters or transactions*”

- ▶ related matters or transactions
 - not tested in courts
 - e.g. solicitor advises purchaser of property and lender, or solicitor advises same individual in respect of house purchase and house sale and claims arise
- ▶ likely to be construed narrowly?
- ▶ remember: not originating cause based

Possible connecting factors in the context of mortgage fraud?

Something much closer than general dishonesty is required.
Possible arguments:

- ▶ the solicitors' involvement in a conspiracy to defraud – e.g. in connection with a series of “back to back” transactions
- ▶ involvement of the same borrower or group of fraudulent individuals
- ▶ same (or similar) modus operandi
- ▶ circumstances where the fraudulently obtained mortgage proceeds of property A are used in the purchase of property B, where a similar fraud is perpetrated

Implications for Insurers?

- wider than previous aggregation wording
- but how much wider?
- each case turns on own facts
- the wording will be tested by courts. In the meantime, scope for argument

Questions?

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