

DOES A PROFESSIONAL OWE A CONTINUING DUTY OF CARE?

Capita (Banstead 2011) Ltd (formerly known as FPS Group Ltd) v RFIB Group Ltd (2015)



Does a professional owe a continuing duty of care?

The Court of Appeal recently considered whether a professional owed a continuing duty of care to correct previous acts of negligence it had committed during the course of an on-going retainer.

Background

RFIB Group Limited (“RF”) sold their entire share capital in Capita Hartshead Benefit consultants (“CHBC”) to Capita (Banstead 2011) Ltd (“CL”) under an SPA in 2004. The SPA provided for RF to indemnify CL against any claims arising from the services provided by CHBC prior to that transfer.

A negligence claim was brought against CHBC in respect of advice provided by an advisor (“ALC”) to Pension Scheme Trustees. It was alleged that ALC was requested to make amendments to the Scheme to reduce members’ liabilities and the cost of funding those liabilities, which ought to have taken effect between 6 April 2000 and 1 April 2004. Whilst announcements of the changes were made to members, this was legally ineffective as only amendments to the rules of the Scheme, signed by the Trustees, would have the desired effect.

From April 2004 (if not earlier) ALC came to appreciate that formal amendments to the Scheme rules were required, so that, in making subsequent representations that the amendments were in place, he was alleged to be guilty of deceit.

The Trustees’ claim against CHBC was compromised for £3.85m. CL sought to recover from RF arguing that the indemnity meant CL was not liable for those losses (since the liabilities arose directly or indirectly from services provided before the transfer date).

First Instance

RF argued that the Trustees’ claim arose directly or indirectly from ALC's advice given before 2004 (rather than any ongoing advice beyond that date) and the indemnity only applied to losses caused by the wrongdoing before the transfer date.

Held: The evidence showed that the Trustees' claim against ALC was very strong. The settlement sum (accepted as being reasonable) was referable to losses suffered between 2000 and 2007 (ie both pre and post the transfer date under the SPA). On a true construction of the retainer, CHBC had a continuing role in advising the Trustees on the scheme (applying *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1979]*).

The indemnity clause in its commercial context was that it covered conduct which was a real and effective cause of the liability or the loss consequent on the claim. RF was correct that the clause distinguished between conduct before and after the transfer and was confined to losses caused by conduct before the transfer date. As a matter of causation, the post-transfer date losses would not have occurred but for the pre-transfer date wrongdoing and would not have occurred but for the post-transfer date wrong-doing. Each was, therefore, an effective cause *EE Caledonia Ltd (formerly Occidental Petroleum (Caledonia) v Orbit Valve Co Europe Plc [1994]* applied.

Although CL had assumed the risk of any future negligence or dishonesty of CHBC employees, the Court concluded the parties would not have intended that liability to extend to pre-transfer conduct. Accordingly, the Court found RF was liable only in respect of losses occurring prior to the Transfer Date.

The Appeal

CL appealed on the grounds, amongst others, that:-

- the losses incurred after the transfer date were effectively caused by breaches of contract and duty which occurred before the transfer date and were all part of the original breaches of contract and duty;
- it was artificial to refer to a 'continuing breach';
- any apportionment was wrong because conduct after the transfer date was a concurrent cause which was insufficient to preclude reliance on the indemnity.

Held: The scheme of the indemnity was to allocate losses caused by pre and post transfer conduct losses between the seller (RF) and the purchaser (CL). Post-transfer conduct was relevant in that assessment.

The Appeal Court split 2:1 (Gloster LJ dissenting) as to whether there was a continuing breach of duty. Whether a duty existed depended on whether there was a breach of contract or duty every day after the transfer date. The Appeal Court distinguished *Midland Bank* following instead *Bell v Peter Browne & Co [1990]* and *Nouri v Marvi [2010]*.

The Court decided the rendering of advice after a mistake had been made could not oblige a professional to correct that mistake. ALC's failure to remedy his previous acts of negligence did not constitute a fresh

cause of action accruing day-by-day entitling the Trustees to sue CHBC. It would be an unusual term to require the adviser to exercise continuing vigilance to discover and rectify any mistake and it was not appropriate to imply such an obligation into a standard form of contract.

The Appeal Court agreed that the indemnity could not be relied upon if a concurrent cause of loss was the misconduct of an employee after the transfer date EE Caledonia [1994] applied. This is consistent with the approach in concurrent loss insurance cases (Wayne Tank v Employers' Liability.)

CPB Comment

The similar, yet conflicting, lines of authority flowing from the Midland Bank and Bell decisions (both of which relate to solicitors' PI cases) presented the Appeal Court with much food for thought. In the former, the Court found a continuing duty was owed to a client where a solicitor retained a document to be registered (and for which it had retained an open file). In the latter, the solicitor failed to register a husband's interest in a property during divorce proceedings. Despite the two being barely distinguishable, the Court found that a single, rather than continuing, cause of action accrued in Bell.

In the present case, the Court did not agree that Midland Bank could be distinguished. However, the Court was obliged, given Bell was also an Appeal Court decision, to follow that approach. Despite the Court concluding that there was a continuing retainer (pre and post the transfer date) the failure to remedy the earlier negligent acts did not comprise a new cause of action.



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