Professional Liability Update

PATRICK LAWRENCE QC
4 New Square
November 2019

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Lawyers/insurers as litigants

When do lawyers or insurers become exposed to a possible liability for the other side's costs?

2

Exposure to 3rd party costs orders

- The general principle is that third parties who are interested in litigation may be exposed to adverse costs orders if they have acted in a way that makes them "the real parties": *Symphony Group v Hodgson* [1994] QB 179
- It is increasingly likely in current conditions that lawyers may have a monetary interest pursuant to a CFA or DBA or similar arrangement which means that the litigation is to an extent (sometimes, an overwhelming extent) conducted for their benefit
- In such circumstances, may they be susceptible to a 3rd party costs order if the case is lost?
- The answer to this question may have far-reaching consequences in terms of access to justice and the funding of PNeg claims

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Myatt v NCB [2007] 1 WLR 1559

- In *Myatt* the appeal was concerned solely with the enforceability of a CFA.
- The issue was of little (though not nil) consequence so far as the claimant was concerned, but was of great importance to the solicitors since the outcome would affect a large number of cases in which they were acting.
- The CofA held that the solicitors were 'real parties' in the relevant sense, and should pay 50% of the costs of the successful respondent.
- The judgments, carefully read, make it clear that the case should be regarded as exceptional, being one in which the lawyers' interests were not congruent with the clients'.
- On that point, see *Harcus Sinclair v Buttonwood* [2013] EWHC 2974.

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Willers v Joyce [2019] EWCA 2183

- This case established new law, when the Supreme Court held that it was possible to sue in respect of the malicious prosecution of civil proceedings
- However, the case failed at trial
- A major part of the claim concerned fees owed to the solicitors and counsel who were acting on the case, in respect of the earlier litigation which had allegedly been prosecuted maliciously
- The claimant was insolvent
- The successful party sought a 3rd party costs order against the lawyers
- The court dismissed the application

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Grounds for dismissal

- *Myatt* was carefully analysed, and shown to be an exceptional case turning on its own facts
- The overarching principle was that established by the earlier case of *Tolstoy v Aldington* [1996] 1 WLR 736: lawyers are as a general rule outside the scope of the jurisdiction to make costs orders against third parties, for reasons of high policy
- Note: in *Tolstoy* the lawyers were liable for costs, but only under the wholly separate jurisdiction to make wasted costs orders against lawyers who behave unreasonably (or worse) …

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The position of insurers

- In *Travelers Insurance v XYZ* [2019] UKSC 48 multiple claims were brought in respect of defective implants, and some were covered by the defendant's indemnity insurance, but some were not
- The relevant insurer funded the defence, and exercised control pursuant to the policy provisions
- The "uninsured claimants" sought a 3rd party costs order against the insurer.
- The Supreme Court held that no order should be made; and that as general rule an insurer who acted in good faith in the interests of an insured would be unlikely to be exposed to the risk of a 3rd party costs order.

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What was *BPE v Hughes Holland* about and how is it being applied in practice?

8

The mountaineer's knee

- A man goes to his doctor and asks if his knee is strong enough to withstand a mountaineering expedition.
- The doctor negligently tells him that it is when it is not.
- He goes on the trip and dies of a cause unconnected with his knee. Is the doctor liable?

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Relevance to Professionals

What damages, if any, should be awarded where:

- But for a professional's negligence, a client would never have embarked upon a course of action, but
- Part or all of the loss the client suffered arose from risks inherent in that action, against which the professional owed no duty to advise (such as commercial risks)?

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Hughes-Holland: the facts

- Mr Gabriel lent £200,000 to a company called Whiteshore, under the mistaken impression that it would be used to develop a disused heating tower at Kemble Airfield into offices.
- Mr Gabriel instructed BPE Solicitors to draw up a facility letter and a charge over the tower. BPE's draft contained the incorrect information that the loan was a contribution to the costs of the development
- The transaction was a failure and Mr Gabriel lost virtually all of his money. The Claimant sued the builder (and associated companies) and BPE.

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Hughes-Holland: Lord Sumption's analysis

- *"Where a party is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the venture, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire venture" Philips J, SAAMCO*

- The *SAAMCO* principle has nothing to do with causation as the expression is usually understood. The focus is on scope of duty and whether the claimant's loss flows from a "*particular feature of the defendant's conduct that made it wrongful".*

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Information or Advice?

ADVICE

The professional considers what matters should be taken into account.

The professional guides the whole decision making process.

INFORMATION

The professional provides one part of the information

The process of identifying other relevant considerations and considering commercial merits are for the client

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Hughes-Holland: Lord Sumption's explanation

- *"A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest a self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated." At paragraph [44]*

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Hughes Holland: the Outcome

- The Supreme Court decided that the airport scheme was always doomed to failure. Mr Gabriel's appeal was dismissed;
- BPE's role was limited to drawing up a facility letter;
- The effect of BPE's negligence was that Mr Gabriel's assumption that the money would be used for development was not corrected;
- But, and significantly, even if that assumption had been correct Mr Gabriel would still have lost his money because the project was not viable;
- That loss was not within the scope of BPE's duty.

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Manchester Building Society v Grant Thornton UK LLP [2018] EWHC 963 : First Instance

- Claimant Building Society entered into lifetime mortgages and interest swaps to hedge the risk of interest rate fluctuations;
- The Defendant accountants advised the Claimant that it could use "hedge accounting" to reduce balance sheet volatility;
- The Defendant accepted that it had acted negligently;
- Defendant not liable for the losses incurred in breaking the swaps because they were not the type of losses for which the defendant had assumed responsibility.
- The Defendant advised on how the business activities should be treated and was not responsible for the consequences of the activities themselves.

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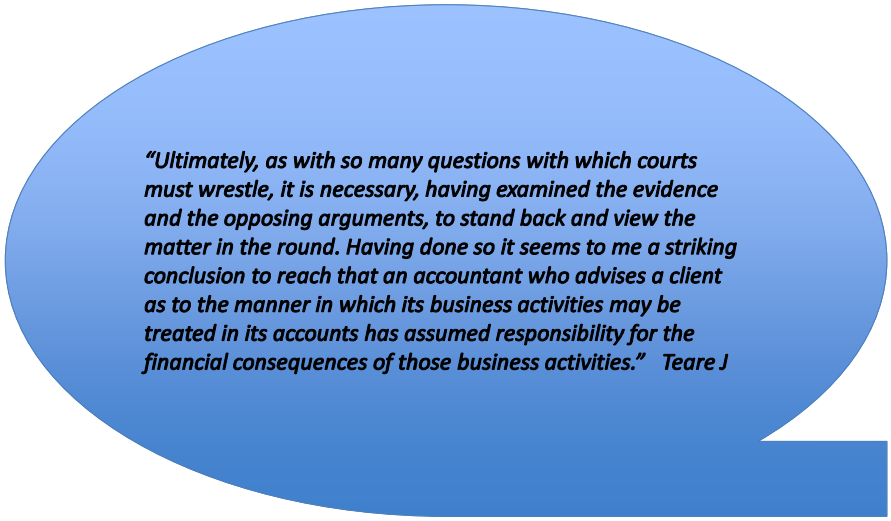
Manchester Building Society v Grant Thornton UK LLP [2018] EWHC 963 : First Instance



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Manchester Building Society v Grant Thornton UK LLP [2019] EWCA Civ 40: Court of Appeal

Hamblin LJ's six principles at [54]:

- Is it an "advice" case or an "information" case?
- It will be an "advice" case if it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction", that "his duty is to consider all relevant matters and not only specific matters in the decision" and that he is "responsible for guiding the whole decision making process"
- If it is an "advice" case, then the negligent adviser will have assumed responsibility for the decision to enter the transaction and will be responsible for all the foreseeable financial consequences of entering into the transaction.
- If it is not an "advice" case, then it is an "information" case and responsibility will not have been assumed for the decision to enter the transaction.
- If it is an "information" case, the negligent adviser/information provider will only be responsible for the foreseeable financial consequences of the advice and/or information being wrong.
- This involves a consideration of what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable.

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Halsall v Champion Consulting Ltd [2017] EWHC 1079

- The Claimants were four solicitors who invested in two tax planning schemes: a film finance scheme and a charity shell scheme;
- The Defendants were a tax and accountancy firm;
- The Claimants case was that they had entered into the schemes on the Defendants' advice and lost money.

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Halsall v Champion Consulting: advice case?

- Advisers suggested that investing in the scheme was a "no brainer" and it was alleged that they had "guaranteed" the outcome;
- Was this an advice or an information case?
- A professional only has to "*guide*" a decision to potentially fall within the "advice" category. It is not necessary for him to "*take*" the decision. In all cases, the responsibility for taking a decision ultimately lies with a client;
- In *Halsall*, the accountants had advised their clients "*as to what course of action they should take*". They had not merely contributed a limited part of the material which the clients would use as part of their decision making process.

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Bank of Ireland v Watts Group PLC [2017] EWHC 1667 (TCC)

- A quantity surveyor was engaged to consider an appraisal of a borrower/developer's building costs estimates.
- The court held that the role of the professional was not to re-perform the exercise of calculating the estimates but to consider their reasonableness. In reaching this conclusion, the court relied on *Hughes-Holland* and concluded that the quantity surveyor's work was "plainly in the 'information' category."
- Quantity surveyor only liable for the consequences of the information he gave being wrong: but the Bank had pleaded an "all or nothing case" which suggested that he was liable for all losses.

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Other Decisions

- *Main v Giambrone & Law* 2017 [EWCA] Civ 1193 - solicitors
- *Lloyds Bank Plc v McBains Cooper Consulting* [2018] EWCA Civ 452 – construction
- *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) - auditors

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The duty to warn of uncertainty?

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Balogun v Boyes Sutton and Perry (A Firm) [2017] PNLR 20

- Claimant restauranteur had sought damages against Defendant solicitors in connection with the Claimant's acquisition of a commercial lease of a premises at a property in London.
- Defendant knew that the Claimant intended to fit out and run a restaurant in the premises.
- Claimant alleged that the Defendant failed to provide him with any or any adequate advice as to the permission required from the superior landlord to use the ventilation shaft in the property, essential for the operation of the restaurant.
- Further, even if the underlease did confer a right of access to the ventilation shaft, there was a risk that it did not and the Defendant should have warned him of this risk: *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson Solicitors* [2011] EWCA Civ 1360.
- Claim dismissed at first instance.

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Balogun v Boyes Sutton and Perry (A Firm) [2017] PNLR 20

Court of Appeal:

- The underlease did confer on the Claimant a right to connect to and use the ventilation shaft.
- However, the risk of a court coming to a different conclusion was sufficiently great to require the Defendant to advise the Claimant; and to take steps to amend the draft underlease to remove that risk.
- *"The question whether a solicitor is in breach of duty to warn his client of the risk that a court may come to a different interpretation from that which the solicitor advises is correct will necessarily be highly fact-sensitive and will depend on the strength of the facts favouring a different interpretation and thereby giving rise to the risk. Nevertheless, I consider that if Mr Davies had considered the relevant provisions as he should, he would have appreciated that there was a possible non-correspondence between the terms of the headlease and the underlease in relation to access to the ventilation shaft, a matter of great importance to his client's project. Notwithstanding my conclusion as to the correct interpretation of the provisions, I consider that the risk of a court coming to a different conclusion was sufficiently great to require Mr Davies to advise his client accordingly and to take steps to amend the draft underlease so as to remove the risk. Accordingly I consider that Mr Davies was in breach of duty owed to his client in failing to do so."*
- But no loss on the facts.

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Barker v Baxendale-Walker Solicitors [2017] EWCA Civ 2056

- Claim against Defendant solicitor in relation to specialist tax advice provided to the Claimant.
- HMRC challenged the relevant scheme recommended by the solicitor.
- On receiving advice that the challenge was likely to succeed, the Claimant paid £11.29 million to HMRC.

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Barker v Baxendale-Walker Solicitors [2017] EWCA Civ 2056

- Claim dismissed at first instance. Although a *"general health warning"* of the risk of challenge to the scheme by HMRC should have been given, the Defendant was not under a duty to give a more specific warning about the particular construction of section 28(4) of the Inheritance Tax Act 1984 relied upon by HMRC, such a construction was *"not obvious or likely"* and *"very doubtful"*.
- Decision appealed on the basis that Roth J was wrong to conclude that there was no breach of duty in failing to give the more specific warning.
- Appeal allowed – a reasonably competent solicitor would have gone beyond his own view and set out the risks.

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Barker v Baxendale-Walker Solicitors [2017] EWCA Civ 2056

Principles set out by Asplin LJ:

"(i) The question of whether a solicitor is in breach of a duty to explain the risk that a court may come to a different interpretation from that which he advises is correct is highly fact sensitive: (Queen Elizabeth, Hermann, Balogun and Levicom cases);

(ii) If the construction of the provision is clear, it is very likely that whatever the circumstances, the threshold of "significant risk" will not be met and it will not be necessary to caveat the advice given and explain the risks involved;

(iii) However, depending on the circumstances, it is perfectly possible to be correct about the construction of a provision or, at least, not negligent in that regard, but nevertheless to be under a duty to point out the risks involved and to have been negligent in not having done so (Levicom and Balogun cases);

(iv) It is more likely that there will be a duty to point out the risks, or to put the matter another way, that a reasonably competent solicitor would not fail to point them out when advising, if litigation is already on foot or the point has already been taken, although this need not necessarily be the case (the Queen Elizabeth case to be compared with Balogun); and

(v) The issue is not one of percentages or whether opposing possible constructions are "finely balanced" but is more nuanced."

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Duties to the other side

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Steel v NRAM [2018] UKSC 13: the facts

- Key issue: does a solicitor acting for a borrower owe a duty of care to a lender?
- Defendant solicitor acted for borrower that had purchased a business park comprising Units 1, 2, 3 and 4 with the assistance of a loan from Northern Rock, secured against the four units.
- Borrower later sold Unit 3 and upon partial redemption of the loan, Northern Rock's security was restricted to Units 1, 2 and 4. The Defendant acted for the Borrower and Northern Rock was unrepresented.
- In 2006, Borrower also sought to sell Unit 1 of the business park. Again, the Defendant was instructed to act in the proposed sale for the Borrower and Northern Rock was unrepresented. Northern Rock agreed to release its security upon Unit 1 for repayment of £495,000 in partial redemption of the loan. The balance of the loan was to remain secured on Units 2 and 4.

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The key representation

Inexplicably, the Defendant sent the following email to Northern Rock:

"Helen/Neil
I need your usual letter of non-crystallisation for the sale of the above subjects to be faxed through here first thing tomorrow am if possible…marked for my attention – I have had a few letters on this one for previous other units that have been sold. I also attach discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that. Can you please arrange to get these signed and returned again asap."

Many thanks
Jane A Steel"

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The correct position

However, contrary to the Defendant's email, as had been agreed between the parties:

- The whole loan was not being paid off, simply reduced by payment of £495,000;
- Northern Rock's security upon Units 2 and 4 was to remain in place.
- The Defendant did not have a settlement figure for repayment of the whole loan.

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Importance of assumption of responsibility

Lord Wilson:

"The legal consequences of Ms Steel's careless misrepresentation are clearly governed by whether, in making it, she assumed responsibility for it towards Northern Rock. The concept fits the present case perfectly and there is no need to consider whether there should be any incremental development of it."

However the *"unusual dimension"* of the case was noted– a claim brought by one party to an arm's length transaction against the solicitor acting for the other party.

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Conclusion: no reasonable reliance

Lord Wilson:

"No authority has been cited to the court, nor discovered by me in preparing this judgment, in which it has been held that there was an assumption of responsibility for a careless misrepresentation about a fact wholly within the knowledge of the representee. The explanation is, no doubt, that in such circumstances it is not reasonable for the representee to rely on the representation without checking its accuracy and that it is, by contrast, reasonable for the representor not to foresee that he would do so."

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2 properties, 2 landmark claims

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Dreamvar appeals

- What if the facts are not known to the representee?
- 2 conjoined appeals- *Dreamvar v Mishcon de Reya* and *P&P Properties v Owen White & Catlin* [2018] EWCA Civ 1082.
- In both cases purchasers were duped by imposter vendors.
- Both sued the vendors' solicitors, who had failed to carry out proper identity checks
- Causes of action- negligence, breach of warranty of authority, breach of undertaking

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Negligence

Focus on **assumption of responsibility.** Relevant features included:

- Negligence claim was founded on an omission (i.e. on not carrying out the money laundering checks). No positive act.
- Money Laundering Regulations 2007 ("the MLR") do not create liabilities to third parties on the part of professionals checking documents.
- The imposter vendors and the buyers were engaged in a transaction at arm's length. Nothing to suggest that the imposter's solicitors had assumed any duty to the buyers to carry out any due diligence on their behalf.
- Purchasers' solicitors could have sough some form of undertaking from the imposters' solicitors about identity checks.

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Breach of warranty of authority

- Orthodox view is that the warranty of authority given by a solicitor is only to the effect that the solicitor acts for his client and not that his client is who he purports to be: *Excel Securities PLC v Masood* [2010] Lloyd's Rep PN 165.
- Position different as regards P&P Properties because the vendor's solicitors signed the contract on behalf of the vendor and was held to have warranted that it acted for the real Clifford Harper;
- But claim failed at reliance stage.

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Loss of a chance … and primary causation

The *Allied Maples* test:

- The Claimant has to prove on the balance of probabilities that but for the Defendant's negligence, he would have acted in a certain way;
- The Claimant has to show that he had a "real and substantial chance" of achieving the better outcome for which he contends (and a discount is applied to his damages in order to reflect the prospect of the Claimant failing to do so).

Second part of the test can prove problematic. 3 particular facets under consideration:

- The honesty of the claimant
- The extent to which you can have a "trial within a trial"
- The relevance of "after-available" evidence.

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Putatively dishonest claimant: *Perry v Raleys* [2019] UKSC 5

- Loss of a chance claim based on Mr Perry's lost opportunity to make a "services claim" in a VWF compensation scheme;
- Defendant solicitors alleged that Mr Perry could not honestly have made such a claim;
- Did Mr Perry have to prove on the balance of probabilities that he would have brought an honest claim for a Services Award? Or was his honesty merely one of the factors to which the court would have regard in deciding whether such a claim would have had real and substantial prospects of success?
- Lord Briggs made clear that Mr Perry would have to prove on the balance of probabilities that he would have made an honest claim. The issue was a stage 1 *Allied Maples* causation issue, and was decided against the claimant.
- A strong policy element: just as compensation will not be awarded for 'nuisance value', a claimant cannot be heard to rely on a propensity to make dishonest claims.

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What about relying on a 3rd party's allegations of dishonesty?

Brearley & Ors v Higgs [2019] 3 WLUK 463L:

- High ranking employee of a car chain left to try and set up a competitor. Employers tried to restrain his activities. He later sued his solicitors.
- The solicitors contended that "according to" Pendragon in the dispute with Mr Brearley, he had been involved in wrongdoing. The Claimants applied to strike out these allegations on the grounds that they contained allegations of fraud that were not properly pleaded.
- Claimants lost: the nature of a "lost litigation" case is that parties often have to rely on information emanating from third parties which cannot be validated first hand.

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Trial within a trial?

- *Dixon v Clement Jones Solicitors* [2005] PNLR 6: *"it is the prospects and not the hypothetical decision in the lost trial that have to be investigated*" (para 27).
- *Edwards v Hugh James Ford Simey* [2019] UKSC 54 has now been decided by the Supreme Court and, strangely, has been treated as raising no point of general importance.
- *Moda International Brands Ltd v Gateley LLP* [2019] EWHC 1326 (QB)- effect of availability of third party's evidence

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"After- available" evidence

- 4 exceptions to the general principle that such evidence is not admissible:
- (1) Evidence that would have been available, in the absence of negligence, at the time the claim was lost will be admissible (*Dudarec v Andrews* [2006] 1 WLR 3002). (2) Evidence of the original parties' attitude to settlement at the time that the claim was lost will be admissible (*Somatra Ltd v Sinclair Roche and Temperley* [2003] 2 Lloyd's Rep 855). (3) Evidence of dishonesty or misconduct will be admissible (*Perry; Green v Collyer-Bristow* [1999] Lloyd's Law Rep PN 798). (4) Evidence within the scope of the *Bwllfa* principle.

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Where are we now?

- In *Edwards*, the Court of Appeal did not say that after-available evidence could never be admitted, but instead that there would have to be a *"significant or serious scale to the consequences of the supervening event*" for it to be relevant. The Supreme Court decision does not qualify this principle and sheds no further light, being based squarely on the particular and unusual facts of the case.
- The current position is that adducing after-available evidence will usually be impermissible.
- The consequence of this is that the court's assessment of "loss of chance" is a rather blunt instrument and tends to favour claimants (with a consequent costs risk imbalance, unless defendants can make well-judged Part 36 offers).

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Updating thoughts

Nicholas Davidson QC
4 New Square
November 2019

The one-man band plays again

Singularis Holdings Ltd
v
Daiwa Capital Markets Europe Ltd
[2019] UKSC 50 [2019] 3 W.L.R. 997

How complex is simple?

Edwards (Watkins)
v
Hugh James Ford Simey
[2019] UKSC 54

Down the fairway

Magical Marking Ltd
v
Ware & Kay LLP
[2013] EWHC 59 (Ch)

Down the fairway

Para 157:
"... broadly in the middle rather than at the edges of advice which might have been given without negligence..."

Allied Maples and the dance floor

Perry v Raleys
[2019] UKSC 5 [2019] 2 W.L.R. 636
Para. 20

Allied Maples and the dance floor

"To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done *upon receipt of competent advice*, this must be proved by the claimant upon the balance of probabilities." (Italics added)

Allied Maples and the dance floor

Dayman v Lawrence Graham
[2008] EWHC 2036 (Ch)
Para. 81
[obiter?]

Allied Maples and the dance floor

"If [the claimant proves that there was a real or substantial chance that [the counterparty] would have responded to such an approach by proposing a deal
...

Allied Maples and the dance floor

... then (3) the claimant must prove, on the balance of probabilities that [she] would have accepted that deal."

Allied Maples and the dance floor

Assetco Plc v Grant Thornton UK LLP
[2019] EWHC 150 (Comm)
Section G
Para. 415

The United Kingdom

Learning from Northern Ireland and Scotland

The United Kingdom

The P.N.L.R.

The United Kingdom

A tale of interest
Al Jaber v. Al Ibrahim
[2018] EWCA Civ 1690
[2019] 1 W.L.R. 885

The United Kingdom

A tale of interest
1812 in England
1820 in Scotland
Neilson v. Stewart
(1991) S.C. (H.L.) 22

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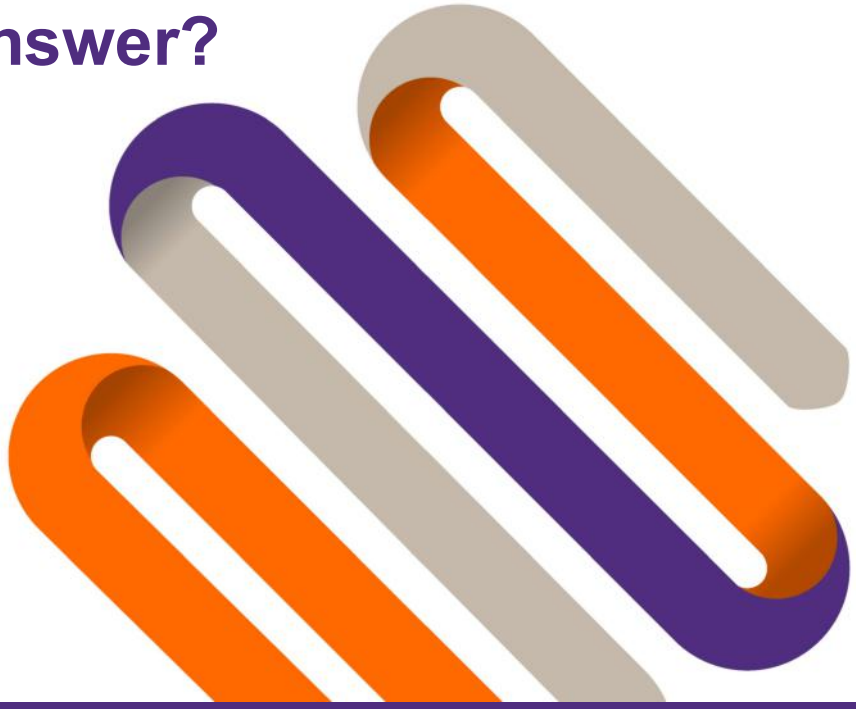
Audit negligence - Is technology the answer?



28 November 2019

Philippa Hill

Audit reform – closing the expectation gap

Carillion collapse in Jan 2018 – dam bursts

John McDonnell MP commissions Prof Prem Sikka's review '**Reforming the Audit Industry**' (May 2018)

FRC publishes thematic review into **Audit Culture** citing high profile collapses (May 2018)

Sir John Kingman appointed by BEIS to conduct "*root and branch*" review of the **FRC** (April 2018)

Extended to include **procurement and remuneration of auditors** (Oct 2018)

More enquiries into audit

CMA launched its investigation into whether the audit sector is **competitive and resilient** enough to maintain high quality standards citing "*growing concerns about statutory audits, in particular following the collapse of Carillion*" (Oct 2018)

BEIS Select Committee inquiry into "**The Future of Audit**" (Nov 2018)

Sir Donald **Brydon** appointed by Audit Quality Forum to review the **scope of audit and auditing standards** (Dec 2018)

Advances in technology in audit

Audit testing over the decades

Originally substantive testing of nearly all items -	Significant coverage but hugely time-consuming
Proliferation of records and activity -	Materiality and sampling
Data analytics -	100% coverage (and more)

Changes in audit techniques

Whole population testing

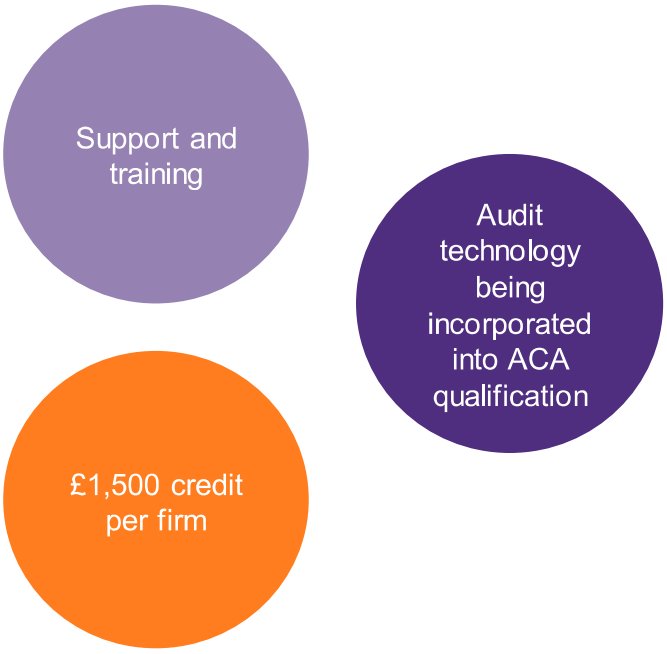
Automated trend analysis and outlier identification

Benchmarking between companies

Industry bodies embrace technology

The ICAEW has partnered with Inflo (a financial data analytics software company)

Significant benefit for smaller audit firms



The challenges of adopting technology

Auditing standards	Not drafted with data analytics in mind and still assume sampling methodology
Approach to exceptions	Judgement when it comes to testing of exceptions or outliers - could be 1,000s
Skills/ techniques	Data scientists/ analysts, interpretation of results
Adaptation by fraudsters	Steps to disguise transactions and avoid detection

The detection of fraud using technology

- AI and data analytical techniques can identify unusual transactions **BUT**
- Over-reliance on the data?
- Too many false positives?

- Detection of fraud is more difficult where:
- It involves senior management
- Collusion is involved or false documentation

So is technology the answer to negligent audits and company collapses?

Carillion in 2016 – positive results

- Very large long-term contracts incl. UK public sector
- Turnover of £4.4bn in 2016
- Highly competitive environment and thin margins
- 3% net profit before tax (less on construction contracts)
- High and increasing net borrowings but looking to reduce
- The largest balance sheet asset was goodwill of £1.5bn

March 2017 announced healthy pipeline and dividends

- 3-year positive viability statement and **clean audit**

Carillion – profit warning within 4 months and bust within 10 months

- **July 2017** - Profit warning with £845m of contracts written down
- One analyst commented

> *"Carillion looks like it's trying to bail out a supertanker with a soup spoon"*

- **September 2017** – amount written off increased to £1bn+
- **November 2017** - warned it may breach bank covenants
- **January 2018** - went into liquidation with negligible assets

Could it happen again?

- Judgement remains fundamental to current accounting standards and biased financial reporting is difficult to identify – management may believe own hype
- Many difficult accounting estimates are forward looking – data analytics can't accurately predict the future
- Particular difficulties where the product/business is highly specialised and relevant knowledge is held by few
- Increased risk if we go into a recession – more incentive to manipulate and stave off potential failure

Negative bond yield warning of recession

What could one expect in a recession?

Falling demand and shrinking sales and margins

Going concern issues

Increased incentive for fraudulent reporting

In summary

Significant advantages from data analytics and AI tools and techniques – 100% coverage

Increasingly accessible to even small firms with less excuse for not using analytics

Potential negligence if not used, and a fraud is missed that would have been picked up

Auditing Standards have not caught up with new technology and an expectation gap remains

Training of auditors may be lagging behind and negligence could arise from poor interpretation

Technology may help with fraudulent transactions, but of more limited assistance in preventing collapse following estimates of future performance that did not come to pass

Q&A

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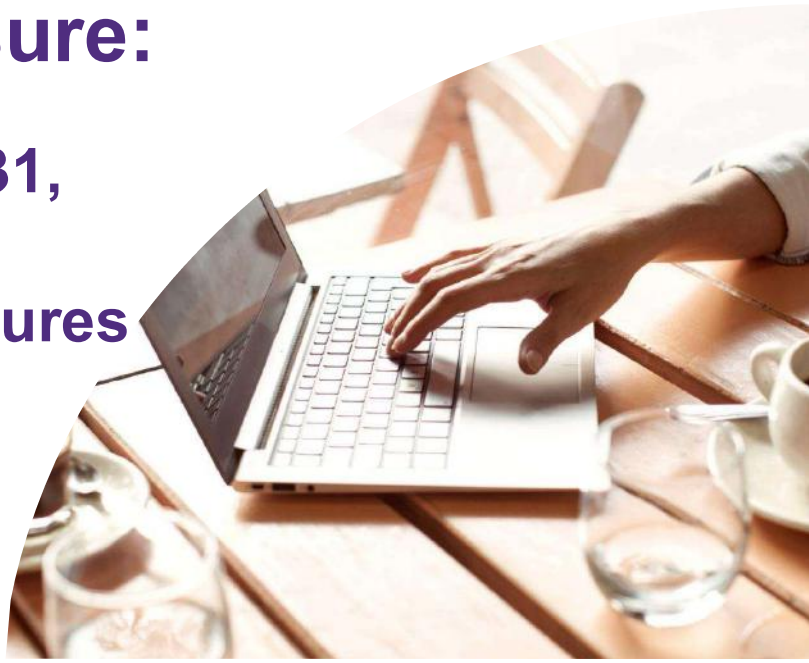
Electronic Disclosure:

Developments in CPR 31, Investigations Tools, Technologies & Procedures



Vijay Rathour
Partner, Grant Thornton
Digital Forensics Group

Themes for Today

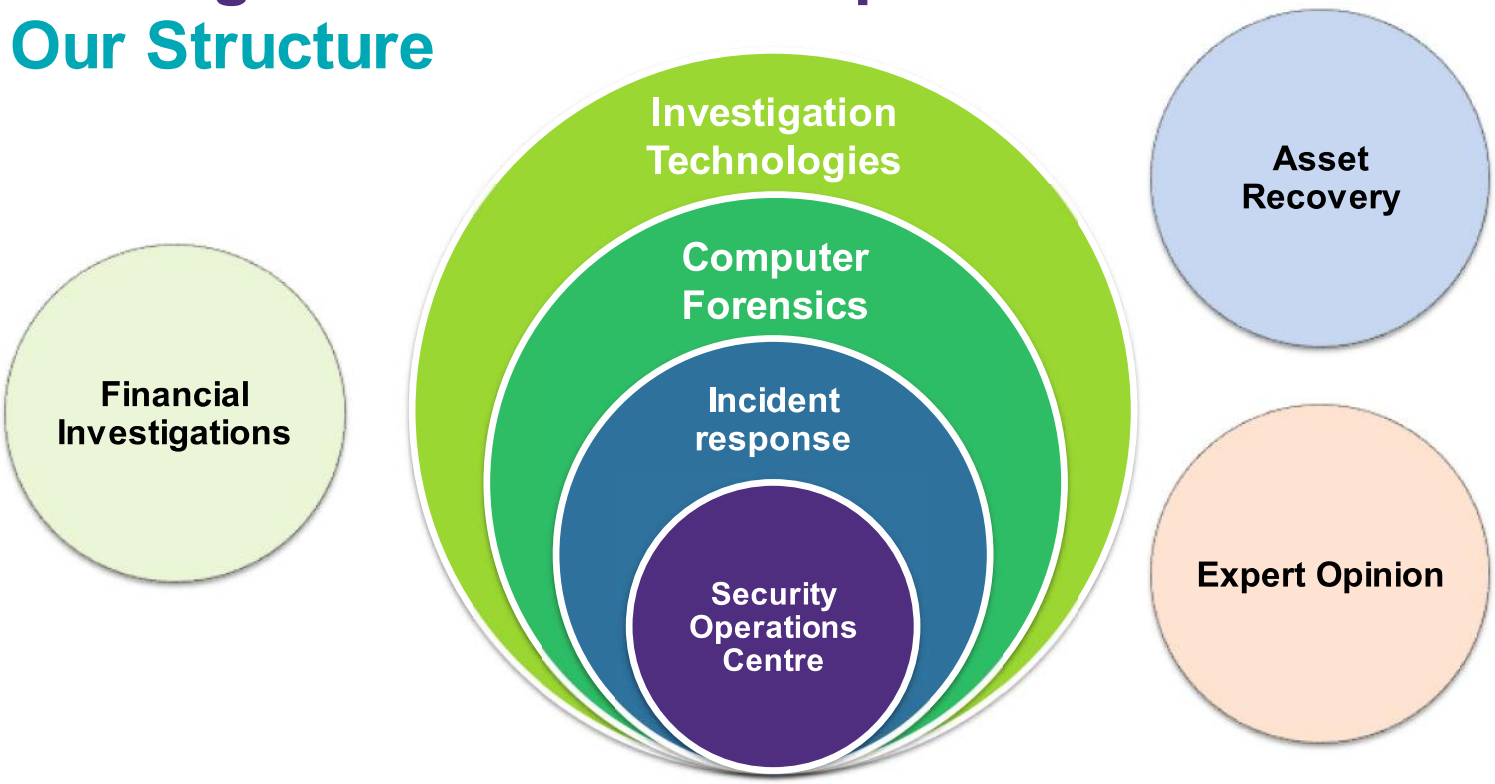
Agenda

1. The Data Deluge
2. Changes to the Disclosure Regime
3. New Tools, Technologies and Solutions
4. Stopping it Before it Happens
5. Questions

Who are we?

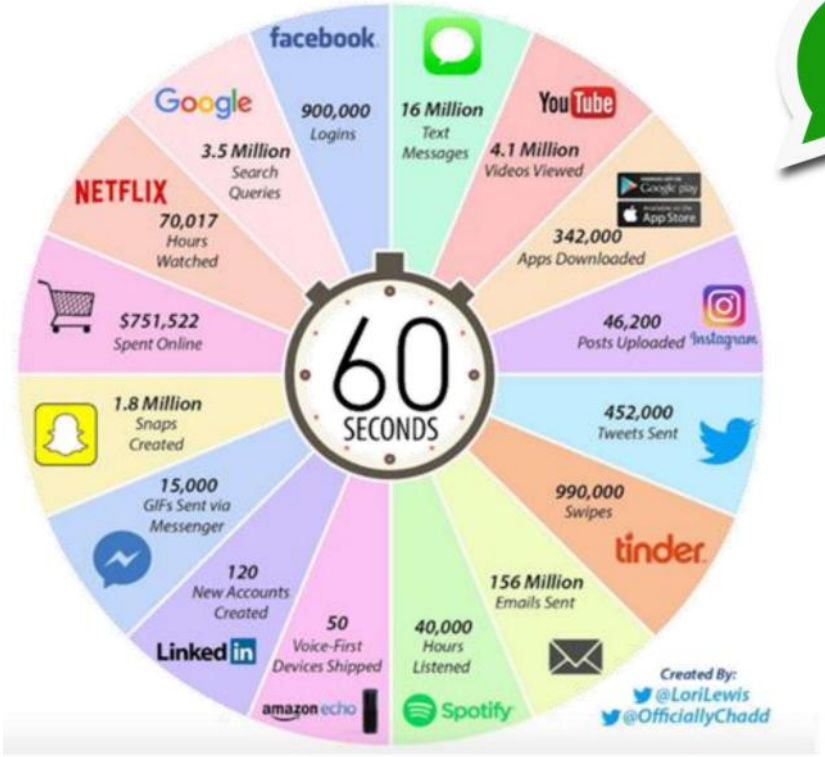
The Digital Forensics Group

Our Structure

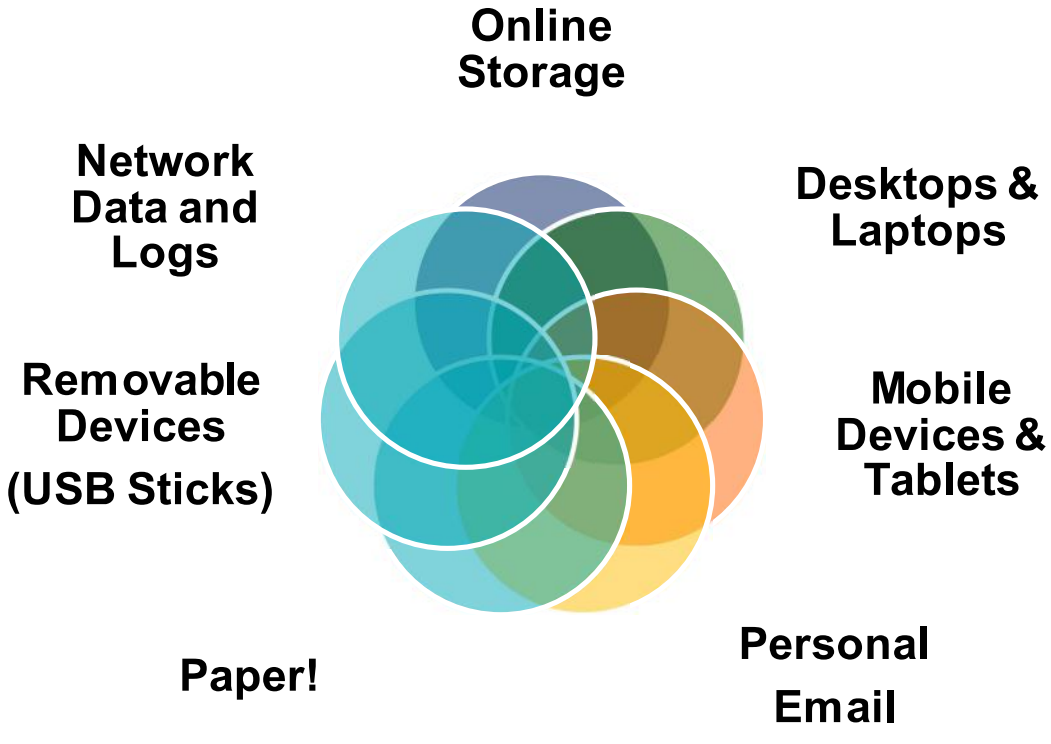


The Data Deluge

All About the Data



Where Does Data Live?



Investigating the Data Estate

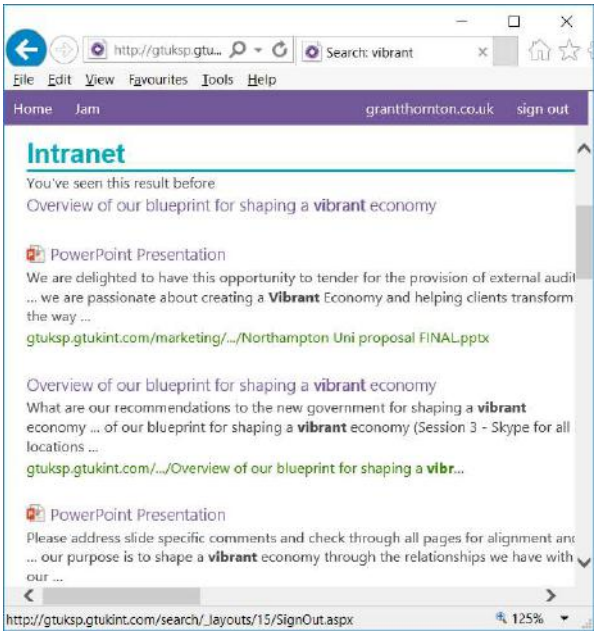
Devices

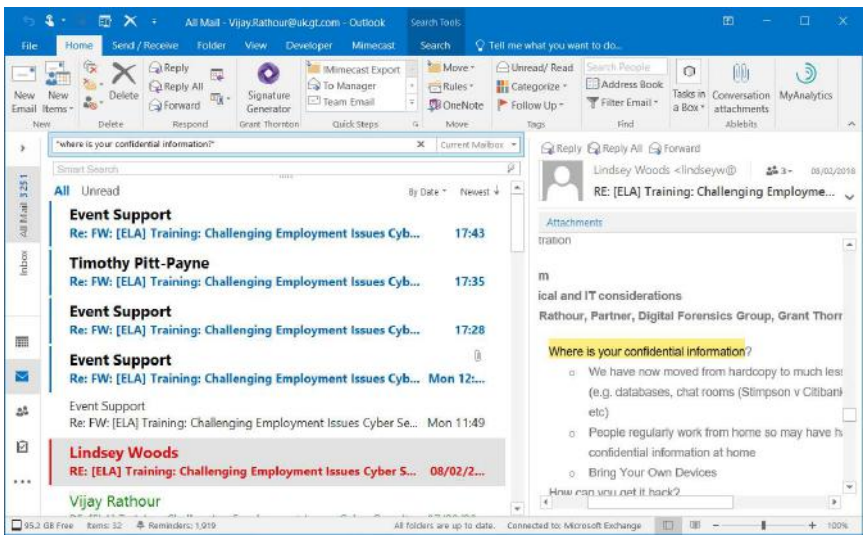
- Laptops, PCs
- Internet of Things
- USB Sticks

What we can recover

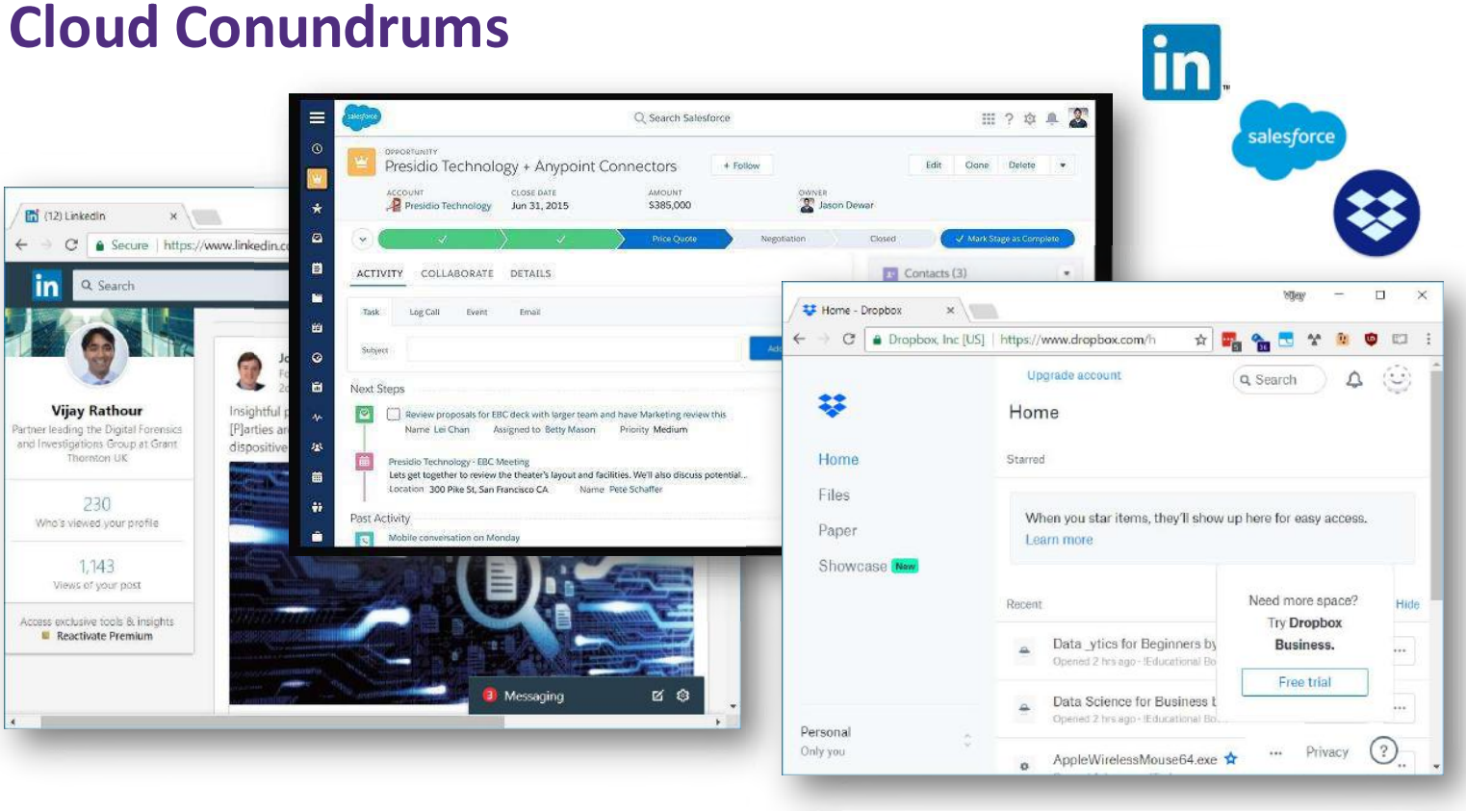
- Deleted data
- Personal data (emails)
- Hidden data in Docs
- Dropbox/Cloud accounts
- Encrypted data
- Backups
- File and folder activity
- Copying
- Internet searches
- GPS Data

Inside the Firewall



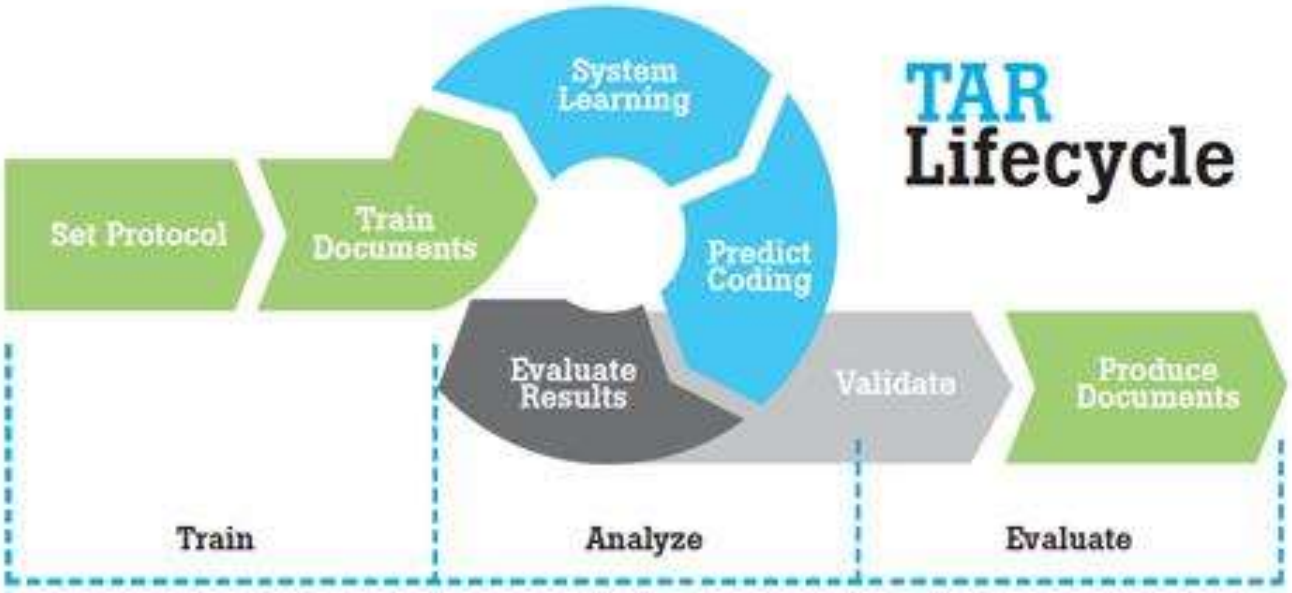


Cloud Conundrums



If it ain’t broke?

Pyrrho Investments Limited - TAR



AI – Predictable Cost Savings

The Pilot Scheme – "Initial Disclosure"

- **Focused List of Issues**:
  - Initial Disclosure is by **list**
  - Copies of **supporting documents** must accompany it
  - These should be **key documents** that are relied upon by the disclosing party, and
  - the documents necessary for the other parties to **understand the claims**

The Disclosure Pilot Scheme Principles

"

- Disclosure is important in achieving **the fair resolution of civil claims.**
- The court expects the parties (and their representatives) to **cooperate with each other** and to assist the court so that the scope of disclosure, if any, that is required in a claim can be agreed or determined by the court in the **most efficient way possible.**
- The court will be concerned to ensure that disclosure is directed to the **key issues in the claim** and that the scope of disclosure is **not wider** than is **reasonable** and **proportionate** in order fairly to **resolve those key issues.**

"

The Pilot Scheme – The Duties

"

- Disclosure is important in achieving **the fair resolution of civil claims.**
- **Legal representatives** who have the conduct of litigation on behalf of a party to a claim are under the following **duties to the court**:

  (3) To ***liaise and cooperate*** with the legal representatives of the other parties to the claim (or the other parties where they do not have legal representatives) so as to **promote the reliable, efficient and cost-effective conduct of disclosure, including <u>through the use of technology</u>**

"

The Pilot Scheme – Practicalities

- From 1 January 2019 parties commencing or continuing matters in the Commercial Court will have to follow the **Disclosure Pilot Scheme.**
- The Scheme will run for two years.
- If it's considered successful it will continue indefinitely.
- Failure to comply may result in court sanctions including the **adjournment of hearings** and **adverse costs orders**.

The Pilot Scheme – Obligations

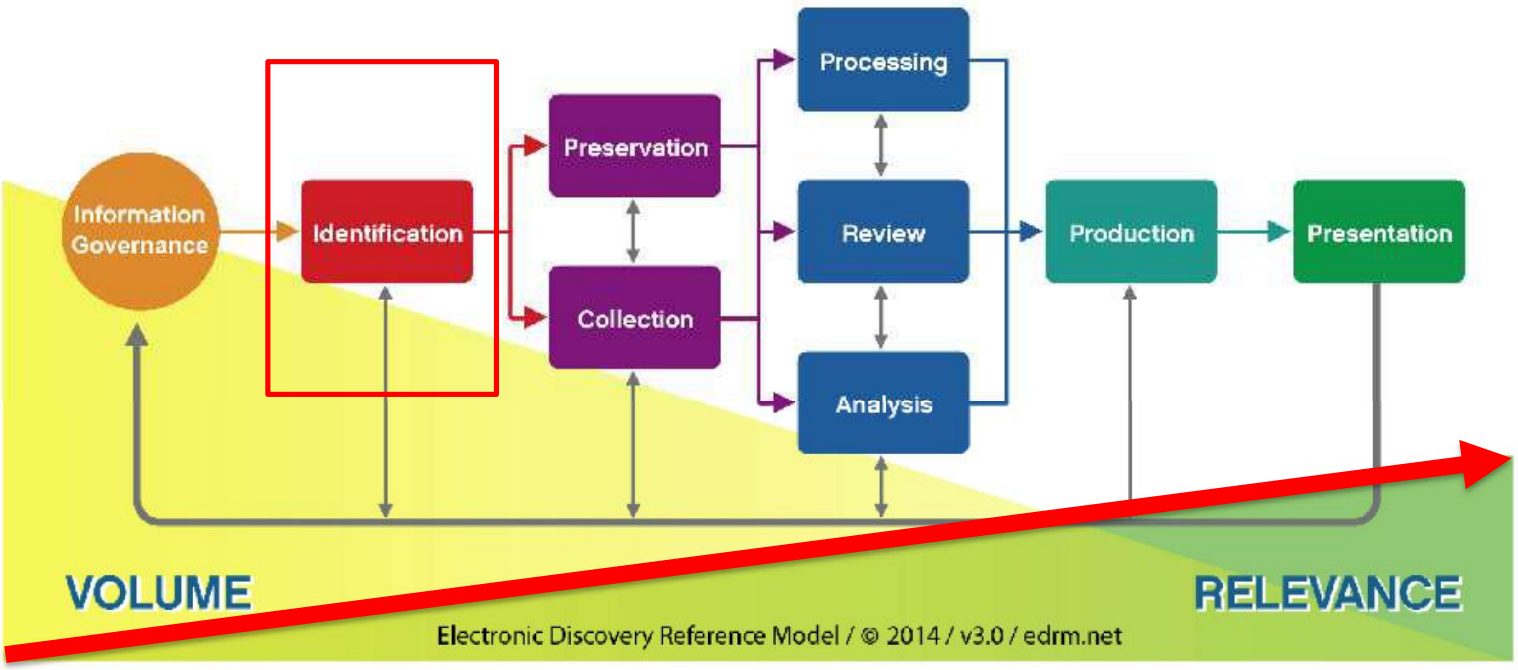
- Document **preservation** obligations have been **hardened**
- Now, a party who knows that they "***may become***" a party to proceedings is under a **duty to the Court** to take **reasonable steps** to **preserve documents** that "***may* be relevant to any issue in the proceedings".**

The Pilot Scheme – Obligations

- Document preservation obligations have been **hardened**
  - Parties must **suspend** relevant **document destruction policies**, issue a hold notice (including **former employees**) and take **reasonable steps** to stop **third parties** from destroying relevant documents.
  - Legal Representatives must **notify** clients of obligation

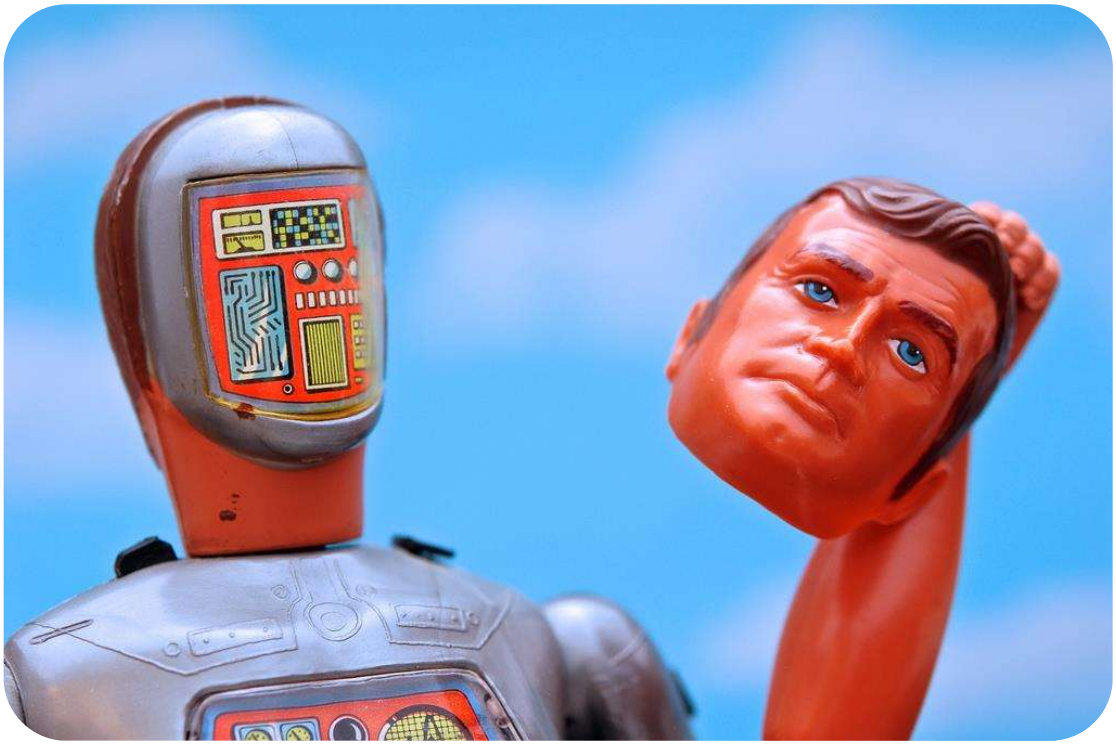
The Investigator's Dilemma

The Goals of an Investigation

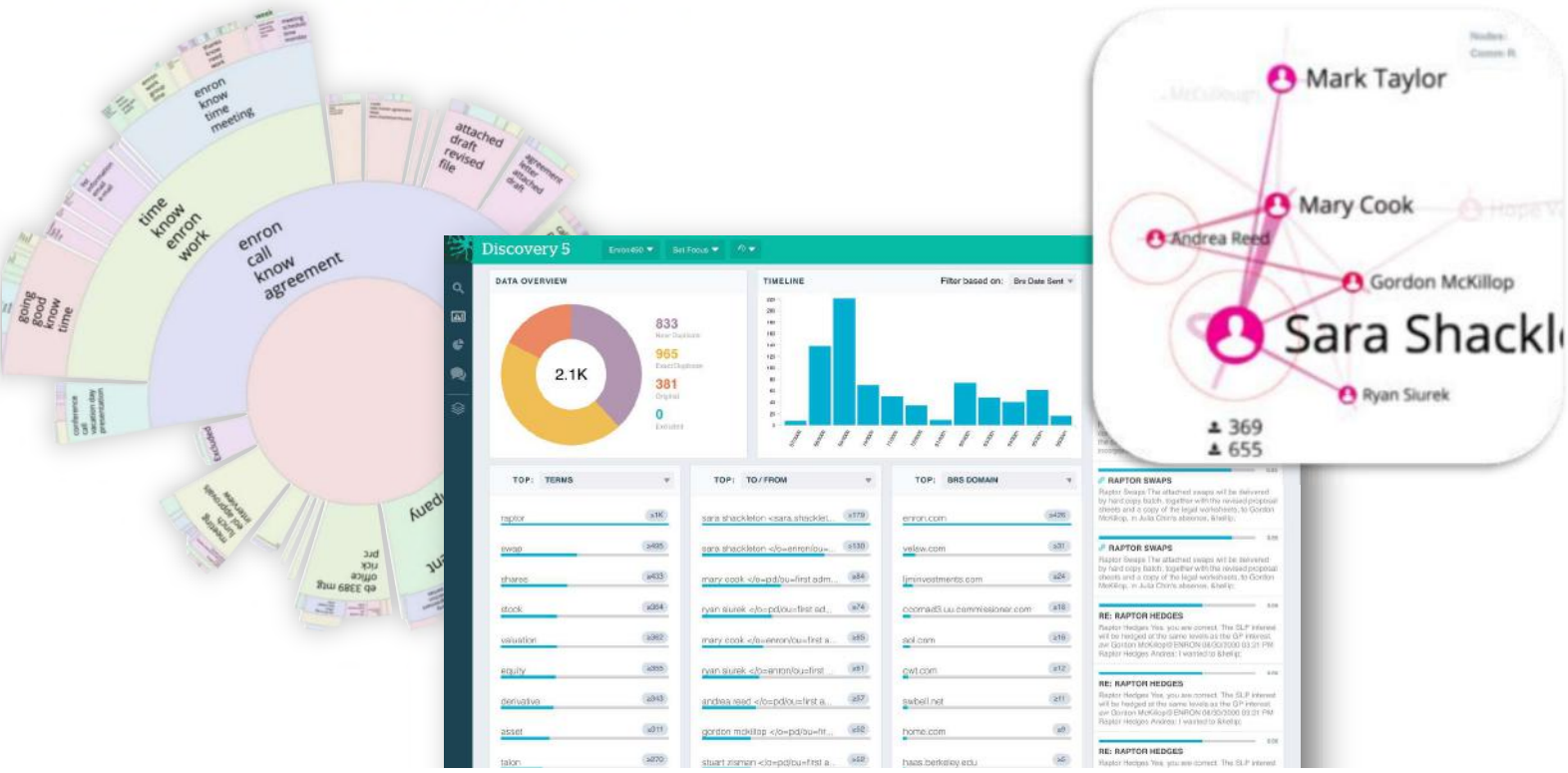


Hay in a Haystack

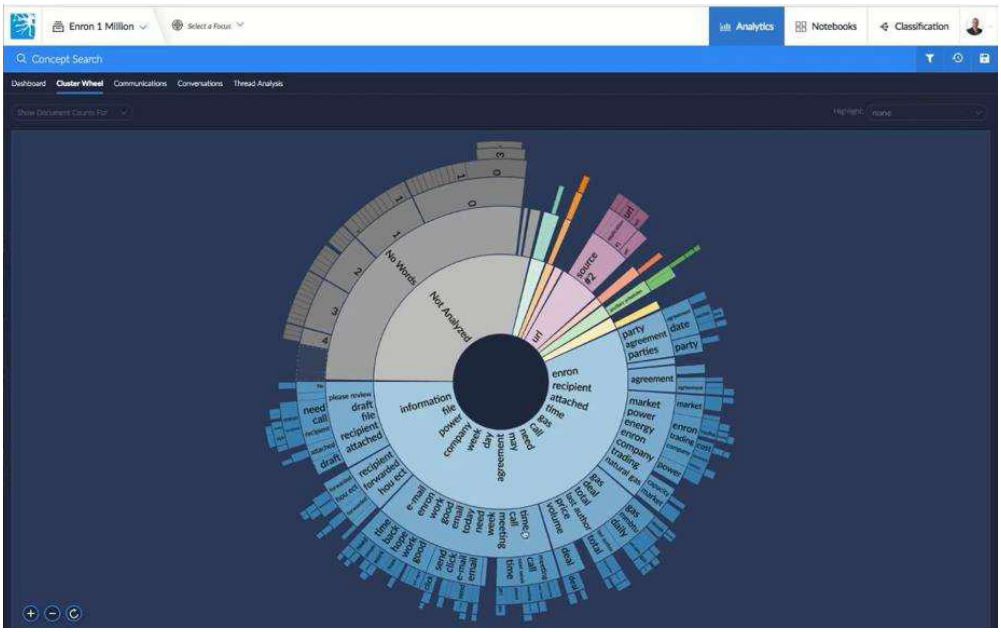
Accelerating Investigations



Human + Investigation Technology Hybrids



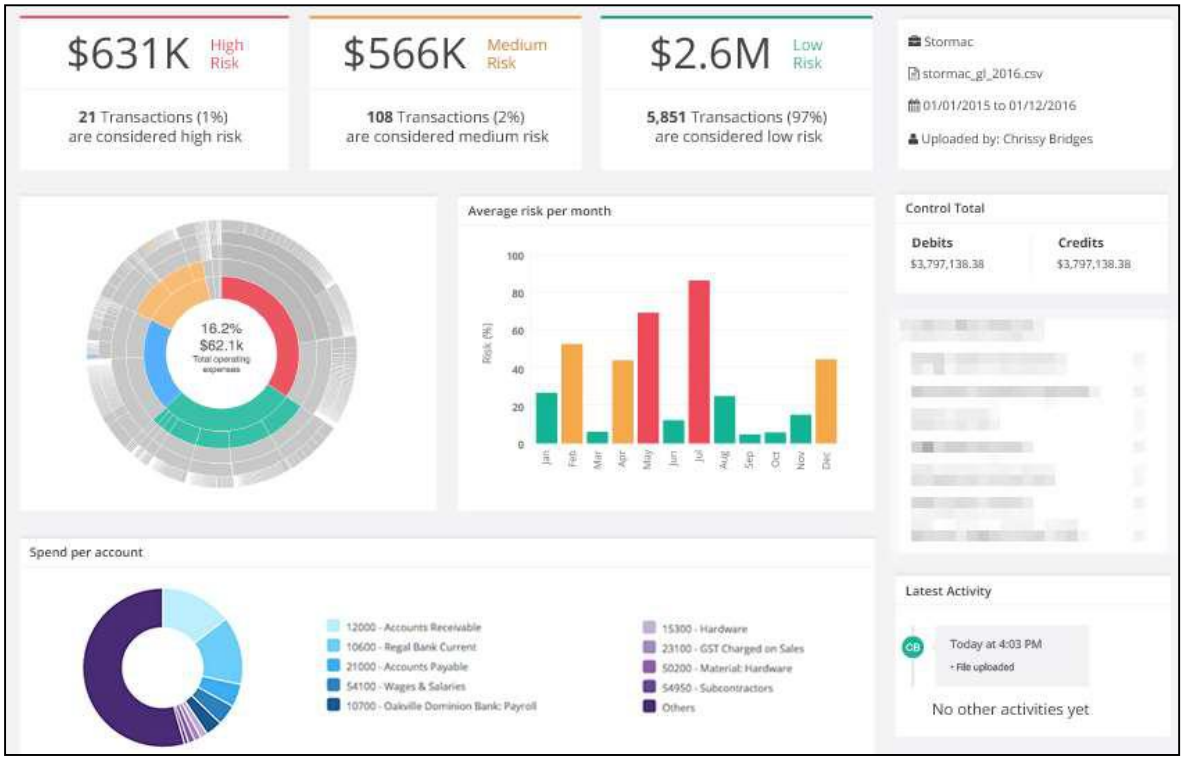
Human + Investigation Technology Hybrids



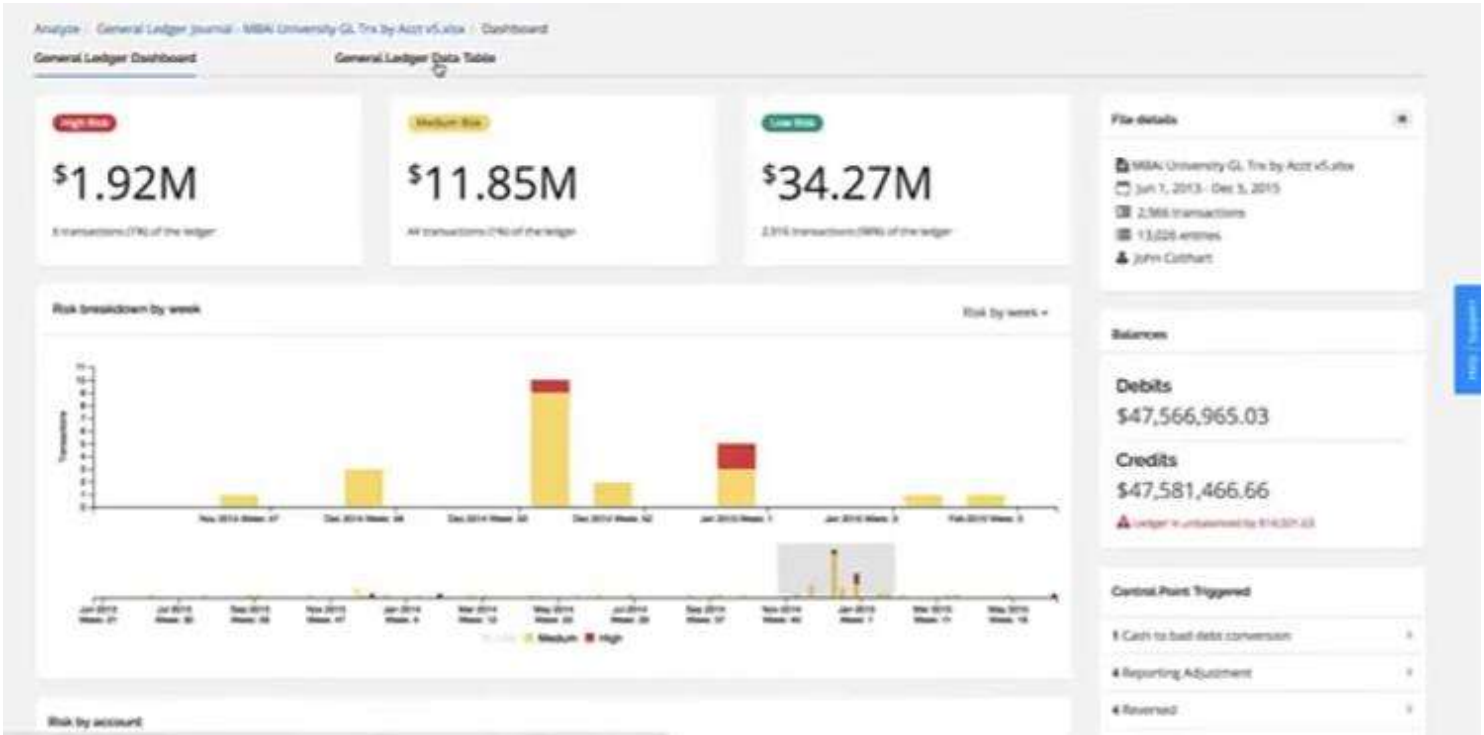
Analytic Tools

- Conceptual analytics
- Sentiment Analysis
- Timeline Analysis
- Who Spoke to Who?
- Who was *Angry*
- Better than Keywords

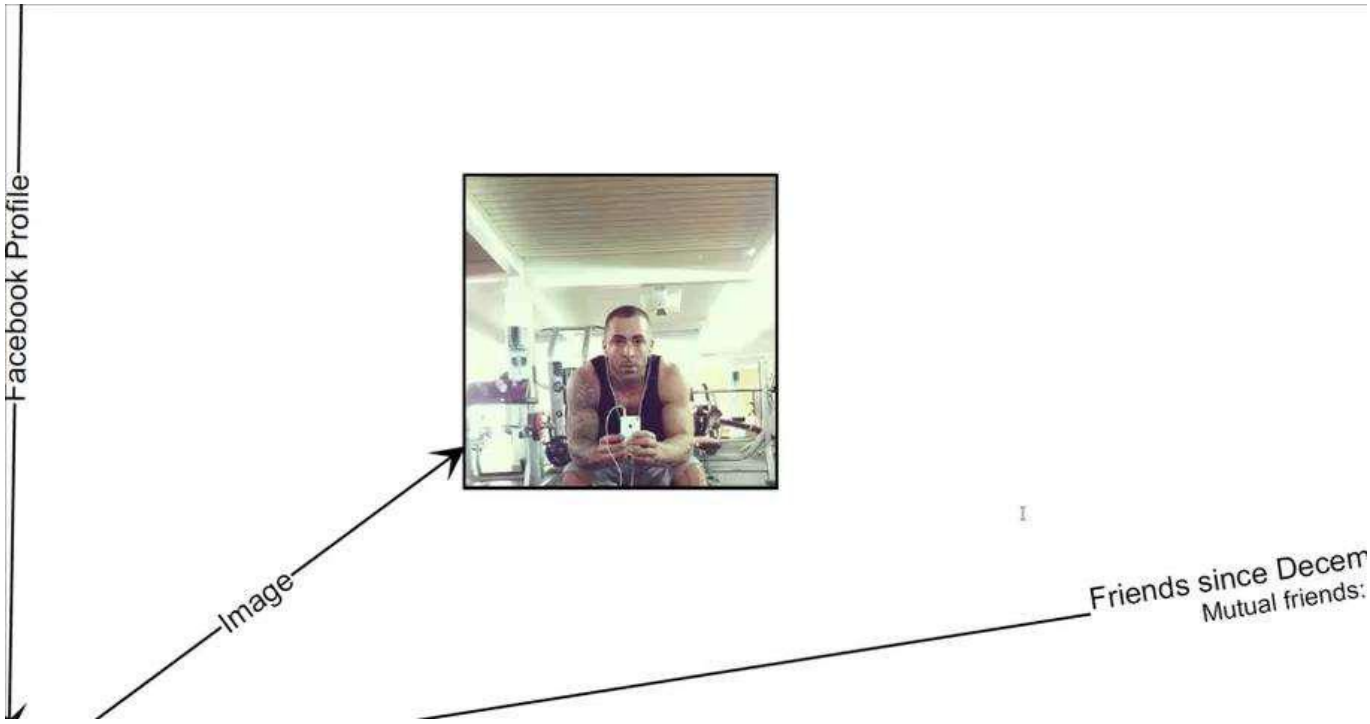
Financial Crime – Anomaly Detection



Financial Crime – Anomaly Detection

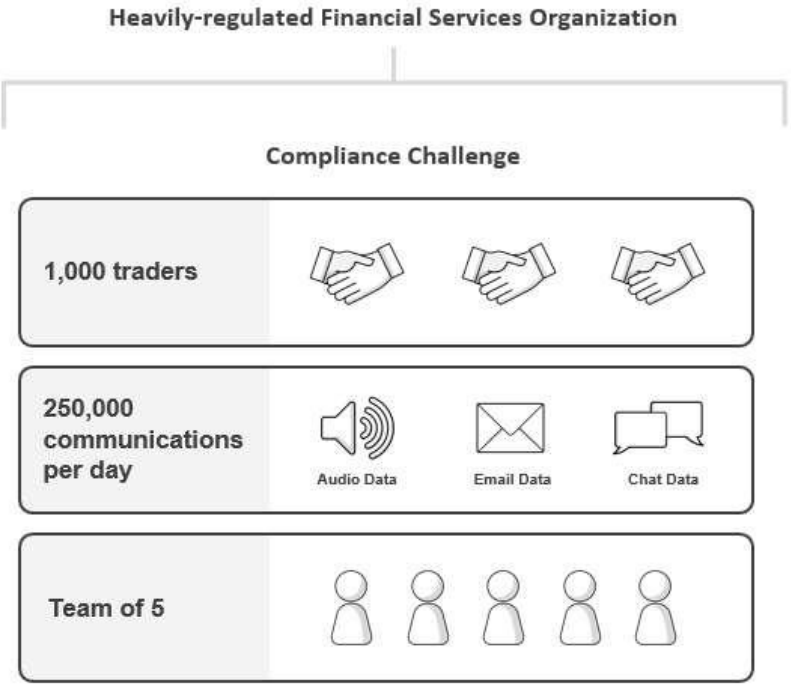


Mapping Relationships

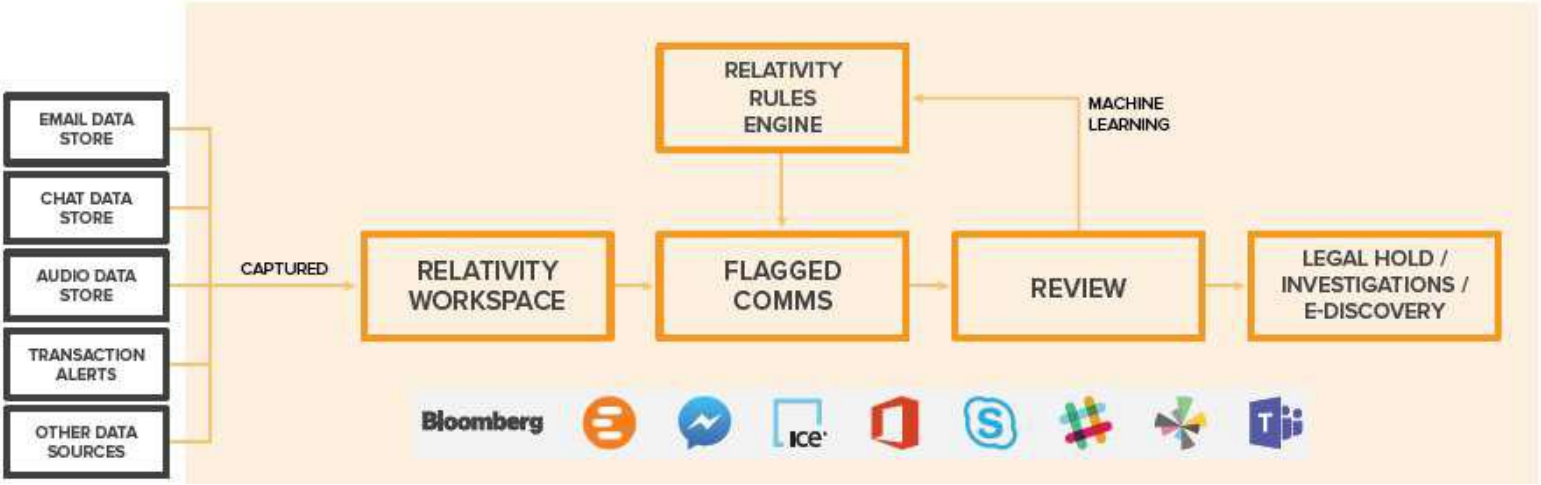


Stop it Before it Happens

Preempting Compliance Failings



Preempting Compliance Failings



Can we Stop it Before it Happens?

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Vijay.Rathour@uk.gt.com
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PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

ANNUAL CONFERENCE

28th November 2019

PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION
ANNUAL CONFERENCE
Thursday 28th November 2019

0830–0900	Registration and Refreshments
0900–0910	**PNLA Introduction**
0910–0930	**'Chairman's address'** Jeremy Cousins QC - Radcliffe Chambers
0930–1015	**'Professional Negligence and Liability Update'** Patrick Lawrence QC - 4 New Square Nicholas Davidson QC - 4 New Square
1015-1100	**'Lender claims and Contracts (Rights of Third Parties) Act 1999'** Ian Wilson QC - 3 Verulam Buildings
1100-1115	Refreshments
1115–1200	**'Reasonable Behaviour or Taking Advantage?'** David Berkley QC - 3 Paper Buildings
1200-1215	**'PNLA ATE SCHEME'** David Pipkin & Matthew Pascall & David Chase - Temple Legal Protection
1215-1300	**'Misfeasance and Private Prosecutions'** Colin Witcher & Anthony Eskander - Church Court Chambers
1300–1400	Lunch
1400-1430	**'Advice & Loss'** David McIlroy - Forum Chambers
1430-1500	**'Is that Appropriate? The limitations of COBS 10'** Susanne Muth, Forum Chambers
1500-1530	**Panel discussion session**
1530-1545	Refreshments
1545-1630	**'E-Disclosure - Auditors and Accountants Negligence update'** Philippa Hill & Vijay Rathour - Grant Thornton
1630-1645	**Q&A and Chairman's Closing Remarks**
1645-1700	**PNLA - Annual General Meeting**

PROFESSIONAL NEGLIGENCE AND LIABILITY
ANNUAL CONFERENCE
Billesley Manor Hotel, Alcester Road, Billesley near Alcester, Stratford-upon-Avon B49 6NF
Thursday 28th November 2019
ATTENDEES (1 of 2)

Robert Bajaj	Trethowans LLP	Southampton
David Berkley QC	3 Paper Buildings	London
Justin Briggs	Burges Salmon LLP	Bristol
Helen Brown	Paris Smith LLP	Southampton
Daniel Brumpton	Nelsons Solicitors Limited	Nottingham
Andrew Burnette	Burges Salmon LLP	Bristol
Andrew Call	4 New Square	London
Colin Carr	Kevin Edward Costs	London
John Carter	BPE Solicitors LLP	Cheltenham
David Chase	Temple Legal Protection	Guildford
Jenna Coad	Penningtons Manches Cooper	London
Andrea Cohen	Consultant - Compli/ Weightmans/PNLA	Cheshire
Howard Colman	Colman Coyle LLP	London
Tim Constable	Dentons UKMEA LLP	Hertfordshire
Chris Cooney	Campbell Courtney & Cooney	Surrey
Jeremy Cousins QC	Radcliffe Chambers	London
Nicholas Davidson QC	4 New Square	London
Tim Edward	Dentons UKMEA LLP/PNLA	Edinburgh
Anthony Eskander	Church Court Chambers	London
John Gosling	J Gosling Services Limited	Wilmslow

Paul Griffiths	Clarke Willmott LLP	Birmingham
Philippa Hill	Grant Thornton	London
Bill Holohan	Holohan Lane Solicitors	County Cork
Matthew Howarth	Shoosmiths LLP	Leeds
John Hyde	Law Society Gazette	London
Patrick Lawrence QC	4 New Square	London
Kendal Litherland	Shakespeare Martineau	Nottingham
Andy Lyalle	Temple Legal Protection	Guildford
Julia Mahoney	Howden UK Group Limited	London
Katy Manley	PNLA President	Cheltenham
David McIlroy	Forum Chambers	London
Susanne Muth	Forum Chambers	London
Alison Neate	Smith Partnership	Leicester
David O'Brien	Penningtons Manches Cooper	London
David Osborne	Fraser Dawbarns LLP	Norfolk
Suzanne Padmore	Burges Salmon LLP	Bristol
Matthew Pascall	Temple Legal Protection	Guildford
Jon Powell	Kevin Edward Costs	London
Philip Radford	BPE Solicitors LLP	Cheltenham
Vijay Rathour	Grant Thornton	London
Cathryn Selby	Nelsons Solicitors Limited	Nottingham
Joe Walch	Temple Legal Protection	Guildford
Kelly Whittaker	Burges Salmon LLP	Bristol
Rhys Williams	Howden UK Group Limited	London
Ian Wilson QC	3 Verulam Buildings	London
Colin Witcher	Church Court Chambers	London

PNLA
Professional Negligence Lawyers Association

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

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Duncan Lamont - Charles Russell Speechlys

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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.

01483 514428 | matthew.pascall@temple-legal.co.uk

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.

01483 514424 | david.chase@temple-legal.co.uk

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.

01483 514815 | nicholas.ellor@temple-legal.co.uk

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.

01483 514411 | jacob.white@temple-legal.co.uk

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.

01483 514420 | amy.edgington@temple-legal.co.uk

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INTRODUCTION - *This year's 'Wheel of Fortune'*

Professionals involved in financial services and professional negligence and liability will find this conference not only useful but highly enlightening. The changing fortunes of those involved in litigation will be under review. Results over this year have been surprising and the conference will include inspiration for new areas of litigation and creative approaches.

PNLA Introduction

Jeremy Cousins QC
Radcliffe Chambers

‘Chairman’s address’

Jeremy Cousins QC

| Silk 1999 | Call 1977

Radcliffe Chambers

Practice Areas

Banking and Financial Services
Commercial Disputes
Professional Liability
Trusts Wills and Estates

"He is statesmanlike and has a very nice manner about him. You just learn a lot from him." Chancery: Commercial, Chambers UK Bar 2019

Jeremy Cousins QC specialises in substantial commercial, commercial chancery (including trusts), banking and professional negligence disputes.

Experience and Expertise

He has appeared in numerous leading cases, including the very important and well-known banking and solicitors' breach of trust case AIB v Redler in the Supreme Court, the major, and very high value, banking dispute in Rosserlane v Credit Suisse and, most recently, in Dreamvar v Mishcon de Reya, a landmark case on solicitors' breach of trust and negligence in conveyancing transactions, which led to the rewriting of the Law Society's Code for Completion by Post in 2019. Jeremy is consistently recommended by the leading legal directories across his core practice areas.

Recommendations

Jeremy has consistently been recognised over many years by Chambers UK and Legal 500 for his expertise, skill as an advocate, and user friendly qualities. He is listed as a leading silk for commercial litigation, commercial chancery, professional negligence and banking & finance.

- "A strategic thinker who is very good at professional negligence cases." (Professional Negligence, Chambers UK 2018)
- "Has great gravitas and a lovely manner with clients. He has an encyclopaedic knowledge of case law at his fingertips."
- "Jeremy likes to deal with every element of the claim, and he goes the extra mile in terms of client services." (Chancery Commercial, Chambers UK, 2018)
- "He has superb knowledge of the law. He's very quick to respond and his advice is always excellent." (Banking and Finance, Chambers UK, 2018)
- "First class." (Professional Negligence, The Legal 500, 2017)
- "Very clever and unflappable, and a very reassuring presence during complex matters." (Commercial Litigation, The Legal 500, 2017)
- "A friendly and confident silk with outstanding knowledge." (Banking and Finance, The Legal 500, 2017)

"He is excellent: he has an eye for detail, is incredibly thorough and looks at things in a very calm way." (Professional Negligence, Chambers UK, 2017)

- "He's very calm and assured, and you know he's carefully considered things. His clients have a lot of faith in his advice." (Chancery: Commercial, Chambers UK, 2017)
- "His encyclopaedic knowledge of the law combined with his thorough preparation makes him unbeatable." (Banking and Finance, Chambers UK, 2017)
- "He has superb grasp of detail and wonderful client care." (Commercial litigation, The Legal 500, 2016)
- "A high-quality silk, who provides in-depth research and analysis." (Banking and Finance, The Legal 500, 2016)
- "A favourite for heavyweight litigation". "A quite exceptional performer who is very intuitive and has a touch of genius about him."
- "Remarkably versatile and client-friendly. His encyclopaedic knowledge of the law and thorough preparation make him unbeatable." (Chancery commercial, Chambers UK and Chambers Global, 2015) "Calm, collected, and never flustered by the largest, most complex cases." (Commercial litigation, Legal 500, 2014)
- "An encyclopaedic knowledge of the law coupled with comprehensive and formidable preparation." (Professional negligence, Legal 500, 2014)
- "Very intuitive with a touch of genius about him. A quite exceptional performer, he is remarkably versatile and client-friendly. His encyclopaedic knowledge of the law combined with his thorough preparation make him hard to beat." (Banking & Finance, Chambers UK, 2014)

- "Very intuitive with a touch of genius about him. A quite exceptional performer, he is remarkably versatile and client-friendly. His encyclopaedic knowledge of the law combined with his thorough preparation make him hard to beat." (Banking & Finance, Chambers UK, 2014)
- "He has a gentle approach but he gets results. He is a formidable preparer of his work and that makes him unbeatable. Possessed of the most lovely cross-examination method, he is gentle, persuasive and avuncular." Recent work: worked on the AIB v Redler case which is tipped to be the leading authority on the remedies available to bankers where solicitors are liable for breach of trust. (Chancery: commercial, Chambers UK, 2014 and Chambers Global, 2014)
- "He's very approachable and willing to muck in. He assists in ways other counsel don't." (Professional negligence, Chambers UK, 2014) Jeremy Cousins QC is an "outstanding" practitioner on commercial matters, and is particularly good on cases with a fiduciary duties element to them. He recently acted in *ptanleybet International Betting v Steinberg & others*, a claim surrounding guarantee liability construction. (Chancery: commercial, Chambers UK, 2013 and Chambers Global, 2013)

Publications

Jeremy has contributed articles to a number of leading publications:

- "The future of Banking Litigation" - Legal Week May 2015
- "Damages for delay: generally a liability at large" published by the Journal of International Banking and Financial Law, May 2014.
- "The revival of lenders' breach of trust claims" published by the Journal of International Banking and Financial Law, July 2012.
- "Company Charges" Solicitors' Journal 2005 Volume 149 (23) pages 694-695 (analysing the validity against a liquidator of an unregistered charge which arises by implication of law)
- "Should Jersey follow South Australia: Developments in Liability for Negligent Advice", Jersey Law Review October 2006 (considering developments in negligence liability and whether the Jersey Courts are free not to follow the English decisions)
- "Trustees – how to sell a business and distribute the proceeds" published in May 2010 in Sweet & Maxwell's Private Client Business (considering trustees' powers to give warranties on sale, and to restrict powers of appointing proceeds pending beneficiary covenants being given to vendors)
- "Misrepresentation on bond issues: liability in the secondary market" published by the Journal of International Banking and Financial Law, January 2011

He is the consultant editor of Third Party Litigation Funding by Nick Rowles-Davies published by OUP. He also contributes articles on a regular basis for a number of leading=publications, including "The Royal Court Rules" a commentary on civil procedure in Jersey,= published by Jersey Advocates Hanson Renouf.

Patrick Lawrence QC
&
Nicholas Davidson QC
4 New Square

‘Professional Negligence and Liability Update’

Patrick Lawrence QC

Call: 1985 Silk: 2002

+442078222000 p.lawrence@4newsquare.com

Clerk: Andrew Call

a.call@4newsquare.com

+442078222038 +447788443600

A towering courtroom presence ... superb in heavyweight cases, known for razor-sharp mind and ability to take a witness apart

- Chambers & Partners

Former Chambers & Partners Professional Negligence QC of the year, Patrick has appeared in many leading cases at appellate level.

He defended expert witness immunity in the Supreme Court in *Jones v Kaney*. If you believe the Directories*: "a wonderful advocate", ""extremely bright and very personable - a formidable opponent"* [Chambers]. *"He is fantastic on his feet and I have the utmost confidence in him." "One of, if not THE best for professional negligence claims. He is calm, tactical and holds his nerve." [Chambers] "A Rolls-Royce silk ... able and approachable in equal measure, one of the most in demand professional indemnity barristers ... first port of call, particularly when it comes to large surveyors' and valuers' claims ... a towering courtroom presence .. superb in complex heavyweight cases, known for razor-sharp mind and ability to take a witness apart.*" [Chambers] "*very charismatic and good with clients; he is able and approachable in equal measure*" [Chambers]. *"He is a brilliant lawyer with a real appreciation of the 'human' side of cases", "a superb advocate, who always manages to engage the court and present arguments in a compelling fashion", "highly persuasive" and "can make complicated arguments understandable"* [Legal 500]. "*He has a fantastic manner and outstanding judgement", "Inspires great confidence and tackles problem with the minimum of stress"* [Legal 500].

Many of his recent professional negligence cases have been in the commercial and company law sectors. This work fits well with his expertise in auditors' negligence and his involvement in claims against investment/pensions advisers, tax advisers, and other financial services professionals. He is numerate (as barristers go). He is retained in cases where effective cross-examination is considered critical. Many of his cases involve allegations of fraud or other impropriety in the commercial world, and he is prepared to read closely large amounts of material in order to find out what really went on, and then - if necessary - to go to court to prove it.

There is an obvious connection between his professional liability work and disciplinary proceedings involving professionals, and he has acted for complainants and respondents in relation to conduct issues concerning solicitors, barristers, accountants and surveyors. He has conducted a number of substantial hearings involving allegations of misconduct against auditors on behalf of the JDS, the AADB and now the FRC, the bodies responsible for investigating complaints against auditors in cases raising issues of public interest.

He is frequently retained to advise on coverage issues, particularly in the field of professional indemnity insurance.

He studies chance and probability, not only in the legal context, and has readily adapted to the brave new world in which lawyers are required to gamble on the success of their own cases.

Patrick operates also in the field of public law, specialising in A1P1 cases. He appeared in the Supreme Court in *UKIP v Electoral Commission*, and in Court of Appeal in the A1P1 solar panel claims against DECC; *Breyer v DECC*.

He is a co-author of the chapter on solicitors' negligence in the Lloyds looseleaf on Professional Negligence.

Privacy Policy

Click here for a **Privacy Policy** for Patrick Lawrence QC.

Areas of Expertise

Professional Liability

"Hugely intelligent and eloquent both in written and oral advocacy" *– Legal 500, 2020*

"His presentation style is fantastic and he's very good at holding a room, while delivering the key message of his advice." "He is extremely experienced and truly specialises in professional negligence. He can distil a case of a million papers down to size." *– Chambers & Partners, 2020*

"He is fantastic on his feet and I have the utmost confidence in him." "One of, if not THE best for professional negligence claims. He is calm, tactical and holds his nerve." *– Chambers & Partners, 2019*

"He is particularly impressive in the court room; completely unflappable." *– Legal 500, 2019*

Former Chambers & Partners Professional Negligence QC of the year (and nominated for a second time in 2017), Patrick has appeared in many leading cases at appellate level. He defended expert witness immunity in the Supreme Court in *Jones v Kaney*.

Cases

- Gladman Commercial Properties v Fisher Hargreaves Proctor

- Brill v. Penn

Accountants, Auditors & Actuaries

Patrick has acted in a number of claims against accountants that have gone to trial and to appeal. The cases have concerned tax advice; investment advice; general financial advice to private individuals and family; and a wide range of advice to corporate clients. A representative case is *Little v George Little Sebire* which involved defective advice on Corporation Tax and related tax avoidance issues. He appeared in *Haines Watts v Thornhill*, a multi party case arising out of a container leasing tax avoidance scheme involving solicitors, accountants and tax counsel. He acted in the fall-out from the failed *Cabvision* litigation, which itself concerned another over-ambitious tax avoidance scheme.

Auditors' negligence is a separate area of expertise. He has conducted three lengthy contested cases, Resort Hotels, Wiggins and Mayflower (each involving much pre-hearing investigation and drafting, and each going to a contested hearing before the tribunal) on behalf of the Joint Disciplinary Scheme, the AADB or now the FRC. He has extensive knowledge of auditing and accounting standards; and in particular of the issues that arise where auditors suspect fraud on the part of management, or where auditors are asked by management to recognise revenue/profit prematurely or inappropriately. He acted on auditor and director complaints arising out of the largest ever fraud on the AIM, Langbar International PLC – 2011-12) and arising out of the Farepak collapse (the Christmas hampers case) – 2013.

He is currently acting in a $200m auditors negligence claim arising out of the collapse of an insurance conglomerate in the Eastern Caribbean.

Financial Services Professionals

His familiarity with claims against accountants fits well with claims arising out of bad investment advice. He is currently instructed on claims concerning the mis-selling of endowment mortgages; the marketing of ‘zeros’; the negligent management of a portfolio of equities (excessive weighting in technology and internet stocks); and many claims related to the aggressive marketing of supposedly tax-efficient schemes which have gone disastrously wrong.

Insurance Brokers & Agents

He has acted in many claims against insurance brokers. Not many have reached court, but that may partly be because such claims tend to be rather difficult to defend on liability issues. He appeared in *Jones v Environcom* [2011] EWCA 1152. *Kirk v Aviva and others* settled shortly before trial in 2017; a fire case involving claims against insurers and brokers, and allegations of breaches of fiduciary duty arising out of undisclosed close commercial connections between broker and insurer.

Lawyers

Patrick has very extensive experience of all forms of litigation arising out of claims against lawyers. In the 1990s he was frequently instructed by the Solicitors Indemnity Fund in cases involving errors made (allegedly) in a very wide range of areas of legal practice. He was instructed in the managed litigation involving claims brought by the Bristol & West Building Society, which went to a 12-week trial before Chadwick J. He was subsequently instructed in further managed litigation and mediation concerning claims brought by other lenders. His involvement in the protracted duel between lenders and those who insure solicitors has left him with an understanding not only of most forms of mortgage fraud and incompetent conveyancing, but also of the increasing significance of equitable and proprietary claims in the context of professional liability and of the delicate handling required in cases containing allegations of impropriety. He acted for the defendant solicitors in *Lexi v Pannone*, a claim arising out of the £100m fraud perpetrated by the managing director of the claimant company which raises *Stone & Rolls* illegality issues; for the defendant solicitors in the case brought by Earl Spencer in relation to the conduct of divorce proceedings; and for the claimant in proceedings against the lawyers who acted in the unsuccessful *Cabvision* litigation. He successfully defended the *Petrocapital* claim, which concerned advice on convertible loan notes against the background of a bolier room scam. He acted in the managed claims concerning Right to Buy. He is currently acting in high value claims involving the conduct of big money divorce proceedings, and in multi-party pensions negligence litigation arising out of the *Gleeds* decision.

Patrick co-authors the section on solicitors’ negligence in the *Lloyds Looseleaf on Professional Negligence*

Cases

- Ward Hadaway v DB UK Bank Limited
- Petrocapital Resources PLC v Morrison & Foerster
- Lexi Holdings v Pannone & Partners
- (1) William James Luke (2) Kingsley Smith & Co (A Firm) v (1) Wansbroughs (A Firm) (2) Caroline Addy
- Bowie v. Southorns
- Martin William Cave v. Robinson Jarvis & Rolf (A Firm)
- Parry v. Edwards Geldard

- Mortgage Corporation Ltd v. Lewis Silkin & Anor : Same v. Marsha Shaire & Others

- Maes Finance Ltd v. Sharp & Partners

- Bristol & West plc v. Bhadresa

- Halifax Mortgage Services Ltd v. S & S

- Parry v. Edwards Geldard

- Bristol & West Building Society (Plaintiff) v. Fancy & Jackson (a firm) (Defendants) : Same (Plaintiff) v. Defendants in 1995 B 2165; 1995 B 2401; 1995 B 2468; 1995 B 2858; 1995 B 3197; 1996 B 0784

- Bristol & West Building Society v. May, May & Merrimans (a firm) & between The Bristol & West Building Society & 13 Other Parties

- Shah v Forsters

Pension Advisors

Patrick has been instructed in many cases involving allegations of negligence against those who advise pension schemes. They have concerned (among other things) failed post-*Barber* equalisations; variations to schemes which have been ineffective as a result of a lack of attention to the provisions governing amendment; issues as to the identity of those to whom the advisers owe duties; black hole damages points; damages issues arising in relation to entry of scheme into PPF. He is currently acting in multi-party litigation arising out of the decision of Newey J. in *Gleeds Retirement Benefits Scheme* [2014] EWHC 1178; and in litigation brought by the PPF both as assignee and in its own right. Each case is due to be tried in 2019.

Surveyors & Lawyers

Much of Patrick's work in the 1990s related to allegedly over-optimistic valuations. He appeared in *Platform Home Loans*, the leading authority on the interaction in claims against valuers of the *Saamco* principle and contributory negligence on the part of claimant lenders. In 2009 he acted for the claimant in *McKay v Savills* – a claim arising out of dishonest collusion between buyer and property professionals.

Since the market collapse in 2008-09 he has been retained in a large number of high value claims against valuers, and is very familiar with the issues that arise where claims arise out of aggressive lending practices of 2000-2008. In 2010 he appeared for the successful defendant in *K/S Lincoln v CBRE* [2010] EWHC 1156, a claim concerning the valuation of a £40m portfolio of hotels. The case stands as the most up-to-date authority on the "margin of error defence". Since then, Patrick has been looking to develop the reach of that defence in cases involving residual valuations of commercial developments, where a small and permissible variation in relation to one component of the valuation can lead to the final valuation figure being 'out' by a very significant margin. He has also been considering the issues that arise where an employee of the claimant lender may have acted improperly in relation to the making of the loan in question, and has been exploring the ways in which evidence of an individual's impropriety may provide a valuer with a complete defence. He is currently acting in claims involving a £1.2bn commercial portfolio valuation; a €300m portfolio of commercial properties in Benelux/Germany; a £250m commercial valuation in the Midlands; a £150m hotel

portfolio valuation; among others.

He acted in *Titan (Europe) 2006-3 plc v Colliers* [2015] EWCA Civ 1083*;* the first valuer's claim to raise issues as to title to sue in the context of securitisation. The Court of Appeal overturned the decision of Blair J (reported at [2014] EWHC 3106, (Comm)), that the defendant valuer had negligently overvalued a large commercial property in Germany, for the purpose of inclusion in a portfolio of loans to be securitised by Credit Suisse. For a more detailed note on this case, written by the instructed counsel, please click here.

Cases

- TITAN EUROPE 2006-3 PLC v COLLIERS INTERNATIONAL UK PLC (In Liquidation) (2015)
- K/S Lincoln v CBRE
- Mortgage Express v Countrywide Surveyors

Commercial

Patrick's practice ranges widely over all forms of commercial law. He has extensive experience of all forms of arbitral process and is very familiar with the ICC Rules of Arbitration. He has acted in many construction cases, and has advanced so-called 'black hole' arguments as to no loss on both sides of that debate. He first argued issues of that type in the construction field, where the 19th century jurisprudence (the Albazero case, etc) has been developed in cases such as *Alfred McAlpine v Panatown*. He acted for the successful appellant in *Titan v Colliers*, a securitisation case involving 'black hole / no loss' arguments arising out of a complex web of assignments and trust arrangements. The Court of Appeal judgment contains the most recent appellate guidance in this area of the law. He is currently engaged in an appeal to the Privy Council from the Eastern Caribbean Court of Appeal which will require an extensive review of jurisdiction authorities, and may involve critical reconsideration of the law relating to acceptance of jurisdiction.

Patrick has appeared in a wide range of commercial contract cases, both in court and before arbitrators. He has extensive experience of the obtaining of interim remedies in the commercial context: eg. *Orb ARL v Fiddler* [2016] EWHC 361, in which Popplewell J, set aside freezing and search orders on the ground of non-disclosure.

Cases

- D&G; Cars Ltd v Essex Police Authority
- D&G; Cars Ltd v Essex Police Authority
- Breyer Group Plc v Department of Energy and Climate Change
- Pennyfeathers Limited v Pennyfeathers Property Co Ltd
- Petrocapital Resources PLC v Morrison & Foerster
- THOMAS COOK TOUR OPERATIONS LTD (FORMERLY SUNWORLD LTD) v HOTEL KAYA

• Rubicon Computer Systems Ltd v. United Paints Ltd

• Brill v. Penn

• Orb ARL v Fiddler

Commercial Chancery

Patrick is frequently instructed in cases involving issues in the Chancery field; tax, trusts, company law and real property. Present and recent cases include:

- Multi-jurisdiction litigation involving Israeli will and $800m assets held in multiple offshore trusts; continuing
- *Shah v Forsters* [2018] PNLR 8; trusts, joint tenancies, administration of estates
- *Pennyfeathers Limited v Pennyfeathers Property Co Ltd* [2013] EWHC 3530; trusts arising out of failure of joint venture, Rose J.
- A long-running matter (*Lexi Holdings PLC v Pannone*) before Briggs J., arising out of the frauds of Shaid Luqman. Issues arising included difficult points as to the implied actual authority and apparent authority of a director to give unconventional instructions on behalf of a company.
- *Smith v Contact Holdings Ltd*; scope of managing director's authority to instruct lawyers in connection with shareholder dispute.
- Litigation arising out of the Tax Tribunal's decision in relation to an *Eclipse* film finance scheme that the participants in the scheme were not trading.
- Litigation arising out of the failure of other film finance and container leasing tax avoidance schemes.
- *Former Queen of Malaysia v Lattey & Dawe*; trial before Hodge J. concerning tax advice given in connection with the late King of Malaysia's holdings in the UK and abroad.
- *Dore v Leicestershire CC*; 2 week trial before Sales J; issues as to trust law; charities; local government.
- £5m claim arising out of allegedly defective advice concerning rights to light.
- Probate litigation concerning allegations of undue influence in relation to a will.
- Litigation concerning delay in commercial conveyancing.
- Directors disqualification proceedings.
- *Christofi v Schubert Murphy*; claims arising out of the setting up of a bogus solicitor's practice; issues as to scope of solicitors' undertakings; jurisdiction of Compensation Fund.
- *Turpin v Brabners Chaffe Street*; allegations of breach of fiduciary duty and conflicts of interest in relation to the sale of a substantial company.
- *Pennyfeathers v Pennyfeathers Property Co Limited* [2013] EWHC 3530; acquiescence; breach of fiduciary duty; directors' obligations.

Cases

• Pennyfeathers Limited v Pennyfeathers Property Co Ltd

• Noel Edmonds v Lawson

• Dore v Leicestershire County Council

• BUXTON COUNTRY HOMES LTD v (1) SURFBUILD LTD (2) SCSC DEVELOPMENTS LTD (3) JAMES CANSDALE (LITTLE CHALFONT LTD)

• Starbibi Raja (Administratrix of the Estate of Mohammed Sabir Raja Deceased) v. Austin Gray (A Firm)

• Mortgage Corporation Ltd v. Lewis Silkin & Anor : Same v. Marsha Shaire & Others

• Bristol & West Building Society (Plaintiff) v. Fancy & Jackson (a firm) (Defendants) : Same (Plaintiff) v. Defendants in 1995 B 2165; 1995 B 2401; 1995 B 2468; 1995 B 2858; 1995 B 3197; 1996 B 0784

• Homsy v. Searle

• Shah v Forsters

Costs

Patrick's familiarity with (i) claims arising out of failed litigation and (ii) insurance law has led to the development of a practice in the field of costs law. Costs cases include: *IOMA Insurance v Wake Smith* – failure of multiparty industrial illness litigation supported by CFA/ATE packages; 3 week trial in Mercantile Court of costs/ATE issues arising therefrom; (ii) *Automotive Latch Systems v Honeywell Inc.* – advising on ATE cover following failure of >$100m commercial claim giving rise to >$15m costs liabilities; (iii) *Hunt v Harlock* – successful appeal against a ruling that a clerical error in an ATE policy vitiated the cover and meant that the premium was irrecoverable; (iv) *Astaldi SPA v [a firm of solicitors]* claim by Italian construction company in respect of disbursements relating to litigation in Algeria; (v) *Bamrah v Gempride* – leading case on the power to disallow costs on the ground of misconduct in assessment proceedings; now a landmark judgment on appeal [2018 EWCA 1367; (vi) *Hill Dickinson v Warren* (7.1.19) – considering s.70(1) Solicitors Act; and ambiguities and lacunae in CPR provisions concerning interim costs certificate.

Disciplinary and Regulatory

"An approachable and eloquent silk.**"** – *Legal 500, 2020*

Ranked as a Leading Silk, Patrick is described as "**a class act who is very user-friendly**", "**very good at carrying vulnerable clients through a difficult process. He explains regulatory requirements and how best to deal with issues**", "**he's a wonderful advocate and a very bright chap**", "**very bright**" with a "**huge ability to take in massive amounts of detail in very complex cases and make them straightforward**", "**his charming and rather urbane style always goes down well**".

He has appeared for solicitors and surveyors in front of their professional disciplinary bodies on numerous occasions. In the last 4 years he has been retained in disciplinary matters involving accountants/auditors, solicitors, barristers, a handwriting expert, a psychologist and a county councillor. He has advised on judicial review remedies in this field and has been concerned in judicial review applications against the Bar Council and the ICAEW. He is very familiar with issues arising where a complainant has delayed unreasonably before lodging the complaint. He has been frequently been retained by the JDS/ AADB/FRC (the bodies charged with investigating public interest allegations against the auditors of public companies) to conduct substantial complaints against auditors and accountants in business.

He has acted in judicial review proceedings against the ICAEW concerning a complaint against a chartered accountant (*Crookenden v ICAEW)*; and in the first matter to go before the Disciplinary Committee of the Insolvency Practitioners Association for a number of years.

In 2016-17 he was heavily engaged in *Williams v SRA*, a SDT case which went to the Divisional Court, a leading case on issues relating to proof of dishonesty; the distinction between dishonesty and want of integrity; and the consequences of an omission to cross-examine.

Cases

- R (on appn of Crookenden) v ICAEW

- Williams v SRA

Insurance & Reinsurance

Patrick's extensive practice in this area has focused on disputes between insurer and insured concerning questions of construction, and the avoidance of policies for non-disclosure, misrepresentation and fraud. He has appeared in a number of contested trials at which the honesty of the insured has been the subject of a direct challenge. He has frequently advised on the relationship between the solicitors' policies now written by the commercial market and the run off insurance administered by SIF; and has acted as in arbitrator in that connection. He has advised on coverage issues relating to claims arising out the Madoff fraud. In 2013-14 he has appeared in numerous (c. 10-15) arbitrations in the field of PI cover, raising issues as to the operation and construction of the 'Minimum Terms'; as to 'Successor Practices'; as to the liability of insurers to indemnify in respect of issues arising out of disputes as to costs and fees; and (of course) as to notification and aggregation.

Public Law and Human Rights

Patrick has considerable experience of applications for judicial review arising out of his work in the disciplinary/regulatory context. He has appeared in a number of reported cases concerning the construction of statutes pursuant to s.3 of the Human Rights Act – eg. *Cachia v Faluyi*. In the last few years this grounding has enabled Patrick to develop his public law practice, especially in the field of political activity and the funding of political parties. In 2010 he acted in the Supreme Court for the successful appellant in *R (on application of Electoral Commission) v City of Westminster Magistrates Court; UKIP as interested party* [2010] UKCC 40. He appears for claimants in the claim against DECC for damages under the Human Right Act which arises out of the attempt to make retrospective changes to solar heating tariffs, now on appeal from the ground-breaking decision in *Breyer v DECC* [2014] EWHC 2257

Cases

- D&G; Cars Ltd v Essex Police Authority

- D&G; Cars Ltd v Essex Police Authority

- Breyer Group Plc v Department of Energy and Climate Change

- R (on application of Electoral Commission) v City of Westminster Magistrates, UKIP intervening

- Cachia v. Faluyi

Sports Law

'He has a fantastic manner and outstanding judgement' – The Legal 500, 2015.

Patrick Lawrence comes from a racing family. He has conducted a number of hearings before the BHA's Disciplinary Panel, and has recently joined the Panel as one of its three legally qualified members. He has acted in many cases concerning sports spread

betting, and has drafted the standard terms used by the members of the Sports Spread Betting Association. Cases include: (i) McGarel Groves v Glyn; action arising out of death of international dressage horse; (ii) BHA v Warwick Racecourse; 2day hearing arising out of abandonment of racing at Warwick; (iii) BHA v Wigham & MacKay; 2 day hearing into Rule 155/157 complaints.

He appeared for the successful defendant in Venturi v Coral Eurobet [2012] EWHC 2139, a claim brought by an internet gambler who alleged that he had turned 20 euros into 700,000 euros in 2 hours.

In 2011 he obtained an injunction on the morning of Derby day to restrain Kieren Fallon from riding in the Derby; Araci v Fallon [2011] EWCA Civ 668

Cases

- Venturi v Coral Eurobet
- Vefa Ibrahim Araci v Kieren Fallon
- Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves
- Exterior Profiles Ltd v. Curragh Bloodstock Agency Ltd

Offshore

‘”He is particularly impressive in the court room; completely unflappable.” – Legal 500, 2019

“Very charismatic and good with clients; he is able and approachable in equal measure” – Chambers & Partners, 2018

Patrick has a substantial offshore practice and has been instructed in cases in the Eastern Caribbean, Hong Kong, and Guernsey. He is currently acting in a $400m audit claim in Trinidad; commercial fraud and trusts litigation raising jurisdictional issues in the BVI, to be considered in the Privy Council; and is advising on jurisdictional issues concerned multi-party litigation in the Channel Islands. He is called to the Bar in the Eastern Caribbean.

Qualifications & Memberships

Christ Church, Oxford, 1st class degree in P.P.E

Nicholas Davidson QC

Call: 1974 Silk: 1993

+442078222000 n.davidson@4newsquare.com

Clerk: Lizzy Stewart

l.stewart@4newsquare.com

+442078222032 +447912405153

He's a great leader on complex cases who is always calm and measured.

- Chambers & Partners

Nicholas Davidson QC is a commercial litigator and arbitrator who has been described in the Legal 500 as being “an exceptional silk” (2019) with “a charming manner, which puts clients at ease” (2016) and by Chambers & Partners (2019) as someone who "produces masterpieces. The work, the detail, the focus that goes into it - it is outstanding; it blows me away." "You want him on your side and not on the other side."

Also as "one of the leading trial lawyers of his generation with excellent client skills" (2015), displaying "mastery of the law and practice of insurance" (2011); and in Chambers and Partners as "a great leader" (2017) "extremely competent, user-friendly and authoritative" (2016) and "a must-have barrister who is mustard when it comes to identifying the salient points" (2010) and a "master cross-examiner" (2011) and "a sensational cross-examiner and advocate" (2013). He is equally at home in trial work and in appellate work at all levels ("listened to" was another).

Always aiming to maintain a wide breadth of knowledge of the law and commercial awareness, he is committed both to understanding his clients' angles on their cases and to readiness to search for new angles. Despite having conducted many large cases for the defence, he does much claimant work. He is particularly interested in claims about investment advice and management.

Other directory (and in one case *The Lawyer*) comments in his time in Silk have been:

"A "fantastic" litigator and arbitrator, particularly noted for his skills in cross-examination and advocacy."

"Nicholas Davidson QC is "clearly one of the top guys at the Bar" and is held in the highest regard. Junior lawyers often turn to him for advice and he "rather generously and happily imparts his knowledge to them."

"Very approachable"

"Breathtaking intellect"

"Fearsome intellect"

"Sharp intellect and cuts quickly to the issues"

"A good advocate with great court presence"

"Frighteningly intelligent and incisive"

"An excellent advocate on weighty matters"

"Dry but hugely talented"

"Terrifying intellect and precision"

"Top-notch"

"Hot stuff"

"Incredibly bright"

"One of the barristers of choice for the defence of large issues"

"Names such as Nicholas Davidson QC ... have the most impressive professional negligence track records at the Bar"

"Wide-ranging experience"

"Excellent"

"Top professional negligence silk"

Nicholas is a past chairman of the Professional Negligence Bar Association and is also a member of the British Insurance Law Association, Chancery Bar Association, COMBAR, Bar European Group and Society for Computers and Law.

He has given numerous talks to the Professional Negligence Bar Association and Professional Negligence Lawyers' Association, particularly including the topics of professional insurance needs, obligations, and ability to exclude or restrict liability, and spoke on "Claims against Funds and Investment Managers" at the 2011 COMBAR North American meeting.

Privacy Policy

Click here for a **Privacy Policy** for Nicholas Davidson QC.

Areas of Expertise

Commercial Dispute Resolution

As someone interested in and aiming to maintain high awareness of economics and finance Nicholas has a keen interest in commercial matters. He is involved not only in pure financial or interpretation litigation (a case of particular satisfaction to him was *AIB Group (UK) plc v. Martin and Gold* [2001] UKHL 63) but also in very tough business disputes. In *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 Ch he acted for the Club in establishing that a transaction in relation to its ground had been affected by bribery and fraudulent misrepresentation. He acted for Newcastle Airport in a high profile claim (settled the day before trial) against its former Chief Executive and the Estate of its Finance Director seeking to recoup in respect of multi-million bonuses which had become payable on a refinancing.

Insurance & Reinsurance

Nicholas regards the interpretation of documents as an exceptionally interesting area, and is intrigued by the challenges, including those of professional indemnity policies with the requirements to conform to Minimum Terms, not to mention the special context of solicitors' policies' with the Assigned Risks Pool policy in the background.

Nicholas has extensive experience, as advocate and arbitrator, of insurance law, especially professional indemnity insurance law, and the practical operation of policies, including dishonesty issues and the potentially vexing subjects of "notification" of circumstances and the composite nature of the insurance. Recent work for Quinn Insurance has seen cases which have interested

many – *William McIlroy (Swindon) Ltd v. Quinn Insurance Ltd* [2010] EWHC 2448 (TCC) (arbitration clause; time bar; relevance of ICOB; now on its way to the Court of Appeal); *Quinn Insurance v. The Law Society* [2010] EWCA Civ 805 (on the extent to which insurers can access documents, on which decision he has delivered explanatory talks to the British Insurance Law Association and the Professional Negligence Bar Association); *Kidsons v. Underwriters at Lloyds* [2008] EWCA Civ 1206 (application of minimum terms; notifications of Circumstances and their effect). *Quorum A/S v. Schramm* [2002] 1 Lloyd's Rep. 249 involved unusual interpretation problems and exploration of the London and French markets for a Degas pastel thought to be of unique interest to the Greek shipowning community.

He frequently deals with issues relating to fraud exceptions and reimbursement claims based on dishonesty.

He is experienced in the procedures where dishonesty is under consideration, and has conducted "indemnity cons" and is familiar with issues as to the handling of subsequent arbitrations.

Professional Liability

Nicholas Davidson QC is a commercial litigator and arbitrator who has been described in the Legal 500 as being "**a class act with tremendous presence and gravitas in court**" (2020) and "**an exceptional silk**" (2019) with "**a charming manner, which puts clients at ease**" (2016) and by Chambers & Partners (2019) as someone who "**produces masterpieces**. **The work, the detail, the focus that goes into it – it is outstanding; it blows me away**." "**You want him on your side and not on the other side.**" "**His technical knowledge is first rate. He gets right into it himself, so he's a great leader to work with, and brings tremendous enthusiasm**." "**He is very effective and has a sensible, smooth approach. He has gravitas and is able to lead in a way that lets some of the heat out of the situation**." (2020)

Also as "**one of the leading trial lawyers of his generation with excellent client skills**" (2015), displaying "**mastery of the law and practice of insurance**" (2011); and in Chambers and Partners as "**a great leader**" (2017) "**extremely competent, user-friendly and authoritative**" (2016) and "**a must-have barrister who is mustard when it comes to identifying the salient points**" (2010) and a "**master cross-examiner**" (2011) and "**a sensational cross-examiner and advocate**" (2013). He is equally at home in trial work and in appellate work at all levels ("**listened to**" was another).

Accountants, Auditors & Actuaries

Nicholas has frequently worked with accountants on numerous aspects of litigation, often to do with company valuation issues (a notable early case was involved successful defence of a share valuation claim where the claimant's expert was perhaps the then doyen of share valuation, Bruce Sutherland: *Whiteoak v. Walker* (1983) showed that if a company's articles required a valuation to be carried out by a generalist accountant he was not to be judged as if he had held himself out as a share valuation specialist).

In 2016 he led for the claimants in one of The Lawyer's "leading cases of the year", Harlequin Property (SVG) Ltd v Wilkins Kennedy, in which Harlequin recovered more than £9 million in a case which the Judge described as having been defended "stubbornly" [2016] EWHC 3188(TCC) [2017] 4 WLR 30.

Insurance Brokers & Agents

Nicholas' most recent case in this field involved an 8-figure claim for a broker's client whose insurers were admittedly entitled to avoid for non-disclosure, the issue being how the non-disclosure had come about.

Financial Services Professionals

Nicholas' considerable experience of, and great interest in, financial services claims has perhaps had an emphasis on investment management or advice, where he has acted for both claimants and defendants (usually in arbitrations). Being himself a trustee of a defined benefit pension scheme, he has to be able to understand the investment challenges for trustees and managers, and to be aware of legislative and administrative background. He has acted for a major financial adviser in defence of a split caps claim, and for various individuals who, having sold successful businesses, made or are making claims against leading investment houses when their investments disappointed by 7-figure sums, and for other individuals whose investments are said not to have been tailored suitably; certain pension issues following the demise of a business, and issues relating to offshore investment funds, have been

referred to him.

Lawyers

Nicholas has deep experience of both claimant and defendant work in lawyers' liability cases, across the range of common law and equitable remedies. He led the defence teams in both the *Bristol and West* and *Nationwide* cases, and the technically vital cases in the House of Lords *Cave v Robinson, Jarvis and Rolf* (limitation) and *Medcalf v Mardell* (wasted costs). More recent defence and recovery work has included pursuit for a major national solicitors firm of recovery proceedings against one of the practices in the middle of the huge commercial mortgage fraud involving Dunlop Haywards, defence and third party recovery work for solicitors who had acted for banks on a syndicated loan for a fraudulent project, and defence of a claim where a solicitor was alleged to have induced the client to make the commercial decision to make a large and risky loan; and work in cases of internal problems in a practice. For claimants he was brought in to a leading role in the Supreme Court in *AIB v Mark Redler*, and notably has led in claims involving the specialist employment work of major law practices, successively in *Newcastle International Airport v Eversheds*, *Wright v Lewis Silkin* and *Commodities Research Unit International Ltd v King Wood Mallesons*. The *Wright* case featured the problems of cross-border work, as did *Bancroft v Weil Gotshal*, where Nicholas acted for an international investment fund in a claim related to the handling of a central European business acquisition.

He has been / is involved in some extremely high value claims in overseas matters. His wide experience across all Divisions of the High Court includes financial matters post-divorce, a field in which he practised while a junior and in relation to which he has experience in Silk, and to which he brings his interest in investment and pension matters (he is a Trustee of a Defined Benefit Pension Scheme).

Surveyors & Valuers

Nicholas has appeared in various surveying and valuation cases, and finds valuation cases particularly intriguing. He particularly relished the valuation challenge in *Hartle v. Laceys* [1999] Lloyd's Rep. P.N. 315, in which he effectively had to argue both sides' cases in the Court of Appeal as the appellant was unrepresented, in which the evidence was that for a significant period following a residential development market collapse there was no active market. Valuation problems were a frequent factor in the litigation in which we was engaged throughout the 1990s.

Qualifications & Memberships

M.A. (Cantab.)

Publications

Not so common common law

9 July 2019

Not so common common law, suggests Nicholas Davidson: Interest, the Scots in the House of Lords and the English in the Court of Appeal.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Ian Wilson QC
3 Verulam Buildings

‘Lender claims and Contracts (Rights of Third Parties) Act 1999’

3 Verulam Buildings
Gray's Inn, London.
WC1R 5NT DX: LDE 331
Telephone: +44(0)20 7831 8441

Out of hours contact
Stephen Penson,
Senior Practice Manager
on +44 (0)7941 218 259.

Ian Wilson QC

Email Address: **iwilson@3vb.com**

Year of Call: **1995**

Year of Silk: **2018**

Ian Wilson QC is an experienced commercial litigator, specialising in banking and finance, financial services and regulation, professional negligence, commercial fraud, insurance, insolvency and restructuring, energy disputes and general commercial litigation as well as offshore litigation and arbitration. He has a strong reputation as a trial advocate and cross-examiner, as well as for his advisory work.

Ian is regularly instructed in professional negligence claims involving financial advisers, valuers and solicitors (particularly in the context of financial transactions).

Ian is top rated (Tier 1 in the Legal 500 (2018-2020) in his core fields of practice. The directories describe him as:

- *"A great practitioner who is building a stellar practice"* (Legal 500 2019-2020).
- *"Super client-friendly and an incredibly capable advocate for complex and challenging matters… one of the most collaborative QCs to work with and provides very pragmatic, sensible advice"* (Chambers & Partners 2020).
- *"Superb in terms of his technical written ability and oral performance at hearings. He also has a great rapport with clients. … He writes great skeleton arguments that grab the reader by the throat in the first paragraph. He's a very measured advocate and clients really like him as he's very responsive and sensible"* (Chambers & Partners 2019).
- *"Brilliant, both in terms of his drafting and advocacy"* (Legal 500 2016).
- *"Very approachable and user-friendly as well as an impressive advocate and a superb cross-examiner"* (Chambers & Partners 2018).

Ian is a co-author of Paget's Law of Banking (chapters on Unauthorised Payments, Restitution, Proprietary Claims, and Tracing), the author of the banking chapter in Bullen & Leake and the sub-editor of the banking and finance section. He is also the Vice-Chair of the London Common Law & Commercial Bar Association. Beyond his legal practice, Ian is a pianist and organist (playing to a professional standard), an Associate of the Royal College of Music, and a governor of St Paul's Cathedral School.

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Telephone: +44(0)20 7831 8441

Out of hours contact
Stephen Penson,
Senior Practice Manager
on +44 (0)7941 218 259.

LENDER CLAIMS:

THE CONTRACTS (RIGHTS OF THIRD PARTIES ACT) 1999

Ian Wilson QC

Key provisions of the 1999 Act

1(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the party to enforce a term of the contract if:

...

(b) Subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

Chudley & Bean v Clydesdale Bank Plc [2019] EWCA Civ 344

Key facts

- The Bank signed a "letter of instruction" ("LOI") (the supposed contract) agreeing with Arck to establish a "Segregated Client Account" with a restricted mandate. But no such account was opened.
- The Claimants paid their investment into another Arck account (called the "074" account), with an unrestricted mandate. The money was transferred by Arck to the Paradise Beach investment.
- The Claimants were unaware of the LOI and had expected the money to be transferred to Paradise Beach. But they had been told by Arck that they would receive both the return of the capital and a substantial uplift within a defined period of time thereafter. In fact their money was never repaid.

Key findings by the Court of Appeal

- The LOI was a concluded and unconditional contract between the Bank and Arck (cf the first instance judge had reached the opposite conclusion).
- The contract had not subsequently been varied/waived/revoked between the Bank and Arck.
- The Claimants were entitled to take the benefit of the contract under the 1999 Act. In particular, the Claimants were expressly identified as a class by the use of the words "Segregated Client Account" in the LOI; and the requirements of s.1(1)(b) and s.1(3) of the Act could be satisfied by the same contractual term.
- The Bank had breached the contract causing the Claimants loss. The first instance judge had found that the Claimants had not proved causation. But the Court of Appeal said that it was not a necessary part of the Claimants' case that they must demonstrate what would have happened to the monies if there had not been a breach.

David Berkley QC
3 Paper Buildings

‘Reasonable Behaviour or Taking Advantage?’

David Berkley QC

Year of Call: 1979
Year of Silk: 1999
Email Address: david.berkley@3pb.co.uk
Telephone: 020 7583 8055

Overview

David Berkley QC has been advising and representing clients in business disputes for more than 30 years and enjoys a substantial practice in London and across the UK. David has a busy practice assisting in the resolution of complex disputes in the fields of commercial litigation, banking disputes, and employment.

David became 3PB's Head of Chambers in 2019 and is a senior member of 3PB's Commercial and Chancery Groups. David is a qualified mediator (College of Law accredited) and is willing to act as arbitrator in commercial disputes. He is also a popular choice for direct access instructions.

David's legal expertise includes:

- Business and Commercial
- Property
- Employment
- Professional Negligence
- Regulatory and Professional Ethics
- Entertainment law.

He adopts a practical approach working closely with clients and their solicitors, and business clients direct.

David is also a frequent lecturer having conducted many seminars in-house at Herbert Smith Freehills, Freshfields Bruckhaus Deringer and other leading City and UK regional law firms.

Outside the office, David was a founder, and remains a member, of the Executive Council of the Muslim Jewish Forum of Greater Manchester. He has an interest in academic and vocational training including a long association with Nottingham Law School and the National Institute for Trial Advocacy and was formerly an Honorary Teaching Fellow at Manchester Law School. He is currently acting as consulting editor for Halsbury's Law.

Recommendations

"Has a diverse practice which encompasses commercial and chancery litigation. He also has extensive experience with banking and insolvency matters and entertainment law disputes."

Chambers UK 2019/Chancery

Strengths: "A calm, collected and measured barrister, he is an excellent orator and he fights his client's corner."

Chambers UK 2018/Chancery

'David Berkley QC has more than 20 years' experience in chancery work. He is known for commercial property disputes, employment, professional negligence and regulatory law.

Strengths: "A very nice chap; he is a very eloquent speaker with good advocacy skills."'

Chambers UK 2017/Chancery

'David Berkley QC Has a strong commercial and chancery practice. He is experienced in company and commercial work as well as banking and insolvency matters. He also handles landlord and tenant and partnerships disputes and is an accredited mediator.'

Chambers UK 2016/Chancery

'Noted for his expertise in directors' disqualification matters.'

Legal 500 2018/19/commercial, banking, insolvency and chancery law – Leading Silks.

'His technical knowledge is exemplary.'

Legal 500 2017/commercial, banking, insolvency and chancery law – Leading Silks.

'Highly experienced in banking and commercial litigation.'

Legal 500 2016/commercial, banking, insolvency and chancery law – Leading Silks.

"David is an excellent mediation advocate and team leader. "

Mark Mattison, Mediator

"David is an excellent public speaker and advocate for the causes with which he is associated."

Dr Yaakar Wise, retired academic

Academic qualifications

- LLB (Hons), University of Manchester
- BVC, College of Law

Professional qualifications & appointments

- 2000 - Appointed Deputy District Judge

- 2001 - Appointed Recorder (Civil)
- 2007 - Appointed Honorary Teaching Fellow, Manchester Metropolitan University
- Qualified mediator (College of Law accredited)

Professional bodies

- Professional Negligence Bar Association
- Northern Circuit Commercial Bar Association (Chairman)
- Northern Chancery Bar Association

Commercial

David Berkley QC is highly experienced in banking and commercial litigation. His practice focuses on complex disputes and major trial work and he regularly appears in the High Court and the Court of Appeal in contentious security and receivership issues; civil fraud trials and directors' disputes.

He frequently advises in and acts on behalf of professional clients in disputes relating to partnerships; restrictive covenants; confidentiality and trade secrets, most notably within the professional practice of solicitors' and accountants'.

Most recently, David has been recognised for his work in relation to advising and acting for businesses seeking redress for the mis-selling of Interest Rate Hedging Products via the FCA / FSA Review process and litigation in the High Court.

In the past, David has acted for several well known musicians/bands like Gary Barlow and Stone Roses as well as broadcasters like Granada TV on copyright and contract issues.

He has extensive experience dealing with the subsequent professional negligence issues arising from such disputes; especially those relating to the provision of financial services.

Reported cases:

Parmar and another v Barclays Bank plc [2018] EWHC 1027 (Ch)
Swap agreement – Interest rate swap agreement. Although the claimants had established that there had been breaches of certain of the Conduct of Business Sourcebook (COBS) rules, no loss had been sustained by them as a result. Therefore, the Chancery Division, dismissed the claimants' claim, under s 138D of the Financial Services and Markets Act 2000, for damages for alleged breaches of the COBS rules.

Wardman and others v GSD Law Ltd [2017] EWCA Civ 2144
Costs — Detailed assessment — Solicitor's misconduct — Paying parties alleging that receiving parties' legal representative had engaged in unreasonable or improper conduct during detailed assessment proceedings — District judge upholding allegations and disallowing costs after three-day hearing — Whether jurisdiction to disallow costs summary — Whether district judge should have declined to entertain allegations — Whether three-day hearing disproportionate — Whether guidance as to wasted costs procedure to be applied — CPRr 44.11

Bailey and another company v Barclays Bank plc [2014] EWHC 2882 (QB)
Practice – Striking out. The claimant, B, had arranged a loan with the defendant bank. He subsequently sought to transfer the loan from himself to a company that he controlled. B and the company brought proceedings against the bank for, among other things, misrepresentation. In the course of proceedings, the bank sought to strike out the claim, and the claimants sought permission to amend the particulars of claim. The Queen's Bench Division held that the application to amend would be dismissed, and judgment would be given for the bank.

Pourghazi v Kamyab [2014] Lexis Citation 155
Misrepresentation – Deceit. The claimant brought a claim against the defendant, alleging that he had been induced into lending him money in respect of the purchase of a leasehold penthouse in London and into signing a declaration of trust in

respect of it, in circumstances where the defendant had not disclosed that a bank had appointed receivers in connection with the property. The Chancery Division set aside the declaration of trust, ruling that the misrepresentations alleged had been proved.

Lombard-Knight and another v Rainstorm Pictures Inc [2014] EWCA Civ 356
Arbitration – Award – Enforcement – Application to enforce award – Claimant successful in arbitration proceedings in California – Claimant obtaining enforcement order in High Court – Defendants applying to set aside order – Judge finding claimant failing to comply with procedural requirements for applying to enforce award – Judge finding defendants' submissions unsustainable – Judge making new enforcement order – Defendants appealing and claimant cross-appealing – Whether judge erring in finding procedural irregularity in claimant's application – Whether judge erring in finding defendants having had notice of arbitral proceedings – Arbitration Act 1996, s 102(1)(b).

Green and another v Royal Bank of Scotland [2013] EWCA Civ 1197
Bank – Duty of care. The claimants issued proceedings claiming that the defendant bank had 'mis-sold' them an interest rate swap by giving inadequate disclosure of break costs, contrary to its duty under the Code of Business Rules then in existence, and to warn that break costs could be substantial and to explain clearly and fairly the true potential magnitude of those costs. The Court of Appeal, Civil Division, upheld a decision that the bank had not owed the claimants a common law duty of care which had involved taking reasonable care to ensure that they had understood the nature of the risks involved in entering into the swap transaction.

Ahmad v Secret Garden (Cheshire) Ltd [2013] EWCA Civ 1005
Contract – Rectification – Written contract – Appellant lessor of property entering into tenancy with respondent company – Parties going through standard form of business lease (LS2), agreeing to amend it to reflect particular terms agreed – Parties signing written agreement for lease on those terms (Lease 1) – Parties subsequently signing lease in form LS2 not containing amendments shown in Lease 1 (Lease 2) – Respondent going into possession but having difficulties paying rent – Appellant taking proceedings for possession of property – Respondent contending Lease 2 ought to be rectified as not setting out full terms agreed by parties – Judge holding parties both mistaken as to effect of terms of Lease 2 and mistakenly believing would take effect in combination with Lease 1 – Judge holding Lease 2 accordingly being executed under mistake – Appellant appealing – Whether evidence from which judge finding common mistake meeting requirement for outward expression of accord – Whether judge ought to have exercised discretion to refuse to order rectification.

Re SED Essex Ltd Revenue and Customs Commissioners v SED Essex Ltd [2013] EWHC 1583 (Ch)
Company – Winding up – Fraudulent trading – Revenue and Customs Commissioners (the Revenue) seeking compulsory winding-up order regarding respondent company – Court appointing provisional liquidators – Company opposing winding-up order and seeking to discharge order appointing provisional liquidators – Whether winding-up order to continue – Whether provisional liquidators to remain appointed.

Rehman and another v Jones Lang Lasalle Ltd [2013] EWHC 1339 (QB)
Limitation of action – Accrual of cause of action. The claimants issued proceedings against the defendant for negligent property valuations. The judge dismissed the defendant's application for summary judgment or strike out of the claim. The defendant appealed on the basis that the claim was statute-barred. The Queen's Bench Division, in allowing the appeal, held that the claimants had acquired the requisite knowledge to issue proceedings and could not begin to justify the period of two years during which they apparently did nothing.

Connell Property Holdings Ltd and another v Mutch (trading as Southey Building Services) and another [2012] EWCA Civ 1589
Costs – Order for costs – Discretion – Second claimant succeeding partially in claim against defendant – Defendant succeeding on counterclaim – Judge setting off damages payable to defendant under counterclaim against damages awarded to second claimant – Claimant being overall successful party – Judge ordering defendant to pay second claimant's costs of claim and ordering second claimant to pay defendant's costs of counterclaim – Second claimant appealing – Second claimant submitting judge being required to order defendant to pay proportion of second claimant's overall costs – Whether judge erring – CPR Pt 44.

Revenue and Customs Prosecution Office v Backhouse [2012] EWCA Civ 1000
Sentence – Confiscation order – Receivership order – Defendant owning equal share in aircraft – Joint owner pleading guilty

to laundering – Judge making confiscation order of joint owner's assets – Judge appointing enforcement receiver to take possession of and deal with assets of joint owner – Defendant agreeing to extinguish joint owner's liabilities in regard to aircraft – Receiver seeking order joint owner making tainted gift to defendant – Judge finding no commercial sense in joint owner giving up interest in aircraft – Judge making order against defendant – Defendant appealing – Whether judge erring – Criminal Justice Act 1988, ss 74, 102.

Revenue and Customs Prosecutions Office v Johnson and another [2011] EWHC 1950 (Admin)
Sentence – Confiscation order – Proceeds of crime – Defendant pleading guilty to laundering £6.25 million – Judge making confiscation order for over £26 million – Judge appointing enforcement receiver to take possession of and deal with assets of defendant – Aircraft specifically excluded from list of assets receiver might sell – Respondent beneficially owning aircraft – Whether respondent having assets to which receiver entitled for satisfaction of confiscation order – Criminal Justice Act 1988, Pt VI.

Hooper and another v Oates and another [2010] EWCA Civ 1346
Contract – Repudiation – Rescission – Seller of property serving rescission notice in response to alleged breach of contract by defendant – Claimant erring in calculation of dates for service of notice – Notice being served early – Buyer contending early notice amounting to repudiatory breach – Judge finding sellers not repudiating contract – Whether judge erring.

Hameed v Central Manchester University Hospitals NHS Foundation Trust [2010] EWHC 2009 (QB)
Employment – Wrongful dismissal – Declaration – Employee dismissed following investigation and disciplinary hearing into claimant's conduct – Employee bringing proceedings seeking declaration that purported dismissal in breach of her contract of employment – Whether employer in breach of its contractual obligations to employee.

Sternlight v Barclays Bank and other cases [2010] EWHC 1865 (QB)
Consumer credit – Agreement – Form and content of agreement – Term stating manner in which amount to be repaid – Regulated agreement – Claimants contending rate of interest set out in regulated agreements misstated with effect agreements 'irredeemably unenforceable' – Whether misstatement – Consumer Credit Act 1974, ss 61, 65, 127 – Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, Sch 6, para 4.

Saddique v Sadiq and another Court of Appeal, Civil Division (judgment delivered extempore)
Practice – Striking out – Abuse of process – Claimant appointed as receiver of missing husband's assets – Claimant seeking to bring action in her name in respect of husbands assets – Defendant seeking to strike out claim as abuse of process and on ground that claimant as receiver having no authority to bring claim – Case struck out on ground that claimant lacking authority – Claimant appealing – Whether judge erring – Whether order entitling claimant to bring claim – Whether proceedings could have been saved – CPR 17.9.

Southern Pacific Personal Loans Ltd v Walker and another [2009] EWCA Civ 1218
Consumer credit – Agreement – Enforcement – Amount of credit – Interest on charge for credit – Parties entering into fixed sum credit agreement – Total amount financed comprising of loaned amount plus charge for credit stated in agreement to be 'broker administration fee' – Statutory meaning of 'credit' and 'charge for credit' – Calculation of amount of credit – Whether prohibition of interest on broker administration fee – Whether agreement between parties enforceable – Consumer Credit Act 1974, s 9.

Reasonable Behaviour or Taking Advantage

David Berkley QC, Head of Chambers, 3PB Barristers, 3 Paper Buildings, Temple.

This Lecture will consider the recent Court of Appeal decision in *Woodward and anor v Phoenix Healthcare Distribution Limited* [2019] EWCA Civ 985

It concerns procedural law and the originating process for civil litigation and is therefore of general interest to practitioners.

I appeared for the claimants in second appeal before the Court of Appeal, not having been previously instructed either at first instance or in the first appeal.

The overriding objective

This was a new concept when the Civil Procedure Rules were introduced by Lord Woolf in April 1999.

CPR r.1(1) The overriding objective

1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

CPR 1.1(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate—
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;

CPR 1.2 - Application by the court of the overriding objective
The court must seek to give effect to the overriding objective when it –
(a) exercises any power given to it by the Rules; or
(b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2."

The court must further the overriding objective by actively managing cases (CPR 1.4(1)) and active case management includes the matters set out at (a) – (l) of CPR 1.4(2). They include at (a) "encouraging the parties to co-operate with each other in the conduct of the proceedings".

CPR r. 1.3 - The parties are required to help the court to further the overriding objective.

This was a radical statement in the context of adversarial litigation. Jackson LJ in *Hallam Estates v Baker* [2014] EWCA Civ 661 emphasised the requirement and stated that legal representatives would not be in breach of any duty to their client if they agree reasonable extensions of time. In commercial litigation, a particularly "*high level of realism and co-operation*" is expected of parties in their approach to pre-trial case management in order to ensure that wasted court and party costs are not incurred (*McGann v Bisping* [2017] EWHC 2951 (Comm), 15 December 2017, (Richard Salter QC sitting as a deputy judge of the High Court).

We are now going to look at the relevant rules relating to service of a Claim Form.

The Period of Validity for Service of a Claim Form

Service of a claim form
7.5—(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue.

Extension of time for serving a claim form
7.6—(1) The claimant may apply for an order extending the period for compliance with rule 7.5.
(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made—
(a) within the period specified by rule 7.5; or
(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if—
(a) the court has failed to serve the claim form; or
(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and
(c) in either case, the claimant has acted promptly in making the application.
(4) An application for an order extending the time for compliance with rule 7.5—
(a) must be supported by evidence; and
(b) may be made without notice.

Methods of service

6.3—(1) A claim form may … be served by any of the following methods—
(a) personal service in accordance with rule 6.5;
(b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A;
(c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;
(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or
(e) any method authorised by the court under rule 6.15.

(2) A company may be served
(a) by any method permitted under this Part; or
(b) by any of the methods of service permitted under the Companies Act 2006.

Service on Solicitor

6.7—(1) Solicitor within the jurisdiction:
Subject to rule 6.5(1), where—
(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or
(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, the claim form must be served at the business address of that solicitor.

The Mechanism of Retrospective Validation

CPR 6.15.- Service of the claim form by an alternative method or at an alternative place

(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

Playing Technical Games

Abela v Baadarani [2013] UKSC 44 concerned the exercise of the powers in CPR r 6.15.

Permission had been granted to serve proceedings out of the jurisdiction at a specified address in Beirut and to the extent required, to do so by an alternative method, being personal service of untranslated documents at that address.

Attempts were made without success to locate the defendant at the specified address but the untranslated documents were delivered to a Lebanese attorney who was known to have acted for the defendant in other proceedings. Those documents were returned by the attorney, stating that the defendant would not instruct him to accept service.

Unsuccessful attempts were also made to serve the defendant through diplomatic channels.

The claimants sought an order from the Court under CPR 6.15(2) that delivery to the Lebanese attorney amounted to good service. The judge made the order, which was subsequently set aside by the Court of Appeal but reinstated by the Supreme Court.

Lord Clarke JSC (with whom Lord Neuberger, Lord Reed and Lord Carnwath JJSC agreed) stated that in his view the most important purpose of service was to ensure that the contents of the documents served came to the attention of the defendant and quoted with approval a passage from the judgment of Lewison J at first instance that

The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.

The Facts in Woodward v Phoenix

On the 20 June 2011 two companies controlled by the claimants purchased from the defendant, Phoenix Healthcare Distribution Limited, a large quantity of the drug, atorvastatin.

Almost immediately, it was discovered that the drug was still under patent and that Phoenix was made the subject of an injunction which prevented them from selling the drug.

The claimants claimed that Phoenix had misrepresented the position when negotiating the contract by stating that the drug was no longer under patent and was available for sale.

Because Phoenix refused to accept return of the drug or to provide a refund or credit for the contract price, the companies went into administration. The rights of action against Phoenix were then assigned to the claimants. The claim was said to be worth in excess of £5M.

On 19 June 2017, just before the sixth anniversary of the contract and therefore on the cusp of the limitation period, Collyer Bristow, the Claimants' Solicitors issued a Claim Form against Phoenix.

By virtue of CPR r 7.5(1) the Claim Form should have been served by no later than 12.00 midnight on 19 October 2017 and no extension had been sought or any in time application to extend time for service.

Although there was a chain of correspondence between Collyer Bristow and Mills & Reeve about the case and Mills & Reeve were clearly instructed by Phoenix, Mills & Reeve were not instructed to accept service on behalf of Phoenix and neither Mills & Reeve nor Phoenix had ever confirmed in writing to Collyer Bristow that Mills & Reeve had been authorised by Phoenix to accept service. This is a real trap for the unwary and Collyer Bristow fell into that trap.

On Tuesday 17 October 2017 the claim form, particulars of claim and a response pack were sent by Collyer Bristow to Mills & Reeve by first class post by way of service and were actually received on 18 October 2017. They did not post the documents to Phoenix, which would have been a valid step amounting to service.

The same documents were also sent on the 17 October 2017 by email to the relevant file handler at Mills & Reeve; and a read receipt confirmed that he had opened that email at 10:43 on that day.

According to his own evidence, filed for the appeal, the defendant's solicitor realised that the purported service was ineffective but he took the view that he was not obliged to notify Collyer Bristow of their mistake.

He took instructions from his clients and decided not to inform Collyer Bristow until after the expiry of the Claim Form at midnight on Thursday 19 October 2017.

Therefore, on Friday 20 October 2017 Mills & Reeve wrote to Collyer Bristow and informed them that the Claim Form had not been served on Phoenix and that Mills & Reeve were not instructed to accept service on behalf of Phoenix and that neither Mills & Reeve nor Phoenix had ever confirmed in writing to Collyer Bristow that Mills & Reeve had been authorised by Phoenix to accept service.

In response, Collyer Bristow immediately sought to serve Phoenix by courier, first class post and email at its trading address in Runcorn and the claim form and particulars of claim and response pack was delivered to Phoenix just after 11 a.m. on Friday 20 October 2017.

On Monday 23 October 2017 Collyer Bristow issued an application for an order that the steps taken on 17 October 2017 had been good service; alternatively, that, service be dispensed with; and in the further alternative, that the court should validate the purported service on Phoenix on 20 October by granting a short extension of time.

A cross-application was issued by Phoenix, for an order that the claim form be set aside and a declaration that the court was without jurisdiction to hear the claim on the grounds that the claim form had not been served within the time allowed by CPR r 7.5(1).

Master Bowles

The Applications came before Master Bowles. There was an issue as to whether the correspondence passing between the Solicitors might have operated as an estoppel. The Master decided that there was nothing in the various exchanges of correspondence

which amounted to written notification that Mills & Reeve was instructed to accept service, whether expressly or implicitly. He also held that on the facts, Mills & Reeve and their client, Phoenix, were not estopped from denying that the purported service of the claim form upon Mills & Reeve on 17 October 2017 constituted good service. There was no appeal against that part of his judgment .

Having decided that Mills & Reeve was not under a duty, as between the parties, to speak out in respect of Collyer Bristow's mistake, the Master went on to deal with the question of whether the purported service upon Mills & Reeve on 17 October 2017 should be validated retrospectively and made a declaration that it there had been good service.

At the hearing and when he was writing his judgment, the Master did not have the benefit of the Supreme Court's decision in *Barton v Wright Hassall LLP* [2018] UKSC 12.

Barton (Supreme Court)
The *Barton* decision was handed down in the Supreme Court on 21 February 2018 after Master Bowles had sent out his draft judgment to the parties and while arrangements were being made for handing down that judgment.

In *Barton* Lord Sumption JSC set out the following 4 non-exhaustive principles

(1) The test is whether, "*in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good serv*ice"

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served. This is therefore a "*critical factor*". However, "*the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)*"

(3) *The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode*.

(4) the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; that no such power existed under the rules as they then stood. *The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served*.

Lord Sumption also stated

"*In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what*

he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances.

Lord Briggs JSC in *Barton* however gave a dissenting judgment in which he said

In respectful disagreement with Lord Sumption JSC, I do not regard the fact that validation would deprive the defendant of an accrued limitation defence as a factor militating against validation (or for that matter in favour of it). The defendant's solicitors were aware of Mr Barton's attempt to serve them before the expiry of the claim form. The acquisition of a limitation defence would have been … a windfall.

The Master was asked by the Defendants to reconsider his judgment in light of the Supreme Court's decision. Having done so, the Master decided that there was indeed "*good reason*" to validate service of the claim form retrospectively under CPR r 6.15 because of what he had characterised as the playing of technical games and the application of CPR r. 1.3 and he explained his reasoning as follows

In my judgment, I characterised the Court of Appeal decision in Barton as being one of a number of cases where validation under CPR 6.15 had been refused upon the primary basis that, although de facto service had been effected, there was nothing other than de facto service to constitute good reason for validation. The majority decision in the Supreme Court seems to me to bear this out. The fact that the claimant in Barton was a litigant in person did not, in the view of the majority, provide a sufficient additional factor such as to give rise to a good reason for validation. Likewise, on the facts and on the very limited arguments deployed (see paragraph 22 of the Supreme Court judgment in Barton) the conduct of the defendant's solicitors, in that case, did not amount to the playing of technical games.

It is true that Lord Sumption, giving the majority judgment, took the view that the solicitors in Barton were not, even had they had the time to do so, under any duty to advise the claimant of his mistake as to service. The Supreme Court, however, was not asked to consider and did not consider, as I have been asked to, any developed argument, as to the impact and effect of the duty to further the overriding objective, as giving rise to a duty to the court to warn an opposing party of his, or her, mistakes. I do not regard the majority in Barton (and I do not think that the majority in Barton would have regarded themselves) as having given a definitive, or any, answer, in respect of that argument.

It is true, also, that, in endorsing the principles to be derived from Abela, Lord Sumption gave, it might be said, new, or greater, weight to the fact that validation might deprive a defendant of a limitation defence than has, perhaps, emerged from the earlier authorities. He was, however, at pains to say that the point was not, necessarily, decisive. *As explained by Lord Briggs in his dissenting judgment, the point can, indeed, be put the other way; namely that, in a case where the de facto service fulfils all the objectives of good service, a refusal to validate may provide the defendant with a windfal*l.

In the current case, I consider that the de facto service effected by Collyer Bristow did fulfil all the objectives of good service … and that, to the extent that something additional is required in order to give rise to a good reason to validate, then that good reason was

provided by the failure of Mills & Reeve, contrary, as I find, to its, or its client's, duty to further the overriding objective, to warn Collyer Bristow that its purported service was defective, such that good service could have been effected in time. It was that failure which constituted the deliberate playing of a technical game.

As I set out in my judgment, I do not think that the undoubted culpability of Collyer Bristow, in overlooking the fact that Mills & Reeve had not indicated that it had authority to accept service, outweighs Mills & Reeves conduct, in failing to draw Collyer Bristow's attention to its mistake. Had Mills & Reeve acted as it should have done, Collyer Bristow's mistake would not have precluded good service being effected in the lifetime of the Claim Form.

For the same reason, I do not think that, in this case, the fact, that validation will, or may, deprive Phoenix of a limitation defence, should preclude validation. Had Mills & Reeve acted as it should have done, good service would have been effected in time. In that context, validation does no more than to preclude Phoenix from procuring a windfall.

On the First Appeal heard, HHJ Hodge QC decided that the Master was wrong in principle in holding that there was "good reason" to validate service of the claim form retrospectively under CPR r 6.15 as Mills & Reeve and Phoenix were not under a CPR r 1.3 duty to warn Collyer Bristow that its purported service was defective; and had not been "*playing a technical game*" by remaining silent. He said

In my judgment, the culture introduced by the CPR does not require a solicitor who has in no way contributed to a mistake on the part of his opponent, or his opponent's solicitors, to draw attention to that mistake. That is, in my judgment, not required by CPR 1.3; and it does not amount to 'technical game playing'.

He considered that there was no duty to inform an opposing party of an error which has been made, even if there is still time for the opposing party to cure that error. "*Each side must look after itself*"

He therefore set aside the Master's Order which rendered the claim struck out.

The claimants then appealed to the Court of Appeal.

Dismissing the appeal and delivering the judgment of the Court, Asplin LJ emphasised the significance of the majority decision of the Supreme Court in *Barton* and considered that the Master's error was in following Lord Briggs' dissenting judgment rather than the majority judgment.

The Master … took the view that the Supreme Court in Barton had not been asked to consider the effect of the duty to further the overriding objective as giving rise to a duty to warn the opposing party of its mistakes and proceeded accordingly… he held that there was such a duty, that M&R had indulged in technical game playing, and that the fact that validation would deprive Phoenix of a limitation defence should not preclude such a step and that validation would do no more than preclude Phoenix from procuring a windfall. It seems to me, therefore, that despite making reference to the Supreme Court decision in the

Addendum to his judgment, the Master, in effect, ignored the judgment of the majority, which although perhaps understandable, given the timing of his judgment and the handing down of the judgments in Barton, is fatal to the appeal. He also appears to have preferred the judgment of the minority in relation to the effect of limitation upon an evaluative judgment under CPR r 6.15.

….

Although Lord Sumption did not expressly mention CPR r 1.3 or specifically address that duty as opposed to a duty inter partes to warn a claimant, I agree with the Judge … that it is hard to imagine that Lord Sumption would have taken the view that it was inappropriate for the defendant to have refused to authorise the giving of advice of the kind under consideration if he had regarded it as inconsistent with the defendant's duties under the overriding objective.

Lord Sumption made clear that even if there had been time to warn, the defendant's advisers were under no duty to give advice, they could not have done so without taking instructions and it was inconceivable that they would have been authorised to do so, and that a person having courted disaster by waiting until the very end of the limitation period to serve the claim form has only very limited claim to the court's indulgence and by comparison the prejudice in losing an accrued limitation defence is "palpable." It seems to me that the emphasis placed upon the prejudice which would arise and the lack of a duty to warn in such circumstances is entirely inconsistent with a positive duty under CPR r 1.3.

Conclusions

The balance between substantive justice and fairness on the one hand and procedural certainty and expediency on the other is a matter of calibration and is open to some degree of subjectivity. It can be contested ground as reflected in the differing judgments in the Supreme Court in *Barton*.

The lessons to be learned from the analysing *Woodward v Phoenix* are:-

- The service rules, when they come up against limitation, are complex.
- Mode and time of service are critical.
- Attempting service at the edge of the limitation period is courting disaster.
- There is no inter-partes' duty to point out mistakes made by other parties
- Remaining silent is not technical game playing.
- The duty under CPR 1.3 does not extend to pointing out such mistakes and
- the limitation defence is not to be regarded as windfall.

So apparently there is no duty on a party to inform the other party of procedural mistakes even though it denies the other party of its rights of action, unless of course the party in question has itself contributed to the other party's mistake.

David Pipkin
&
Matthew Pascall
&
David Chase
Temple Legal Protection

‘PNLA ATE SCHEME’

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.

E: david.pipkin@temple-legal.co.uk T:01483 514423

Matthew Pascall
Senior Underwriting Manager

temple
legal protection

Barrister Matthew Pascall is the latest addition to the expanding commercial team at Temple Legal Protection, joining as Senior Underwriting Manager from November 2017.
Matthew was called to the Bar in 1984 and joined Guildford Chambers two years later. Spending more than 30 years in practice there, he has comprehensive knowledge and experience of the commercial legal sector and he is listed in the current Legal 500 as a Tier 1 barrister.

Matthew has been providing ongoing consultancy services to Temple Legal Protection for some time and therefore has prior insight into the company and has already established productive relationships with our clients. His knowledge of the commercial legal sector and litigation practice will be invaluable to the business, providing specialist experience to lead the commercial litigation insurance team.

E: matthew.pascall@temple-legal.co.uk T:01483 514428

David Chase
Deputy Underwriting Manager

temple legal protection

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. Having worked for over 12 years in this evolving market.

David has worked with many of the leading law firms in the British Isles. 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.

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 in order to assist customers in making efficient and timely use of our litigation (ATE) insurance and funding products.

E: david.chase@temple-legal.co.uk T:01483 514424

Don't talk to me about ATE!

Matthew Pascall
Senior Underwriting Manager

1

Don't talk to me about ATE!

You don't like the cases we send you.

You're too expensive.

You don't pay out when we make a claim.

2

You don't like the cases we send you.

- Litigation insurance doesn't work if the insurer insures everything!
- We set the threshold at 60% and that works.
- Delegated authority with a coverholder agreement – you make the decision!

3

You're too expensive.

- Litigation insurance can be expensive.
- The premium for £100k of cover payable at the trial stage of a privacy claim will cost £82,500 – 82% of the limit of indemnity.
- Using the PNLA rate, the premium for £100,000 of cover in a case with damages of £100,000 will be £20,000 or 20% of the limit of indemnity.
- Can your client risk £100,000?

4

You're too expensive.

Limit of Indemnity: £150,000*		
Stage of Premiums	Percentage of Damages for cases valued up to £150,000	Cases valued over £150,000
(ai) Pre-issue, after an Adjudication.	6%	Please refer to Temple
(aii) Pre-issue, without an Adjudication.	7.5%	
(bi) Post-issue, within 120 days of issue of proceedings.	12.5%	
(bii) Post Issue, more than 120 days after issue of proceedings but up to 45 days before trial.	17.5%	
(c) Post Issue, Settles within 45 days of the trial or proceeds to judgement in the insured's favour.	20%	

Limit of Indemnity top up provision is available subject to terms and conditions.
*** Includes up to £10,000 for an Adjudicator's fee (Band 2).**

5

You don't pay out when we make a claim.

- Since LASPO we have paid out on every claim presented to us for prof neg cases.
- Since Temple first insured prof neg cases, we have paid out on 99% of the claims presented to us.

6

A question for you?

temple legal protection

Without Litigation Insurance, how are you going to protect your clients from the risk of not recovering their own disbursements and paying their opponent's costs if they lose?

Colin Witcher
&
Anthony Eskander
Church Court Chambers

‘Misfeasance and Private Prosecutions’

Professional Negligence Lawyer's Association

Biographies

Colin Witcher

C.Witcher@churchcourtchambers.co.uk

"Juries warm to him; he approaches the cross-examination of witnesses with care and skill."

Legal 500 2020, Ranked as a Leading Junior

"A very fine Advocate", "an impressive knowledge of law and procedure"

Legal 500 2019, Ranked as a Leading Junior

Colin Witcher is a barrister specialises in corporate crime and financial regulation. He both prosecutes and defends, being entrusted with cases of the highest sensitivity and is often sought to act in high-profile and high-value matters, both in an advisory capacity and at trial. He has acted as a Leading Junior, Led Junior and Junior Alone. Colin is comfortable before all Courts and Tribunals and has developed an impressive appellate practice. Colin also undertakes employment and civil cases which require robust cross-examination and mastery of voluminous and complex evidence. His practice is thus diverse: recent instructions include advising a Japanese Bank on insider-trading, defending trading standard matters, and visiting Kosovo to advise on War Crime allegations.

Colin regularly publishes commentary on current legal issues and has lectured both domestically and internationally. For example, Colin was invited to present a key note speech in Seattle, USA, on cross board perspectives on tackling racial bias within the jury system and has previously presented in Delaware, USA on effective case presentation by utilising technology. Colin is also a regular guest on Inspire FM's show "ask your lawyer".

Anthony Eskander

A.Eskander@churchcourtchambers.co.uk

Anthony Eskander is an experienced barrister who advises corporates and individuals on corporate crime matters with particular expertise advising on the legal and regulatory landscape in the distributed ledger technology, cryptocurrency and Initial Coin Officer (ICO) sector. Anthony previously sat on KPMG's specialist blockchain/cryptocurrency risk panel and has worked with various regulators and government agencies.

Anthony specialises in financial crime, regulatory law and civil litigation. He advises domestic and international clients, including solicitors and corporate clients, on a broad range of issues. He has been seconded to the Serious Fraud Office and Peters & Peters LLP.

Prior to joining Chambers, Anthony was an Analyst in the foreign exchange team in the Operations Division at the investment bank, Goldman Sachs. His responsibilities included ensuring the investment bank's compliance with domestic and international financial regulations

Anthony enjoys writing legal articles. He has been published in the New Statesmen and the New Law Journal, and has been quoted in The Guardian, CNN and the British Medical Journal.

Professional Negligence Lawyer's Association

Misfeasance and Private Prosecutions : The Rise and Risk of the Private Prosecutor

Colin Witcher and Anthony Eskander, Church Court Chambers

The Tort : Misfeasance in public office

The elements of the tort of misfeasance in public office were summarised by the House of Lords in *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1, 191-193 per Lord Steyn as follows:

1. The Defendant must be a public officer;

2. The Defendant must be exercising a power as a public officer;

3. The Defendant must either (a) specifically intend to injure the Claimant (referred to as 'targeted malice'); or (b) know that there is no power to do the act complained and that it is likely to damage the Claimant.

For a recent analysis of the tort we commend the discussion of Zacaroli J in *Brent London Brough Council v Alan Davies and* Others [2018] EWCH 2214 (Ch).

There is often common ground in such cases that the jurisprudence in the context of the criminal offence is of assistance in determining the meaning of the elements of, and the context of, the tort of misfeasance in public office.

The Criminal Offence : Misconduct in Public Office

In *Attorney General's Reference (No 3 of 2003)* [2005] QB 73 the Court of Appeal identified the four elements of the common law offence of misconduct in public office as:

1. a public officer acting as such;

2. wilfully neglects to perform his duty and/or wilfully misconducts himself;

3. to such a degree as to amount to an abuse of the public's trust in the office holder;

4. without reasonable excuse or justification.

Discussion : the overlap in "acting as such" / "exercising a power"

In the civil arena Sweeny J in *TPKN v Ministry of Defence* [2019] EWCH 1488 (QB) (a case heard in June 2019), made it clear that an act for the purpose of misfeasance in public office is not confined to acts that constituted an improper exercise of a power, but also includes illegal acts, beyond the scope of any power.

In the recent case of *R (on the application of Boris Johnson) v Westminster Magsitrates' Court [2019] EWCH 1709* (admin) (a case heard in July 2019), the Court narrowed the meaning of acting as such, making it narrower than other jurisdictions, narrower than the academic commentary, and ultimately narrower than we argued the matter. The Court found that "*The words "as such" plainly mean acting in the discharge of the duties of the office."*

Contrast *Quach* [2010] VSCA 106, an Australian state case in which the court stated that "*the proper formulation of the offence requires the element ['acting as such'] to be expressed so that it encompasses the circumstance in which the offender's misconduct, though not occurring while the offender was discharging a function or duty, had a sufficient connection to their public office*".

The Rise in Private Prosecutions

There has been a marked increase in the number of private prosecutions:

1. A lack of confidence in the Crown Prosecution Service;
2. The victim wishing to retain control and active involvement;
3. Confirmed ancillary orders are permitted (for example *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52);
4. There is now a better understanding and public knowledge as to the power;

The Private Prosecutor as a Defendant in Professional Negligence Claims

We anticipate there being an increase in the number of solicitors being sued where their conduct causes the collapse of a prosecution and/or causes adverse costs.

Private Prosecutions are not easy.

The Private Prosecutors' Association ('PPA') has published the first edition of the Code for Private Prosecutors .The Code is essential reading for those contemplating bringing any type of private criminal proceedings as well as for those instructed to act on their behalf

The Court has routinely pressed the cardinal importance of the duty of candour, and the serious consequences of failing to fulfil it was spelt out last year by Sweeney J in *Kay* [2018] EWHC 1233 (Admin).

Further, indemnity costs are not uncommon.

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Speakers Biographies

David McIlroy
Forum Chambers

‘Advice & Loss’

David McIlroy

DMcIlroy@ForumChambers.com

PNLA Biography

David McIlroy is Head of Chambers at Forum Chambers and Visiting Professor in the Centre for Commercial Law Studies, Queen Mary University of London. David's practice focuses on mis-selling of financial products and professional negligence in connection with investments, mortgages, and accounting. David frequently handles class actions against solicitors and financial advisors as well as claims against accountants, quantity surveyors and others arising out of failed investments.

Advice and Loss after *BPE v Hughes-Holland* [2017] UKSC 21

David McIlroy
Barrister, Forum Chambers
Visiting Professor, Centre for Commercial Law Studies, Queen Mary University of London

1

Why the advice / information distinction matters

SAAMCO [1997] AC 191 had been understood as meaning:

- A professional providing information is only liable for the consequences of that information being wrong
- A professional giving advice is liable for the consequences of that advice being wrong, which may include all the consequences of C entering into the advised transaction

2

The expansive view of "advice"

Henderson J in *Walker v Inter-Alliance Group plc* [2007] EWHC 1858 (Ch):

- Advice is *"any communication…which… is objectively likely to influence the transaction in question."*

HHJ Havelock-Allan QC in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB):

- *"The key to identifying where the giving of information about a financial investment amounted to the giving of investment advice was that the information was either accompanied by a comment or value judgment on the relevance of that information to the client's investment decision, or was itself the product of a process of selection involving a value judgment so that the information would tend to influence the recipient's decision."*

3

The "Advisory Relationship"

- *Crestsign Ltd v NatWest* [2014] EWHC 3043 (Ch)*:* Between the duty to advise and the duty not to mis-state there is a mezzanine duty to provide accurate information
- *Thornbridge v Barclays Bank* [2015] EWHC 3430 (QB): To identify an advisory relationship one needs to look at all aspects of the objective evidence of the relationship between the parties.
- *PAG v RBS* [2018] EWCA Civ 355: "*The expression 'mezzanine' duty … is best avoided. … concentration should be on the responsibility assumed in the particular factual context as regards the particular transaction or relationship in issue."*

4

The evolution of "advice"

Hughes-Holland v BPE Solicitors [2017] UKSC 21:

- Information and advice are not distinct nor mutually exclusive categories
- Assumption of responsibility is on a sliding scale between the valuer at one end and the investment adviser at the other end

5

"Advice" given but information-only responsibility!

- *Manchester Building Society v Grant Thornton* [2019] EWCA Civ 40: Even where advice is given, a case will be an "information" case rather than an "advice" case unless the advisor has assumed responsibility for *"guiding the whole decision making process"*

6

The new questions

The new application of SAAMCO:

1. Is this an "advice" case or an "information" case?
2. In an "advice" case, the advisor is responsible for all the foreseeable financial consequences of the transaction
3. In an "information" case, responsibility has not been assumed for the decision to enter into the transaction
4. In an "information" case, responsibility is only for the foreseeable financial consequences of the information being wrong

7

Still at a loss (1)

- Testing whether "the *SAAMCO* Cap" applies:
  - Assume (for the sake of the argument) that the transaction had gone ahead, would C have suffered the same loss even if the negligent information had been true?
  - *Would the injury still have been suffered if the doctor's diagnosis that there was no problem with the knee was correct?*

8

Still at a loss (2)

- *Mason v Godiva Mortgages* [2018] EWHC 3227 (QB) shows difficulty of identifying a recoverable loss in a mortgage mis-selling case
- *Manchester Building Society v Grant Thornton* [2019] EWCA Civ 40: Auditor not liable for mark to market losses following negligent advice regarding hedge accounting, as outside the scope of its duty
- *Various Claimants v Giambrone* [2018] PNLR 2, conveyancing solicitors held to have guided Cs' decision-making process and therefore liable for all losses suffered

9


FORUM

Susanne Muth
Forum Chambers

‘Is that Appropriate? The limitations of COBS 10’

Susanne Muth

smuth@forumchambers.com

Practice overview

Before being called to the Bar Susanne worked for several years on the swaps sales desk of a major Japanese investment bank and subsequently looked after the money market, investment and hedging requirements of corporate and high net worth clients for Sal Oppenheim & Cie in Cologne and Frankfurt

She is passionately interested in the detail of her case and favours a hands-on approach with a focus on taking the right strategic and tactical decisions along the way to a successful outcome for her client.

Susanne is a lawyer with a strong sense and understanding of the commercial, reputational and personal priorities of her clients, and these matters always complement and inform her legal advice.

She has contributed to Butterworths Journal of International Banking and Financial Law.

Legal 500
“A strong advocate who gets the court on side” (2020)
“A determined and hardworking operator” (2018)
“Extremely bright, straight-talking and very good with clients” (2017)
“Tenacious, thorough, approachable and strong in court” (2016)
“Very thorough with papers, and drafts excellent statements of case” (2015)
“Commended for her engagement with clients” (2013)
“Her written work is of the highest quality” (2012)

Is that Appropriate?

The Limitations of COBS Rule 10

Genesis of the *Appropriateness* Rules

1. *Appropriateness* as a concept was first introduced when the regulatory protections provided by the Conduct of Business Rules (COB) were restructured and amended by the EU Markets in Financial Instruments Directive (MiFID). Art 19(5) of MiFID introduced the new *appropriateness* regime for non-advised sales, following on from Art 19(4) with its KYC ("Know Your Client") requirements for advised sales.

2. The *appropriateness* requirements in Art 19(5) of MiFID were included in the new Code of Business Sourcebook rules (COBS) as rule 10 and came into force on 1 November 2007. COBS 10 is aimed at protecting retail clients, defined in COBS 3.4.1 as clients who are not *professional clients* or *eligible counterparties*.

3. The introduction of the *appropriateness* rules constituted a fundamental recasting of a firm's responsibilities towards its retail client in the context of a non-advised sale. The culture change effected by this change should not be underestimated. Under the previous COB rules there was a clear demarcation line between, on the one hand, advised sales which attracted suitability obligations on the part of the firm, and, on the other, transactions which were "execution only", leaving the firm free to deal in its own interest. COBS 10 tilted the balance firmly in favour of a retail client who contemplates the purchase of a complex product/service. That is because the firm is required, at least to a limited extent, to engage with the client's interests. In addition, Art 19(6) of MiFID severely circumscribed transactions qualifying for "execution only" status. For present purposes, it is sufficient to highlight the requirement that an "execution only" transaction cannot relate to anything other than "non-complex financial instruments".

4. The *appropriateness* regime was intended to provide a safety net for retail clients who enter into **non-advised** sales of **complex** investment products. Supporting that intention, the provisions of COBS 10 prohibit the sale to retail clients of products which are inappropriate for them.

Assessing *Appropriateness* – What is Required?

5. In contradistinction to the firm's positive duties in an advised sale (COBS 9) which require it to ascertain whether a product is suitable, the requirements placed on the firm by COBS 10 are negative in character. COBS 10 requires the firm to ask the client to provide information about his knowledge and experience in the investment field relevant to the specific type of product or service offered. It is then the task of the firm to assess whether, in the light of the information provided, the product is appropriate for the client. If the firm decides that the product is not appropriate, it must warn the client, but it is entitled to do so in a standardised notice.

6. While COBS 9 is intended to protect clients against negligent advice, COBS 10 is intended to protect clients who do not know what they are doing from entering into inappropriate transactions. Notably, and in distinction to the more onerous obligation in COBS 9, in a non-advised sale under COBS 10 the firm is not required to be particularly proactive in the KYC process, but may rely on the information provided by the client, unless that information is manifestly out of date, inaccurate or incomplete.

COBS 10 Breaches and Consequences

7. Pursuant to s.138D(2) of the Financial Services and Markets Act 2000 (FSMA) a contravention by an authorised person of a rule made by the regulator is actionable at the suit of *a private person*, subject to the defences applying to actions for breach of statutory duty. Damages claims for COBS 10 breaches may, accordingly, be advanced under this section.

8. The definition of *private person* in Regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations (SI 2001/2256) includes individuals or any person who does not suffer the loss in the course of carrying on a business of any kind.

9. The effect of that definition is to lock out companies from bringing statutory claims for breaches of the COBS rules, and this is probably the single most serious limitation on

ensuring and policing *appropriateness* in non-advised sales of complex financial products or services.

10. In the context of COBS 9 (suitability) where the quality of the firm's advice is under consideration, the courts have been prepared to "import" COBS 9 duties into negligent advice claims made by companies at common law on the basis that a competent adviser would adhere to the prevailing financial services rules when giving advice: see the cases quoted by Tomlinson LJ in *Green and Rowley v RBS [2014] Bus. LR 168* at [18] (*Loosemore v Financial Concepts* et al.).

11. In the case of *appropriateness*, by contrast, there is no common law cause of action that might be advanced and populated with the requirements of COBS 10. *Appropriateness* is entirely a creature of MiFID and the COBS 10 financial services rules. As a result, while breaches of COBS 10 can be advanced by individuals under s.138D FSMA, companies, even unsophisticated small and medium sized enterprises (SMEs), are excluded from relief for the non-advised sale of products that were inappropriate for them.

12. Occasionally the regulators come to the rescue of SMEs, particularly where the sale of inappropriate products to this cohort has been widespread. Such was the case when the Financial Conduct Authority ordered banks to provide automatic redress to SMEs to whom they had sold structured collars, a type of toxic and complex interest rate hedging derivative in which the customer's exposure increased once interest rates fell below the specified floor. When regulators take these steps, they are indicating that the kind of product should never have been sold to the type of client to whom it was sold.

Appropriateness in the Courts

13. The effectiveness of *appropriateness* protection has come up against several limits in the courts:-

    (i) "Execution only" defences continued to be routinely advanced by banks in the interest rate swap mis-selling litigation in relation to trades made after 1 November 2007. In *Thornbridge v Barclays Bank [2015] EWHC 343*, a decision that was cited with approval in several subsequent High Court decisions, including *Property*

Alliance Group v RBS [2016] EWHC 3342, Barclays asserted that it had treated the sale of a swap to a property company owned by Mr and Mrs Harrison as "execution only". The case was fought and lost by the claimant on the issues of (i) whether advice had been given and (ii) whether a contractual estoppel debarred the claim. It appears not to have been pointed out to Her Honour Judge Moulder (as she then was) that by the time Barclays sold the swap to Thornbridge, the distinction between advised and "execution only" sales (which was highlighted in the witness statement of Barclays' salesman) had ceased to exist because under MiFID the sale of an interest rate derivative to a retail client was no longer an "execution only" sale, and classification as such was itself a breach of COBS 10. Instead, the distinction between an "execution only" and an advised sale featured throughout the judgment and appears to have informed the judge's conclusion that no advice had been given in relation to the sale of the swap. The judge's apparent acceptance that the swap had been transacted on an "execution only" basis was plainly wrong,. However, COBS 10 could not have assisted Thornbridge, a corporate claimant who was not entitled to pursue a statutory claim for breach of the *appropriateness* rules.

(ii) The scope of the COBS rules in any given case will be assessed, not in isolation, but in the context of the objectives set out in s.5(1) of FSMA (see, recently, Flaux LJ in *Ehrentreu v IG Index Ltd [2018] EWCA Civ 79*, [16]). S.5(1) FSMA creates an obvious tension between the objectives of (i) securing the appropriate degree of consumer protection and (ii) supporting the general principle that consumers should take responsibility for their decisions. The tension between protection and responsibility has come into sharp focus in the spread betting cases. Spread betting is a highly geared and high-risk activity where the bet placer bets on the movement of the market in shares, commodities or foreign currency values. It is also a regulated activity to which the *appropriateness* rules in COBS 10 apply. In the reported cases the bet placers (claimants) typically accumulated eye watering losses. But how far should consumer protection rules be deployed to protect the gambler against the consequences of his own folly? And where does the COBS 10 *appropriateness* regime fit in? In *Quinn v IG Index Limited [2018] EWHC 2478 (Ch)* the starting point for the judge's analysis was that COBS 10.2 imposed on providers of spread betting services a duty to assess *appropriateness* before opening

an account and permitting the applicant to place bets. However, *appropriateness* was exclusively concerned with knowledge and experience relevant to the product or service offered, such as was necessary to understand the risks involved. The judge rejected the claimant's submission that the spread betting provider should also have assessed the bet placer's expertise in the sense of competence or success. In coming to this conclusion, the judge revisited the terms of Art 19(5) MiFID and decided that the *appropriateness* enquiry was limited to what was required in COBS 10 (and its sub-rules), none of which were concerned with expertise, but referred only to knowledge and experience. Nevertheless, he found that the spread bet provider had breached the provisions of COBS 10 in two respects:-

(a) Firstly, when it unilaterally upgraded the bet placer's account to a "Select Account" which exposed the bet placer to larger potential losses, without determining (in accordance with the provisions of COBS 10) whether the bet placer understood the risks involved in relation to the Select Account. However, as the claimant had not pleaded or proved that he had suffered any greater (or additional) loss as a result of being given a Select Account, a claim for that COBS 10 breach could not succeed on causation grounds;

(b) Secondly, when it failed to carry out a new *appropriateness* assessment after a re-opening of the bet placer's account. The judge found that where the provider closed the bet placer's account for any reason, any future dealing involved the provision of a new service for which a fresh *appropriateness* assessment was required. Despite the provider's failure and the apparent breach of the requirements of COBS 10, the judge concluded that if the provider had undertaken that fresh *appropriateness* assessment, it would inevitably have assessed spread betting as appropriate for Mr Quinn. Such an assessment would have followed in the light of the information supplied in the original application for the account and Mr Quinn's previous trading activity. The judge rejected the submission that the provider should have taken into account Mr Quinn's record of unsuccessful bets leading up to the date of the closing of his account. Returning to the general theme permeating his judgment, the judge reiterated that assessing *appropriateness* was about determining whether the applicant for an account had the necessary experience and knowledge to

understand the risks involved. It was not about the degree to which the applicant was likely to win or lose.

(iii) As in professional negligence actions, proving the breach of a regulatory duty is never enough on its own to entitle the claimant to an award of damages under s.138D FSMA. Quite apart from the requirement that the claimant must prove a causal connection between the breach and eventuating recoverable loss, the courts adopt a "substance over form" approach to COBS breaches. Cooke J in *Basma v Credit Suisse Securities (Europe) Ltd [2013] EWHC 400 (Comm)* at [19] said in a case involving COBS 9 suitability that:-

"… If an investment is in fact suitable for the client, then it does not ultimately matter if there have been failings in the process."

In *Quinn* the technical breach of COBS 10 by the provider's failure to reassess *appropriateness* on the re-opening Mr Quinn's spread betting account did not result in relief because the judge found that such an assessment (had it been carried out) would inevitably have determined that the activity was appropriate for Mr Quinn. As spread betting was in fact appropriate for him, it did not matter that the provider had failed to make a fresh *appropriateness* assessment in breach of COBS 10.

Conclusion – Utility of *Appropriateness*

14. Overall, COBS 10 *appropriateness* is a welcome safety net for retail investors. "At arms' length" non-advised sales transactions (i.e. "execution only" transactions) with this category of client are prohibited. The *appropriateness* regime will undoubtedly reduce the number of retail clients exposed to risky investments because the firm must assess the client's knowledge, experience and his understanding of the risk taken in accordance with COBS 10 before the transaction can go ahead.

15. *Appropriateness* requirements are in some instances added into existing regulatory obligations of firms engaged in regulated activities to apply an extra layer of protection. A recent example is the FCA's introduction of the *appropriateness* requirements in COBS 10

into Peer2peer lending activities (P2P) with effect from 9 December 2019. At the same time P2P lending is being restricted to high net worth investors, sophisticated investors and restrictive investors, and retail clients not matching that description are removed from non-advised P2P lending altogether. Ordinary retail clients must now be provided with COBS 9 and 9A suitability advice before being permitted to invest in P2P loans, and restricted clients will have the benefit of the safety net protection afforded by an *appropriateness* assessment under COBS 10.

16. This Note highlights the limits of the protection conferred by the *appropriateness* rules in COBS 10. In summary, the statutory cause of action in s.138D FSMA is not available to corporate retail clients, and this rules out claims by SMEs suffering loss from inappropriate products/services acquired in non-advised sales. Proven technical COBS breaches will go nowhere, where in the final analysis a flawed regulatory process cannot be shown to have disadvantaged the client. Finally, it may be difficult to prove causation of loss by a distinct COBS rule breach, especially where the claim involves other allegations of regulatory rule breaking.

Susanne Muth
Forum Chambers
13 November 2019

smuth@forumchambers.com

Panel discussion session

Philippa Hill
&
Vijay Rathour
Grant Thornton

‘E-Disclosure - Auditors and Accountants Negligence update’

Grant Thornton

PNLA Annual Conference

Developments in technology for dispute resolution
– Vijay Rathour

Is technology the answer to audit negligence
– Philippa Hill

28 November 2019

Vijay Rathour
Head of Digital Forensics

T: +44 (0)7788 418652
E: Vijay.Rathour@uk.gt.com

Overview

Vijay is a Partner in the Forensic and Investigations practice and leads the UK Digital Forensics Group, a team dedicated to the delivery of solutions for large scale, complex and high intensity investigations, regulatory responses, financial-crime and compliance remediation and digital solutions.

He also manages cyber and data breach response for many international businesses. Across these groups of capabilities the Digital Forensics Group delivers data driven consultancy and solutions to reduce the burden of otherwise costly and manual investigations and compliance reviews.

Vijay has managed data collection exercises internationally including in South Africa, India, China, Eastern Europe and in the CIS. These projects included intensive on-the-ground data scoping exercises to assess the clients' challenges and devise an effective and efficient investigation strategy.

Vijay is well versed in many forms of technologies, databases and business infrastructure configurations. He will typically commence an investigation by working with clients and their infrastructure teams to draw up network infrastructure diagrams, define data locations (including cloud-based, offsite, offline/archived etc) and assess the feasibility and proportionality of collecting data from each available source. This work can include interviews of relevant infrastructure team members and of each custodian under investigation.

Vijay's is familiar with many PC hardware configurations and mobile device forensics and can manage collections of such systems and the subsequent interrogation data to reconstruct device activity, behaviours such as efforts to remove or spoliate data, and can typically reconstruct many forms of internet based evidence.

He has undertaken substantial investigations for some of the world's largest mobile and telecommunications businesses, devising innovative techniques to recover and substantiate evidence in defence of civil, criminal and regulatory matters.

Vijay is currently engaged on the UK Courts' Working Group on the redrafting of CPR 31B on Electronic Disclosure and sits on the Cyber Security Advisory Group of ILAG.

The Grant Thornton Digital Forensics Group has been ranked as Digital Forensics Experts of the Year in the Legal Awards 2019. The team is also top ranked in Chambers for Litigation Support Services, 2019.

Vijay is listed as a global Thought Leader in Who's Who Legal 2019 for Digital Forensics.

Professional qualifications

Vijay is a qualified barrister and solicitor, and is an affiliate member of the ICAEW. He sits on the board of the Cybercrime Practitioners Association.

Publications

Vijay is a regular public speaker on issues related to cyber security, risk management and digital investigations. He has authored pieces regarding crypto-forensics, breach response and digital investigations.

Relevant experience

- Vijay has given expert evidence as a single joint expert on a matter related to asset tracing into crypto-currencies (including Ethereum and Bitcoin), and the creation and validity of sidechains and innovative blockchain applications.
- Conducted a data breach and system failure/business continuity investigation for an international airline.
- Managed multiple regulatory investigations into alleged LIBOR manipulation by a client bank; undertook data scoping and data collection of over 40 million documents and provided strategic guidance on efficient approaches to legal and regulatory response.
- Undertaken FCPA assessments of multiple international clients; prepared compliance questionnaires, conducted interviews and assisted in preparation and presentation of Board reporting.
- Worked alongside legal counsel on managing a multi-national investigation into alleged fraud and corruption within a high-profile sporting body.
- Managed an investigation into a UK based newspaper publisher alleged to have undertaken hacking of mobile telephones.
- As a pro-bono project, created and managed the electronic disclosure infrastructure used by legal teams in the Hillsborough Inquests, covering decades of poor quality data.
- Led the Digital Forensic investigation into the data privacy infrastructure utilised by one of the world's largest mobile telephone manufacturers; conducted a forensic assessment of data and infrastructure in response to international regulatory probes.

Philippa Hill FCA
Forensic accounting expert

T: +44 (0)207 865 2372
E: philippa.hill@uk.gt.com

Overview

Philippa is a Partner in Grant Thornton's Forensic and Investigation Services practice. She is a Chartered Accountant, specialising in accounting disputes and investigations since 2001, prior to which she spent four years as a statutory auditor.

Philippa leads the firm's Accounting Integrity and Conduct specialist group, which advises in matters involving suspected accounting irregularities and fraud. She has particular experience of investigating the roles of finance directors, accountant advisers and auditors following financial misstatements and corporate failure.

Philippa is also experienced in accounting and commercial disputes in the context of litigation, arbitration, and expert determination, including professional negligence claims, post-M&A disputes, breach of warranty and fraudulent misrepresentation claims, acting as quantum expert.

Philippa acts as independent expert witness and has given oral testimony in civil, criminal and regulatory matters. Her entry in 'Who's Who Legal' 2019 for expert witnesses notes: *"an excellent team player"* who stands out for her *"ability to respond calmly in questioning and withstand hostile cross-examination".* One source comments, *"She is able to assimilate information and present coherent and strong arguments and analyses."*

Example case experience

Philippa's experience includes the following matters:

- Accounting expert in a High Court claim on impact of alleged audit and due diligence negligence following the take-private of an AIM-listed business by a PE fund
- Advising in connection with the correct accounting for financial instruments and the role of the auditors following collapse of a major shipping company
- Advising on negligence and dishonest assistance by an auditor following discovery of a significant fraud in an offshore insurer
- Led a multi-disciplinary inquiry for the Financial Reporting Council (FRC) into the roles of a director, auditors and actuaries of a Lloyd's motor insurance syndicate that under-reported its reserves by £200m
- Advised on the roles of directors and auditors following the collapse of a mutual society that was conducting regulated banking activity without authorisation
- Investigated the work of corporate finance advisers to the Phoenix Four directors and auditors of the collapsed MG Rover Group – gave evidence in the FRC tribunal
- Accounting expert in a Danish breach of warranty arbitration claim under a W&I insurance policy, following allegations of accounting manipulation by the Seller
- Accounting expert in LCIA claim by a joint venture party following cessation of a middle eastern oil exploration venture due to force majeure, alleging fraud and breach of contract by the other JV partner
- Advising the liquidators of a hedge fund over suspected accounting misrepresentations made by the owners of a collapsed care home business in which the fund invested
- Accounting expert in LCIA claim assessing the diminution in value of an acquired business arising from alleged breach of non-compete clauses by Sellers
- Accounting expert in LCIA claim by a minority shareholder alleging improper intra-group charges by the majority shareholder
- Investigation of money-laundering by an offshore corporate services provider, in relation to which Philippa gave evidence in the Royal Court in Jersey
- Advised in a regulatory enquiry into the role of the finance director and auditors of a listed professional services firm that collapsed
- Advised on quantum of loss in relation to a solicitors' negligence claim for loss of chance following a failed swaps mis-selling claim against a bank
- Advising the Serious Fraud Office on false accounting and audit issues in a criminal trial of executives of a UK public company.

Professional qualifications and publications

- Fellow of the Institute of Chartered Accountants in England and Wales (FCA)
- Institute of International Business Valuers 101 and 102 Exam qualified
- Co-author of the ICAEW's '*Best practice guidelines to Completion Mechanisms – determining the final equity value in transactions*'

Grant Thornton
An instinct for growth™

Accounting integrity and conduct

In matters involving suspected accounting irregularities, black holes, financial misstatements, or alleged accounting or audit negligence, you need strong technical support from subject matter experts, supported by an experienced team.

Our Accounting Integrity and Conduct specialists combine forensic accounting skills with technical accounting and audit expertise to advise on both technical and practical considerations with regards to allegations of accounting irregularities and malpractice.

We provide objective expert advice and opinion on liability and causation issues arising from allegations of negligence against finance professionals in commercial matters. We support subject matter expert witnesses to produce CPR compliant and fully tested opinions, that will withstand scrutiny in Court or tribunal proceedings.

We also have significant experience of advising on matters subject to investigation by UK regulators, particularly Financial Reporting Council (FRC) inquiries into suspected misconduct by finance professionals in business and chartered accountants in practice and the US Department of Justice. Our integrated computer forensics and eDisclosure services facilitate efficient collection, review and sharing of relevant case materials and subsequent analysis and disclosure.

We will be able to support you from the start of an investigation or potential claim, through to providing expert testimony if a matter comes to trial or tribunal.

Multi-disciplinary teams with a deep sector and technical expertise

We work with specialists across the UK and international member firms in technical disciplines relevant to the accounting advice under scrutiny, such as audit taxation, actuarial and risk, pensions, valuations, and transactions advisory. We also draw on our deep sector experts, including over 400 financial services sector specialists in the UK.

Our services

We regularly advise on the following:

- Professional liability (including audit, tax and accounting negligence)
- Professional discipline (particularly FRC inquiries)
- Accounting misstatements
- Financial misrepresentation
- False accounting/fraudulent accounts/wire fraud
- Directors and officers liability and conduct
- Tax avoidance schemes

Experienced, considered and robust expertise

Whether you need early stage advice on the merits or technical aspects of a claim or dispute, or you require an independent testifying expert witness, we can provide you with the right specialists and the right team, giving you the best chance of resolving your dispute effectively.

When faced with a dispute, you will require a team that can bring commercial, regulatory and accounting capability, be able to value assets and sophisticated products, quantify losses and provide recommendations on addressing deficiencies.

Capability and experience

Our disputes team have been expert witnesses on claims worth a total of over **US$100 billion** and have given evidence over **250 times**.

We have been appointed as experts by individuals, businesses, governments and regulators acting both in an advisory and a testifying capacity.

We have acted as party-appointed experts both by claimants and respondents, as single joint experts, as tribunal-appointed experts and as expert determiners in jurisdictions all over the world, under various procedural rules.

Types of work and claims

- **Misrepresentation**
- **Breach of warranty**
- **Contentious valuations**

Context

- **Commercial litigation**
- **Arbitration**
- **Insurance claims**
- **Civil fraud**
- **Loss of profits**
- **Asset tracing**
- **Professional negligence**

Breadth and depth of coverage

Our sector coverage and geographical reach is substantial. Recent cases include those in the financial services sector, energy, construction and manufacturing.

We have over **140 people** in our Forensic team in the UK and 8**00 globally** in **37 countries**.

We can also draw on the expertise of the wider UK firm which comprises over **4500 people**.

Grant Thornton has a presence in **135 countries**.

*In 2019, Grant Thornton UK LLP was ranked in **Band 1 by Chambers & Partners** for the provision of litigation support services.*

*We were recognised in the **Global Arbitration Review 100 in 2019**, alongside only a handful of other accountancy firms and arbitration consultancies as being amongst the most active firms undertaking Expert Witness work.*

*Grant Thornton Digital Forensics Group has been ranked as **Digital Forensics Experts of the Year** in the Legal Awards 2019.*

*Grant Thornton was selected as the **winner of the Who's Who Legal award as Expert Firm for 2019**, and **ACQ5 Insolvency and Asset Recovery Firm of the Year, 2019**.*

Band 1, Litigation support services, Chambers & Partners 2019

Global Arbitration Review (GAR) 100, 2019

Global Investigations Review (GIR) 100, 2018, 2019

Who's Who Legal, Asset Recovery Experts Firm of the Year 2019

Digital Forensic Experts of the Year 2019 – Legal Awards

Q&A

Chairman's Closing Remarks

PNLA - Annual General Meeting