This Quarterly Review includes updates on insurance issues involving Accountants, Solicitors, Surveyors, Construction, Irish developments and finishes with a slightly more in depth look at the Mitchell case which will have a substantial impact on all litigation going forward.

Accountants

Accountants doing probate work and changes to the ICAEW minimum wording

Subject to the final approval of the Lord Chancellor, ICAEW members are likely to start undertaking probate work later this year following the ICEAW’s application to become both a regulator of probate services and a licensing authority for alternative business structures. Accountants undertaking probate work will be a significant change as this has always previously been a reserved activity for legal professionals. It is still to be seen how many ICAEW members will take up the opportunity to undertake probate work but some members have already suggested that they expect to be able to significantly undercut solicitors on fees.

ICAEW members undertaking probate work is a brand new area of work for accountants and of course opens the profession up to potential claims in a complex area that the accountancy profession currently has little experience. As a result, ICAEW members that undertake probate work will now be subject to the jurisdiction of the Legal Ombudsman if probate clients have cause to complain.

As part of the approval, a significant change has been made to the ICAEW minimum wording for professional indemnity insurance policies for accountants. This is the first time since 2010 that the ICAEW has made changes to its minimum wording. In respect of probate claims, the limit of indemnity in an ICAEW member’s professional indemnity insurance policy must be a minimum of £500,000 for each and every claim and exclusive of defence costs. In a separate amendment to the minimum wording, the ICAEW have also specified the minimum limit of indemnity for carrying out insurance mediation activities, for which an ICAEW member needs to be directly authorised by the Financial Conduct Authority or licensed under the ICAEW’s Designated Professional Body arrangements. The minimum level of cover for insurance mediation activities is now the equivalent of €1,120,200 for each claim and €1,680,300 per annum for all claims.

Stratton v Revenue and Customs Commissioners [2013] UKFTT 578 (TC)

First-tier Tribunal (Tax Chamber)

X unsuccessfully appealed to the First-Tier Tax Tribunal against an amendment to his tax return and a penalty imposed on him relating to the submission of that incorrect return. X, with the assistance and advice of his accountants, submitted his tax return on the basis that a disposal of shares to his employer, for which he received £382,748, was subject to capital gains tax. HMRC contended that the proceeds of the share sale were subject to income tax and not capital gains tax as X had obtained the shares on a conditional basis as a direct result of his employment.
As part of his appeal, X contended that the penalty imposed by HMRC for the incorrect tax return should be nullified on that basis that he had not been negligent under the old penalty regime and had exercised reasonable diligence in that he had relied upon his accountant when completing and submitting his tax return. The Tribunal found that reliance upon defective advice given by an accountant could not constitute reasonable diligence in circumstances where there is no reasonable basis for the accountant’s advice or when there was a failure by the accountant to consider the relevant statutory provisions. The Tribunal concluded that granting relief on that basis would be equivalent to finding that a mistake of law or ignorance of the law could constitute reasonable diligence, which Parliament had not intended.

This case highlights that an error made by a taxpayer’s accountant is usually insufficient to avoid a penalty, although there are cases in which it has been successful (see Hanson v HMRC). Under the new penalty regime HMRC do accept that no penalty should be charged if their agent has made an error but only provided that the taxpayer has taken reasonable care themselves and appointed an accountant who was competent to deal with their affairs, who might need to be a specialist in a particular area for example. In addition they will need to have given them all the necessary information and checked their return as far as they could. It can remain difficult in practice to convince HMRC of this.

For ease of reference the current penalty regime is set out below. The penalty is calculated by applying an appropriate percentage to the potential lost revenue.

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<th>Reason for wrongdoing</th>
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**Solicitors**

**Gabriel v Little and BPE Solicitors LLP**

In a unanimous decision in the case of Gabriel v Little and BPE Solicitors LLP the Court of Appeal has reinforced the recent run of decisions against Solicitors limiting losses to the consequences of a solicitor’s “information” (as per Lord Hoffman’s categorisation in Saamco) being wrong. Despite cases such as Portman BS v Bevan Ashford where full losses for the entire transaction were awarded, the Court of Appeal now appears to be slow to allow full losses. In this case the Court of Appeal was content to follow the Saamco ratio in relation to Solicitors; the loss must flow from the breach of that duty otherwise losses will not be recoverable.

**Surveyors**

(1) Flanagan (2) Coles v Greenbanks LTD (T/A Lazenby Insulation) [2013]

Mr Flanagan & Mrs Coles (householder claimants) pursued a claim against Greenbanks Ltd (“G”) who installed cavity wall insulation. G settled with Mr Flanagan & Mrs Coles and pursued an Additional Claim against Mr Cross
trading as JK Surveys ("JK") who surveyed the properties for the purposes of assessing suitability and to measure. G claimed breach of contract and sought an indemnity or contribution under the Civil Liability (Contribution) Act 1978.

The issue before the Court of Appeal was whether the Judge was correct to decide there was no break in the chain of causation following JK’s breach of contract with G. JK submitted that (1) G had been aware of previous occasions when JK had provided erroneous positive surveys but G’s installers had discovered the problems and the insulation had not been installed; (2) G had a contractual entitlement to terminate the contract with the householder if it found the property unsuitable; therefore, G’s failure to carry out a pre-installation check was serious negligence, bordering on recklessness, which broke the chain of causation; (3) JK could not have foreseen G’s failure to check for a timber frame, given that G was certified by a trade body whilst JK was not, and in the 11 months between JK’s survey and G’s installation there was a risk that the suitability might have changed.

The appeal was dismissed. (1) JK’s submission implied that because G had known of other similar failures by JK, it should not have trusted JK to comply with their contractual obligations. If successful, that submission would permit JK to rely on their own incompetence. (2) G’s conduct, undoubtedly and admitted negligent, could not be elevated to recklessness, or near it. (3) Unforeseeable events combining with the breach to cause loss did not mean that those events superseded the breach as the cause of loss. Instead the effects of a breach might continue to combine with other events to produce the final result. Even if G’s default had been an effective and concurrent cause, it would not have obliterated JK’s earlier breach, where both events had combined to cause the loss.

Conclusion. G’s negligent failure to establish that houses were suitable for installation did not break the chain of causation in respect of JK’s prior negligent surveys performed in breach of contract.

Harrison v Technical Sign Co Ltd [2013]

On 23rd June 2007 the fascia of a shop in Putney became detached from the building and fell onto the pavement causing serious injuries to the claimants who happened to be passing by. As a result they brought proceedings against the proprietor of the shop ("M") and various other persons who were alleged to owe them a duty of care. They included T which had supplied and fitted the shop sign, A, who had carried out a remodelling of the shop front, including the fascia, in 2005 and a firm of surveyors, Cluttons ("C") who inspected the awning over the shop window at the request of M in March 2007. M submitted to judgment and A conceded it was liable. The 20 claims (between the co-Defendants) were all compromised apart from the claims by M and A against C. At first instance the Judge held that A and C were both liable to the claimants for the injuries they had suffered and were also both liable to indemnify M in respect of the financial loss it had suffered in compensating the claimants. A was entitled to obtain a contribution from C under S.1 (1) Civil Liability (Contribution) Act 1978 on grounds that they were both liable to the claimants and M in respect of the same damage. Liability was apportioned 89% to A and 11% to C.

C appealed against the Judge’s order that A is entitled to obtain a contribution from them towards its liability to M. C denied they owed a duty of care either to the claimants or to M. A resisted that and by a cross-appeal challenged the Judge’s apportionment of liability, which it says was too favourable to C.

The appeal was allowed. (1) C’s involvement had nothing to do with the safety of passers-by; their role was simply to see whether the shopfront had sustained damage for which their client might be liable, and there was not a
sufficient degree of proximity between them and the claimants to give rise to a duty of care. (2) The Judge had also erred in holding that C owed a duty of care to M - C were approached as agents of the landlord rather than as surveyors, for M to make a claim in respect of damage that it thought had been caused by the landlord's workmen. C’s concern was with the awning. There was no evidence to suggest that they had been asked to advise M in relation to the condition of the shopfront in general, or that a relationship of professional adviser and client had come into existence. The judge’s finding that M would have relied on what C reported following the inspection, and that it was reasonable for M to do so, was not supported by the evidence. The nature of the relationship was inconsistent with an assumption of responsibility by C. (3) As C did not owe a duty of care to the claimants or M, A’s claim for a contribution had to fail.

Conclusion. The relationship between C (a firm of surveyors, acting as agents of the landlord) when inspecting a shop awning for damage, and M (the owners of the shop, whose shopfront sign had later fallen and caused serious injury to passers-by), was insufficient to sustain a finding that C owed a duty of care to the claimant passers-by or the shopowners.

Construction

**Parkwood Leisure Limited v Laing O’Rourke Wales and West Limited [2013]**

A collateral warranty was held to be a construction contract under the Housing Grants, Construction and Regeneration Act 1996, giving the parties to the warranty the right to adjudicate.

The contractor entered into a collateral warranty with the sub-tenant. The warranty contained an obligation that the contractor “shall carry out and complete the Works in accordance with the Contract.”

The sub-tenant issued Part 8 proceedings asking the court to consider whether the collateral warranty was a construction contract for the purposes of the Construction Act entitling the sub-tenant to commence adjudication proceedings.

The court held that this collateral warranty was a construction contract. The contractor was under a future obligation to "carry out and complete the Works in accordance with the Contract." It was clear from this that the warranty was a contract for “carrying out construction operations” under s.104(1)(a) of the Act.

However, the judge noted that not all collateral warranties will be construction contracts. If the warranty is provided after the works (or services) have been completed and is simply warranting a past state of affairs, the warranty is unlikely to be a construction contract.

**SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC)**

This case is a reminder that caps on liability will be construed against those relying on them and in the context of the contract as a whole. The scope of any cap on liability should therefore be considered very carefully.

In 2006 an employer entered into a contract with a contractor to build a polyethylene plant. The contractor’s parent provided a PCG to the employer. The contractor failed to meet the date for completion stipulated in the contract, which led to the employer terminating the contract and completing the works.
itself. The employer then sought to recover the costs of doing so from the contractor's parent company after the contractor had entered administration.

The cap on liability in the EPC contract stated that it applied to "the aggregate liability of the Contractor under or in connection with the Contract (whether or not as a result of the Contractor's negligence and whether in contract, tort, or otherwise at law)". While the wording of the clause was very wide (and typical), on a detailed analysis in the context of the contract as a whole, it was held obiter that the parties did not intend the cap to apply to the costs incurred by the employer in completing the works on termination.

Procedure

Durant v Chief Constable of Avo & Somerset [2013] EWCA Civ 1624

This case was the first time the Court of Appeal had ruled on non-compliance following the Jackson reforms in April. The Court of Appeal in Durant were critical of the first instance Judge (Judge Britles) for following the old CPR 3.9 checklist.

Judge Britles had approved two applications for relief from sanction, agreeing for a total of eight witness statements to be served more than two months after the set deadline. The reasons for the delay were due to adverse weather conditions, operational commitments of the officers and the Christmas period.

In overturning the High Court decision, Lord Justice Richards held that Judge Britles ‘did not approach the exercise with the focus or degree of toughness called for by the guidance in Mitchell’ and failed to appreciate the considerations of proportionality and compliance which ought to have been given greater weight. This is a clear example of the stringent and robust approach the courts are now taking.

Thevarajah v Riordan and others [2014] EWCA Civ 15

The Court of Appeal reinforced the robust approach taken in Mitchell v News Group Newspapers Ltd with respect to applications for relief from sanction by overturning an order granting the defendants a second application for relief from sanctions under CPR 3.9.

The defendants were in breach of an Unless Order for which non-compliance meant they would be de-barred from defending the claim and any defence would be struck out. Hildyard J dismissed the defendants’ application for relief from sanctions due to their failure to comply with the Unless Order and whilst that decision was not appealed by the defendants, a second application was made for relief from sanction. The second application was granted by Mr Sutcliffe QC (the deputy judge) under CPR 3.9(1) and CPR 3.1(7) to the extent that Hildyard J’s order required variation or revocation. The decision was overturned by the Court of Appeal as it was held that the defendants had ‘manifestly’ failed to advance an appropriate basis for revisiting Hildyard J’s order refusing relief and therefore should not be granted a second bite of the cherry under CPR 3.9 without reference to the test under CPR 3.1(7) and in accordance with the principles established in Tibbles v SIG plc [2012] EWCA Civ 518. This included proving there had been a material change in circumstances since the order refusing relief was made, for which the defendants had failed to satisfy.

The Court of Appeal’s decision serves to remind us of the court's stricter and more robust role in upholding the need for litigation to be conducted at proportionate cost and in compliance with orders, rules and practice directions.
It is worthy of note that the defendants’ second application came two months after Hildyard J’s decision and merely two days before trial and this was held to be non-compliant with the need for applications to be made promptly.

**Webb Resolutions Ltd v E-Surv Ltd [2014] EWHC 49**

The application of the *Mitchell* case was extended by the High Court in *Webb Resolutions* in order to set aside a grant of permission to appeal made under CPR 52.3(5) due to late filing of the appeal request within the mandatory seven day period required by CPR 52.3(5).

Where an appeal court refuses permission to appeal without a hearing, a request may be made for the decision to be reconsidered at a hearing pursuant to CPR 52.3(4) and such request for the decision to be reconsidered at a hearing "must be filed within seven days after service of the notice that permission has been refused" (CPR 52.3(5)). Turner J held that although CPR 52.3(5) did not contain a specific sanction for out of time applications, the mandatory language and tight seven day deadline highlights the prompt nature in which such applications must be made. Moreover, it was held in this case that there was considered to be no good reason for the delay, Turner J extended the application of the *Mitchell* case to CPR 52.3(5).

In this decision, it is clear that the court recognises the importance of finality in litigation and for there to be clarity in favour of the parties knowing when that end has been reached. As such, the recent case law post *Mitchell* reiterates that paramount importance of parties strictly adhering to court deadlines as far as possible.

**Ireland**

**First Conviction under Section 29 of Civil Liability and Courts Act 2004**

On 8 October 2013 the Dublin Circuit Criminal Court imposed the first criminal prosecution under Section 29 of the Civil Liability and Courts Act, 2004, which provides for a fine or a term of imprisonment for knowingly giving false or misleading material evidence in a personal injuries case. This is the first prosecution since the Act came into effect 10 years ago. The Plaintiff in the personal injury proceedings, Mr. Smith, was involved in a car crash in August 2009. He was treated for his injuries in hospital. He returned to the hospital several times complaining of back pain and reduced movement of his spine. He sued the car owner and motor insurers and was awarded €7,500 in the Circuit Court. The Defendants appealed the decision to the High Court. In the High Court DVD evidence was presented of the Plaintiff engaging in mixed martial arts contests (cage fighting) from the date of the crash until the trial date. Mr. Justice Kearns found in favour of the Defendants and ordered that the case be handed over to the DPP. Mr. Smith was arrested in 2012 and during interview admitted that he failed to disclose details of his cage fighting. Mr. Smith was before Judge Mary Ellen Ring for sentencing on 11 December. He avoided a jail term and received a three year suspended sentence. Judge Mary Ellen Ring said that an example had to be made of people “willing to make false claims for financial reward” and that the message should go out that anyone who engages in this activity will face criminal prosecution as well as fines as determined by the Civil Courts. Judge Ring also noted that while the case was first of its kind, it “was not dissimilar in nature to others where people make false assertions either under oath during a trial or as in this instance while swearing an affidavit”. This will be of interest to the Insurers of construction professionals involved in personal injury litigation and will hopefully signal a new trend in personal injuries claims.
**Recent Decision of Irish High Court Clarify Third Party Rights Against Insurers**

There is no Irish legislation equivalent to the UK Third Parties (Rights Against Insurers) Act 1930. In the absence of any specific legislation the common law principle of privity of contract applies and a third party will not be able to enforce a contract of insurance to which it is not a party. Attempts have been made to use Section 62 of the Civil Liability Act, 1961, which operates to ensure that any moneys paid under a policy of insurance on behalf of an individual who goes bankrupt, or a corporation that is wound up, are not used to satisfy the claims of creditors but instead are used to meet the compensation claim, to confer a right of action against an insolvent Insured’s Insurer. *McCarron v Modern Timber Homes Limited (2012) IEHC 530* established that liability against an Insured (in bankruptcy or liquidation) must first be established and quantum assessed before an Insurer can be sued under Section 62. Recently, in *Yun Bing Hu v Duleek Formwork (in liquidation) (2013) IEHC 15* the claimant obtained judgment against the Insured but Insurers declined an indemnity as it was a condition precedent that the Insured’s excess be paid and the liquidator refused to do so. It was held that Section 62 applies to circumstances were monies are payable and this was not the case as the Insurer had declined indemnity due to the liquidator’s refusal to pay the Insured’s excess. Accordingly the claimant had no cause of action against the Insurer. It was also found that the Insurer owed no duty of care to a claimant to inform him as to whether the Insured had complied with all policy conditions.

**Points for Insurers**

- Carefully consider any requests from third parties for information on insurance arrangements
- Consider any policy points that may be taken before providing an indemnity to an Insured or third party
- Seek legal advice if served with a third party request for discovery/disclosure
- The Courts will recognise a valid repudiation/declinature by an Insurer
- A claimant will not be entitled to remedy a breach by an Insured of a condition of its policy

**Pyrite Resolution Board**

The Pyrite Resolution Act was enacted on 25 December 2013. It was commenced on 10.01.14 by S.I. No. 1 of 2014. It is now fully in force. This will enable the Pyrite Resolution Board to start taking applications straight away and for remediation works to commence on affected properties. On 16 October the Irish Government announced the establishment of a €10 million fund which will be utilised to carry out remedial works on those homes most affected by pyrite, with further funding from the Government’s Capital Stimulus Programme to be allocated in the next two years. It is estimated that up to 1,000 homes will require immediate remedial works where almost 10,000 will not require immediate attention (but may require work in the future). It is estimated that the average cost of repair to an affected dwelling will be €40,000, which if accurate means that, until the additional funding is actually put in place, only 250 homes can be repaired. Under the scheme homeowners can apply for repairs estimated to cost up to €50,000. Only the most severely damaged houses will qualify. Repairs already undertaken will not be covered.

The original intention was that a levy would be imposed on the quarrying and insurance industries. However concerns over the constitutionality of this approach meant that it was sidelined. The Government has indicated that this
decision will be reviewed once the outcome of current litigation is clear on what redress the State or homeowners can obtain. About 12,500 homeowners complained about pyrite damage to HomeBond, the construction industry insurance scheme. HomeBond refused to pay any compensation and blamed the quarries for supplying the pyritic material instead. The Government said discussions were continuing with HomeBond and the Construction Industry Federation to find ways of having them assist with the scheme. In particular, the Pyrite Resolution Board was looking at how they could provide technical assistance and testing of houses affected by pyritic heave.

Brownrigg v Aidan Leacy carrying on business under the style title of Phoenix Estates and Ben Kavanagh [2013] IEHC 434

The article discussed the developing jurisprudence of the Irish High Court which has recently found, in the case of Brownrigg v Aidan Leacy and another, that auctioneers and valuers owe a duty of care when preparing valuations.

The Court held that a party who has commissioned a valuation is entitled to rely on it and to assume that any valuation has been prepared with due skill and care, and in compliance with generally accepted standards and guidelines adhered to by valuers. Also of note in this regard is that the commissioning party need not necessarily have engaged the valuer to market or sell the property or to have paid them in order for the valuation to ground a suit for negligence. The Judge also commented on what the essential ingredients of a valuation are. He found that a valuer’s opinion or a letter which places a value on a property could be deemed to be a valuation even absent the word “valuation” from the document.

The Judge also considered the Plaintiff’s behaviour as a factor which had contributed to the loss sustained and found the Plaintiff and co-Defendants liable on a 50/50 basis.

The case is among the first of its type in Ireland and will be of significant interest to those professionals involved in valuation of property, opening up as it does, more professionals to professional indemnity claims.

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The Andrew Mitchell MP “plebgate” row has taken a further twist, giving rise to a landmark Court of Appeal decision with a hard line interpretation of the Civil Procedure Rules (“CPR”). The Courts have set out their stall that, post-Jackson, poor excuses will not be tolerated for missed deadlines and relief from sanctions will be granted sparingly.

First Instance Decision and Application Hearing

Mr Mitchell issued a defamation claim in the High Court. Mr Mitchell’s appeal leapfrogged a High Court Judge and was heard in the Court Appeal on 7 November 2013 by three Lord Justices, including the Master of the Rolls.

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The Court of Appeal found that Master McCloud was entitled to impose the sanction in CPR 3.14 by analogy as it was illustrative of the thinking of the CPR Committee where “The mischief at which CPR 3.13 and 3.14 are directed is the late filing of costs budgets”. It is noteworthy that the Lord Justices also took a dim view of Mr Mitchell’s solicitors' excuses. As in the hearing at first instance, the Court noted the observations in Sir Rupert Jackson’s (as he was then) report, including that the “Courts at all levels have become too tolerant of delays and non-compliance with orders” in what he referred to as a “culture of delay and non-compliance” and that “the balance needs to be redressed”, which resounded in the amendments to CPR 3.9 as to relief from sanctions among others.

In respect of the factors to be considered now under the amended CPR 3.9, the Justices stated that the “need (i) for litigation to be conducted efficiently and at proportionate costs and (ii) to enforce compliance...reflected a deliberate shift of emphasis” and “should now be regarded as of paramount importance.” The Justices stated that “The new robust approach that we have outlined...will mean that from now on relief from sanctions should be granted more sparingly than previously.” Mr Mitchell’s appeals were dismissed, with the effect that Mr Mitchell’s costs budget is now restricted to Court fees only.

Implications

As this case illustrates, solicitors who fail to meet deadlines because they are under pressure, experience unanticipated delays by third parties, have high workloads or are under resourced will not find sympathy with the Courts such that they will avoid sanctions or obtain relief. Solicitors will have to be proactive to ensure compliance with Court deadlines and procedural steps or face sanctions.

It is inevitable that, on occasion, solicitors will miss deadlines and they will be guilty of delays which the Court will consider to be more than trivial and they may well not have good excuses. Given the Court’s endorsement of harsh sanctions in such circumstances, this will surely be fertile ground for negligence claims against solicitors. This case may lead to more contested applications and front loading of litigation steps to avoid breaches, which could increase the cost of litigation.

Solicitors who are under-resourced may consider it wise to sub-contract more stages of litigation to third parties. Costs budgets could be compiled by costs draftsmen (NGN instructed costs draftsmen in this case). Solicitors will have to ensure that any third parties, including counsel are able to meet deadlines, or be proactive about seeking extensions of time and relief in advance of hearings which may garner more favour with the Court than waiting until after a deadline has been missed.

Insurers writing Solicitors PII and brokers would be wise to check that their insureds are aware of this legal development and suggest that their insureds take steps to manage this risk and put processes in place, to avoid the same fate that has befallen Mr Mitchell and his solicitors.