Quarterly Review – May 2014

Our review contains an update on some of the interesting cases over the last few months which are of particular significance to insurers working with accountants, solicitors, surveyors, construction and some Irish developments.

Construction

Subject: Net contribution clauses

The Royal Bank of Scotland plc v. Halcrow Waterman Ltd [2013]

A structural engineer was appointed by a design and build contractor on a construction project in Edinburgh. In 2001, the property was let and the tenant received the benefit of a collateral warranty from the structural engineer.

The collateral warranty contained a net contribution clause which provided that the structural engineer’s liability would be limited to “the Tenant’s losses which it would be just and equitable to require the Consultant to pay having regard to…. the Consultant's responsibility for the same and on the basis that all other Consultants shall…have provided [similar] contractual undertakings”.

In proceedings commenced by the tenant against the structural engineer in respect of losses including the cost of extensive remedial works arising from defects in the works, the Court applied a literal interpretation of the net contribution clause, in concluding that “other Consultants” did not include the contractor or its sub-contractors. The contractor argued that this was consistent with the distinction drawn throughout the contract between consultants and contractors and the Court held that to interpret the clause so that ‘Consultants’ included contractors would amount to re-writing the contract. Therefore, with regard to loss caused by other contractors rather than consultants, the structural engineer had failed to contract out of joint and several liability.

N.B this is a Scottish judgment.

West v. Ian Finlay Associates [2014]

A domestic client engaged architects along with a number of other consultants, contractors etc to carry out work on a private dwelling house. There were a number of defects following completion and substantive remedial works were required.

The client commenced a claim against the architect, as the main contractor had become insolvent. The Architect’s appointment included a net contribution clause as follows:

“Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you.”

In the original decision, the TCC concluded that the wording of the net contribution clause was not ‘unfair’ under the Unfair Terms in Consumer Contracts Regulations (“UTCCR”). However, the TCC held that there was
uncertainty as to whether the main contractor was included because of the word “other”. Therefore, pursuant to the UTCCR the TCC held that the clause should be given the meaning most favourable to the consumer. The TCC held the architect wholly liable and no apportionment was made.

The Court of Appeal said that the first consideration in considering construction of legal terms is to consider the normal meaning of the words. Doing this, the Court rejected that there was any ambiguity; there was no limitation on the words “other consultants, contractors and specialists” and so the Court held that the wording was to include the main contractor. The Court considered that in the factual circumstances, the clause was ‘fair’ under the UTCCR and ‘reasonable’ under UCTA and therefore the architect’s payment was reduced to the amount it would be reasonable for them to pay having regard to the contractual responsibilities of the main contractor.

Subject: Incorporation of contract terms

Twintec Ltd v. Volkerfitzpatrick Ltd [2014]

The contractor employed a sub-contractor to provide floor slabs at a plant and warehouse in Bristol. The parties entered into a Letter of Intent (“LOI”) authorising the sub-contractor to commence the work in accordance with the referenced documents; the parties would enter into the formal sub-contract later.

Pursuant to this LOI and DOM/2, the contractor sought to adjudicate a dispute relating to a larger litigated claim regarding defects at the plant and warehouse. The contractor contended that the DOM/2 standard form sub-contract (“DOM/2”) and its terms were incorporated into the LOI by reference, save to the extent the provisions were inconsistent with the LOI.

The sub-contractor sought an injunction to prevent the adjudication on the basis that the adjudicator had been appointed under a term (in DOM/2) which had never been agreed by the parties.

As it was intended that the sub-contract would be entered into with retrospective effect, the Court found that the purpose of referencing DOM/2 was to pre-empt breaches of the sub-contract before it had been concluded.

The Court granted the injunction, finding that it was not intended that every term of DOM/2 should be incorporated into the contract; this was especially so given the wording in the LOI that “we are not yet in a position to enter into this sub-contract”. The obligation, given its natural meaning, was for the subcontractor to carry out the work “in accordance with”, i.e. in compliance with the referenced documents. This did not require every obligation in DOM/2 to be deemed incorporated into the LOI and therefore the Court held that the dispute resolution obligation had not been incorporated.

Subject: Interpretation of order of precedence clause

RWE Npower Renewables Ltd v. J N Bentley Ltd [2014]

A contractor agreed to carry out civil engineering works on the Black Rock hydro-electricity plant in Scotland.

The contract was based on NEC3 ECC, including Options X5 and X7. The dispute arose when the client sought to levy liquidated damages on the contractor with regard to the section 2 works. The Contract Data Part 1 (“CDP1”) required “Completion…to allow Hydro Plant to be installed”.

The Court granted the injunction, finding that it was not intended that every term of DOM/2 should be incorporated into the contract.
However, the Works Information required “Completion...to allow the hydro plant to be tested and commissioned”.

The matter went to adjudication, at which it was held that there was inconsistency and that the order of precedence clause applied giving precedence to the CDP1.

The client sought a Part 8 declaration from the Court that, reading the contract as a whole, the contractor’s obligations were defined by the Works Information.

The Court of Appeal, dismissing the appeal, held that reading the contract as a whole and ‘so far as possible’ to avoid inconsistencies, there was no inconsistency between the CDP1 and Works Information with regard to the contractor’s obligations, therefore the order of precedence clause did not need to be operated. Only where there is a ‘clear and irreconcilable discrepancy’ would recourse to the order of precedence be required.

Subject: Assignment of collateral warranty


The claimant sued the contractor for defective works in relation to the design and construction of a large warehouse near Rugby.

The collateral warranty provided by one of the sub-consultants, Jubb, restricted the number of permitted assignments without consent to two. The collateral warranty was in fact assigned twice before a further purported assignment to the claimant without Jubb’s consent.

Two preliminary issues arose in relation to the contribution claims as to whether:

1. The Contractor’s causes of action in negligence against the sub-consultants were time barred under section 2 of the Limitation Act 1980; and

2. the attempt to assign Jubb’s collateral warranty to the claimant without consent gave rise to an implied trust of the benefit of that warranty to the claimant.

On the second preliminary issue, Stuart-Smith J held that the collateral warranty entered into by Jubb included a prohibition against assignment on more than two occasions without consent. The warranty was assigned twice. The assignment to the claimant was the third assignment. The parties to the deed neither appreciated the need for, nor obtained, consent for the assignment of the warranties.

Having considered the authorities on the creation of an implied trust Stuart-Smith J held that the attempt to assign the benefit of the warranties did not give rise to a trust of the benefit of the warranties in favour of the claimant. The intention of the parties in the deed was clearly to assign, not to hold on trust, which was fatal to the contractor’s argument. The Don King case was distinguished on the basis that there was “no language in the deed of assignment...in any way redolent of the language of trusts”. The meaning of the deed did not change simply because the parties failed to obtain a consent that was necessary to render the assignment effective.

“Only where there is a ‘clear and irreconcilable discrepancy’ would recourse to the order of precedence be required.”
This case suggests that the Court will only permit an assignment without consent which is expressly prohibited in the original agreement to give rise to a trust in limited circumstances. The mere fact of a failed assignment will not give effect to a trust of the benefit of the relevant contract. Whilst the position will always depend upon the basis on which the purported assignment takes place, this underlines the importance that the grantor of a collateral warranty ensures that such collateral warranty includes an express clause restricting the number of assignments.

Beale and Company Solicitors LLP acted for Jubb in this matter.

**Solicitors**

**Subject:** Effect of third party fraud in breach of trust claim

**Santander UK v. RA Legal Solicitors [2014]**

The Court of Appeal considered a solicitor’s entitlement to relief from liability for breach of trust under Section 61 Trustee Act 1925.

The Claimant had agreed to advance a loan, secured by a mortgage, to the borrower for his purchase of a property. In reliance on the solicitor’s certificate of title, it transferred the mortgage monies to the solicitor. The solicitor proceeded with the transaction and, following a purported completion of the transaction, transferred the mortgage monies to the person purporting to be the vendor’s solicitors. It subsequently transpired that the vendor’s solicitor was a fraudster who had been operating with the knowledge of the owners of the property. The Claimant alleged that, under the terms of its instruction, particularly by reference to the CML Handbook, the solicitors had held the mortgage monies on trust for the Claimant pending completion of the transaction. As the transaction was a fraud, the transaction had not completed and the solicitor had transferred the mortgage monies to the fraudster in breach of trust.

When the Claimant brought a claim for breach of trust, the solicitors applied for relief under section 61 of the Trustee Act 1925 which provides: “If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the manner in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.”

At first instance, the Court held that, whilst the solicitors had acted in breach of trust by advancing the funds without completion, he had done so in the genuine belief that completion had taken place. The Court was therefore prepared to grant relief from sanction because the loss was caused by the Vendor’s solicitor’s fraud and the solicitor should not be held responsible for the consequences of that fraud.

The Court of Appeal concluded that the solicitor should not be entitled to relief. The solicitor had failed to act in accordance with best practice (by following the conveyancing code) and those departures had exposed the claimant to an increased risk of fraud. As such, it could not be said that the solicitor “ought fairly to be excused for the breach of trust” in accordance with Section 61 and was not entitled to relief.

“**As the transaction was a fraud, the transaction had not completed and the solicitor had transferred the mortgage monies to the fraudster in breach of trust**"
Following the first instance decision in this case and other similar cases, it had appeared that the Courts were prepared to adopt a wide interpretation of Section 61 and that relief would be widely available if the loss was caused by a third party's fraud. Following the Court of Appeal decision in this case, it seems that relief will not be granted lightly which will be of concern to solicitors and their professional indemnity insurers who may feel that they are being made to indemnify a client for losses which were caused by the fraud of a third party.

**Subject:** “Chinese walls” and confidentiality

**Georgian American Alloys Inc v. White and Case LLP [2014]**

The solicitors were acting for party A against B and C in the Commercial Court. Another department of the same firm of solicitors were advising companies in which B and C were directors and had a majority interest. B and C were concerned that the solicitors had access to confidential information from the transaction which was relevant to A’s claim.

The solicitors had put in place a number of “chinese walls” and “ethical screens” to prevent the transfer of confidential information between the team acting in the transaction and the team acting in the litigation but the court was not satisfied that the procedures were sufficiently robust. The Court found there was a continued risk that confidential information could pass to the litigation team. The question of any prejudice to A was not relevant. The Court therefore granted an injunction preventing the solicitors from acting for A in the claim.

**Subject:** Contributory negligence in drafting and assessing “loss of chance” claims

**Wellesley Partners LLP v. Withers LLP [2014]**

Solicitors had been instructed by the Claimant to amend an LLP Agreement to reflect the proposed introduction of new partners and their capital to the LLP. It was intended that the Claimant would use the additional investment to open an office in New York and to try to secure a contract to work with N.

The executed LLP Agreement included an options clause, which allowed the new partners to withdraw half of their capital contribution within the first 41 months. The new partners exercised the option within the first 41 months. The evidence showed that the Claimant had instructed the solicitors that the option clause should only allow the new partners to withdraw half of their capital contribution after the first 41 months. The solicitors had made an error in the drafting of the agreement and the Claimant sought to recover the revenue that it said it would have earned if they had expanded and secured work with N, losses flowing from the diversion of time running the business to dealing with a dispute with the new partners and legal costs of dealing with a dispute with the partners.

In relation to liability, the Court held that the solicitors had been negligent in failing to draft the LLP Agreement to reflect their client’s intentions. The Claimant was found not to have been contributorily negligent in failing to spot the error in a draft LLP Agreement which had been sent to him for approval. The Claimant had seen and approved earlier drafts of the LLP agreement and, whilst other changes were specifically addressed in a covering email, the email was silent about changes to the relevant section.
In relation to quantum, the Claimant contended that, had they opened an office in New York, as they intended to do, they would have been in a position to secure work with N and would have made profits in line with a Revised Business Plan. The Court considered that the loss should be assessed as a “loss of chance” in accordance with Allied Maples Group Ltd v Simmons and Simmons: ‘The claimant must prove on the balance of probabilities that he would have taken action to obtain the benefit which he says he would have obtained … where the claimant’s loss depends on the hypothetical action of a third party. At this stage the claimant does not have to establish on the balance of probabilities that the third party would have acted in such a way as to confer the benefit, but only that he (the claimant) had a substantial, rather than speculative chance of obtaining it…”

The Claimant argued that this was not the correct assessment of loss in this case and that the case should be distinguished from Allied Maples in line with Parabola Investments Limited and Vasiliou i.e., that Allied Maples should be applied to assessing causation only and was not relevant to assessing loss. The Court disagreed stating that “this is clearly a different type of exercise from that undertaken in an Allied Maples case. It does not require the Court to find that there was a real and substantial chance of a third party acting in a particular way: but to reach a conclusion whether trading would have been profitable or not.” The Court went on to say that “it is clear from Parabola and Vasiliou that if the Court finds that trading would have been profitable, it then makes the best attempt it can to quantify the loss of profits taking into account all the various contingencies which affect this...This neither requires any particular matter to be proved on the balance of probabilities ... nor has anything to do with the loss of a chance as such ... The assessment of the loss will itself include an evaluation of all the chances, great or small, involved in the trading... Once the judge has assessed the profits in this way, any further discount is therefore inappropriate...”

The Court assessed loss on the basis of a loss of chance of capitalising on the specific opportunities referred to by the Claimant and was to be assessed on in accordance with the principles set down in Allied Maples and found that, if the new partners had not been able to withdraw their capital, the Claimant would have opened an office in New York and that there was some likelihood that the Claimant would have succeeded in capitalising on an opportunity by doing so.

Accountants

Subject: Scope of retainer and no ‘general retainer’

Mehjoo v. Harben Barker [2014]

In the Court below Mr Justice Silber held the accountants liable for failing to advise the Claimant on his non-domicile status or refer him to a specialist. The Claimant was a wealthy businessman, who made a capital gain of £8.5 million from the sale of shares in his business. The Court held the Defendant liable for over £1.2m in damages due to their failures and which prevented him from entering into a bearer warrant scheme prior to March 2005, when the Government introduced blocking legislation. The Claimant brought his action even though he only paid tax at a rate of 10% on the sale of his shares. The Judge held that despite the terms of the written retainer to the contrary, the course of dealing between the parties established that the Defendant was expected to advise generally on his tax affairs even when that advice was not requested.

The Judge held that despite the terms of the written retainer to the contrary, the course of dealing between the parties established that the Defendant was expected to advise generally on his tax affairs even when that advice was not requested
The Court of Appeal disagreed. The terms of the retainer were the written ones, under which the accountants would only advise on tax planning if requested. Although they had advised on routine tax issues over the years when not asked to do so, that was no more than was to be expected from a pro-active accountant in general practice. The case was not about that type of general advice but involved highly specialist tax planning of a kind that the Defendants could not be expected to know about. They had therefore assumed no positive duty to advise him on highly specialist schemes of that nature.

The above held true even though there was a meeting at which the Defendants did advise the Claimant on some possible tax saving schemes arising out of the sale. An accountant in general practice could not be criticised for failing to know about bearer warrant schemes or for failing to recommend that the Claimant take advice from someone who was specialist in non-domicile tax.

The Judgment is very welcome news for accountants and their insurers. It reinforces the importance of the written retainer documents and that there is no such thing as a general retainer upon professionals (per Midland Bank Trust Co Ltd v Hett Stubbs & Kent).

There are numerous claims going through the Courts at present arising out of much more adventurous and artificial failed tax avoidance schemes. The decision demonstrates that litigants will obtain little judicial sympathy when engaged in that type of activity and given the prevailing public sentiment.

General Litigation

Subject: The ‘but for’ test

Greenwich Millennium Village Ltd and another v. Essex Services Group plc and another

The Claimant brought subrogated claims against the designers of certain flats that were destroyed as a result of a water leak. No single organisation had overall control of the design, installation, supervision, inspection, testing and acceptance of the boosted mains cold water system. The various different contracts and subcontracts resulted in pipework systems which, on completion, varied markedly from core to core, even though they should have been the same in each. The litigation involved five parties, with different defences and claims up and down the line, depending precisely on where the parties sat in the contractual chain. The TCC determined the claim on the facts.

This case concerned a situation where concurrent and equally effective causes were responsible for the relevant losses and either cause would independently have resulted in the relevant losses being suffered. In such circumstances the traditional ‘but for’ test would lead to a conclusion that neither cause was responsible because the other cause would still have resulted in the losses being suffered. Prior to this case it was generally considered that the solution to such a ‘patently absurd’ conclusion was to depart from the ‘but for’ test and determine that both causes were responsible for the loss.

When advising on causation, lawyers need to be aware that in circumstances where the application of the ‘but for’ test suggests that a particular event (cause A) did not cause the loss because the losses would have been suffered in any event as a result of another, independent cause (cause B),
there is a risk that a court would still decide that cause A was responsible for the loss, if cause A on its own, would also have caused the loss.

There are a number of previous authorities which depart from the 'but for' test in specific circumstances. They talk about the need for common sense, making value judgments on responsibility and the requirements of fairness and reasonableness. However, the 'but for' test remains good law. Judges will not reject the 'but-for' test purely because it does not produce a 'fair result' in the particular circumstances and will only depart from it on the basis of clear and proper reasoning.

Subject: Time limitation


The claimant sued the contractor for defective works in relation to the design and construction of a large warehouse near Rugby. The claimant had issued its claim about 12 years after practical completion and the contractor commenced contribution proceedings in tort and in contract against its flooring sub-contractor and its geotechnical and engineering sub-consultants. The contractor’s claim in contract relied upon the parties’ subcontracts and collateral warranties they had provided to the original leaseholder.

Two preliminary issues arose in relation to the contribution claims as to whether:

1. The Contractor’s causes of action in negligence against the sub-consultants were time barred under section 2 of the Limitation Act 1980; and

2. The attempt to assign Jubb’s collateral warranty to the claimant without consent gave rise to an implied trust of the benefit of that warranty to the claimant.

On the first preliminary issue Stuart-Smith J concluded that as the contract was responsible for the construction until handover, or practical completion, it had at least a possessory interest in the development as well as accrued rights under the main contract (e.g. to payment). These interests were to be regarded as “assets” under the “damaged asset rule”, which were capable of devaluation and measurable as the cost of remedying the defects.

Accordingly, he concluded that the contractor had suffered measurable financial detriment on constructing in accordance with the defective design or following negligent inspection, and a present liability arose at the latest on practical completion. Accordingly, time began to run at the latest from practical completion, which means that the claim against Jubb in tort was time barred.

Stuart-Smith J also considered that this case fell within the “package of rights rule”. ”[W]hen Birse transferred the defective development to the employer, its legal position changed to its financial detriment as it became a contract-breaker whose rights under the main contract were devalued by its liability to the employer.” This was a case of an accrued liability and not a purely contingent liability; the value of the contractor’s interest in the development and in its right under the contract had been affected on transfer of the defective development to the employer.

Judges will not reject the 'but-for' test purely because it does not produce a 'fair result' in the particular circumstances and will only depart from it on the basis of clear and proper reasoning.
The contractor’s claim in tort was therefore time barred under s2 of the Limitation Act 1980 on the basis that at the latest, the cause of action accrued on practical completion.

This case suggests that the limitation period in tort for a claim against a sub-consultant which relates to defective works under the main contract is likely to start running, at the latest, on practical completion. The main contractor is unlikely to be able to argue that the limitation period has not commenced because the losses payable by it to the ultimate client have not yet been determined.

Subject: Extension of time for service of a claim

Lincolnshire County Council v. (1) Mouchel Business Services Limited and (2) R G Carter Building Services Limited [2014]

The Claimant (Lincolnshire County Council) complained of damp problems at the science block of Boston Grammar School, Lincolnshire, constructed in 2001 and 2002. Having instructed its own in-house legal advisors, proceedings were issued for limitation reasons. Having not carried out the Pre-Action Protocol requirements previously, the Claimant also issued an application without notice requesting an extension of time for service of proceedings (but no other directions) in order to enable the parties to take the steps set out in the Protocol. The extension was granted on that basis, and thus had two constituent parts; proceedings had to be served by 18 January 2014 and the Protocol was to be complied with by then. In spite of multiple requests by solicitors for the first Defendant, the Claimant did not issue its letter of claim until some four and a half months into the extended period for service, with the Claimant solicitor having taken no effective steps to progress its claim or the Protocol procedure in the interim. As a consequence of their own delay, solicitors for the Claimant made a further application without notice for a second extension of time for service. A further three months was ordered by Edwards-Stuart J. The first Defendant applied to set aside the order under CPR 23.10, and for strike-out as a result in accordance with CPR 3.4.

The Claimant solicitor cited various reasons for failure to comply with the original order, including annual leave of the principal solicitor having conduct of the case, and a requirement to cover for other members of his team who had annual leave around that time. Of particular note was the Claimant solicitor’s inexplicable delay in instructing a new expert to provide a further report, having already procured an expert report (which was not subsequently relied upon) before issue of proceedings.

In what represents a clear statement of intent from the TCC, the order of Edwards-Stuart J was set aside. The claim was accordingly struck out because it was not, and could no longer be, served within the time of validity of the Claim Form. The judgment of Stuart-Smith J carefully sets out guidance for the conduct to be expected from parties to litigation, in the post-Jackson era. Providing much-needed clarity, the judgment draws out key principles from the decisions in Hashtroodi v Hancock, Hoddinott v Persimmon Homes (Wessex) Ltd, Aktas v Adepta, and Mitchell v News Group Newspapers Ltd.

To issue a claim marginally before expiry of a limitation period, without notice, is accepted as being a dangerous route for a litigant to follow. To subsequently apply for an extension of time for service of proceedings without notice carries the inherent risk that any such extension may later be set aside, potentially leaving the Claim Form and Particulars of Claim out of time for service. The situation is further worsened where there are genuine limitation arguments which would be disturbed by an extension of time, as to continue
to extend time for service effectively interferes with the relevant statutory limitation period. It was acknowledged by Stuart-Smith J that potential limitation defences available to the first Defendant would have been fettered by the further extension of time.

In reaching his decision, Stuart-Smith J highlighted a number of points which should serve as a warning to parties to litigation and their legal advisors:

(i) The Claimant failed to apply on notice for directions either at the same time as, or after, applying for the initial extension of time for service of proceedings, with no reason being offered for such a failure. A clear distinction was drawn between an application for such an extension under CPR 7.6, and an application on notice for directions (as required by Paragraph 6 of the Protocol and 2.3.2 of the TCC Guide) – primarily because an application for directions on notice is likely to provide the Court with further and better material on which to base its decision and has the necessary benefit of bringing both parties before the Court.

(ii) Having applied without notice for an extension, but no other directions, the Claimant had essentially set the timetable for service itself. It was therefore imperative that the Claimant should act promptly to ensure it was in a position to comply with the Protocol and, if necessary, serve the proceedings in accordance with that timetable. It did not.

(iii) The Claimant issued its second application without notice, and in doing so compounded its earlier failure to seek directions on notice at the outset.

(iv) That the principal solicitor having conduct of the matter took some holiday and, when at work, had to cover for other colleagues who did the same, was deemed to be an entirely unacceptable excuse for failing to prosecute the case diligently. It is clear that the onus is placed upon the solicitor embarking upon litigation to “ensure that it is run properly and efficiently and with the necessary allocation of resources”. The lack of urgency on the part of the Claimant solicitor rendered the fulfilment of the necessary steps impossible.

(v) It was further submitted that special dispensation should be granted to the Claimant on the grounds that it is a local authority, and is therefore subject to financial and resource constraints. This argument was given little credence, particularly as no evidence had been adduced to suggest that the Claimant’s solicitors were constrained from acting more promptly due to financial pressures. Even had such evidence existed, it should still be viewed with “extreme circumspection”. Alternative funding options could, and should, have been explored including outsourcing the case, perhaps using an alternative funding arrangement so as to allow the case to be prosecuted effectively without compromising the Claimant’s cash-flow position.

What this means is that in the absence of sound reasons, proceedings should be served within four months or in accordance with any direction of the Court. A failure to comply with the Protocol’s requirements will rarely, if ever, amount to a sound reason for an extension of time for service of proceedings. That
service of proceedings might lead to an increase in costs because of non-compliance with the Protocol will not amount to a good reason for failing to serve the Claim Form. Although each case is to be decided on its individual facts, the general approach is clear; the less compelling the reason, the more likely the court will be to refuse to grant the extension.

In the Jackson Report, it is stated that “…courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting on the civil justice system. The balance therefore needs to be redressed.” - the TCC has distilled a significant amount of case law to redress that balance, leaving parties to litigation in no doubt as to the approach the courts will adopt in the post-Jackson era.

It is no longer acceptable to assume that an extension of time for service of proceedings will be granted to enable compliance with the Protocol; extensions must be treated as an exception rather than a rule, and are unlikely to withstand a bona fide challenge – especially where a potential limitation defence may be placed under threat - unless there is a compelling reason for a party’s failure to comply.

It is also clear that resourcing matters, staff absences and financial constraints must be managed effectively as an integral part of the litigation process.

Beale and Company Solicitors LLP acted for the first Defendant in this matter.

Ireland – Insurance

Subject: Third party rights against insurers

Yun Bing Hu v. Duleek Formwork Limited (in Liquidation) and Aviva Direct Limited t/a Aviva [2013]

The Claimant carpenter sued his former employer for a personal injury he sustained while at work. Duleek, his employer, held a valid employers liability policy and duly informed its insurers, Aviva, of the claim in 2009, but after the company had gone into liquidation. Aviva advised the liquidator that they would not indemnify Duleek unless the liquidator paid the excess under the policy which was €1,000. Payment of the excess was a condition precedent to an indemnity being provided under the particular policy. The excess was not paid by the liquidator and Aviva declined indemnity in respect of the claim.

The Claimant obtained judgement against Duleek (in liquidation) but at the time was unaware indemnity had been declined by insurers until March 2010. The Claimant then joined Aviva to the proceedings and an application was then taken by Aviva to have the claim against them struck out.

Aviva argued the Claimant was not a party to the insurance contract and therefore had no right to sue Aviva under the policy. The Claimant sought to rely on Section 62 of the Civil Liability Act 1961 which has previously been interpreted to provide for similar results to those provided under the UK Third Parties (Rights against Insurers) Act 1930 (see Dunne v. P.J White Construction (in liquidation) [1989] ILRM 803 and McCarron –v- Modern Timber Homes Limited and Others (2012) IEHC 530). The authorities have not been clear but essentially it was thought that section 62 created a right of action in favour of the injured third party against an insurer of an insured party who has gone into liquidation.
However, in this case the Court held Section 62 applied to circumstances where monies are payable and this did not arise in this case as Aviva had repudiated liability due to non-payment of the excess and this was not disputed by the Claimant.

Interestingly for insurers, this case further held that Aviva had no third party duty of care to the Claimant to ensure he was informed by way of information or otherwise as to whether the insured had complied with any conditions under the policy. This decision sits in tandem with a prior decision which held that an injured Claimant was not entitled to discovery of information as to the insurance arrangements of an insolvent defendant where a liquidator refused to provide details. Indeed the Judge noted in that case there should be a procedure which would require this information to be revealed in order to make Section 62 workable.

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