

SOLICITORS:

NEWS

FROM

A

NEW ERA

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SOLICITORS : NEWS FROM A NEW ERA

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1. INTRODUCTION

1.1 THE NEW ERA

- 1.1.1** SIF has been in run-off since 1st September 2000.
- 1.1.2** Insurers have to comply with minimum terms and have to be approved insurers. According to *Legal Week*, (12.10.00), those insurers with £10m premiums or more are:

St Paul International Insurance Company Ltd
QBE International Insurance
Zurich Professional
CGU Insurance,

but there are a number of other (approx. 8) substantial participants.

There are 35 approved insurers overall (*POST MAGAZINE*, 15.02.01).

- 1.1.3** There has been some element of "laundry listing" of notifications to SIF. This may reduce the volume of claims for new insurers in the short term, but it would be optimistic to think that claims experience over the next few years will dramatically differ from the last few years. Having said that, the current trend is downwards:

1997 - 1998: 13,991 new notifications
1998 - 1999: 12,499 new notifications

In the mid 1990s, the figure was significantly higher than 1997 - 1998.

(*Solicitors Indemnity Fund, Twelfth Annual Report, 1999*)

- 1.1.4** Approved insurers are adopting different claims handling models to solve the age-old problem of resolving relatively complicated disputes on sensible terms. Different claims handling philosophies may, as a result, emerge.
- 1.1.5** SIF's co-ordinated dispute handling (for example, managed litigation, such as the *Nationwide* and *Bristol and West* litigation) maybe a thing of the past once the run-off is completed. The co-ordinated approach has historically resulted in significant improvements in the law from the point of view of solicitor insureds.
- 1.1.6** The Assigned Risk Pool for firms without insurance is surprisingly small. In mid-December it was reported that 34 firms were in the pool, of which 10 were there by default and 24 were turned down by the market. It seems likely that the number will increase.

- 1.1.7** Premium income has reduced from around £240m to £160m (*Legal Week*, 12.10.00); or £250 to £150m (*POST MAGAZINE*, 15.02.01).
- 1.1.8** SIF panel solicitors' fees (for handling claims) were £68m in 1998/9 (£73.6m in 1997/98): *SIF Twelfth Annual Report, 1999*.
- 1.1.9** The projected SIF shortfall was £209m (as at 31.8.99) (£359m, as at 31.8.98)
- 1.1.10** Even allowing for the fact that, in the new era, external legal costs will go down significantly, the above statistics present an alarming picture for any insurer who has not pitched premiums at the right level.

1.2. SOURCES OF CLAIMS

1998/9

	By Number %	By value %
Residential conveyancing	29	19
Commercial conveyancing	10	17
Litigation	16	16
Personal injury	16	14
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Trusts and probate	9	11
Commercial	4	8
Landlord & Tenant	3	3
Financial advice	2	3
Matrimonial	3	1

[*SIF, Twelfth Annual Report, 1999*]

1.3 POINTS OF DISTINCTION BETWEEN SOLICITORS AND OTHER PROFESSIONALS?

1.3.1 One view: there are none. A claim is a claim. Similar issues arise in all claims: duty, breach, causation, loss and limitation.

1.3.2 This is true to some extent, but (without wishing to over-generalise):

- (i) there is a huge variety of ways a solicitor can make a mistake; the sheer variety of duties and types of work can expose certain practices to a wider range of claims than, for example, surveyors or architects;
- (ii) solicitors carry extraordinarily large sums of client money in their accounts;
- (iii) the Courts are more inclined to apply a counsel of perfection to lawyers than to other professionals; they can (perhaps unconsciously) be harsher in judging their own;
- (iv) in solicitors cases the Courts often refuse to admit expert evidence, even where the Judge has no experience of, for example, a conveyancing transaction. In relation to other professionals, the Courts often have to be guided by experts as to the appropriate standard of care by which they should be judged;
- (v) some solicitors think they are expert on the law and therefore better placed than, say, an accountant or engineer insured, to dictate how the case should be handled. This can be so even where the solicitor has no litigation experience at all; and
- (vi) once the claimant has lost faith in their original solicitor it can be harder to instil faith that the legal system will give them an appropriate remedy.

1.4 THE NIGHTMARE SCENARIO!

1.4.1 A solicitor called Jones comes into the underwriter's or broker's office and says he wants insurance cover for the year 2001 - 2002. He is still paying too much by way of premiums and is looking for a reduction next year.

1.4.2 The Underwriter asks about his claims record and then what areas he practices in. He says: "I do quite a lot of conveyancing, particularly acting for lenders and borrowers; I advise wives quite often on charges on their homes to fund their husbands' businesses; and I have an assistant who does County Court advocacy in a mixture of civil claims (including personal

injury). One other thing you ought to know: as part of my practice I give quite a lot of undertakings".

1.4.3 Question: What does the Underwriter do? Perhaps reserve judgement until I have been through recent developments on:

Lender claims
Etridge (on charges)
Advocates' immunity
Solicitors' Undertakings; and
Limitation

2. LENDER CLAIMS

2.1 THE BACKGROUND

- 2.1.1** In the recession from the early 1990s, defaults by borrowers increased substantially, and negative equity became a relatively widespread problem. Lenders made inevitable losses. On repossession, it often appeared that the properties secured had never had the values the lenders claimed to have believed in when the loans were agreed: someone had to be blamed; someone had to pay. One source of recouping losses was well insured professionals who advised on the original transactions.
- 2.1.2** The early 1990s therefore saw an unprecedented number of claims by lenders against solicitors and valuers caused by the surge in property prices in the late 1980s and the subsequent recession.
- 2.1.3** Professional indemnity insurers (as is well known) made massive payouts and premiums soared. For solicitors, SIF suffered a similarly huge exposure to claims.
- 2.1.4** The majority of claims arose in the domestic conveyancing area. The volume of these claims has been declining in recent years but, as above, in 1998/9 SIF reported that they still constituted 29% by number of all claims against solicitors.
- 2.1.5** The solicitor often acted for the lender as well as the borrower. The solicitor usually received written instructions from the lender and reported to them on the property title. Lenders' instructions vary in their terms, but they often make clear the solicitor's responsibility goes beyond merely verifying a valid title to the property and securing a first charge over it.
- 2.1.6** Typical examples of claims included: the solicitor not reporting (i) a sub-sale; (ii) a direct payment of deposit; (iii) a discounted purchase price; (iv) a connection between a purchaser and vendor; (v) discrepancies in a borrower's address; (vi) a vendor paying a borrower's costs; and (vii) that the borrower would not reside in the property. In many cases the underlying transaction was of course a mortgage fraud. Solicitors received warnings about what to look for to identify a fraud in the "Green Card" warning issued by the Law Society in March 1991. There was also guidance issued in the previous December in the Law Society Gazette. It is extraordinary how many solicitors acting regularly in conveyancing transactions were not aware of this guidance. The Courts are generally harder on solicitors if the date of the transaction is after the date of the Green Card warning. All of the cases before the Court in the *Nationwide* case (referred to below) involved transactions which were pre-March 1991.
- 2.1.7** The volume of lender claims has significantly declined in recent years, but claims are still being made. There is a view that lenders have again started to adopt

more dubious lending practices and, if a further property recession were to occur, it would be reasonable to assume that a substantial increase could happen again, albeit that the levels of claims of the 1990s may not be equalled.

- 2.1.8** There is now a huge volume of case law on lender claims against solicitors which provides considerable guidance on issues such as what duties are owed, what constitutes breach, and the principles by which damages are calculated. It is not possible to cover all of this ground today¹, but set out below are some of the key principles in the light of the *Nationwide* litigation. There is, in a summary like this, a necessary element of generalisation.

2.2 NATIONWIDE -V- VARIOUS SOLICITORS (HIGH COURT)

- 2.2.1** This is the latest managed lender litigation. The Nationwide had started more than 400 claims against solicitors. The managed litigation brought most of these claims within the ambit of one Court and one procedural framework. We were involved in representing a number of firms on instructions from SIF.
- 2.2.1** An initial trial took place involving twelve of the firms, the Judgement of Mr Justice Blackburne being issued on 2nd February 1999. The Judgement runs to nearly 500 pages. The remainder of the claims were settled in a global settlement, thus avoiding the need for any further trial.
- 2.2.3** The Court's main findings are summarised below (2.3 - 2.7)

2.3 SOLICITOR'S EXPRESS DUTIES

- 2.3.1** The express duties (as opposed to those implied by the Court) are primarily set out in the solicitor's instructions and the report on title form.
- 2.3.2** The Court confirmed that the solicitor's duties go beyond verifying title and obtaining a first charge. In the case of the Nationwide's instructions, the duties arising included (i) a duty to report any known matters affecting the value of the property and the security obtained by the lender; (ii) a duty to use reasonable care in warranting in the report on title the actual price of the property; (iii) a duty to comply with the lender's conditions; and (iv) a duty to investigate title before certifying the title is good.
- 2.3.3** Each lender's terms will vary, so too much cannot be read into the above findings, but the method adopted by the Court, focussing upon the instructions and report form, will be applied in other cases.

¹ For example, the difficult question of breach of fiduciary duty is not addressed.

2.4 SOLICITOR'S IMPLIED DUTIES

- 2.4.1** The duty laid down in the *Bowerman* case will normally be implied unless this would be inconsistent with the express terms or the overall circumstances of the appointment as solicitor.
- 2.4.2** The implied duty includes a duty to report information the solicitor has which might cast doubt on the valuation of the property or the bona fides of the borrower (or some other ingredient of the lending decision), subject to that information not being confidential.²
- 2.4.3** If the information comes into the solicitor's possession in the course of investigating title for the lender and is not the sort of information which the lender would normally obtain from other sources, it is likely a duty will arise to pass on the information, if material to the lender's decision to lend.

2.5 SPECIFIC EXAMPLES

The solicitor had in general to report to the Nationwide:

- 2.5.1** where the vendor is not the registered proprietor of the property (unless the vendor has a clear contractual right to be registered);
- 2.5.2** a direct payment of a deposit if the purchaser has not given a satisfactory explanation as to why it was paid direct - the solicitor cannot just rely on the vendor's acknowledgement that the deposit has been paid;
- 2.5.3** any variation in the price (e.g. the purchaser/borrower tells the solicitor the vendor has agreed a reduction in the price);
- 2.5.4** any special deal where the vendor pays the purchaser's costs; and
- 2.5.5** any uplift in purchase price, for example where there is a back-to-back transaction, again unless there is an obvious explanation for the uplift. As Mr Justice Blackburne pointed out, by 1990, house prices were falling.

2.6 CAUSATION AND DAMAGES

- 2.6.1** *Nationwide* confirms that, where there has been a non-disclosure by the solicitor, the lender must show that, if given the missing information, they would not have entered into the transaction or would have entered into it on different terms.
- 2.6.2** If the claimant can show they would not have entered the transaction at all, much turns on the information not disclosed. If it relates, for example, to the value of

² The Court gave guidance as to what the solicitor must do if the information which should be passed on is confidential. If the borrower will not consent, the solicitor is likely to have to cease acting for one or possibly both clients (i.e. lender and borrower).

the property only, it may follow from the *SAAMCO* case that the loss is confined to the difference between the value the lender thought the property had and the actual value of the property taking into account the information not disclosed.³ On the other hand, if the information directly relates to the bona fides of the borrower (for example the solicitor becomes aware that the borrower has deliberately misled the lender on the question whether or not the borrower would reside in the property) the damages may be assessed on the traditional "no transaction" basis. The lender then recovers the whole of the loss arising from the loan.

This distinction was first drawn in the previous managed litigation known as *Fancy and Jackson*. Within that litigation, in *Colin Bishop* the *SAAMCO* approach was adopted, but in *Steggles Palmer* the "no transaction" approach was appropriate. The essential question is the nature of the information which should have been provided. Would it have made the lender unwilling to lend to this particular borrower at all? Or would it only have affected the valuation, which still might have stopped the transaction proceeding but not due to the particular borrower in question. An example is attached in a schedule to show how these principles apply with real numbers.

In the event the lender would still have lent, but at a lower amount, the loss is assessed by reference to that amount.

2.7 CONTRIBUTORY NEGLIGENCE

2.7.1 SIF has had success in arguing contributory negligence against lenders in numerous cases.

2.7.2 This was continued in *Nationwide*. By way of example:

- (i) the lender placed too much emphasis on the value of the security and too little on the value of the borrower's covenant;
- (ii) the lender failed to heed its own procedures;
- (iii) the lender lent at excessively high loan to value ratios in some cases; and
- (iv) the lender should have done more to train staff to deal with fraudulent mortgage applications.

"I had the impression that, in general, the process was one of going through the motions of ticking off the boxes to see that the relevant information had been supplied and that, applying the relevant lending criteria, the valuation and

³ The value of the borrower's covenant (and any diminution in it due to the non-disclosure) also needs to be taken into account, but the position has been simplified for this summary.

income disclosed justified the loan applied for. There seemed to be little critical evaluation of the information supplied looked at overall."

"Nevertheless, with the Society's drive for increased mortgage business and the relatively less conservative lending policies pursued by the Society and others in the industry from the late 1980s, which increased lenders' exposure to fraudulent applications, it is clear that the Society should have done more in the months leading up to March 1991 to equip its staff to detect, investigate and deal with fraudulent mortgage applications where they occurred. This is not simply a matter of hindsight."

[Both quotes are from the Judgement of Blackburne J]

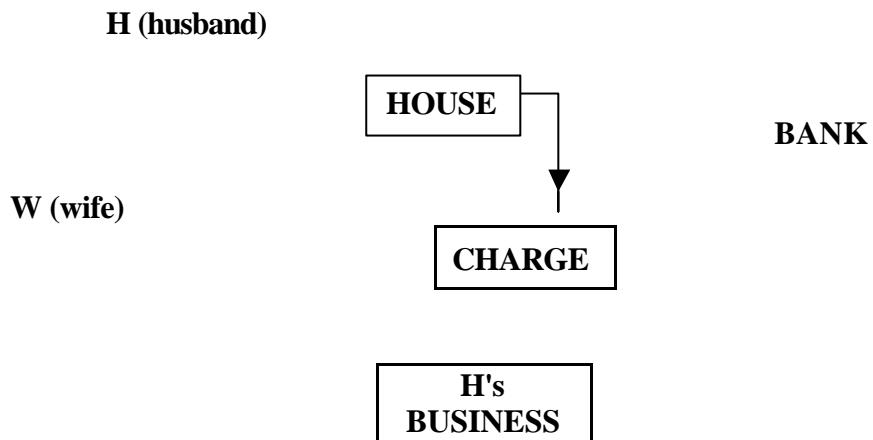
- 2.7.3** Specific decisions on contributory negligence included: 50%, 66%, 75% and 90% responsibility for losses on the part of the lender.

2.8 CONCLUSION ON LENDER CLAIMS

- 2.8.1** The golden (or should it be dark?) era of lender claims produced a number of landmark decisions, particularly clarifying the level of damages to which the lender is entitled against a negligent solicitor. The *Nationwide* case follows the *Bristol & West* and *Fancy & Jackson* cases in developing the relevant principles.
- 2.8.2** If a new era of these claims were to emerge, insurers of professionals would be better placed in many respects to defend the claims. Lenders would know, for example, that, if they launch proceedings, their lending practices will come under close scrutiny and may well be criticised. A further point not addressed above is that the statement by the lender's employee that he or she would never have approved the proposal if the solicitor had disclosed all information will also be looked at critically by the Courts, as happened in the leading cases.
- 2.8.3** There remain areas of uncertainty. In a case where the information the solicitor should have passed on goes to the status of the borrower, how should the borrower's covenant be valued? How is the date at which the lender suffers a loss assessed where, for example, the borrower has continued to pay the mortgage for many years?
- 2.8.4** However, overall the principles for lender claims are now better developed than in 1990. If there were another bout of claims, advisers should be able to give insurers a reasonably clear idea of their exposure on claims at an early stage. Whilst in some cases they may not like the answer to the question, at least the answer may be a little more certain, and hopefully a little more contained, than last time around. This will, however, depend to some extent on the ingenuity of the lenders and their advisers when and if they face again the black hole of property recession losses.

3. ETRIDGE

3.1 THE SCENARIO



- 3.1.1** H takes a loan to fund his business.
- 3.1.2** W owns part or whole of the matrimonial home.
- 3.1.3** As security for the loan, the bank takes a charge over the home.
- 3.1.4** The solicitor is asked by the bank to advise W.
- 3.1.5** The solicitor is likely to charge a few hundred pounds for the advice.

This example scenario has been presented this way (Hs and Ws, W as victim) purely because in many of the reported cases this is, in simplified terms, the factual scenario the Courts have had to address.

3.2 PRESUMED UNDUE INFLUENCE

- 3.2.1** A relationship of trust and confidence must be present: is W accustomed to placing trust in H?
- 3.2.2** Mrs Etridge's evidence was that she was accustomed to sign anything Mr Etridge put in front of her without reading it or asking for an explanation.

- 3.2.3** W must prove she has suffered manifest disadvantage. The more disadvantageous the transaction, the easier it is to show undue influence.

3.3 W & BANK

- 3.3.1** Is the bank on notice of any undue influence? *Barclays Bank -v- O'Brien* sets out the leading guidance from the House of Lords as to what puts a Bank on notice.
- 3.3.2** The *Code of Banking Practice* sets a lower standard: a bank should require W to obtain independent legal advice, but is not required to meet with W.
- 3.3.3** In *Etridge* the Court of Appeal accepted 3.3.2 is sufficient, even though in *O'Brien* the House of Lords' comments suggested more rigorous requirements.

The bank is not required, generally, to go behind the solicitor's certificate that they have seen W and explained the transaction to her.

3.4. W & SOLICITOR

- 3.4.1** The Court of Appeal in *Etridge* made it clear that W was not receiving sufficient protection from the existing state of the law:

"The advice which the wife has received has often been perfunctory, limited to an explanation of the documents and yet inadequate to dispel her misunderstanding of the real extent of the liability which she was undertaking, and not directed to ensure that she was entering into the transaction of her own free will rather than as the result of illegitimate pressure from her husband or blind trust in him."

- 3.4.2** The Court had two options:

- (i) expand the bank's duty so that they can no longer rely on a solicitor's certificate.
- (ii) expand the solicitor's duty to advise W

- 3.4.3** CA adopts (ii) but not (i).

- 3.4.4** The solicitor's duty under *Etridge* (CA) is now set out as follows:

- (i) is the solicitor satisfied W is free from improper influence?
- (ii) if so, the solicitor must ensure W has explained to her and understands the full implications of the transaction, and
- (iii) if not satisfied at (i), the duty is to advise W not to enter the transaction. If W rejects advice, the solicitor must refuse to act further and inform the bank they have ceased to act.

3.4.5 There is a spectrum of possible duties the Court could have adopted:

- (i) the duty to explain the legal implications of the transaction and ensure W understands them;
- (ii) (i), plus a duty to explain the commercial wisdom of the transaction, bearing in mind the relationship between H and W;
- (iii) (i), (ii), plus a duty to do more than advise: the solicitor must certify there is no undue influence and indirectly tell the bank if not satisfied (by ceasing to act).

In *Etridge* the Court set the duty at level (iii). This is a disaster for solicitors practising in this area and a potential problem for underwriters and claims departments.

3.4.6 To comply with the duty at level (iii), the solicitor may have to have the skills of an accountant, an actuary, a tax adviser, a marriage counsellor and may be even a psychiatrist!

- (i) What are H's and W's attitudes to risk?
- (ii) How strong is the marriage?
- (iii) What are W's sources of income?
- (iv) Is the transaction a good deal commercially?
- (v) Is it good enough to put the matrimonial home at risk?
- (vi) Is the business strong?

How far does the solicitor go? The Court says it is a matter of "professional judgement". And all for £350 plus VAT!

3.4.7 House of Lords Appeal

- (i) *Kenyon-Brown -v- Desmond Banks*; in which Henmans represent Desmond Banks on instructions from SIF; Law Society intervention in *Etridge* in the House of Lords.
- (ii) There is strong case authority to support a much lower level of duty. The solicitor is an adviser, but cannot make W's decision for her; if she ignores his advice, that is the lot of the adviser, but it is not their responsibility. Further, there is strong authority supporting a duty only to advise on legal (not commercial) implications.

3.4.8 For the present, banks continue to rely on solicitors' certificates; that leaves W without a defence to the bank's claim for possession; therefore W is given a remedy against the solicitor insured.

3.4.9 How will solicitors react?

- (i) Many would not instinctively provide the level of investigation and conduct required by *Etridge* (CA).
- (ii) Some will not be aware of the *Etridge* requirements.
- (iii) Some will tend to advise defensively by investigating, but then by ceasing to act, preventing transactions from proceeding.
- (iv) Some will refuse to act at all.

Underwriters may prefer solicitors in categories (iii) or (iv) than those in category (ii).

3.5. CONCLUSION

3.5.1 Litigation arising out of advice on charges is widespread, time consuming and costly.

3.5.2 In view of the *Etridge* duty, is this a good risk to underwrite?

3.5.3 Some solicitors do more of this sort of work than others.

3.5.4 Invariably, some will be better at exercising their "professional judgement" than others.

3.5.5 By leaving the parameters of liability to the solicitor's "professional judgement" the case has ensured that the Courts will have the last word in many cases: the Courts will tell the profession on a case by case basis, and after the event, whether or not they have got it right.

4. ADVOCATES' IMMUNITY

"The time may come when we look back and wonder how we could have allowed our courts of law, the most important protectors of our freedoms, to be populated with under-trained advocates."

Keith Evans, *The Golden Rules of Advocacy*.

4.1 THE LAW BEFORE HALL -V- SIMONS

4.1.1 Pre-1800: start of barristers' immunity.

- 4.1.2 Why?**
- (i) the dignity of the Bar;
 - (ii) the 'cab rank' principle: a barrister may not refuse to act for a client on the ground that he disapproves of him or his case;
 - (iii) the barrister has no contract; they cannot therefore sue for their fees;
 - (iv) the undesirability of relitigating cases;
 - (v) the barrister's duty to the Court; and
 - (vi) the analogy with witness immunity.

4.1.3 1963: *Hedley Byrne*: HELD that a duty could arise where there is no contract. The argument at (iii) above therefore ceased to be relevant.

4.1.4 1967: *Rondel -v- Worsley* (unanimous House of Lords) upheld the immunity, due to considerations of 'public policy' which are "not immutable" (Lord Reid). The immunity was confined to litigation work (not noncontentious work), but was extended to solicitors.

The main reason given was the overriding duty of a barrister to the Court. If the barrister could be sued, this might undermine the willingness of barristers to carry out their duties to the Court. Barristers would face potential conflicts between those duties and their duties to their clients. However, other reasons given included those listed above.

4.1.5 1978: *Saif Ali* (majority House of Lords) the immunity was confined to advocacy in Court, plus work so "intimately connected" with the conduct of the case in Court as to amount to a decision on how it would be conducted at the hearing. In this case the barrister had failed to advise joining additional parties before the limitation period expired. HELD: the barrister's conduct fell outside the immunity.

4.1.6 1990: *Courts & Legal Services Act 1990*: this enabled the extension of wasted costs orders to barristers as well as solicitors.

Any legal representative became liable to pay costs wasted by any party as a result of 'any improper, unreasonable or negligent act or omission'. (Leading

case: *Ridehalgh -v- Horsefield*). Advocates (including barristers) became liable for the negligent conduct of litigation, but this was limited to liability for wasted costs.

4.2 2000: HALL -V SIMONS:

- (i) unanimous House of Lords: civil immunity abolished;
- (ii) majority House of Lords: criminal immunity abolished.

4.2.1 Lord Hoffmann:

" I do not say that Rondel -v- Worsley was wrongly decided at the time. The world was different then. But, as Lord Reid said then, public policy is not immutable and your Lordships must consider the arguments afresh."

4.2.2 Was this the right decision? Yes, in principle; no for insurers of barristers and solicitor-advocates.

- (i) **Dignity of the Bar**, (ii) **the cab rank rule**: these are largely historical. The Bar is no more dignified than any other professions who do not enjoy any immunity; the Cab Rank rule has little real relevance today in many areas of litigation (although query criminal cases), but in any event there is no evidence a barrister would be forced to act by this rule for clients who they would otherwise have turned down due to fear of claims against them.
- (iii) **No contract**; cannot sue for fees. Since 1963 it is not necessary to have a contract to sue a professional: *Hedley Byrne*.
- (iv) **Relitigation**: it is contrary to the public interest for a Court to retry a case decided by another Court. The risk inevitably arises of conflicting decisions by different Courts, which undermines the purpose of the system of Court-enforced law. Further, in general a party should not be troubled by the same claim twice. But, there is legal authority for dealing with such situations. *Hunter -v- Chief Constable of West Midlands*: subsequent proceedings can be dismissed as an abuse of process where justice and public policy demand this result.

Hall now recognises the following:

- (a) In criminal cases: it will usually be an abuse of process for a claimant to bring a claim against his lawyer rather than to pursue an appeal. In other words, unless the claimant overturns the conviction first, usually he or she will not be allowed to sue his or her lawyer, subject to limited exceptions.

(b) In civil cases:

Lord Hoffmann (with majority support):

"In civil (including matrimonial) cases, it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into disrepute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications. There is no public interest objection to a subsequent finding that, but for the negligence of his lawyers, the losing party would have won."

The *Hunter* principle is unlikely therefore to apply in civil cases. Exceptions? e.g. relitigated defamation action (this could be unfair to the successful claimant?)

Notwithstanding this, the House of Lords held that the *Hunter* principle provided sufficient basis for limiting relitigation to appropriate bounds. It was not necessary to apply advocate's immunity to achieve that.

(v) **Barrister's duty to the Court:** what Lord Hoffmann calls the "Divided Loyalty" argument. The advocate's duty to the Court was recognised as being very important. Judges rely heavily upon advocates' oral presentation and advocates act according to a recognised code based on trust. For example, they have to cite unhelpful authorities if relevant. However, this did not justify the immunity: solicitors and barristers are regulated by codes of conduct and are subject to disciplinary proceedings. Further, Court proceedings take place in a very public arena and there is again no empirical evidence to show that advocates would compromise their duties to the Court if not protected.

(vi) **Analogy with witness immunity:** no-one can be sued in defamation for anything said in Court. This is an absolute immunity to protect witnesses, lawyers and the Judge. The administration of justice requires that individuals can speak freely in Court without fear of being sued. But, witnesses owe no duty of care to anyone in respect of the evidence they give in Court. The witness's duty is to tell the truth. Similarly, a Judge does not owe a duty of care to the parties. The Judge's duty is to administer justice in accordance with his oath. An advocate owes a duty of care to his client; hence why he or she can be sued for negligence.

NB: Expert witness immunity therefore remains (see *Stanton -v- Calloghan*), at least for the moment.

4.3 CONCLUSION

None of the reasons put forward justified the immunity

4.4 POSITIVE REASON FOR NO IMMUNITY?

In general, English law provides a remedy in damages for someone who has suffered injury as a result of professional negligence. Any exception must be specifically justified, otherwise it would contravene the principle of justice that people should be treated equally and like cases treated alike.

4.5 IMPLICATIONS

4.5.1 Retrospective effect?

Unclear. Lord Hope thought not, and this can be argued, although it may be an uphill struggle. See Lord Goff in *Kleinwort Benson -v- Lincoln City Council*: prospective overruling "has no place in our legal system".

4.5.2 A flood of claims?

- (i) Certainly an increase, both direct claims against advocates, and Part 20 proceedings against advocates by solicitors and others who will say they relied on "their learned friends". The risk for barristers' and solicitors' practices with advocates must increase and premiums will presumably increase to some extent.
- (ii) Claimants will not always appreciate the inherent uncertainties of litigation. All claims handlers have seen the claimant who has absolute belief in their hopeless case or argument and who has the determination to take the claim through any amount of litigation. Indeed, we have probably all seen insureds who might fall into that category as well! These sorts of claimants will start satellite litigation against advocates.
- (iii) In my view, advocacy is the hardest litigation skill. The advocate operates under considerable pressure and has to balance innumerable factors at any time.⁴ As such, it is very easy to criticise and pick holes; or to say "I would have done xyz". It is therefore much less scientific than, say, a surveyor's valuation exercise which can be judged more objectively. Difficult claimants are bound to think they could have done better.

⁴ "The task of the advocate is to be argumentative, inquisitive, indignant or apologetic - as the occasion demands - and always persuasive on behalf of the person who pays for his voice." David Pannick, *Advocates*, Oxford University Press, 1992, page 1. Keith Evans in *The Golden Rules of Advocacy* tells advocates not to sound like a lawyer and to "at least be more likeable than your opponent" (at pages 16 and 53).

- (iv) The flip side of (iii) above is that it is not going to be straightforward to prove negligence. Judges have for the most part (at least at the higher levels) been advocates and know (1) how difficult it is and (2) that there is more than one way reasonably to go about the task. Lord Bingham MR in *Ridehalgh -v- Horsefield*:

"Any Judge who is invited to make or contemplates making an Order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."

- (v) Further, the House of Lords felt the Courts would use their powers under Part 24 CPR (to strike out where the claimant has no real prospect of succeeding in the claim) to restrict vexatious claims. This test may be wider than the old 'frivolous and vexatious' test, but I am a little sceptical. Clearly vexatious claims may be struck out, but it is not in my experience that difficult to muddy the waters and to establish some prospect of success. A favourite trick is to impress upon the Judge the need for witnesses to be heard orally for the Court to fully appreciate the merits of the case. The reality can be that a striking out application is before a fairly junior Judge, who may feel he is less likely to be criticised if he allows the case to continue than if he applies the draconian remedy of striking out.
- (vi) Nevertheless, it will not be easy for a claimant to show that taking a different approach to a case (even if the original approach can be shown to have been negligent) would have caused (in a legal sense) a different result. This was stressed in *Hall*. How will another Court decide how an earlier Judge would have reacted if a particular witness who was not called had been called? The Court of Appeal often relies on the fact that the trial Judge saw and heard the original witnesses. Will it be necessary for the same Judge to hear the negligence claim? This would surely be unworkable.

4.5.3 Effect on advocates

- (i) It could be argued advocacy will go the way of medicine and practitioners will become defensive: every point made to be on the safe side, every witness called etc.

- (ii) This seems, at least in its extreme form, to be unlikely. Most advocates have for some time been exposed to the probability of claims in other areas of practice. This development is not entirely new to them. Further, if advocates are too defensive, they will be criticised anyway, for example for not being proportionate under the Civil Procedure Rules. They would also acquire a reputation for being defensive, which is unlikely to be attractive to clients. Finally, they are, of course....insured!
- (iii) Advocates may therefore be even more careful, but in general it may not go further than that. You may say: if it makes us more careful, that is no bad thing!

4.5.4 Solicitor-Advocates

- (i) There will be many more qualified Higher Court Solicitor-Advocates in ten years time than there are at present. The requirements are being reduced and the courses offered to young solicitors are expanding. Young solicitors are likely to be less afraid of advocacy.
- (ii) Even now some firms are doing increasing amounts of advocacy:

"Increasingly City Firms are performing the advocacy work previously undertaken by junior barristers...Eventually there will be no reason for any City Firm to use a junior barrister in commercial litigation."

The Lawyer, 21 November 1995, article by Mark Humphries, Linklaters & Paines

- (iii) Insurers underwriting some solicitors will therefore have to face the impact of *Hall -v- Simons*.

5. SOLICITORS' UNDERTAKINGS

5.1 WHAT IS AN UNDERTAKING?

Very broad definition

- 5.1.1** Any unequivocal declaration of intent addressed to someone who reasonably places reliance on it and generally made by a solicitor or a member of a solicitor's staff in the course of practice.

An undertaking can be:

- Oral.
- No consideration necessary, as with a contract.
- Need not use the word "undertake".
- Jointly and severally binding on all partners in the firm giving the undertaking.
- Can be relied on by a non-client.
- Can be out of the solicitor's control - e.g. that a third party will do an act.
- Will be enforced even if given in error.

- 5.1.2** Example: *John Fox (a firm) -v- Bannister King & Rigbeys (a firm)* (1986):

A solicitors firm (Firm 1) was owed money by a client. Firm 2 held £18,000 of the client's money after a sale of their property. Firm 2 said to Firm 1 that they would retain the sum "until you have sorted everything out".

HELD: clear and unequivocal statement that Firm 2 would retain the money and it was therefore an undertaking. Firm 2 had in fact transferred the money to the client and were therefore in breach of undertaking. Firm 2 had to make good Firm 1's losses.

5.2 HOW ENFORCED?

- 5.2.1** Professional conduct: a solicitor who fails to honour an undertaking is generally guilty of professional misconduct. The Law Society can require implementation of the undertaking. It cannot order compensation or specific performance. If the solicitor refuses to comply, the Law Society can exercise its disciplinary powers.
- 5.2.2** The Courts have a summary jurisdiction: solicitors are Officers of the Court, which has the right and duty to supervise the conduct of solicitors.
- 5.2.3** Normal action: e.g. breach of contract.

5.3 COURT'S SUMMARY JURISDICTION: *Udall -v- Capri Lighting Company, Balcombe L J*

- 5.3.1** Summary proceedings: there is no need for a full action.
- 5.3.2** Unless the undertaking cannot now be performed, the Court will generally order the solicitor to do what he or she has undertaken to do.
- 5.3.3** If performance is impossible, the Court can exercise its discretion to order that the solicitor compensates the claimant.

5.4 UNDERTAKING AS A SOLICITOR

- 5.4.1** The undertaking must be given in the capacity of a solicitor or in the usual way of business of the firm.
- 5.4.2** Was there a transaction underlying the undertaking, which transaction was part of the usual business of the firm?
- 5.4.3** In one case, the solicitor obtained advances of money for a client and undertook to pay the principal sum with interest. HELD: no underlying transaction. The fund of money did not come into the solicitor's hands in the course of a transaction which was the sort of transaction that solicitors usually undertake.
- 5.4.4** If in an area of doubt, the claimant must have made enquiries which would satisfy a reasonably careful and competent party that there was a proper underlying transaction.

5.5 CONSTRUCTION

- 5.5.1** The undertaking must be given by the solicitor personally and not merely on behalf of his or her client.
- 5.5.2** The *Law Society's Code of Professional Conduct* requires an ambiguous undertaking to be construed in favour of the claimant (but query the Court's approach?).

5.6 THE COURT'S DISCRETION

- 5.6.1** The Court retains a discretion whether or not to enforce.
- 5.6.2** In general (unless performance of the undertaking is impossible) the Court will enforce on a strict basis.
- 5.6.3** *Jackson and Powell:* "there is no reported case where an undertaking has not been enforced as a matter of discretion."

5.7 DEFENCES?

- 5.7.1** Limitation is not generally available, although lapse of time may be relevant to the Court's exercise of its discretion.
- 5.7.2** Contributory negligence?
- 5.7.3** Remoteness of damage?
- 5.7.4** Reliance necessary?
- }
- Court's summary jurisdiction
-v- full action

5.8 CONCLUSION

- 5.8.1** Generally, the definition of an undertaking is very broad; solicitors easily slip into giving undertakings by mistake; once given, undertakings will be strictly enforced under the Court's summary jurisdiction; the defences available may be limited.
- 5.8.2** In short, undertakings are risky and dangerous in the wrong hands. All solicitors' firms should therefore have in place strict practices and supervision to ensure that undertakings are only given where appropriate.
- 5.8.3** If a firm practices in an area like conveyancing where undertakings are widespread, the risk is magnified and should be carefully assessed by underwriters on a practice by practice basis.

6. LIMITATION

6.1 CONCURRENT DUTIES

Henderson -v- Merrett Syndicates (1995): solicitor owes the client concurrent duties in contract and negligence.

- 6.2 CONTRACT AND NEGLIGENCE:** 6 years from date of cause of action.
Note: there may be a difference between contract and negligence: in negligence, the 6 years starts from the date of damage.

6.3 SECTION 14A LIMITATION ACT 1980: NEGLIGENCE ONLY

- 6.3.1** 3 years from the date of the claimant's knowledge (actual or constructive).

- 6.3.2** Knowledge of:

- (i) the material facts about damage suffered;
- (ii) the fact that the damage was attributable to the negligent act; and
- (iii) the identity of the defendant.

[Not knowledge that the defendant's act was negligent in law: s.14 A(9)]

6.4 SECTION 14B LIMITATION ACT 1980: TORT

- 6.4.1** 15 year long stop: period starts with the date of the negligent act.

- 6.4.2** Overrides S14A, but not S32(1)(b) (see below).

6.5 SECTIONS 32 (1) (b) / 32(2) LIMITATION ACT 1980:

- 6.5.1** Applies where: (1) there is a deliberate commission of a breach of duty; and (2) it occurs in circumstances in which it is unlikely to be discovered for some time.

- 6.5.2** Then: limitation begins to run when the claimant discovers the breach (or could with reasonable diligence have discovered it) i.e. the claimant gets 6 years from that date.

- 6.5.3** Possible meanings of "**deliberate commission**":

- (i) solicitor does the act deliberately (e.g. reports to the client on a legal title to property; writes a letter of advice on a client's matrimonial settlement); i.e. the solicitor intends to do the act which is ultimately held to be negligent; or
- (ii) the solicitor does the act deliberately (as at (i)) and appreciates that his act amounts to a breach.

6.5.4 *Brocklesby -v- Armstrong & Guest* (1999) Lloyds Reports PN 888; *Ringrose; and other cases*: the correct meaning is (i) above.

6.5.5 In many professional negligence cases

- (i) the negligence is unlikely to be discovered for some time; and
- (ii) the solicitor's act will be intentional.

Under *Brocklesby*, the solicitor need not realise they have been negligent and need not have consciously kept anything back from the client.

In other words, in many professional negligence cases, the normal 6-year rule and S14A can be thrown in the dustbin.

6.5.6 Example:

A solicitor reports on title (on 2.1.95) to a lender: they fail to include a crucial fact in the report: e.g. the fact that the solicitor knows the price of sale may not be the correct price. The lender sues the solicitor.

Limitation:

- (i) Contract: 6 years from 2.1.95 = 2.1.01
- (ii) Negligence: 6 years from 10.1.95 = 10.1.01
(date of advance by lender to borrower - damage first suffered)
- (iii) Negligence extended period (S14A): 3 years from lender's date of knowledge
Date borrower defaulted: 15.1.98
Date lender should have realised damage incurred due to solicitor's negligence: 15.1.99
i.e. Date of knowledge = 15.1.99
3 years from 15.1.99 = 15.1.02

(iv)	<i>Brocklesby</i> period:	15.1.05 (6 years from 15.1.99)
(v)	Long stop date (section 14B):	2.1.10 (does not apply anyway if <i>Brocklesby</i> period went beyond 2.1.10)

6.6 RESTRICTING THE EFFECT OF BROCKLESBY:

- 6.6.1 Insurers can try to restrict the decision to cases where the solicitor knows his client has been left with a misapprehension as to the facts (c.f. *Ringrose* does not fit this restriction).
- 6.6.2 The broadest comments in *Brocklesby* may be "obiter" (i.e. not binding).
- 6.6.3 *Brocklesby* was thought widely to be wrongly decided, but see *Cave -v- Robinson Jarvis & Rolf*: reported on line: 21.02.01. The claim was statute barred unless the claimant could rely on *Brocklesby*. The facts were that in 1989 the claimant instructed solicitors to secure mooring rights over certain land. The firm failed to do so. Between 1989 and 1994 the claimant used the mooring. In 1994 the owner stopped him. Proceedings were issued in 1999.

The case report does not say how the various limitation periods were calculated, but the position appears to be:

- (i) Contract: 6 years from 1989 = 1995
- (ii) Negligence: 6 years from 1989 = 1995
- or s. 14A: 3 years from 1994 = 1997

Proceedings were issued in 1999. Hence, out of time. However, under *Brocklesby*: 6 years from 1994 = 2000: in time, not statute barred.

The Court of Appeal upheld the original Judge in applying *Brocklesby*; the claim was not statute barred. This was a three Judge Court of Appeal, whereas in *Brocklesby* it was a two Judge Court, but the Court HELD that it was bound by its previous decision. Leave to appeal to the House of Lords was not given by the Court of Appeal, but that is unlikely to be the end of the story. The House of Lords could still reconsider the matter in due course (although it refused leave to appeal in *Brocklesby*). Two of the Judges in *Cave* appeared to have some sympathy with the Defendant's argument, albeit that they felt bound to apply *Brocklesby*. Parker L J pointed to the fact that S32 should be concerned with unconscionability and impropriety and not with innocent acts or omissions.

6.7 EFFECT ON UNDERWRITERS/CLAIMS DEPARTMENTS

- 6.7.1** The above recent developments could have a very significant effect on future claims. There will inevitably be a greater volume of claims brought and strong limitation defences will, in some cases, now look much weaker.
- 6.7.2** This effect in turn must ultimately feed into the rating of solicitors' risks and the level of premiums set.

7. OVERALL CONCLUSIONS

7.1 NEW ERA

- 7.1.1** Underwriters, claims handlers, brokers, insureds and lawyers specialising in solicitors negligence claims have to adjust to a new era.
- 7.1.2** Underwriters have to assess risks which have not been subject to the scrutiny of the market for a substantial period.
- 7.1.3** Some insureds are in for a shock! For example:
 - (i) the approach of the market to resolving claims; and
 - (ii) the more rigorous collection of deductibles
- 7.1.4** Solicitors and barristers dealing with claims will be subject to greater scrutiny than ever in terms of their performance: the result of the case; the claimant's costs incurred; the level of defence costs; a satisfied insured?⁵

7.2 THE LAW

- 7.2.1** The law has moved in favour of solicitors in a number of respects (e.g. lender claims), as a result largely of SIF's hard work, but the extent of the risks for underwriters are highlighted by the developments considered in the above areas: *Etridge*, advocates' immunity, solicitors' undertakings and the law on limitation. This is of course only a limited selection of the issues which commonly arise.
- 7.2.2** The *Civil Procedure Rules* are taking shape: pre-action protocols are being used; more claims are being resolved without going through the normal litigation stages; and ADR (Alternative Dispute Resolution) is now well and truly rooted in our legal system.⁶ In February, for example, I handled three mediations in one week on instructions from two insurers. Claims should therefore be resolved more quickly and more economically; the Courts should be less busy in future, as suggested by recent figures for Claim Forms issued in the High Court.

⁵ "The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain...Above all it is too fragmented...and too adversarial." Lord Woolf, *Access to Justice, Final Report*, p.2

⁶ "The new procedures I propose will emphasise the importance of ADR through the Court's ability to take into account whether parties have unreasonably rejected the possibility of ADR or have behaved unreasonably in the course of ADR." Lord Woolf, *Access to Justice, Final Report*, July 1996, Section 1, paragraph 18. This has, in my experience, proved a little optimistic, but there is no doubt that ADR is now more prevalent.

7.3 THE INSUREDS

- 7.3.1** Solicitor insureds may be at the more difficult end of the professional spectrum, albeit that it is accepted that this is a generalisation.
- 7.3.2** The Courts can to some extent apply a counsel of perfection when assessing the performance of their own Officers.

7.4 A GOOD RISK?

- 7.4.1** I return to the example in the Introduction: Jones, the solicitor who comes into the underwriter's or broker's office whose practice includes advice on charges, advocacy, advice to lenders, and countless undertakings.
- 7.4.2** Is the firm a good risk? If they:
 - (i) are selective as to the cases where they advise on charges and are careful when they do advise,
 - (ii) do a substantial amount of advocacy, rather than occasionally, and do it in areas of specialisation they are expert in,
 - (iii) advise lenders carefully in accordance with the guidance given by the Court, and the lender's instructions,and (iv) have good practices to ensure undertakings are only given where appropriate,
they may be a good risk.
- 7.4.3** If not, think long and hard about the premium!

The information and expressions of opinion in this paper and talk are intended to be a selective introduction to the subjects covered and not a comprehensive study. They should not therefore be treated as a substitute for specific advice concerning individual situations.

SCHEDULE: DAMAGES EXAMPLE

(i) **The facts**

Loan: £90,000 (**1990**)

Valuation in 1990: £100,000

True value in 1990: £80,000

Resale after repossession: £40,000 (**1994**)

Borrower's repayments: £5,000

Cost of repossession/sale: £5,000

Cost of borrowing/income which could have been earned on the advance monies: £50,000

Solicitor has failed to disclose material information to the lender.

(ii) **No transaction loss** (see *Swingcastle -v- Alastair Gibson (1991) 2 AER 353 HL*)

The lender claims: advance + cost of borrowing/income which could have been earned on the advance monies + cost of repossession/sale - resale price - borrower's repayments.

Putting numbers in that calculation:

$$\text{£90,000} + \text{£50,000} + \text{£5,000} - \text{£40,000} - \text{£5,000} = \text{£100,000}$$

This includes a recession loss. The resale value was only £40,000 because property prices had reduced from a true value of £80,000 in 1990.

(iii) **SAAMCO loss**

The original valuation was £100,000; the true value, in 1990 was £80,000. If the information provided by the solicitor had been correct, the true value in 1990 would have been £100,000; the lender would have proceeded with the loan, and, on repossession, the lender would have recovered, say, £50,000 (allowing a 50% reduction of the value, as was the case in the actual example i.e. £80,000 to £40,000). Thus, if the correct information had been given by the solicitor, recession losses would have been incurred in any event. It is for this reason that they do

not fall within the scope of the solicitor's duty and are therefore not recoverable.

The loss caused by the negligence was that the lender had **£20,000** less security than he thought he had.

(iv) Summary

The lender's actual loss (*Steggles Palmer*) was £100,000, but only £20,000 of this loss was due to the solicitor's negligence if a *Colin Bishop* approach were adopted.

The remainder of the loss was due to the fall in property values which resulted in a low resale price, the borrower having failed to repay, possible contributory negligence on the part of the lender or some other cause.

If the actual loss is less than the difference between the original valuation and the true value then the actual loss is recoverable.