PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

LONDON CONFERENCE

19th June 2019

PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION
LONDON CONFERENCE – RECENT CHANGES UNTANGLED
Wednesday 19th June 2019

0900–0925 Registration and Refreshments
0925–0930 PNLA Introduction

0930–0950 **Chair's Keynote Address**
Nicola Rushton QC – Hailsham Chambers

0950–1035 **"Loss of a Chance"**
Michael Pooles QC – Hailsham Chambers

1035–1110 **"Legal Advice and Representation in Criminal Cases: Professional Negligence as a Tool to Advance Quality and Remedy Failure"**
Jago Russell – Fair Trials

1110–1115 **"Litigation Funding Update"**
David Pipkin & David Chase Temple Legal Protection

1115–1130 Refreshments

1130–1200 **"Post-Implementation Review of Part 2 of LASPO – 7 February 2019"**
Robert Wright - Head of Civil Litigation Funding and Costs at Ministry of Justice

1200–1215 **Q&A**
1215-1300 **"Non-Party Costs Orders against Professional Indemnity Insurers"**
Shantanu Majumdar – Radcliffe Chambers
1300–1400 Lunch
1400–1445 **"Expert stunts"**
Daniel Shapiro QC – Crown Office Chambers

1445–1530 **"Brokers Negligence"**
Neil Hext QC – 4 New Square Chambers

1530–1545 **Q&A**
1545–1600 Refreshments

1600–1645 **"The Future of Disclosure? The Pilot Regime in the Business & Property Courts"**
Luka Krsljanin - 2 Temple Gardens Chambers

1645–1700 **Q&A – Chair's Closing Remarks**

PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE – RECENT CHANGES UNTANGLED
EEF Broadway House, Tothill Street, London, SW1H 9NQ
Wednesday 19th June 2019
ATTENDEES (1 of 2)

Helen Brown	Paris Smith LLP	Southampton
Andrew Burnette	Burges Salmon LLP	Bristol
Stephen Cannell	Blake Morgan	Southampton
Colin Carr	Kevin Edward Costs	London
David Chase	Temple Legal Protection Ltd	Guildford
Timothy Cockram	Carson McDowell LLP	Belfast
Michael Colledge	Blake Morgan	Southampton
Christopher Cooney	Campbell Courtney & Cooney	Surrey
Karen Cornwell	TLT/PNLA	Glasgow
Duncan Crine	Freeths LLP	Oxford
Paul Daniel	The Specter Partnership Solicitors	London
Gemma Fleetwood	Thomas Miller Legal	London
Nichola Gordon-Jones	Blake Morgan	Southampton
Andrew Herridge	Tanners Solicitors LLP	Cirencester
Neil Hext QC	4 New Square Chambers	London
Philippa Hill	Grant Thornton UK LLP	London
Moira Hindson	Kingston Smith LLP	London
Robert Johnson	Healys LLP	London
Luka Krsljanin	2 Temple Gardens Chamber	London
Lisa Laurenti	City University of London	London
Ben Leandro	Kingston Smith LLP	London

Alison Mackintosh	Bindmans LLP	London
Shantanu Majumdar	Radcliffe Chambers	London
Katy Manley	Manley Turnbull/PNLA	Cheltenham
Peter Marquand	Capsticks Solicitors LLP	London
Esther Millard	Barlow Robbins LLP	Surrey
Pradeep Oliver	Cripps LLP	Tunbridge Wells
David Osborne	Fraser Dawburns LLP	Cambridgeshire
Fiona Pearson	Michelmores LLP	London
David Pipkin	Temple Legal Protection Ltd	Guildford
Michael Pooles QC	Hailsham Chambers	London
Bipin Regmi	Campbell Courtney & Cooney	Surrey
Nicola Rushton QC	Hailsham Chambers	London
Tim Russ	Roythornes Solicitors	Spalding
Jago Russell	Fair Trials	London
Joanthan Sachs	Irwin Mitchell/PNLA	London
Daniel Shapiro QC	Crown Office Chambers	London
Thomas Tilbrook	Best Solicitors	Sheffield
Nicholas Tubb	Shoosmiths LLP	London
Rupert Warren	HFW	London
David Wingate	We Solicitors LLP	Manchester
Robert Wright	Ministry of Justice	London

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Professional Negligence
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Kevin Edward Costs are delighted to continue to support the PNLA.

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Contacts:

Matthew Pascall

Senior Underwriting Manager

Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team where his wide-ranging knowledge and experience of the commercial legal sector is invaluable to our client law firms.

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David Chase

Deputy Underwriting Manager

David has extensive experience in risk analysis, case management and relationship management. He considers all types of commercial litigation including professional negligence and insolvency. Management of our fully-delegated schemes is a speciality of his.

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Nicholas Ellor

Senior Underwriter

Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Jacob White

Underwriter

Jacob supports the senior commercial underwriters by reviewing a wide range of cases involving all types of commercial and business litigation. This involves providing costs solutions to SMEs, large corporates, private individuals and insolvency practitioners.

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Amy Edgington

Underwriting Support Manager

Amy provides underwriting support for the Commercial team as well as managing our underwriting assistants. Committed to providing the highest levels of service, her role includes the swift and efficient creation of quotes, issuance of policies and fielding of enquiries.

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PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

INTRODUCTION - Recent Changes Untangled

Professional negligence and liability has foremost been affected by the funding changes in LASPO Part 2 recently subject to review published on 7 February 2019.

We also focus on fair trials and human rights. The law continues to develop with another new crop of recent judgments. Legal principles are developing not only in a linear fashion according to the type of professional or area of law,but also in ways which can be applied thinking laterally to many other situations.

Conversely, it is often said that judgments clarify the law and therefore perhaps there is a way through.

This conference will address changes and try to 'untangle' them for the benefit of the delegates.

Nicola Rushton QC
Hailsham Chambers

Chair's Keynote Address

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Nicola Rushton QC

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Overview

Nicola specialises in finance-related professional negligence claims. She also handles a wide range of commercial disputes and has particular experience of issues arising from secured lending. Her areas of expertise include: lender claims; professional negligence of surveyors, solicitors, accountants, IFAs, insolvency practitioners and brokers; all issues connected with mortgage-lending; legal and equitable charges; insolvency, both individual and corporate, particularly in a property context; LPA and fixed charge receivers; insurance; freezing orders, fraud, tracing and constructive trusts. She has a niche specialism in enforcement of legal aid regulations and legal aid costs.

Clients instruct Nicola because of her collaborative and practical approach to problems. She is engaging and robust and enjoys getting her teeth into complex commercial disputes. She is adept at dealing with numerical and financial data, and has a knack for making complicated issues or concepts easy for her clients and others to understand. She communicates clearly and has a keen awareness of commercial realities. She prides herself on being accessible, friendly and prompt with her advice.

Nicola also sits part-time as a Fee-paid Judge of the First-tier Tribunal (Property Chamber) in London.

Professional negligence

Nicola’s core area of practice is professional negligence claims against lawyers, surveyors and financial professionals such as accountants and auditors; financial advisers and insolvency practitioners. She has particular expertise in claims with a commercial, property or insolvency dimension. She has extensive experience of lender claims arising from mortgages and has acted and advised on many key issues arising from lending-related negligence and breach of trust, including securitisation, insurance coverage and title insurance.

Commercial law

Nicola is very experienced in handling commercial disputes, for institutional clients, large and small businesses and individuals. She has particular expertise in claims arising from loans, mortgages and charges; freezing orders and enforcement of judgments; fixed charge receiverships; debentures; fraud, tracing and constructive trusts; directors' duties and restrictive covenants; debt and asset recovery; and insolvency, both individual and corporate, especially transaction avoidance. She also has experience of contentious and non-contentious company law matters, including minority shareholder claims and issues arising from articles of association and shareholder agreements, including company restructuring.

Costs litigation

Nicola has for many years been the preferred counsel of the Legal Aid Agency's Debt Recovery department (formerly the Legal Services Commission) in its costs enforcement claims. She has particular expertise in the legal aid regulations and statutory charge.

Notable cases

Barclays Bank Plc v. TBS & V Ltd [2016] EWHC 2948 (QB)

Claim by bank for professional negligence in connection with the valuation of a care home. Valuation was held to be within margin of error. Considered issues as to correct valuation method, reliance and causation of loss.

Barclays Bank plc v. Christie Owen & Davies (trading as Christie & Co.) [2016] EWHC 2351 (Ch), [2017] PNLR 8

Represented the Claimant bank in its successful claim for negligent over-valuation of three amusement arcades. Included determination of the correct basis for carrying out a trading valuation; relevance of purchase price agreed to the valuation; that the bank did not need to give credit for sums paid from an overdrawn account or proceeds of sale used to discharge pre-existing lending; and issues of contributory negligence.

Lord Chancellor v. Charles Ete & Co. [2016] EWHC 275 (QB): Successful claim on behalf of the Lord Chancellor (operating as the Legal Aid Agency) to recover over-claimed payments on account under contract, statute and in restitution where the solicitors had failed to submit any proper final bills. The Lord Chancellor was awarded almost £1m, including additional sums for successful use of a Claimant's Part 36 offer.

Legal Services Commission v Lonsdales LTL 3.8.12. Succeeded in fully contested claim for a freezing order against solicitor, where evidence of systematic dishonesty in failing to report receipt of settlement monies to the Commission.

Legal Services Commission v Henthorn [2011] EWCA Civ 1415 (Court of Appeal); [2012] 1 W.L.R. 1173; [2012] 1 Costs L.R. 169;[2011] EWHC 258 (QB) (High Court). Successful appeal, led by Jeremy Morgan QC on behalf of the Commission concerning the date on which time begins to run in claims against barristers or solicitors for overpaid fees.

Legal Services Commission v. Thipthorpe [2009] B.P.I.R 1399. Confirmed Commission entitled to recoup payments made to a solicitor pursuant to legal aid certificates where the solicitor failed to submit a bill for taxation or assessment.

Legal Services Commission v. Banks [2008] EWHC 1035 (QB); [2008] All ER (D) 171 (May); [2008] 20 E.G. 137 (C.S.). Enforcement of statutory charge over withheld rent.

Levy v. Legal Aid Board, CA [2001] 1 All E.R. 895; [2000] B.P.I.R. 1065. Bankruptcy petition; enforcement of costs order. Whether the Board could petition for bankruptcy on the basis of a costs order made in matrimonial proceedings.

Recommendations

“She is someone who genuinely takes an interest in her clients and instructing solicitors. She is very progressive and understands that it is a team effort. When it comes to complex, technical areas of law, she is one of the few people I would go to” *Chambers UK 2019*

“Very impressive” *Legal 500 2019*

“Amazing. She has a real knack for sorting out the most knotty of cases and is a winner with clients. She is particularly well regarded in lender claims” *Chambers UK 2018*

“Calm, methodical and charming with clients.” *Legal 500, 2017*

“An exceptionally safe pair of hands who also innovates in terms of strategy and practical suggestions. The advice she provides is robust and concise.” *Chambers UK 2017*

“She delivers excellent attention to detail” *Legal 500 2016*

“Nicola really understands the client and how they operate. Her written work is excellent and her advocacy is exceptional. She turns work around very quickly when necessary, but always maintains a very high standard.” *Chambers UK 2016*

Further information

Education: St John’s College, Cambridge – BA (Law); Dalhousie University, Nova Scotia, Canada (LLM); Rotary Foundation Scholarship; Gray’s Inn Scholarship; St John’s College Larmor Award.

Memberships: Nicola is a member of the Commercial Bar Association, the Chancery Bar Association and the Professional Negligence Bar Association.

Publications

Teaching new dogs old tricks; the remedies available to unhappy noteholders on a CMBS default **(JIBFL)**

The consequences of an issuer in a CMBS having its own rights of action **(JIBFL)**

X-class loan notes and avoiding moral hazard **(JIBFL)**

ICO Data protection registration number: **Z4652931.** Click to visit **Nicola Rushton QC's Privacy Notice.**

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Notes: -

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Michael Pooles QC

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Overview

Michael Pooles QC's principal area of practice is that of professional indemnity claims and related coverage issues. He frequently acts for or against lawyers, accountants and surveyors but he acts for or against all manner of professionals including areas such as veterinary science, land management and fish farming. He is frequently instructed in costs matters. His practice also includes general insurance matters of all types and substantial personal injury claims. Michael is consistently ranked as a leading silk in the areas of professional negligence and costs by the leading directories and is Chambers & Partners' 2016 Silk of the Year for Professional Negligence. Michael was one of the former editors of the solicitors' chapter of Professional Negligence and Liability.

Professional negligence

Lawyers
Michael is recognised as a leader in the field and has appeared in a number of the highest profile claims against lawyers in recent years.

Accountants & auditors
Michael has acted in a number of claims against accountants and auditors and represented accountants before a variety of disciplinary bodies up to the AADB.

Financial professionals
Michael has represented many financial professionals and has challenged determinations of the FOS before the administrative court.

Insurance brokers
Michael has appeared in many brokers claims and has considerable experience of both professional indemnity and general insurance disputes.

Costs litigation

Michael has experience in costs matters appearing in the Court of Appeal in The Accident Group final costs hearings and in leading cases on costs capping.

Noteworthy cases

Perry v Raleys [2019] UKSC 5. The correct approach to loss of a chance claims in professional negligence.

Cavanagh v Witley Parish Council [2018] EWCA Civ 2232. Owners' obligations in respect of tree inspections.

Edwards v Hugh James [2018] EWCA Civ 1299. Admissibility of after-acquired evidence in professional negligence damages calculations.

Barton v Wright Hassell [2018] UKSC 12. Whether litigants in person are entitled to additional latitude under the Civil Procedure Rules.

Thomas v Hugh James [2017] EWCA Civ 1303. Explanation of limits upon what solicitors might be expected to advise in low value personal injury claims.

Joseph v Farrer [2017] EWHC. (Ch) Solicitors did not owe contractual tortious duties to the claimant beneficiary of an intended inter vivos gift.

Rahim v Arch Insurance [2016] EWHC 2967 (Comm). Solicitor not entitled to an indemnity owing to her fraudulent conduct.

LSREF v Gateley LLP [2016] EWCA Civ 359. Date to be adopted for transactional loss following professional negligence.

CRU v King & Wood Mallesons LLP [2016] EWHC 727 (QB). Solicitors' duties when advising on termination of employment contracts.

Clydesdale Bank v Workman [2016] EWCA Civ 73. Requirements in findings of dishonesty against professional men and women.

Wellesley v Withers LLP [2015] EWCA Civ 1146. Test of remoteness of damage in cases of concurrent professional liability.

Rayner v Wolferstons [2015] EWHC 2957 QB. Date of knowledge under section 11 (4) a of the Limitation Act 1980 and impact upon consequential claim against solicitors.

Wellesley v Withers [2014] EWHC 556 – Test of remoteness of damage where parallel duties owed in contract and tort.

Santander v R A Legal [2014] EWCA Civ 183 – Nature of trusts in conveyancing and relief under s61 Trustee Act 1925.

Harrison v Cluttons [2013] EWCA Civ 1569 – Duty of care of landlords' surveyor to tenant.

Drysdale v Hedges [2012] EWHC 4131 – Landlord's duties under Defective Premises Act 1972.

Davisons v Nationwide [2012] EWCA Civ 1626 – Nature of solicitor's obligations in trust and s61 Trustee Act defence).

Herrmann v Withers LLP [2012] EWHC 1492 Ch, Newey J – Solicitor's conveyancing obligations and measure of damages.

Asiansky v Khazada [2011] EWHC 2831 QB, Andrew Smith J – Summary dismissal of claim against QC.

Kmeicic v Isaacs [2011] EWCA Civ 451 – Duties of householder towards construction workers on site.

Greene & Wood Mclean LLP (in administration) *v Templeton Insurance Ltd* [2010] EWHC 2678 – Defending counsel alleged to have negligently advised the pursuit of a Group Litigation Order, claim dismissed.

Cabvision v Feetham & ors [2009] EWHC 3400 (Ch) Norris J – Costs litigation and breach of duty.

Jones v Attrill (Law Society intervening) [2008] EWCA Civ 1375 – Accident line direct challenges to recoverability.

Taylor Walton v Laing [2008] PNLR 11 – Abuse of process by way of relitigation.

Zurich Professional v Karim [2006] EWHC 3355 – Exclusion of professional indemnity cover due to dishonesty committed or condoned.

Flora v Wakom [2007] 1 WLR 482 – Indexation of periodical payments in injury claims.

The AIDB v (1) PricewaterhouseCoopers and (2) David Donnelly FCCA [2007] – Disciplinary complaints brought about by the AIDB following the collapse of the Mayflower Group.

The Queen on the Application of Rosemary Fogg v The Secretary of State for Defence [2006] EWCA Civ 1270.

Aer Lingus v Gildercroft Ltd [2006] EWCA Civ 4 – Contribution between tort feasors and limitation.

Haward v Fawcetts [2006] UKHL 9 – Accountants / limitation / family business / multiple potential causes of loss / damage / attribution.

Law Society v Sephton [2006] UKHL 22 – Accountants / limitation / solicitor's accounts rules certificates / date of damage.

3M United Kingdom & Anor v Linklaters & Paines (A Firm) [2006] EWCA Civ 530 – Solicitor's negligence / date of knowledge.

Shalson v Russo [2005] Ch 281 – Tracing / offshore trust / test for sham trusts.

Sharratt v London Central Bus [2004] EWCA Civ 575 – Costs / TAG costs group action / referral fees / ATE premiums.

Atack v Lee [2004] EWCA Civ 1712 Costs – CFAs / success rates / cases at trial / judicial discretion.

Manolakaki v Constantinides [2004] EWHC 749 (Ch) – Solicitor / insurance / financial instrument fraud / coverage / non-disclosure.

J.J. Couglan Ltd v Ruparelia Thaker [2004] PNLR 4 – Financial instrument fraud / solicitor / outside ordinary course of business / liability of innocent partner.

Sweetman v Nathan [2004] PNLR 7 – Strike out / fraud on third party / subsequent negligence claim against partners of fraudulent solicitor.

Ezekial v Lehrer [2002] Lloyd's Rep PN 260, C.A. – Limitation S14A knowledge.

Delaware Mansions v Westminster City Council [2002] 1 AC 321 – Nuisance and tree-root damage.

Ingmar GB Ltd v Eaton Leonard Technologies Inc [2001] CMLR 9 – Commercial agents regulations.

Lloyds Bank v Crosse & Crosse [2001] Lloyd's Rep P.N. 452 – Negligent conveyancing / limitation / measure of damages.

Lec (Liverpool) Ltd v Glover [2001] Lloyd's Rep I.R. 315 – Fire insurance policy construction / exclusion cause / blow torch.

Casey v Hugh James Jenkins [1999] Lloyd's Rep P.N. 115 – Solicitor's obligation on loss of legal aid / causation.

Abbey National v Sayer Moore [1999] EGCS 114 – Limitation lenders claim against solicitors.

Recommendations

"A super advocate who has tremendous knowledge of solicitors' negligence and fraud" *Chambers UK 2019*

"He is a master and has been operating at the top level for a very long time" "Absolutely charming and quick off the mark. Everyone finds him a delight to work with" *Chambers UK 2019*

"Excellent advocacy and client service" *Legal 500 2019*

"Top end, especially for solicitors' negligence. He is absolutely excellent" "He provides clear and down-to-earth advice. He spots the key issues immediately and develops a strategy accordingly" *Chambers UK 2018*

"He has an excellent way of getting to the heart of a case and is a pleasure to work with " *Legal 500 2017*

"The best professional indemnity barrister there is." "If we need a case to win, we instruct Michael. What he doesn't know about professional indemnity isn't worth knowing." "Confident, inspiring and reassuring: a superb lawyer with a refined and smooth style." *Chambers UK 2017*

"An absolute star" *Legal 500 2016*

"He is the jewel in the crown of their chambers. He sets everything out in a huge amount of detail and is organised and methodical." "Very approachable, highly regarded and a very good strategist. He knows the insurance market really well and has a common-sense way of dealing with cases." *Chambers UK 2016*

"He has very good instincts and stands by them." *Legal 500 2015*

"Confident, inspiring and reassuring, he's a superb lawyer with a refined and smooth style. 'He is extremely clever, has very good instincts and stands by them'." *Chambers UK 2015*

"Cool headed, steady and extremely experienced." *Legal 500 2014*

"A very strong professional indemnity practitioner – there are few people who know the field as well as he does." *Chambers UK 2014*

"For any sticky situations he is normally the first one called. 'Very impressive, he's great on his feet, and clearly knows his stuff'." *Chambers UK 2014*

"Good on his feet." *Legal 500 2013*

"Regularly receives top-class instructions, and impresses sources with his 'complete mastery of his brief'. He is further lauded for his cross-examination skills and commanding presence in court. A fine performer, 'he has an outstanding mind, is brilliant in court, is charming with clients and is clear and concise in his written work'." *Chambers UK 2013*

"It is unsurprising that clients have total confidence in the 'assured and authoritative' Michael Pooles QC, who is one of professional negligence's leading lights. He is 'excellent at what he does' since he is a 'lethal cross-examiner' who can also 'get involved in the detail'." *Chambers UK 2012*

"A barrister with a very judge-friendly style, 'he is a persuasive voice in the courtroom who is particularly good for the bigger cases as he has a quick turnaround time and always gets to the essence of a case quickly'." *Chambers UK 2012*

Further information

Education: The Perse School Cambridge; LLB (London); Scarman Scholar, Inner Temple Jardine Scholar and Treasurer's prizewinner (1978). Qualified Mediator 2003.

Appointments: Recorder 2000-2012. Master of the Bench of The Inner Temple.

Committees: Former Board Member of the Bar Standards Board; Former member of the Professional Conduct Committee (and the Legal Services Committee) of the Bar Council of England and Wales.

Professional memberships: Professional Negligence Bar Association; COMBAR; South Eastern Circuit; London Common Law and Commercial Bar Association.

Publications & lectures: Former editor of the solicitors' chapter of Professional Negligence and Liability (Informa looseleaf.), Michael Pooles has frequently provided lectures to members of the Professional Negligence Bar Association and others on professional indemnity, policy, conduct, limitation and civil fraud matters.

ICO Data protection registration number: **Z687517X.** Click here to view **Michael Pooles QC's Privacy Notice**

LOSS OF A CHANCE – Where Are We Now?

PNLA London Conference June 2019

Michael Pooles QC

hailshamchambers
4 Paper Buildings

1. For 30 years, after the decision of the Court of Appeal in *Allied Maples Plc v Simmons and Simmons* [1995] EWCA Civ 17, those of us practising in our area of interest felt a degree of confidence concerning the courts' approach to the quantification of loss in respect of loss of a chance claims. This was an issue which could arise in respect of any professional negligence claim arising out of circumstances in which, by reason of the fault of the professional person, an intended outcome had not been achieved. In those circumstances, if fault was established, the court would proceed to consider whether there was a significant possibility of the intended outcome occurring and if so what that possibility represented in monetary terms. That would usually be determined on a percentage of full value basis.

2. In *Allied Maples* the Court of Appeal made clear that there were two related issues to be determined. Insofar as the assessment of the counterfactual

outcome was concerned, what a claimant would have done had to be resolved by the professional negligence judge as a finding of fact on the balance of probability. In general, what other interested parties would have done would be assessed as a percentage chance, that percentage falling somewhere between zero and 100. However, even this relatively simple guidance gave rise to a number of issues, some of which I will discuss below. One of those issues concerns the extent to which a court should try out a disputed issue which would have been open to resolution in the underlying transaction litigation. Another concern is the extent to which evidence coming into existence or obtained after the date of putative judgment or agreement can be taken into account by the Court.

3. The *Allied Maples* test seemed to have suffered significant damage by reason of the decision of the Court of Appeal in *Perry v Raleys*, the leading judgement being delivered by Gloster LJ. However, the Supreme Court granted permission to appeal and judgment was delivered last March and is reported at [2019] UKSC 5. That judgment reflects not only a return to orthodoxy but also a real emphasis on the importance of evidence.

4. *Perry* was one of the numerous cases arising out of the miners' Vibration White Finger compensation scheme which was created by the government following British Coal's unsuccessful defence of a group liability action in the late 1990s. The compensation scheme was created to provide an assessment of damages on a remarkably rough and ready formulaic system intended to save the government money. It can fairly be said that it failed in that ambition. In addition

to an award of general damages calculated by reference to the scale of the particular miner's disability determined by a remarkably superficial examination, that scaling also generated a rebuttable presumption that, if the claimant miner had undertaken various household services prior to the onset of VWF, he would be unable to continue them without assistance thereafter and would be entitled to be compensated in respect thereof. Many miners did not seek services awards. A number of practices identified these potential claims as a significant profit-making opportunity and a substantial number of claims were intimated and made. Mr Perry's case involved one of these claims.

5. At the trial the judge rejected the evidence of Mr Perry and members of his family. As a result of inconsistencies in account given to various doctors and other official bodies over the years together with entries on social media platforms he concluded that, notwithstanding that the advice provided by the solicitors was inadequate, Mr Perry had suffered no loss because he was unable to establish, on the balance of probabilities, that if properly advised he would have made a successful services claim. The judge concluded that Mr Perry would have acted honestly and not pursued a claim to which he was not entitled.

6. In the Court of Appeal, the judges comprehensively rejected the trial judge's findings. They were positively dismissive of his reliance on social media entries amongst other things. They held that the judge had misapplied the law and had reached erroneous findings of fact. He was roundly criticised for having conducted a "trial within a trial", a phrase which has received a great deal of

consideration over the years and a somewhat nebulous concept which judges have been quick to disparage.

7. The Supreme Court has in turn reversed the judgement of the Court of Appeal. As to the facts, it was clearly satisfied that, notwithstanding that their recent judgments had recited, on more than one occasion, the limited basis on which an appellate court can interfere with findings of fact of a trial judge, the Court of Appeal had not properly applied the law which it had recited. The Supreme Court also reversed the legal criticisms made by the Court of Appeal. The Court of Appeal had concluded that the trial judge was in error insofar as he placed the burden of proof of loss upon Mr Perry. This was in many ways the most striking part of the Court of Appeal's judgement and had significantly extended the evidential presumption set out by an earlier Court of Appeal in *Mount v Barker Austin* [1998] PNLR 493. The Supreme Court made it clear that the burden of proving loss always falls upon the claimant in such a claim.

8. The Supreme Court judgment, delivered by Lord Briggs JSC, is of importance in our field in a number of respects:

    i. It emphasises that a claimant bringing a claim seeking damages ordinarily bears a burden of proving loss on the balance of probabilities.

    ii. The full force of that obligation is departed upon only in circumstances where its application would produce "an absurd result" of which the prime example is where what has been lost is an outcome with a substantial but uncertain prospect of

realisation, be that litigation or some form of transaction. Another important example may be where it would be unfair to place the burden upon the claimant because, due to the passage of time or some other reason, key evidence has become unavailable without any fault on the part of the claimant. Nevertheless, the claimant still bears the obligation of proving a loss and doing so by reference to evidence rather than mere speculation: see Bryan J in *AssetCo plc v Grant Thornton* [2019] EWHC 150 (Comm).

iii. It emphasises very clearly the importance of identifying those of the issues pertaining to the failed outcome, be it litigation or transaction, which should be the subject of a full judicial investigation. He made it clear that there are a number of matters in professional negligence claims which will require a comprehensive investigation with all the adversarial rigour of a trial. Clearly, if a claim has been struck out for delays such that it is no longer able to conduct such a claim fairly, the judge in the professional negligence action will not attempt to undertake a comprehensive investigation and adjudication which has already been ruled impossible. On the other hand, if an issue turns upon expert evidence alone and all of the material which the experts would have considered remains fully available for the purposes of the professional negligence trial, it may be anticipated that the judge will conduct a far more intensive examination, albeit that he may still conclude that the claimant had a relatively low percentage prospect of establishing his claim. As a result, the

judgement in *Perry* suggests that at a professional negligence trial much of the available evidence which goes to the prospects for the underlying litigation or transaction will be paraded before the judge. It will no longer be enough for a claimant to deprecate the conduct of a "trial within a trial".

iv. It emphasised the presumption of innocence. However, in this context, this does not mean that a court presumes innocence. What it means is that the court will presume that the claimant would have acted honestly and will not reward a claimant who does not. In the words of Lord Briggs, "the court simply has no business rewarding dishonest claimants". Thus, the judge having concluded that Mr Perry did not have a meritorious services claim was not placed in a position in which he had to assess the possibility that the assessment organisation would have made award in any event.

9. On the whole, well-known existing authorities were approved. In *Mount v Barker Austin*, Simon Brown LJ in the Court of Appeal had made clear that where a claimant had been deprived of a claim part or all of which could not now be fully investigated by reason of the solicitor's negligence, the court would adopt a generous approach to the claimant's evidence. Thus, *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920, was not a case of the court rewarding an arsonist, as it has sometimes been described. In fact, on proper analysis because of the solicitors' negligence it was impossible for a court to fairly try Mr Hanif's claim. Indeed, there was no pleaded allegation that he was himself an arsonist. The

trial judge therefore had to form an assessment as to the prospects for Mr Hanif's claim, on a generous basis but knowingly in the absence of the totality of the evidence. On that basis the court considered that Mr Hanif's prospects of success were low but not insignificant. The court had no option but to take the route which it did.

10. One of the interesting issues carried forward by *Perry* is the decision of the Supreme Court in *Dixon v Clement Jones* [2005] PNLR 6. The claim in *Dixon* was made against a firm of solicitors. They had acted on behalf of the claimant in a claim against a firm of accountants which had been struck out for delay. The accountants defence had asserted, inter-alia, that the claimant would not have acted upon the advice with which she alleged that she ought to have been provided by the accountants, and had therefore suffered no loss. The Court of Appeal held that this issue came into consideration at the loss of a chance assessment stage under *Allied Maples* rather than in assessing the claimant's conduct on a balance of probability basis. The matter was not fully argued before the Supreme Court, but it seems clear that, whilst the decision was not disapproved, it was certainly not approved, and the more general comments of Lord Briggs might suggest that it is now of very limited authority, if any.

11. The process of working out loss of a chance claims will be the subject of further consideration by the Supreme Court, sitting in Cardiff next month. The case of *Edwards v Hugh James* [2018] EWCA Civ 1299 was yet another miner's compensation scheme professional negligence action. In this case, pursuant to the standard directions for cases of this type, Mr Watkins (subsequently

deceased and represented by his daughter Mrs Edwards as executor) had been examined by a consultant vascular surgeon, Mr Tennant. Whilst Mr Watkins had earlier been the subject of the standard form VWF assessment which concluded that his disability was at a level which gave rise to the rebuttable presumption that he was entitled to a services claim, Mr Tennant's examination, as joint expert for the professional negligence claim, concluded that Mr Watkins' disability was at the lowest level and that he had never qualified for such a claim. On that basis the trial judge concluded that Mr Watkins had already recovered from the compensation scheme a sum in excess of that to which he was truly entitled and had thus suffered no loss.

12. In the Court of Appeal, the judges approached the matter as one of causation rather than loss. They determined that the question was, what loss has Mr Watkins and his estate suffered, rather than whether the solicitors' negligence had caused any loss at all.

13. Once again, the Court of Appeal felt itself able to significantly interfere with the trial judge's findings. It is right to say at the outset that Irwin LJ, who delivered the leading judgement, understandably placed significant reliance upon the then recent judgment of Gloster LJ in *Perry*. He started by assuming a loss. He rejected the trial judge's entitlement to take into account the assessment made by Mr Tennant and indeed criticised the report of Mr Tennant on various bases which had never been advanced before the trial judge, and some of which were in fact inconsistent with agreement between the parties.

14. In giving permission to appeal, the Supreme Court made express reference to the principal found in the decision of the House of Lords in *The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Co* [1903] AC 426, in which, in determining damages flowing from a statutory interference with the colliery, the House determined that the relevant arbitrator was entitled and obliged to take into account all information to hand at the time of making his award. As stated by Lord McNaughton, "*why should he listen to conjecture on a matter which has become an accomplished fact? Why should it guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?*". This principle has been followed on numerous occasions subsequently but in the professional negligence field has proved problematic. The most striking case is that of *Whitehead v Searle* [2009] 1 WLR 549. In that case the solicitors' negligence had caused the claimant's case to be struck out for want of prosecution. It was a very sad case involving failure to detect spina bifida, a so-called "wrongful birth" claim. In the original claim the mother sought her losses arising out of her need to provide care to the child and this was pursued against the solicitors. Before the professional negligence trial was heard, the claimant mother committed suicide. The trial judge had awarded damages on the basis of the full compensation which would have been available at the time the original action ought to have been heard, disregarding the death. The Court of Appeal reversed this approach. They considered that the assessment of damages on this basis would provide a windfall for the estate and that the professional negligence court should assess damages on the basis of its knowledge of the actual period over which the mother had provided care.

15. The Court of Appeal in *Edwards* has effectively crystallised the professional negligence claim at the time the alleged services entitlement would have been sought and potentially paid. They accepted that "subsequent" evidence could be admissible under certain circumstances but imported a new threshold of "scale" before such evidence should be admitted. Given that the evidence in the present case effectively reduced the claim to zero, it must be assumed that they meant that evidence should be admitted in large claims but not in small. The Supreme Court's approach to this should become apparent over the course of the summer.

16. Three cases subsequent to *Perry* are also of interest albeit only first instance. In *Hanbury v Hugh James* [2019] EWHC 1074 (QB), Yip J was considering a professional negligence claim against solicitors arising out of an asbestosis claim which had not been pursued. Mr Hanbury had worked in industries exposing him to asbestos for much of his working life. Following his death from lung cancer a post-mortem report recorded high levels of asbestos in his lungs. His family retained solicitors to investigate a potential claim and pursue it, if available. The claim was not without difficulties. Some at least of the potential defendants were uninsured. A consultant chest physician was instructed but, crucially, was not informed of, or provided with, the post-mortem report. He concluded that there was insufficient evidence to attribute Mr Hanbury's fatal cancer to asbestos exposure. He concluded that, on the balance of probability the cancer was due to cigarette smoking. As a result, the claim was abandoned.

17. Reading the judgment in *Hanbury* it is impossible not to have a great deal of sympathy with all concerned. The particular solicitor who dealt with the matter clearly got himself into considerable difficulty in the witness box and liability was conceded during the course of the trial. Matters got worse for the defendant's team. The defendant's engineer's evidence was so bad that the judge rejected his evidence in its entirety. The judgment is of considerable value in reminding even the most experienced practitioners of the need to carefully monitor expert's witness's reports in case they exceed their brief. Interestingly, the judge, whilst reviewing *Perry* appears to have played down the extent to which she felt able to resolve issues which might have arisen had Mr Hanbury's claim proceeded. Her approach to the valuation of the lost chance is also interesting. She was clearly highly conscious of the need to be alert to double discounting but not only applied a discount of 25% in respect of litigation risk but then applied a discount of a further 20% to provide a settlement figure which she concluded was that which would have been obtained. It is certainly the case that, if a judge is satisfied that litigation would have led to a settlement at a figure less than the full value of the award which would have been obtained at trial, it is that lesser figure which is relevant in assessing loss: see *Somatra Ltd v Sinclair Roche & Temperley* [2003] Lloyd's Rep 855. However, Yip J does not identify this as her reasoning and it would be surprising if she felt able to reach such a conclusion without a clear recital of its basis.

18. The correct approach to assessing the likely outcome of the underlying dispute has also been considered by Freedman J in *Moda International Brands v Gateley LLP* [2019] EWHC 1326. The case involved a joint enterprise property

development scheme. The claimant alleged that the solicitors had failed to bring to his attention alterations to the underlying agreement which deprived him of a significant additional profit opportunity. At the trial of the professional negligence issue the solicitors called the underlying counterparty's director to give evidence that he would never have agreed terms such as those for which the claimants contended. Having concluded that the solicitors were negligent, the trial judge declined to accept the evidence of the director as Hurley determinative of the value of the chance lost. Whilst the evidence was admissible, the individual had come to court reluctantly, subject to a witness summons and having declined to provide a witness statement. The judge concluded that his evidence was "detached" from the case, that he was irritated at being involved and that he was generally uncooperative in giving his evidence. The judge also recognised that the court had not had access to full disclosure from the counterparty because it was not a party to the proceedings. As a result, the judge stated that he could not rely upon the director's evidence confidently and that an "all or nothing" balance of probabilities test would accordingly produce an absurd outcome or, or at least, a potential injustice. In the event, the claimant recovered 22.75% of the full value of the investment for which it contended. It seems probable that the impact of such third-party evidence will very much depend upon the precise circumstances and the judge's assessment of that evidence, as with any other evidence.

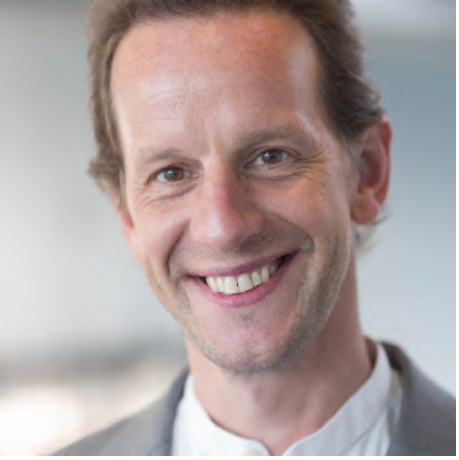
19. The final recent case which merits attention in this area is *Wairaich v Ansari Solicitors* [2019] EWHC 1038 (Comm), a decision of HHJ Pearce, sitting as a Deputy High Court Judge in Manchester. The defendants had acted for the

claimant in respect of a potential claim against another firm of solicitors. The claim had arisen out of the alleged misconduct of an application for indefinite leave to remain in the UK. A sum of over £800,000 was sought, including loss of earnings on behalf of the claimant and his wife. The judge found that the solicitors had provided negligent advice and that a small element of the damages claim was made good. However, he concluded that, overall, the claim had no value because the claimants would have pursued an unrealistic and, at least in part, dishonest claim to trial so that any very modest amount of damages which would have been recovered in the underlying action would have been "swallowed by their own irrecoverable costs or conceivably an adverse costs order".

20. What can be stated with some confidence is that this is an area of law which is of the utmost importance to the cases with which we deal on a regular basis. The recent decisions have demonstrated how a number of difficult issues fall to be played out. Insofar as any overarching policy change can be discerned there appears to have been a move away from a position in which the *Mount v Barker Austin* presumption has been overstated in practice to one in which the court has paid more attention to the broader merits of both the underlying litigation or transaction and the resultant outcome. It has to be accepted that these are extremely fact-sensitive, but it is also the case that the authorities already demonstrate the need to identify the relevant issues with clarity and, as emphasised by Lord Briggs in *Perry*, to bring appropriate evidence before the court. The decision in *Edwards* may tell us how extensive that evidence can be.

Jago Russell
Fair Trials

"Legal Advice and Representation in Criminal Cases: Professional Negligence as a Tool to Advance Quality and Remedy Failure"



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Jago has been the Chief Executive of Fair Trials since September 2008. Before joining Fair Trials, he worked as a policy specialist at the human rights charity Liberty and worked as a Legal Specialist in the UK Parliament, assisting the Human Rights, Home Affairs and Constitutional Affairs Select Committees.

Jago is a qualified solicitor and has published and lectured widely on a range of criminal justice and human rights issues.

The Right to a Fair Trial:

Fair trials are the only way to prevent miscarriages of justice and are an essential part of a just society. Every person accused of a crime should have their guilt or innocence determined by a fair and effective legal process. But its not just about protecting suspects and defendants. It also makes societies safer and stronger. Without fair trials, victims can have no confidence that justice will be done. Without fair trials, trust in government and the rule of law collapses.
The right to a fair trial is not new; it has long been recognised by the international community as a basic human right. Despite this, it's a right that is being abused in countries across the globe with devastating human and social consequences.

Despite the importance of fair trials being recognised by the international community, this basic human right is being abused day-in-day-out in countries across the globe. We're working to put an end to these abuses, towards realising our vision of a world where every person's right to a fair trial is respected.

PNLA Conference – 19th June 2019
Jago Russell

Legal Advice and Representation in Criminal Cases: Professional Negligence as a Tool to Advance Quality and Remedy Failure

Fair Trials (www.fairtrials.org) works globally to advance the human right to a fair trial. This right which has long been recognised by the international community but, in practice, is being abused in countries across the globe with devastating consequences.

Given the complexity of the criminal law and proceedings, and the severe consequences of conviction, defendants require competent legal advice and representation to protect their fair trial rights. Sadly, in practice, many criminal defendants are failed by their lawyers.

This presentation will explore this challenge and consider what role professional negligence might play as a means of redress and as a mechanism for advancing effective legal representation. It will address the following themes:

Context:

- Defining quality legal representation in criminal cases
- The importance of quality defence representation, including case examples and evidence of systemic failures
- The right to effective legal assistance, including international human rights standards and the standards required by the US Constitution

Remedies – protecting the right to a fair trial:

- What is an effective remedy from the perspective of a defendant? What remedies are most effective in encouraging competence?
- Preventing incompetence before the damage is done – practical challenges.
- Quashing the conviction - caselaw of international human rights courts, the US Supreme Court and courts in Scotland and England & Wales – and practical and legal challenges.

Professional negligence:

- The practical and legal challenges/limitations of professional negligence claims and their potential to inspire competence.

David Pipkin & David Chase
Temple Legal Protection

"Litigation Funding Update"

David Pipkin
Director
Underwriting Division

temple
legal protection

David has spent over 30 years as a Legal Executive specialising in personal injury litigation. Initially, he was a claimant litigator pursuing leading industrial accident and disease cases.

As an Associate at Davies Arnold Cooper for over a decade he managed a team of lawyers and acted for defendants in personal injury and general insurance litigation. In this role, he became involved in the early development of the ATE market, assisting the ABI in their involvement in the Court of Appeal test cases such as Callery v Gray. As the London representative for FOIL he was involved in the liability insurers' approach to ATE and worked with the government and judiciary in several key consultations. He was a member of the CILEX National Council for over 15 years and was CILEX President in 1995/6.

This diversity of experience means that he brings an exceptional knowledge of the practice of law and the management of a law practice to Temple's customers. His hands-on involvement at a high level of both sides of legal disputes means that he is able to give our customers advice beyond an expert evaluation of the probability of success of a case.

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David Chase
Deputy Underwriting Manager

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David is the Deputy Underwriting Manager in Temple's Commercial Department who partners with solicitors and brokers to provide litigation (ATE) insurance and funding solutions to businesses and individuals.

Having started his career in ATE insurance in 2006 at FirstAssist, David gained experience in litigation funding as an analyst at Burford Capital, before joining Temple Legal Protection in late 2013.

He has extensive and varied experience in risk analysis, case management and long-term relationship management. One of David's specialisms is his management of our fully-delegated schemes, a responsibility which plays an integral part in the retention of Temple's partnerships with many leading and specialist commercial law firms.

In his role as Deputy Underwriting Manager, David considers a very wide variety of non-injury litigation including all types of commercial litigation, group actions, professional negligence cases, insolvency actions and contentious probate.
He combines strategic activities – evaluating developments such as the impact of ADR on the commercial litigation sector – with expert underwriting.

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PNLA
Professional Negligence
Lawyers Association

Notes: -

Robert Wright
Head of Civil Litigation Funding & Costs
Ministry of Justice

"Post-Implementation Review of Part 2 of LASPO – 7 February 2019"

Ministry of JUSTICE

Robert Wright

Head of Civil Litigation Funding and Costs

Robert will speak about the recent review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which assesses the impact of five statutory reforms implemented following Sir Rupert (then Lord Justice) Jackson's 2010 Review of Civil Litigation (civil litigation costs and funding).

Ministry of Justice

Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Civil litigation funding and costs

February 2019

CP 38

Ministry of Justice

Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Civil litigation funding and costs

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

February 2019

CP 38

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Any enquiries regarding this publication should be sent to us at:

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Contents

Executive Summary

1. Part 2 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) implemented the recommendations in Sir Rupert Jackson's 2010 *Review of Civil Litigation Costs* with the aim of reducing the costs of civil litigation while maintaining 'access to justice at proportionate cost'.[1] This Post Implementation Review (PIR) assesses the impact of the five statutory reforms:
   i. non-recoverability of conditional fee agreement (CFA) success fees;
   ii. non-recoverability of after the event insurance (ATE) premiums;
   iii. the introduction of Damages-Based Agreements (DBAs);
   iv. section 55 changes to Part 36 offers; and
   v. banning referral fees in personal injury (PI) cases.

2. The statutory reforms in Part 2 of LASPO were implemented on 1 April 2013. The reforms were not implemented at the same time for the following categories of case, which are therefore excluded from this review: claims for mesothelioma; insolvency proceedings; and defamation and privacy cases.[2]

3. Stakeholders had a range of opportunities to contribute to this PIR. Stakeholder engagement included a seminar hosted by the Civil Justice Council on 29 June 2018, meetings MoJ officials held with stakeholders from summer 2017 to November 2018 and an online survey which led to 155 responses. In general terms, the responses were anecdotal and limited evidence was provided. Nevertheless, claimant representatives were generally consistent in their views, as were defendant representatives, although there were large areas of disagreement between the two groups. An initial assessment was published[3] which sought to give stakeholders a preliminary assessment of the reforms and a steer as to the issues on which the Ministry of Justice (MoJ) particularly welcomed comment.

4. The Part 2 reforms had five objectives:
   i. Reducing the costs of civil litigation (**Objective 1**)
   ii. Rebalancing costs liabilities between claimants and defendants (**Objective 2**)
   iii. Promoting access to justice at proportionate cost (**Objective 3**)
   iv. Encouraging early settlement (**Objective 4**)
   v. Reducing unmeritorious claims (**Objective 5**)

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[1] Sir Rupert Jackson, 'Review of Civil Litigation Costs: Final Report', https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (December 2009), p. 2.

[2] See section 1.2 for further details.

[3] See Annex A.

Stakeholder feedback on the five statutory reforms

Reform 1: Non-recoverability of CFA success fees (section 44[4])

5. Success fees for CFAs were made non-recoverable generally, and capped in PI cases. The majority of respondents, including claimants, accepted that this change had reduced costs (**Objective 1**) although there were a handful of calls to repeal the primary legislation.

6. Claimant lawyers expressed concern that success fees were deducted from damages reducing net damages. It was said that this had led to a need to adapt PI services (when considered along with the introduction of fixed recoverable costs for low-value PI claims), while defendants said that this reform had reduced and rebalanced the costs of litigation (**Objectives 1 and 2**). There was anecdotal evidence that claimant lawyers and barristers now looked for higher prospects of success than prior to LASPO when assessing a case contributing towards **Objective 5.**

Reform 2: Non-recoverability of ATE insurance premiums (sections 46 and 47[5])

7. ATE insurance was considered an expensive form of costs protection and was made non-recoverable[6], but there is an exception for the recoverability of ATE premiums for clinical negligence expert reports, which relate to causation and liability.

8. Claimant lawyers argued that the costs of ATE premiums can be prohibitive to bringing a case particularly in areas where damages are relatively low. There were mixed views about the impact of non-recoverability of ATE insurance. One ATE insurer said the ATE market continues to operate well and had never been so competitive while another said they had noted changes in claimant behaviour which included cases being insured at a later stage. It was suggested that similar volumes of ATE insurance are being purchased as prior to LASPO, especially to cover the 'Part 36 risk' (under Part 36 of the Civil Procedure Rules (CPR) and the cost of disbursements.

9. In relation to the continued recovery of ATE insurance premiums for clinical negligence claims, claimant lawyers argued that this was necessary to assess the merits of these cases and that expert reports were a pre-requisite and would be prohibitively expensive without this recoverability. On the other hand, defendants stated that clinical negligence ATE premiums were poor value for money and that there was a lack of transparency about their pricing.

10. Qualified One-Way Costs Shifting (QOCS) was introduced for PI cases at the same time as the Part 2 reforms. QOCS is a form of costs protection which means that normally an unsuccessful claimant does not have to pay a defendant's costs. Stakeholders generally stated that QOCS was working well, but there were issues around the use of 'fundamental dishonesty' by defendants and the late withdrawal of claims by claimants. There were calls for the extension of QOCS to a wider range of cases including professional negligence, actions against the police, housing disrepair, discrimination, private nuisance and judicial reviews to improve access to justice.

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4 http://www.legislation.gov.uk/ukpga/2012/10/section/44/enacted

5 http://www.legislation.gov.uk/ukpga/2012/10/section/46/enacted; http://www.legislation.gov.uk/ukpga/2012/10/section/47/enacted)

6 Section 46 does not apply in claims for mesothelioma or privacy and defamation cases.

Defendants argued that an extension of QOCS was not necessary or desirable and risked an increase in unmeritorious claims.

Reform 3: Introducing Damages Based Agreements (DBAs) as a funding method (section 45[7])

11. DBAs were introduced as a funding method for civil litigation to increase funding options. This makes DBAs an alternative 'no win, no fee' agreement to CFAs, which are well used in damages claims. Under a standard DBA lawyers are not paid if a case is lost but the lawyer may take a percentage of the damages awarded to their client as their fee if the case is successful. There was a consensus amongst all stakeholders that DBAs are rarely used and the regulations needed improvement to increase clarity and confidence in the use of DBAs as a funding method.

12. Commercial lawyers particularly strongly argued for the use of 'hybrid DBAs' which would allow DBAs to be combined with another form of funding agreement so that the lawyer can be paid a fee even if the case is unsuccessful; it was argued that these would be particularly useful in high-value complex claims. Some commercial lawyers argued that hybrid DBAs could address a lack of flexible funding options, which was putting England and Wales at a competitive disadvantage as an international centre for dispute resolution although no evidence was provided to support this, and contrary views were expressed.

Reform 4: Changes to Part 36 offers (section 55[8])

13. Stakeholders were generally supportive of Part 36 but had mixed views about the effectiveness of Part 36 offers. Claimant lawyers welcomed the additional 10%[9] uplift on damages where a defendant fails to beat a claimant's offer, but it was argued that this should be increased or should be extended to apply where an offer is accepted late. However, many stakeholders also agreed that no further substantive changes should be made to the Part 36 regime for some time to allow it to settle properly.

Reform 5: Banning referral fees in PI cases (sections 56-60[10])

14. Stakeholders were supportive of the principle of the referral fee ban for PI cases. However, there was some concern about the effectiveness of the ban and its enforcement as there were suggestions that similar behaviour continues under different guises such as marketing fees. However, stakeholders did not offer any suggestions on how this could be addressed.

Data Analysis

15. The PIR sought to use evidence and data wherever possible. Recently published independent analysis by Professors Fenn and Rickman has been very helpful in assessing the impacts of the Part 2 reforms (summarised in Chapter 10: Data

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7 http://www.legislation.gov.uk/ukpga/2012/10/section/45/enacted

8 http://www.legislation.gov.uk/ukpga/2012/10/section/55/enacted

9 The 10% uplift is set out in the Civil Procedure Rules at CPR 36.17(4)(a) - https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36#36.17

10 http://www.legislation.gov.uk/ukpga/2012/10/part/2/crossheading/referral-fees/enacted

Analysis).[11] Fenn and Rickman analysed substantial samples of PI (excluding clinical negligence) claims over £25k and clinical negligence claims under £250k which concluded within two years both pre- and post-LASPO. Their analysis indicates lower base costs and damages, and reductions in the length of legal proceedings.

16. Although a wide variety of data were assessed for the review there were limitations in terms of quality and level of detail available. Factors such as changes in court recording mechanisms, the time taken for post LASPO cases to settle, and the potential impacts of other policies all affect ability to quantify impacts with certainty. Nevertheless, the MoJ took a proactive stance in using Government data, published data and invited the submission of evidence along with survey responses to provide insights. The Government's sources, approach to data and the limitations of the available data are explained in greater detail in Chapter 10: Data Analysis.

17. The high level available data on the volumes of court claims suggest that the number of claims has reduced slightly and in a manner consistent with the Government's objective of reducing unmeritorious claims (**Objective 5**), and not to an extent that would indicate a negative effect on access to justice (**Objective 3**).

Conclusion

18. Based on the evidence received as part of the PIR, the Government considers the Part 2 reforms to have been successful in achieving the principal aim of reducing the costs of civil litigation (**Objective 1**). The evidence shows that, in a range of personal injury claims (including clinical negligence claims), costs have reduced significantly (c. 8-10%) and early settlement has also improved (**Objective 4**). A definitive judgement on the impact on unmeritorious claims cannot be made at this time but the claims volumes data, the changes in financial incentives to CFAs, the test of fundamental dishonesty for QOCS and anecdotal stakeholder feedback suggest there has been an overall decline in unmeritorious claims (**Objective 5**). The Government considers that, on balance, the evidence suggests the Part 2 reforms have successfully met their objectives. The Government does not therefore propose any amendments to the primary legislation.

19. Two main areas of concern have been identified in the feedback from stakeholders. The first is that the DBA regulations would benefit from additional clarity and certainty. The Government accepts this argument. It will give careful consideration to the way forward in the light of the outcome of the independent review of the drafting of the regulations, which is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC. Their report is expected later in 2019.

20. The second area of concern is that QOCS (or some other form of costs protection) should be extended beyond PI. There are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection that some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The

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[11] Paul Fenn and Neil Rickman, 'The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012' (January 31, 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326665

Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.

21. Other suggestions for change were proposed to the rules and regulations, as set out in this report. The Government will keep them under review, as it will all aspects of the reforms more generally. While it is not proposing to make immediate changes, it may be that some of these issues are revisited at a later stage.

Chair’s closing remarks and Q&A

Alan McMillan
Partner, Solicitor Advocate
Burness Paull LLP
Edinburgh

"The Commercial Court for you, in practice: a view from the front row - and back in the office"

Q&A

Shantanu Majumdar
Radcliffe Chambers

"Non-Party Costs Orders against Professional Indemnity Insurers"

Practice Areas
Overview
Partnership and Joint Ventures
Trusts
Banking and Financial Services
Commercial Disputes
Company
Insolvency
Professional Liability
International

Shantanu Majumdar | Call 1992

Profile: Overview

In his 20 years at the Bar, Shantanu has practised in most areas known to the law but for over a decade he has specialised in commercial and commercial Chancery litigation, professional negligence and some employment. He thinks very hard about his cases for, as a famous Roman once said: “Grasp the subject matter and the words will follow”.

Experience and Expertise

Shantanu undertakes litigation, arbitration (LCIA, ICC, SIAC, Swiss Rules as well as ad hoc) and advisory work in the following fields:

Commercial: Insurance, sale of goods, financial contracts, agency (inc. Commercial Agents), credit & security, banking & financial services, telecommunications, economic torts, bailment & conversion.

He is ranked as a leading junior in commercial litigation in both Chambers & Partners -"Our go-to counsel on commercial contractual issues" and the Legal 500 - "Superb on paper and a very talented advocate." & "A very good trial advocate with a light touch."

“Highly praised for his forensic talents and ability to handle the most challenging clients.” (Commercial Litigation, The Legal 500, 2019)

"A highly intelligent lawyer, who is excellent in court." (Commercial Litigation, The Legal 500, 2017)

"Very good with difficult clients."

"He's hands-on and a great tactician." (Chambers UK 2018)

Commercial Chancery: insolvency and company, partnership and joint ventures, confidential information, directors and other fiduciaries, trusts.

He is ranked as a leading junior in commercial chancery in Chambers & Partners - "he is very, very good and gets behind the client" and “he has got a really nice courtroom manner, and always comes across as unruffled.”

"Gives sensible and pragmatic advice," and is "highly persuasive." (Chambers UK 2019)

"Great to work with and a go-to barrister for complex chancery work." (Chambers UK 2018)

Fraud from simple deceit to international asset tracing, breach of fiduciary duty, dishonest assistance, fraudulent trading and transactions defrauding creditors.

He is ranked as a leading junior in commercial fraud in the Legal 500 - "Very proactive and commercial" & "After seeing him in court, you would definitely instruct him."

“An excellent advocate, very intelligent and great at drafting.” (Fraud: Civil, The Legal 500, 2019)

"He works tirelessly for his clients and never leaves a stone unturned." (Fraud: Civil, The Legal 500, 2017)

Professional Negligence: Solicitors, barristers, brokers, financial advisers, accountants, insolvency practitioners, surveyors and engineers - with particular expertise in limitation issues.

He is ranked as a leading junior in professional negligence in The Legal 500, noted as being:

- “Produces very persuasive oral advocacy.” 2019
- "An exceptionally talented advocate, who is highly intelligent and very good with clients" 2016
- "Excellent with clients and his preparation is exemplary." 2016
- "Highly intelligent, articulate and knowledgeable"
- With a "phenomenal ability to assimilate detail."
- "Very well respected."

Energy & Utilities: Oil & gas, renewable energy/carbon emission reduction (inc. CERT) and water.

Engineering: from giant water pumps in Wales to boric acid filtration plants in Turkey.

Limitation

Privilege and disclosure/e-disclosure

Conflict of laws: Choice of law / jurisdiction disputes in a wide range of fields.

Emergency interim relief Freezing, anti-suit/anti-arbitration and other injunctions – prohibitory and mandatory; Norwich Pharmacal/Bankers Trust orders; stop orders.

Employment: High Court - wrongful dismissal and other contractual claims, restraint of trade, breach of duty, business secrets & confidentiality.

Cases and Work of Note

- *Various Claimants v Giambrone & Law & others 2010* - acting for c 100 claimants in a claim (negligence, breach of trust and fiduciary duty) against Italian lawyers in relation to their advice to buyers at an off-plan property development in Southern Italy including a 4-week trial of common issues in March 2015, see: [2015] EWHC 1946 (QB).
- *DCD Factors plc v Ramada Trading Limited 2009* onwards - long-running multi-million fraud and guarantee claim by trade financiers/factors, involving worldwide freezing injunctions and over 18 hearings including
    - February 2011 - resisting applications to strike out the claims and discharge freezing injunctions before Burnett J (Lawtel AC0128576
    - *[2012] EWHC 1277 (QB)* - resisting application to vary freezing injunctions before Charles Hollander QC.
    - March 2014, secured judgment against Defendants for over £20 million in long-running fraud and guarantee claim by trade financiers/factors.
    - *[2014] EWHC 1872 (QB)* - April 2015, contested application to renew freezing injunctions post-judgment.
    - *[2015] EWHC 1046 (QB)* - inter-partes oral application for permission to appeal.
- *LCIA Arbitrations Nos 122159, 122160, 122161 – (2013)* acting for a Russian airline in claims under aircraft leases.
- *Philip Hanby Limited v Andrew Clarke [2013]* EWCA Civ 647, [2013] All ER (D) 107 (Jun), Court of Appeal – appeal against partnership arbitration award - judge refused permission to appeal to Court of Appeal - Court of Appeal’s residual jurisdiction under s 16 Senior Courts Act.
- *ASES Havacilik Servis Ve Destek Hizmetleri A.S. v Delkor UK Limited* - Dispute about construction of boric acid filter plant on the Sea of Marmara.
    - *[2012] EWHC 3518 (Comm), [2013]* 1 Lloyd's Rep 254 - challenge to jurisdiction of English arbitrator - nature of s 67 & s 72 challenges - whether submitting “counterclaim” invoked arbitrator’s jurisdiction. (Further details under International profile).
    - *[2012] EWHC 3667 (Comm)* - permission to serve claim form for an injunction under s 44 Arbitration Act out of jurisdiction where no in personam jurisdiction over defendant.
    - *[2014] EWHC 1473 (Comm)* - locus of High Court to interpret its earlier injunction order under s 44 AA 96 where Swiss tribunal alleged to have misunderstood it.
- *Withers LLP v Harrison-Welch [2013]* BPIR 145 (QB) – defended claims to set aside a transaction under s 423 of the Insolvency Act 1986 and non-party costs under s 51 of the Senior Courts Act 1981.
- *FBME Bank v Elwes & Aspin [2012]* EWHC 2209 (QB) – resisted the claimant bank’s

interpretation of the payment terms of a guarantee.

- *Crastvell Trading Limited v Bozel SA [2010]* EWHC 0166 (Comm) – US$15m summary judgment in complex multi-jurisdictional loan litigation involving proceedings in England, BVI, Luxembourg, Florida. (See further details under International profile)
- *Richmond Pharmacology v Dhaliwal – EAT [2009]* ICR 724, [2009] IRLR 336 - leading case on test for racial harassment under 1976 Act.
- *Paulin v Paulin & Cativo Limited (in liquidation) CA [2009]* EWCA Civ 221, [2010] 1 WLR 1057, [2009] 3 All ER 88, [2009] 2 FCR 477, [2009] 2 FLR 354, [2009] BPIR 572

  - IOM liquidators - matrimonial dispute - corporate veil - annulment of bankruptcy -abuse of process.
- *VFS Financial Services Ltd v Euro Auctions & Hennellys Ltd [2007]* EWHC 1492 (QB) - hire purchase - measure of loss in conversion, restitution - contribution between successive convertors - whether liable for "same damage" under Civil Liability (Contribution) Act 1978.
- *Hidrostal Limited v Opperman Mastergears Limited London Mercantile Court [2006]*. Dispute about the failure of gears for pumps supplied to a pumping stations operated by Welsh Water.
- *Peekay Intermark Limited v Australia and New Zealand Banking Group Ltd [2006]* 2 Lloyd's Rep 511 (Court of Appeal), [2005] PNLR 42, Times June 10, 2005 (Comm Court) - Russian derivatives – misrepresentation. Established modern ambit of contractual estoppel.
- *Inter-Tel Inc v OCIS plc [2004] EWHC 2269 (QB), [2004]* All ER (D) 142 (Oct) -Conflict of laws - forum non conveniens - choice of law in tort - Arizona state law. *Eurodale v Ecclesiastical*
- *Insurance Office plc [2003]* Lloyd's LR (Insurance and Reinsurance) 444, Court of Appeal - transit insurance/cover attaching prior to inception of physical transit - typed voyages clause overriding printed Institute Cargo Clauses.
- *Picnic at Ascot v Derigs [2001] FSR 8* - a guideline case on costs in interim injunction applications.

Publications

Books:

The Law of Limitation (Bloomsbury) – editor of the chapters on (1) Contract, (2) Professional Negligence (3) Latent Damage and (4) Fraud, Deliberate Concealment & Mistake

Civil Court Practice ("the Green Book") (Lexis Nexis) – member of editorial board and editor of the chapter on limitation.

Member of the editorial board of Lexis PSL Commercial and author of the Lexis PSL practice notes on limitation and professional negligence.

Articles (including):

An impossible position: fraud claims, solicitors and their fees in Butterworths Journal of International Banking and Financial Law (May 2015)

The Revised LCIA Arbitration Rules 2014 with Georg Scherpf of Luther Rechtsanwaltgesellschaft mbH in Zeitschrift für Schiedsverfahren (SchiedsVZ) - German Arbitration Journal (German Arb. J.). SchiedsVZ 2014, 227. C.H. Beck Verlag.

Entire agreement, non-reliance clauses & contractual estoppel - what do they prevent and how?

Hanby v Clarke: The Court of Appeal's "residual" arbitration appeals jurisdiction under s 16 of the Senior Courts Act 1981.

Aluminium, fish and some unusual collateral: the pitfalls of lending on the security of your own shares - Butterworths Journal of International Banking and Financial Law – July/August 2011 – Robert Tchenguiz's unusual loan arrangements with his Icelandic bankers.

Trust Me – Commercial Litigation Journal, October 2010 – a review of the law relating to limitation and fiduciaries.

To have & have not – New Law Journal (2010) 160 NLJ 348 - Axa Insurance Ltd v Akther:

limitation and professional negligence – the date of occurrence of actual loss. (Cited in Charlesworth & Percy on Negligence 12th Ed)

Insolvency set-off and security: anomaly or principled exception? - Journal of International Banking and Financial Law (2009) 11 JIBFL 652.

Reverse Gear - Part 1 and Part 2 – New Law Journal (2009) 159 NLJ 1015 and 159 NLJ 1053 – *Paulin v Paulin & Cativo Ltd*: a judge's jurisdiction to change his mind between judgment and order - the test on an application to annul a bankruptcy on the debtor's own petition.

A matter of some interest – New Law Journal NLJ (2008) 158 NLJ 435 – the requirement of insurable interest in non-indemnity insurance.

Seminars

17 June 2015 "Cross-Examination in International Arbitration" an advocacy workshop organized by DIS40 (the young arbitrators' initiative of the German Institute of Arbitration) and held at the offices of CMS Hasche Sigle in Hamburg.

5-6 May 2014 "Forgiveness before and after the event - the position of trustees" at the Chancery Bar Cayman Conference 2014 on relief for breach of trust under s 61 of the Trustee Act 1925.

16 May 2013 IQPC's 8th Information Governance and eDisclosure Summit with Tom Spencer, Senior Counsel at GlaxoSmithKline on "Managing eDisclosure Costs: The Jackson Reforms and their Implications for Corporations".

27 June 2012 A US/UK judicial seminar on technology in e-disclosure hosted by Epiq Systems with Senior Master Whitaker, US Magistrate Judge Andrew Peck and Bob Lewis MBE, Global Director of CFI/eDiscovery, Barclays
http://www1.axisto.co.uk/webcasting/investis/epiq/epiq-panel-debate/

Read Shantanu's Privacy Notice, Data Protection Policy and Disposal Policy.

"Non Party Costs Orders against Professional Indemnity Insurers"

Shantanu Majumdar, Radcliffe Chambers

Shantanu Majumdar| Call 1992

"*Highly praised for his forensic talents and ability to handle the most challenging clients.*" (Commercial Litigation, *The Legal 500 UK Bar 2019*)

In his first few years at the Bar, Shantanu practised in most areas known to the law, once even cross-examining a police officer in the Court of Appeal. For the past 20 years he has specialised in commercial and commercial Chancery litigation and arbitration and professional negligence. He thinks very hard about his cases for, as a famous Roman once said: "Grasp the subject matter and the words will follow". Shantanu undertakes litigation, arbitration and advisory work in the following fields, much of it of an international nature involving foreign parties and/or foreign law and/or foreign proceedings.

Commercial Disputes

He receives instructions from firms of UK solicitors ranging from City firms to sole practitioners as well as in-house counsel. He is also instructed by or has worked with law firms abroad, most recently major firms in Germany, Switzerland, Austria, Cyprus and Russia.

He also advises and prepares pleadings, written arguments and (where English law is in issue) expert evidence in relation to litigation in foreign jurisdictions.

He has advised or acted in arbitrations (domestic and international) under various institutional rules as well as *ad hoc*.

He is ranked as a leading junior in commercial litigation in both *Chambers UK Bar* and the *Legal 500 UK Bar*.

His experience includes insurance, sale of goods and supply of services, agency (including Commercial Agents Regulations), credit and security, equipment leasing (including commercial aircraft), bailment and conversion, joint ventures, banking, financial services and financial contracts, as well as:

- Fraud in all its manifestations from simple deceit to international asset tracing, breach of fiduciary duty, dishonest assistance, fraudulent trading and transactions defrauding creditors
- Telecommunications (contract)
- Energy & Utilities: He has advised and acted in cases involving oil and gas, renewable energy/carbon emission reduction (including CERT) and water
- Limitation: the English Limitation Act and analogous foreign limitation laws
- Conflict of laws: Choice of law and jurisdiction disputes in a wide range of fields in both litigation and arbitration
- Emergency interim relief: Freezing, anti-suit/anti-arbitration and other injunctions – prohibitory and mandatory; Norwich Pharmacal and Bankers Trust orders; stop orders.

Professional Liability

Shantanu acts for and against solicitors, barristers, insurance brokers, financial advisers, accountants, insolvency practitioners, surveyors and engineers and has a particular expertise in associated questions of limitation.
He is ranked as a leading junior in professional negligence in *The Legal 500 UK Bar 2019*, which describes him as producing *"very persuasive oral advocacy"*.
His recent work includes the following:

- *Various Claimants v AIG Europe Limited* [2019] EWHC 34 (QB) – Obtaining s 51 (non-party) costs order against the liability insurers of the defendants in professional negligence claims

- *Bateson v Fruhman Davies Livingston & Another* – Acting on the instructions of Bar Mutual, defending senior chancery counsel against a complicated claim by a former client for allegedly negligent advice in relation to an unfair prejudice petition under s 459 of the Companies Act 2006

- *Various Claimants v Giambrone & Law & others* (2010 onwards) - Acting for c. 100 claimants in a claim (negligence, breach of trust and fiduciary duty) against Italian lawyers in relation to their advice to buyers at an off-plan property development in Southern Italy in the High Court ([2015] EWHC 1946 (QB); [2015] EWHC 3315 (QB)) and the Court of Appeal [2017] EWCA Civ 1193, [2018] PNLR 2

Recognition

- *"Gives sensible and pragmatic advice." "Highly persuasive."* (Chancery: Commercial, *Chambers UK Bar 2019*)
- "*Highly praised for his forensic talents and ability to handle the most challenging clients."* (Commercial Litigation, *The Legal 500 UK Bar 2019*)
- *"Produces very persuasive oral advocacy."* (Professional Negligence, *The Legal 500 UK Bar 2019*)
- *"An excellent advocate, very intelligent and great at drafting."* (Fraud: Civil, *The Legal 500 UK Bar 2019*)
- *"He's hands-on and a great tactician." "Very good with difficult clients."* (Commercial Dispute Resolution, *Chambers UK Bar 2018*)
- *"Great to work with and a go-to barrister for complex chancery work."* (Chancery: Commercial, *Chambers UK Bar 2018*)
- *"A highly intelligent lawyer, who is excellent in court."* (Commercial Litigation, *The Legal 500 UK Bar 2017*)

- *"He's hands-on and a great tactician when handling class actions"* (Commercial Dispute Resolution, *Chambers UK Bar 2017*)

- *"He's got a really nice courtroom manner, and always comes across unruffled."* (Chancery: Commercial, *Chambers UK Bar 2017*)

- *"He is great to work with and a go-to barrister for complex chancery work. He is extremely good with difficult clients."* (*Commercial Dispute Resolution*, Chambers UK Bar 2016)

- *"Very suave and confident, he expertly outmanoeuvres his opponents and always appears to have the upper hand."* (Chancery: Commercial, *Chambers UK Bar 2016*)

"Non Party Costs Orders against Professional Indemnity Insurers"

- Shantanu Majumdar, Radcliffe Chambers

1. In what circumstances may (or should) a liability insurer become liable to pay the adverse costs of litigation to which it is not a party? As with so many (but not all) questions, this is easier to pose than answer.

2. Section 51 of the Senior Courts Act provides as to "Costs in civil division of Court of Appeal, High Court and county courts" that

> "(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

3. Since the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk, The Vimeira (No 2)* [1986] AC 965, it has been clear that the words "by whom" in section 51 include non-parties.

4. The relevant rule is now CPR rule 46.2(1) ("Costs orders in favour of or against non-parties"):

> "(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must—
>
> (a) be added as a party to the proceedings for the purposes of costs only; and
>
> (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

5. Neither the rules nor any practice direction provides any guidance as to the exercise of the jurisdiction and it is thus a discretion which is peculiarly at large. This is no doubt in part because the range of circumstances in which an order might be sought (and made) is so various. Such general guidance as is possible is instead to be found in the cases.

6. Before turning, briefly, to what these say, it is worth noting that the Court of Appeal has expressed some caution about the use of precedent in this field:

    a. *Petromec Inc v Petroleo Brasileiro SA Petrobras [2006] EWCA Civ 1038 [2007] 2 Costs LR 212*:

        i. Longmore LJ said (at [11]) that

            > "There is a danger that the exercise of the jurisdiction to order a non-party to proceedings to pay the cost of those proceedings becomes over-complicated by reference to authority."

        ii. Laws LJ said (at [19]) that

            > "I would wish to emphasise my agreement with his statement at para 11 that the exercise of this jurisdiction becomes over-complicated by reference to authority. Indeed I think it has become overburdened. Section 51 confers a discretion not confined by specific limitations. While the learning is, with respect, important in indicating the kind of considerations upon which the court will focus, it must not be treated as a rule-book".

    b. *Deutsche Bank AG v Sebastian Holdings Inc [2016] EWCA Civ 23 [2016] 4 WLR 417*, Moore Bick LJ said (at [62]) that:

        > "As all three members of the court observed in Petromec, the exercise of the discretion is in danger of becoming over-complicated by authority.
        > ...
        > Thus, the Privy Council has explained that an order of this kind is "exceptional" only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.
        > ...
        > We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind."

7. Turning to the guidance given by the authorities, there are (currently) two seminal appellate cases.

8. The first was *Symphony Group plc v Hodgson* [1994] QB 179 the Court of Appeal identified what have proved to be enduring principles as to the exercise of the s 51 jurisdiction. So far as relevant, these were that

    a. An order for the payment of costs by a non-party is exceptional: "The judge should treat any application for such an order with considerable caution."

    b. It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings.

    c. The Applicant should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him.

    d. An application for payment of costs by a non-party should normally be determined by the trial judge.

    e. The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias.

    f. Section 51 is a summary procedure, not necessarily subject to all the rules that would apply in an action.

    g. the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings.

    h. The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action.

9. The other case is the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807. In summary, it decided that

    a. "exceptional" means only "outside the normal run of cases";

    b. "pure funders"[1] will not normally be liable

    c. where, however

        > "the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs."

    d. The non-party need not be the only real party to the litigation "provided that he is "a real party in … very important and critical respects"

    e. A major consideration will often be the reason for the non-party causing a party, often an insolvent company, to bring or defend the proceedings. If a non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person.

    f. Approving *dicta* in *Arklow Investments*:

        > "The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued."
        >
        > "… the overall rationale [is] that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail."

    This could be described as a principle of "reciprocity"

[1] *ie* "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". *Hamilton v Al Fayed (No 2)* [2003] QB 1175 at 1194.

The insurer cases

10. Neither of these cases involved applications for costs against liability insurers. There is, however, a significant body of such cases and they are conveniently (if controversially) considered by the Court of Appeal in its decision in *Travelers Insurance Co Ltd v XYZ* [2018] Lloyd's Rep IR 636:

    a. *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12;

    b. *Citibank NA v Excess Insurance Co Ltd* [1999] 1 Lloyd's Rep IR 122;

    c. *Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398;

    d. *Palmer v Palmer* [2008] EWCA Civ 46, [2008] Lloyd's Rep IR 535 and

    e. *Legg v Sterte Garage Ltd* [2016] EWCA Civ 97, [2016] Lloyd's Rep IR 390.

11. Travelers' position was that these cases established that

    a. a liability insurer who funds an unsuccessful defence by its insured will only be liable under section 51 if the evidence establishes that the insurer controlled the litigation in its own interest, and without paying appropriate regard to any inconsistent or contrary interest of its insured;

    b. in such a case it is appropriate to regard the insurer as the real party such that an order under section 51 can properly be made;

    c. if this criterion is not established, then no order under section 51 should be made.

12. The Court of Appeal rejected this submission, Lewison LJ saying this:

> "I do not consider that these cases, with the possible exception of *Citibank*, lay down a series of conditions which must be fulfilled before a costs order can be made against insurers, such that if they are not fulfilled an exercise of discretion against insurers must be wrong."

As for *Citibank*, Lewison LJ considered that, to the extent that it did purport to do so, it was wrong.

13. The question of non-party costs orders against liability insurers will only usually arise where there is coverage issue. *Travelers* was a product liability claim in respect of which there were multiple claims against a manufacturer – Transform - subject to a GLO. Some were insured by Travelers (197) and some were not (426) although the fact that there was no insurance was not disclosed to the claimants until a late stage.

14. An order was made for the trial of preliminary issues in 4 sample cases. 2 of the 4 sample cases were, as it turned out, uninsured claims. Under the terms of the GLO, costs incurred in dealing with issues common to all claims were to be shared equally between all claimants on the GLO register. That would have included both insured claimants and uninsured claimants. However, their liability for and entitlement to costs was expressly stated to be several rather than joint.

15. Transform went into insolvent administration and in the light of expert evidence which was adverse to the claimants' claims, the *insured* claims were settled by an agreement under which Travelers agreed to pay an agreed proportion of the damages and costs attributable to those insured claims. Those costs were the proportion of the common costs attributable to the insured claims calculated by dividing the amount of the costs in question by the number of insured claims relative to the total number of claims on the register. Thus Travelers paid approximately 20 per cent of the common costs.

16. The uninsured claimants incurred very little by way of their individual costs; the costs for which they were potentially liable under the GLO were their proportion of the common costs incurred in progressing the four sample cases but these were not recovered (or realistically recoverable) from the insolvent Transform.

17. The uninsured claimant therefore applied for an order that Travelers pay their costs of the claims.

18. This application succeeded before the judge and was upheld by the Court of Appeal. The latter did not regard itself as constrained by the facts and outcomes of the previous insurer cases. The Court took the view that Travelers both funded the defence and stood to benefit from a successful outcome and was therefore squarely within the principle in *Dymocks.* The Court also considered that the principle of reciprocity required Travelers to pay the uninsured claimants' costs in circumstances where, amongst other things, if Travelers had become entitled to its costs it would have expected to be paid its costs by uninsured as well as insured claimants. It was a matter of accident that the test cases comprised a mixture of insured and uninsured cases, whereas Traveler's expectation when concluding the contract of insurance would have been that it would be liable to pay all of the adverse costs of an unsuccessful defence.

19. That decision is the subject of an appeal to the Supreme Court (which was in fact heard last week on 11 June).

<u>Giambrone</u>

20. This is a case with a long and unfortunate history.

21. It relates to money paid by hundreds of British and Irish buyers in 2007 and 2008. for the purchase of about 600 holiday properties on the Calabrian coast – Jewel of the Sea ("JOTS"). This was meant to be complete by June 2009 but most of it is incomplete and indeed the last building work was done prior to 5 March 2013 when the site was seized by the Guardia di Finanza (the Italian financial police) on the alleged grounds that the developer RDV – supposedly a creature of the local mafia the 'Ndrangheta – had collaborated with the Irish promoter, VFI, to launder the proceeds of IRA drug trafficking through the Jewel of the Sea development.

22. The claimants sued the Italian lawyers (practising in England and Italy) who had acted for them in these transactions

23. After a 4-week trial ([2015] EWHC 1946 (QB)) and then summary judgment application ([2015] EWHC 3315 (QB)) in 2015, the claimants succeeded in the Court of Appeal in 2017 ([2018] PNLR 2).

24. Giambrone's insurers, AIG, have paid neither damages/equitable compensation nor costs. This is because there is a coverage dispute about the right to aggregate claims which, if AIG is right, would mean that it has already paid out the total sum insured under the policy in respect of "any one claim".

25. In 2018 we applied for a non-party costs order against AIG under s 51 of the Senior Courts Act 1981.

26. After a predictably complicated (4-day) hearing,

    a. Mr Justice Foskett (the trial judge) exercised this "summary" jurisdiction and ordered AIG to pay half of our costs of the proceedings (see [2019] EWHC 34 (QB) [2019] 4 WLR 7).

    b. He refused AIG a "leapfrog" certificate permitting an application to appeal directly to the Supreme Court in order to seek conjoinder with the appeal in *XYZ v Travelers*.

    c. The Court of Appeal then gave AIG permission to appeal, dismissed that appeal on the papers but then, on AIG's request, revoked that dismissal.

    The appeal is now due to be heard in January 2020, after the decision of the Supreme Court in *Travelers* is given.

27. In Giambrone, the key features were that

    a. AIG had settled all previous Jewel of the Sea cases.

    b. They needed the permission of the insureds ("Giambrone") to do so but this was readily forthcoming whilst AIG was indemnifying claimants in respect of damages and costs.

c. A dispute as to AIG's right to aggregate claims arose between it and Giambrone. Given that claims continued to be made in respect of Jewel of the Sea, the prospect of uninsured losses arose.

d. Once the limit of indemnity was finally eroded, AIG would have no liability to indemnify the Giambrone against the costs of defending further claims.

e. In February 2013, AIG and Giambrone entered into Heads of Terms (the "HOTS") which had 2 material effects

   i. It agreed a compromise basis of aggregation which made further money available to settle claims but nowhere near enough money substantially to compensate many more claims.
   ii. In return for establishing this basis of aggregation, AIG agreed to fund the defence of claims even after the exhaustion of the (revised) indemnity limit *ie* it agreed to fund defence costs beyond the terms of the policy albeit subject to an exception:

> "that AIG shall be entitled to withdraw funding for Defence Costs in respect of the Aggregated Claims in the event that it reasonably considers that there is no realistic prospect of defending the claim and on the basis that such Defence Costs are not or would not be reasonably incurred."[2]

f. All of the clients' claims were made after the conclusion of the HOTS and, therefore, the defence of their claims took place pursuant to its terms.

28. As to the conduct of that defence the Judge said a number of things:

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[2] AIG's evidence was that
"The reason that AIG agreed in the HOTS to fund defence costs even after the exhaustion of the indemnity limit was in order to settle the aggregation dispute with the Giambrone Partners. Under the HOTS, AIG obtained the agreement of the Giambrone Partners to aggregate the claims (albeit on a compromise basis) and, in exchange, the Giambrone Partners obtained the right to receive defence costs notwithstanding the erosion of the indemnity limit."

> “I would have thought that any reasonably well-informed layman would have regarded the way the litigation was conducted on the Defendants' side from the point of view of the costs position as unbalanced and, at first blush, unfair.”
>
> "As I observed in paragraph 10 of the main judgment, almost every issue raised by the Claimants was "hotly contested". A few matters were conceded during the trial, but all major issues were fiercely fought by the Defendants. The revelation of some of the "without prejudice" material indicates that the Defendants had little confidence in success on many of the major issues, but nonetheless the proceedings were fought and no admissions or concessions were made on the principal issues that formed the subject matter of the trial. That position was maintained throughout the trial even though many individual claims had been settled prior to the hearing."
>
> "All this is only relevant to the proposition that a very great deal of the time at the trial was spent in litigating issues about which there appears no longer to be a dispute and about which there was little confidence of success prior to the trial. Notwithstanding that situation, I am being asked to award the Defendants the costs of the trial."
>
> “every possible point was taken on behalf of the Defendants and such concessions as were made were made very late and made only when the position being maintained hitherto was plainly untenable. The objective observer, which I was for this purpose, could readily conclude that this was a war of attrition…”

29. RPC was jointly retained by AIG and Giambrone to defend the claims and AIG separately instructed Kennedys to act for it on the question of coverage.

30. Giambrone did not consent to the waiver of its joint privilege with AIG and so the Court was not able to see various communications which were said to show who exercised control over the litigation, but it was asserted that

> "AIG certainly did not adopt or pursue a strategy of delay or a policy of making life difficult for the Claimants."

Our position was that somebody had clearly done so and that the Judge should assume that it was Giambrone and that AIG had effectively permitted it to conduct the defence in this way.

31. Ultimately, the Judge decided that AIG's involvement was sufficiently exceptional to justify the making of a non-party costs order. He did so, essentially, for two (cumulative or alternative) reasons. Both related to the fact and effect of the HOTS agreement which, the Judge held, was an agreement from which AIG had derived a commercial benefit namely an agreed basis on which it could aggregate claims against Giambrone.

32. In return for that agreement, AIG had agreed to fund defence costs outside and beyond the terms of the policy and AIG had relinquished control over how that defence was conducted either because it could not or, alternatively, did not exercise such control. In either case, the effect was that

> "on a broad impressionistic basis from the vantage point of being the judge who presided over the trial. Avvocato Giambrone had a more or less free hand in dictating the tactics of the trial and I have little doubt that he did just that."

33. The additional/alternative basis was that pursuant to the exception in the HOTS, AIG had been entitled to withdraw defence funding but had not done so. There was a number of reasons for this conclusion:

    a. the wholesale settlement of all previous JOTS cases;

    b. the fact that prior to trial AIG had offered to settle the claims on the basis of 80%, 90% and then 100% of the deposits paid by the claimants (subject of course to the resolution of any dispute as to aggregation);

    c. this, striking passage, in a letter from Kennedys to Avvocato Giambrone after the trial but before the appeal:

> "It may well be that on a proper analysis AIG could have taken the position at an earlier stage to withdraw defence costs. However, it elected not to do so thereby giving you the maximum opportunity to defend the claims being made against you …"

The existence but failure to exercise a right to withdraw funding was especially significant because it was a vital part of AIG's defence of the s 51 application that it did no more that it was contractually obliged to do and, indeed, that as soon as it was entitled to stop funding Giambrone's defence it did so.

34. When it came to causation, it was our primary case that since AIG had offered 80% of the deposits within a few months of concluding the HOTS, the judge was entitled to conclude that AIG was, at all material times, entitled to withdraw funding and should be liable for all of the claimants' costs subject to some discount to reflect those (much lower) costs which would have been incurred in any event.

35. He decided, recognising that he might be acting generously towards AIG, that it should liable for half of the claimants' costs of their claims, to be assessed if not agreed.

36. There were of course many more aspects and complexities of the Giambrone s 51 application than there is time to discuss in this talk but, in any event, in the context of such a fact-specific jurisdiction they can be of only anecdotal interest.

Conclusion

37. So what is the law when it comes to s 51 applications against liability insurers?

38. The inevitable, but unsatisfactory, answer is that time will tell. It depends in the first place on what the Supreme Court decides in the *Travelers* appeal and, to some extent, what the Court of Appeal decides in the *Giambrone v AIG* Appeal next year.

39. It is unlikely to be the law that liability insurers are ordinarily to be held liable to pay costs on a non-party basis merely because they discharged a liability to defend their insured's under the relevant policy.

40. This is so, despite the fact that a liability insurer always has its own interest in or potential benefit from funding such a defence (*viz* eliminating or minimising its liability to indemnify in respect of damages).

41. Rather less clear is what else/more an insurer will have to do (or not do) in order to be held liable? It will involve its having stepped outside of the usual insurer role, but that is probably merely to restate the question!

42. In Giambrone, the key factor in support of the imposition of exceptional liability was the HOTS, by which AIG entered into a commercial agreement for its benefit which was made after it was abundantly clear

    a. that its insured's involvement in the JOTS development was disastrous and

    b. that there were many more claims than could be compensated even under the enlarged indemnity limit that the HOTS' agreement as to aggregation made available.[3]

43. AIG therefore knew exactly what it was getting into, but made a commercial decision to fund nonetheless both *in* the HOTS but also subsequently when (as the Judge held and AIG anyway seemed to believe) it had but decided not to exercise a right to cease funding.

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June 2019

[3] Unlike the usual situation where the policy is entered into before the claims are made.

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Crown Office Chambers

"Expert stunts"

Daniel Shapiro QC

Call 1999 • QC 2019

"Insurance Junior of the Year"
(Chambers UK 2016)

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Daniel Shapiro QC is recognised as “ferociously bright” with “beguiling advocacy skills”. He has extensive trial and appellate advocacy experience in a wide range of commercial litigation, appeals and arbitrations. “Technically excellent” and “top-quality”, Daniel is recognised for his cross-examination skills and his abilities in legally novel claims, such as removing expert witness immunity in Jones v Kaney.

Daniel’s courtroom skills, commitment and commerciality result in his instruction in complex cases for and against a wide range of commercial parties, insurers and professionals and across his practice areas. Clients appreciate his tactical awareness, clear advice, and commitment to delivering a first rate service. Daniel always seeks the effective commercial solution to disputes and regularly acts for clients in successful mediations, round table meetings and other forms of ADR.

Commercial

Daniel advises, litigates and acts in arbitration in relation to commercial agreements for clients both within and outside the jurisdiction. Daniel regularly advises and litigates in claims arising out of SPAs, joint venture agreements, distribution agreements, commission agreements, agency agreements and agreements in relation to business start-up. Daniel regularly acts in respect of agreements between insurers and/or insurance brokers.

Selected Cases

- **Confidential proceedings arising out of an SPA** – Daniel acts for the vendor of a substantial business in disputes arising out of the SPA.
- **AmTrust v TRG [2014] EWHC 3912 (Comm) & [2014] EWHC 4169 (Comm) & [2015] EWCA Civ 437; [2015] 2 Lloyd’s Rep 154** – Daniel acted for an Italian insurance broker in a dispute concerning brokerage commission.
- **Global Draw v IGT [2014] EWHC 2973 (Comm)** – Daniel acts for the vendor of a video gaming company in respect of various claims arising out of the SPA.
- **Grup v Philips** – Daniel acted for Grup, a Turkish distributor of baby products, in relation to the

termination of an exclusive distribution agreement for baby feeding products.

- **Paratus v Connells** – Daniel acted for Paratus in this matter concerning the proper construction or rectification of a settlement agreement.
- **LCP Holdings v Hombergh Holding BV** – Daniel acted for the Defendant in the dispute in relation to the acquisition of a global steel business.
- **Zoran Stoyanovich v Brompton's Auctioneers Ltd** – Daniels acts for the defendant in this dispute concerning the sale of fine musical instruments.
- **RRT Holdings Establishment v Shafique [2012] EWHC 860 (Comm)** – Daniel acted for the successful claimant in this dispute between two Formula 1 Agents in relation to driver fees.
- **Dhanani v Crasnianski [2011] EWHC 926 (Comm); [2011] 2 All ER (Comm) 799** – Daniel was instructed for the successful defendant in relation to a significant dispute concerning the potential creation of a private equity fund which was the subject of a two week trial before Teare J. Daniel was led by Roger Ter Haar QC.
- **Ogilvie v Hiscox (2010)** – Daniel acts for Ogilvie in a claim against insurers. He successfully resisted an application to stay a Commercial Court claim under the Arbitration Act notwithstanding an express arbitration clause.
- **The Buncefield Incident** – Between May 2006 and February 2011 Daniel was been heavily involved in the litigation arising out of the explosion at the Buncefield Oil Terminal in Hertfordshire. With Michael Harvey QC, Daniel advised Total UK Ltd and Chevron, the shareholders in a joint venture, Hertfordshire Oil Storage Ltd, in relation to issues where there was no conflict between them. Latterly, when Total was found to be liable, he continued to be instructed to advise Total on such issues.
- **BP v Total UK Ltd** – Daniel acted, with Michael Harvey QC, for Total in relation to a claim in excess of £30,000,000 brought by BP arising out of the Buncefield explosion.
- **Shell v Total UK Ltd** – Daniel acted, led by Michael Harvey QC, for Total in relation to a claim in excess of £200,000,000 brought by Shell arising out of the Buncefield explosion.
- **Blackstone v Total UK Ltd** – Daniel acted, with Michael Harvey QC, for Total in relation to a claim in excess of £75,000,000 brought by part of the Blackstone property group in relation to a private equity investment in a large regional distribution centre, known as "Mammoth".

Energy & Natural Resources

Daniel has extensive experience in the TCC, arbitration and adjudication in relation to energy claims and construction. He spent five years acting for HOSL, Chevron and latterly Total in matters relating to Buncefield. He is regularly instructed on insurance issues arising out of energy matters. Recently he has acted in a significant number of cases involving wind farms (both onshore and offshore) and offshore oil platforms. He is experienced in disputes concerning the negligence of construction professionals including surveyors, engineers, architects and project managers. He is often instructed in insurance disputes arising out of construction contracts. He appears regularly in the TCC in flood and fire claims, including the effective case management of some 124 claims arising out of the Buncefield Incident before Ramsey J.

Daniel accepts appointments as an adjudicator and is a TECBAR accredited adjudicator. He has acted for both employers and contractors in adjudication. He is a TECBAR accredited Adjudicator and accepts appointments as Adjudicator in all types of construction dispute.

Daniel is the Assistant Editor of *Emden on Construction Law* and the author and editor of the chapter in Emden: "Formation of the Contract, Mistake and Misrepresentation".

Selected Cases

- **Trenchless** – Daniel acts in relation to a construction and insurance dispute arising out of microtunnelling under railways.
- **Confidential adjudication proceedings** – Daniel acted in relation to one of the world's largest offshore wind farms leading Richard Sage and Caroline McColgan.
- **Confidential adjudication proceedings** – Daniel acted in relation to the steel decking and structure of a luxury London hotel.
- **Confidential arbitration proceedings** – Daniel acted in confidential arbitration proceedings concerning defective wind turbines.

Insurance & Reinsurance

Daniel is an insurance and reinsurance specialist. He regularly acts for and advises insured's, insurers and reinsurers in respect of the operation and effect of insurance and reinsurance policies. Daniel acts for insurance brokers and other insurance intermediaries in defending professional negligence claims. Clients appreciate his clear advice. The quality of his insurance practice is recognised by the directories and winning Insurance Junior of the Year at the Chambers & Partners Bar Awards 2016.

Daniel acts in litigation involving all non-marine and many marine policies. He has particular expertise in insurance matters related to his other areas of practice, dealing with professional indemnity, CAR, property damage, public liability, products liability, business interruption and building warranty policies. He is often instructed in developing areas of insurance law such as cyber risks or where wording is evolving. Much of the litigation he is instructed is highly complex in involves complex technical evidence or the interaction of foreign law or programmes of insurance or multiple insurance policies.

In addition to his work as an advocate, Daniel is instructed in foreign proceedings as an expert witness to English insurance law. He is also jointly instructed by insurers and insureds to provide binding opinions or early neutral evaluations to determine issues between parties efficiently and accurately.

Selected Cases

- **Dalamd v Butterworth Spengler [2018] EWHC 2558** (Comm) – Daniel defended Butterworth Spengler against a claim for insurance broking negligence arising out of property damage, business interruption and CAR policies. Daniel led Mek Mesfin.
- **Spire Healthcare v RSA** – Daniel acted for Spire at first instance ([2016] EWHC 3278 (Comm); [2016] 2 C.L.C. 1002; [2017] Lloyd's Rep. I.R. 118) and in the Court of Appeal ([2018] EWCA Civ 317; [2018] Lloyd's Rep. I.R. 425) in respect of the limits and the proper meaning and effect of an alleged aggregation clause.
- **Prezzo v High Point Estates** [2018] EWHC 1851 (TCC); [2018] L. & T.R. 30. The application and scope of the principle in Berni Inns to a leaseholder leasing only part of a building.
- **Peel Port v Dornoch Ltd** [2017] EWHC 876 (TCC); [2017] B.L.R. 382; [2017] Lloyd's Rep. I.R. 374: Daniel acted in this dispute in respect of pre-action disclosure of a solvent insured's insurance policy.
- **C v GL** – Confidential Arbitration in respect of multiple waste recycling plants.

- **AmTrust v TRG** [2014] EWHC 3912 (Comm) and [2014] EWHC 4169 (Comm) and [2015] EWCA Civ 437; [2015] 2 Lloyd's Rep 154 – Daniel acted for an Italian insurance broker in a dispute concerning brokerage commission.
- **AJ Buckley v Quinn** – Daniel acted for AJ Buckley in proceedings claiming an indemnity under a professional indemnity insurance policy.
- **Confidential arbitration proceedings** – Daniel acts for professional indemnity insurers in arbitration proceedings.
- **Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289; [2015] Lloyd's Rep IR 661; & [2015] EWHC 2834 (Comm); [2015] 5 Costs L.R. 813** – Daniel acted for the Greek producing broker in respect of a claim in respect of a yacht hull and increased value insurance policy.
- **Brit UW Ltd v F&B Trenchless Solutions Ltd [2015] EWHC 2237 (Comm); [2016] Lloyd's Rep IR 69** – Daniel acted for the insured tunnelling contractor where insurers were seeking to avoid their public liability insurance.
- **Lorman v Allianz** Daniel acted for insurers in respect of a building warranty insurance policy.
- **Fullflow v (1) Newline, (2) Abacus** – Daniel gave expert witness evidence to the Cour d'Appel de Fort de France as to English insurance law in respect of a public and products liability policy and a professional indemnity policy.
- **Proceedings in the High Court of Mumbai** – Daniel acts for the London market insurance brokers in respect of a terrorism reinsurance policy.
- **British Waterways v Royal & Sun Alliance [2012] EWHC 460 (Comm); [2012] Lloyd's Rep IR 562** – Daniel acted for British Waterways in its successful claim for cover under its motor insurance policy in relation to the death of two independent contractors.
- **Burdon-Cooper v Lockton** – Daniel was instructed on behalf of the placing insurance broker in respect of a professional indemnity policy.
- **Cornish v Markel** – Daniel acted for the Claimants seeking indemnity under an IFA's professional indemnity Policy.
- **Confidential arbitration proceedings** – Daniel acted for insurers in relation to a significant claim arising out of oil rigs inthe Gulf of Mexico.
- **Confidential arbitration proceedings** – Daniel acted for a captive insurer in relation to an inwards insurance claim and an outwards reinsurance claims in respect of property damage and business interruption totalling over £150m.
- **Flexsys America LP v XL Insurance Co Ltd [2009] EWHC 1115; [2010] Lloyd's Rep IR 132** – Daniel acted in a claim for indemnity under the provisions of a drop down clause in a global Master Policy based on a local policy governed by Ohio Law.
- **Confidential arbitration proceedings** – Daniel acted for insurers in arbitration proceedings brought by a luxury hotel for business interruption following a fire.
- **Confidential arbitration proceedings** – Daniel acted for insurers in relation to the loss of a prototype robot.
- **Midland Mainline & Others v Commercial General Norwich Union & Others [2004] EWCA 1042; [2004] Lloyd's Rep IR 22** – Daniel was instructed in a £30 million dispute between Train Operating Companies and their business interruption insurers arising out of the aftermath of the Hatfield derailment.

Professional Liability

Daniel is an expert in professional liability litigation. The calibre of Daniel's professional liability practice is recognised in the directories and reflected in the instructions coming to him. Clients appreciate Daniel's clear strategic advice, his experience in fighting professional negligence claims, and his knowledge in the area. Daniel is instructed for and against professionals including:

1. Solicitors and barristers. Daniel acts in claims arising out of the full range of legal work including arising out of litigation and the settlement of litigation, commercial transactions, SPAs, private equity, tax advice, commercial property, conveyancing, Friday afternoon frauds, ancillary relief and crime.
2. Financial professionals, including independent financial advisors (IFAs), financial product providers, mortgage brokers, tax advisors and accountants. Daniel is instructed both in more typical advice claims but also in claims arising out of tax mitigation, financial investments, private equity schemes and audit work.
3. Construction professionals including architects, engineers, structural engineers, M&E contractors, plumbers and electricians.
4. Insurance brokers. Daniel defends insurance brokers in substantial claims and across all areas of insurance. See further his insurance practice.
5. Surveyors and valuers. Daniel frequently acts in substantial claims involving commercial property valuations and investment schemes.
6. Other professionals or quasi-professionals including expert witnesses, nautical engineers, restaurant kitchen designers and fireworks display designers.

Daniel also acts in professional regulatory and disciplinary matters. Daniel is the author of "Mitchell and Denton: injustice and professional negligence claims" P.N. 2014, 30(3), 145-157.

Selected Cases

- **Mayr & others v CMS Cameron McKenna Nabbarro Olswang LLP** and **Spokane v CMS Cameron McKenna Nabbarro Olswang LLP** ([2017] EWHC 3264 (Comm); [2018] EWHC 3093 (Comm); [2018] EWHC 3669 (Comm)) Daniel defended CMS in a very substantial claim arising out of a private equity transaction where the Claimants discontinued and paid CMS' costs after the first week of trial. This was one of the Lawyer's Top 20 cases of 2019.
- **Liddle v Atha** [2018] EWHC 1751 (QB); [2018] 1 WLR 4953 – Daniel acted for Atha in this solicitors' negligence action and on appeal.
- **Dalamd v Butterworth Spengler** [2018] EWHC 2558 (Comm); [2019] P.N.L.R. 6 – Daniel defended Butterworth Spengler against a claim for insurance broking negligence arising out of property damage, business interruption and CAR policies. Daniel led Mek Mesfin.
- **Cayton Law v DWF, Baker Tilley**. Daniel acted for Cayton Law in an experts' and solicitors negligence action.
- **Hamilton-Smith v CMS Cameron Mckenna LLP** [2016] EWHC 1115 (Ch) – Daniel defended a claim by a liquidator against CMS Cameron Mckenna LLP
- **Two groups of claimants v Birchall Blackburn LLP** – Daniel acted for two groups of claimants

claiming losses from the defendant solicitors arising out of the purchase of foreign properties.

- **Wilshire v Churchers** – Daniel acted for the defendant solicitors in a claim arising out of the alleged loss of pension rights in the settlement of ancillary relief proceedings.
- **Involnert Management Inc v Aprilgrange Ltd [2015] EWHC 2225 (Comm); [2015] 2 Lloyd's Rep 289; [2015] Lloyd's Rep IR 661; and [2015] EWHC 2834 (Comm); [2015] 5 Costs L.R. 813** – Daniel acted for the Greek producing broker in respect of a claim arising out of the placing of a yacht hull and increased value insurance policy.
- **Whibley v Strachan, (2) Thompsons Solicitors** – Daniel acted in defence of a Consultant Orthopaedic Surgeon expert witness.
- **Smith v Eversheds (a firm) [2014] EWHC 2622 (Ch)** – Daniel acted for the defendant in a claim for an alleged breach of a solicitors' undertaking.
- **Aylward v (1) Hunt and (2) Sutton** – Daniel was instructed by the Claimant against the solicitor and barrister who represented the Claimant in criminal proceedings.
- **McGuinness v Bank of Scotland** – He was instructed for a buy-to-let purchaser bringing a claim against the valuer for negligent misstatement.
- **Excel v Stevens Scanlan** – He acted for the defendant surveyors in a commercial property valuation claim.
- **BPE & Others v Fox** – Daniel acted for the Claimant against an allegedly negligent medical expert witness.
- **MMR vaccine group litigation** – Daniel was instructed on behalf of the defendant solicitor.
- **Jones v Kaney [2011] UKSC 13; [2011] 2 WLR 823; The Times, 31 March 2011; (First instance: [2010] EWHC 61 (QB); [2010] 2 All ER 649)** – Daniel acted for Mr Jones at first instance and in the Supreme Court in this landmark decision abolishing partial expert witness immunity. The claim was against an expert psychologist who was negligent in the agreement of an expert's joint statement.
- **Leonard v Byrt [2008] EWCA Civ 20** – Acted for the claimants, instructed by the Bar Pro Bono Unit in a claim against a barrister, solicitor and expert metallurgist.
- **Sinclair Roche & Temperley (a firm) v Somatra [2003] EWCA Civ 1474, [2003] 2 Lloyds Rep 855, CA; [2002] EWHC 1627 (Comm)** – Daniel acted for the defendant solicitors in this action arising out of the settlement of a marine insurance dispute.

Product Liability

Daniel has advised upon and litigated various product liability claims involving property damage and/or personal injuries. He acts in relation to a wide range of consumer and commercial products from skin reactions to children's shampoo through to defective brakes on a mid-sized car. Daniel regularly undertakes subrogated claims and advises in relation to cover under product liability insurance policies.

Selected Cases

- **Wheatley v Hit Air**; Daniel is defending the supplier of an equestrian air bag jacket. Daniel is leading Adam Taylor.
- **Hufford v Samsung Electronics (UK) Ltd [2014] EWHC 2956 (TCC); [2014] 1 BLR 634** – Daniel acted for the defendant in respect of an allegedly defective fridge-freezer which it was determined had not caused a fire.
- **AFT** – Daniel acted in respect of a number of actions concerning allegedly defective glue.
- **Renold v Holroyd** – Daniel acted for the Claimant in a claim for damage caused by the non-

operation of a fire suppression system.
- **Inhealth v Cruickshank** – He acted for the Claimant in respect of a fire in an MRI scanner.

Property Damage

Daniel has extensive experience of acting in property damage claims arising out of explosions, fires and floods. He acts for both claimants and defendants, but often in subrogated claims. Daniel was heavily involved in the litigation arising out of the explosion at the Buncefield Oil Terminal in Hertfordshire, representing Hertfordshire Oil Storage, Chevron and latterly Total and was instructed to defend many of the larger or trickier property damage claims. His property damage practice has developed from there, clients appreciating his hands-on approach and willingness to think around problems. Daniel recognises that property damage claims are typically about achieving a recovery efficiently. He is committed to getting the best commercial result for the client.

Selected Cases

- **Hiscox v Precious Marble and TPN Electrical** [2018] EWHC 3585 (TCC). Daniel defended electrical contractors in respect of a claim for property damage arising out of an escape of water followed by a fire.
- **Prezzo v High Point Estates** [2018] EWHC 1851 (TCC). Daniel acted for Prezzo in this dispute as to the application and scope of the principle in Berni Inns.
- **SFS Fire Services v Ashworth Frazer Ltd** – Daniel acted for the defendant in respect of a claim relating to flooding of the archive of the Motor Manufacturers.
- **Hufford v Samsung Electronics (UK) Ltd [2014] EWHC 2956 (TCC); [2014] 1 BLR 634** – Daniel acted for the defendant in respect of an allegedly defective fridge-freezer which it was determined had not caused a fire.
- **York Neuro Imaging (2) The University of York v VPS (UK) Ltd** – Daniel acted for the owners of a
- substantial commercial building in a claim arising out of substantial flooding resulting from the heating and ventilation system.
- **Endeavour drilling** – Daniel acts for a drilling company in a claim arising out of damage to electricity cables.
- **Mood Developments Ltd v VPS (UK) Ltd** – Daniel acted for security service providers in a claim in respect of flooding at a property.
- **CB Transport Refrigeration Limited v Iveco & Others** – Daniel acted in a claim in respect of damage to a commercial damage by fire.
- **A group of 124 different claimants v Total UK Ltd** – Daniel was responsible for the defence of a group of 124 commercial claimants' claims in the Technology and Construction Court across 2009 and 2010.
- **Keystone v Total UK Ltd** – Daniel acted for Total in relation to a claim in excess of £80,000,000 brought by Keystone, the distributor for McDonald's Restaurants in the UK.
- **NPIA v Total UK Ltd** – Daniel acted in relation to the defence of a claim in excess of £12,000,000 brought by the National Police Improvements Agency.
- **West London Oil Pipelines & United Kingdom Oil Pipelines v Total UK Ltd** – Daniel acted for Total in relation to a claim in excess of £200,000,000 brought by the operators of the oil distribution pipelines and terminals feeding Heathrow Airport. The claim involved highly technical evidence as to the appropriate reconstruction of oil terminal and pipeline systems.

- **Triumph Motorcycles** – Daniel was instructed on behalf of Triumph Motorcycles to recover losses sustained in a factory fire caused by a petrol fuelling system.

Sports Law

Daniel has an extensive practice in Sports Law. He has acted in arbitrations and litigation involving current and former professional sports persons and governing bodies in a wide number of sports, including for and against high profile current and former professional footballers, cricketers and rugby union players. His professional negligence practice includes acting in disputes concerning sports agents and in respect of financial advisers to professional sportsmen. He has acted in a number of insurance disputes following career ending injuries, overarching insurance arrangements provided by governing bodies for players, disputes concerning liability and professional indemnity policies, and insurance disputes arising out of sporting events and cancellations. Daniel acts in a wide range of contractual disputes in relation to sports, including agency agreements, appearance agreements and image rights contracts. Daniel appreciates the particular features of the position of a professional sports person and the importance of a swift and discrete resolution to disputes.

Selected Cases

- **RRT Holdings Establishment v Shafique [2012] EWHC 860 (Comm)** – Daniel acted for the successful claimant in this dispute between two Formula 1 Agents in relation to driver fees.

Rankings

- **Winner:** Insurance Junior of the Year, Chambers & Partners Bar Awards 2016.
- **Shortlisted:** Professional Negligence Junior of the Year, Chambers & Partners Bar Awards 2018 and 2012.
- Daniel is recommended in Who's Who Legal, for both Professional Negligence and Insurance and Reinsurance
- Daniel is recommended by Chambers & Partners as a leading junior for Professional Negligence, Insurance, Property Damage and Energy & Natural Resources.
- Daniel is recommended by Chambers Global as a leading junior for Energy & Natural Resources.
- Daniel is recommended by Legal 500 as a leading junior for Professional Negligence and Insurance & Reinsurance.

Qualifications

- CPE / Diploma in Law (Distinction – Inner Temple Bursary 1997), City University (1997 – 1998)
- BA Hons, Merton College, University of Oxford (1994 – 1997)
- George Webb Medley Prize in Economics, Oxford University (1996)
- Merton College Exhibition (1995 & 1996)

Memberships

- COMBAR
- PNBA
- TECBAR

Recommendations

“Daniel Shapiro is “a very impressive and experienced advocate” recognised for his “calm and authoritative court presence”.”
Who’s Who Legal UK Bar 2018

"A barrister already working at silk level, he is extremely quick and very bright, and has an extraordinary courtroom presence. He is a very skilled presenter and cross-examiner."
Chambers & Partners UK Bar 2018

"A very effective and analytical junior," who is "highly tenacious and very energetic."
Chambers & Partners UK Bar 2018

"He is very commercially minded, very bright, cuts through the facts and gets to the issue quickly. He's very good on his feet as well."
Chambers UK 2016

"Quickly identifies the key issues and provides practical and commercial advice."
Chambers UK 2016

"An experienced and effective advocate."
Chambers UK 2016

"He is a very well-rounded senior junior who really gets the bit between his teeth when instructed on a case."
Chambers UK 2015

"He's extremely hands-on and very good at thinking around problems."
Chambers UK 2015

"His tactical abilities are outstanding and he is extremely good with clients."
Legal 500 2015

"He's a savvy advocate. He reads the court well and pitches his arguments well".
Chambers UK 2014

"He is clever and practical. One can work with him flexibly."
Chambers UK 2014

"Ferociously bright and gets straight to the point." "Very responsive and user friendly."
Legal 500 2014

EXPERT STUNTS

RELEVANT MATERIALS

1. This is a note containing Relevant Materials to accompany a seminar, "Expert Stunts" to be given at the PNLA London Conference 19 June 2019.

Expert joint meetings – Rules of the Supreme Court

2. RSC Order 38, rule 38:

"*38. Meeting of experts*

In any cause or matter the Court may, if it thinks fit, direct that there be a meeting "without prejudice" of such experts within such periods before or after the disclosure of their reports as the Court may specify, for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement."

Expert joint meetings – CPR

3. CPR r.35.12:

"*35.12—Discussions between experts*

(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to—

(a) identify and discuss the expert issues in the proceedings; and

(b) where possible, reach agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which—

(a) they agree; and

(b) they disagree, with a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement."

4. Practice Direction to Part 35, paragraph 9:

"*9.1 Unless directed by the court discussions between experts are not mandatory. Parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts' discussion and if so when.*

9.2 The purpose of discussions between experts is not for experts to settle cases but to agree and narrow issues and in particular to identify:

(i) the extent of the agreement between them;

(ii) the points of and short reasons for any disagreement;

(iii) action, if any, which may be taken to resolve any outstanding points of disagreement; and

(iv) any further material issues not raised and the extent to which these issues are agreed.

9.3 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone.

9.4 Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions.

9.5 If the legal representatives do attend –

(i) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and

(ii) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

9.6 A statement must be prepared by the experts dealing with paragraphs 9.2(i) - (iv) above. Individual copies of the statements must be signed by the experts at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 7 days. Copies of the statements must be provided to the parties no later than 14 days after signing.

9.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.

9.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

5. Guidance for the Instruction of Experts to Give Evidence in Civil Claims 2014 paras 77–81:

"*77. Those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions.*

78. The content of discussions between experts should not be referred to at trial unless the parties agree (CPR 35.12(4)). It is good practice for any such agreement to be in writing.

79. At the conclusion of any discussion between experts, a joint statement should be prepared setting out:

a. issues that have been agreed and the basis of that agreement;

b. issues that have not been agreed and the basis of the disagreement;

c. any further issues that have arisen that were not included in the original agenda for discussion; and

d. a record of further action, if any, to be taken or recommended, including if appropriate a further discussion between experts.

80. The joint statement should include a brief re-statement that the experts recognise their duties (or a cross-reference to the relevant statements in their respective reports). The joint statement should also include an express statement that the experts have not been instructed to avoid reaching agreement (or otherwise defer from doing so) on any matter within the experts' competence.

81. The joint statement should be agreed and signed by all the parties to the discussion as soon as practicable."

Expert joint meetings – TCC Guidance

6. Paragraph 13.6 of the TCC Guide, which states that:

"*13.6.1 Following the experts' meetings, and pursuant to CPR 35.12 (3), the judge will almost always require the experts to produce a signed statement setting out the issues which have been agreed, and those issues which have not been agreed, together with a short summary of the reasons for their disagreement. In any TCC case in which expert evidence has an important role to play, this statement is a critical document and it must be as clear as possible.*

13.6.2 It should be noted that, even where experts have been unable to agree very much, it is of considerable importance that the statement sets out their disagreements and the reasons for them. Such disagreements as formulated in the joint statement are likely to form an important element of the agenda for the trial of the action.

13.6.3 Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement."

BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915 (TCC); [2018] PNLR 34, HHJ Stephen Davies 25 July 2018

7. This was a professional negligence claim brought by the claimant national housebuilder, BDW, against the defendant firm of consulting engineers (IGL). The essential complaint was that IGL failed to give proper advice to BDW of the risk that materials containing asbestos (known as "ACMs") might be present within part of a site.

8. In respect of expert evidence it was commented

"*17 Mr Mort rightly complained that it was quite inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement or, for that matter,*

for the solicitors either to ask an expert to do so or to provide input if asked, save in the limited circumstances referred to in paragraph 13.6.3 of the TCC Guide, which states that:

> *"Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement.*
>
> *Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement.*
>
> *Any such concerns should be raised with all experts involved in the joint statement."*

This is consistent with the Practice Direction to Part 35, which at paragraph 9 makes clear that:

(1) The role of the legal representatives in expert discussions is limited to agreeing an agenda where necessary and, whilst they may attend the discussions if ordered or agreed, they must not intervene and may only answer questions or advise on the law.

(2) Experts do not require the authority of the parties to sign a statement, which should be done at the conclusion of the discussion or as soon thereafter as practicable and in any event within 7 days.

18. *What happened here was, I agree, a serious transgression and it is important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means.*

19. *However, it was plain to me having heard him give evidence that Dr Tonks was genuinely unaware that his conduct in this respect was inappropriate. Furthermore, I am quite satisfied that there is no basis for considering that he had modified in any significant way the substance of his opinion as discussed with Mr Waite as a result of his contact with and feedback from IGL's solicitors. My only qualification to that is that I am satisfied that he added to his opinion in section 14 of the joint statement, in relation to the specific issue as to whether or not the investigation undertaken by IGL was a "main investigation" as defined by the relevant Code of Practice (as to which see below), as a result of feedback from IGL's solicitors.*

20. *Nonetheless overall Dr Tonks' evidence seemed to me in the main to be balanced and realistic and I tend to accept his views. In closing submissions Mr Mort contended that Dr Tonks came*

across as a "hired gun", prepared to argue the case and to change his opinion based on what Mr Pritchard said or based on input from IGL's solicitors. He disclaimed however any suggestion that Dr Tonks was not an independent expert witness."

Alexander Mayr, Rouver Investments S.A.R.L, Life Science Partners Limited v CMS Cameron McKenna Nabarro Olswang LLP; Spokane Investments Limited v CMS Cameron McKenna Nabarro Olswang LLP [2018] EWHC 3669 (Comm); Males J (as he then was)

9. Mr Mayr was an advisor to Spokane, a private equity fund. Mr Mayr (via various companies) acquired "LMM" a French pharmaceutical manufacturing plant and business for €1. He advised Spokane LMM was worth €50 million and that it should acquire an 8.5% interest in LMM for €3.5 million, which it did. CMS documented the transaction acting for both parties.

10. There were two particular issues on which there was a need for market and accountancy expert evidence:

    10.1. The LMM issue: what was the value of LMM in 2011 and what would the value have become by the date of trial in 2019. This involved expert evidence as to the French generic pharmaceutical market. The Claimants instructed Prof Kilgallon. The Defendant instructed M. Jean-Michel Peny.

    10.2. The Turkish issue: what were the values of three Turkish companies in 2011 and what would their values have become by the date of trial in 2019. This involved expert evidence as to the Turkish generic pharmaceutical market. The Claimants again instructed Prof Kilgallon. The Defendant instructed Mr Nuri Kilic.

11. Males J stated:

"*2 What happened is that in relation to both aspects of the expert evidence, the LMM issue and the Turkish issue, conventional directions were given. These provided, in accordance with the usual practice of this court, for a sequence of steps. First there was to be an exchange of the experts' initial reports. This would be followed by a joint meeting of the experts in each discipline. Nobody involved in litigation in this court, whether as client, lawyer or expert, can be in any doubt that the court expects and requires the experts at the joint meeting to take a constructive approach, discussing the contents of their report and the issues on which they are required to express their opinions, reaching agreement where they can and setting out concisely where they cannot reach agreement and why they cannot.*

3 That is then recorded in a joint memorandum. It is the experts' responsibility to agree the content of the joint memorandum. This is part of their duty to the court as independent experts and is the basis on which the court gives permission for expert evidence. While the lawyers may properly assist the experts by ensuring that they focus on the issues which the court will need to determine, neither clients nor lawyers have any role in dictating to the experts what they can or cannot agree.

4 It is only once that joint memorandum is produced that there is scope for supplemental reports which are usually described, and were described in the order made on this occasion, as short supplemental reports. The object of those reports is not simply to repeat what has been said the first time around but to engage with the points, hopefully although not always, the narrowed points on which the experts remain in disagreement after their joint meeting. Sometimes the order will spell this out but, even when it does not, this is implicit.

5 What happened in relation to the LMM issue is that reports were prepared by Professor William Kilgallon on behalf of the claimants and Mr. Jean-Michel Peny, on behalf of the defendants. The joint memorandum which they prepared records this at paragraph 4 under the optimistic heading "Areas of agreement":

> *"The meeting of experts did not lead to any further agreement on any of the points addressed in the experts' reports. Each expert continues to fully rely on his own report as a true and accurate statement of his own expert opinions on the issues addressed. However, the situation may change after Professor Kilgallon completes his supplemental report on 21 September 2018, in which case this memorandum can be updated accordingly."*

6 The memorandum then continues in paragraph 7 with 18 numbered points in which on every issue which is raised for discussion Professor Kilgallon gives the following response:

> *"Has not finalised his thinking on this point. He is due to serve a supplemental report by 21 September 2018, by when he anticipates he will have formed a view as to whether he agrees or disagrees with Mr. Peny on this point. If he disagrees, he will at that point be in a position to set out his reasons and to prepare an updated version of this memorandum as per the email from Asserson to Simmons dated 12 September 2018."*

7 Those were the parties' solicitors. That response is then repeated under every issue raised for discussion.

8 In the event a supplemental report was provided by Professor Kilgallon, although the joint memorandum never was updated as had been envisaged by paragraph 4 and there has been no further discussion between the experts on the LMM issue. There was instead a sequential exchange of the supplemental reports. As I say, this is not satisfactory. It means that the essential step in the proceeding of a constructive discussion between the experts has simply not happened.

9 For present purposes that is the background to what has happened in relation to the Turkish expert evidence where again Professor Kilgallon was the expert on behalf of the claimant. This was an issue which was introduced later in the course of the proceedings and as a result the steps relating to expert evidence took place after the LMM evidence had been produced in the way which I have described. Service of the initial round of reports took place on 30th November 2018, a date which I understand was put back to some considerable extent to assist Professor Kilgallon. The experts meeting did not take place until 5th December 2018.

10 When the experts meeting took place there occurred again what Mr. Roger Stewart QC for the defendant described, with some justification in my view, as the same "stunt" as had happened before. The joint memorandum produced, which is dated 11th December, records this at paragraph 1.5:

> *"The meeting of experts did not lead to any further agreement on any of the points addressed in the experts' reports. Each expert continues to fully rely on his own report as a true and accurate statement of his own expert opinions on the issues addressed. However, the situation may change after Professor Kilgallon completes his supplemental report on 21 December 2018."*

11 There is then a statement, item by item, of the opinion of the defendant's expert on this issue, Mr. Nuri Kilic to which Professor Kilgallon on every occasion gave this response:

> *"Professor Kilgallon is considering his response. He is due to serve a supplemental report by 21st December 2018 by when he anticipates he will have formed a settled view as to whether he agrees or disagrees with Mr. Kilic on this point."*

12 *Although the joint memorandum states in these unequivocal terms that Professor Kilgallon anticipated that he would have formed a settled view by 21st December 2018, I am told by Mr. Jonathan Crow QC for the Mayr claimants that this was not intended as an indication that Professor Kilgallon would be in a position to complete his supplemental report by 21st December; it was merely a date which happened to be the date which had been ordered for exchange of supplemental reports. If that is so, I have to say that the statement was thoroughly misleading as well as unacceptably cavalier. In fact I am now told that Professor Kilgallon cannot, for whatever reason, produce his further report until 7th January. That is a very short time before the trial, albeit that the experts on this issue are not due to give evidence until some weeks later, towards the latter part of the trial.*

13 *I do not regard the joint memorandum dated 11th December, only three days ago, or the meeting which it records, as coming close to compliance with the order that the parties' experts should meet and produce a joint memorandum. That is intended to be produced in the way which I have described earlier. When an expert fails lamentably to comply with that order the whole procedure for further expert evidence in the case is thrown into disarray. The purpose of the supplemental reports is to enable the experts to comment on and express their further views upon the points on which they remain in disagreement, having had the benefit of a proper experts' discussion at which they can properly understand the point of view of the opposing expert.*

14 *That has simply not happened in this case. It is impossible for the defendant's expert to say anything further in a supplemental report until he knows what Professor Kilgallon has to say about the matters on which he has expressed his opinion.*

15 *All that the claimants can say in response to this is that the least bad option now is to have sequential exchanges of reports, such as happened in the case of the LMM issue with Professor Kilgallon serving his report on 7th January. Mr. Stewart points out that that is far too late given the preparations for trial which will by then be entering their closing stages with opening written submissions due on 16th January.*

16 *It seems to me that the position is that the claimants have failed to comply with the terms on which they were given permission to adduce evidence of the Turkish pharmaceutical industry in this case. The burden is on them to provide a workable solution which they have not done. It is for them too to apply for relief from sanctions. Again, they have not done so. They would need, if they were to do so, to give a proper explanation of why it is that Professor Kilgallon has taken this approach on not one but two occasions. He must have been told, he certainly should have been told after the LMM expert memorandum was produced, that this was not an acceptable way to proceed.*

17 *The order which I make therefore is that as matters stand the claimants do not have permission to adduce evidence of the Turkish pharmaceutical industry at the trial. The burden will be on them to come forward, as I have said, with a proper and acceptable procedure which will include a proper joint meeting and will meet the criteria of relief from sanctions if they wish to pursue this evidence. If they have simply left it too late to do so in an acceptable way then that is something for which they must take the consequences.*"

DANIEL SHAPIRO QC

10 June 2019

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Highly analytical, very bright and a great asset for the most complex of cases.

- The Legal 500

Neil Hext QC specialises in Insurance / Reinsurance, Professional Negligence, Construction and Commercial Law.

Recognised in the directories as a leading Silk in Insurance and Professional Negligence, he has been described as "*incredibly talented and great to work with*", "*ferociously bright, with an excellent eye for detail*", "*an excellent analyst of claims*" and "*a very effective advocate*" who "*provides clear and business-focused advice*".

Neil is a highly respected trial advocate with an increasing appellate practice. He is at home in arbitration as he is in court, and also sits as an arbitrator.

His insurance/reinsurance practice covers the full range of coverage and policy issues, from material damage and business interruption claims, to public and professional liability and D&O claims. He has a particular interest in construction related insurance, including coverage under design and build policies for contractors and contractors all risks cover. He has significant experience in advising on coverage for historical abuse claims.

In construction and engineering, Neil's recent experience includes a dispute arising out of the construction of a residential tower block in Canary Wharf, a claim arising out of the construction of a international sports stadium, and an adjudication relating to the joint insurance provisions of the NEC3 contract.

Neil's professional negligence practice encompasses insurance brokers, lawyers, construction professionals, accountants, surveyors and other disciplines. He has been in a number of the recent important broking cases. He edits the chapter on surveyors in Jackson & Powell on Professional Liability.

In the commercial field he has particularly expertise in commercial fraud cases, including misappropriation of corporate assets and tracing claims. His practice encompasses the obtaining of urgent interlocutory relief, including freezing injunctions, *Norwich Pharmacal* orders and *Bankers Trust* applications.

Privacy Policy

Click here for a **Privacy Policy** for Neil Hext QC.

Areas of Expertise

Commercial Dispute Resolution

Neil's experience includes disputes arising out of share sale agreements, breach of warranty, commercial property transactions, development agreements, loan agreements, insurance and reinsurance, partnerships, joint ventures, guarantees and performance bonds, contractual construction, breach of fiduciary duty, director's duties, constructive trusts, and misrepresentation.

He has a particular interest in commercial fraud litigation and asset tracing claims, having appeared in

His practice includes an expertise in urgent interlocutory relief, including freezing injunctions, *Norwich Pharmacal* and *Bankers Trust* orders.

He has been described in the directories as "*ferociously bright, with an excellent eye for detail*", his "*judgment is very good in difficult situations*," and he "*provides clear and business-focused advice*".

His cases include:

- *Millharbour Investments Ltd v. Caddick (Mill Harbour) Ltd* (2018) (dispute between developer, purchaser and sub-purchaser relating to construction of residential apartment block in Canary Wharf; whether latent defects cover complied with contractual requirements; operation of long-stop termination provisions)
- *Grenda Investments Ltd v. Barton* [2017] EWHC 2371 (Comm) (£20m claim under loan agreements; oral set-off agreement between related parties; summary judgment application dismissed; case to be managed as part of the multi-party SFO v. Litigation Capital Ltd litigation)
- *Hexglade Ltd v. Cooper* (2017) (£3m fraud allegedly perpetrated by finance director of travel agency business; freezing injunctions and tracing of proceeds into assets in hands of defendant and recipients; section 423 claim in respect of transferred assets)
- *Rollerteam Ltd v. Riley* [2016] EWCA 1291 (CA); [2015] EWHC 1545 (Ch); *Sherlock Holmes International Society Ltd v. Aidiniantz* [2013] EWHC 1381 (Ch) (claim against shadow director for misappropriation of gate proceeds of museum; issues included directors' powers and duties, breach of fiduciary duty, freezing injunctions and misappropriation of corporate assets; dispute subsequently arising out of settlement agreement; applicability of s. 2 Law of Property (Miscellaneous Provisions) Act 1989).
- *Re TPD Investments Ltd* [2016] EWHC 507 (Ch) (third party disclosure application arising from s. 994 petition relating to joint venture company alleging that ownership of company had been wrongly removed from company's control; dilution of applicants shareholding; and debts wrongly allocated to the company).
- *Zurich Insurance plc v. Asons Solicitors Ltd* (2016) (QB) (freezing injunction against solicitors firm arising out of alleged misrepresentation relating to costs claims; claim in deceit, unlawful means conspiracy and restitution).
- *Ambey Capital Private Ltd v. Virgin Infraa Asia Investments Inc* [2014] EWHC 3345 (QB) (freezing injunction arising out of cross-border advanced fee fraud via Cypriot bank accounts allegedly perpetrated by BVI company against Indian conglomerate in relation to funding for Nepali construction project; issues include conspiracy to defraud, misrepresentation, guarantees and restitution).
- *Barclay Pharmaceuticals Ltd v. Waypharm LP* [2012] EWHC 306 (Comm) (a £9m letter of credit fraud arising out of presentation of false invoices and freight forwarder's certificates of receipt; issues included tracing of payments through French SAS, conspiracy to defraud, unlawful means conspiracy, unlawful interference, inducing breach of contract, breach of fiduciary duty, secret profits and restitution).
- *Wirecard Bank AG v. Scott* (2009) (claim by banks for alleged conspiracy to defraud in relation to the supply of Olympic tickets; issues included deceit, conspiracy, constructive trusts, freezing injunctions and a claim under section 15 of the Company Directors Disqualification Act 1986).

Insurance & Reinsurance

"Fantastically detailed and very diligent." "He has a great eye for detail and is able to drill down to the heart of the most complex of cases. Highly intelligent and analytical." – *Chambers & Partners 2019*

Neil acts for both insurers and insureds dealing with the entire range of coverage issues. He has experience that is both broad and in depth, encompassing issues of non-disclosure and misrepresentation, breach of warranty, application of conditions precedent, as

well as aggregation, the Third Parties (Rights Against Insurers) Acts, subrogation and notification of circumstances in claims made policies. His experience includes public liability policies, material damage/business interruption, directors & officers insurance, construction/erection all risks, employers' liability, jewellers block policies and professional indemnity. He regularly advises both insurers and insureds on policy response, including on questions of fraud, and has also advised insurers on drafting of policy terms.

Neil has a particular interest in construction related insurance and advises on design and build cover and contractors all risks policies. He has expertise in the effect of the joint insurance provisions in the standard construction forms and significant experience in the issues that frequently arise as to the width of cover for construction defects following a notification.

He has acted in a number of cases involving claims on financial advisers' liability policies arising out of FCA mandated remediation schemes, dealing with coverage issues, and in particular the threshold for notification of circumstances.

He has particular experience in relation to the arguments that commonly arise in relation to the solicitors' minimum terms, including the meaning and effect of the aggregation clause, and its application to bulk retail practices. He also advises on public/employer's liability cover for historical abuse claims.

Neil regularly acts in insurance broking cases and has appeared in a number of the recent important cases in this area.

He is recognised in Chambers & Partners as a leading Silk in Insurance, *"a silk known for the quality of his advice", "gets to the nub of things very quickly", "he delivers robust, comprehensive and well-formulated commercial advice and products exceptional advocacy"* (Chambers & Partners, 2018); *"technically excellent and a real fighter", "Incredibly bright and hard working, and particularly good on highly technical insurance issues" , "he's an absolutely brilliant teamworker and someone who looks at the detail and picks up points other people would miss"* (Chambers & Partners, 2017); *"ferociously bright, with an excellent eye for detail"* (Chambers & Partners, 2016).

His important cases in this field include:

- *Dalamd Ltd v. Butterworth Spengler Commercial* Ltd [2018] EWHC 2558 (Comm) (claim against insurance broker arising out of fire at waste recycling facility; effect of non-disclosure on variation of composite policy; test for causation in broker's claims; whether balance of probabilities or loss of a chance)
- *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm) (assessment of damages in brokers claim)
- *Channon v. Ward* [2017] EWCA Civ 13 (Court of Appeal; representing broker in £1.8m claim arising out of failure to place accountants' PI cover; whether notional policy would have paid out)
- A £30m claim against insurers arising out of dispute between design and build contractor and employer for alleged defects in the design of a waste processing plant; alleged failure of process to pass reliability testing; whether contractually waste was "acceptable waste"; cause of catastrophic failure of one of main structural members in composting hall (2015)
- *Ocean Finance & Mortgages Ltd v. Oval Insurance Broking Ltd* (2015) (acting for brokers in the context of an £4m claim arising out of alleged failure to make a block notification in respect of sale of PPI products)
- Acting for the Claimants in an arbitration brought under the Third Parties (Rights against Insurers) Act 1930 concerning the aggregation provisions of the solicitors' minimum terms (2015)
- *Homeserve plc v. RSA* (2014) (claim against insurers by financial services provider for costs of remediation exercise mandated by FCA)
- *Jones v. Environcom Ltd* [2010] Lloyd's Rep IR 676 (claim against brokers arising out of fire at waste processing facility; scope of broker's duty to explain duty of utmost good faith; whether insured insurable); [2010] Lloyd's Rep IR 190 (whether insurers seeking negative declaration in relation to cover can obtain security for costs against counterclaiming insured)
- *Dedames v. NFU Mutual* [2009] EWHC 2805 (non-disclosure and affirmation)
- *Mopani Copper Mines plc v. Millennium Underwriting Ltd* [2009] Lloyd's Rep IR 158 (significance of deletions to construction of reinsurance slip)

Professional Liability

"Has a real grasp of the issues right away." *– The Legal 500, 2019*

Neil's practice in this area focuses on lawyers, brokers, construction professionals, accountants and surveyors. He deals with all aspects of lawyers' liability, from solicitors' negligence to vicarious liability for fraud. He has been instructed on a number of high value and complex cases, including claims arising from the purchase of a football club, an alleged conspiracy to appropriate copyright material, and a US hedge fund's finance of a property development in Pakistan.

His work in the context of brokers dovetails neatly with his insurance practice, with claims frequently being brought against both insurers and the brokers. His experience here encompasses the brokers' duty to obtain insurance that meets the insured's needs, to ensure that the insured understands its duty of utmost good faith, and to explain relevant exclusions, warranties and conditions precedent. It also includes the difficult causation and scope of duty issues that can arise where breach of duty is established. He has acted in a number of the recent important cases in this area.

He has considerable expertise in relation to disputes arising from tax mitigation schemes, having been involved in litigation over the Evolution and other film finance schemes. He has dealt with numerous professional liability cases with a tax element, acting for or against lawyers, accountants and financial advisers. He has also had significant experience in the management of group litigation.

Neil's practice also includes claims against construction professionals and accountants. He recently acted for the Claimants in a €40m claim against accountants and solicitors. He acted for actuaries in a €30m claim arising out of the purchase of a pension fund.

He edits the chapter on surveyors in Jackson & Powell on Professional Liability.

His cases include:

- *Dalamd Ltd v. Butterworth Spengler Commercial* Ltd [2018] EWHC 2558 (Comm) (claim against insurance broker arising out of fire at waste recycling facility; effect of non-disclosure on variation of composite policy; test for causation in broker's claims; whether balance of probabilities or loss of a chance)
- *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm) (assessment of damages in brokers claim)
- *Channon v. Ward* [2017] EWCA Civ 13 (Court of Appeal; representing broker in £1.8m claim arising out of failure to place accountants' PI cover; whether notional policy would have paid out)
- *Ocean Finance & Mortgages Ltd v. Oval Insurance Broking Ltd* (2015) (acting for brokers in the context of an £4m claim arising out of alleged failure to make a block notification in respect of sale of PPI products)
- acting for the Claimants in group litigation brought against a firm of solicitors, and subsequently in arbitration against insurers, alleging failures in the advice given regarding an equity release scheme (2015)
- *AW Group Ltd v. Taylor Walton* [2014] EWCA Civ 592 (Court of Appeal; solicitors: acting for respondent solicitors in appeal against dismissal of claim arising out of purchase of industrial estate)
- *Community Gateway Association Ltd v. Beha Williams Norman Ltd* [2011] EWHC 2311 (TCC) (defending housing consultant in £16m claim arising out of transfer of local authority housing stock)
- *Jones v. Environcom Ltd* [2010] PNLR 27 (brokers: claim for failure of broker to explain duty of utmost good faith; whether insured insurable)
- *Berry v. Laytons* [2009] EWHC 1591 (solicitors: claim for negligent advice on Commercial Agents Regulations)

Construction & Engineering

Neil is frequently instructed in cases that have a construction or engineering element. He has significant experience of mastering the technical issues that arise, and quickly assimilates the detail. He is used to dealing with the complex contractual arrangements that apply, such as those relating to delay, variation, termination, completion and acceptance standards.

His experience includes litigating and advising upon the effect of the joint insurance provisions in both the JCT and NEC standard forms.

His cases include:

- Advising on dispute arising out of EPC contract for the construction of a power plant in the Middle East (2018)
- Acting in dispute relating to insurance cover of subcontractor in £multi-million claim arising out of defective construction of

stands at sports stadium (2018)
- *Millharbour Investments Ltd v. Caddick (Mill Harbour) Ltd* (2018) (dispute between developer, purchaser and sub-purchaser relating to construction of residential apartment block in Canary Wharf; operation of long-stop contractual termination provisions; effect of alleged defects on right to insist on completion; whether latent defects cover complied with contractual requirements)
- Adjudication arising out of the joint insurance provisions of the NEC 3 sub-contract (2018)
- A £30m claim against insurers arising out of dispute between design and build contractor and employer for alleged defects in the design of a waste processing plant; alleged failure of process to pass reliability testing; whether contractually waste was "acceptable waste"; cause of catastrophic failure of one of main structural members in composting hall (2015).
- Advising building owners on defects alleged in design, specification and installation of heat exchanger units in air conditioning system in office buildings (2015).
- *Gondola Holdings v. Mersh* (2014). Claim arising from flood damage to computing equipment caused by allegedly defective design and installation of air conditioning equipment in ceiling void; HVAC engineering evidence and analysis of design of a/c drainage system.
- A multi-million pound claim by a large construction company against solicitors instructed to advise on amendments to DOM/2 and NEC3 forms of subcontract; pay-when-paid provisions in standard contractual terms
- Claim by specialist concrete contractor against insurers arising out of alleged defects in certain structures at Wembley stadium; allegations of failure of design and construction management (2011).

Property Damage

Neil has expertise both in breadth and in depth in relation to property damage cases. Many of his cases relate to fires or floods, whether they be claims brought against a defendant alleged to be responsible for starting a fire, or ancillary claims on an insurance policy or against a broker. He has significant experience of the technical issues that commonly arise, including investigation of the cause of the fire, issues relating to fire detection, prevention and spread, architectural/engineering questions arising out of the design of properties, compliance with building regulations, and product liability claims.

His cases in this field include:

- *Dalamd Ltd v. Butterworth Spengler Commercial* Ltd [2018] EWHC 2558 (Comm) (claim against insurance broker arising out of fire at waste recycling facility; whether insured had breached external storage condition at time of fire)
- *Bacup Holding Co Ltd v. Navigators* (2015) (claim against insurers and brokers arising out of flooding of warehouse as a result of river breaking its banks during storm);
- acting for defendant contractors in claim arising out of flood at office premises (2015);
- claim arising out of fire at factory; issues included causation of fire; whether device controlling heater defective or negligently designed (2013)
- *Jones v. Environcom Ltd* [2010] Lloyd's Rep IR 676 (claim against insurers and broker re fire at waste processing plant; issues included causation of fire; whether insured's processes in breach of health and safety regulations)
- *Mopani Copper Mines plc v. Millenium U/W Ltd* [2009] Lloyd's Rep IR 158 (preliminary issues relating to significance of deletions to construction of reinsurance slip arising out of damage done to an electrostatic precipitator in smelting plant in Zambia)
- *Bartoline v. RSA* [2007] Lloyd's Rep IR 423 (whether expenses arising out of environmental clean-up following fire covered under public liability insurance policy)
- acting for subcontractor in relation to claim arising out of significant fire at a superstore; issues included causes of fire-spread, and compliance with building regulations (2003).

Information Technology

Neil has significant experience in the context of information technology cases. He is currently acting in a claim by resellers of telephone and broadband services in respect of the sale of a book of business. He has acted in two major insurance claims arising out of IT projects that have failed and is familiar with the complex issues arising out of delay in the context of a development programme and alleged failures to meet specification.

Qualifications & Memberships

Neil is a member of COMBAR, BILA and the London Common Law and Commercial Bar Association.

LLB (Bristol) European Legal Studies

Publications

Liquidated Damages after Termination: Triple Point Technology v. PTT

5 March 2019

What happens to liquidated damages when a contract is terminated? Does the clause apply? If so, is the employer entitled to payment up until the point of termination, or beyond? These questions were addressed by the Court of Appeal in today's decision in Triple Point Technology v. PTT. Neil Hext QC considers the implications of the judgment.

Professional Negligence Claims arising out of GDPR

14 May 2018

The penultimate instalment in 4 New Square's GDPR series- what happens when professionals get their GDPR advice wrong? Inevitably it will transpire that mistakes will have been made by professionals giving (often very expensive) guidance on GDPR compliance. Their clients will want to consider whether a claim for professional negligence can be made. In this article Neil Hext QC, Stephen Innes and Helen Evans of 4 New Square discuss some of the issues which are likely to arise in such claims.

INSURANCE BROKER'S NEGLIGENCE

Neil Hext QC[1]

June 2019

1. This paper considers issues of breach of duty, causation and quantum arising in professional liability claims against brokers in the light of four recent cases: *Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited* [2018] EWHC 1311 (QB), *Dalamd Ltd v Butterworth Spengler Commercial Limited* [2019] PNLR 6, *Channon v. Ward* [2018] Lloyd's Rep IR 239, and *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm).

Breach

The duties owed by brokers

2. When advising and assisting a client with placing and renewing insurance a broker's duties consist of taking reasonable steps to:

    a. Identify and advise on the type and scope of cover the client needs by using information readily available and obtaining relevant information from the client;
    b. Arrange cover that should be suitable to meet those needs;
    c. Advise the client of the duty to disclose all material circumstances/make a fair presentation;[2]
    d. Explain to the client the consequences of failing to give disclosure/make a fair presentation;
    e. Explain to the client what sort of matters ought to be disclosed as being material (or arguably material);
    f. Elicit matters which ought to be disclosed but which the client might not think it necessary to mention, by asking appropriate questions a competent broker might ask in the circumstances.[3]

3. Of these, it is often (a) and (f) that give rise to the most difficulties. These are demanding duties. They require a broker to think carefully about all the relevant circumstances including the nature of the insured and its activities, the perils for which cover is sought, the information that has been provided already and the likely attitude of potential insurers.

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[1] An earlier version of this note was originally written in conjunction with Miles Harris of 4 New Square. I am very grateful to him for his assistance. Any errors remain mine alone.

[2] Consideration will need to be given to whether the obligations the broker needed to advise on were those imposed by s.18 and 19 of the Marine Insurance Act 1906, or the Consumer Insurance (Disclosure and Representations) Act 2012 or the Insurance Act 2015, which was effective from 12 August 2016.

[3] See ICOBS §5.1.4, 5.3. and §5.3.2; *Jones v Environcom Ltd* [2010] PNLR 27, §53 and 54, *per* David Steel J; *Synergy Health (UK) Limited v CGU Insurance Plc* [2010] EWHC 2583 (Comm), §203 to 206 *per* Flaux J and *Jackson & Powell on Professional Liability*, 8th Ed., 16-044.

Eliciting material information

4. In *Avondale* it was alleged that the broker had failed to take proper steps to bring to its client's attention the importance of making necessary disclosures and, in particular, had failed to elicit the fact that the insured's Mr Watkins had been convicted twice for offences that had resulted in prison sentences. Failure to disclose these convictions was relied upon by insurers to avoid cover after fire damaged the insured's premises in August 2012. On many occasions over a period of around 5 years[4] the broker had given advice on the obligation to give disclosure and what might constitute material facts in standard wording contained a suite of documents.

5. Further, on a number of occasions Mr Watkins had read and confirmed documents submitted to insurers that contained statements to the effect that none of the insured's directors had been convicted. Importantly, on the final renewal before the fire he did not correct a Statement of Fact that left blank a box for listing any *"convictions or criminal offences which are not spent under the Rehabilitation of Offenders Act"*.

6. The claimant argued the broker was obliged to make enquiries of relevant facts and to explain the duty of disclosure orally. HHJ Keyser QC accepted that had Mr Watkins been directly asked about any previous convictions orally, then he would have answered honestly. Nevertheless, he found that the broker had not acted negligently.

7. The judge started by observing that authority showed there was no *"immutable requirement"*[5] to give advice orally and that such an approach was too inflexible. The adequacy of communication must be assessed on a case-by-case basis.[6] Importantly in his view:

    a. Although Mr Watkins was not sophisticated he was *"on the ball"*;
    b. The material paperwork was not unduly long or dense and was clearly highlighted;
    c. The Market Presentations and Statements of Fact were clear, concise and easy to read, verify or correct and time and again the need to check was identified;
    d. The explanations given in writing were *"clear and full"*;
    e. Although the explanations did not specify convictions as disclosable, (i) there was no expert evidence they should,[7] (ii) it was impossible to set out all material facts meaning that any attempt to do so would be misleading, (iii) convictions were only especially significant with hindsight and (iv) the documents provided repeatedly mentioned convictions.

8. The Judge also rejected the claimant's attempt to point to particular instances when it said fuller oral advice should have been given. When the broker had been initially instructed in 2007 Mr Watkins had been in business for 20 years and was no novice. Although there had been a personnel change at the defendant, that did not impose any duty to give advice or make enquiries orally. Finally, it did not matter that the insured had changed from Mr Watkins as sole-trader to a company; the same people had remained involved.

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[4] From around 2007 the client and insured had been Mr Watkins as a sole trader. In 2010 the business was transferred to the corporate entity of Avondale. At all times, the guiding mind was Mr Watkins, assisted by his wife.

[5] See *Synergy Health (UK) Limited v CGU Insurance Plc* (Supra)

[6] See §16 and 17

[7] In fact, unusually, no expert broking evidence was adduced at all: see further below.

9. *Avondale* is to be contrasted with *Dalamd.* In the latter case, Butcher J held that the broker had acted in breach of the duty to take reasonable steps to elicit relevant information from the insured in connection with a policy. It was common ground that on a number of occasions in the past advice had been given by the broker on the obligation to give disclosure and also that the individuals responsible for arranging the clients' insurance were at all relevant times aware in general terms of that obligation. However, the Court found specific failures by the broker.

10. At the last renewal before the fire in October 2012, the insurers, XL, had been invited to rely, and had relied, on a proposal submitted originally in 2010 which had stated *"there have been no problems"* as a result of regular inspections of the insured's premises by the HSE, EA and Fire Service. However, the broker had failed to obtain the original presentation and so did not actually know if facts had changed since 2010. Had the original presentation been obtained it would have been clear that it was necessary to inform XL of the fact that: (i) since January 2012 there had been warnings given by the HSE, EA and Fire & Rescue about excessive amounts of waste on site and the site's untidiness and (ii) there had been a fire at the premises on 27 November 2011 which had required attendance of the Fire and Rescue Service (albeit not a claim on any policy).

11. Against this background, a finding of breach is perhaps unsurprising. However, the judge's criticisms of the brokers went further. He said that they were also at fault for not passing on a communication from XL about whether there was *"any further information which was material"* and for not drawing properly to the clients' attention the need to make proper disclosure to each of the insurers they used in respect of a number of different risks: "…*there seems to have been no attempt to indicate to the insured the types of matters which might need to be disclosed.*" This was particularly the case because the broker knew of some of the arguably material matters (e.g. the EA inspection and the untidy state of the premises, which had itself led to other insurers imposing conditions), knowledge of which meant it was *"more incumbent upon them to raise with the insured whether there were any further related matters which required to be disclosed…"*

12. There were two specific areas where the defendant ought to have done more:

> *"…The first was whether there has been any problems with HSE, the EA and the Fire and Rescue Service. This was necessary given that the risk was being placed on the basis of a document which indicated that there were no problems (albeit [the defendant] did not know its terms). But it was in any event a matter which was of potential materiality and which, in the light of [the defendant's] knowledge of the build-up of waste, they ought to have enquired about.*
>
> *The second was as to the previous fire incidents. That is perhaps the most obvious example of the type of question that a broker ought to ask of a client in respect of a policy that covers property damage. I accept [the claimant's expert's] evidence that a reasonably competent broker ought to ask about previous fires and make it clear that that included fires that did not result in an insurance claim."*

13. Butcher J went on to hold that the brokers were in further breach because they themselves knew, but had not disclosed, facts that were material to the risk, namely the build up of waste itself and the fact that a previous insurer had cancelled earlier in the year on grounds that the risk was unacceptable.

14. The approach in *Dalamd* suggests that in order to fulfil its obligation to elicit potentially material facts, a broker is likely to need to: (i) consider the kind of perils insured and make enquiries about events relating to such perils (whether or not they resulted in a claim) and any facts relevant to the risk of those perils eventuating; (ii) consider what facts are already known to it that might be material and make enquiries arising from those facts; and (iii) (at least on a renewal) consider any previous statements to insurers and enquire regarding any events or facts relevant to the information provided in those statements, particularly if it might render anything previously stated false or misleading.

Recommending Cover

15. *Dalamd* also raised a question as to whether the broker had provided competent advice on Business Interruption cover. The insured client had only taken out standalone Increased Cost of Working ("ICOW") cover. Dalamd argued that this was clearly inappropriate because in the event of a major peril destroying the premises ICOW would not help because little could be done to mitigate the loss of profit until property and plant were reinstated. It alleged that this had never properly been explained.

16. The issue was largely a factual one relating to the advice that had actually been given. The case illustrates, however, the importance of what is on the broker's file. The broker said that he had discussed BI cover on multiple occasions with the client and had given full explanations of *inter alia* the different types of BI cover and how ICOW would work as standalone cover before recommending that the full suite of cover be taken out. He said the insured had nonetheless chosen to take out standalone ICOW cover.

17. This disputed account was accepted by the judge, and in part that was influenced by the contemporary documents on the broker's file, which included: (i) a minute of a meeting produced by the broker and sent to insured: *"The following uninsured risks were discussed at length…The relative merits of other forms of business interruption was discussed including Stock debris removal, Increased cost of Working and Additional Cost of Working …"'* and (ii) an email send by the broker to the placing broker saying *"…They would have liked to take the full Gross Profit cover but unfortunately finances dictate that this is not possible at the moment…"*

18. Neither of these documents was conclusive as to what had actually been discussed. But the judge felt these indicated there were *"lengthy discussions of BI cover and of its various types"* and that, as a result, there was an awareness that standalone ICOW was less satisfactory than gross profit cover.

19. The Judge also dealt with the question of how often the question of BI cover ought to have been raised by the broker. He said:

> *"…if a broker has adequately explained the existence of an uninsured exposure but been told by the client that cover for it is financially unaffordable, he does not*

necessarily have to go through a consideration of the same exposure with the insured every time there is a mid-year review. Mr Powell's evidence was that a broker might not do such an exercise every year, although he should still do it periodically and that to raise it each year might be unwelcome to the client. I accept this as well, though what might be needed must depend on the precise circumstances"

Evidence

20. Both *Avondale* and *Dalamd* contain valuable lessons on evidential matters when seeking to address issues of breach.

21. Firstly, Butcher J's explanation of his findings in favour of the broker in *Dalamd* regarding standalone ICOW cover shows, again, the importance of contemporary emails and minutes. Although none of these provided a blow-by-blow account of what advice was given they did lend weight to the broker's contention that he gave full advice. Combined with a plausible performance by a witness, such contemporary documents are always vital, particularly for brokers struggling to recall what are often routine and relatively short meetings some years ago. In prefacing his assessment of the evidence he had heard, Butcher J said that *"As with most commercial cases, the most reliable evidence is provided by the contemporary documentation and the inferences which can be drawn from it."*[8]

22. In contrast, in cases where there are few notes on the file, or indeed none, the broker, like any professional, will experience much greater difficulty in displacing the client's version of the advice that was (or was not) given.

23. Secondly, a striking feature of *Avondale* was that, in exonerating the broker, HHJ Keyser QC placed significant weight on the fact that the claimant had not adduced any broking evidence.

24. There is, of course, a strong body of authority to the effect that, generally speaking, a professional should not be held in breach of duty in the absence of assistance from a suitably qualified expert who can explain why in his or her opinion the acts or omissions complained of fell below the standard of professional competence required.[9]

25. But in broking cases, a tension in the authorities exists. The view has been expressed in some cases that the standard of care expected of an insurance broker is sufficiently elucidated in previous decisions so as to make the need for expert evidence redundant. See for example, the views expressed by Leggatt J in *Involnert Management Inc v Aprilgrange Ltd & Ors*. [2015] 2 C.L.C. 307 at [294] to [297]:

"I am doubtful of the value of much of the evidence from broking experts which was adduced in this case and is typically adduced in cases of this kind. It is common place, and this case was no exception, for broking experts to be asked to give their opinions on whether the defendant brokers owed duties to do the various things which they were allegedly negligent in failing to do. The general duties of insurance brokers have,

[8] At §61; see also *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22].
[9] See *Shaw v. Leigh Day (a firm)* [2018] EWHC 2034 (QB) at [8]; *Pantelli Associates Ltd v. Corporate City Developments Number Two Ltd* [2010] EWHC 3189 (TCC).

however, been considered by the courts in many cases and, to a substantial extent, have become a matter of law...

295. Certainly there are circumstances in which the question whether a broker owes a duty to do something which he has not been expressly asked to do depends at least in part upon the scope of the responsibilities which a broker ordinarily expects and is expected to perform...

296. Once the relevant general principle or accepted practice has been identified, however, the question becomes one of its application to the circumstances of the particular case. This is frequently a fact-sensitive exercise. For example, what matters a broker has a duty to explain to the client or is entitled to assume or accept without question is likely to depend on the level of knowledge and sophistication of the client or of the individual(s) giving instructions on the client's behalf, as reasonably perceived by the broker. At this level of specificity, there will necessarily be no practice that all competent brokers in the particular situation normally follow…"

26. It is not clear why the absence of expert evidence was considered so important in *Avondale*. Whether explanations and questions need to be given orally or in writing is not something to be judged by reference to what only brokers might do. The fact that it is not necessarily negligent to deal with matters in writing is self-evident, indeed the more common criticism is that explanations were only oral. On one view, whether or not competence would require an explanation orally is something a judge can justly determine by considering all the factual circumstances including the nature and complexity of the advice being given and the characteristics of its recipient without recourse to an opinion from an expert.

27. Further, the scepticism expressed by Leggatt J accords with one's experience in the courts. Some judges are hostile to, and may even refuse permission for, any expert broking evidence on breach, while others assume it to be essential without question. The safest course is to ensure that one seeks permission for broking evidence particularly if one is a claimant. If one is refused it then at least there is an explanation for a judge who takes the same approach as HHJ Keyser QC in *Avondale*.[10]

Causation

28. Brokers' cases can give rise to some complex causation issues. If the broker's breach is simply that it failed to get sufficient insurance, the problem may be relatively straightforward: what would the claimant have received under the policy had there been no underinsurance? But where, because of the broker's breach of duty, the insurer has taken a point that goes to the validity of the cover, or that otherwise potentially invalidates the claim, there are a number of factual questions that arise.

29. First, is there a loss? It is, of course, one thing to say that insurers refused to indemnify. But it is another as to whether they were right about that. On one view, the insured has only suffered a loss if he has *in fact*, as a result of the broker's breach, ended up in a situation in which he has no rights against insurers. This raises the question whether the claimant has to prove that a claim against insurers would have failed, or whether it is enough simply to show

[10] Albeit that one still might ultimately be left with an evidential lacuna at trial, to the potential prejudice of whichever party has the relevant burden of proof.

that the broker's breach has impaired the claim.

30. Second, on the assumption that there is a loss, what would have happened if the broker had not been in breach? Would the claimant have done what needed to be done to get insurance? (e.g. would disclosure have been given?). What would insurers' reaction have been? Would they have insured in any event? If so, on what terms and would they have been acceptable to the claimant? If not, would alternative insurance been available, and would the claimant have been prepared to take it?

31. If insurance would have been in place, would it have paid out? There may have been other reasons – nothing to do with the broker's breach – that would have given rise to a defence. Would insurers have relied upon those reasons? If so, would the claimant have pursued insurers, and would they have settled? If they would not have settled, would the claimant have pursued the matter to trial and won?

32. These issues give rise to fundamental questions as to the correct approach, whether they are to be determined on an all or nothing, balance of probabilities, basis, or on the basis of loss of a chance.

Is there a loss?

33. In *FNCB Ltd v. Barnet Devanney* [1999] Lloyd's Rep IR 459, an insurance policy was taken out in respect of a property in Gloucestershire. The policy was in the name of the owner of the property and of the bank that had loaned £2m as mortgagee. The property was damaged in a fire. Insurers refused to indemnify on a number of grounds including non-disclosure and breach of condition, both on the part of the owner but not the bank. The bank sued insurers but settled for a fraction of its loss. It then brought proceedings against the broker that had placed the relevant policy.

34. The criticism made of the broker was that it failed to include in the policy a standard clause protecting the mortgagee against default on the part of the mortgagor. Such clauses were in common use and did not give rise to any additional premium. That criticism was upheld in the court of appeal. However, the broker argued that it had not caused the bank loss because, as a matter of law, it could not have been affected by the default of the property owner since the policy was a composite policy; the bank's cover was therefore independent of that of the property owner. That that was so was established by a court of appeal decision that post-dated the fire. Thus, the claim against insurers, if pushed to trial, would have succeeded.

35. However, the court of appeal rejected the broker's causation defence. At the date of the settlement, the legal position was uncertain. Had the broker included a mortgagee protection clause in the policy, the position would have been clear and insurers would have paid. Thus the broker was responsible for the difference between the full amount of the bank's loss less that which had been recovered by way of settlement with insurers. It was not an answer to the claim against the broker that the claim against insurers would in the event have succeeded.

36. This decision has proved to be controversial. It has meant that a claimant is not obliged to press to trial what may be a good claim against insurers, and can instead settle at a sum perhaps significantly below its true entitlement and sue the broker for the shortfall. The broker can only challenge the settlement if it can show that the settlement was unreasonable. This is notoriously difficult to do. For these reasons *FNCB* has long been unpopular with those who insure brokers, since they consider (with perhaps some justification) that they are being

asked to compensate for loss that ought to have been borne by the original insurers.

37. Does the same logic apply where the claimant considers that the claim against insurers is so poor that it does not think it worth pursuing insurers? This question was another of the issues that arose in *Dalamd*. There, both insurers declined to indemnify the claimant on various grounds, including non-disclosure for which the claimant blamed the defendant broker. Having put its claim to insurers, the claimant did not pursue it further and instead sued the broker.

38. At trial, the claimant argued that that the broker's negligence had created a situation in which the insurers both had a defence that was reasonably arguable. In those circumstances, seeking to apply *FNCB*, the claimant said that it was entitled to turn to the broker to make good its loss. The court disagreed. Butcher J distinguished *FNCB* on the basis that that was a case in which the claimant had entered into a reasonable settlement with insurers. In *Dalamd* there was no such settlement; the claimant had simply decided to pursue the broker alone.

39. Butcher J considered that the approach contended for by the claimant made "*unduly favourable to the insured an action against the broker for a breach consisting simply of creating an uncertainty as to cover by comparison with the insured's action against the insurer who, [where a claim against that insurer would have succeeded], is in breach of its obligation to indemnify*" (at [132]). Moreover Butcher J made the point that, where the claimant sued both insurer and broker, the issue as to the insurer's liability would be dealt with on a "yes/no" basis with the facts being determined on the balance of probabilities. It was unsatisfactory, he said, for the broker's potential liability to be dealt with differently just because the insurer had not been pursued.

40. This decision introduces further complexity into claims against brokers because the parties will need to consider to what extent additional evidence is required in order to deal with the notional (non-)liability of the insurer. Where, for example, one is dealing with material non-disclosure, expert underwriting evidence may be required, and consideration will need to be given as to whether evidence from the underwriter him- or herself is necessary.

41. From a claimant's perspective it will make sense specifically to interrogate the defendant's position on the insurer's liability. In a case in which it seems clear for example that, because of the non-disclosure for which the broker is being blamed, it is likely that the insurer would have had a good defence, the claimant will want to ensure that the defendant has been given a formal opportunity to concede the issue, perhaps by way of notice to admit facts. Where a defendant requires the issue to be litigated, the consequence may be that the claimant will bring proceedings against both insurer and broker, with all of the attendant costs risk that that will entail for the parties.

42. In this context, it should be noted that the introduction of the Insurance Act 2015 may have a similar effect, because the number of cases in which insurers have a clear defence in relation to the entirety of the loss is likely to diminish.

43. Where the claim against insurers is settled, one would expect the position to remain governed by *FNCB*, and the burden will be on the broker to show that the settlement was unreasonable.

What would have happened but for the breach?

44. The analysis that is applicable to this issue will depend upon the nature of the problem that the has been encountered in relation to the insurance. For example, where the allegation is

that the broker failed properly to warn the insured about the existence of an insurance warranty or condition, the primary question will be whether, properly advised, the claimant would have complied with that term. Because that is a question of what the claimant would have done, it falls to be resolved on a balance of probabilities basis. If the claimant would have complied with the term, it will normally follow that the insurance would have paid out, and the claimant will recover.[11]

45. Other types of breach can give rise to the need for more complex analysis. The decision in *Channon v. Ward* [2018] Lloyd's Rep IR 239 gave rise to a good example. The defendant broker failed to place professional indemnity insurance for his accountant client. Claims eventually came in against the accountant relating to advice that he had allegedly given to certain investors about loaning money to a property company that he controlled. The loans were not repaid and the investors sued the accountant. He brought proceedings against the broker alleging that, had insurance been in place, it would have covered him for the claims. In due course the accountant settled with the investors on the basis (in part) that he would pass on to them what he was able to recover from the broker.

46. The court of appeal held that, in those circumstances, the task of the court, as a matter of evaluative judgment, was to assess in monetary terms the difference between the position the accountant found himself in and the position he would have been in if he had been insured, assessed on an expectation or loss of a chance basis. The enquiry focused on two matters. First, what would the putative insurers have done when presented by the accountant with notice of the claims made against him. Second, what would the accountant's response have been to the stance adopted by insurers. See [27].

47. As to the first question, the court below found that the accountant would have told his insurers that the claims arose out of disappointment on the part of the investors at the losses of a trading company of which he was a director and were nothing to do with his role as an accountant. Against that background, the judge found that insurers would certainly have sought to deny that the claims were covered, principally on the basis of two exclusions in the Accountants' Approved Wording (including one that excluded trading losses and liabilities).

48. As to the second, the judge found that, faced with that refusal, the accountant himself would not have challenged it. Accordingly, he held that there was no substantial (as opposed to merely speculative) chance that the claimant would have been in a different position had there been insurance, and awarded the claimant nothing.

49. On appeal, with a view to getting something for loss of a chance, the claimant sought to displace the certainty with which the judge had concluded that insurers would have denied liability by asserting, on the basis of some of the expert evidence at trial, that insurers would have taken legal advice. That attempt failed. The court of appeal concluded that it was pure speculation that advice would have been taken and that this did not produce a loss of a chance result. The claimant's challenge to the factual question of what the claimant would have done in the face of insurers' refusal also failed.

50. Avoidance for non-disclosure can give rise to a similarly complex inquiry. The starting point is whether, on the balance of probabilities, given proper advice, the insured would have disclosed the relevant information. Then one has to consider whether insurers would have

[11] Unless the broker can show that the loss would not have occurred at all but for the breach of the term, in which case a scope of duty issue potentially arises: see *Jones v. Environcom* [2010] Lloyd's Rep IR 676 at [106-109] (and on appeal, [2012] Lloyd's Rep IR 277 at [34]).

insured in the light of that information, and if so, on what terms. If not, would alternative insurance have been available? Would different terms have been accepted by the insured? In the context of the evaluation of what insurers would have done, the test is loss of a chance rather than balance of probabilities.

Insurers with an alternative defence – balance of probabilities or loss of a chance?

51. What happens where there was an alternative ground upon which insurers were arguably entitled to resist payment, for which the broker was not responsible? That situation arose in *Dalamd*. There, the buildings insurers, Aviva, declined to indemnify on the basis of non-disclosure of the insolvency of a company related to the insured (which had previously been the insured under the policy). This non-disclosure was the fault of the broker. However, Aviva also denied liability on the separate basis that the insured was in breach of an external storage condition, which required that storage of waste material be kept a certain distance from the perimeter of the buildings. The broker was not responsible for this latter issue.

52. The broker contended that, even if it had not been in breach, the claim against Aviva would have failed for breach of the external storage condition. That gave rise to an interesting question as to whether the issue should be determined on a balance of probabilities basis or as a loss of a chance.

53. There was no dispute that loss of a chance applied where one was assessing whether insurers would either decided not to take the point, or otherwise to settle the claim (see *Fraser v. Furman* [1967] 1 WLR 898; *Everett v. Hogg Robinson & Gardner Mountain (Insurance) Ltd* [1973] 2 Lloyd's Rep 217). But the judge found that there was no chance of either of those things on the facts of this case. So the question was, how does one approach what a court would have done had a claim against insurers been pressed to judgment (in the light of no non-disclosure defence being available)?

54. That issue had previously been addressed in the context of solicitors' indemnity cases. In *Hanif v. Middleweeks* [2000] Lloyd's Rep PN 920, the defendant solicitor negligently permitted the claimant's claim against insurers in respect of a fire to be struck out. The solicitor argued that the claim would have failed because, amongst other things, the claimant's partner had deliberately set fire to the property. The judge found that there was a 75% chance of insurers defending the claim on that basis. Nevertheless, on a loss of a chance basis, the judge awarded damages. The solicitor argued in the court of appeal that that was the wrong approach and that the judge, having in effect found that there was arson, should have awarded nothing. The court of appeal upheld the judge's analysis. The correct approach in a case like this was to determine the prospects of the claim against insurers succeeding.

55. In *Dalamd*, Butcher J took a different approach. He noted that there were a number of cases in which the court appeared to have decided the question of whether there was an alternative defence on an all or nothing basis. The question of the insurers' putative liability depended on facts which existed at the time either of placement or of the occurrence of the loss. Moreover, it was again relevant that, in the event that both insurers and the broker were parties to the action, the insurers' liability would be determined on the balance of probabilities, and the manner of determining the broker's liability should not depend upon whether the insurers were at the time of trial still parties to the action. See [136-137].

56. Hence one determined the putative fate at trial of the alternative argument open to insurers on a balance of probabilities basis. Butcher J said that it might be different in a case in which

the broker's negligence had deprived the insured of the opportunity of having its claim under the insurance determined by a court.

Quantification of Loss

57. Where the loss of a chance principle does apply, the range of possible outcomes can be quite wide and difficult to predict. *Pakeezah Meat Supplies Ltd v. Total Insurance Solutions Ltd* [2018] EWHC 1141 (Comm) perhaps provides a recent useful illustration of the manner in which it might be approached. In that case, insurers had declined to indemnify in respect of a fire on the grounds of non-disclosure (a) of the fact that various companies associated with the insured had become insolvent, and (b) of the capacity of two free-standing deep fat fryers at the premises. The claimant blamed the broker for these non-disclosures, and a default judgment was granted with damages to be assessed.

58. At the assessment, the question arose as to what, if any, discount should be applied to reflect the possibility that the insured would have experienced difficulty in obtaining insurance in the light of the information that would (on the premise of no breach of duty) have been disclosed. The court accepted that, given the relatively standard nature of the risk, and the type of premium with which the court was concerned, the chance of either piece of information preventing insurance being obtained from somewhere was fairly low. However, there remained a possibility that, while existing insurers might not have insured because of the frying equipment, other insurers might not have insured because of the financial issues. Damages were assessed at 75% of expected indemnity.

Q&A

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"Very good technically, very thorough and approachable "
(Chambers UK)

Practice Overview

Luka is ranked as a "**Leading Individual**" at the Bar in Chambers UK 2019: "**He is confident and robust as an advocate**", who is "**able to think outside the box and consider matters not just legally but also tactically".** He is ranked as an "**up and coming**" barrister by Chambers UK in the field of Private International Law.

His practice has a significant sports commercial focus, and he has represented well-known Football Clubs in the Premier League and French Ligue One. From 2016-2018, he acted for West Ham United in the heavily-publicised High Court litigation relating to the former Olympic Stadium (valued over £100m), which involved a major judgment from Court of Appeal. He is now instructed in the complex ownership dispute concerning Sheffield United, which is in a 6-week High Court trial from May-June 2019. He is also presently acting for French Club Stade Rennais F.C. in a multimillion pound commercial dispute before the High Court.

Luka also frequently acts in a range of cases with a cross-border element, hence his ranking as a leader in the field of private international law since 2017 (Chambers UK), and in high-level professional/clinical negligence litigation.

He frequently appears unled in the High Court and also has a considerable appellate practice, having acted before the Court of Appeal (5 times), Privy Council and Supreme Court, and the Bermudian Court of Appeal.

Commercial Dispute Resolution

Both led and as sole counsel, Luka regularly advises and acts in cases concerning all manners of commercial disputes, most commonly in the Sports context, but also more generally in the Joint Venture, Partnership and Agency contexts.

Practice areas

Commercial Dispute Resolution
Sport
Private International Law
Travel & Jurisdiction
Insurance & Reinsurance
Clinical Negligence
Professional Negligence

Memberships

PIBA
Guernsey International Lawyers Association

Qualifications

MA (Cantab)
BVC (Certificate of Honour)

Education

Cambridge University

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Most significantly, he has received repeat instructions from the Premier League Football Club West Ham United, for whom he has dealt with a range of complex, high-level commercial issues including Court proceedings valued at over £100 million.

He has particular interest in the controversial issue of implied obligations of good faith in English contract law, and has frequently advised on the issue and written on the subject for Law in Sport (https://www.lawinsport.com/topics/articles/item/the-concept-of-good-faith-in-commercial-contracts-what-is-it-and-when-does-it-apply-in-the-sports-industry)

Current and Recent Work

Sheffield United Ltd v UTB LLC & Ors [2019-]: Luka acts for Sheffield United Ltd in this dispute concerning the ownership of the Club. The dispute arises out of an Investment and Shareholders Agreement, pursuant to which Sheffield United Ltd (a limited company controlled by English businessman Kevin McCabe) and UTB LLC (a limited company controlled by Saudi Prince Abdullah Bin Mossad Bin Abdulaziz Al Saud) held 50% of the shares in the Football Club's holding company. UTB claims it is entitled to obtain Sheffield United Ltd's shares in the company, and the latter counterclaims and also pursues an unfair prejudice petition by which it asks the Court to make a buyout order in its favour. The case involves legally significant questions as to implied obligations of good faith.

WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652: Luka acted for the successful Appellant, (led by Paul Downes QC) in this landmark appeal concerning the scope of litigation privilege. Luka's client succeeded in the appeal, with a unanimous Court of Appeal (Sir Terence Etherton MR, Lewison LJ and Asplin LJ) rejecting the Respondent's argument that it was entitled to redact and conceal evidence of discussions between Board Members regarding a potential settlement of the claim. The Court of Appeal held that such discussions, which were in the context of anticipated litigation but not directed at obtaining advice or evidence for that litigation, were not protected by litigation privilege.

West Ham v E20 Stadium LLP [2016-2018] Luka acted on behalf of the owners and operators of West Ham United, in their claim against the leasehold owner of the London Stadium (the former Olympic Stadium). West Ham alleged that E20, the Stadium owners, were unlawfully preventing West Ham from accessing certain seats in the Stadium, and therefore depriving West Ham of substantial ticketing revenue. The claim involved allegations that E20 has failed to act in good faith, and so invokes complex consideration of good faith issues. Prior to its settlement at trial,

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the case involved numerous complex case management issues, and interim applications which led to valuable High Court Judgments on **the redaction of commercially sensitive documents ([2018] EWHC 2578 (Ch))** and **applications for third party disclosure ([2018] EWHC 2971 (Ch))**.

B-P v K [2018-] Luka acts for the Claimant in this claim concerning the fraudulent transfer of monies from the client account of a professional financial investment adviser.

Atang & Another v Newatia & Credit Suisse [2016] Luka represented the Claimants in a professional negligence claim against a senior financial investment adviser, involving issues of breach of fiduciary duty and breach of the COBS rules.

Sport

Luka deals with disputes in a range of sports but has a particular reputation for his ability to litigate football cases. He is junior counsel of choice for West Ham United Football Club, the well-known Premier League Football team, and has represented them in a series of disputes, including in their high-profile dispute with the owners of the former Olympic Stadium; a claim valued at over £100 million.

In addition to his comprehensive commercial experience, Luka has conducted numerous personal injury/clinical negligence trials, and therefore is well-versed in cross-examining experts on complex scientific and medical issues in a sporting context.

Current and Recent Work

Sheffield United Ltd v UTB LLC & Ors [2019-]: Luka acts for Sheffield United Ltd in this dispute concerning the ownership of the Club. The dispute arises out of an Investment and Shareholders Agreement, pursuant to which Sheffield United Ltd (a limited company controlled by English businessman Kevin McCabe) and UTB LLC (a limited company controlled by Saudi Prince Abdullah Bin Mossad Bin Abdulaziz Al Saud) held 50% of the shares in the Football Club's holding company. UTB claims it is entitled to obtain Sheffield United Ltd's shares in the company, and the latter counterclaims and also pursues an unfair prejudice petition by which it asks the Court to make a buyout order in its favour. The case involves legally significant questions as to implied obligations of good faith.

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Private International Law

As a result of his work for the European Court of Justice, Luka has invaluable practical experience of engaging with Conflict of Laws issues at the highest judicial level in Europe.

Luka has also gained experience of high-level Conflict of Laws disputes before the English Courts. He has worked on landmark cases before the High Court, Court of Appeal and Supreme Court.

Current and Recent Work

X v Y [2018-]
(led by Marie Louise Kinsler QC), Luka is instructed in a case arising out of injuries sustained by a CNN journalist whilst on a reporting assignment in Gaza.

Re [X] Insurance [2018-]
Luka is instructed in this high-value (C.£80 million) matter, arising out of the collapse of a foreign motor insurer, which involves a number of complex insurance, insolvency and general contractual issues.

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Spring v EvKB (2017-)
(led by Charles Dougherty QC), an ongoing High Court case in which the Claimant, a former soldier stationed in Germany in the 1990s, seeks to claim in respect of injuries suffered during training.

Howe v MIB (2016)
(led by Marie Louise Kinsler), a High Court case on the issue of limitation in the context of a claim brought against the Motor Insurers Bureau relating to an accident abroad. Luka appeared for the successful Defendant. The Claimant is now seeking permission to appeal.

Brownlie v Four Seasons Ltd (2015)
(led by Howard Palmer QC and Marie Louise Kinsler), a Court of Appeal case concerning jurisdiction and choice of law in contract and tort;

Bianco v Bennett (2015)
(led by Marie Louise Kinsler), a High Court case in which Luka and Marie Louise succeeded on an important point of law regarding foreign causes of action in the English Courts;

Travel & Jurisdiction

Luka has established a reputation as a leading junior in a range of Conflict of Laws issues. Please see above under the heading, "Private International Law" for details of his involvement in leading High Court, Court of Appeal and Supreme Court cases in this field.

Additionally, Luka is regularly instructed to advise and act in claims arising out of injuries sustained on holidays, including package travel claims. Recent instructions include a claim brought in respect of a hypoxic brain injury sustained by a young boy who suffered a tragic drowning accident whilst on holiday.

Insurance & Reinsurance

Luka is building a considerable insurance practice.

Current and Recent Work

Miley v Friends Life [2017-]:
A much-publicised claim in which the holder of a permanent health insurance policy alleged that he suffers from a debilitating condition which renders him totally unable to carry out his previously lucrative employment. The Defendant insurer alleged fraud. Luka is presently instructed in the

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appeal to the Court of Appeal in this matter, which involves insurance contract disputes at the highest level (led by Caroline Harrison QC and Sonia Nolten).

A claim arising out of a life insurance policy, which considers the consequences of the murder of a policyholder.

A claim worth several millions of pounds relating to a professional indemnity insurance policy.

Clinical Negligence

Luka regularly advises, pleads and acts in clinical negligence disputes in the High Court and Appellate Courts. He has experience well beyond his call in this area. He has acted unled in High Court trials, and acted for the successful Defendant both in the High Court and in the Court of Appeal in ***Manzi v King's College Hospital NHS Foundation Trust*** [2018] EWCA Civ 1882, an important judgment on adverse inferences and fact-finding, as well as for the successful Respondent in the Privy Council in ***Williams v Bermuda Hospitals Board*** [2016] UKPC 4 (led by Benjamin Browne QC), a leading authority on the law of causation in the clinical negligence context. Luka is frequently instructed to advise on complex issues of causation.

Current and Recent Work

Luka frequently appears in trials, and has built up a reputation for his strong cross-examination of medical experts. His recent trial successes include the following:

Austin v Dorset County Hospital NHS Foundation Trust & Others [2019]: Luka represented the First Defendant in this complex case relating to gynaecological treatment. The trial was originally listed for a full week's hearing. On the third day of trial, Luka cross-examined the Claimant's expert, and drew from him vital concessions which were fatal to the Claimant's case. The Claimant discontinued immediately after the cross-examination, and agreed to pay the Defendants' costs.

Hindmarsh v Norwich County Hospitals NHS Trust [2018]: Luka acted for the successful Defendant in this case concerning spinal surgery carried out on the Claimant. A spinal fixation device had failed shortly after complex spinal surgery, and the Claimant alleged that this was the result of wrongful surgical technique. Under Luka's cross-examination, the Claimant's expert conceded that he had fallen into the "Sherlock Holmes fallacy" (the erroneous approach to causation rejected by the House of Lords in the

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famous case of ***The Popi M***). The Judge found for the Defendant on breach and causation.

Teasdale v Royal Free London NHS Trust [2017]: Luka represented the successful defendant in this ophthalmology case where breach of duty had been admitted. Causation was firmly disputed and HHJ Baucher singled out Luka's cross-examination of the Claimant's expert, a Professor of Opthalmology, as "*exemplary*", as essential in resolving the case in the Defendant's favour

Sinclair v Colchester Hospital NHS Foundation Trust [2017]: Luka represented the successful defendant in this Fatal Accidents claim arising out of cardiac treatment. The claim was pleaded in the value of several hundreds of thousands of pounds. The Court found for the Defendant on breach of duty and also on causation.

Professional Negligence

Luka is currently instructed as sole counsel in a professional negligence claim worth $500,000. The claim relates to the provision of negligent investment advice by a senior, experienced financial investment adviser. As such, Luka has valuable experience of dealing with complex allegations of professional negligence, including breach of the COBs rules.

Luka has also gathered significant experience of high-level professional negligence disputes whilst assisting Andrew Miller QC. Luka worked on cases involving allegations of contractors', valuers' and solicitors' negligence.

Recommendations

"A Confident and Robust Advocate" **Chambers UK 2019**
"Very approachable and incredibly helpful" **Chambers UK 2019**
"Thinks Outside the Box...legally but also tactically" **Chambers UK 2019**
"A Bright and Self-Confident Advocate" **Chambers UK 2018**
"Very good technically, and very thorough" **Chambers UK 2018**

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THE FUTURE OF DISCLOSURE?
The Pilot Regime in the Business & Property Courts

1. **Essential Changes:**
   a. The Initial Disclosure Process (CPR PD51U, paragraph 5)
   b. "Known Adverse Documents" (CPR PD51U, paragraph 2.8, 2.9)
   c. Extended Disclosure: Models A-E (CPR PD51U, paragraph 8)
   d. Disclosure Guidance Hearings (CPR PD51U, paragraph 11)
   e. The emphasis on Technology (CPR PD51U, paragraph 3.23)

2. **The Judgment of the Chancellor in *UTB LLC v Sheffield United & Others* [2019] EWHC 914 (Ch): Temporal Scope and Challenges under the Disclosure Pilot.**

3. **The Practical Ramifications of seeking "specific disclosure" where an order for Standard Disclosure was made under the old regime:**
   a. The power of the Court to order Extended Disclosure: to what extent are the categories of Extended Disclosure different to 'old' standard disclosure, and to what extent do they resemble classes of specific disclosure?
   b. The power of the Court to vary an earlier order under CPR PD51U, paragraph 8.3.

4. **The Approach to be Taken in "New Cases":**
   a. Duties with regard to preserving evidence, known adverse documents and searches.
   b. Identifying the issues for disclosure and preparing the Disclosure Review Document; the ramifications of these matters.
   c. Challenging claims to privilege or the withholding of documents from inspection on other grounds.

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Chair’s closing remarks and Q&A