John Mowlem Construction Plc v Neil F Jones & Co [2004] APP.L.R. 06/30

CA on appeal from TCC (HHJ Richard Havery Q.C.) before Judge LJ; Tuckey LJ; Kay LJ. 30th June 2004

Lord Justice Tuckey:

1. This is an appeal from a judgment of His Honour Judge Richard Havery Q.C. given in the Technology and Construction Court in which he dismissed John Mowlem Construction's (JMC) claim against the defendant solicitors, Neil F Jones and Co. JMC sued as assignees of the Solicitors' former client, Commissioning South West Ltd. (CSW), which is now in liquidation. The allegation was that the Solicitors should have advised CSW to notify its professional indemnity insurers of a threatened claim by JMC and that their failure to do so resulted in the insurers avoiding liability for the claim, leaving JMC with a large unsatisfied arbitration award. The judge held that the Solicitors were under no such duty and that even if they had advised CSW to notify its insurers JMC had not proved that CSW would have done so. JMC say that both the judge's conclusions on liability and causation are wrong.

2. Because of these conclusions the judge did not have to decide issues of CSW's contributory negligence and whether the assignment entitled JMC to sue. The assignment issue was raised late in the trial and involves a number of apparently difficult points of law. The judge simply gave permission to amend to raise these points. We did not hear argument on this issue and in view of our decision it is unnecessary for us to do so. We also do not need to deal with contributory negligence.

3. JMC were the main contractors employed by the Ministry of Defence on a very large office design and construction project in Bristol. JMC employed CSW in 1994 as sub-contrators/engineers on the ACE conditions of engagement to commission/manage the commissioning of the mechanical and electrical installations for the project. The contract required CSW to maintain PI insurance and included the schedules to CSW's current cover insuring it for £2m. any one claim in its capacity as engineering consultants. It was common ground that such a policy would cover its activities as managing engineers, but not its activities as sub-contractors.

4. CSW had such PI insurance from 1991. Mr Povey had been responsible for arranging this cover. By 1996 he had become CSW's commercial and finance director and its company secretary. The cover had been arranged through brokers. When first arranged the brokers had provided CSW with a guide to help with claims to be circulated to all its directors and managers. It said:

   As soon as you first become aware of a claim or circumstances which could give rise to a claim please ensure that the appropriate PI director is notified immediately to enable them to advise us. They should be notified irrespective of:

   - *the amount which may be involved*
   - *your personal views or opinions on liability*
   - *whether you consider the claim or circumstances may be spurious or without merit*
   - *whether you consider the claim or circumstances may disappear.*

   Failure to notify on time could prejudice the position of your insurers and your firm which could lead to a breach of policy conditions and a rejection of the claim.

   Each year when the cover was renewed the brokers reminded Mr Povey of the policy conditions governing the notification of claims and of:

   Your obligation to keep insurers notified not only of any actual claim but also of any circumstances which may subsequently result in a claim against you.

   Based on this evidence the judge concluded that Mr Povey "was perfectly competent to deal with CSW's professional indemnity insurance".

5. One of Mr Povey's co-directors was the brother of Mr Simon Baylis, a partner in the Solicitors. Mr Baylis had been a quantity surveyor and then qualified as a solicitor in 1989. He specialised in construction work.

6. By July 1996 CSW believed that JMC were withholding payment for the work which they had done. Mr Povey retained the Solicitors to "recover outstanding debt" as the solicitors' new client/matter creation form shows. In the following months Mr Baylis considered the contractual documents in order to discover the scope of CSW's work so as to see what it was entitled to be paid for and then started an arbitration to recover the £150,000 which CSW said was due. It is not suggested that during this period Mr Baylis had any obligation to ask or advise CSW about insurance.

7. A preliminary meeting with the arbitrator took place on 14 February 1997. This was followed by a without prejudice meeting and a letter of 19 February from Masons, JMC's solicitors. The letter referred to JMC's contention that CSW had been overpaid £100,000 and offered to settle the claim for £20,000. However the letter went on to say that:

   Our client can and will look to your client for reimbursement of any and all monies it is required to pay to the MOD or any other third parties for any breaches of its contractual obligations to the MOD or any other third parties which have been brought about or contributed to by your client's negligence and/or breach of contractual duty to our clients in respect of the project.

   A large contingent claim of this kind had been intimated to the arbitrator. Mr Povey said he was confident that there was no basis for such a claim which he believed was a bluff designed to frighten CSW off. The Solicitors were inclined to agree that this was a tactical ploy. CSW rejected the offer and the arbitration proceeded.

8. Unknown to the solicitors CSW's professional indemnity policy was due to expire on 12 March. On 21 February, knowing of the threatened claim by JMC, Mr Povey completed a proposal form to enable the cover to be renewed for the following twelve months. Under the heading:

PLEASE NOTE IT IS IMPERATIVE THAT THIS QUESTION IS ANSWERED CORRECTLY, AS FAILURE TO DO SO COULD PREJUDICE YOUR RIGHTS IN THE EVENT OF A CLAIM ARISING IN THE FUTURE.

Mr Povey had answered "No" to the questions "*Have any claims been made against the firm?"* and *"Are any of the directors aware of any circumstances which may give rise to a claim?".*

9. JMC served its defence and counterclaim at the end of June. On 14 July Masons wrote to the Solicitors saying that in view of the nature and quantum of JMC's counterclaim it was imperative that CSW's professional indemnity insurers be notified of the claim and asked for confirmation that this had been done. On 23 July Mr Baylis's assistant, Miss Llewellyn, wrote to Mr Povey saying:

Given that allegations are being made in the counterclaim in respect of which – should Mowlem prove to be successful in their arguments – your insurers will prima facie be obliged to make payment then it is advisable to notify your insurers of the claims if you have not already done so.

At the end of July Mr Povey told Miss Llewellyn that he had notified insurers of the claim. In fact, as the judge found, he had not done so. The judge accepted the brokers' evidence that he did not notify them of the claim until 21 October 1997.

10. This was a claim or "circumstances" which should have been notified under the policy which expired on 12 March 1997. The policy for the following twelve months had been obtained as a result of non-disclosure/misrepresentation, so the insurers declined to meet JMC's claim under either policy although they contributed a substantial sum towards a fund to enable CSW to contest the arbitration. In the event, however, the arbitrator rejected CSW's claim and awarded JMC damages and costs of over £1m., none of which it has recovered.

11. After a review of the authorities to which he had been referred the judge said: *I go back to the principle enunciated by Mr Justice Oliver in* ***Midland Bank v Hett Stubbs and Kemp****. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession. Or, to adopt the phraseology of Mr Justice Laddie in* ***Credit Lyonnais v Russell Jones and Walker,*** *ought Mr Simon Baylis to have noticed, from 14 February 1997 or at any time until the counterclaim was served, the risk that the insurance cover would be lost without notification? The matter must not be considered using hindsight. All the circumstances are relevant. Among those circumstances are these: that the initial instructions were simply to prosecute the claim; and the reasonable belief, that the proposed counterclaim was merely a defensive tactic, notwithstanding the large figures mentioned. Those figures evidently did not impress themselves, even on the mind of Mr Roe at the time. I conclude that the failure on the part of the defendants to advise CSW about their insurance cover, in circumstances where there were no express instructions to give such advice, is something that a reasonably competent practitioner, adopting the standards normally adopted in his profession, could have done. Thus I dismiss the claim.*

12. Mr Roe was the very experienced partner in Masons leading JMC's defence in the arbitration. He accepted at trial that CSW's insurance was of concern to his client. Yet it had not occurred to him or his experienced assistant solicitor to raise any question about CSW's insurance until July after the defence and counterclaim had been served when, as he said, "*we had woken up to the fact that we might obtain a pyrrhic victory".*

13. There is a further point arising out of the passage from the judgment which I have quoted. The judge refers to the time between 14 February and when the defence and counterclaim was served which was at the end of June. In fact the relevant period was much shorter than this. The advice would have had to be given to enable notification of the claim to be made before the policy expired on 12 March. Notification after that date would have been too late for the policy which had expired and would have been ineffective under the new policy because of the mis-representation/non-disclosure in the proposal form.

14. In reaching his conclusion about causation the judge relied on a CSW document headed "*Notes for board meeting … 20 July 1998".* The judge found that this document had been prepared by Mr Povey although he had denied this. It said: *The subject of PI coverage related to our dispute with JMC has become an increasingly more important issue, with wide reaching consequences. My initial reaction, when aware that JMC were pursuing ourselves in an attempt to trigger this policy, was negative. I believed that if we had no PI cover then JMC would probably cave in and settle our claim for additional monies. This in reality may still be the case.*

The judge said: *Whether that was in truth [Mr Povey's] view in February 1997 does not appear. It is of course possible that he was seeking, after the event, to justify his failure to notify the counterclaim when he completed the proposal for the 1997 insurance, I cannot say what would have happened if [the Solicitors] had advised Mr Povey to notify the counterclaim to the brokers in sufficient time. If they had given bare advice to notify the brokers without more, Mr Povey might well have ignored it, given that he had ignored the advice that was given in July 1997 for three months and given the views expressed in his note of 20 July 1998. If, on the other hand, Mr Simon Baylis had had occasion to advise Mr Povey against a deliberate policy of avoiding the cover, he might have been able to persuade Mr Povey against it. The burden lies on the claimants to prove causation of their loss. In ordinary circumstances a court would readily infer the ordinary links in the chain of causation. But the evidence in this case leaves me in the position that I am unable to say what would have happened if the advice in question had been given.*

Thus the claimants have failed to satisfy me that the loss they have suffered was caused by the fact that [the Solicitors] did not advise CSW about its insurance. On this ground also the claim must be dismissed.

15. JMC do not contend that the judge misdirected himself on the issue of liability. He quoted the well-known passage in ***Midland Bank v Hett Stubbs*** [1979] 1 CH 384, 402 where Mr Justice Oliver said: "*No doubt the duties owed by a solicitor to his client are high in the sense that he holds himself out as practising a highly skilled and exacting profession. But I think that the court must beware of imposing upon solicitors, or upon professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interest, take it upon himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do, having regard to the standards normally adopted in his profession … the duty is directly related to the confines of the retainer.* "

In ***Credit Lyonnais v Russell Jones and Walker*** [2002] EWHC 1310 (CH) at para. 28 Laddie J. said:

"*A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. … .the solicitor has only to expend time and effort in what he has been engaged to do and for which the client has agreed to pay.*

He is under no general obligation to expend time and effort on issues outside the retainer. However, if in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that, he is neither going beyond the scope of his instructions nor is he doing extra work for which he is not to be paid. He is simply reporting back to the client on issues of concern that he learns as a result of and in the course of carrying out his express instructions.

… if a dentist is asked to treat a patient's tooth and on looking at the latter's mouth he notices that an adjacent tooth is in need of treatment it is his duty to warn the patient accordingly. So too, if, in the course of carrying out instructions within his area of competence, a lawyer notices or ought to notice a problem or risk for the client, of which it is reasonable to assume that the client may not be aware, the lawyer must warn him."

16. The judge was also referred to ***Carradine Properties Ltd. v DJ Freeman & Co.*** [1999] Lloyds Law Rep. P N 483, a 1982 decision of this court not reported at the time. In that case it was alleged that solicitors should have asked their property company client whether it had public liability insurance which would have covered the company's liability for damage caused by its demolition contractors to a third party. After a three and half day hearing each member of the court (Lord Denning M.R., Eveleigh and Donaldson L.JJ) gave extemporary judgments upholding the judge's conclusion that the solicitors had not been negligent. No authority is cited in the judgments and it cannot be said that the judges spoke with one voice as to the extent that a solicitor may owe duties to his client beyond the terms of his express retainer. Each judge however based his decision on the fact that the solicitors were entitled to assume that their experienced client would have told them if they had insurance; it was not for the solicitors to ask. As a decision on its own facts this case is a useful illustration of the extent of solicitors' duties, but I do not think it was intended to lay down principles of general application to cases of this kind. Each case must depend upon it own facts.

17. Here the Solicitors accepted that when JMC threatened to counterclaim, their retainer was extended to deal with every aspect of the counterclaim. The question was whether this included an obligation to ask whether CSW was insured against such a claim and to advise notification of it to insurers at the relevant time.

18. In support of his contention that this question should have been answered by the judge in favour of JMC Mr Palmer Q.C. advanced much the same arguments as his predecessor advanced at trial. He relied on the solicitors' new client/matter form which had a box saying *"Is the client insured for the claim or for costs?"* which was not relevant when the solicitors were first retained in July 1996 but shows, Mr Palmer says, the question which should have been asked in February 1997. Mr Palmer submits that Mr Baylis knew or ought to have known that CSW's contract required it to have professional indemnity insurance from his study of his documentation. In any event Mr Baylis had accepted in cross-examination that he would have expected CSW to have PI cover. Notification provisions in such policies were a trap for the unwary. Mr Povey needed advice about this and was possibly encouraged not to notify the claim because of the Solicitor's support for his view that it was spurious. It was Mr Baylis's evidence that the question of CSW having PI insurance simply did not enter his mind in February 1997. If it had done, he agreed that he would have asked to see the policy and, having seen the policy, advised notification.

19. The judge considered each of these points. Of the form he said that it was not reverted to when the counterclaim was raised and so it took the matter no further. It could not in any event have defined the extent of the Solicitors duty. It did not follow that because Mr Baylis knew or ought to have known that CSW had PI insurance he should have advised CSW to notify its insurers of the claim. Mr Povey should have asked: do I have to do anything, and if so what, to keep the insurance in force? As this question had not been asked the judge had to decide whether the solicitors were nevertheless under a duty to answer it. Furthermore, although the voluminous contract documentation did show that CSW were required to have PI insurance, this was of no relevance to Mr Baylis at the time he went through it and in his evidence he did not really accept that he would expect CSW to have such insurance because of the dual nature of its employment on this project.

20. None of Mr Palmer's arguments persuade me that the judge reached the wrong conclusion on liability. The Solicitors were not retained to advise about insurance by their client, who was perfectly competent to deal with

such matters. Nevertheless, when, out of the blue, what was thought to be a tactical counterclaim was threatened, would a reasonably competent solicitor have immediately asked about insurance and advised notification? I think the judge's view that he would not is unassailable, supported as it is by the fact that such questions did not occur at the time to other experienced solicitors.

21. Mr Palmer's attack on the judge's finding of causation is premised on the assertion that Mr Baylis's advice to notify the claim should have been emphatic. The judge made no positive finding that Mr Povey would not have notified insurers if he had been given the right advice. In answering the hypothetical "what if" question he should not have attached any weight to the failure to notify for three months following the solicitors letter of 23 July 1997 because that letter simply said it was "advisable" to notify insurers and gave no warning of the consequence of failing to do so. The note of 20 July 1998 could not be relied on either because, as the judge said, it could have been written simply to justify Mr Povey's mis-representation/non-disclosure in the proposal form. Commonsense suggested that if Mr Povey had been given the right advice he would have been persuaded that there was no benefit to be gained by appearing to be uninsured.

22. I do not accept these submissions. The judge acknowledged that in the ordinary way, causation could readily be inferred in a case such as this. But Mr Povey must have been aware of the risks he was running by failure to notify. The importance of this had been emphasised to him by CSW's brokers time and time again. The proposal form which he signed on 21 February also made the position clear. And yet Mr Povey did not notify or disclose the claim. The proposal form is the most telling indication of what Mr Povey would have done if he had been advised by Mr Baylis after 14 February to notify the claim. The judge rejected Mr Povey's reason for completing the form as he did, but added that he was unable, on the evidence, to make any finding as to his reasons. The evidence of what Mr Povey did and said after being advised to notify insurers in July 1997 is wholly consistent with the fact that, although he knew the risks he was running, he chose not to notify in the belief that the counterclaim was a tactical ploy by JMC which he would best be able to defeat by not involving CSW's insurers. At the end of the day however, the judge's finding on causation was a finding of fact. I can see no grounds for interfering with it.

23. For these reasons I would dismiss this appeal.

Lord Justice Kay: I agree.

Lord Justice Judge: I also agree.

24. Perhaps because it is a decision of the Court of Appeal; perhaps, too, because the constitution of the Court included the then Master of the Rolls, Lord Denning, and a future Master of the Rolls, then Donaldson LJ, ***Carradine Properties Ltd v D.J. Freeman & Co*** [1999] Lloyd's Law Rep P N 483 recently received a level of attention of which it was not deemed worthy when it was first given in 1982. Although it supports the principle that there will be occasions when, notwithstanding the absence of a specific retainer to do so, solicitors are professionally obliged to their clients to enquire into and advise them about insurance issues, the question whether the solicitors were in breach of their professional obligations in any individual case where this issue arises is fact specific: so too, with the consequence of such breach (if any).

25. Despite Mr Palmer's thoughtful submissions, for the reasons given in his judgment by Tuckey LJ, the attack on the reasoning and findings of this experienced specialist judge fails.

Order:

1. The appellant's appeal be dismissed.
2. The appellant pay the respondent's cost of the appeal, to be assessed by detailed assessment if not agreed
3. The appellant make a payment on account of the respondent's costs of the action as a whole (including the costs ordered to be paid by the appellant at first instance) in the amount of £150,000 by 4pm on Friday 16 July 2004.

(Order does not form part of the approved judgment)

H. PALMER Q.C. (instructed by Masons) for the Appellant
R. STEWART Q.C. and L HILLIARD (instructed by Barlow, Lyde & Gilbert) for the Respondent