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Claims against solicitors - update on claims trends, liability and coverage

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Agenda

- Claims trends
- Liability - recent decisions on duty / assumption of responsibility
- Coverage
- Questions

Claims trends

Malpractice claims against solicitors

- **Claims inflation**
- Causes of action beyond negligence
- Defence costs
- Regulatory scrutiny
- Litigation funding
- Emerging liabilities: Cyber, AI, ESG
- Arbitration

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Liability

Duty of Care to Own Client (1)

Spire Property Developments v Withers LLP [2022] EWCA Civ 970

- Assumption of responsibility should be "*judged objectively in context and without the benefit of hindsight*"
- Necessitates a "*fact sensitive enquiry*"
- "[T]*he primary focus must be on exchanges which cross the line between the solicitor and the claimant*"

Miller v Irwin Mitchell [2024] EWCA Civ 53

- The Claimant had an accident while on holiday in May 2014.
- She called Irwin Mitchell's legal helpline who gave her basic advice and told her of the three-year limitation period for personal injury claims but not that it was advisable to ask the tour operator to notify its insurers
- A CFA and engagement terms were ultimately signed between Mrs Miller and Irwin Mitchell but over a year later
- The tour operator went into administration and its insurer declined to cover the claim as it had not been notified (even though the tour operator knew about the accident) in the relevant period year. Alleged that Irwin Mitchell should have advised of the need to tell the tour operator to notify its insurers sooner
- The Court of Appeal found that even before engagement Irwin Mitchell had a duty to give accurate advice but the scope of that duty did not extend to protecting Mrs Miller's position more generally and there was no assumption of responsibility to advise her on her position generally
- Importance of not using hindsight emphasised

Liability

Duty of Care to Own Client (2*J*)

Lewis v Cunningtons Solicitors [2023] EWHC 822

- The Claimant claimed against solicitors who acted in her divorce alleging that they had failed to advise her that she entered an unfair settlement with her ex-husband as she did not obtain a share of his pension.
- The Claimant had signed a disclaimer saying that she did not want financial disclosure and that as a result the solicitors could not advise her on the terms of the settlement that she had negotiated herself and could only document the settlement.
- The Court found the solicitors could not rely on the disclaimer because the solicitors had acquired a broad scope of duty and knowledge from the outset (including knowledge of the husband's pension) given this knowledge they had a duty to warn the Claimant that she could obtain a far better settlement with a pension sharing order if the matter went to court. It reached this decision on the following grounds:

  (1) Respecting the Claimants autonomy did not remove the need for solicitors to give appropriate advice

  (2) The Claimant was unsophisticated and vulnerable increasing the scope of duty

  (3) One size fits all disclaimer was not appropriate given the stage of the case

Liability

Duty of Care to Third Parties

Ashraf v Lester Dominic Solicitors & Ors [2023] EWCA Civ 4

The Court of Appeal confirmed the general rule that solicitors owe a duty of care only to their own clients subject to 3 exceptions

(1) Where the very purpose of a solicitor's retainer is to confer a benefit on a particular third party

(2) Where the solicitor makes representations on which a third party reasonably and foreseeably relies

(3) Where the solicitor has stepped out of their role as solicitor for their client and accepted responsibilities for another client

Mclean & Ors v Thornhill [2023] EWCA Civ 466

The Court of Appeal held that a barrister's opinion on tax given to promoters of a tax avoidance scheme could not be relied on by investors (despite no disclaimer of responsibility) because:

(1) The scheme documents had clearly advised potential investors to consult their own tax advisors

(2) No investor could subscribe to the scheme without warranting they had relied only on their own advisors

(3) The barrister was advising the parties on the opposite side of the transaction so reliance was "presumptively inappropriate"

(4) The investors were sophisticated investors of significant means who had access to independent advice.

Liability

Breach of Fiduciary Duty in conducting Litigation

Kings & Ors v DWF LLP [2023] EWHC 3132

- The Claimants alleged dishonest breach of fiduciary duty and negligence against their solicitors and barristers for dishonest breach of fiduciary duty in respect of conduct of prior litigation.
- It is alleged that the lawyers advised the Claimants to discontinue that litigation to cover up own mistakes rather than, as advised at the time, new evidence coming to light that fatally undermined the case
- Complex fact sensitive case which was dismissed by the court but some interesting points of general application
  - (a) The Court was not persuaded that lawyers owe fiduciary duties in respect of the conduct of litigation because they had no power or control over the litigation
  - (b) The decision emphasises the difficulty of establishing that an exercise of judgment is negligent "*in the realm of art not science*"
  - (c) Confirmed that solicitors are entitled to rely on counsel's advice to discontinue even if it had been negligent (but must not do so "blindly" or if the advice is "obviously wrong")

Coverage

The SRA Minimum Terms and Conditions of Professional Indemnity Insurance ("MTC")

The SRA's MTC provide uniquely broad and unassailable cover

Key features

- Cover is mandatory
- Sum insured must be for at least £2m (or £3m for LLPs) for each claim with no aggregate limit
- Unlimited defence costs
- Not possible to avoid/repudiate policy, decline claim or reduce indemnity for any breach (save as permitted by the minimal exclusions)
- Exclusion for dishonestly/fraud is permitted but will provide cover for innocent insureds, so cannot usually be relied on (although it is possible to seek re-imbursement from culpable insured)
- Insurer must pay the excess if not paid by Insured
- Insurance must provide 6 year run off cover if no fresh insurance with successor practice

Coverage

Scope of Cover about MTC – Some observations

- Cyber breach liabilities - MTC cover includes third party losses but not a law firms' own losses
- Regulatory liabilities - MTC does not require an insurer to cover costs of disciplinary and regulatory proceedings and can exclude any fine or penalty that an insured may be ordered to pay
- Solicitors' insurance *may* cover disciplinary and regulatory proceedings but even then not all fines will be covered

Coverage

Aggregation

Axis v Discovery Land Company [2024] EWCA Civ 7

- A 2 partner firm. Partner B stole client money intended for a property purchase and subsequently stole loan monies he borrowed against the property. The judge found both partners were "bad apples", Partner B was jailed for fraud and Partner A found to be "*dishonest…in a number of respects*"
- Despite finding of dishonesty, the court found that Partner A did not have knowledge of Partner Bs "*particular dishonest behaviour*". The Court of Appeal did not overturn this on basis "*it was not plainly wrong*".
- The court further found that the two claims for the two thefts from client account did not aggregate within the wording of the MTC despite being thefts from the same client account in respect of the same property.

Dixon Coles & Gill v Baines[2021] EWCA Civ 1097

- Again involved the theft of client money, considering aggregation of claims arising from "*one series of related acts or omissions*"
- Court of Appeal held that repeated thefts of client monies could not be aggregated as an underlying pattern of dishonest conduct was not sufficient.
- Per Lord Justice Nugee (with whom the others agreed) "*if there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too*"
- Would only aggregate if the series of acts together resulted in each of the claims.

Coverage

Scope of Cover - fees

RSA v Tughans [2023] EWCA Civ 999

- A partner of the defendant firm was engaged by a company in relation to a sale of loans. The law firm was subject to a claim for recovery of £9m success fee in respect of the transactions
- Insurers declined the claim on the grounds that the claim did not arise from the provision of professional services (so was outside insuring clause) and that no loss was suffered
- The Court of Appeal held insurers could not decline cover because
    (1) The insurance clause was wide and covered an indemnity for "*any civil liability… incurred in connection with the Practice*"
    (2) There was a loss because the firm was deprived of a success fee it had "earned" under contract
    (3) Court indicated that even in a restitutionary (rather than a contractual) claim, a claim for fees may be covered

But "unearned" fees may not constitute loss

Thank you. Any questions?

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