This week the Court of Appeal has unfortunately overturned the first instance decision in *Impact Funding Solutions v (1) Barrington Support Services (2) AIG Europe*.

**The Facts**

The claimant is a disbursement funder and Barrington was a firm of solicitors. The claimant made available disbursement funding loans for the purposes of bringing industrial deafness claims under CFA’s. Barrington signed an agreement with the claimant under which they undertook to repay the loans in the event of default by their clients. They also represented and warranted to them that they would indemnify them against any losses caused by their negligence and that their performance of services to the clients would be in accordance with their CFA, which included an assessment of the merits.

A large number of claims for clients failed or were abandoned and the clients failed to repay their loans. The claimant pursued Barrington and in an earlier decision the court gave judgment against Barrington for failing to properly vet the claims at the outset. It also found that some of the monies had been used for improper purposes. The claimant then pursued Barrington’s insurers under the *Third Party (Rights Against Insurers) Act 1930* as they had understandably refused to indemnify Barrington.

At first instance the court upheld their refusal to indemnify Barrington on the basis that the exclusion at clause 6 of the Minimum Terms applied. This excludes from cover any trading or personal debt of an Insured or any liability assumed by them under any agreement for the supply to, or use by, them of goods or services in the course of their practice.

**The Decision**

The Court of Appeal overturned the decision, holding that the exclusion was intended to prevent cover for those liabilities of a solicitor that were personal to him as opposed to those arising from professional obligations to clients. It gave the examples of liabilities in respect of photocopier supplies, cleaning

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services, leases or a mortgage as examples falling squarely within the exclusion.

Here the obligations were part and parcel of the obligations in respect of their professional duties to their clients and had been assumed as an essential part of the duty to advise on whether their claims were likely to be successful or not. As they were professionally incurred and not personally incurred they did not fall within the exclusion.

Importantly the court took the view that the economic reality was that the loans were made to Barrington’s clients and not Barrington. The fact that this claimant was never Barrington’s client did not feature in their reasoning, albeit of course Barrington had specifically assumed duties to them.

The Impact
It is a disappointing decision on the scope of the trading debts exclusion, which may leave underwriters wondering why a PI policy should possibly be responsible for repaying commercial loans made by a third party in circumstances where surely the economic reality was they were made for the solicitor’s benefit, to enable them to persuade clients to sign up to CFA’s at no cost. After all, the solicitor paid all the fees associated with them.

However, it is in our view very fact specific and in particular because of the contractual arrangements. Helpfully the Court of Appeal did not question the earlier decision in Sutherland Professional Funding v Bakewells in which the trading debts exclusion was successfully applied and which also contains further useful arguments to exclude appropriate claims from cover. It should not change underwriters strategies to inappropriate claims for indemnity nor to attempts to recover professional fees for example.

For non solicitor risks it is another example of why underwriters should pay close heed to the very standard trading debts exclusions that exist in the market. Finally, it is hoped that it at least provides yet further impetus to the urgent need for the SRA to revisit generally the Minimum Terms, which remain wholly unrealistic.

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