

## Insurance Newsletter

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Hardwicke is a leading set offering contentious and non-contentious expertise in the insurance sector acting nationally and internationally for the Insurance Market including the London Lloyd's market, the London company markets, domestic retail insurers, mutual insurers (including members of the international group of P & I Clubs and other mutual insurers), their insureds, managing agents and brokers.

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Welcome to the first edition of Hardwicke's Insurance Newsletter. In this issue, Jeffrey Thomson reviews policy exclusions covering fraud and dishonesty in light of the High Court's recent judgment in *Goldsmith Williams (a Firm) v Travelers Insurance Company*, Steven Weddle discusses applications to withdraw admissions under Part 14.1A CPR and Sarah Venn highlights some recent cases which may be of interest to you. If you have any comments or suggestions for future editions please contact Louise Poppelwell, Marketing Manager, on [louise.poppelwell@hardwicke.co.uk](mailto:louise.poppelwell@hardwicke.co.uk)

### Silk Appointment

We are delighted to announce that **Paul Reed** has been appointed Queen's Counsel in the new silk appointments. We would like to congratulate Paul for this well-deserved recognition of his expertise and abilities.

### A Few Introductions...

In 2009 Hardwicke underwent a bold restructuring exercise, resulting in the launch of four new client-facing divisions. The Insurance Division comprises a team of barristers with extensive knowledge of the worldwide insurance market and experience in most classes of non-marine and marine insurance and reinsurance. For details of our core practice areas and to find out more about individual members of the Division, please see our new website at [www.hardwicke.co.uk](http://www.hardwicke.co.uk)

The Insurance Practice Management Team is lead by Senior Practice Manager, **Vivian Frew**, an experienced insurance lawyer who has worked as in-house Counsel and as a Solicitor in private practice. Vivian is assisted by Practice Manager, **Oliver Edwards** who is already well known to many of you, and by Assistant Practice Manager, **Gagan Grewal**. The Practice Management Team looks forward to working with you over the coming years.

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## Article: New Ruling on Policy Exclusions for Fraud and Dishonesty

The High Court's recent judgment in *Goldsmith Williams (a firm) v. Travelers Insurance Company Limited* [2010] EWHC 26 (QB) will be of interest to those who deal with professional indemnity insurance policies in which clauses excluding claims arising from fraud or dishonesty are common.

The assureds were two directors of a solicitors firm. They were insured under a typical, claims-made professional indemnity policy. Over a period of time, the first director submitted a large number of mortgage applications containing false information. On several occasions, the first director had gone on to steal the monies advanced (rather than completing a purchase, registering a charge, etc).

A claim was brought against the directors in relation to two such transactions where the advances had been stolen. Insurers sought to deny liability on the basis of policy exclusion for "*any claim ... against any Insured arising from dishonesty or a fraudulent act or omission committed or condoned by such insured*".

Wyn Williams J found that the second director had known the first director was submitting fraudulent applications, and had been involved in submitting a number of them herself both in conjunction with the first director, and independently. However, in relation to one of the claims brought against the firm, there was no evidence before the judge to prove the second director had been aware that the particular transaction had taken place. Nor was there any evidence that the second director had been aware that the first director had ever stolen any of the funds advanced by lenders.

Nevertheless, the judge held that insurers were entitled to deny liability, stating:

*"... by the time that [the first director] stole the money loaned ... [the second director] knew that he was engaging in mortgage fraud... she knew that he had made false applications in the [earlier] mortgage forms. That was a course of conduct which she condoned. Had she not condoned such conduct [the first director] would have been in no position to steal the money... Her condoning of [the first director's] fraudulent mortgage **applications permitted a state of affairs to arise whereby he was left free to steal.**"* (Emphasis added.)

In so holding, the judge approved and applied an earlier decision of Irwin J in *Zurich Professional v. Karim* [2006] EWHC 3355 (QB), another case involving solicitors and a similar exclusion clause in the 2002/03 Assigned Risks Pool policy.

In light of these two decisions, it appears that the following can be said about policy exclusions of this very common type:

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- To 'condone' means 'to forgive or overlook an offence, so as to treat it as non-existent'; and (apparently) an assured cannot be held to have condoned an act or omission, or dishonesty, of which that assured is not aware.
- 'Dishonesty' is to be read disjunctively from 'fraudulent act or omission'. 'Dishonesty' is a broader concept, which includes not merely particular dishonest incidents causing a loss and claim, but also persistent general practice or dishonest 'courses of conduct'.
- If an assured has condoned a dishonest course of conduct (eg submitting fraudulent mortgage applications), and subsequently a claim is made as a result of a particular incident of dishonesty or fraud falling within the scope of that dishonest course of conduct (eg submitting a particular fraudulent mortgage application, of which the assured was not aware), the exclusion will apply.
- This result is not affected even though the loss and claim may *also* have been contributed to by other, subsequent dishonest acts (eg theft of the mortgage funds advanced), of which the assured was not aware, and which do not fall within the scope of the dishonest course of conduct condoned by the assured.

In allowing the insurer to deny cover in this last instance - ignoring the effects of dishonest acts *not* condoned by the assured, either specifically or as a course of conduct - the courts have adopted a broad view of the 'cause' of a claim. As the judge said in *Goldsmith Williams*:

*"[Counsel for the assured] argues that the claim brought ... arises from the theft of the money loaned ... [and] that it does not arise from the dishonest and fraudulent mortgage application. In my judgment that is too narrow a view of what transpired. There could have been no theft ... without the dishonest and fraudulent mortgage application. In my judgment the phrase "arising from" interpreted in a policy of insurance afforded to solicitors is apt to embrace both aspects of [the first director's] dishonesty."*

## Jeffrey Thomson



*For a more detailed analysis of policy exclusions covering fraud and dishonesty, the Goldsmith Williams decision, and related matters, by this author, please see the May-June edition of the Journal of Business Law.*

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## An Article: Can I Change My Mind Please?

### Part 14 of CPR – Where are we now?

Arguments over pre action admissions in Multi Track claims have proved fertile ground for argument since the CPR came into force in 1999. After early indications, at District and Circuit judge level, the Courts were going to make it harder to withdraw admissions, a position was reached whereby the balance of prejudice between the parties became the primary, if not the sole, basis for deciding whether or not an admission could be withdrawn. The law was far from settled but, in practice, one could advise with reasonable confidence. The case of *Sowerby v. Charlton* [2005] EWCA Civ 1610 followed throwing the whole situation into disarray.

In *Sowerby*, the Court of Appeal found that CPR Part 14 did not apply to admissions made before action. A main plank of the Court's reasoning was its view that CPR Part 14 had been drafted so carefully, that it could not have been intended to embrace pre-action admissions of liability. In other words, if those drafting the CPR had intended to include pre-action admissions in the provisions of Part 14, they would have done so expressly.

In addition to considering the application of Part 14 to pre-action admissions, the Court of Appeal considered how to approach the exercise of the discretion to permit a party to withdraw an admission. The decision of Sumner J in *Braybrook v. Basildon & Thurrock University NHS Trust* [2004] EWHC 3352 was cited as providing valuable guidance. Having first suggested that the courts should consider all circumstances and try to implement the overriding objective, the Court of Appeal listed five matters in particular that might be considered: –

- (a) the reasons and justification for the application, which must be made in good faith;
- (b) the balance of prejudice to the parties;
- (c) whether any party has been the author of any prejudice they may suffer;
- (d) the prospects of success of any issue arising from the withdrawal of an admission;
- (e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

The Court further commented that timing would be influential. The closer to a final hearing an application was made, the less likely it would be to succeed.

It is clear that those charged with drafting CPR amendments did not entirely agree with the Court of Appeal's view of Part 14. *Sowerby* was decided in December 2005 and only reported in January 2006. With what one might call unusual haste - it took little more than a year - the rules were reconsidered and amended. On 6th April 2007, CPR 14.1A came into force. It specifically applies to admissions made before the commencement of proceedings. The new rule clarifies what pre-action admissions it applies to, and when an application can be made to withdraw such an admission, but is silent with regard to the basis upon which the application should be decided. Details as to the latter are contained in the Practice

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7.1 and 7.2.

After stating that the court will have regard to all the circumstances of the case, PD14 7.2 sets out a non-exhaustive list of matters the court may take into consideration when determining an application to withdraw an admission:-

- (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
- (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
- (c) the prejudice that may be caused to any person if the admission is withdrawn;
- (d) the prejudice that may be caused to any person if the application is refused;
- (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
- (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and
- (g) the interests of the administration of justice.

This can be seen to be little more than a re-statement of the wording in Braybrook that was approved in Sowerby.

The author recently represented a Claimant on a defence application to withdraw an admission, based primarily on the assertion that the person who had made the admission had '*made a mistake*'. It was argued that the mistake was obvious, in that it should not have been made, but no more explanation was provided. The application was successfully opposed on the basis that it was not enough simply to state that a mistake had been made; it was necessary to show what that mistake was and why it had been made.

This effectively brings into play paragraph 7.2(a) of the amended Practice Direction and draws upon the '*good faith*' requirement identified in Braybrook. The way in which the Defendant had arrived at the admission was relevant to the Court's decision. The Defendant had a criminal conviction as a result of his poor driving. However, from an early stage, the Defendant's insurer had maintained that the Claimant's negligent driving had contributed to the collision. Over a 12-month period, the insurer made a series of reducing offers with regard to extent of the Claimant's contributory fault before finally giving up and making a full admission as to liability. It was clear from this series of events, that the Defendant's insurers were aware of the risks involved in making admissions and that they had been trying to negotiate some discount from the claim. When the claim was issued, the Defendant's insurers instructed solicitors: it was they who tried to resurrect the contribution argument and, in the circumstances, to withdraw the admission.

Whilst the Claimant conceded that PD 7.2 is not an exhaustive list of criteria it was contended that paragraph 7.2(a) created a '*gateway*' to a successful application to withdraw a pre-action admission. It is only when the applicant can show that there is a

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reason why the court should allow the admission to be withdrawn that the court need go on to consider the factors set out in subparagraphs 7.2(b)-(g), or any additional factors. In this particular case, it was not argued that the 'good faith' of the application was a gateway requirement. However, the author suggests that opening the gateway under paragraph 7.2 requires the applicant to show a real, rather than fanciful, reason for the withdrawal. Any such reason is also likely to satisfy the good faith requirement. Only after an application is shown to be genuine in this way do questions of conduct, prejudice, timing and prospects come into play (*Rhiannon Barker v Robert Fraser*, 25th February 2010, unreported).

## Steven Weddle



## Did you see this? Recent Cases You Might Have Missed.

### ***Whiston v London Strategic Health Authority (Successor Body in Law for Queen Charlotte's Maternity Hospital)* [2010] EWCA Civ 195**

The Court of Appeal considered the limitation period in a clinical negligence claim arising from brain damage sustained during the Claimant's birth in 1974, which caused him to suffer from cerebral palsy. Proceedings were brought in 2006, following concerns expressed by the Claimant's mother in 2005, when the Claimant deteriorated from a previously stable condition. The claim was underpinned by an assertion that a junior doctor had persisted in using the wrong forceps and delayed seeking assistance.

The Court of Appeal emphasised that actual or constructive knowledge that the injury was significant was not determinative of the constructive knowledge issue under section 14(3) of the Limitation Act 1980; the issue should be determined by reference to the knowledge which a person might reasonably be expected to acquire, depending on all the circumstances of the case.

In this case the Claimant knew his injury was significant and had he asked his mother (a nurse and midwife) about his birth as a reasonable person would have done, she would have told him what she told him in 2005 and he would have acquired knowledge of the alleged negligence; accordingly, the Claimant would have had constructive knowledge by no later than his early 20s.

The Court of Appeal held that following *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 an objective test must be applied to section 14(3). Lord Justice Dyson held that when assessing the extent to which someone is reasonably to be expected to be curious about the cause of his disability, a distinction should be drawn between someone who has lived with a disability and its effects all his life and someone who suffers an injury following an

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adverse incident which occurs in adulthood. However, in this case, it was equitable to allow the Claimant to pursue his claim by exercise of the discretion under section 33 of the Limitation Act 1980.

## ***Markerstudy Insurance Co Ltd (2) Planet Insurance Co Ltd (3) Symphony Insurance Co Ltd (4) Markerstudy International Holdings Ltd v Endsleigh Insurance Services Ltd [2010] EWHC 281 (Comm)***

The Claimants wrote motor business and the Defendant provided services to them under a series of five agreements. The parties entered into deeds of termination terminating two of the contracts and a deed of variation on another. The Claimants alleged that they had suffered losses totalling in the region of £14 million from the payout of unnecessary sums on claims, inaccurate reserving of claims, delays in passing on claims documentation, disruption to business, over-reserving of claims and interest.

One preliminary issue concerned interpretation of an article which excluded liability for “*indirect or consequential loss (including but not limited to loss of goodwill, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with the agreement*”. It was held that the specific heads of loss, such as loss of goodwill, were not freestanding, in the sense that they encompassed all losses within that category whether direct or indirect, but were examples of the type of losses making up indirect loss. The use of the phrase “*including but not limited to*” was a strong pointer that the specified heads of loss were only examples of the excluded indirect loss.

## ***Shaul Yechiel v Kerry London Ltd [2010] EWHC 215 (Comm)***

A suitcase containing valuable jewellery belonging to the Claimant was stolen. At the time of the theft the jewellery had been out of its safe deposit box for 23 days. It had been a condition of the insurance policy covering the jewellery that the items were only covered for 14 days whilst in the Claimant’s personal custody. The insurer refused to pay on the policy. The Claimant averred that he had faxed and then posted a handwritten letter to the Defendant, before the theft, informing the Defendant that he intended to remove the jewellery for an extended period of time. The Defendant denied having ever received such a letter and claimed that it had only been informed of the letter’s existence 15 months after the event. The Claimant produced copies of the letter and the accompanying fax report but was unable to provide the originals.

The Court found as a fact that the Claimant had not sent the disputed letter, but had, fabricated it and the contemporaneous fax reports. Amongst other things, it was not the Claimant’s practice to deal with the Defendant by letter, but rather by phone. Moreover, it was incredible that the original letter and fax reports had been lost given the substantial value of the concerned jewellery. In the absence of a response to the letter it behove the Claimant to confirm that the Defendant had received it before embarking with the jewellery. In all the circumstances, it was implicit that the Claimant had failed to obtain an agreement from his insurers that the 14 day time limit be extended and the action failed.

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## ***O'Beirne v Hudson* [2010] EWCA Civ 52**

O'Beirne's claim, following a road traffic accident, had settled for £400 general damages and £719.06 hire charges and payment of costs. The settlement was recorded in a consent order which provided for Hudson to pay O'Beirne's reasonable costs on the standard basis, to be subject to detailed assessment if not agreed. Hudson argued that if the case had gone on to allocation it would have been allocated to the small claims track. The Court of Appeal held that (in accordance with CPR 44.5(1), when making an assessment the costs judge was entitled to take account of all circumstances, including the fact that the case would almost certainly have been allocated to a small claims track if it had been allocated. Provided the costs judge did not purport to vary the original order or tie himself to assessing by reference to the small claims track it was quite legitimate to give items on a bill very anxious scrutiny to see whether costs were necessarily or reasonably incurred and whether it was reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track.

## ***Drew v Whitbread***

Drew had suffered injuries and losses which he pleaded would exceed £15,000 (the former fast track limit); his schedule of special damages totalled some £30,000 and his claim for personal injury was in excess of £1,000. The trial went into a second day and the judge found Whitbread liable, with 25% contributory negligence. On damages, and in reliance on the joint statement of the medical experts, he found that that Drew would not have required any of the future losses claimed (put at £18,325 in his schedule). Drew did recover a *Smith v Manchester* award (for incapacity on the open labour market) assessed at £5,000 prior to the deduction of 25%. Total damages were £9,291.56. The judge ordered Whitbread to pay Drew's costs on the standard basis, if not agreed. Whitbread disputed Drew's bill of costs as disproportionate and said that Drew's claim had been exaggerated. The costs judge held that on the basis of the medical reports the case should have been pursued as a fast track case and that costs would be assessed on that basis. The Court of Appeal held that if it was clear that a costs judge would be assisted in the assessment of costs by some indication from the trial judge about the way in which a trial had been conducted, a request for that indication should be sought. That said, there was no rule that a failure to raise a point before the trial judge would preclude the raising of a point before the costs judge. The costs judge was not entitled simply to rule that she was going to assess the costs of the trial as if the case were on the fast track; that would be to rescind the trial judge's order. The permissible approach was to assess costs on the standard basis taking into account the fact that the case should have been allocated to the fast track.

## **Some Points to Watch ....**

### **Asbestos claim forecast doubled**

The cost to the insurance industry of asbestos related claims is

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expected to reach £9 billion over the next 30 years. The projected cost has almost doubled since the actuarial profession last estimated the figure six years ago. This is largely attributable to the fact that the proportion of mesothelioma sufferers who claim compensation has almost doubled since 2004.

## **Law Commission recommends changes to disclosure obligations in insurance contracts**

The Law Commission and Scottish Law Commission (consultation paper 319) have recommended that changes should be made to the duty of disclosure in insurance contracts that would see less severe penalties levied on consumers who make innocent and careless mistakes.

## **Consultation on Employers' Liability Bureau**

The government has announced a consultation which could lead to the creation of an Employers' Liability Insurance Bureau – a fund of last resort similar to the Motor Insurance Bureau for the victims of workplace accidents. The consultation will consider how a tracing office, which would help track down insurance policies, should be funded and managed.

George Pulman QC 1971 (1989)  
William Lowe QC 1972 (1997)  
Nigel Jones QC 1976 (1999)  
Paul Reed QC 1988 (2010)\*  
John Gallagher 1974  
Robert Leonard 1976  
Steven Weddle 1977  
Wendy Parker 1978  
P J Kirby 1989  
Sara Benbow 1990  
Rupert Higgins 1991  
John de Waal 1992  
Colm Nugent 1992  
Dr. Maggie Bloom 1994  
Jamie Clarke 1995  
David Pliener 1996  
Edward Rowntree 1996  
Charles Bagot 1997  
David Lewis 1997  
Romilly Cummerson 1998  
Henry Slack 1999  
James Watthey 2000  
Sarah McCann 2001  
Jasmine Murphy 2002  
Sarah Venn 2002  
Rebecca Richardson 2003  
Michael Wheeler 2003  
Alexandra Bodnar 2004  
Jeffrey Thomson 2004  
Thomas Bell 2006  
Simon Hale 2006  
Philip Fellows 2007  
Amelia Walker 2007

\*With effect from the 22<sup>nd</sup> March 2010

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