Construction of the insuring clause in solicitors' MTC compliant policy considered in law firm funder's claim

On 3 February 2022 Mr Justice Butcher handed down judgment in Doorway Capital Ltd v American International Group Ltd[1], granting reverse summary judgment in favour of the insurer defendant. The claim arose out of a funding agreement entered into between the claimant lender and a law firm in 2016. The lender sought to recover alleged losses from the law firm's insurer. The judge dismissed the claim on the basis that the solicitors' minimum terms compliant policy did not respond. This will be a welcome decision for insurers underwriting solicitors' professional indemnity business.

The claim

The claim by Doorway Capital Ltd (Doorway) was brought under the Third Parties (Rights Against Insurers) Act 2010 against AIG, the professional indemnity insurers of the law firm Seth Lovis & Co Ltd (Seth Lovis). The firm went into administration in March 2019, upon which Doorway became the statutory assignee of any rights under the policy for the purposes of the claim.

Doorway provided capital funding to law firms. In 2016, it entered into a Receivables Funding Agreement with Seth Lovis under which Doorway agreed to purchase certain 'Receivables', along with any related rights to pursue those debts. In exchange, Doorway agreed to make funding available to Seth Lovis for use as working capital and to repay certain debts.

AUTHOR

Laura Stocks
Partner
+44 20 3060 6389
laura.stocks@rpc.co.uk

Aimee Talbot
Senior Associate
+44 20 3060 6943
aimee.talbot@rpc.co.uk

Note

1. [2022] EWHC 182 (Comm).

The Receivables comprised the firm's trading debts owed by third parties, principally legal costs owed by clients and by third parties pursuant to cost orders. Doorway appointed Seth Lovis as its agent to collect the Receivables. Upon receipt into its client account, Seth Lovis was then obliged to pay those sums into a nominated account for Doorway. It was an express term of the agreement that Seth Lovis held the Receivables on trust for Doorway.

Doorway's claim was that it was a 'quasi-client' of Seth Lovis as a result of it having appointed Seth Lovis as its agent to collect the Receivables. Accordingly, it said that Seth Lovis owed it fiduciary duties in respect of the receipt of the Receivables. Doorway alleged that Seth Lovis only transferred a fraction of the value of the funds it received in payment of the Receivables to Doorway's nominated account, in breach of trust and/or fiduciary duty and/or it paid away some of the relevant funds to third party creditors.

AIG sought summary judgment on the claim on the basis that there was no realistic prospect of Doorway demonstrating that the policy would respond to the claim. It did not dispute, for the purposes of the application, that Seth Lovis owed Doorway fiduciary duties or that the firm had failed to transfer the full amount of the Receivables to Doorway. Its argument was simple: the policy did not respond because the claim fell outside the scope of the insuring clause and/or the claim engaged the trading debts exclusion in the policy.

The relevant policy terms

Seth Lovis' policy was subject to the solicitors' minimum terms and conditions. The insuring clause contained standard wording as follows:

> *"...The Insurer will indemnify an Insured against civil liability to the extent that it arises from Private Legal Practice in connection with the Insured Firm's Practice...."*

Private Legal Practice was defined as

> *"the provision of services in private Practice as a solicitor ... including, without limitation... c) any Insured acting as a personal representative, trustee, attorney, notary, insolvency practitioner, or in any other role in conjunction with a Practice...".*

The policy also contained a Debts and Trading liabilities exclusion which excluded liability to indemnify any claim relating to any

> *"...b) legal liability ... under any contract or agreement for the supply to, or use by, the Insured of goods or services in the course of the Insured Firm's Practice...".*

The Arguments

Doorway contended that the policy should respond for the following reasons:

- The definition of Private Legal Practice in the policy included (at sub-clause (c)) the provision of services where the insured was 'acting as a ... trustee... or in any other role in conjunction with a Practice'.
- By acting as a trustee for Doorway, the liability arose from 'Private Legal Practice' (falling within sub-clause (c)) and so the insuring clause in the policy was engaged.
- Alternatively, the liability arose as part of the conduct of litigation or from the performance of an ancillary function in relation to proceedings, was a Reserved Legal Activity, and accordingly fell within the definition of 'Private Legal Practice'.

AIG's counter-argument was that the policy did not respond:

- The obligations of Seth Lovis to Doorway, including the trust and fiduciary duty obligations, arose entirely from the Receivables Funding Agreement. Accordingly, although Seth Lovis had been acting as a trustee, it was not providing a 'professional service' or doing so 'in conjunction with a Practice' as required in the definition of Private Legal Practice. As a result, any liability arising as a trustee did not engage the insuring clause.
- The liability did not arise from the conduct of litigation or from the performance of an ancillary function in relation to proceedings, and therefore did not engage the definition of 'Private Legal Practice' in that capacity.
- In any event, liability under the policy was excluded by sub-paragraph (b) of the Debts and Trading Liabilities exclusion.

The Decision

Mr Justice Butcher concluded that there was no cover under the insuring clause of the policy; the claim did not arise from Private Legal Practice in connection with Seth Lovis' 'Practice' (as defined in the policy). This involved construing the policy terms. In doing so, Mr Justice Butcher confirmed that the sub-clauses in the policy (and by extension the MTCs) were qualified by the opening words of the definition. The essential definition of Private Legal Practice is 'the provision of services in private Practice as a solicitor'. The sub-clauses are instances of what is included within the concept of services in private Practice as a solicitor. They are not intended to enlarge the group of matters that constitute Private Legal Practice which are not in fact such services.

The court also considered whether Seth Lovis' obligation to collect the funds into its client account meant that it was work done in the provision of services in private practice. Doorway had argued that the utilisation of the client account was a central plank of a solicitors' practice. Mr Justice Butcher dismissed this. Whether the use of the client account was relevant turned on the use to which the client account was put and whether that use

arose out of the provisions of service in private practice. The use of the client account does not, without more, involve the solicitor providing services as a solicitor.

Mr Justice Butcher also concluded that the services performed for Doorway also did not arise from the conduct of litigation and were not ancillary to it. Once the Receivables were deposited into Seth Lovis' client account, whatever was done with them subsequently formed no part of the conduct of litigation. Accordingly, the insuring clause was not engaged on this basis either.

Finally, Mr Justice Butcher went on to look at the Debts and Trading Exclusion, obiter. He applied the approach to construction of exclusion clauses laid down in **Impact Funding Solutions v Barrington Services**[2] and concluded that the Receivables Funding Agreement was a 'contract for the supply to, or use by, the Insured of goods or services in the course of the Insured Firm's Practice'. The agreement provided a service – the facility to provide working capital for Seth Lovis' practice – and so engaged the relevant limb of the exclusion. Doorway's attempts to argue that the fiduciary and trust duties were independent of the contractual arrangement (and were therefore not obligations which arose 'under' the contract) was given short shrift.

Commentary

This will be a welcome decision for insurers writing solicitors' professional indemnity policies. On its face, it may appear to be a straightforward decision on the facts. Ordinarily, a funding agreement such as this would not engage a solicitors' professional indemnity policy. As Mr Justice Butcher himself commented, the type of liability which arose in this case was not the type of liability against which a solicitors' professional indemnity policy was designed to protect.

However, it is always the arrangements that exist on the fringes that give rise to uncertainty and the resultant dispute. The incorporation of the trust and fiduciary duty obligations into the funding agreement brought it close to engaging the insuring clause in the policy given the way in which the clause was expressed.

As Mr Justice Butcher made clear, the insuring clause was to be read such that the opening part of the clause qualified the scope of the sub-clauses, such that they too must form part of the 'provision of services in private Practice as a solicitor'. Acting as a trustee without more is not enough; the role must be part of the provision of a solicitor's services in private legal practice. Whilst of course every policy must be construed on its own terms, where the wording is closely based on the MTCs such as this one, this construction is likely to have broad relevance to other solicitors' PI policies.

Note

2. [2016] UKSC 57