PROFFESIONAL INDEMNITY INSURANCE CONFERENCE - 4 JULY 2007

AVOIDING LIABILITY IN CASES OF FRAUD - STEPHEN RUBIN QC

Fraud - introduction

1. This paper is concerned with issues of fraud arising between claimant and professional and between professional and insurer.

2. The topics covered are as follows:

   (1) The meaning of fraud.
   (2) The practical advantages and disadvantages to a Claimant for advancing fraud claims.
   (3) The scope of professional Indemnity Insurance cover for fraud
   (4) Avoiding liability by insurers in respect of PI claims against insured professionals on the grounds of fraud.
   (5) Some practical points in relation to avoiding for fraud.

3. What is meant in legal practice by the word fraud? Is it no more than another word for deceit or fraudulent misrepresentation? Is there any other sort of claim for fraud under English law?

4. Fraud is a word commonly used in the law to mean the tort of deceit (i.e. fraudulent misrepresentation inducing a contract). But it is also used properly in related contexts where there is some misrepresentation involved e.g. bribery and conspiracies to injure through cheating and deception. The second common meaning of fraud in law is unconscionable conduct which courts of equity will relieve against by setting aside a transaction or imposing a trust or other similar remedies. This is what we call equitable fraud. Thirdly, the word fraud is sometimes used to describe generally dishonest conduct.

Deceit/Fraudulent Misrepresentation - common law

5. Fraud as a reference to the tort of deceit is about misrepresentations made dishonestly and relied upon by the claimant.

Fraud in equity

6. Equitable fraud for our purposes concerns the dishonest receipt of trust property ("the constructive trust") and the dishonest assistance in the breaches of trust or fiduciary duty ("dishonest assistance"). The professional indemnity insurer can avoid for fraud against the insured who dishonestly assists another's misappropriation of money as this cause of action includes a dishonesty element. The position is different with constructive trusts as this does not necessarily include an element of dishonesty although it may do so. The test for liability as a constructive trustee of property is knowledge that it belongs to another not dishonesty.

The dishonesty test

7. I have mentioned dishonesty in the context of both deceit and dishonest assistance in a breach of trust. The word is the same but the test is different for these two causes of action. There is a distinct practical difference in the way in which the court decide whether a person has been dishonest in relation to a deceit i.e. fraudulent misrepresentation of a fact and dishonest assistance in the misappropriation of money held on trust or as a fiduciary. In deceit honesty is assessed by reference to the actual state of mind of the Defendant; it is a subjective test. The question in deceit is whether a person had an honest belief in the truth of what they said. If the defendant thought what he was saying was honest then even if a reasonable person objectively speaking would have thought it dishonest he is not liable. This makes success in alleging deceit in an action much more difficult for the claimant than may at first appear.

8. The case of Ansbacher & Co Ltd v Binks Stern [1998] PNLR 221 illustrates the problems that can arise. The Defendant was a solicitor of impeccable reputation who was senior partner of a substantial firm. He was prevailed upon by Roger Levitt to write to the claimant bank giving details of two contracts for the sale of shares by Levitt in his soon

to collapse group of companies. The claimant bank was looking to the proceeds of these contracts as security for its advance of £2.5 million. Mr Binks was not acting on the transaction in two senses. First he had not been instructed to act. Secondly, in any case, the transaction had already completed and Levitt had the money. Mr Binks at Levitt's insistence wrote to the bank saying that he acted for Levitt, which was not untrue in the sense that he did act for him on matters, but not this one, and used phraseology intended to leave it open to interpretation that the contracts had not yet completed i.e. that the money had not yet gone to Levitt.

9. Knox J at first instance took the view that Binks had no improper motive and was thus not acting dishonestly and so was not liable for deceit. The Court of Appeal allowed the appeal on the grounds that dishonesty in that sense was not required to be proved. The honesty in issue is the honesty belief in the truth of the statement made not a general dishonesty. The statements made by Binks were not true and thus the were deceitful even though he was not a dishonest man. Contrast this to the case of dishonest assistance. In that case the court is assessing when to impose a liability for involvement in wrongdoing by another who has taken money. The test there is a broader test of whether the defendant has acted dishonestly in relation to the transaction as a whole and the assessment of that dishonesty is not made from a subjective standpoint of the defendant himself but objectively in accordance with the Twinsectra and Tan tests i.e. proof of a dishonest state of mind - consciousness that one was transgressing ordinary standards of honest behaviour.

10. It can be said therefore that fraud for the purposes of an indemnity insurer will include deceit and dishonest assistance in the disposal of trust property. It will sometimes include accountability for knowing receipt of trust property but will not always do so as the test is conscience not dishonesty.

The advantages and disadvantages of fraud from the claimant's perspective

11. It is useful to have in mind why it is that a Claimant will wish to allege fraud. The advantages to a claimant of alleging fraud are as follows:

(1) Claims may be made against third parties with who the claimant has no contractual or common law relationship. For example the auditors of a company confirm that the accounts of the company give a true and fair view. This is a representation which could give rise to a claim for damages at common law for misrepresentation only if the auditors owe a duty of care to all of those reading the accounts. However generally speaking (leaving aside any special statutory duties) auditors do not owe such a duty to third parties even if they invest in the company on the strength of the accounts (Caparo Industries v Dickman [1990] 2 AC 605]; likewise actuaries and their valuation reports (Precis 521 v Mercer [2005] PNLR 28. A claim may lie on special facts but in big banking and commercial collapses the victims in search of a deep pocket to sue may be far and wide. For example the depositors with BCCI. A claim for deceit can lie against an auditor or and actuary in deceit.

(2) An illustration, which failed, is Goose v Wilson Sandford & Co [2001] 1Lloyd's Rep 189 C.A. where an accountant acting for a potential borrower informed a bank that was contemplating lending to his client (much like the Binks Stern scenario) that certain precious stones were his clients' and available to be charged. In fact they were not his client stones and were already pledged to another lender on an existing debt. The client went bankrupt and the accountant was sued. The defence was that the accountant had not expected the statement to be relied upon as an assertion that the stones were available as a security in the contemplated transaction In contract to the Binks Stern case however the court dismissed the case against the accountant on the grounds that the statement he made were honestly believed to be true if understood in the way he intended these statements to be understood which it held was not as the lender had understood the statement.

(3) In a legal transaction the solicitors for one party may make a statement on behalf of their client to the other side. They generally do not owe a duty of care to the

other side of a transaction. If the client is not good for any loss sustained from his solicitors misstatement in the course of the transaction suing the solicitor will not enable recovery to be made unless the solicitor knew what he was saying was false thus allowing a claim in deceit. Negligence will generally not be enough (Gran Gelato Ltd v Richcliff Group Ltd [1992] Ch 560[1]). Thus claims for deceit or for breaches of undertakings given by the solicitor are generally the only means of claiming against the opposing solicitor.

(4) A strategic decision to allege deceit will sometimes be made by a claimant when they recognise that they have themselves acted carelessly in the transaction. Contributory negligence is not a defence to a claim for deceit however careless the claimant may have been on his own account. It is not "fault" at common law and thus not relevant fault within the meaning of the Law Reform (Contributory Negligence) Act 1945 (Standard Chartered Bank v Pakistan National Shipping Corp and others (No 2) [2003] 1 All ER 173). Similarly it is no defence that the victim was gullible or careless or could have found out about the fraud if he had taken more pains – Redgrave v Hurd (1881) 20 Ch D 1.

(5) If the claimant would have made the payment in any event whether there had or had not been a deceit, provided in fact he relied to some even small extent on the deceit he may still recover damages for deceit (Edgington v Fitzmaurice (1885) 29 Ch D 459).

(6) Where the damages sustained by the Claimant from a negligent misrepresentation inducing a contract are so remote in law that they would not be regarded as reasonably foreseeable but are nonetheless caused directly by the

[1] But see Allied Finance & Investments Ltd v Haddow (1983) NZLR 22 and Al-Kandari v Brown [1988] 1 QB 665; Dean v Allin & Watts 2001 28 June TLR "Although as a general rule a solicitor when performing his duties towards his client did not owe a duty of care to third parties, special circumstances in a particular case might require a different conclusion.

misrepresentation then framing the claim in deceit rather than negligent misrepresentation[2] will lead to an enhanced recovery of compensation. In Smith New Court Securities Ltd v Scrimigeour Vickers (Asset Management) Limited [1997] AC 254 Lord Steyn held that

> "…*Doyle v. Olby (Ironmongers) Ltd.* settled that a wider test applies in an action for deceit. (5) The dicta in all three judgments, as well as the actual calculation of damages in *Doyle v. Olby (Ironmongers) Ltd.,* make clear that the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss. (6) Significantly in the present context the rule in the previous paragraph is not tied to any process of valuation at the date of the transaction. It is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement

(7) There is sometimes a greater limitation period available where deceit is claimed. Under Section 32 of the Limitation Act 1980 the limitation period for claims based on fraud is 6 years from discovery of the fraud or from the date when it should have reasonably been discovered.

12. The disadvantages to the Claimant of alleging fraud are several:

(1) The standard of proof where fraud is alleged is proof commensurate with the seriousness of the allegation made. Allegations of dishonesty are serious matters. Thus the court will require proof appropriate to the charge. It is not proof beyond a reasonable doubt but it is more onerous on the whole than where merely negligence is alleged- Re H [1996] A.C. 563 at 586 per Lord Nicholls[3].

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[2] This does not apply in relation to claims under the 1967 Act where damages are assessed in the same way as deceit damages

[3] *"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should the evidence be before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... "*

(2) The pleadings become more important where fraud is alleged. The precise formulation of the allegation will be scrutinised more often and with greater severity in cases of fraud than negligence.

(3) The indemnity insurer has the opportunity of avoiding liability in relation to the immediate fraudulent professional and as we shall see more later on possibly against the whole firm. This will be the subject to detailed consideration below. However it is important to note at this stage that where, in the case of solicitors the firm has one or few partners each of whom may be implicated, the danger of even alleging fraud as a cause of action is that the claimant will be forced to seek to recover any judgment obtained not from the insurers but from the Solicitors Compensation Fund. The fund provides compensation on a discretionary basis, may well make a significant reduction for contributory fault where a court might not do so and is not always prepared to cover the legal costs incurred before it became involved or otherwise gave its consent[4].

(4) The lawyers alleging fraud expose their clients to the risk of indemnity costs awards where fraud is alleged but fails. The solicitors and counsel acting for the claimant expose themselves to the risk of professional discipline. It is open to the defendant to report the claimants' solicitors and counsel for wrongly alleging fraud in breach of the professional standards of the relevant branch of the profession[5].

The Scope of Professional Indemnity Cover for Fraud

13. The current minimum terms and conditions of professional indemnity insurance for solicitors registered in England and Wales provides for a composite policy of insurance

[4] R v The Law Society, ex parte Mortgage Express Limited [1996]

[5] Medcalfe v Mardell [2003] 1 AC 120 - "…paragraph 606(c) of the Code of Conduct of the Bar did not require that counsel should, when making allegations of fraud in pleadings and other documents, have before him "reasonably credible material" in the form of evidence which was admissible in court to support the allegations; but that, at the preparatory stage, it was sufficient if the material before counsel was of such a character as to lead responsible counsel exercising an objective professional judgment to conclude that serious allegations could properly be based upon it"

which covers the firm, any company owned by the firm, each principal, employee and their estates from civil liability arising from Private Legal Practice in connection with the Firm's Practice.

14. The exclusions though are of more interest in this context. Clause 6.8 allows the insurer to exclude liability to indemnify the insured to the extent that any civil liability or related Defence Costs arise from "*dishonesty or a fraudulent act or omission committed or condoned*" by that person. This expressly does not affect the cover of any other insured person.

15. Clause 6.6 is also important. Clause 6.6(a) provides that the insurer may exclude trading or personal debt of any insured. Clause 6.6(c) allows liability in relation to any *"undertaking by any particular Insured in connection with the provision of finance or other benefit*" to be excluded. It is worth considering very carefully in certain types of case involving in particular borrowing or investment by the solicitors in the course of their practice whether in fact the claims made against the solicitor are personal ones rather than professional.

16. An insured has never been entitled in law to claim an indemnity in relation to his own fraudulent acts. It was a well established principle that a man could not recover under a policy of insurance for his own deliberate act: see Beresford **v** Royal Insurance Co Ltd [1938] AC 586 , 595. Clause 6.8 of the Minimum Terms extends the common law rule by adding condoning into the scope of the exclusion. In each case though the question of whether a policy will respond in the case of dishonesty of any of the insured in favour of another insured who is not complicit in that dishonesty is a matter of construction of the policy (Arab Bank PLC v Zurich Insurance Co and others [1999] 1 Lloyd's Law Reports 262 per Rix J). Plainly professional indemnity policies will ordinarily be written so that this is their effect.

17. In the case of the Law Society minimum terms (and the accountants also) this includes an exception for dishonest and fraudulent acts condoned by the other insured not just

committed. The word condoned means to overlook, to forgive in the sense of not allowing it to affect one's relations, to approve of or to sanction, even if reluctantly. I shall be examining later on the scope of the insurers defence of condoning dishonesty.

Avoiding liability by insurers in respect of PI claims against insured professionals on the grounds of fraud

18. The first basis of avoiding liability on the basis of fraud or indeed in response to other claims is to avoid the policy entirely on the grounds that it was induced by non-disclosure, misrepresentation or breach of the warranty arising from the basis clause.

19. This gives rise to the right to treat the policy as at an end from inception. Conversely if the policy is allowed to remain in force with knowledge of the non-disclosure or misrepresentation then the right to cancel will be lost.

20. The need to protect the public from having no recourse when the victim of negligence or fraud by professionals has led of course to the introduction of contractual restrictions in the policies covering solicitors, surveyors and accountants. Much turn on the particular wording of the restriction and the basis for the cancellation.

21. Clause 4.1 of the minimum terms for solicitors provides that the insurance must provide that the insurer is not entitled to reduce or repudiate the insurance on any grounds whatsoever including without limitation non-disclosure or misrepresentation whether fraudulent or not. Clause 4.2 provides that the Insurer is not to be entitled to reduce or deny liability on any grounds whatsoever Clause 4.3 provides that the insurance cannot be cancelled unless there is a merger or replacement insurance. It is hard to argue that as against any innocent insured the insurer could avoid the policy on the grounds that the proposal form or communications contained any non-disclosure or misrepresentation whether fraudulent or not on the basis of these very wide and seemingly watertight clauses. However there is one possible avenue for avoiding the whole policy. This is to allege that the insurance was void ab initio as a matter of law.

22. I can think of two possible circumstances which are relevant in the case of small firms of solicitors operating at the margins where such an argument might work. The first is where a dishonest solicitor who is not entitled under Law Society regulations to work for himself or by himself unsupervised persuades another solicitor to pretend that this other legitimate solicitor (the front man) is running the practice. The front man obtains insurance cover whereas the truth is that the firm is a sham operating as a cover for the rogue solicitor who is would not otherwise be entitled to practice or to obtain insurance. The case would turn on a fine factual analysis but it might be successfully argued that the insurance was taken out by a solicitor who was not truly practicing at all and thus he was not truly employing the fraudulent solicitor. The insurance would either therefore be void entirely as there was no firm operated by the front man or it might be void for illegality being a contract the purpose of which was to enable the rogue solicitor to operate in breach of the Solicitors Practice Rules which are the equivalent of statutory instruments. The insurance contract with the Insurers may well be unenforceable on the grounds that it was designed to enable an illegal practice to operate[6].

23. The distinction between illegality that renders the insurance contract void and misrepresentation which renders it voidable is significant. A mere misrepresentation in relation to the status of the firm and its constituent partners is not a basis for avoidance in this case due to the clauses 4.1 and 4.2 of the solicitors' minimum terms that preclude the Insurers from avoiding even if there is a fraudulent misrepresentation and the no adjustment or denial clause. Whereas if the insurance contract is held to be void it is not be "avoided" or "cancelled" but never came into existence at all.

24. Outside of solicitors cases there is more scope because the special clauses of the type just referred to are not usually included. The burden usually lies on the insured in such case to show that the misrepresentation etc was one of which he or she was innocent before the policy can be maintained in force see for instance Special Condition C/1 of the Institutes Minimum Approved Policy Wording – 1.1. 2006. There would still be potentially an

[6] Hudgell Yates & Co v Watson [1978] QB 451 – a costs case but shows the attitude the court may take to unlawful practice

argument that the Insured under the policy means individual insured persons not the firm so that innocent insured might still maintain the policy in force.

Avoidance of particular claims

25. It is rarely possible to avoid particular claims made against an innocent insured based upon the joint or vicarious liability of the insured as a partner or employer of the fraudulent solicitor or accountant as the case may be. I have already referred to the particular clauses and common law position. However both the solicitors and the accountants minimum terms permit exclusions to avoid liability where the defendant has condoned the fraud or dishonesty. This raises starkly the question as to what constitutes "condoning" in this context. The insurer can escape its duty to indemnify the insured for his or her liability or Defence Costs that arise from dishonesty condoned by that "innocent" insured.

26. We can eliminate from debate some obvious illustrations of a person condoning the dishonesty of another. An insured would be unable to claim an indemnity if he actively aids, abets counsels or procures the dishonest person to act as he did. This would in all probability make him liable as a joint tortfeasor or an accessory to the principal wrongdoer and thus jointly liable. If this were not "committing" a dishonest act it would undoubtedly amount to condoning such an act.

27. On the other extreme we have the situation in which an innocent partner only learns after the event of the dishonest act but does nothing about it or even makes some comforting or supportive comment. As mentioned the word condoned includes the meanings *" to overlook, to forgive in the sense of not allowing it to affect one's relations"*. Is the indemnity lost by such conduct or inaction? It might be argued that a failure to do something about one's partners' dishonesty should disentitle one to an indemnity but equally it could be said that by not doing anything the innocent partner has not increased the loss and damage and thus the amount that the insurer may have to pay. If doing nothing is sufficient to amount to condonation then how long must such inactivity last for before it becomes sufficient to disentitle the innocent partner to an indemnity?

28. There is only one case that concentrates upon avoidance of liability for condoning dishonestly and its fact are extremely complicated. Zurich Professional Limited on behalf of the Assigned Risks Pool v Karim and others [2006] EWHC 3355; LTL 18/12/2006 was decided by Irwin J without the attendance of the Defendants at the trial. They had sought an adjournment on the grounds of alleged illness and when that was refused and so did not appear. They were each solicitors but not independently represented in the action. For complicated reasons none of the victims of their frauds intervened in the action to preserve their rights under the Third Parties Rights against Insurers Act nor did the Law Society. The Judge and Counsel for the Claimant therefore had between them to formulate the potential arguments of the defendants.

29. As I have said, the facts of this case are fearsomely complicated but in summary they are as follows. Mrs Karim was in practice with her husband for a number of years under the name Karims or varieties of that name. She and her husband were disciplined in 1981 for breaches of the account rules and unbefitting conduct and suspended from practice. Mrs Karim's practicing certificate was restored in about 1984 with a condition that she practice only in partnership or employment approved by the Law Society.. This was not policed and she worked for solicitors without approval and some if not all of these firms were called Karims or names including it. She was probably practicing on her own in that period but it is not clear. In 1996 her son Imran qualified as a solicitor. He was the second Defendant. In 1997 Mrs Karim's daughter Saira qualified also. In 1997 she obtained a practicing certificate allowing her to practice but not on her own account. By 1997 Imran was being described as a partner. It is possible that at various times the father was also involved in the practice. By 1999 both Imran and Saira were recorded as being partners.

30. The firm of Karims was in reality, and at least as far as its main business was concerned of conveyancing, run entirely by Mrs Karim who was not a partner. Her children were totally under her control. Indeed Imran was not even allowed to draw cheques although a partner and Saira did entirely what her mother told her to do. Imran did a little criminal and media work. In the year they obtained cover from assigned risks pool they declared

income of £33,000 p.a. They had originally declared £133,000 but said that was a mistake when they learned that the premium was 25%!

31. A series of substantial frauds involving loses of millions of pounds were practiced by Mrs Karim. These consisted generally of unauthorised borrowings on behalf of clients and the misappropriation of the borrowed funds by Mrs Karim. These were sometimes effected by forging the mortgages as most starkly revealed in Campden Hill Limited v Chakrani, Karim and others [2005] NPC 65; LTL 20 May 2005 Hart J. In that case the Judge held that Mrs Karim had fraudulently procured without authority a 6-month loan of £500,000 on behalf of a client whose land certificate she held. She had agreed to pay £200,000 as an arrangement fee/interest (i.e. 80% p.a.). She obtained the advance by forging the mortgage documents. Mr Chakrani did not authorise the transaction at all. Neither Imran nor Saira was implicated as a knowing participant in that fraud. Indeed this was not merely tactical as there was no realistic evidence that they were involved.

32. There were several other frauds practiced by Mrs Karim but for present purposes the Campden Hill fraud illustrates the legal points as well as any of the frauds.

33. The Judge held that Imran and Saira although not personally involved or knowledgeable of the frauds (the "innocent" partners) had nonetheless condoned that fraud by their persistent dishonest handling of money, breaches of the rules in the period before it took place which allowed this fraud and the specific acts or omissions which gave rise to the causes of action against the rogue solicitor to take place. By those general acts of condonation although innocent as regards the actual commission of those specific acts of fraud, Imran and Saira were condoners of those specific acts of frauds even though they may not have known about them at the time they were to be or were committed (Judgment - para 108). This is therefore a decision that by not taking action to stop dishonest practices in a firm that preceded the particular fraud giving rise to the current claim, an innocent partner will have condoned the fraud that gives rise to the current claim.

34. The Karim case was a particularly bad example of dishonest practices at a small firm. But if that principle applies then there will be good arguments for avoiding liability for later claims where any dishonest act but one partner or employee comes to the attention of another partner who does not take steps there and then to deal with that dishonesty and to prevent further dishonesty taking place in the future. Even if the next act of dishonesty by the rogue partner is unconnected to the first act it will be arguable that the innocent partner is not covered for the next fraudulent act.

Some practical points in relation to avoiding for fraud

Costs

35. There may be serious costs consequences for insurers even when they successfully avoid for fraud if they continue to provide Defence Costs for the insured while reserving the position in relation to cover. under Section 51 of the Supreme Court Act 1981 ("the 1981 Act"). This statutory provision has been held in several leading cases to include a discretionary power to ensure that third parties on whose behalf litigation is in fact being pursued or defended or who have interfered in litigation can be made to compensate the winning party.

36. There are some clear principles established in the cases that govern the exercise of this power. An order made against a non-party will only be made in exceptional circumstances. In general, those providing funding for friends or relations are not liable to pay the other side's costs if their friends or relations fail in the litigation. On the other hand those financing litigation for their own commercial or other interests (such as for example, shareholders funding liquidators claims on behalf of an insolvent company where this will benefit the shareholders) will ordinarily be obliged to pay the other side's costs. In the middle are a variety of cases where the court has had to wrestle with two conflicting policies. The first is that costs follow the event and the winner should recover its costs from the party that has caused it to incur such costs. The second is that there should be access to justice for those who cannot afford to fund litigation themselves where they have taken out insurance or have supporters who are willing to assist them.

37. In Chapman v Christopher [1998] 1 WLR 12 an insurer sought to avoid a liability under Sec 51 for the costs of an insured whose defence it had funded on the grounds that the cover under the policy was limited to £1 million and this had already been used to pay the judgment so that the contractual liability to the insured had come to an end. Phillips LJ, as he then was, considered that the following features relied upon by the plaintiffs to justify seeking a costs order against the insurers were made out in that case and it was thus exceptional and justified an order against the insurers:

    (1) the insurers determined that the claim would be fought;
    (2) the insurers funded the defence of the claim;
    (3) the insurers had the conduct of the litigation;
    (4) The insurers fought the claim exclusively to defend their own interests;
    (5) the defence failed in its entirety.

38. It has been held in Cormack v Washbourne [2000] Lloyds LR 459 C.A. that the feature that was most significant in Chapman was the self-interest of the insurer in that case. In insurance cases that is likely to be a critical ingredient in finding that there are exceptional circumstances.

39. This raises the following further issues whether the Court will treat an insurer that is investigating cover as a party litigating for its own benefit. Bristol and West v Bhadresa and Mascarenhas [1999] 1 Lloyds Insurance and Reinsurance Reports 138 Lightman J considered whether delay by the insurer in avoiding was relevant. It was an application under Section 51 by Claimants against SIF. In that case SIF funded a multi-party claim against solicitors until only 3 weeks or so before trial. They then very late in the day denied cover on grounds of dishonesty. The Claimant Building Society won the action after a full trial and then claimed costs from SIF under Section 51. Lightman J rejected their application for costs from SIF after a 4-day hearing with leading counsel. He held that there were no exceptional circumstances in that case justifying the making of an order under section 51. It was in the public interest that cover should be provided as it was under the SIF Scheme, and the Scheme required SIF to continue funding the

arguable defences until fully satisfied that there had been dishonesty, and that is exactly what SIF did. There was no question of SIF acting in bad faith or so unreasonably as to call for the intervention of the Court.

40. In an ordinary case delay by an insurer in its decision-making whether it is entitled or bound to refuse cover is not an exceptional circumstance that can justify an order under section 51. The timeliness of the decision making process was not a matter in respect of which Bristol & West had any legitimate interest: SIF owed duties to act responsibly and fairly towards solicitors insured under the Scheme, and owed no potentially conflicting duty of care or expedition to Bristol & West as the plaintiff in the actions. There was not on the evidence any culpable delay, and any proven delay could not justify an order in this case as Bristol & West was alert to the dishonesty and took a calculated gamble that SIF would not reach the same conclusion that Bristol had reached the role of SIF in deciding whether there is dishonesty requires anxious, full and unrushed consideration of all available material made with full regard to the dire and (often) irreparable consequences of an adverse decision for the solicitor in question.

41. On the issue of causation the Judge held issues of causation when exercising this jurisdiction can be fraught with difficulty, for it may be exceptionally difficult to know whether the successful party would have incurred the same costs but for the impugned conduct of the non-party and, if some difference in expenditure is likely to assess such difference. If the Solicitors did not have the means to defend, they may have obtained legal aid or conducted their own defences. The earlier withdrawal of funding may or may not have induced an earlier settlement. He could not be satisfied with the necessary degree of certainty that a substantial saving of costs would have been achieved by Bristol.

42. The decision in that case was not appealed and in 6 years there is no decision on the same point going the other way. That was multi-party litigation on a grand scale with special factors that may have so inclined the Judge against making an order under section 51.

43. Since that decision there have been two important decisions on section 51 but not on solicitor cases. Lord Simon Brown said in Dymocks Franchise Systems v Todd [2004] 1 WLR 2807:

> "Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes."

44. In the recent case of Arkin v Bochard Lines [2005]1 WLR 3055 the Court of Appeal considered the costs liability of a professional funder who paid the Claimants costs and took a 25% share in the recoveries. It held that that a successful party should in general recover his costs. It was thus unjust that a funder who purchased a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party failed in the action; that a more just and practicable approach, which neither denied a successful opponent all his costs nor deterred commercial funders from providing help to impecunious claimants seeking access to justice, was that a professional funder, who financed part of the claimant's costs of litigation in the expectation of reward if the claimant succeeded, and who did so through a non-champertous and otherwise unobjectionable agreement which left the litigating party in control of the litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided.

45. The later cases coming as they do after Lightman J's decision in Bristol & West means that his decision will be subject to considerable argument should the point arise again.

The Land Registry

46. Finally, Schedule 8 of the Land Registration Act 2002. This is not a well-known provision but is of considerable strategic significance to indemnity insurers . It provides that the proprietor of a registered estate or charge claiming in good faith under a forged mortgage is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged and is entitled to an

indemnity from the Land Registry. Although they then have a subrogated right to go against the insurer there may well be cases where do not take that opportunity.

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