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Private Security Industry Act 2001

The Act was given the Royal Assent on 12th May but its commencement date has yet to be announced. It aims to regulate, through a newly established Security Industry Authority, certain activities carried out in the field of security industry services. The designated activities include those concerned with guarding people and property, immobilising vehicles, security consultants and private investigators.

The Security Industry Authority will have responsibility for licensing individuals to work within designated sectors of the private security industry.

It is unlikely that a loss adjuster would carry out any designated activity himself and accordingly, the first offence of engaging in licensable conduct without a license is unlikely to apply. However there may be instances, in particular when a loss adjuster is investigating a loss which entails surveillance, where he could engage in activities falling under the Act. There may also be occasions, for example, where the services of an investigation agent are required. In such instances the loss adjuster will have to take all reasonable steps to ensure that the person whose services he employs is the holder of any license which the Act requires him to hold. If he does not take these steps, he will be guilty of an offence.

Merrett v Babb [2001] 3 W.L.R 1

Summary of decision

A surveyor employed by a valuation firm produced and signed a valuation report commissioned by a building society. In the report the surveyor gave his name and professional qualifications. This report was relied upon by purchasers in deciding to purchase a house and borrow money from the building society. The valuation report was incorrect owing to the negligence of the surveyor and the property was overvalued. As a result the purchasers found themselves owing more money than the house was worth. The



purchasers sued for the difference between the valuation figure and the correct value. The firm by which the surveyor was employed went bankrupt and its professional indemnity insurance was cancelled by the Trustee in Bankruptcy. Proceedings were therefore started against the surveyor personally. At first instance, the Judge held that the surveyor owed the purchasers a duty of care.

The surveyor appealed. He argued that in such a case an assumption of responsibility was required and that as he had been an employee of the firm instructed there could not be any assumption of responsibility on his part even though he knew that the report would be relied on by the purchasers. The Court of Appeal held that there was an assumption of responsibility by the surveyor sufficient to sustain a duty of care. It took the view that the professional person who carried out the inspection and made the valuation was the person on whom the purchaser relied to exercise proper skill and judgement. The relevant relationship was that between the purchaser and the employed professional valuer and the nature of the valuer's employment was not relevant to that relationship. By signing the report in his personal capacity as a qualified surveyor, he assumed personal responsibility for it since he knew that his report would be relied on by the purchasers.

Application to loss adjusters

This case has arisen out of exceptional circumstances which are unlikely to occur in relation to the work of loss adjusters.

The discontinuance of the firm's insurance and its bankruptcy caused the plaintiff to sue the individual valuer as he presented the best chance of recovery. In normal circumstances the employer's policy will cover its employees (at least where the employer requests this) and, where the employer is capable of meeting the liabilities incurred through the actions of its employees through insurance or otherwise, there is no practical purpose in suing the individual employee directly.

The most important point to note about this case is that there was no contractual relationship between the claimant and the firm of surveyors or indeed between the claimant and the individual surveyor. Therefore, the duty to the claimant only arose in tort and it was based on the concept of assumption of responsibility.

The concept of assumption of responsibility is relied on by the Courts in those limited number of cases where pure economic loss is held to be recoverable, that is loss which does not stem from physical damage. It is notoriously difficult to recover such losses outside any contractual relationship.

It is difficult to see how in practice an extra-contractual relationship is likely to exist between a loss adjuster and a third party such that the loss adjuster could be said to have assumed responsibility to the third party. Loss adjusters are normally contracted by their client, be it an insurer or not, to adjust claims. Whilst loss adjusters purport to act independently and impartially (at least when acting for insurers) it would be difficult to



argue that the third party relied upon the work of the loss adjuster or that the loss adjuster assumed a responsibility to the third party as well as to his own client in the adjustment of the loss.

For responsibility of an individual loss adjuster to arise under *Merrett v Babb*, the following conditions are likely to have to arise:-

1. The third party being a non-client would have to establish that nevertheless, there was such a close relationship between him and the loss adjuster that the loss adjuster could be said to have assumed responsibility. In particular, this would involve showing that the third party relied on the loss adjuster's work and the loss adjuster knew that he would rely on it. This would be difficult to show as the work of loss adjusters is generally only communicated to the clients who instruct them. Exceptionally an adjuster's report may be disclosed to a policy holder but this is only likely to arise where the insurer is defending a claim against the policy holder under a liability policy such that it is unlikely that the policy holder will have occasion to rely upon the report.
2. The employer of the individual adjuster is unable to meet the claim. In effect, the employer of the individual loss adjuster would have to be (1) bankrupt or insolvent so as not to be able to meet its liabilities for the actions of its employees and (2) without any insurance cover for continuing liabilities.