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**Established
by Solicitors
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**SOLICITORS' MUTUAL DEFENCE FUND LIMITED
PROFESSIONAL NEGLIGENCE
RISK MANAGEMENT**

1995 No. 2

Members are once again invited to submit contributions for inclusion in future memoranda that they consider would be of assistance to the profession in avoiding the incidence of claims.

1. **JUDGEMENTS**

(i) **White –v- Jones (1995) 1 All E.R. 691**

The House of Lords, on 16th February last, upheld the decision of the Court of Appeal that a solicitor who fails to draft a Will promptly, despite having instructions to do so, is liable to a particular known beneficiary whom the client/testator had intended to benefit through the particular Will, if the testator died before the Will was executed.

This case was previously referred to in Risk Management circular 1994 NO. 1. Reference is also made to it in the April 1995 issue of the Law Society's Gazette.

(ii) **Doyle –v- C & D Providers (Wexford) (1992/120) O'Hanlon. J. November 8th 1994**

In this case it was held that the fact that the Plaintiff was not aware of the Defendant's alleged breach of contract until after the statutory period of limitation had expired did not prevent the claim becoming statute barred. The judgement of the Supreme Court in Tuohy v. Courtney (unreported 26th July 1994) was applied.

The latter case was referred to the Risk Management circular 1994 No. 2.

(iii) **McCabe & Anor. –v- The Governor and Company of the Bank of Ireland (305/1994 S.C. December 19th 1995**

Members are referred to the report of the above entitled case in the January 1995 issue of the Irish Current Law Monthly Digest. Very briefly, a guarantee was created on 10th July 1989 to deal with a particular transaction which was successfully completed shortly afterwards. The written terms of the guarantee were to the effect that the guarantee was a continuing security on the guarantors. On 5th January 1990, the bank claimed under the guarantee for the balance of a loan on a later and independent transaction. The trial Judge gave judgment for the bank.

However, on appeal to the Supreme Court, the judgement was reversed, the Court holding that while on its face the guarantee clearly created a continuing obligation, the parties had clearly agreed that once a specific transaction had been completed, the guarantee should be at an end. That agreement was not qualified in any way and was to be so irrespective of the contents of the agreement itself.

(iv) **Banque Bruxelles Lambert SA –v– Eagle Star Insurance Company Limited and Others**

The judgement of Mr. Justice Phillips in this case in March 1994 was referred to in Risk Management circular 1994 No. 2. In February of this year, the Court of Appeal allowed an appeal by Eagle Star (Insurers of the plaintiff Banque Bruxelles Lambert) from Mr. Justice Phillips' decision disallowing a claim in damages against property valuers for a sum representing the loss occasioned by market fall when, on the borrower's default, the bank sold the property secured against its loan. Inter alia, the court took the view that if the property rose in value the negligent valuer would be entitled to the benefit of that rise, it would be contrary to common sense to disallow a claim by the lender for the element of his loss due to market fall where the transaction was one into which the lender would not have entered if the valuer had not advised negligently.

The Court of Appeal simultaneously decided a number of other appeals (including Mortgage Express Ltd. –v- Bowerman & Partners (a firm)). In that case the defendants were solicitors (acting for a lending institution) whose negligence allegedly contributed to their clients' loss.

(v) **Doyle (administratrix ad Litem of James Doyle deceased) –v– O'Neill & Anor. (1998/120) O'Hanlon J. 13th January 1995 (reported at page 15 Irish Current Law April Digest 1995)**

In this case it was held (inter alia) that "in order to defeat the title of the original landowner, the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place. This was particularly the case where the parcel of land involved was for the time being worthless or valueless for the purposes of the original owner".

GENERAL

1. Proceedings Statute-barred

Members are reminded that the mere fact negotiations with a view to a possible settlement of their client's case are ongoing does not necessarily prevent the client's claim becoming statute-barred, if the case is not settled, should be the statutory period meanwhile expire before proceedings are commenced. If proceedings are being withheld whilst negotiations with a view to possible settlement are being undertaken, if there is any danger that those negotiations will not conclude in good time before the statutory period will expire, then members should either institute proceedings in time (notwithstanding the continuance of those negotiations) or obtain an acknowledgement in writing from the defendant, or (where appropriate) his insurers, that the statute will not be pleaded as a defence to his client's claim.

2. Solicitor/client contractual relationship

Many claims would be avoided if Members took greater care when entering into the contractual relationship with their client at the commencement of his case. Members should be satisfied that they fully understand the clients' objectives, that the same can be attained within an agreed time frame, and, obviously, that the matter is one which they (or their firm) are competent to deal with on behalf of the client. Any concern entertained by Members that the client's objectives may not be attained, either in part or at all, or within the time-frame proposed, should be clearly spelt out by the Member to the client. The foregoing should be confirmed by the Member to his client in writing at the outset.

It is of equal importance for Members to ensure that the client is under no misapprehension as to his position if and when the Member (for whatever reason) has ceased to act for that client. In contentious matters, clients should be informed at the conclusion thereof of their right to appeal if they are dissatisfied with the outcome, and of the time limit within which they must do so and also both of the prospects of success and the consequences of failure. Further, if Member has decided not to pursue a contentious matter any farther on behalf of the client, either before commencing proceedings at all, or bringing them to a conclusion, this should be made absolutely clear to the client, the client being informed of Member's reasons for so doing and that, if he (the client) wishes to pursue the matter any farther, he should seek the advice of another Solicitor, and, finally, warned within that timescale such further

advice should be sought and any necessary action taken if the proceedings are not to become statute-barred meantime.

Again, Members would be well advised to confirm the foregoing to their client promptly in writing. Several claims have arisen against Members in recent years as a consequence of their failure to do the latter.

September 1995

DISCLAIMER

This memorandum provides "information" and is designed to minimize the possibility of solicitors being guilty of professional negligence. The material presented does not establish, report, or create the standard of care for solicitor. The articles do not represent a complete analysis of the Topics presented and readers should conduct their own appropriate legal research.