Update: professional negligence

Spike Charlwood and Catherine Ewins highlight the most recent professional negligence cases, including loss of a chance, limitation and dishonesty

SOME 25 YEARS AGO LORD DENNING observed that lawyers "seem to have a vested interest in not changing the law". The same cannot be said of increasing its volume. *Professional Negligence & Liability* (Informa, looseleaf) recently moved from two volumes to three and *Jackson & Powell's 6th edition* contains more than twice as many chapters as its 4th edition. Much more modestly, there is no shortage of material for this update: issues concerning brokers, contribution claims in restitution cases, loss of a chance, limitation and dishonesty have all recently arisen.

Insurance brokers: Arbory v West Craven Insurance Services

Arbory v West Craven Insurance Services (QBD, 13 March 2007) was a claim against insurance brokers arising out of the placing of business interruption cover. In summary the claimant alleged that he was underinsured because the defendant had failed to warn it that the method of calculating insured gross profit was different to the normal business and accounting method of doing so. Two heads of loss were claimed: the amount of the under insurance; and loss of profit, the latter on the ground that the receipt by the claimant of a smaller sum than should have been received meant that the business could not be maintained as a going concern.

Accordingly, the claimant claimed more than he could have claimed from his insurers had he been fully insured.

Unsurprisingly, the defendant, who admitted breach of duty, contended, amongst other things, that that was not permissible. Relying on two decisions of the Court of Appeal, *Ramwade v Emson* [1987] RTR 72 and *Verderame v Commercial Union* [2000] Lloyd's Rep PN 557, it said that the claim for loss of profits was bad in law. The court disagreed and awarded the claimant both heads of loss. There were four limbs to its decision:

- first, that *Ramwade* and *Verderame* had to be read in the light of SAAMCo (a proposition which the defendant accepted);
- second, that it followed that the issue was one of foreseeability;
- third, that, according to the evidence, business interruption cover is different to other types of insurance; and
- fourth, that *Ramwade* and *Verderame* could be distinguished on causation grounds.

Whether this decision will be upheld by the Court of Appeal (we understand that an appeal is pendin) remains to be seen. In the meantime, it appears that it may be possible to obtain from a negligent insurance broker a sum greater than would have been obtained from the insurer had the broker not been negligent and, if so, that is a surprise.

Contribution claims in restitution cases: Charter v City Index

Although contract and tort remain the primary bases of professional liability, they are not the only ones. Claims for breach of trust and/or fiduciary duty and, of relevance for present purposes, in restitution also appear occassionally and one issue that has recently arisen is whether defendants liable in restitution are able to claim a contribution under the Civil Liability (Contribution) Act 1978.

In *Friends Provident v Hillier Parker May & Rowden* [1995] 4 All ER 260 the Court of Appeal held that they could. Lord Steyn disagreed in *Royal Brompton v Hammond* [2002] 1 WLR 1397 at [33] and, that being a House of Lords' decision, one might have expected it to be the last word on the subject. Regrettably for those seeking to apply the law, it was not.

First, in *Dubai Aluminium v Salaam* [2003] 2 AC 366 the House of Lords held that the Act could be relied on where there was a concurrent, fault-based claim. In other words the existence of a restitutionary claim does not prevent reliance on the Act where there is also a fault-based claim, as the House of Lords held was the case in relation to claims for dishonest receipt. Second, in *Niru Battery Manufacturing Ltd v Milestone Trading Ltd* (No. 2) [2004] 2 Lloyd's Rep 319 at [87] Sedley LJ agreed with counsel that Lord Steyn's comments in *Royal Brompton* were obiter and therefore considered that the court remained bound by *Friends Provident*. Third, Sir Andrew Morritt C reached the same conclusion in the recent case of *Charter plc v City Index* [2007] PNLR 15.

The balance of judicial opinion therefore seems to favour the view that those liable in restitution are able to claim a contribution under the Act, but the position cannot be said to be certain.

Loss of a chance: Phillips v Whatley

Since *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602, at least, professional negligence lawyers have been used to assessing damages on a loss of a chance basis. The correctness of that approach has, however, never been tested in the House of Lords outside the personal injury context. Further, when it was tested in that context, in *Gregg v Scott* [2005] 1 AC 176, the House of Lords held that the loss of a chance approach did not apply to personal injury, including clinical negligence, claims.

As a result the claimants sought to argue in the recent Privy Council case of *Phillips v Whatley* [2007] UKPC 28, a lost litigation case to which *Allied Maples prima facie* squarely applied, that the loss of a chance approach to assessing damages is no longer correct. The Privy Council did not allow the argument to be raised, principally because it had not been raised below.

Phillips is therefore interesting not because it decides whether or not the loss of a chance approach is correct in the light of *Gregg*, but because it suggests that: (i) if the point is to be taken, it should first be taken at first instance; and (ii) the correctness of *Allied Maples* and the loss of a chance approach to professional negligence generally may be the subject of argument before too long.

Nonetheless, anyone considering raising the argument will no doubt wish to bear in mind Lord Mance's not very encouraging observation that "there are . . . obvious differences between the medical context of *Gregg v Scott* and the present".

Scope of insurance for dishonesty

Dishonesty tends to raise its head in professional negligence cases in two quite distinct contexts: first, as a question of liability, for example in fraud, dishonest assistance and some breach of trust claims; and second, as an insurance issue, cover being excluded at least to those committing the dishonesty. As is generally the case, such insurance issues usually depend in large measure on the terms of the relevant policy, but two recent cases, *Zurich v Karim* [2006] EWHC 3355 (QB) and *McCarthy v St Paul International Ins Co Ltd* [2007] FCAFC 28 (Full Court of the Federal Court of Australia), shed light on the courts' likely approach to such issues.

In *Zurich* the relevant clause excluded liability "to the extent that [it] arise[s] from dishonesty or a fraudulent act or omission committed or condoned by that Insured" and Irwin J had to decide whether it could be relied on against 2 defendants who had not committed the specific acts or omissions giving rise to the claims in respect of which an indemnity was sought. He concluded that it could. His decision depends on both the facts of the case and the specific insurance clause with which he was concerned, but given that most professional indemnity insurance policies provide cover to innocent insureds even in cases of dishonesty, the case is important in confirming that cover may in appropriate cases be refused to persons not directly involved in the dishonesty concerned.

McCarthy dealt with a different issue, namely whether a dishonesty exclusion can be relied on where the claim could be said to have both dishonest and non-dishonest causes. The Full Court of the Federal Court of Australia held that it could. Again, the wording of the policy will be critical, but the case suggests that professional indemnity insurers will generally be able to refuse cover where dishonesty is a cause of the claim even if there is also an innocent cause of the claim.

So, for example, where a combination of innocent and fraudulent misrepresentations by a professional gives rise to a claim against him, the existence of the fraudulent misrepresentation(s) is likely to allow the insurer to refuse him cover (although the position of his partners / employers may well be different, depending on whether the policy also excludes cover to those persons).

Limitation

In the case of *Cattley v Pollard* [2007] PNLR 19 the issue arose of whether a claim against the wife of a fraudulent solicitor for dishonest assistance in her husband's fraudulent breaches of trust was statute barred by reason of the Limitation Act 1980. It was argued by the claimants that section 21(1)(a) of the 1980 Act applied such that there was no period of limitation to bar the action. That section provides that no period of limitation shall apply to an action by a beneficiary under a trust where the action is in respect of any "fraud or fraudulent breach of trust to which the trustee was a party or privy". It was argued on behalf of the claimants that accessory liability was a form of equitable liability which had historically been treated for limitation purposes in the same way as the liability of express trustees.

It is important, when understanding the judgment, to remember the distinction Millet LJ (as he then was) drew in the case of *Paragon Finance v Thakerar* [1999] 1 All ER 400 between two different categories of constructive trustees. In the first category, a defendant, although not expressly appointed as a trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the claimant. There he is a true trustee. In the second category, the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the claimant. There the defendant is not really a trustee although he may be liable to account as if he were a trustee (the terminology confusingly has been that he is "liable to account as a constructive trustee"). There is no true trust and rather the constructive trusteeship is a formula for equitable relief.

In *Paragon* the solicitors were treated as falling within the second category. Although they had been fiduciaries and had held the claimants' money on trust for them, there was no breach of that trust and if there was a breach of trust it was of the second category of constructive trust. The Court of Appeal's reasoning suggested that it was at least reasonably arguable that such a constructive trust was not within section 21(1)(a) of the 1980 Act and so the ordinary six-year period applied.

The issue which arose in *Cattley* was whether someone who was an accessory to a true trustee's breach of trust, would fall within section 21(1)(a) on a similar basis. In *Cattley* it was argued by the claimants that it did not matter that no pre-existing trust relationship on the part of the wife had existed before the transactions which were impeached occurred, since there was a pre-existing trust relationship involving the fraudster husband which was a sufficient basis on which to say that the action was in respect of a fraud/fraudulent breach of trust to which the trustee was a party or privy. That argument failed. It was held that since there was no pre-existing trust relationship on the part of the wife, she was a category 2 trustee. Furthermore, the judge Richard Sheldon QC, sitting as a deputy high court judge, could see no reason to make a distinction between dishonest assistance cases involving direct accessories to a fraud committed by an express trustee (as was the case of *Cattley*) and indirect accessories, such as accessories to a fraud committed by a constructive trustee. The judge held both fell within category 2.

Thus, although the action was in broad terms in respect of a fraud or fraudulent breach of trust to which an express trustee was privy/a party, since an accessory is not a true trustee in the category 1 sense, section 21(1)(a) of the 1980 Act could not apply. The references to a "breach of trust" and "trustee" in that section could, the judge held, only apply where there is truly a trustee relationship (such as in category 1 cases). Thus the normal six-year limitation period pursuant to section 2 of the Act applied.

This was not the end of the matter. In fact the claim was found not to be statute barred. This was by reason of section 21(3) of the 1980 Act (the right of action had not accrued as regards the beneficiaries with future interests) and also by reason of section 32 (there had been concealment and the claimants could not with reasonable diligence have discovered the accessory's role in the fraud until more than six years before the commencement of the action).

Spike Charlwood and Catherine Ewins are barristers at Hailsham Chambers

Practice points

- Can a claimant recover more from a negligent broker than could have been claimed had appropriate insurance been effected?
- Can a defendant liable in restitution claim a contribution under the Civil Liability (Contribution) Act 1978?
- Might the loss of a chance approach be incorrect?
- When can an insurer rely on a dishonesty exclusion?
- Limitation: when does s 21(1)(a) of the Act apply?