



Insurers' Liability for Insured's Own Costs

INTRODUCTION

We [previously](#) commented on the judgment of Foxton J in *RSA v Tughans* [2022] EWHC 2589. This addressed the extent to which solicitors are entitled to an indemnity for claims relating to their own costs. The Court of Appeal has now upheld the decision and provided further analysis in support of the conclusion reached.

This note reviews the decision on appeal.

THE FACTS

Tughans is a solicitors' practice in Belfast. Ian Coulter was its Managing Partner. He helped facilitate the sale of the loan book of the National Asset Management Agency ('the Agency'). This was a 'bad bank' established to acquire and manage impaired loans. The Agency was assisted by the Northern Ireland Advisory Committee ('the Committee'). Frank Cushnahan was a member of the Committee.

An investment company in the United States expressed interest in buying the book. The London office of Brown Rudnick agreed to act for it in the purchase. Its engagement letter provided for it to be paid a substantial success fee on completion. It was to be split three ways between Brown Rudnick, Tughans and Mr Cushnahan.

The intended purchaser pulled out. Another was found. This time, the engagement letter provided for Brown Rudnick to be paid a success fee of £15m on completion. Brown Rudnick told the buyer that it would pay 50% of the success fee to Tughans for work it sub-contracted to it. Brown Rudnick and Tughans both gave various warranties, including that no payments were to be made to public officials. The transaction completed. Brown Rudnick was paid its success fee. It paid £7.5m to an account in the name of Tughans.

Mr Coulter told his partners that he had generated a fee of £1.5m in a confidential transaction and paid the balance of £6m to an offshore company he had incorporated. He later admitted the true position and left the practice. He and Mr Cushnahan are facing criminal proceedings.

Brown Rudnick advanced a claim against Tughans in its own right and as assignee of the buyer's rights to recover the £7.5m success fee. It argued that the warranties Tughans had given were false because Mr Coulter planned to share the fee with Mr Cushnahan.

Tughans notified a claim to RSA, which declined indemnity. An arbitrator found for Tughans. RSA appealed to the High Court. It was unsuccessful. The Judge concluded that there was a critical distinction between a restitutionary claim to recover fees to which the solicitor was never entitled and a damages claim for fees which were properly invoiced. RSA obtained permission to appeal.

THE APPEAL

In the Court of Appeal, RSA contended that any apparent contractual right to the success fee was a matter of empty legal form, not substance. The reality, it maintained, was that Tughans should not have been entitled to the fee because it was procured by misrepresentation. It was obliged to return it as part of the damages claim in the same way as if the contract had been avoided and it faced a claim in restitution. The Court of Appeal disagreed.

Popplewell LJ (with whom the others agreed) was satisfied that Tughans had earned a fee for services rendered and would suffer a loss if deprived of it. He considered it irrelevant whether the retainer might be avoidable for misrepresentation. Unless and until it is avoided, the solicitor is entitled to the fee "*in substance*" and not through some legal technicality, as submitted by RSA.

He also thought it important to have regard to the purposes of compulsory professional indemnity insurance. RSA's analysis would, he concluded, run counter to the public interest purpose as it would leave a client unable to recover fees as damages if the practice and partners were insolvent.

Similarly, it would be inconsistent with the commercial and regulatory purposes of the cover. It exists to protect partners and employees from the financial consequences of their own and others' mistakes and from the fraud of others. On RSA's case, the practice would be exposed to liability for the fees even if Mr Coulter had immediately diverted the monies to himself and the practice never received the monies.

This led him to identify a further flaw in RSA's reasoning in that it failed to recognise that the policy was composite. Each of the partners would only ever receive a proportion of the fee generated, and then only from the profit element, yet would be exposed to liability for the whole sum. If RSA were right, they may well be substantially uninsured.

He shortly dismissed RSA's argument that there was no reason to distinguish between a restitutionary and a damages claim on the basis that there are real differences between them, as the Judge had outlined.

Tughans, in turn, sought to challenge the premise that a restitutionary claim would not be covered on the basis that the policy covered *any* civil liability. Popplewell LJ indicated that he would "*not readily accept*" that a restitutionary claim could never be covered and gave the example of an employee stealing money held on account of fees. However, he preferred not to express a concluded view.

DISCUSSION

This is an important point of wide application and a ruling of the Court of Appeal adds certainty. That said, the outcome of the appeal is none too surprising. RSA's arguments against the first instance decision were ambitious.

The court left open the possibility that restitutionary claims might be covered in some circumstances, although in England and Wales this is addressed by the definition of 'Claim' in the Minimum Terms as "*a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages,*" subject to a limited write back for liability to make good a client account shortfall.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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