**Neutral Citation No. [2003] NIQB 8** | *Ref:* **COGC3850**

*Judgment: approved by the Court for handing down* | *Delivered:* **20.01.2003**
*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL LIST)**

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**BETWEEN**

**DAVIDSON & HARDY (LABORATORY SUPPLIES) LIMITED**

**Plaintiff**

**and**

**THE BOARD OF GOVERNORS OF RUDOLPH STEINER SCHOOL and BALLANTYNE HOLLINGER & ASSOCIATES LIMITED**

**Defendants**

**and**

**CREECHURCH DEDICATED LIMITED**

**Third Party**

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**COGHLIN J**

[1] The plaintiff is a private limited company concerned with the sale and supply of laboratory furniture and equipment and it has brought these proceedings against the defendants seeking payment of the sum of £23,341.38 in respect of supplying and fixing laboratory furniture at the first-named defendant's school premises in Holywood, County Down. The second-named defendant is a firm of planning and design architects which was retained by the first-named defendant for the purpose of designing and administering the contract for the building of a four classroom block at the school. The third party, Creechurch Dedicated Limited ("the underwriters") are the second defendants professional indemnity insurers. During the course of the proceedings the first-named defendant has issued a Notice of Contribution and Indemnity against the second-named defendant ("Ballantyne") and all parties have agreed that, in the circumstances, it would be expedient and in the interests of justice to determine whether the second-named defendant is entitled to indemnity from the third party in respect of the first defendant's Notice of Contribution and Indemnity by way of preliminary issue. For the

purpose of determining the preliminary issue the second-named defendant was represented by Mr Humphries while Mr Dunford appeared on behalf of the third party. I am grateful to both counsel for the assistance that I derived from their carefully prepared skeleton arguments and detailed oral submissions.

**The factual background**

[2] On 27 February 2001 the plaintiff's solicitors wrote a letter of claim to Ballantyne referring to the goods supplied, work done and services rendered by the plaintiff at the first defendant's school premises and continuing in the following the terms:

> "These works, involving the supply and installation of laboratory furniture and fume cupboard, were carried out in May and October 2000 and were invoiced to you by agreement by way of invoice number 291024 dated 30 October 2000 in the sum of £23,341.38.
>
> You have since advised our client that you do not intend to furnish payment as agreed.
>
> The original invoices were issued initially to Savage Bros, in accordance with and on reliance upon your directions. Our client has issued the last invoice to your firm in accordance with the agreement reached between your firm and our client. By authorising the issue of this invoice to your firm, you have accepted responsibility for its payment and failure to do so constitutes a breach of contract on your part."

[3] Ballantyne replied to this letter by a letter dated 7 March 2001 in which they pointed out:

> "1. We are acting as architects on a contract between the Steiner School and Savage Bros and the lab furniture supplied by Davidson & Hardy formed part of this contract. Davidson & Hardy were fully aware of this situation and invoiced Savage Bros for the lab furniture in October 2000. The full value of this invoice from Davidson & Hardy to Savage Bros was included in a valuation of monies paid to Savage Bros in October/November 2000. Had this money been

> paid by Savage Bros to Davidson & Hardy that would have been the end of the matter. At no time prior to Savage Bros going into receivership did Davidson & Hardy look to us for payment, nor would they, as architects are not the paymaster in any contract set up.
>
> 2. You mention several times in your letter that the invoice was sent to us `by agreement'. No agreement has ever been made with Davidson & Hardy regarding payment of the invoice by ourselves.
>
> 3. You also state that we authorised issue of the invoice to our firm. At no time have we given any such authorisation."

[4] In a further letter dated 15 March 2001 the plaintiff's solicitors denied that the plaintiff had been informed that the works which it carried out were part of an ongoing building contract and maintained that the invoice had been sent to Savage Bros simply in accordance with Ballantyne's directions. The plaintiff's solicitors pointed out that Savage Bros had not placed the order which had been sourced from Ballantyne.

[5] On 2 May 2001 the plaintiff's solicitors wrote to the first defendant claiming the outstanding sum.

[6] On 7 August 2001 the plaintiff's solicitors again wrote to Ballantyne seeking payment of the outstanding balance and Ballantyne referred this correspondence to their professional indemnity brokers, Aon Professions, under cover of a letter in which they indicated that they would welcome the brokers comments on the situation from a liability point of view, set out a brief history of the claim and continued:

> "7. D & H (the plaintiff) invoiced the builder in October 2000 and the builder passed the invoices to the Quantity Survey. The invoices formed part of the Quantity Surveyor's valuation and our subsequent certificate to the client. The client paid the builder. D & H were not paid by the builder.
>
> 8. The builder went into receivership in February 2001. Since then D & H have sent an invoice addressed to us, which we returned stating that the builder had already been paid for their work.

> We have also had a series of letter from L'Estrange & Brett regarding the payment, which we answered to clarify the background to the situation. We had assumed that they had accepted their position as an unsecured creditor. They have since been writing directly to the school seeking payment. This current letter has been sent to both ourselves and the school.
>
> D & H's main argument is that they only had dealings with ourselves (and at times teachers from the school). We talked to them at the design stage, obtained quotes from them to establish a PC sum and had written letters to confirm the orders to them. The builder was asked at a site meeting to instruct them but we have subsequently discovered that there was no correspondence between the builder and D & H until they sent their invoice.
>
> D & H are trying to argue that their contract was with us, or us on behalf of the school. …
>
> Our two concerns are;
>
> *(1)* The merit of D & H's claim that payment should have been made directly.
>
> *(2)* The legal costs of defending any court action, and the legal costs involved if their claim were to be successful."

[7] On 10 September 2001 Ballantyne received a letter from Squire & Co, solicitors acting on behalf of their professional indemnity insurers. This letter contained a draft letter to be sent to the plaintiff's solicitors.

[8] On 11 September 2001 the plaintiff issued a Writ of Summons against the first-named defendant and Ballantyne claiming the outstanding sum "… in respect of laboratory equipment supplied and installed by the plaintiff at the premises of the first defendant at the request of the second defendant their servants and agents and also do on foot of a stated and settled account."

[9] On 24 September 2001 Ballantyne received a further letter from Squire & Co containing their advice. The relevant portion of this document read as follows:

"As you know, we act for the insurers subscribing to your professional indemnity policy for the period 24 03 01 to 23 03 02. That policy provides for, inter alia, `claims first made' during that period.

From the correspondence which you provided to us, it is clear that this claim was first made on 27 February 2001, in the letter from the Claimants solicitors of that date, written before your current insurers were on risk. The claim was thus first made while you were ensured through ASE Insurance Agency Limited.

Accordingly, your 2001/2002 insurers are not prepared to indemnify you for this claim. Instead, you should seek indemnity, if at all possible, from ASE.

There is a further point which we should add for the sake for completeness. Even if the claim had first been made during your current (2001/2002) policy, Exception 8 of that policy would apply. As you will appreciate, the claim made against you is simply for unpaid goods/an unpaid invoice, rather than there being any suggestion of negligence on your part.

Exception 8 of your policy excludes:

> `… any claim arising out of or in connection with any … trading liability incurred by any business managed by or carried on by or on behalf of the Assured.'

Had this claim first been made after 24 March 2001, underwriters might well have argued that the claim was in connection with a trading liability and therefore outside the scope of your current policy.

We accordingly suggest that, as a matter of urgency, you instruct your own solicitors to deal with this claim and/or that you notify ASE."

[10] On 13 February 2002 the plaintiff delivered a statement of claim which alleged, at paragraph 3 that the plaintiff had provided the original quotation for the laboratory furniture and equipment to Ballantyne, at its request, and that Ballantyne had represented to the plaintiff that it was acting on behalf of the first-named defendant. Subsequent paragraphs 4 to 12 then set out a history of events and at paragraph 13 it was simply stated that:

> "13. No payment has been received by the plaintiff for the laboratory furniture and equipment, which was ordered from the plaintiff by the second-named defendant and further and in the alternative as servants or agents of the first-named defendant."

[11] On 27 March 2002 Ballantyne lodged a defence denying that it had ever entered into a contract with the plaintiff and asserting that Ballantyne had informed the plaintiff to invoice Savage Bros as the furniture and equipment form part of the building contract between the plaintiff, the first-named defendant and Savage Bros. On 9 April 2002 the first-named defendant delivered a defence denying any contract between it and the plaintiff and also denying that Ballantyne had acted as the agent or representative of the first-named defendant.

[12] On 19 June 2002 the solicitors for the first-named defendant issued a Notice of Contribution/Indemnity against Ballantyne on the basis of alleged negligence and/or breach of contract. Included in the particulars of negligence were allegations of a failure to give proper advice as to whom payment should be made for the supply of the laboratory equipment, failing to warn the first defendant of the affect of not paying the plaintiff directly, allowing the first defendant to make payment to Savage Bros and failing to have sufficient regard for the defendant's financial liabilities in respect of the contract of works. By way of alleged breach of contract the first defendant repeated the particulars of negligence and asserted an implied term in the contract between the first defendant and Ballantyne that Ballantyne would take all reasonable care in providing professional services to the first defendant.

[13] On 16 September 2002 Ballantyne served a third party notice upon the underwriters seeking indemnity under the professional indemnity insurance contract in respect of the first-named defendant's Notice of Contribution/Indemnity. This was followed by a third party statement of claim served by Ballantyne on 18 October 2002 referring to the policy of professional indemnity insurance taken out by Ballantyne with the third party on 24 March 2002 and seeking indemnity thereunder. The third party served

an amended defence to this statement of claim on 24 December 2002. The third party also served notice for particulars and interrogatories to which Ballantyne replied.

[14] Mr Dunford, on behalf of the underwriters, referred to the relevant policy of professional indemnity insurance taken out by Ballantyne and submitted that the underwriters were entitled to repudiate by virtue of all three sub-clauses contained in paragraph 4 of the "Exclusions" section of the policy. I propose to deal with each of these sub-clauses in turn.

[15] Each of the sub-clauses contained in paragraph 4 of the Exclusions falls to be considered in relation to "any claim or Circumstance" and Mr Dunford accepted that, in accordance with the decision in Robert Irving & Burns (a firm) v Stone & Ors [All England Official Transcripts 16 October 1997], the "claim" in this case was to be equated with the first-named defendant's Notice of Contribution and Indemnity dated 19 June 2002 which had been referred to the underwriters by the second-named defendant during the operative period of the professional indemnity policy. Consequently, Mr Dunford focussed his attention upon the word "Circumstance" which is defined at page 1 of the policy as; "any matter likely to give rise to a claim against the Insured." He then proceeded to deal with each of the exclusion provisions contained in paragraph 4.

4*(a)* Any Circumstance known to the Insured prior to the inception of this Policy or which in the reasonable opinion of Underwriters ought to have been known to the Insured.

[16] Under this heading Mr Dunford identified a number of matters:

*(i)* Ballantyne was aware that the first defendant had made payment to Savage Bros for the laboratory equipment, Savage Bros had not passed this payment onto the plaintiff, Savage Bros had gone into administrative receivership in February 2001 as a result of which the plaintiff was unlikely to receive payment from them, the plaintiff was seeking to hold or both the school and Ballantyne liable for the outstanding amount and had alleged that its original invoices had been sent to Savage Bros at the direction of Ballantyne and Ballantyne had denied any agreement to pay the outstanding amount to the plaintiff.

*(ii)* Despite the allegations contained in the plaintiff's letter of claim of 27 February 2001, no specific allegation of breach of contract, breach of authority or misrepresentation had been made by the plaintiff against Ballantyne in the statement of claim which simply alleged that Ballantyne had represented to the plaintiff that it was acting on behalf of the first-named defendant.

*(iii)* In completing the proposal form on 28 February 2002 Ballantyne had provided details of this litigation in answer to question 10 rather than question 29. Question 10 asked "Have any claims for professional negligence, error or omissions or the like ever been made against the Practice or its Partners both past and present?" whereas question 29 asked "Are there any submissions to which the proposer wishes to draw the attention of the Underwriters, or any other information in your possession, or to your knowledge material to any estimate of the risk to be insured?" Mr Dunford pointed out that it was only after the underwriters had repudiated liability that Ballantyne attempted to specifically characterise the claim as limited to a contractual debt and referred, in particular, to Ballantyne's replies to the interrogatories. While accepting that it was not a determinative factor, Mr Dunford argued that, nevertheless, the perception or belief of the insured was one of the matters to be taken into consideration.

[17] I reject this submission since I am not persuaded on the balance of probabilities that any of the matters identified by Mr Dunford constitute, singly or in combination, circumstances "likely to give rise to a claim" against the insured for breach of any professional duties. The plaintiff's original letter of claim against Ballantyne was clearly couched in terms of an alleged breach of contract and while I doubt whether the statement of claim would qualify as a model piece of draftsmanship, it does seem to focus the case made against Ballantyne in contract or, possibly, breach of warranty of authority – see, in particular, paragraph 13. Perhaps more important is the fact that neither the letter of claim, nor the statement of claim nor any other document emanating from the plaintiff made any allegation against Ballantyne based upon any alleged breach of professional tortuous or contractual duties. No doubt the simple reason for not doing so is that, as far as I understand the matter, no professional duties were ever owed by Ballantyne to the plaintiff whether in contract or in tort. I do not place any real weight upon the fact that Ballantyne completed question 10 rather than question 29 of the proposal form when providing the underwriters with details of this litigation and I accept the explanation put forward by Andrew Charles Ballantyne at page 8 of his affidavit sworn on 6 February 2003 that he was simply doing his best to ensure that he complied with his duties of disclosure. I simply cannot see the basis upon which it is suggested that providing the details that "… subcontractor claiming payment directly from client due to insolvency of building contractor. Ballantyne Hollinger & Associates named as second defendant as architect acting on behalf of the client." confirmed acceptance on the part of Ballantyne that this was really a case of professional negligence particularly in the context of the advice which Ballantyne had received from Squire & Co solicitors in September 2001 that the claim was "… simply for unpaid goods/an unpaid invoice, rather than there being any suggestion of negligence on your part." I do not believe that this was a case of any attempt by Ballantyne to prophesy or predict a claim for professional negligence as occurred in J Rothschild Assurance Plc v Collyear & Ors [1999] Lloyd Reports

IR 6. Unlike that decision the only independent professional view received by Ballantyne negated any aspect of negligence on its part. While it might be arguable that a trained lawyer might have advised that the facts known to Ballantyne could give rise to a claim for professional negligence, I am not persuaded that they were such as to be "likely" to do so. The fact is that Squire & Co a firm of solicitors in this field did not express any such opinion after considering the history set out in Ballantyne's correspondence.

[18] In Thorman v NHIC & HIC [1988] Lloyd's Law Reports Vol 1 page 7 Sir John Donaldson MR, as he then was, observed, at page 12:

> "What matters is what claim was being made by the building owners, not what claim was perceived by the insured."

And, in similar terms, Stocker LJ said, at page 16; "in my view, it is not the subjective view of the insured, or their representatives, which is decisive of the matter, but the nature of the claim formulated by the owners …". In this case, as Mr Dunford accepts, no claim whatsoever for professional negligence was made until the issue of the notice of contribution and indemnity by the first-named defendant on 19 June 2002, some 2½ months after lodging their defence. In the circumstances, the underwriters have not persuaded me that Ballantyne had knowledge of any circumstance that was objectively "likely to give rise to a claim against the insured".

4*(b)* Any circumstance notified by the Insured under any other insurance prior to the inception of this policy.

[19] Mr Dunford relied upon the facts sent by Ballantyne to Aon Professions on 14 August 2001. While this certainly represented a notification of the plaintiff's claim against Ballantyne there is nothing in the document to indicate that it was a reference of any claim for a breach of professional duties on the part of Ballantyne and this certainly appears to have been the opinion of the underwriter's solicitors, Squire & Co, as indicated in their letter of 24 September 2001. I do not accept the argument put forward by Mr Dunford that since Messrs Squire & Co were acting on behalf of Ballantyne's then professional indemnity insurers they were acting on behalf of an interest which was adverse to Ballantyne and that, in such circumstances, a reasonable businessman would have rejected their view that this was not an issue of negligence.

[20] While Ballantyne might or might not have taken up the suggestion to consult solicitors themselves this does not change the nature of the circumstances notified by Ballantyne on 14 August 2001.

4*(c)* Any circumstance disclosed on the latest Proposal made to Underwriters.

[21] In arguing that the underwriters were entitled to take advantage of this exclusion Mr Dunford, relying upon Haydon v Lo & Lo [1997] 1 WLR 198 at page 205, again referred the court to the fact that Ballantyne had chosen to furnish the details of the plaintiff's claim in answer to question 10 of underwriters proposal form. While it may be legitimate to have regard to the manner in which the proposal form has been completed as a factor, ultimately, much will depend upon all the facts of the individual case. In Haydon's case the insured notified their brokers as soon as the theft came to light, that they might be subject to a claim of negligence. As I have indicated earlier in this judgment, I place no real weight upon the fact that Ballantyne furnished details of the plaintiff's claim at paragraph 10 rather than paragraph 29 of the proposal form. To accept Mr Dunford's submission that completing the proposal form in this manner indicated a belief by Ballantyne that the "real threat" which it faced was a suit for professional negligence from the first defendant would mean that Ballantyne, as a reasonable businessman, had rejected the advice which it had received from Squire & Co, had appreciated the significance of the question asked at paragraph 10 of the proposal form yet had managed to furnish the underwriters with details of the plaintiff's claim in such a way as to disclose nothing of this belief. As a matter of fact, I do not accept that, in completing paragraph 10 in this manner, Ballantyne was making any attempt to predict or prophesy that it might have to face a claim for professional negligence and I do not consider that any analogy with the decision in Hayden or Rothschild is relevant in relation to this point.

[22] Accordingly, I propose to grant the declaration of indemnity sought by the third party.