



## newsletter

Professional Indemnity - Spring 2009

### Introduction

Welcome to this edition of Morgan Cole's Professional Indemnity newsletter.

In this issue, we consider the effect on future ATE insurer claims of the important first instance decision dealing with the date of accrual of a cause of action in tort in the CLE litigation. You may also find the review of the law on wasted costs of interest.

In addition, proprietary estoppel and the scope of duty of care owed by one partner to another are considered in [Crooks v Newdigate](#) and [Tann v Herrington](#).

Procedurally, specific disclosure and the scope of the without prejudice rule have also been recently considered and are included here as useful reminders of the Court's approach.

We hope that you will find this newsletter of interest.

### Accrual of a cause of action in tort

Limitation in the CLE litigation

**Axa Insurance Ltd (formerly known as Winterthur Swiss Insurance Company) v Akthur Darby Solicitors and Others [2009] EWHC 635 (Comm)**

Are we seeing the tail end of ATE insurer type claims?

One of the key points that has concerned insurers for the last few years is the length of time that a firm is

exposed to the risk of claims in relation to advice given particularly where the negligent act was the failure to assess the strength of a personal injury case leading to ATE insurers giving insurance. This was of particular concern in relation to TAG type claims where ATE insurers were bringing claims several years after the actual negligent act had occurred. The effect of this was obviously to mean that firms that did claimant personal injury work were at risk of claims being made many years after work had been carried out.

The issue has now been considered at first instance by the High Court in the case of [Axa Insurance Ltd \(formerly known as Winterthur Swiss Insurance Company\) v Akthur Darby Solicitors and Others](#). This case has provided invaluable assistance to Insurers in deciding that the cause of action accrued at the date when the insurance policies were issued, which means that a significant number of such cases are now statute barred and, given the tighter regimes now imposed on the issuing of ATE policies and the lessons learnt from previous litigation, this will hopefully mean that firms doing claimant personal injury work are now far less of a risk to insurers.

Given the importance of the decision, it is worth setting out and considering the facts of the decision. The case considers the date of accrual of a cause of action in tort, arising from the negligence of a professional advisor.

There was a trial of a preliminary limitation issue based on Assumed Facts to determine when the Claimant's claim for damages became time barred. The claim arose from the losses made to NIG (from whom the Claimant had obtained an assignment of its cause of action) on the operation of a scheme to fund litigation operated by Composite Legal Expenses Ltd. NIG provided legal expenses insurance, issuing some 40,000 ATE policies.

The Claimant alleges that the defendants, the panel solicitors to whom the claims were referred, negligently failed to "vet" the claims, so as to ensure that ATE policies were issued only to those claims with a greater than 50% chance of success, and which had a value of



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more than £1000, the “Vetting” claim. In addition, the Claimant alleges that the Defendants negligently failed to notify them during the course of the claims when the prospects of success dropped to 50% or less and when the value of the claim dropped below £1000. Finally, the Claimant alleged failure to conduct claims with due care and diligence the “Conduct” claims.

The Scheme ran from October 2000 to August 2003. Proceedings were issued on 17 June 2008. The Defendants argued that the Vetting claims were time barred in respect of all policies issued prior to 17 June 2002, as the cause of action had accrued on the issue of the policy. The value of the claim in respect of ATE policies issued before 17 June 2002 was £19,544,472. At the heart of the Judgment is the interpretation of the House of Lords decision in [Law Society v Sephton](#) [2006] 2 AC 543 (Sephton).

The Claimant argued in reliance on Sephton that the cause of action only accrued when the underlying claim in respect of which the ATE policies were issued had failed on the basis that the loss until that point was purely contingent, and pursuant to Sephton the cause of action did not accrue until this later date.

The judge, at first instance, found that the cause of action in tort accrued at the date of issue of the insurance policies as pleaded by the defendants thus allowing the defendants to be successful on a limitation defence in respect of one tranche of claims worth nearly £20 million.

An appeal to the Court of Appeal has been lodged and will be heard in July. We will report further on the outcome of the case when the Court of Appeal has decided it. But as it currently stands, this is clearly a decision which is helpful to insurers and if not overturned may well assist litigation firms in the placing of their insurance this year.

## Wasted costs

### A brief overview

**Applications for wasted costs against solicitors and barristers continue to form a part of the litigation that we see as professional negligence lawyers. For that reason, it is worth a recap on the way in which a wasted costs application can be made against a firm of solicitors.**

The three stage test as set out by the Court of Appeal in [Ridehalgh v Horsefield](#) in 1994 remains good law and is as follows:

- was the conduct complained of improper, unreasonable or negligent?
- did that conduct cause the wasted costs complained of?
- is it just in the circumstances that the lawyer should be required to compensate the aggrieved party?

The body of case law that exists to deal with wasted costs makes it clear that there are a number of points to remember when considering whether to bring a claim for wasted costs. The application for wasted costs must be capable of being resolved by summary disposal at a proportionate cost;

- A solicitor can not defend himself by choosing to waive his client’s privilege. Only the client can choose to waive privilege.
- A Judge should not make an order against a solicitor for wasted costs unless satisfied that there was nothing that the lawyer could say, even if the privilege was waived, to defend the order and that, in all the circumstances, it was fair to make the order – [Metcalf v Mardell](#) [2002] UKHL.

There is a wealth of cases dealing with applications for wasted costs. The question that these cases consider is whether the conduct was ‘plainly unjustifiable’.

Two recent cases are [Koo Golden East Mongolia v Bank of Nova Scotia\(1\) & Oths](#) [2008] EWHC 1120 and [Burkhard Hedrich \(1\) Hedrich Consult \(2\) v Standard Bank London Ltd \(Appellant\) and Zimmers \(Respondent\)](#) [2008] EWCA Civ 905.

In the first of these, the question to be addressed was whether the solicitors had acted unreasonably in taking steps to apply for an injunction and then Norwich Pharmacal relief against the Central Bank of Mongolia



in circumstances where the Bank was immune from proceedings because of its state immunity. Whilst the Claimant's solicitors were successful at obtaining Norwich Pharmacal relief at first instance, this was overturned on appeal because of the state immunity. It was in respect of the appeal costs that the Bank of Nova Scotia sought the wasted costs because they felt it should have been obvious to them that CBM should not have been a party to the litigation and that they would lose on appeal. The Judge who dealt with the application for wasted costs refused to grant these against the solicitors because he did not feel that their conduct had been unreasonable or negligent given that the issue as to the liability of CBM was not straightforward and furthermore because there was no evidence that Koo Golden would not pay the costs ordered against them in any event.

The facts of the Hedrich case are complicated and lengthy but in short the case relates to the failure by the solicitors for Hedrich to give complete disclosure until part way through the trial. Disclosure occurred in July 2005. In October 2005, the solicitors were told of the existence of a CD ROM which contained data from Hedrich's hard drive. The solicitors received that CD 14 days before the trial but its existence was only disclosed on day 3 of the trial. When the CD Rom was eventually looked at it disclosed documents that revealed that Hedrich had acted in breach of its contract with the Bank. Hedrich then served notice of discontinuance but the Bank found that they were unable to recover all their costs and so sought wasted costs from the solicitors. The Judge in that case found that whilst there clearly had been late disclosure, it was simply not possible for the Bank to establish that the solicitors had breached their duty of care in the circumstances which was simply to advise their client on its obligation to give disclosure. The Judge felt that as a matter of policy, it was not right to allow such issues to become the subject of costly and lengthy satellite litigation and that the costs involved with looking at this issue in detail would be disproportionate to the wasted costs jurisdiction.

In conclusion therefore, it is clear that the issue of wasted costs remains one that occupies the court on a regular basis. The law on the issue, however, remains clearly set out in *Ridehalgh* as clarified in *Medcalf v Mardell*. The CPR has not significantly altered the position but has perhaps emphasised the need for such applications to be proportionate and only made in clear and straightforward circumstances.

## Assigning a cause of action: treat with caution

**Crooks v (1) Newdigate Properties Ltd and others [2009] EWCA Civ 283**

**This case confirms that an assignment of a debt or chose in action that has already been extinguished cannot occur. The point is a trite one but is not always so clear in the context of a complex settlement agreement. The lesson of this case is always to be certain of the value of an assignment before accepting it.**

The claim arises from a finders fee of approximately £250,000 that the Claimant alleged was owed to him by all five defendants as joint tortfeasors who had together conspired to attempt to deprive the Claimant of his fee.

The Claimant's claim was settled and a Consent Order drafted between the first, second, fourth and fifth defendant (the remaining defendants). Judgment in default had been entered against the third defendant and the proceedings had continued against the remaining defendants. The parties reached agreement recorded in a Consent Order. The remaining defendants paid off the finders fee "in full and final settlement of the Claimant's claim against the remaining defendants". Finally, the Claimant assigned the benefit of the Judgment against the third defendant to the second defendant, who subsequently assigned it to the fourth defendant.

The requirement to assign the debt was included in the Consent Order as follows: "Upon the Claimant receiving the total settlement sum, he is to assign his judgment against the third defendant to the second defendant to be recorded in a deed of assignment between the Claimant and the second defendant and to be completed on payment of the sum..."

The third defendant issued an application seeking a declaration that the judgment debt was satisfied by the payment made by the remaining defendants under the Consent Order. The fifth defendant contended that as assignee, he was entitled to receive payment of the full amount without giving any credit for the payment to the Claimant. The parties accepted that the decision was made on the basis that the payment made to the Claimant represented a full recovery for the Claimant in respect of his claim.

Counsel for the fifth defendant contended that the payment made to the Claimant was not in satisfaction



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of his claim, but was payment for the assignment of the judgment debt which survived in tact. The Court of Appeal considered the construction of the Consent Order, and agreed with the Judge at first instance that the payment was made in settlement of the Claimant's claim against the first, second, fourth and fifth defendants.

The case is a useful reminder of the basic principles which caused the claim to fail by operation of law. The Claimant's obligation to assign the debt was said to be conditional upon the Claimant receiving the total settlement sum. Thus by the time of the assignment, the debt would be extinguished. Further, even if the debt were not extinguished, as a joint tortfeasor, the payment of other joint tortfeasors would have to be given credit for the payment by other joint tortfeasors. This would be so even if the payment were made after the assignment and after notice of the assignment is given to the debtor.

An assignment of a debt is subject to equities, including the right of the debtor to raise defences to enforcement out of the subject matter of the assignment (para 22). Indeed, Lord Justice Hooper in his judgment comments [obiter](#) that even if the assignment had been drafted in terms such that the payment made to the Claimant was only in consideration of the assignment of the judgment, that would not have been enough to prevent the operation of law from preventing the fifth defendant effecting a recovery against the third defendant. The proper way to proceed would have been to seek contribution under the Civil Liability (Contribution) Act 1978, despite the limitations and constraints imposed by that act.

We know therefore that a debt has to exist to be assigned and that in this complex area careful thought is required prior to any commitment to an assignment of a debt or cause of action.

## Scope of duty owed by one partner to another

**Philip Tann v Clive James Herrington [2009] EWHC 445 (Ch)**

**This case is a useful reminder on the current state of the law as to the standard of duty owed by one partner to other partners. It should be read by every partner whose responsibility it is to notify circumstances and claims to professional indemnity insurers.**

The facts arise from the dissolution of a two partner firm of a surveyor ("H") and an architect ("T"). The partnership was dissolved on the retirement of T in March 2001. The partners failed to reach a satisfactory agreement as to the terms of the dissolution of the assets and matters were allowed to drift for some years until 2006.

In May 2001, the surveyor had received a letter of claim in alleging professional negligence in connection with work carried out by an employee of the firm. He failed to notify the matter to the firm's professional indemnity insurers until January 2004. Unsurprisingly, the insurers declined to provide indemnity on the basis that it was a claim first made in May 2001. T knew nothing about the claim or its settlement in the sum of £226,000 agreed by H, until November 2006.

H alleged that the settlement was a debt of the partnership. T alleged that H was in breach of his duties of good faith and of care in failing to notify him of the existence of the dispute and failing to give the insurer prompt notice of the making of the claim.

The Court considered the standard of duty owed by one partner to another. In order to justify a finding that one partner alone must bear responsibility for a debt of the firm, there had to be an "[element of culpability](#)". Bernard Livesey QC (sitting as a Judge of the Chancery division) found after consideration of the authorities that the standard which had to be applied was that H owed a duty to, "[exercise reasonable care and skill a duty which required compliance to an objective standard](#)." H had breached that duty in failing to notify the claim when it was first made.

Although fairly limited on its facts, the case provides a useful exposition of the standard of care to be applied as between partners and the prospects as between partners of recoveries in respect of liabilities of the firm.



## Establishing a proprietary estoppel

**Thorner v Major & Ors [2009] UKHL 18**

**This is a House of Lords case dealing with a classic proprietary estoppel. In a unanimous decision the House of Lords overturned the Court of Appeal reinstating the judgement at first instance. Although a re-statement of the law, the case provides a clear explanation of the elements required for a successful claim to a proprietary right using the doctrine of proprietary estoppel.**

The Claimant, David, was a Somerset farmer. He worked over a period of 15 years from 1990 until 2005 for Peter, his first cousin once removed, at Peter's farm, Steart Farm, for over half of his long working life.

In 2005, Peter, a taciturn and private man, died intestate. David claimed a declaration that he was the beneficial owner of Steart Farm, its working capital, live and dead stock as a result of a proprietary estoppel arising out of the circumstances of his devoting so much of his working life to unremunerated work for Peter. David claimed that he had worked unpaid in reliance on the representations and assurances of Peter that he would inherit Steart Farm on Peter's death.

The proprietary estoppel claim required that David prove the following elements:

- a representation or assurance made to the Claimant;
- reliance on that representation or assurance by the Claimant;
- detriment to the Claimant in consequence of his (reasonable) reliance.

At first instance the Judge made a finding of fact that despite David being unable to identify a specific announcement at any point over the course of the 15 years there was indeed a representation or assurance that had been made by Peter to David that David would inherit the farm.

The Judge at first instance was careful to set out the basis on which he reached his conclusion. This included a carefully analysed evaluation of the context of the familial relationship between Peter and David, the evidence as to the type of man that Peter was, his

taciturn and private nature and his habit when speaking of personal matters referring to them obliquely as opposed to directly. The Court of Appeal and House of Lords both agreed that the findings of the Judge at first instance on these points were immutable.

The issue before the House of Lords was the finding by the Court of Appeal that the Judge at first instance failed to consider whether the implicit statement, which he found had been made in 1990, that the farm was to be inherited by David on Peter's death, was intended to be relied on. The Court of Appeal considered that the implicit statement made by Peter to David was insufficient to found a claim for proprietary estoppel. As they did not consider that it could be said to have been intended to have been relied on and that it was no different from a statement of intention at the time.

The House of Lords considered that such a finding by the Court of Appeal was inconsistent with the finding that it was reasonable for David to have relied on the representations made by Peter that he intended to leave the farm to David. In circumstances where it had been reasonable for David to rely on the representation or assurance made by Peter in respect of Peter's intentions that David succeed him to the farm, it was to some extent not germane to the issue whether Peter in fact ever intended David to rely on the representation or assurances that he made. The Lords were unanimous that the Court of Appeal was wrong in circumstances where on an objective basis they considered and found that it was reasonable for David to have placed reliance on Peter's representation or assurance.

The argument appears to have been made purely on the ground of proprietary estoppel. However, Lord Scott found some difficulty with the idea that a proprietary estoppel could be founded on a representation or assurance of a future right when the possibility of change of circumstances intervening prior to the fruit of the promise coming to fruition could easily occur. In these circumstances, Lord Scott considered the claim was better explained by way of a constructive trust. Nevertheless, Lord Scott confirmed that although overlapping the concepts of constructive trust and proprietary estoppel should in his view remain separate remedies.

That the element of reliance was proved does not appear to have been in issue given David's hours of unremunerated work over an extended period of time. In addition, although there was uncertainty in the Court of Appeal as to whether Peter was aware that David had acted to his detriment in foregoing other possible opportunities instead of assisting him at Steart Farm,



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the Lords did not consider that Peter's understanding of detriment was an element that the proprietary estoppel included.

The other issue considered by the Lords is whether there was sufficient identity over the property as at the date of the promise and as at the date of Peter's death to constitute one entity that could be identified and passed to David. The "farm" being whatever elements it constituted as at the date of death was found to have been a sufficient description to found the proprietary estoppel.

This case provides a classic illustration of the operation of the doctrine of proprietary estoppel. The House of Lords reinstated the decision of the Judge at First Instance to provide a just result for a man described by the Judge at first instance as painfully honest who had devoted half or more of his working life in unremunerated pay on the tacit understanding that he would inherit Steart Farm. The familial relationship, the "clean hands" of the Claimant, his devotion to Peter over a long period that were obviously to his detriment were he not to inherit the farm are clearly matters that operated powerfully to ensure that the equitable remedy was made available to David in this particular case.

## Scope of the without prejudice rule

**Ofulue and another v Bossert [2009] UKHL 16**

**The House of Lords constituted of Lords Hope, Scott, Roger, Walker and Neuberger have confirmed in their Judgment in this case the protection afforded by the without prejudice rule to parties who make admissions against interest in negotiations seeking to compromise a dispute. Lord Scott dissented from the Judgment.**

The facts of the case are as follows. The Claimants sought possession of 61 Coborn Road, Bow ("the property") from the Defendant who had been permitted to occupy the property by one of the Claimant's previous tenants. In 1989 the Claimants began possession proceedings against the Defendant in the High Court. During the course of those proceedings the Defendant admitted the Claimants' title to the property but denied their right to possession. Additionally, in without prejudice communication, the Defendant's solicitor wrote to the Claimants' solicitor offering to buy the property for £20,000.00.

The possession proceedings fell into an automatic stay in April 2000 under the provisions of the Civil Procedure Rules as the Claimants had failed to pursue them following the failure of the settlement negotiations for about 10 years. The proceedings were subsequently struck out. In 2003 the Claimants issued fresh proceedings for possession of the property against the Defendant. The Defendant alleged in those proceedings that she had obtained title to the freehold of the property by adverse possession.

Under the Law of Adverse Possession, if the Defendant could prove that she had been in adverse possession of the property for more than 12 years the defence would succeed. For the purposes of this case, the matter in issue was whether the without prejudice communication sent by the Defendant offering to purchase the property to the Claimants, on 14 January 1992 and expressly marked without prejudice could be admitted in evidence to defeat the claim for adverse possession, as being less than 12 years prior to the date of the 2003 proceedings.

An issue therefore, was whether the without prejudice rule of evidence applied to subsequent proceedings in respect of a different issue. The issue being litigation with regard to adverse possession was not the issue that was being litigated when the without prejudice letter was written in January 1992.

Lord Neuberger provided the Judgment in this claim. He considered the relevant authorities and found that the letter was inadmissible. The dissenting opinion of Lord Scott of Foscote was based on a distinction between the issue to be compromised in the first set of litigation that of possession of the property and the issue that the Claimant sought to admit into evidence which was that the Claimant had title to the property, a fact agreed in the first litigation and uncontroversial. However, Lord Neuberger considered that the distinction was too fine and relying on the majority decision in the case of [Rashid \[2006\] 1 WLR 2066](#), Lord Neuberger considered that it would be impractical and contrary to public policy to allow the Claimants to admit into evidence the letter written expressly without prejudice in the previous litigation between the parties.

It is clear that save for Lord Scott, their Lordships considered it undesirable to set any precedent that may give parties in litigation pause for thought when attempting to conduct settlement negotiations and compromise disputes in relation to any acknowledgements made for the purpose of such compromise.



## Disclosure rules

**Henry Webster (2) Joseph Webster (through their mother and Litigation Friend, Elizabeth Webster (3) Elizabeth Webster (4) Roger Durnford v The Governors of Ridgway Foundation School [2009] EWHC 1140 (QB)**

**The redaction of documents on inspection is considered in this decision following a specific disclosure request by the Claimants for documents to be provided without redaction. The case provides a useful summary of the relevant considerations where inspection would involve a disclosure of sensitive information concerning individuals not concerned in the litigation.**

The claim arose from a severe assault with a racial motive of the first Claimant, a pupil at the Defendant school, which took place within the Defendant's school grounds. The assailants were a group included among which were four other pupils at the Defendant school. The Claimants brought a claim in negligence against the Defendants for failing to maintain proper disciplinary standards or otherwise take proper care for the security of pupils in the school.

The Defendants argued that the Data Protection Act 1998 would be breached if they were to provide unredacted documents for the Claimants to inspect. The exception to the requirements of the Data Protection Act for disclosure to occur if it is necessary for the administration of justice did not apply, as the Defendants argued that disclosure was not necessary. In addition, the Defendants argued that disclosure would breach the right under Article 8 (respect for private and family life...) of the European Convention on Human Rights of individual pupils who would be identified in the unredacted documents.

It is not necessary here to detail the specific findings of the Judge in relation to the specific requests. The utility of the case for the practitioner lies in the reference to the framework of legislation within which the disclosure takes place and the consideration and balancing of the relevant need for a fair trial, proportionality and the rights of the individuals. Where disclosure was necessary for a fair trial, it was ordered, but the rights of the individuals were balanced by the use of identifiers for pupils, and a code to show the pupil's racial group, (so far as known). Where disclosure was not necessary for a fair trial, or disproportionate, then no order for specific disclosure was made.

## The team



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David joined Morgan Cole in 1983 and has been a partner since 1985. David's main areas of practice are professional indemnity litigation and professional conduct work including not only the investigation of complaints of professional conduct, but also advocacy at tribunals.

David's professional indemnity expertise includes the defence of professional negligence claims against doctors, solicitors and educational professionals. As well as David's professional work, he also fulfils a significant management role as the team leader. David is a trained mediator.



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Robin is presently the Chairman of the firm. He was also the first solicitor in private practice in Wales to gain Higher Rights (All Proceedings) qualification in 1995.

He is a member of the Solicitors Association of Higher Court Advocates and a member of the Prosecuting Panel for the Law Society. His membership of the Prosecuting Panel provides him with unique experience in relation to the disciplinary procedures of the Law Society and, as a result, he now receives instructions from Zpro to act on behalf of insureds who have found themselves the subject of disciplinary proceedings.



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Clare trained with Morgan Cole. She qualified into the professional indemnity team at Morgan Cole in 1990 and has been a partner since 1998.

Clare has handled a large number of claims against a wide range of professionals including quantity surveyors, surveyors, brokers, accountants and architects. She also has particular expertise in claims against solicitors.



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Joanna is a Senior Associate who joined the team in May 2007. She has many years of experience dealing with defendant professional indemnity insurance work that she gained at her previous firm, Beachcroft LLP.



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Sarah is an Associate who joined the team in January 2009 from Beachcroft LLP. She has substantial experience dealing with defendant professional indemnity insurance work across a range of professions including insurance brokers, underwriting agents, surveyors, architects, solicitors and accountants. Sarah has spent time on secondment with a leading professional indemnity insurance provider in London and has been responsible for supervision and training of a team of claims handlers dealing with claims against a range of professionals.



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Catrin qualified as a solicitor in September 2004, having trained with Morgan Cole, and won the Western Mail "Trainee of the Year" award in November 2004. Since qualification, Catrin has acted on a range of professional negligence claims. Catrin has experience of claims against accountants, doctors and nursing professionals. In addition, she has recently spent nine months seconded to an insurer client and has significant experience of handling solicitors' negligence cases and the way claims are handled by insurers.



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Alison qualified with Morgan Cole and initially worked as a personal injury lawyer acting regularly on behalf of Trade Union clients and their members in relation to personal injury and industrial disease claims.

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