



Bond Pearce



Insurance briefing - Professional Risks

February 2012

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Welcome to our regular review of significant cases and other legal developments affecting professionals, their insurers and brokers. In this edition we take the opportunity to look back at some “highlights” of 2011, look forward to what 2012 has in store, and consider two recent cases.

Looking back on 2011

Experts' immunity from suit abolished by the Supreme Court

In a majority decision, the Supreme Court held that the immunity from suit for breach of duty enjoyed by expert witnesses participating in legal proceedings should be abolished (*Jones v Kaney [2011] UKSC 13*). Time will tell whether this produces a surge of claims against expert witnesses who do not stand up to proof in the witness box.

Courts show greater willingness to use their contempt powers to punish false statements

In several personal injury cases, including *Nield v Loveday [2011] EWHC 2324*, the courts have imposed custodial sentences on claimants who tell deliberate lies in court proceedings by signing statements of truth on documents without an honest belief in their content.

Part 36 offers in the spot light

In *CvD [2011] EWCA Civ 646*, the Court of Appeal confirmed that Part 36 does not permit offers to be time limited. However where it is clear that the offeror intended to make a Part 36 offer, the courts will construe it as a Part 36 offer whenever possible.

Expert shopping is discouraged

In *Edwards-Tubb v JD Wetherspoon plc [2011] EWCA Civ 136*, the Court of Appeal decided that a party should be ordered to disclose an expert report obtained before proceedings were commenced as a condition of being granted leave to use a different expert in the proceedings. Practitioners should thoroughly assess an expert's suitability before formally instructing him as a court expert, or consider appointing a separate expert adviser and court expert if the budget permits.

Court restricts insurers' rights to appoint their own panel solicitors

In *Brown-Quinn and another v Equity Syndicate Management Ltd and another [2011] EWHC 2661 (Comm)*, the High Court granted a declaration that an insurer was not entitled to refuse to appoint the insured's choice of solicitor because the solicitor's proposed rates of remuneration were higher than those set out in the insurance policy.

Court of Appeal restricts duty owed by valuers to buy-to-let purchasers

In *Scullion v Bank of Scotland (t/a Colleys) [2011] EWCA 693*, the Court of Appeal refused to extend the duty of care in mortgage valuation cases beyond the restricted class of those buying modest properties. It now appears that surveyors will not, when providing valuations to lenders, owe a duty of care in tort to buy-to-let or other commercial property purchasers.

Looking forward to 2012

Implementation of Jackson LJ's recommendations on costs

Although the majority of Jackson LJ's recommendations on costs were initially planned to be implemented in 2012, these will not now happen until 2013. However some pilots that stem from Jackson LJ's recommendations are ongoing, including costs management in Technology and Construction Courts and mercantile courts, and "hot tubbing" (the giving of concurrent evidence by experts) in Manchester.

The Civil Procedure Rule Committee (CPRC) is considering the following procedural changes that were also recommended in Jackson LJ's final report and are likely to be implemented as part of the reforms:

- a "change of culture" under which breaches of court orders will no longer be tolerated as readily as they are at present
- requiring a party who wants to adduce expert evidence to provide the court with an estimate of the costs of that evidence
- revised procedures for disclosure in multi-track cases (excluding personal injury claims).

Part 36

Jackson LJ recommended the introduction of an additional sanction (equivalent to 10% of the value of the claim) payable by defendants who do not accept a claimant's reasonable offer and fail to do better at trial. That recommendation is being implemented by section 51 of the Legal Aid, Sentencing and Punishment of Offenders Bill. Section 51 is now expected to come into force in April 2013 at the earliest.

A subcommittee of the CPRC has started work on a fuller review of Part 36 and will make proposals in around March or April 2012.

Solving disputes in the county courts

In March 2011, the Government published a consultation which sought views on proposals to reform the civil justice system in the courts of England and Wales. The proposed reforms include changes to the financial limits for claims in the High Court, automatic mediation procedures and mandatory directions for certain claims, and subject to specific exceptions, increasing the small claims threshold to £15,000. The Government's response will be published later this year.

Prudential

The appeal in *R (Prudential plc and another) v Special Commissioner of Income Tax and others* [2010] EWCA Civ 1094 will be heard at the Supreme Court on 6 November 2012. Prudential is appealing against the Court of Appeal's decision that legal professional privilege does not extend to non-lawyers.

Godiva Mortgage Ltd v Travelers Insurance

Both the Law Society and the SRA have been granted leave to intervene in this case which concerns the capping of insurance cover by aggregating claims. A conveyancing partner at a reputable and long-established law firm, Willmetts, had been involved in a number of allegedly fraudulent property transactions. When losses came to light, numerous claims were brought against Willmetts by various lenders. Willmetts' insurers assert that all claims arising from the individual partner's involvement in the alleged frauds can be aggregated as "one claim" and so they have refused to pay sums beyond the £2million cap on the policy. Total losses could amount to £50million.

If the insurers succeed, the potential impact on the position of innocent partners, the public's rights of redress and the number of claims against the Compensation Fund will be significant.

Law Commissions' insurance law reforms

The Consumer Insurance (Disclosure and Representations) Bill was introduced into Parliament on 16 May 2011 with the aim of updating the law on pre-contractual disclosure and misrepresentation and simplifying the existing legal framework for consumer contracts. The Bill has not yet come into force.

In December 2011, the Law Commissions also published a consultation paper covering four issues considered in some of the earlier issues papers:

- damages for late payment under English law
- insurers' remedies for fraudulent claims
- insurable interest
- policies and premiums in marine insurance.

The consultation remains open until 12 March 2012.

Ministry of Justice proposals to promote ADR

The government's consultation on County Court reforms includes the possibility of automatic referral to mediation in small-claims cases and the introduction of compulsory mediation information sessions for cases up to a value of £100,000. The government's response is overdue.

Future regulation for legal services

The Solicitors Regulation Authority (SRA) Code of Conduct 2011 came into force on 6 October 2011. It was expected that the SRA would be licensed to regulate alternative business structures (ABSs) from 6 October 2011. The SRA missed this deadline but began accepting licensing applications from 3 January 2012.

Consultation on changes to court fees

In November 2011, the Ministry of Justice launched a consultation on changes to fees and the fees structure in the High Court and the Court of Appeal Civil Division. The consultation paper outlines proposals for increasing court fees towards the cost of providing court services. The consultation will close on 7 February 2012 and a response is expected by 7 May 2012.

Useful reminder of the Etridge guidelines

Padden v Bevan Ashford Solicitors [2011] EWCA Civ 1616

The issue: Had a firm of solicitors complied with their duty to advise a wife in a transaction benefitting her husband, even though she had insisted on a short meeting, the advice was free and she appeared determined to proceed?

The facts: Mrs Padden had thought that her husband, a financial consultant, had stolen £200,000 from one of his clients. The husband's solicitor told Mrs Padden that the only way her husband could avoid prosecution was by selling the family home and repaying the money. Mrs Padden had a brief initial meeting with an independent solicitor, followed by a second meeting, which her husband also attended, with another solicitor from the same firm, where she executed various documents, including a second mortgage over the family home. It later transpired that her husband had in fact stolen around £2 million from various clients, for which he was sent to prison. The defrauded client enforced her rights as mortgagee and the family home was sold. The transaction resulted in the loss of Mrs Padden's home, endowment policies, shares and pensions.

The decision: Although the first solicitor had told Mrs Padden not to enter into the transaction, the Court found that the solicitor should have explored and tested her reasons for wanting to go ahead, and emphasised the importance of finding out the full facts from her husband's solicitor.

Had it been discovered that the fraud far exceeded £200,000, Mrs Padden's solicitor should then have advised her that executing the documents was not going to save her husband from prison. The Court of Appeal allowed the appeal but ordered a new trial, as it was impossible for it to decide whether Mrs Padden would have entered into the transaction even with proper advice.

Comment: The Court of Appeal applied the House of Lords' guidance in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 and is a useful reminder of the 'Etridge guidelines' in relation to undue influence, ie where a vulnerable party places trust and confidence in another in relation to their financial affairs such that their free will and judgement are overcome.

As well as setting our clear guidelines for banks, the House of Lords also clarified the solicitor's role. The guidelines are detailed and should be considered in full. In summary however, it is not enough for the solicitor to simply explain the effect of the transaction; he or she must establish the facts, make enquiries as to the surrounding circumstances and advise of the consequences and inequity of the transaction. The adviser must also be independent of the potentially influencing party.

Court prefers expert evidence based on comparable sales evidence from the Land Registry

Paratus AMC Ltd & RMAC 2005NS1 PLC v Countrywide Surveyors Ltd [2011] EWHC 3307 (Ch)

The issue: Had the valuation carried out by the defendant surveyor in 2004 been negligent?

The facts: S re-mortgaged his property with the first claimant in July 2004. On his mortgage application form S stated that the property had a market value of £185,000 and sought to borrow £166,500, a LTV of 90%. The first claimant instructed the defendant to value the property who confirmed a market value of £185,000. The first claimant made the advance on these terms relying on the defendant's valuation. In March 2005 the first claimant sold the beneficial interest in the loan to the second claimant as part of a package of loans but retained the legal interest. S defaulted on his remortgage and the first claimant obtained possession and sold the property at a loss.

The claimants brought a claim against the defendant, arguing that the true value of the property in 2004 was £154,000. The defendant denied the overvaluation and its expert valued the property at £175,000 in June 2004. The defendant also argued that it owed a duty to the first claimant only, and since the securitisation had assigned the first claimant's cause of action to the second claimant, the first claimant suffered no loss. The loss had been borne by the second claimant to whom the defendants did not owe a duty.

The decision: The court rejected the claimants' expert's method of valuation which was based on the application of a price per square metre to the floor area of the property, preferring the defendant's expert method of using comparable sales evidence from the Land Registry. The court accepted the defendant's evidence that the property, in July 2004, had a market value of £175,000. The court held that determining the relevant margin of error was not a matter of law and applied its own margin of 8%. However as the original valuation still fell within the margin it was not negligent. The court also considered the scope of the valuer's duty concluding that it would depend on the nature of the retainer and remuneration received.

The court rejected the defendant's arguments on securitisation as the first claimant remained the residual beneficiary and therefore suffered loss. In any event had there been technical merit in the argument the court held that it would be unjust to allow a surveyor to avoid liability merely because of the strict application of technical rules.

The court held that the standard of care to be applied was that of a lender in the sub-prime market at the time rather than of a prime mortgage lender. On this basis it was not prima facie imprudent to agree to lend 90% of the value of the property and would depend on all the circumstances. However if a high LTV is agreed then the claimants were under a duty to investigate and verify matters of central importance such as S's income and undisclosed liabilities. The first claimant had failed to do so, failing to assess adequately S's covenant to repay in breach of its own lending policy. The claimants argued that the honesty of S was irrelevant provided he was able to repay. The court held that when these discrepancies were considered with all other factors it should have led the claimants to conclude that S was dishonest and it should not therefore have made the advance. The court held that had the defendant been negligent a reduction of 60% would have been made for contributory negligence.

Comment: This decision highlights the importance of expert valuers adopting the correct valuation methodology in their retrospective valuations. This decision also highlights the court's approach to securitisation, making clear that the court will not be impressed by the use of technical arguments in an attempt to avoid liability. Finally, the decision emphasises the importance of a lender complying with its own policy and makes clear that lenders will still be held to account for imprudent or careless lending.

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