



IMC Professional Indemnity Conference: Keeping Ahead Of Tomorrow

The coverage review

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Points for discussion

1. Condonation of dishonesty
2. Aggregation
3. Coverage of fees return liability
4. Notification and attachment
5. Ancillary litigation
6. Miscellaneous issues



DAC BEACHCROFT

1. Condonation of dishonesty

- **Discovery Land Company LLC & Others v AXIS Specialty Europe SE** [2023] EWHC 779 (Comm)
- AXIS provided PI insurance to 3 entities known as the Jirehouse Entities (“JE”) who provided legal services
- Cs had judgments against JE:
 - Surplus Funds Claim – US\$14.05m re purchase of Taymouth Castle
 - Dragonfly Loan Claim – c. £4.98m secured on Taymouth Castle
- Alleged Mr Jones of Jirehouse had dishonestly and without authority paid out / drawn down monies. Jirehouse insolvent.
- Was there an innocent partner? Cue Mr Vieoence Prentice

VIOENCE PRENTICE

- Employed by Jirehouse for over a decade
- Qualified barrister and solicitor
- **London**, Nevis, Jamaica and Ireland
- Litigation focus
- Purportedly a director of Jirehouse and member of Jirehouse Partners LLP at the relevant times
- Claimed no concerns of anything untoward until resignation
- But 3 prior reports by former partners / solicitors at Jirehouse to SRA re financial dealings, solvency, conflicts of interest. All cleared by SRA.

VP'S EVIDENCE

- *"Deeply unprofessional and not honest"* evidence as to Jirehouse solvency in response to two winding up petitions
- Happy to rely on Jones re representations to third party as to monies held
- Was "not open" with the court and "did not tell the truth" to AXIS' silk re background financial dealings
- Disinterest in serious financial problems of Jirehouse "inadequate" and "well below the professional standards expected" as VP "unsuitable to be a solicitor"

Discovery Land – condonation of dishonesty (cont.)

“The **insurer** shall have no liability under the **policy** for:

2.8 FRAUD OR DISHONESTY

Any **claims** directly or indirectly arising out of or in any way involving dishonest or fraudulent acts, errors or omissions committed or condoned by the **insured**, provided that:

- a) the **policy** shall nonetheless cover the civil liability of any innocent **insured**; and
- b) no dishonest or fraudulent act, error or omission shall be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company, or in the case of a Limited Liability Partnership, all members of that Limited Liability Partnership.”

Findings on condonation

- Accepted that Prentice knew Jones “*was prepared to do things that he should not have been prepared to do*” and was the same himself.
- Prepared to “*turn a blind eye*” to Jones’ conduct.
- Prentice did not know at relevant times that Jones had stolen or might steal client monies.
- Prentice fell “*well below*” standards of profession and there were “*episodes*” showing untrustworthy and dishonest conduct.
- But did not condone a Ponzi scheme.
- Given ordinary meaning to “condone”, Prentice did not condone Jones acting dishonestly or fraudulently.
- Arguments as to sham partnership dismissed.
- Decisions in **Zurich v Karim** [2006] EWHC 3355 (QB) and **Goldsmith Williams v Travelers** [2010] EWHC 26 (QB) dismissed as involving different wording, and different facts.

The earlier decisions on condonation

Irwin J (now retired Lord Justice of Appeal) in **Zurich v Karim**:

"I am in the end reinforced in this view by considering what the objective reasonable reading of such a contract would be – by the reasonable person on the Underground. Different responses to this situation might reasonably emerge from the person on the Underground, including surprise that such a contract permits insurers to stand aside from this kind of liability at all. Nevertheless, construing the document, it seems to me the reasonable person would be surprised if this clause allowed the Insurers to step aside from those within the firm who practised or condoned the specific forgery but not from partners who condoned persistent dishonest handling of money, breaches of the rules, and so forth, which allowed the specific act or omission to take place."

Condonation (cont.)

- Wyn Williams J in **Goldsmith Williams**:

I have found that by the time that Mr Atikpakpa stole the money loaned in respect of 42 Tulse Hill Ms Usman knew that he was engaging in mortgage fraud. Specifically, she knew of his application for a mortgage in respect of Netherstone and she knew of his application for a mortgage in respect of 5 Montague Place. Upon my findings of fact she knew that he had made false representations in the mortgage application forms. That was a course of conduct which she condoned. Had she not condoned such conduct Mr Atikpakpa would have been in no position to steal the money borrowed by his wife in order to purchase 42 Tulse Hill. Her condoning of Mr Atikpakpa's fraudulent mortgage applications permitted a state of affairs to arise whereby he was left free to steal."

Discovery Land – condonation of dishonesty (cont.)

- Understood to be under appeal

“The point for discussion, but I suggest it may surprise the client community, and the public, that insurance, which is part of a framework required for their protection, may protect them where one of two partners was dishonest but not where the insurers can show the second partner condoned the dishonesty of the first. This may be especially so where the firm is a separate legal entity from its “partners”.

I appreciate there are other parts of the overall framework that is in place for the protection of the clients of solicitors. However at least the question of sufficient transparency on the point just mentioned may be suitable for joint review by The Law Society and the SRA.” Mr Justice Robin Knowles CBE

2. Aggregation

- Background of recent decisions in **Baines v Dixon Coles & Gill** [2021] EWCA Civ 1211; and **AIG Europe v Woodman** [2017] UKSC 18; **Spire Healthcare v Royal & Sun Alliance** [2022] EWCA Civ 17
- Standard wordings take very different approaches:
 - RICS – “originating cause” based
 - SRA – related acts or omissions / matters or transactions

Aggregation wordings

- RICS: *SERIES OF CLAIMS shall mean a number of CLAIMS (whether made against or involving one or more persons or entities comprising the INSURED and whether made by the same or different claimants and whether falling under one or more insuring clauses of this policy) that arise directly or indirectly from the same originating cause.*
- SRA: One claim The insurance may provide that, when considering what may be regarded as one claim for the purposes of the limits contemplated by clauses 2.1 to 2.3 (inclusive):
 - (a) all claims against any one or more insured arising from:
 - (i) one act or omission;
 - (ii) one series of related acts or omissions;
 - (iii) the same act or omission, in a series of related matters or transactions;
 - (iv) similar acts or omissions, in a series of related matters or transactions, and
 - (b) all claims against one or more insured arising from one matter or transaction will be regarded as one claim.

Decision on aggregation in Discovery Land

- Reference to Dixon Coles & Gill
- Not same series of acts
- Separate thefts
- Purchase transaction and lending transaction might fit together but not here
- 9 months between wrongful release of money from client account in Surplus Funds Claim, and subsequent wrongful arrangement of facility, drawdown and then release from client account in Dragonfly Loan Claim

3. Coverage for fees return liability

Royal & Sun Alliance v Tughans [2022] EWHC 2589 (Comm)

- Challenge by RSA to arbitral award
- Sale of part of portfolio by NAMA (National Asset Management Agency)
- Success fee payable in event of successful transaction
- £7.5m to Tughans
- Recovery claim for breach of conditions on which fee paid
- “Any civil liability” wording



Fees coverage (Tughans) - decision

- Foxton J: where a solicitor has *“done what is necessary ... to accrue a right to the fee, an award of damages for the ... fee payable will ordinarily constitute a loss for the purposes of a professional indemnity policy.”*
- Obligation to return a sum to which Insured was never entitled *“is not ... indemnifiable loss ... in the absence of clear language to that effect.”*
- But Tughans were entitled to fee
- Appeal this month

Fees – lessons from Tughans as matters stand

- What does this mean?
 - Obviously unpalatable for Insurers
 - Arguments based on restitutionary liability (with some support in case law and legal texts) failed
 - Does not apply where no entitlement to fee
 - Also will not apply where there was sufficient consideration for fees, or fees not the issue
 - But immaterial if fee was procured by fraud
 - A concern for Insurers at a time of ingenious remuneration structures
 - Claims in respect of return of fees might become more frequent
 - Difficulties with “all / any civil liability” MTC wording

4. Notification and attachment

- No new developments since **Euro Pools PLC v Royal & Sun Alliance** [2019] EWCA Civ 808
- Reminder:

“In my judgment, issues about the limits of the circumstances notified and the range of claims that might be said to arise from them are matters better left to be determined if and when a claim arises.”

(Vivien Rose J, now Lady Rose, in **McManus v European Risk** [2013] EWHC 18(Ch), approved on appeal)

5. Ancillary litigation

- RICS: allows 80% of non-defence costs claim related legal representation costs + court hearing attendance allowance
- SRA MTC: cover in relation to any investigation or inquiry save for disciplinary proceedings
- ICAEW: silent
- A claims-handling decision?

6. Miscellaneous

- D&O / crime policies – ransom payments?
- Cyber overlap:
 - Global premiums currently \$14bn. Munich Re estimate \$63bn by 2029. London placing
 - Systemic risk; regulator (eg PRA) focus; infrastructure / cyber war exclusions
 - PI crossover especially with MTC. EG data privacy (class actions / GLOs)
 - Growth in Tech PI
 - Considerations of excluding biometric risk / AI – challenge of defining the same

Any questions?

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