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May 2002

Merrett v Babb

The Honorary Solicitor has provided some additional comments on the possible implications of the above case which was summarised in the Technical Bulletin issued in December 2001.

The previous comments were of a general nature, the tenor of which was, not that an individual loss adjuster could have no liability, but that exceptional circumstances would have to exist.

A number of loss adjusting companies offer what might be termed ancillary services including surveying, accountancy etc. Where adjusters undertake expert services of this nature it may be argued that an adjuster owes a duty of care/assumed responsibility to the third party policyholder. The primary remedy of the policyholder where, for example, a remedial scheme has failed, is likely to remain, however, with the insurer on whose behalf the adjuster is employed.

The conditions which are likely to have to arise for an individual loss adjuster to be pursued, as happened to the surveyor in Merrett v Babb, are that the adjusting firm by which the individual was employed is unable to meet its liabilities, and that it is without any insurance for such liabilities. It would be unusual if no arrangements had been made to insure against future liabilities which may arise, including cover for employees and former employees. However, where an individual adjuster believes that he may face a personal exposure for which there is no current insurance then he may wish to arrange some form of personal cover.

The circumstances which arose in Merrett v Babb are not the only situation in which a loss adjuster employed by a firm may face an individual liability. A client/insurer may seek to pursue a claim not only in contract against the loss adjusting company instructed



by it but also against the individual adjuster concerned for negligence. Equally, a loss adjusting firm may potentially seek recourse against its employees where negligence has given rise to a liability and whilst such claims by employers against employees are unusual they are not uncommon nowadays.

ACPO/ABI Guidelines on exchanging information

New guidelines have been drafted and we awaiting advices from the ABI as to when the guidelines will be formally implemented. A copy of the guidelines will be circulated at that time.

Delaware Mansions

At a recent CILA Masterclass a summary of the circumstances and ruling in Ecclesiastical Insurance Group v City of Westminster was given. Beachcroft Wansbroughs have kindly given permission for their summary to be circulated to members.

In a ground breaking judgment, the House of Lords last year ruled that insurers, Ecclesiastical Insurance Group, advised by national law firm Beachcroft Wansbroughs, can recover the substantial costs of repair work to Delaware Mansions in Maida Vale, London. The mansion blocks had been damaged by a 'nuisance' pavement plane tree, which the City of Westminster had failed to maintain properly.

The City of Westminster's inadequate maintenance programme for pavement trees had led to extensive subsidence damage to the mansion blocks, at a repair cost for underpinning of over £_ million. At issue before the House of Lords was when a loss caused by nuisance can be recovered.

Insurance partner Rachel Bolt, who heads Beachcroft Wansbroughs' London household property recovery unit and acted for Ecclesiastical, says that the judgment carries a very clear message for both buildings and liability insurers, which they ignore at their peril.

"Tree owners who close their ears to reasonable requests to maintain their trees and prevent subsidence damage to adjacent premises can expect that a large and recoverable underpinning bill may follow," she comments. "On the other side of the coin, homeowners who proceed to underpin their damaged buildings without first providing the tree owner with notice and opportunity to deal with their trees may find themselves barred from any recovery. Delaware is a sharp reminder of the Woolf requirement for



reasonableness."

Roots from the City of Westminster's large and flourishing pavement plane tree sucked out moisture from the highly shrinkable clay soil beneath the adjacent mansion blocks in Delaware Road, Maida Vale, causing the mansion blocks to drop and crack.

Minimum superstructure repair alone would have been sufficient if the tree had been removed (at an estimated cost of £14,000). However, the City of Westminster chose to keep the tree, leaving residents instead to undertake an extensive and expensive underpinning scheme to strengthen the mansion blocks' foundations. The Delaware Mansions residents and their insurers, Ecclesiastical, proceeded with the underpinning and sued the City of Westminster to recover the £570,734.98 costs.

At first instance, the High Court dismissed the claim on the basis that the previous owners, and not the claimants, had suffered the loss. The court accepted that the tree roots had damaged the mansion blocks. However, they found that the claimants had bought the freehold interest in the blocks during the problem, had not taken an assignment of the cause of action and that the need to underpin arose before the sale (there was no further physical damage after that).

The claimants successfully appealed to the Court of Appeal. They argued that if the City of Westminster had removed the tree either before or after the sale the loss would have been small, and that in those (unusual) circumstances the change of ownership should not provide a loophole for the City of Westminster to avoid liability. Nuisance continued and the loss only crystallised when the City of Westminster refused to remove its tree, which was after the sale. If the claimants had implemented an underpinning scheme prior to that moment, the City of Westminster could reasonably have argued over - mitigation of loss.

The three Court of Appeal judges accepted unanimously that there was a continuing nuisance during the claimants' period of ownership, and that the claimants were entitled to the reasonable cost of repair, including the underpinning costs. Lord Justice Pill stated: "I have been glad to avoid a conclusion under which the right to recover a large sum would have depended on the accident of who was owner when slight physical damage resulting from the nuisance occurred rather than depending upon where the loss of eliminating the nuisance actually fell."

The City of Westminster then appealed to the House of Lords. Applying the same pragmatic approach adopted by the Court of Appeal, Lord Cooke of Thorndon rejected their arguments, stating that he was satisfied that the nuisance did continue after the



transfer of ownership, as there was ongoing tree root-related dehydration of the subsoil. He found that "it matters not that further cracking may not have occurred" following the sale, and referred to the concept of "reasonableness between neighbours".

In their unanimous ruling, all five law lords noted that the City of Westminster had been given fair warning of the consequences of failing to remove the tree. In those circumstances, "even though there may be elements of hitherto unsatisfied pre-proprietorship damage or protection for the future", they should shoulder the loss of the repair scheme costs in full.