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A solicitor update on litigation insurance and funding from Temple Legal Protection

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Welcome to the latest edition of "Commercially Minded".

We start this issue with a look at litigation/ATE insurance providing security for a defendant's costs; that is followed by an article restating the law on professional advisor negligence claims. Elsewhere there is a review of a recent case on misuse of private information and breach of confidence. Just click on the image or gold colour heading below and you'll go straight to that article. Enjoy reading our views; if you'd like to share yours, please get in touch with our team – contact details are on page 9.

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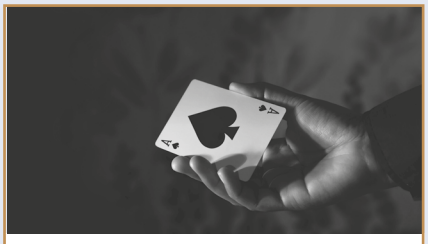

THE ACE IN THE HOLE? HERE TO HELP YOU HELP YOUR CLIENTS

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When does an After-the-Event insurance policy provide adequate security for a defendant's costs?

By Nicholas Ellor, Senior Underwriter

The short answer is, it very much depends on the wording of the particular policy and provisions in it enabling the insurer to void the policy and/or exclude liability. A rather unhelpful answer but nonetheless probably true.

A defendant's legal representatives will go through the policy wording with a fine toothcomb and attack any provision they think will enable the insurer to parachute out or deny cover.

The message seems to be, the fewer exclusions in the policy and the fewer circumstances legislated for which would enable the insurer to deny liability, the better the chance it has of passing muster.

Not a very fair state of affairs from the insurer's point of view, who has to strike a balance between giving the insured adequate cover and at the same time protecting itself against having to bail the insured out in circumstances, where for instance, the insured has been less than honest in its presentation of the risk (e.g. non-disclosure of material facts).

As Longmore LJ seems to have implied in the leading case on this issue in Premier Motorauctions v Price Waterhouse Coopers and Lloyds Bank [2017] EWCA Civ 1872, the prospect of avoidance by the insurer must be illusory in order for the policy to give sufficient protection. Whether or not it is illusory is of course difficult to assess and it seems the benefit of the doubt will lie in favour of the applicant seeking security for its costs.

If the policy enables the insurer to terminate cover if the merits of the case materially deteriorate (a perfectly reasonable clause for a litigation/ATE insurance policy to have) this may be considered anything but illusory and a real, not theoretical, possibility or even probability.

The inclusion of an anti-avoidance clause in the policy, effectively tying the insurer's hands but preserving its rights against the insured in the event of its breach of the terms of the policy, is a way of demonstrating both to the court and the defendant, that the insurer is serious in its commitment to the insured and its belief in the merits of the claim and prospects of succeeding at trial. Such inclusion of an anti-avoidance clause will be persuasive in any threatened or actual security for costs application.

The situation on the ground

Here at Temple we frequently receive applications for insurance where provision is sought to deal with threatened or actual security for costs applications. To cater for this request, we can offer incorporation of an anti-avoidance clause into the policy by way of endorsement. The quid pro quo of agreeing to incorporate such a clause, is that the merits of the claim and its prospects of succeeding at trial have to be higher than normal; the premium pricing is also higher than would normally be the case.

- Temple will specifically authorise the claimant to disclose the policy wording and anti-avoidance clause to the opponent's solicitors.
- When presented with such an anti-avoidance clause, the defendant's solicitors in most cases either withdraw the security for costs application or cease threatening to present such an application.
- It is worth stating that the terms of Temple's anti-avoidance clause are not restricted, as some are, in limiting the circumstances in which it will not avoid cover.

So, in summary, going back to the original question set out in the title to this article, I think it would be instructive to recite verbatim what LJ Longmore said in his aforementioned Court of Appeal judgment in the Premier Motorauctions case, namely the correct approach when assessing an ATE insurance policy being put forward as a security for the defendant's costs is:

[41] "… having regard to the terms of the ATE policy in question, the nature of the allegations in the case and all the other circumstances, there is reason to believe that the ATE policy will not respond so as to enable the defendant's costs to be paid."

If you have any questions about this article or would like to find out about litigation/ATE insurance for your clients commercial disputes please call Nicholas Ellor on 01483 514815 or email nicholas.ellor@temple-legal.co.uk.

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Professional Negligence: judgment restating the law applicable to professional advisor negligence claims

Manchester Building Society v Grant Thornton [2021] UKSC 20; [2021] 3 WLR 81

By Sam Knight, Underwriter

This case arose from negligent advice given by the Claimant's auditor, exposing them to a £32.7 million loss. The key question for the court was whether the scope of the duty owed by the auditor to the Claimant encompassed the losses claimed, or whether the advice given was insufficient to expose the auditor to liability.

The Supreme Court ultimately decided that the auditor's negligent advice fell sufficiently within the scope of their duty of care to the claimant. This decision has restated the law applicable to professional advisor negligence claims and has practical implications for solicitors and counsel in pursuing them.

Where to start – and Preliminary points on actionability

Lord Hodge DPSC and Lord Sales JSC advanced a six-stage approach at para 6 of the judgment, and it would prove prudent for practitioners to follow the recommended line of questioning:

'(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).'

This provides a new starting point and set of criteria to be established for a successful professional negligence claim against an advisor; following that structure will bring your case analysis in-line with the Supreme Court's re-evaluation of the applicable law.

Preliminary Points on Actionability

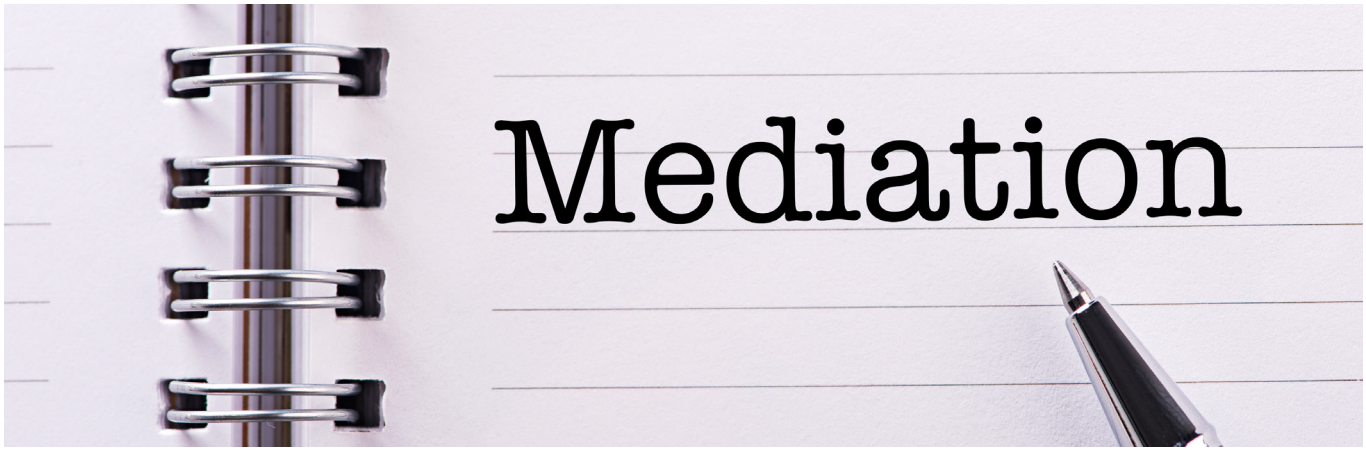
It was held that before examining the scope of any duty of care in a professional advice case, the actual extent of loss arising from the negligent advice must be uncovered. This can be done on a simple 'but for' basis asking - for example, but for my advice that you should read this judgment in full, would you have lost out on billable hours?

The key is to determine which losses 'flowed from the alleged breach of duty' (para 12). Temple Legal Protection recently underwrote a case whereby negligent advice on the formal creation of land rights in a conveyance caused serious loss to the purchaser. Unravelling the case and applying Manchester Building Society, it was clear that such losses flowed directly from the alleged breach of duty, bringing them within the boundaries of the dispute.

The article continues on our website. Click here to read more.

The remainder of the article considers 'The Scope of a Professional Adviser's Duty of Care', 'The Distinction Between 'Advice' and 'Information', Contributory Negligence and some conclusions on a much-needed simplification of the law relating to professional advice cases.

If you would like more information on our litigation insurance and disbursement funding products for professional negligence cases, or you have any other legal expenses insurance query, please email matthew.pascall@temple-legal.co.uk or call him on 01483 514428.



Mandatory Mediation: the end of the litigator?

By Terry Renouf, Renouf Mediation

After many judicial speeches on the topic the summer saw three significant publications. Firstly, the Civil Justice Council reported, at the request of the Master of the Rolls, supporting mandatory Dispute Resolution [1]. Secondly the Ministry of Justice published its own Guide to Civil Mediation [2]; thirdly and finally the Ministry requested evidence on Dispute Resolution [3].

That call for evidence is sponsored not only by the Master of the Rolls and the two Presidents of the Tribunals Divisions but also the Lord Chancellor and his ministerial colleague in the House of Lords - providing support from the Executive branch of Government.

Do not doubt that this is important and will lead to change. The question is not whether there will be a change but how much. The report's introduction explains that the aim is to bring into the mainstream "non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively becomes the norm."

Does this mean the end of the litigator? Are the brave, brash front-line soldiers of the law going to transform to accommodative Dispute Resolution (DR) professionals? Rest easy! Although the world is certainly changing and the judicial focus reflects the client need for resolution, the call for evidence asks how the courts should best implement that change. There will therefore be an opportunity to provide input into the future of dispute resolution.

The Call for Evidence raises 32 questions but cost effectiveness and its close cousin proportionality lie at the heart of many of the issues. The costs of mediation will be relevant and will be judged against sums in dispute (and presumably, where costs budgets are available, the financial savings that might result from settlement.)

Other questions include what types of "DR" are most appropriate to resolve a particular case (and when): no doubt an issue that will take up more time at Case Management Conferences. Pre-Action Protocols will no doubt also need to be reviewed and broadened. Another legitimate question is which cases are not appropriate for DR? The judicial view seems to be that this could be a vanishingly small number - but "test cases" that set precedents will be one class.

Are there others? How should they be defined? Will we see a formal Notice to Mediate as there is in British Columbia? And "unless orders" where DR has been ordered? Should mediators be regulated? Will Courts expect civil mediators to be Civil Mediation Council Registered? Will your clients?

At this stage there are many questions and imponderables, but parties even now will need their settlement strategies from outset. Be ready, know your options, know your mediator(s) and have your answers ready for the Cost-Benefit analysis. The Evidence paper states:

"We want to support people to get the most effective resolution without devoting more resources than necessary - financial, intellectual and emotional - to resolve their dispute. Creating more proportionate and constructive routes to resolution avoids the need for these resources to be expended, saving the user's time, as well as reducing their levels of stress at an already difficult time."

As a client satisfaction guide it is hard to fault this goal. If the Courts are designing such a process, then it can be no bad objective for legal advisers to be ready to offer the same service to their clients.

The MoJ Call for Evidence closes on 30 September. Do respond if you want to influence the policy changes that will follow - and consider your settlement strategies when your clients ask how you will be resolving their dispute without devoting more financial, intellectual and emotional resources than necessary.

If you would like to discuss mediation in relation to a commercial dispute, please contact Matthew Pascall on 01483 514428 or by email to matthew.pascall@temple-legal.co.uk

[1] Civil Justice Council - Mandatory (alternative) dispute resolution
[2] Ministry of Justice - A guide to civil mediation
[3] Ministry of Justice - Dispute Resolution: Call for Evidence

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Error by Omission – Misuse of Private Information and Breach of Confidence after Warren v DSG

By Matthew Pascall, Senior Underwriting Manager

A recent and widely reported case has emphasised the need for practitioners to think carefully before bringing misuse of private information and breach of confidence claims alongside claims under the Data Protection Act.

In **Warren v DSG Retail Limited [2021] EWHC 2168 (QB)** Mr Warren sued DSG for damages limited to £5,000 - caused, he alleged, by DSG's misuse of his private information and breach of confidence as well as DSG's negligence and failure to comply with the Data Protection Act 1998 ("DPA").

DSG had been the victim of a cyber-attack during which the "attackers" had obtained access to the personal details of thousands of DSG customers. In Mr Warren's case, his name, address, email address, date of birth and phone number had been obtained. The Information Commissioner imposed a penalty of £500,000 on DSG after she had determined that DSG had not complied with the DPA.

DSG applied to strike-out all Mr Warren's common-law claims under CPR 24 and CPR 3.4. Mr Warren withdrew his breach of confidence claim but argued that the other common law claims should proceed to trial. Saini J disagreed and struck-out the common law claims. The central point concerned the tort of the misuse of private information and breach of confidence and their applicability in a situation where the Defendant may have failed to act to protect private information rather than taken a positive step to misuse that information and break a duty of confidence. Saini J characterized the position as follows: -

"22. …, the Claimant's claim is that the DSG failed in alleged duties to provide sufficient security for the Claimant's data. That is in essence the articulation of some form of data security duty. In my judgment, neither BoC [Breach of Confidence] nor MPI [Misuse of Private Information] impose a data security duty on the holders of information (even if private or confidential). Both are concerned with prohibiting actions by the holder of information which are inconsistent with the obligation of confidence/privacy. Counsel for the Claimant submitted that applying the wrong of MPI on the present facts would be a "development of the law". In my judgment, such a development is precluded by an array of authority."

"27. I accept that a 'misuse' may include unintentional use, but it still requires a 'use': that is, a positive action. In the language of Article 8 ECHR (the basis for the MPI tort), there must be an 'interference' by the defendant, which falls to be justified. I have not overlooked the Claimant's argument that the conduct of DSG was "tantamount to publication". Although it was attractively presented, I do not find it persuasive. If a burglar enters my home through an open window (carelessly left open by me) and steals my son's bank statements, it makes little sense to describe this as a "misuse of private information" by me. Recharacterizing my failure to lock the window as "publication" of the statements is wholly artificial. It is an unconvincing attempt to shoehorn the facts of the data breach into the tort of MPI."

The Temple Perspective

From a litigation insurers point of view, the case acts as a reminder that care needs to be taken by us when considering cases such as these. As has been pointed out in many of the reports about this case, the advantage to a litigant in bringing a misuse of information or breach of confidence claim is that he can obtain litigation/ATE insurance and if his claim is successful, the premium is recoverable.

Continued on page 7 >>

<< Continued from page 6

The key questions that now arises is: Does the claim presented to us really include a claim for the misuse of private information that will succeed or is it simply a Data Protection Act claim "dressed-up" as a common law claim?

At Temple we have the advantage of many years' experience in this area of law. We have been proud to have supported several important cases on the misuse of private information and breaches of the Data Protection Acts. These have included the "right-to-forget" claims against Google - NT1 & NT2 v Google LLC [2018] EWHC 799 (QB) and the leading case in the phone hacking litigation – Gulati v MGN Ltd [2015] EWHC 1805 (Ch) & [2015] EWCA Civ 1291.

We continue to be the principal insurer for phone hacking claims and insure other misuse of private information and Data Protection Act cases. This enables us to look at claims with an experienced eye.

We can offer premiums that include both recoverable and non-recoverable elements so that a client knows what their potential cost will be if their case is successful.

To find out more about litigation insurance with disbursement funding for your commercial disputes please call me on 01483 514428 or email matthew.pascall@temple-legal.co.uk.

Musings on Mediation

By Matthew Pascall, Senior Underwriting Manager

CEDR was founded in 1990 at a time when mediation and other forms of ADR were in their infancy (save, of course, for arbitration). In the subsequent 30 years mediation has grown from a somewhat obscure concept that practitioners approached with some degree of reserve and skepticism to a routine aspect of much commercial litigation.

Many in both branches of the profession have become not only familiar with the process through their participation in mediations but have also trained and now practice as mediators, adding useful strings to their professional bows.

Selling a settlement to one's own client is not always easy. The client can feel let down and start to question their own team's commitment to their case. A good mediator can take the sting out of the settlement negotiations and draw the parties together, helping them to find a consensus and a sensible resolution of their dispute.

Here at Temple, we welcome and encourage our insured to mediate. It is always important we give our insured and their solicitors and counsel the opportunity to identify and advise as to the right time to engage in mediation, but we will never stand in the way of a client looking to mediate.

It may be prudent to delay a mediation until after discovery so that everyone has a reasonably well-informed view of each side's case and before the parties have started to incur any pre-trial costs. With all the cards on the table, a successful outcome to the mediation is more likely. Others may want to mediate early and in relatively straightforward cases early mediations can work.

For us a successful mediation brings our risk to an end and usually the premium will be significantly less than that payable if the case had proceeded to trial. To encourage mediations, we can build into our staged premiums a discount that applies if the case settles at or within a week or two of the mediation.

Our ATE insurance includes cover mediators' fees and we can fund these through our disbursement funding product.

To find out more about this cover and how Temple Legal Protection's legal expenses insurance products can help to support and develop your business, please contact Matthew Pascall on 01483 514428 or email matthew. pascall@temple-legal.co.uk.

The Ace in the Hole? How to help your clients to make well-informed decision on litigation insurance and disbursement funding.

By Andy Lyalle, Senior Business Development Manager

Covid 19 D-Day has come and gone and, since then, it feels like I haven't been off the motorway attending face-to-face meetings with existing and prospective clients - as well as the Zoom/Teams meetings continuing. All of which has prompted me to write this article.

One theme often discussed is providing your firm with a range of options when considering litigation insurance so they can make a well-informed decision. Often, there appears to be a picture of a specific case or client in the mind of a solicitor that prompts a discussion on insurance and funding.

A commercial dispute resolution client may require litigation/after the event insurance and funding as well as the solicitor and counsel conducting the case under a conditional fee arrangement, or they cannot pursue the case. What I would call a "silver bullet" client. There is no adverse costs risk to the client and the client does not pay any fees or disbursements. There is of a course a price to pay for this; one that will ultimately come out of the clients damages.

At the other end of the spectrum the client may be expecting and able to pay fees and disbursements as they go along as well as underwrite the adverse risk if the case is unsuccessful. So, is it worth more than a brief mention of insurance and funding to that client?

There are several models in between that can be constructed by the solicitor for their clients and the client will appreciate being informed of them. Do remember that discussion of a clients insurance and funding options can be when a case is in progress, not just at the outset.

I have experienced many cases where a client is initially prepared to pay all fees and disbursements plus underwrite the adverse costs risks - but ends up with a variation on this arrangement. Rather than lose a client, or to increase their return, a solicitor may conduct the case on a full or partial conditional fee agreement. Counsel may do likewise after discussing with the client.

Temple is prepared to consider cases for litigation Insurance and disbursement funding regardless of the retainer in place. A misconception sometimes held that litigation insurance and disbursement funding is only available if the case is conducted via a conditional fee agreement so a fee-paying client could be short-changed and 'dealt a unnecessary hand'.

In order to provide a client with that full range of options, the solicitor can make sure the client has all the requisite information to make a well-informed choice. This may mean a well-resourced corporate client likes the idea of "hedging" their position - taking the adverse risk off the balance sheet. They may also like the idea of not tying up money by utilising disbursement funding, particularly if the interest rate is competitive and the capital and interest are not repayable until the case conclusion - and then only if the case is successful.

The above examples are those that can often be overlooked by the solicitor. A client may be unlikely to pursue the case because they fear the case "going wrong" and not being able to fund disbursements. You can help the client to make an informed decision. Speaking to a litigation Insurance and disbursement provider such as Temple will help you.

Here at Temple, we can also provide you with information guides for solicitor but now can also provide a client guide to litigation Insurance and disbursement funding. You may wish to "white label" a client guide so that it is all part of your service when scoping out a case with the client. It can become part of your strategy when discussing a case with a client and it may even be your "ace in the hole" when it comes to securing and retaining a client and adding value.

To find out more about litigation Insurance and disbursement funding and our information guides for solicitors and for clients please contact Andy Lyalle, Senior Business Development Manager on 07936 903767 or via email to andy.lyalle@temple-legal.co.uk

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In case you missed this: Dialogue with the experts:

Construction disputes 2021 webinar review

On our most recent webinar we explored the key issues with three leading experts' - Neil Armstrong, Greg McMahon, Andrew O'Connor - and our very own Nicholas Ellor.

They all share their experience of litigation/ATE insurance and funding as well as the judiciary's attitudes to it. Click here to watch what went on.

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Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team and his wide-ranging knowledge experience of the commercial legal sector is invaluable to our client firms.

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Andy has 25 years' experience in the legal services sector, working in technical and managerial roles. Based in our Bristol office, Andy works predominantly with the Commercial team, meeting with existing and potential clients nationwide and is always ready to discuss your litigation insurance and disbursement funding requirements.

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Amy provides underwriting support for the Commercial team as well as managing our underwriting assistants. Committed to providing the highest levels of service, her role includes the swift and efficient creation of quotes, issuance of policies and fielding of enquiries.

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Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Litigation Insurance or ATE insurance?

Is litigation insurance the same as ATE insurance? Traditional legal expenses insurance is often known as Before-theEvent or 'BTE' cover. Litigation insurance used by solicitors is commonly known as After-the-Event or 'ATE' insurance.
The latter is the technically correct term, but your clients may better understand 'litigation insurance'

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