

PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

DUBLIN CONFERENCE

26th September 2019



PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION DUBLIN CONFERENCE Thursday 26th September 2019

0830-0900	Registration & Refreshments
0900-0905	Welcome Address Harry Fehily, Managing Partner, Holmes O'Malley Sexton
0905-0915	Chairman's Opening Remarks Mr. Justice Gerard Hogan, Advocate General, European Court of Justice
0915-1000	"Does Ireland have a "claims culture" problem?" Rossa Fanning SC
1000-1045	"General Insurance Market Update": Declan O'Rourke, General Manager, Ireland at AIG Europe DAC
1045-1100 1100-1115	Questions & Discussion Refreshments
1115-1200	"Professional Negligence Update" Kelley Smith BL
1200-1245	"The England & Wales Perspective" Simon Wilton, Hailsham Chambers
1245-1300 1300-1400	Questions & Discussion Lunch
1400-1430 Damia	"Markets Update" from Aon Ireland n Kilpatrick, Managing Director & Michael Davis, Director of Financial & Professional Services
1430-1500	"The Role of the Independent Expert Conveyancing Solicitor in Professional Negligence Claims" Michael Carrigan, Consultant Solicitor, Holmes O'Malley Sexton
1500-1515 1515-1530	Questions & Discussion Refreshments
1530-1600	"The Role of the Expert Architect in Professional Negligence Cases" Tony Reddy, Director, Reddy Architecture + Urbanism
1600-1630	Chairman's Closing Remarks



PROFESSIONAL NEGLIGENCE AND LIABILITY ANNUAL DUBLIN CONFERENCE

Stephens Green Hibernian Club, 9 St Stephen's Green, Dublin. Thursday 26th September 2019

ATTENDEES (1 of 3)

Mr. Justice Gerard Hogan	Advocate General European Court of Justice	Dublin
Orla Begley	Holmes O'Malley Sexton	Limerick
Fiona Beirne	Davies - Ireland	Dublin
Bruce Bourne	Bruce Bourne Associates/PNLA	Wimborne
Peter Bredin	Dillon Eustace	Dublin
Marcus Carey	JLT Ireland	Dublin
Michael Carrigan	Holmes O'Malley Sexton	Cork
Gavan Carty	Kent Carty Solicitors	Dublin
Richard Coakley	XL Catlin	Dublin
Martina Connolly	DWF Claims	Dublin
Chris Cooney	Campbell Courtney and Cooney	Surrey
Gearóid Corrigan	DWF	Dublin
Tara Cosgrove	Beale & Co	Dublin
Finbarr Crotty	Crotty Insurance	Dublin
Ian Crotty	Marsh	Dublin
David Curran	Flynn O'Driscoll	Dublin
Denis Daly BL		Dublin
Michael Davis	Aon Ireland	Dublin
Rossa Fanning SC		Dublin
Kevin Farrell	Mason Hayes Curran	Dublin

Harry Fehily	Holmes O'Malley Sexton	Limerick
Danny Gallagher	AmTrust International Underwriters Ltd	Dublin
Derek Gately	Leeson Claims Services Ireland (LCSI)	Dublin
Jim Graham	Leeson Claims Services Ireland (LCSI)	Dublin
John Hennessy	Hennessy & Perrozzi Solicitors	Dublin
Bill Holohan	Holohans Law	Cork
Lisa Kelly	Zurich	Dublin
Louise Kidd	AIG	Dublin
Michael Kilbane	Hodge Jones & Allen Solicitors	London
Damian Kilpatrick	Aon Ireland	Dublin
Ciaran Leavy	Lavelle Partners	Dublin
Katy Manley	Manley Turnbull/PNLA	Cheltenham
Jacki McDonagh	AIG Insurance	Dublin
Andrew Mellusco	Armour Risk Management Limited	London
Lynne Merriman	AmTrust International Underwriters Ltd	Dublin
Niamh Moloney	Liberty Mutual Insurance Europe Limited	Dublin
Keira-Eva Mooney	AIG Insurance	Dublin
Lorcan Moylan Burke	Arthur Cox	Dublin
Michael Murphy	Holmes O'Malley Sexton	Limerick
Brian C Murray BL		Dublin
David Niven	Penningtons Manches Cooper	London
Kyle Nolan	Maples and Calder	Dublin
Helena O'Brien	Gore & Grimes	Dublin
John O'Riordan	Dillon Eustace	Dublin
Declan O'Rourke	AIG Europe DAC	Dublin

Johnny O'Brien	Marsh	Dublin
Kevin O'Connor	Berkshire Hathaway Speciality Insurance (BHSI)	Dublin
Aisling O'Neill	DWF Claims	Dublin
Harry O'Neill	Lavelle Partners	Dublin
Rachael O'Toole	Holmes O'Malley Sexton	Dublin
Tony Reddy	Reddy Architecture + Urbanism	Dublin
Aoife Ryan	Kennedys	Dublin
Sinéad Ryan	DWF	Dublin
Pearse Screenan SC		Dublin
Aoife Skehan	Holmes O'Malley Sexton	Limerick
Kelley Smith BL		Dublin
Rachel Turner	Dillon Eustace	Dublin
Grainne Varian	William Fry	Dublin
Aoife Waters	Flynn O'Driscoll	Dublin
Simon Wilton	Hailsham Chambers	London



With thanks to our partners Holmes O'Malley Sexton





PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

INTRODUCTION

This PNLA annual conference is suitable for lawyers and other professionals seeking an update on professional negligence and liability law and practice.

Eminent speakers drawn from a range of perspectives will provide guidance and insights on recent developments and trends moving forward. Topics will include; a general legal update, an update from England & Wales, construction risk management from legal, insurance and architectural perspective and a market update from insurers, AIG, and brokers, Aon.





Harry Fehily Managing Partner Holmes O'Malley Sexton

Welcome Address





HARRY FEHILY Managing Partner

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Having joined the firm in 1986, he has extensive experience of advising clients across a range of contentious and non-contentious matters with an emphasis on commercial litigation and financial lines claims, including professional negligence litigation, cyber claims and claims against directors and officers. He also has extensive experience of resolving property related disputes and shareholders' disputes. Since 2004 he has practiced extensively in the Commercial Court (a commercial division of the High Court) and is vastly experienced in dealing with cases in this venue.

Much of his work involves dealing with high profile contentious disputes concerning public and private bodies. He frequently advises regulatory bodies on investigations, due process and fair procedures. He also advises frequently on public procurement issues. Harry advises on public administrative law as it relates to state bodies, disputes and investigations concerning public bodies, judicial review, employment law disputes particularly as they impact on the board and chief executives of companies, contentious issues as they impact on environmental law, planning law and health and safety law.

He has developed considerable experience in the area of construction law representing construction companies in respect of prosecutions against the companies arising alleged breaches of Health and Safety matters including indictable prosecutions following fatalities on their construction sites. In addition, he has recently represented a pharmaceutical company in respect of health and safety prosecutions brought by the Health and Safety Authority and environmental prosecutions brought by the Environmental Protection Agency arising from breach/alleged breaches at its plant.

On the advisory side he provides advice to local and multinational companies with a particular focus on high level contentious and board related disputes. Harry is also an experienced employment lawyer dealing principally with high level contentious issues. He works closely with the Boards and CEOs of state and private companies to find effective management solutions to critical employment situations.

Harry has extensive experience in insolvency and corporate recovery and represents liquidators, receivers and examiners. Harry has been involved in high profile examinerships. He has developed a particular expertise in assisting both the company itself entering into the examinership process as well as providing advice to creditors of the company entering into examinership.

Harry practises in the area of dispute resolution and has been involved in many mediations. He is an accredited mediator through CEDR (Centre for Effective Dispute Resolution) in London.

PRACTICE AREAS
COMMERCIAL LITIGATION AND DISPUTE RESOLUTION
CONSTRUCTION
DEFAMATION AND PRIVACY
EMPLOYMENT AND PENSIONS
ENVIRONMENTAL AND PLANNING
EU, COMPETITION AND PROCUREMENT
GAMING AND BETTING
HEALTH AND SAFETY
INSOLVENCY AND CORPORATE RECOVERY
INSURANCE
PROFESSIONAL NEGLIGENCE*
PUBLIC ADMINISTRATIVE LAW
DATA PROTECTION AND CYBER RISK



Mr. Justice Gerard Hogan Advocate General European Court of Justice

Chairman's Opening Remarks



Mr. Justice Gerard Hogan Advocate General European Court of Justice

Gerard Hogan is an Irish judge who has served as Advocate General of the European Court of Justice since October 2018.

He previously served as a Judge of the Court of Appeal from 2014 to 2018 and a Judge of the High Court from 2010 to 2014.

He was educated at University College Dublin, the University of Pennsylvania, Trinity College Dublin and the King's Inns.

He was called to the Bar in 1984 and became a Senior Counsel in 1997. He was a law lecturer and fellow in Trinity College Dublin from 1982 to 2007. He is regarded as "one of the foremost constitutional and administrative lawyers in Ireland" and has published books on Irish Constitutional and Administrative Law as well as numerous articles.

In May 2018, he was nominated by the Government of Ireland for appointment as the Advocate General to the European Court of Justice.

- Graduated in law from University College Dublin (LL.M., 1981);
- Doctor of Laws, University College Dublin (LL.D., 1997);
- Degree in law at the University of Pennsylvania (LL.M., 1982);
- Doctorate in law at Trinity College Dublin (Ph.D., 2001);
- Law lecturer at Trinity College Dublin (1982-2007);
- Senior Counsel at the Bar of Ireland (1997-2010)
- Judge at the High Court of Ireland (2010-14)
- Judge at the Court of Appeal of Ireland (2014-18)



Notes: -		



Rossa Fanning SC

"Does Ireland have a "claims culture" problem?"

Rossa A. Fanning SC

rossa@fanning.ie



Rossa Fanning graduated from UCD in 1997 (BCL, First Class Honours, First Place & Swift McNeill Memorial Prize) and in 1999 (LL.M, First Class Honours, Postgraduate Research Scholarship), from King's Inn in 1999 (BL, First Place, John Brooke Scholarship) and from the University of Michigan in 2000 (LL.M, Fulbright Scholar & University Fellow).

Rossa has been in practice at the Irish Bar since 2000 and took silk in 2016. He combined practice at the Irish bar with a teaching position as a College Lecturer at UCD from 2001 – 2009, where he taught Constitutional and Company Law.

Rossa maintains a broad commercial, chancery, insurance defence & media litigation practice. He acts regularly for banks, insolvency practitioners, newspapers, technology companies and for insurance companies in catastrophic cases, product liability, professional negligence & construction litigation. He has particular experience of acting for religious and sporting bodies in sensitive cases involving child protection issues. He has acted as an arbitrator on coverage and indemnity disputes and is a CEDR Accredited Mediator. He has presented at many conferences and seminars and has appeared by invitation before Oireachtas Committees on constitutional and legislative reform topics.



Notes: -		



Declan O'Rourke General Manager Ireland at AIG Europe DAC

"General Insurance Market Update"





Declan O'Rourke General Manager, AIG Ireland E: declan.o'rourke@aig.com

Declan O'Rourke serves as General Manager for AIG in Ireland.

He has worked at AIG since 1993 in various roles based in London, New York and Dublin.

He has a wide range of management experience at AIG in audit, finance, financial lines insurance, commercial lines insurance, distribution and general management.

He is a Chartered Accountant and previously worked with PWC from 1989 to 1993.





Insurance Market Overview

Declan O'Rourke General Manager, AIG Ireland

- ✓ Irish Insurance Market Overview
 - Motor
 - Liability
- ✓ Financial Lines Market Overview
 - Directors and Officers (D&O)
 - Professional Indemnity (PI)
 - Cyber



Notes: -		



Q&A



Kelley Smith BL

"Professional Negligence Update"

Kelley Smith BL KSmith@lawlibrary.ie



 $\label{lem:commercial} \textit{Kelley Smith BL} \ is \ a \ practising \ barrister \ specialising \ in \ civil \ and \ commercial \ law.$

Prior to commencing practice as a barrister, she worked for a Big Four accountancy firm.

Kelley has significant experience in the area of professional negligence in the context of construction, financial, accounting and legal professionals.

PROFESSIONAL NEGLIGENCE UPDATE

Kelley Smith 26 September 2019

1. This update focusses on two areas of law relevant to professional negligence. The first is the High Court judgment in *Defender v HSBC Institutional Trust Services (Ireland)***DAC and Others** which addresses concurrent wrongdoers and in particular when a plaintiff would be identified with a concurrent wrongdoer released from the proceedings. The second area I deal with relates to the running of time in claims for financial loss in tort. In particular, I look at a couple of judgments delivered in July of this year, one by the Court of Appeal and the other from the High Court which focus on the issue of when damage arises.

CONCURRENT WRONGDOERS AND THE JUDGMENT IN DEFENDER V HSBC

2. In December 2008, the former chairman of the Nasdaq, Bernard Madoff confessed that his asset management activities were "one big lie". It transpired that Mr Madoff had been operating the world's largest Ponzi scheme for which he is now serving a 150 year sentence. Mr Madoff perpetrated his fraud by concurrently having a multiplicity of roles: broker, fund manager and having custody of the assets of managed funds. Mr Madoff's Ponzi scheme is the background to the High Court's judgment in *Defender* which addresses issues relating to concurrent wrongdoers.

Background

3. Pursuant to a custodian agreement, Defender, an investment fund, appointed an Irish entity, HSBC Institutional Trust Services (Ireland) Limited ('HSBC') as custodian of its cash and other assets. HSBC entered into a sub-custody agreement with Mr Madoff / his corporate entity ('Madoff') such that it would delegate custody of Defender's assets to Madoff. As a result, US \$540 million of Defender's assets were held by Madoff.

¹ [2018] IEHC 706. The judgment is under appeal and the Supreme Court has acceded to a request for a leap frog appeal.

US Proceedings and settlement

- 4. Within days of Mr Madoff's arrest Mr Irving Picard was appointed as Madoff's trustee in bankruptcy ('the Trustee'). That appointment was pursuant to the Securities Investor Protection Act, 1970 ('SIPA'). In 2009, a claim was made in the Madoff bankruptcy on behalf of Defender.
- In the course of his work, the Trustee instituted proceedings against Defender (and other funds) in order to recover certain redemptions which had been made by Madoff to Defender.
- 6. Ultimately, in 2015, a settlement was reached between the Trustee, Defender and others ('the Settlement Agreement'). As a result, the Trustee granted Defender an allowed claim in the Madoff liquidation ('the Allowed Claim') and agreed to pay distributions based on the Allowed Claim.
- 7. The Settlement Agreement recorded the settlement of:
 - (a) the Trustee's claim against Defender and
 - (b) Defender's claim in the SIPA process.
- 8. The Settlement Agreement also contained "very extensive" releases.

Irish Proceedings

- Defender instituted proceedings in Ireland for the net sum of US \$141 million. The net claim made by Defender took into account, *inter alia*, US \$335 million, returned to Defender by the Trustee. Defender claimed that HSBC was negligent and in breach of duty in failing to monitor Madoff.
- 10. At the early stages of the trial, Twomey J considered it appropriate to determine a discrete issue namely, whether Defender's settlement with the Trustee meant that it could not pursue its claim against HSBC.

² Paragraph 41

11. In order to determine that issue, arising from the Civil Liability Act, 1961 ('the 1961 Act') the Court had to consider the following matters:

(a) whether HSBC and Madoff were concurrent wrongdoers³;

(b) was there a release or accord within s17; and

(c) the hypothetical exercise to determine the blameworthiness of one concurrent wrongdoer.⁴

Concurrent Fault Under the 1961 Act

12. The issue of concurrent fault is dealt with in Part III of the 1961 Act.

13. Section 11 provides that "two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (...) for the same damage, whether or not judgment has been recovered against some or all of them..."

14. Defender argued that its claim was a customer claim in the liquidation, and as such, was a different claim from its cause of action against Madoff as custodian and so not for "the same damage". As a result, Defender contended that for the purposes of the 1961 Act, Madoff and HSBC were not responsible for the same damage and so, were not concurrent wrongdoers. Having reviewed the pleadings, Twomey J rejected that contention.

15. The Judge concluded that Madoff's fraud and HSBC's negligence were alleged by Defender to have led to the same damage (being the loss of the money invested in the ponzi scheme). Accordingly, he found that Madoff and HSBC were concurrent wrongdoers.⁵

Identification under Section 17(2) of the 1961 Act

What Amounts to an Accord?

³ Paragraph 42

⁴ A significant issue addressed in the judgment was whether New York law was applicable in determining the effect of the Settlement Agreement. That issue is not considered here.

⁵ Paragraph 48. This aspect of the judgment has been cited by Barniville J in AIB v O'Reilly [2019] IEHC 151

- 16. In circumstances where the two parties were concurrent wrongdoers, the Court went on to consider the effect of the Settlement Agreement under the 1961 Act. That issue required an analysis of Section 17 of the 1961 Act and in particular, whether there was a release or accord between Defender and Madoff.
- 17. Section 17(2) provides that if there is no intention to release a concurrent wrongdoer "the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made, in any action against the other wrongdoers, in accordance with paragraph (h) of subsection (1) of Section 35...".
- 18. Section 17 provides that if a release or accord with a concurrent wrongdoer does not indicate an intention to release the other concurrent wrongdoers, then the plaintiff's claim is reduced by the greatest of three amounts, being:
 - 1. The amount of the consideration paid for the release or accord;
 - Any amount by which the release or accord provides that the total claim will be reduced;
 - 3. The extent that the released wrongdoer would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers.
- 19. Having considered the judgments in *Arnold v Duffy*⁶ and *Murphy v J. Donohoe Limited*⁷ the Judge concluded that the Settlement Agreement amounted to an accord.
- 20. As noted above, Section 17(2) provides that where one concurrent wrongdoer (Madoff) settles with the plaintiff (Defender) the other concurrent wrongdoer (HSBC) is not discharged by that settlement. Rather, the plaintiff (Defender) is identified with the person with whom the accord was made (Madoff) in the action against the other concurrent wrongdoer (HSBC) in accordance with Section 35(1)(h).8

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⁶ [2012] IEHC 368

⁷ [1992] ILRM 378

⁸ The Settlement Agreement specifically provided that the parties did not intend to provide any benefit by or under the agreement.

21. Section 35 (1)(h) provides that for the purpose of determining contributory negligence :

"where the plaintiff's damage was caused by concurrent wrongdoers, and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer, whose liability is so discharged".

22. Twomey J concluded that Defender was "deemed to be responsible for the acts of ...

Madoff" and stated that:

"The effect of S. 17(2) and S. 35(1)(h), therefore, is that in this case, Defender is deemed to be identified with the fraud of Madoff when this Court comes to determine the amount of any contribution that 'would be made' by HSBC, relative to the contribution to be made by Madoff, to the loss suffered by Defender."

The Hypothetical Exercise under Section 17(2)

- 23. Twomey J went on to engage in a hypothetical exercise, under Section 17(2), to determine what amount Madoff would have been liable to contribute if Defender's total claim had been paid by HSBC. In that regard, the Court took Defender's case at its height and assumed that HSBC was guilty of negligence. The Court placed great weight on the undisputed fact that Madoff had engaged in a massive fraud as part of a Ponzi scheme.
- 24. The Court considered Section 21(2) of the 1961 Act, entitled "Contribution in respect of damages" which states as follows:
 - "(2) ...the amount of the contribution recoverable from any contributor, shall be such as may be found by the Court to be just and equitable, having regard to the degree of that contributor's fault...".

⁹ Paragraph 86.

Blameworthiness of Madoff

- 25. In the context of what is "just and equitable", Twomey J referred to certain earlier Supreme Court judgments, including *O'Sullivan v Dwyer*¹⁰ and *Carroll v Clare County Council*¹¹. He concluded that the key factor is respective blameworthiness rather than the causative link.¹²
- 26. In analysing the position, the Court considered it was obliged to assume that HSBC was negligent or otherwise vicariously liable for Madoff's wrongs. Somewhat curiously, the Judge referred to the fact that HSBC had "invested the sum of approximately US \$ 1 billion of its own money, up to 25% of which it may not recover in the liquidation of Madoff." As the test under Section 21(2) was "relative blameworthiness" the Court considered it critical that one party was guilty of criminal wrongdoing and the other of mere negligence but was also a victim of the other's criminality.
- 27. Ultimately, the Judge determined that what was relevant was the qualitative difference between the situation where "one wrongdoer is guilty of a criminal activity and the other is guilty of a civil wrong such as negligence" and compared that to the situation where there is an "action between two wrongdoers who are both guilty of a civil wrong (or indeed, both guilty of a criminal wrong)". ¹⁴ Twomey J recognised there was a qualitative difference between that situation and "some other form of concurrent wrongdoers, e.g. an architect and a builder who are both sued for negligence arising from substandard building on the other hand"¹⁵.
- 28. The Court went on to place heavy emphasis upon a judgment of the Australian High Court of *Burke v LFOT Pty Limited*¹⁶ relating to the doctrine of contribution. In that case, a solicitor was joined to proceedings by the seller of a business premises. The seller had misrepresented the quality of the tenant of the property.¹⁷ This resulted in the

¹⁰ [1971] IR 275

¹¹ [1975] IR 221

¹² Paragraph 99 of the judgment. However, Kenny J in *Carroll v Clare County Council* noted that a jury was "to apportion the fault according to their view of the blameworthiness of the causative contributions to the accident and that it is to be measured and judged by the standards of conduct and care to be expected from a reasonable person in the circumstances".

¹³ Paragraph 102

¹⁴ Paragraph 105

¹⁵ Paragraph 105

¹⁶ [2002] HCA 17. That judgment has not been followed in other jurisdictions: see the New Zealand Supreme Court judgment in *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] 1 NZLR 906

¹⁷ The tenant was in arrears of rent and had received an incentive payment.

buyer paying more for the property than its true value. The Court rejected the idea that someone who was guilty of a false representation, could be entitled to a contribution from a solicitor who failed to make enquiries as to the tenant's solvency which would have established that the representation was false¹⁸.

29. Twomey J considered the following statement by McHugh J¹⁹ to be compelling:

"It would be absurd to suggest that a person who stole money and was ordered to repay it could obtain contribution from a person who negligently failed to safeguard the money. And in substance, I do not think that there is any difference between that example and the present case."

- 30. In addition, the Court considered the long established judgment of Costello J in **Staunton v Toyota**²⁰ where it was held that the primary concurrent wrongdoer who was guilty of negligence and should be liable for 100%, even where there was a secondary concurrent wrongdoer, also guilty of negligence.
- 31. Twomey J ultimately considered that a primary wrongdoer guilty of fraud and criminal conduct should not be entitled to a contribution from a secondary wrongdoer guilty of a civil wrong, such as negligence.

What Dark Place in the 1961 Act has been identified by the Judgment?

32. In the preface to his 1951 book *Joint Torts and Contributory Negligence*²¹ Glanville Williams referred to the "many dark places in this part of the law". The 1961 Act, ²² which Dr Williams had a hand in drafting, was introduced to reform the law on civil liability. ²³ However, the 1961 Act has been the subject of judicial criticism. O'Donnell J has referred to the 1961 Act as "an extremely complex provision which, while a significant advance in the law, is not so perfect a construction that there are not provisions in the Act, which do not fit comfortably together"²⁴ and in a different case referred to the provisions relating to concurrent wrongdoers as "a mystery whose secrets have been revealed only to a few,

¹⁸ The solicitor, Mr Burke, had been found guilty of negligence

¹⁹ Paragraph 59

²⁰ Unreported, High Court, Costello J, 15th April, 1988

²¹ Stevens & Sons Limited, 1951, as reprinted in 1998.

²² The Tortfeasors Act 1951 was replaced and elaborated upon by the 1961 Act.

²³ Kerr, *The Civil Liability Acts*, 5th Ed, 2017 page 3

²⁴ Hickey v McGowan [2017] 2 IR 196 at 238

and Sections 16 and 17 and the relationship between the two provisions is particularly Delphic". 25 It appears that **Defender** has revealed a further dark place in the 1961 Act.

- In the Supreme Court decision in *larnród Eireann v Ireland*²⁶ O'Flaherty J approved a 33. passage from McMahon and Binchy where the authors summarised three principles that underlie Part III of the 1961 Act, as follows:-
 - (1) Subject to the rule that the plaintiff cannot recover more than the total amount of the damages he has suffered, the injured party must be allowed full opportunity to recover the full compensation for his injuries from as many sources as possible;
 - (2) Concurrent wrongdoers should be entitled to recover fair contributions from each other in respect of damages paid to the plaintiff; and
 - All matters relating to the plaintiff's injuries, should, as far as possible be litigated (3) in one action.
- 34. The Supreme Court in *larnród Eireann* (and other judgments) have identified certain other relevant principles or provisions of the 1961 Act.
 - a. Where a deficiency arose to an innocent party the Supreme Court concluded that any deficiency "... should be made by someone in default than that a totally innocent party should suffer anew."27
 - b. The risk of non-recovery, whether through insolvency or otherwise, should be borne by a concurrent wrongdoer rather than the injured plaintiff. As noted by McMahon and Binchy, "...the risk of non-recovery is borne by a concurrent wrongdoer and not that of the injured Plaintiff. This is exemplified in Section 12 which states that 'concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers', in essence, the '1% rule"28

²⁵ Cafolla v O'Reilly [2017] 3 IR 209 at 233

²⁶ [1996] 3 IR 321

²⁷ At 376

²⁸ A similar principle is reflected in section 14 which deals with judgments against concurrent wrongdoers.

- c. Section 38(1) provides that where there has been contributory negligence on the plaintiff's part, he is to have a several judgment for such apportioned part of his total damages as the Court thinks "just and equitable" having regard to each defendant's degree of fault. Sub-section 2 goes on to provide that if, after taking reasonable steps the plaintiff has failed to obtain satisfaction of any judgment in whole or in part, he shall have liberty to apply for secondary judgments. This provision has the effect of distributing the deficiency among the other defendants in such proportions as may be just and equitable.²⁹
- d. Section 17 seeks to avoid double-recovery, but also, to encourage out of Court settlements³⁰.
- 35. The outcome of the judgment runs counter to certain principles underlying the 1961 Act as follows:
 - a. The injured party, Defender, has not recovered the entirety of its damage. Despite the fact that there are two concurrent wrongdoers deemed responsible for the same damage, Madoff and HSBC, Defender is at a loss of US\$ 141 million.
 - b. Section 17 is designed to avoid double recovery but also to promote settlement. Clearly there is no double recovery here. Instead, Defender is at a loss as a result of entering into a settlement with a concurrent wrongdoer.
 - c. Defender has suffered a deficiency in its recovery as a result of settling with the Trustee appointed as a result of Madoff's insolvency. Despite the 1961 Act requiring assumptions as to (a) negligence on the part of HSBC and (b) that HSBC was liable for the whole of the damage, HSBC pays nothing to Defender.
 - d. The outcome goes against the basic principle providing for an equitable division of the financial burden between wrongdoers.

²⁹ As recognised by O'Flaherty J in *Iarnród Eireann*. Section 38(2) was not referred to in the Judgment.

³⁰ As discussed by Charleton J in *Haughey v J & E Davy* [2014] 2 IR 549; *Sheehan v Talos Capital Limited* [2018] IEHC 361. That principle has been recognised by various authors, including Williams, McMahon & Binchy and Kerr.

36. The policy aims of the 1961 Act are referred to in the concluding paragraphs of the judgment. Twomey J did not accept that the result of the judgment could be said to be unjust and inequitable to Defender.³¹ Instead, the Court took the view that in entering the Settlement Agreement, Defender would, or should have been aware of the consequences of its settlement, namely, that it would be identified with Madoff.

Should a Plaintiff Settle with a Concurrent Wrongdoer?

37. A query arises as to whether a consequence of the judgment will be to discourage plaintiffs settling with one concurrent wrongdoer. Only time will tell. A plaintiff who refuses to engage with an offer of settlement by a concurrent wrongdoer, may face a claim of failure to mitigate loss. Pending clarification on appeal the view may be taken that the facts of *Defender*, including the criminal context, are relatively narrow and so the usual level of apprehension around settling with a concurrent wrongdoer will simply continue.

³¹ Paragraph 135.

STATUTE OF LIMITATIONS IN FINANCIAL LOSS CLAIMS

38. When a cause of action accrues in financial loss (and other areas)³² is an issue which has been considered by the Superior Courts in recent years in the context of the Statute of Limitations. As noted by Finlay CJ, a cause of action will not have accrued until "the two necessary component parts of the tort have occurred, namely the wrong and the damage". ³³ In July, two Superior Court judgments were address when "damage" arises. I consider both judgments below.

The Belfry Judgment

- 39. On 18 July 2019, the Court of Appeal³⁴ delivered a judgment in *Cantrell & ors v Allied Irish Banks Plc & ors*³⁵ on the limitation period for claims in tort brought by investors ("the Investors")³⁶ for losses made in respect of vehicles bearing the name "*Belfry*". The appeal³⁷ arose from a decision of Haughton J in which he determined a preliminary issue regarding the Statute of Limitations.
- 40. The question for determination was whether Haughton J erred in his overall finding that the Investors were not statute barred in their claims of misrepresentation and negligent misstatement arising from the existence, and pleaded non-disclosure, of loan to value covenants (the "LTV covenants") in borrowings negotiated on behalf of the Belfry vehicles by the director defendants ("the Belfry Directors"). Allied Irish Banks plc ('AIB') acted as investment promoter and placing agents.

Factual Background

41. The Investors in each case made their investment between June 2002 and November 2006.

³² For example, *Hegarty v O'Loughran* [1990] 1 IR 148; *Brandley v Deane* [2017] IESC 83 and *Gallagher v ACC* [2012] IESC 35, [2012] 2 IR 620

³³ Hegarty v O'Loughran, page 153

³⁴ Baker J delivered the judgment (Peart and McGovern JJ concurring)

^{35 [2019]} IECA 217

³⁶ In addition to the Cantrell proceedings, more than 300 sets of proceedings had been issued by Investors. The preliminary application was heard in 8 sets of "pathway" proceedings.

- 42. The Belfry companies purchased commercial properties in secondary locations in the UK, supported by secured borrowings negotiated by the Belfry Directors. At the dates of investment, the Belfry companies had not yet purchased the real property investment assets, and the stated intention was to "finance the proposed property investments from a combination of equity and bank debt". The borrowings were to be secured on the property and without recourse to the Investors. The prospectus said that the Belfry Directors had commenced "non-binding discussions with a number of U.K. and European financial intuitions to fund circa 80% of the purchase price of each of the Properties on competitive terms".
- 43. The borrowings negotiated by the Belfry Directors were subject to LTV covenants. As a result, if the value of any property purchased fell below the borrowings by 80% of the value, there would be a deemed automatic default and crystallisation of the floating charge, thus entitling the lender to dispose of the charged assets.
- 44. It was central to the claims that the Investors made that they were not made aware of the LTV covenants nor were the possible negative impact on their investments explained to them in the prospectus or otherwise.
- 45. Correspondence sent to each of the Investors in 2008 showed, for the first time, concern on the part of the Belfry Directors regarding the performance of the funds. By letter dated 5 August 2008 ('the August 2008 Letter') the Investors were informed that the overall value of the property portfolio in the Belfry 2 fund had shown a decrease, as of 31 March 2008, of 11.7%. The August 2008 Letter showed the net asset value of the investment as of 31 March 2007 and 31 March 2008 and showed a decline of almost 100% between the two years, although the investment was still substantially in profit.
- 46. Some months later, the Investors were informed that the value of the property portfolio represented a 31.1% decline in the overall value of the property portfolio since March 2008 and that, as a result of that reduced value, "all equity within the fund would be eroded". The Investors were informed that the original loan had been purchased by GE Real Estate Finance Limited ("GE") and that it had written to the Belfry Group requesting that the breach of the LTV covenants be remedied by 20 March 2009.
- 47. The Belfry Directors engaged in talks to obtain a new facility and remedy the breach of the LTV covenants. While the loan facility was extended, this was done on terms and ultimately, by letter of 7 September 2009, the Investors were informed that following the

revaluation of the portfolio, and notwithstanding a revised facility agreement, "the value of your investment is being written down to nil".

48. Attempts to further restructure the terms of the loan facility failed and the lender required that the outstanding debt would be repaid through "an agreed disposal programme". This was notified by letter of 11 July 2013 and the Investors were informed that, once the sales were completed, the company would be liquidated, and their investments would cease to exist.

The Belfry Proceedings

- 49. Proceedings commenced on 6 August 2014. In that context, the August 2008 Letter, deemed to be received on 7 August 2008, was key to the argument regarding the running of time. The Investors pleaded that it was not until then, or later, in September 2009 when they received the consolidated financial statements that they knew of the LTV covenants.
- 50. The Investors claimed that the LTV covenants were not disclosed to them prior to making the investments and that the prospectus did not explain how this particularly disadvantageous gearing could mean that their investment would be entirely wiped out if property values fell.
- 51. The principal claims contained in the Statement of Claims were summarised as follows:
 - (a) AIB and the Belfry Directors were aware of the inclusion of the LTV covenants in the investment structures and the adverse implications this had for the Investors;
 - (b) the existence of the LTV covenant had the potential to, and did in fact, cause loss when property valuations declined;
 - (c) the skill of the property managers was a key selling point, but the existence of an LTV covenant meant that the funds "could not be managed through any market volatility";
 - (d) had the Investors been informed of the existence of the LTV covenant, the investment would not have been made;

- (e) negligence arising from the omission from the prospectus of the investment structure and the LTV covenant in the borrowings.
- 52. The existence of the LTV covenant was pleaded. in essence, that irrespective of whether or not the LTV covenant was triggered by the lender, the existence of the LTV covenant caused a risk or an injury to the plaintiff.

High Court Judgment

- 53. Haughton J concluded that the claims in contract were statute barred by s. 11(1)(a) of the Statute of Limitations, and that finding was not appealed. With regard to the pleas in negligence, Haughton J formed the view that the pleas fell into three categories³⁸, as follows:
 - "(1) Claims of negligence simpliciter, negligent misstatement and/or negligent misrepresentation and breach of duty under the Companies Act arising from alleged shortcomings in the prospectuses and advice given in relation to the level of financial risk in the investments and the suitability of the investments for particular investors.
 - (2) Pleas of negligent misstatement/misrepresentation, the alleged failure to specify, refer to or explain the LTV covenants or the possible consequences of such covenants prior to undertaking the investment of Belfry funds in UK properties.
 - (3) Claims of negligence and breach of fiduciary duty in the management of the investments in the choice of the investments, and the level of rotation of properties (the 'churning' claim) and the generation of excessive fees in short the mis-management claims."
- 54. The claims identified at (1) and (2) were held not be to statute barred in respect of the different Belfry investments.
- 55. The Judge concluded that the cause of action in tort did not accrue at the date of entry into the investment as there was "a mere possibility of loss" but no actual loss.

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³⁸ Paragraph 19 of the High Court judgment as quoted by Baker J at Paragraph 37.

- 56. Haughton J went on to consider the effect of furnishing property updates and consolidated annual financial statements to the Investors. The Trial Judge concluded that the accounts and shareholder fund revaluation were such to have raised serious concerns for the future of the investment but there was no evidence of actual loss.
- 57. In the appeal the Appellants (AIB & ors) argued that the cause of action in respect of all of the claims in negligence were statute barred. In particular, they argued:
 - a). that the claims in each case derived from the Investors having suffered financial loss as a result of entering into the investments and so, the cause of action arose at a time they purchased the shares representing the investments;
 - b). the Investors were contending that the cause of action did not accrue until they discovered the loss, which was inconsistent with the decision of the Supreme Court in *Gallagher v ACC Bank plc*, and *Brandley v Deane* and the long established principle that there is no "discoverability" element to the running of time in Irish law, save as provided in regard to claims for personal injuries;
 - c). Haughton J was wrong³⁹ to make a distinction between a claim in tort and one in contract, having regard to the fact that the claims arose from the same set of facts. The Appellants argued that he erred in making the distinction between the classes of claims made in the pleadings.

Analysis of the Court of Appeal

58. Baker J noted⁴⁰ that the starting point to the analysis of the approach of the Irish courts is the judgment of the Supreme Court in *Hegarty v O'Loughran*, which was analysed in some detail by McKechnie J in *Brandley v Deane*. In short, time accrues in an action for tort when damage is manifest, happens, occurs, or comes into existence and that general proposition had recently been affirmed in two decisions of the Supreme Court.

Manifestation

⁴⁰ Paragraph 55

³⁹ Paragraph 41

- 59. Baker J stated⁴¹ that damage can happen or occur without it being apparent to any person. The difficulty with the word "manifestation", she explained, is that it readily admits of a common meaning which imports a subjective element of knowledge, so that one asks to whom has the damage become manifest or to whom ought the damage have been manifest. The word is not used in that substantive sense in the authorities. In that context, she noted that in *Brandley v Deane* McKechnie J said that the language and terms used in the cases have led to a lack of clarity and to some confusion.
- 60. Baker J went on to consider the Trial Judge's treatment of *Gallagher v ACC Bank* and the manner in which he distinguished the facts of that case with the Belfry proceedings. In that regard, Baker J⁴² did not accept the Trial Judge's analysis of *Gallagher* and instead, preferred the analysis of Binchy J in *Lyons v Delaney*⁴³ when he stated that the core of the plaintiff's claim in *Gallagher* was "that the product was not a suitable product to borrow money to invest in. and it was most unlikely that it would deliver any return sufficient to offset the cost of the loan transaction".
- 61. Baker J also considered the Trial Judge's analysis of other caselaw in the area such as *Komady v Ulster Bank*⁴⁴, *European Property Fund Plc v Ulster Bank Ireland Ltd*⁴⁵ and the Supreme Court decision in *Brandley v Deane*⁴⁶. Baker J noted⁴⁷ that the Investors relied on that judgment in *Brandley* as offering full support for the proposition that time did not begin to run in their cases until the date at which the investments lost value, as they asserted that on that date the damage or loss from which they suffered was manifest and capable of being discovered.
- 62. Baker J noted⁴⁸ that the test is when damage, not a defect, becomes manifest. As explained by McKechnie J⁴⁹ in *Brandley* a test based on discoverability assesses the accrual of the cause of action from the date when a plaintiff becomes aware or could reasonably have become aware of the cause of action, the material facts relating to the action and, sometimes, the evidence necessary to support a claim. These elements are "subjectively orientated, with some objective elements".

⁴¹ Paragraph 61

⁴² Paragraph 81

^{43 [2015]} IEHC 685 at para 39

⁴⁴ [2014] IEHC 325

⁴⁵ [2015] IEHC 425

⁴⁶ [2017] IESC 83

⁴⁷ Paragraph 89

⁴⁸ Paragraph 94

⁴⁹ Paragraphs 79 et. Seg.

- 63. Baker J⁵⁰ noted that *Brandley* was relied upon by Meenan J in *Smith v Cunningham*⁵¹. That case related to a defect in title which became clear when the owners went to sell the house. Meenan J considered that while the defect in title occurred as a result of negligent certification in July 2006, damage did not occur until 2008, when a sale fell through.
- 64. The Court of Appeal considered whether *Brandley* was limited in scope⁵², being confined to property damage claims and concluded that it was not. She noted that while McKechnie J accepted that there might be some difference in nature between personal injuries and property damage, he was not convinced that such difference would "warrant a separate or discrete test in respective of those two classes of action"⁵³. Similarly, Baker J concluded that that proposition must equally apply to a mis-selling claim. She considered that there was no difference in nature between a mis-selling claim and a property damage claim.
- 65. Baker J recognised⁵⁴ that the difficulty in assessing damages in financial loss cases is because it is often the market that causes the loss and not the negligent act sued upon. Critically, the Court concluded that the task is to assess the <u>causal connection</u> between the alleged negligent act and the loss said to flow therefrom. The focus is on ascertaining the date on which the negligent act causes the plaintiff to get less than he bargained for. She stated that causation is central to the analysis and may be particularly difficult to identify in financial loss cases. Economic loss or financial loss claims are more difficult at the level of principle⁵⁵.

The Possibility of Loss

66. It is plain that the "mere possibility" of loss will not be sufficient and some level of probability will be necessary. Baker J⁵⁶ explained that some distinction may usefully be drawn between claims where a plaintiff can be said to have suffered loss on entering

⁵⁰ Paragraph 97

⁵¹ [2018] IEHC 600

⁵² Paragraph 99

⁵³ At paragraph 104

⁵⁴ Paragraph 101

⁵⁵ Paragraph 103

⁵⁶ Paragraph 105

into a particular transaction, from those where all that can be said to exist at that point in time is a "contingent liability", or "contingent risk", and actual damage occurs only when real or ascertainable loss has occurred.

- 67. Baker J considered various authorities⁵⁷ when considering the difference between the possibility of a loss and contingent loss and concluded⁵⁸ that she did not find the decisions of the courts of England and Wales regarding contingent liability claims useful. She stated that a contingent liability is something which may happen or may never happen. To speak of risk, on the other hand, is to speak of a present risk that something may or may not happen. The risk is a present risk. An investor in a financial product takes the present risk that he or she will not profit from the investment, and the measure of the risk is ascertainable, albeit sometimes with difficulty. Baker J considered that the Belfry cases fell into that category. The Belfry Directors, at some point after the Investors handed over their money, in the exercise of their power to negotiate the lending arrangements, entered into loan arrangements which added to the risk that property prices could depress the value of the investments to such a level that the secured lenders could call in the loans without giving the Investors the opportunity to await a possible upturn in value.
- 68. The Judge noted⁵⁹ that the approach in *Wardley Australia Limited v Western Australia* was favoured by the Irish Supreme Court. Baker J stated that it seemed to her that it is wrong as a matter of principle to adopt an analysis of when a contingent liability becomes actual to a claim for financial loss by a disappointed investor, by merely replacing the language of *"contingent liability"* with that of a possible and, as yet, not real loss of value in the investment
- 69. The Investors purchased an investment product and their claim was that the inclusion of a LTV covenant in the borrowing arrangements made thereafter exposed them to an increased risk, as stated by Haughton J, a risk which was "more than they bargained for". Baker J concluded that the risk was not contingent, but an actual risk that market forces might impact in a manner to which they could not offer resistance or, to put it another way, they claim to have been negligently and without their knowledge fixed with

⁵⁷ Baker J considered Forster v Outred & Co [1982] 1 WLR 86; Pegasus Management Holdings SCA v Ernst & Young [2010] EWCA Civ 18; Gallagher, Shore v Sedgwick Financial Services Ltd [2008] EWCA Civ 863, [2009] Bus LR 42; Law Society v Sephton & Co. [2006] UKHL 22, [2006] 2 AC 543 and Wardley Australia Limited v Western Australia (1992) 175 CLR 514.

⁵⁸ Paragraphs 121-122

⁵⁹ Paragraph 123

a risk that left them exposed to market forces even if those forces in the early days had a positive effect.

Nature of the Damage

- 70. The Court then examined the nature of damage alleged by the Investors to have been suffered as a result of the pleaded negligence. Baker J⁶⁰ characterised the claims regarding the LTV covenants as being a claim that the Investors were sold unsuitable financial products and/or were not informed of the risks involved at the time of purchase. If so characterised, the claim was broadly one similar to that in *Gallagher v ACC Bank*.
- 71. Baker J held⁶¹ that "the Investors had a provable loss far earlier than the date at which Haughton J considered that damage had accrued...it is the inclusion of the LTV covenants in the borrowing arrangements that is the damage suffered by the Investors. It is true that the investments did well for a number of years but when the borrowings were made and the LTV covenants agreed, there was a defect which was not latent, but one capable of being discovered on inquiry. The loss claimed to have been caused by the actions of entering into the LTV covenants, as part of the borrowings, was manifest at that time".
- 72. The Court of Appeal held that if the claims of the Investors were to be characterised as arising from the fact that they entered into a flawed transaction, the loss occurred at the time of the loan transactions when the LTV covenants were agreed. Baker J⁶² found support for this approach in the judgment of Longmore LJ in *AXA Insurance Ltd v Akther & Darby*⁶³:

"[I]t is true that the investors were not immediately worse off as a result of entering into the investments and it might well have been some time before the underlying assets failed but the question must be determined on the basis of what is claimed to be the causative connection between the flawed transaction and the damage or injuries suffered."

⁶¹ Paragraph 133

⁶⁰ Paragraph 126

⁶² Paragraph 137

⁶³ [2009] EWCA Civ 1166, [2010] 1 WLR 1662 at paragraph 82, as quoted at Paragraph 137 of the Belfry judgment.

- 73. Insofar as there was an actual loss, Baker J considered that it was the actual loss caused by the existence of misrepresentations regarding the LTV covenants. Had the Investors sued after the borrowings had been agreed they would have had a stateable and provable cause of action; that the investment they bought was different from the one represented to them, or that a material element was omitted from the pre-contract information on which they relied.
- 74. Importantly, in terms of quantification, the Court of Appeal recognised that the assessment of the loss might be difficult, but there was still loss which could be ascertained. The loss may have increased with the fall in property prices, but there was a manifest and existing loss once the covenants were entered into, the measurement of which would be done following expert evidence on the relevant state of the market at that time⁶⁴.
- 75. The essence of the claim made by the Investors, was that the investments were riskier than they bargained for and as a result of the alleged negligence, were less valuable than was represented⁶⁵. Baker J noted that the more difficult case is one where the transaction originally was advantageous⁶⁶ and in that regard, gave the example of *Nykredit Mortgage Bank Plc v Edward Erdman Group Limited (No. 2)*⁶⁷. Ultimately, Baker J said:

"The question is when was the plaintiff in a worse position as a result of entering into the transaction..."68

- 76. The Judge⁶⁹ answered that question by determining that it occurred here at some stage after the investments were made and before the commercial property was purchased, with the assistance of secured loans which contained the LTV covenant. That period was outside the 6 year limit and so she concluded that the claims were statute barred.
- 77. In circumstances where Haughton J had made no determination of fact in relation to Section 71(1)(b) of the Statute of Limitations the Court of Appeal returned the case to the High Court.

⁶⁴ Paragraph 138

⁶⁵ Paragraph 140

⁶⁶ Paragraph 143

⁶⁷ [1997] 1 WLR 1627

⁶⁸ Paragraph 143

⁶⁹ Paragraph 166

The Barr Judgment

- 78. In the context of an alleged negligence on the part of a firm of solicitors, O'Regan J in **Noble v Bonner and Others**⁷⁰ delivered judgment 12 days after Belfry.
- 79. There, the plaintiff alleged negligence on the part of his solicitors in the preparation of certain contracts related to the sale of lands in Wicklow. In short, in 2000, the plaintiff entered into written contracts such that he granted an option to an entity, part of the Greenstar Group, to acquire the lands in Wicklow ('the First Option') and the same entity granted the plaintiff an option to re-purchase the lands for IR £1 exercisable on a certain date and if certain conditions came to pass ('the Second Option').
- 80. In 2004/2005, the Greenstar Group entity exercised the First Option. However, the draft contract for sale received by the Defendants named a different Greenstar Group entity as the purchaser. In due course, that entity became the registered owner of the lands. The plaintiff received royalty payments until the end of 2011 through a combination of advance payments of the royalties and a payment from a company within the Greenstar Group. However, ultimately, a receiver was appointed to the original Greenstar entity and no further royalty payments were made to the plaintiff. The second Greenstar entity indicated that it was not under a contractual duty to pay the royalty payments or transfer the lands, pursuant to the Second Option.
- 81. The plaintiff asserted that he did not suffer loss by reason of the 2000 transactions or indeed, the 2005 transactions, but rather, when the royalty payments ceased to be paid. On that basis, he suggested that the plenary summons, which issued in 2013, was within time.
- 82. The defendants identified the loss as occurring in 2005 when:
 - a. There was an inability to enforce royalty payments; and
 - b. Loss of the right to exercise the buy-back option.
- 83. The Court heard argument prior to the delivery of the judgment in *Belfry*. As a result, that judgment is not referred to in the judgment of Ms Justice O'Regan.

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⁷⁰ Unreported High Court, 30 July 2019, [2019] IEHC 590

- 84. Ms Justice O'Regan analysed the earlier Supreme Court judgments including *Irish Equine v Robinson,*⁷¹ *Gallagher* and *Brandley v Deane*, and refers to the High Court judgment of Mr Justice Meenan in *Smith v Cunningham*⁷², referred to by Baker J in *Cantrell.*
- 85. The Court gave a relatively short judgment in which it concluded that both parties contended that the option to buy-back the property and the payment of royalties was part of an integrated transaction. The Court⁷³ noted that while it was not possible in 2005 to quantify the loss suffered by the plaintiff, nevertheless, the plaintiff had suffered loss immediately upon the conclusion of the transaction in early 2005 and could have proceeded with an action against the defendants. Ms Justice O'Regan concluded that the loss or damage sustained in 2005 was not merely the possibility of loss, but rather, amounted to actual loss.
- 86. It is notable that the Court looked closely at the pleadings and considered that the extensive particulars of negligence and breach of contract complained about acts or omissions on the part of the defendants in 2000 and 2005. On that basis, she considered⁷⁴ it was "inescapable that damage was occasioned on the conclusion of the transactions in 2005".
- 87. Interestingly, the Court concluded that "the decision in **Gallagher** remains the relevant jurisprudence to be applied in economic loss cases..." However, the Judge noted that even if the test identified in **Brandley** was the appropriate one, then loss was occasioned to the plaintiff in 2005, the damage being capable of being discovered and capable of being proved.

Conclusion

88. In a number of judgments, the Superior Courts have grappled with the issue of the running of time and in particular, the issue of when damage occurs. The judgments delivered in July, in particular the Belfry judgment, seek to rationalise the earlier decisions in the context of financial loss. However, there are discernible differences

⁷¹ [1999] IR 442

⁷² [2018] IEHC 600

⁷³ Paragraph 30(2)

⁷⁴ Paragraph 30(4)

⁷⁵ Paragraph 30(5)

between he approaches of the various Courts. As a result, litigants may continue to struggle to identify when the damage is provable.



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Overview

Simon is a highly experienced junior barrister specialising in professional negligence, professional regulatory matters, and commercial disputes particularly in the insurance field. He has wide experience of interlocutory, trial and appellate advocacy, arbitration work, and all kinds of alternative dispute resolution.

Simon was short-listed by Chambers & Partners as professional negligence junior of the year in 2014 and 2016.

Since 2016 Simon has been head of the Professional Negligence Group at Hailsham Chambers.

"He offers a technically brilliant, commercial approach and he's excellent with clients, as well as robust in court" "A very solid performer. He really understands his cases and he's very thorough and effective." *Chambers UK 2018*

Professional negligence

Simon has advised and appeared in cases involving all kinds of professionals including solicitors, barristers, surveyors, valuers, accountants, professionals acting as expert witnesses, financial advisers, construction professionals (including specialist sub-contractors), insurance brokers, and professional trustees. Typical cases include lenders' claims against solicitors or valuers or mortgage brokers, and indeed property finance litigation of all kinds, claims against lawyers arising from mishandled litigation or transactional work or private client work including wills and probate, claims arising from poor financial advice or dubious investment or tax avoidance schemes promoted by financial advisers or accountants, claims referable to the acts and omissions of solicitors or accountants acting as professional trustees, claims against professionals (usually surveyors) acting as LPA receivers, and litigation against specialist sub-contractors arising out of failed construction projects.

Simon undertakes work for claimants although the staple of his practice is work for the leading professional indemnity insurers and specialist solicitors active in these fields.

Simon particularly relishes document-heavy cases or cases involving contractual construction points or cases with a specialist Chancery or commercial bent, or cases involving allegations of fraud, including those requiring applications for freezing injunctions or other urgent interlocutory work.

Regulatory & disciplinary

Simon has wide experience of advising and representing professionals such as accountants, solicitors, architects, nurses and estate agents involved in regulatory disputes or disciplinary inquiries. He represents individuals and firms before their professional regulatory bodies or, should it be necessary, on appeal to the High Court or by way of a judicial review challenge.

His recent experience also extends to representing a GP expert facing allegations of contempt of court, believed to be the first case of its kind, representing an account to a national icon before his professional body, and successfully defending a surveyor against a charge of dishonesty before his professional body in circumstances where the Court of Appeal had previously said he was dishonest.

Insurance

Simon has extensive experience of disputes between insureds and insurers, including claims against insurers and insurance brokers following avoidance for misrepresentation or non-disclosure, and policy disputes turning on points of construction, coverage issues, excess layer issues, and double insurance problems. He is also instructed in disputes between insurers, whether primary or excess layer insurers or reinsurers. In conjunction with his professional negligence work he has developed particular experience of cases involving professional indemnity insurance, especially PI insurance for solicitors (and he is unafraid of grappling with the intricacies of successor practice disputes). His advisory work includes joint instructions from insurers wishing to resolve disputes between themselves. He also has extensive experience of contested arbitrations and litigation, including litigation in the Commercial Court, the former Mercantile Court, and the Technology and Construction Court.

Commercial law

Simon has extensive experience of commercial litigation, both by way of advisory work in respect of contractual disputes and by way of court appearances in the Chancery Division, the Commercial Court and the Mercantile Courts. Recent work has included:

- advising in a £10m litigated dispute between an insured and his insurers and brokers arising out of a devastating fire at a logistics warehouse;
- acting for a UK company in respect of a claim against a German manufacturer and featuring an exposure to liabilities consequent upon exports to Thailand of defective chemical products;
- advising on and appearing in a wide-ranging and high-value contractual dispute between online motor insurers and their broker counterparties which led to high-profile litigation mentioned in the Financial Times, comprising 3 linked actions which featured allegations of various economic torts;
- advising on a technically complicated contractual dispute between an insurer and its information technology partner;
- advising on limitation of liability and exemption clauses in connection with a series of disputed food supply contracts.

Costs litigation

Simon's costs practice focuses upon contractual disputes between solicitors and clients and cases involving applications for wasted costs or third party costs orders or disputes about BTE or ATE cover. He successfully defended a solicitor against a wasted costs and non-party costs order in *Tinseltime Limited v Roberts* [2012] EWHC 2628 (TCC); [2013] PNLR 4; [2012] 6 Costs LR 1094.

Notable cases

Dr Mahdavi v (1) Sterling Avram; (2) Healys (2018) – acting for a solicitors' practice accused of breach of trust, of breaching an undertaking, and of being vicariously responsible for deceit following a £7m fraud perpetrated by consultant engaged by the firm.

Acting for accountant to national icon accused of professional wrongdoing by his professional body (2018).

Kirk v Aviva & Ors (2017): junior counsel led by Patrick Lawrence QC in a £10m dispute between a commercial property owner and his commercial property insurers and insurance brokers following a devastating fire at a logistics warehouse.

Kashourides v Allsop LLP (2017): defending LPA receivers against a Commercial Court case valued at £10 million by the claimant, and involving multiple allegations of underselling in relation to two investment property portfolios.

Liverpool Victoria Insurance Company Limited v Khan & Ors. (2017): defending a GP expert accused of contempt of court in relation to expert evidence given in a road traffic claim.

Bridging Loans Ltd v Toombs [2017] EWCA Civ 205 Court of Appeal: successful defence of appeal to the Court of Appeal seeking to overturn an order giving summary judgment to the defendant valuer in a claim brought by a bridging lender.

DB UK Bank Ltd v Jacobs Solicitors [2016] EWHC 1614 [2016] 4 WLR 184: a successful determination of the issue of whether a cross-offer rendered an earlier non-part 36 offer incapable of acceptance, such that a supposed compromise had not been effected when that non-part 36 offer was purportedly accepted shortly prior to trial.

Ahmad v Bank of Scotland [2016] EWCA Civ 602: striking out of a multi-million pound claim against various defendants including LPA receivers: the result at first instance was upheld in the Court of Appeal.

Venus Asset Management Ltd v Matthews & Goodman (2014-2016). Defending a surveyor accused of negligence leading to what are alleged to be very large losses referable to the compulsory purchase of premises for the London Olympics.

Southern Rock v Brightside Group Limited (2014-2016). Led by Michael Pooles QC in a high value commercial dispute between insurers and brokers involving 3 concurrent actions.

Various insurance arbitrations (2009-2016) before well-known arbitrators including Colin Edelman QC, Stephen Hofmeyr QC and William Flenley QC.

Acting (2014-2015) in an asset-recovery action (featuring freezing injunctions and asset tracing in the UK and Pakistan) for a City of London solicitors' practice defrauded (initially) of almost £7m.

Acting (2014) for excess layer insurers, RSA and SIMIA, led by Justin Fenwick QC in Commercial Court case where the issue was whether notification of a potential multi-million pound claim to the excess layer was required under the terms of the excess layer policy.

Johnson v Hibberts (2014): Chancery Division, John Jarvis QC, solicitors' negligence trial: nature of duty owed by solicitor concerning rule that marriage revokes a will.

Valentine Rainer Ltd v Henderson (2013), Chancery Division, HHJ Hodge QC, acting for receivers, defeated claim for damages for acting after funds in hand to pay off appointing creditor.

Hotel Installations (Project Support) Limited v Plummer Parsons (2013): acting for defendant accountant: striking-out of £1m claim on scope of duty/causation grounds.

Tinseltime Limited v Roberts [2012] EWHC 2628 (TCC); [2013] PNLR 4; [2012] 6 Costs LR 1094: successfully defended wasted costs/non-party costs application against claimant's solicitor who bore the cost of disbursements under a CFA.

Led by Michael Pooles QC, successfully defending City firm in arbitrated professional negligence claim before a panel of arbitrators (2011).

Acting (2010) for financial adviser sued in part 20 proceedings as part of the Innovator and Gentech Technology Scheme litigation.

Coomber v Alan Bloom (& Ors) (2010): Acting for LPA receivers in multi-party action arising out of the collapse of 'The Icelandic Bank'. Claim struck out after 3-day hearing before Lewison J.

Nationwide BS v Barnes Kirkwood Woolf v Hiscox (2010): Led by Christopher Symons QC, acting for insurer defending declinature on grounds of dishonesty of valuer's claim for indemnity for £2.5m lender's claim. Claim withdrawn on the eve of trial with indemnity costs payable.

Bonham v (1) Fishwick; (2) Fenner [2008] Pens LR 289 and [2008] 2 P&CR DG6. Acted for accountant trustee sued for breach of trust. Case struck out by Evans-Lombe J in 2007 [2007-8] 10 ITELR 329. Appeal dismissed by Court of Appeal.

Leonard v Byrt & Ors [2008] EWCA Civ 20. Acting for solicitors. Court of Appeal upholds summary judgment in a 'lost litigation' claim.

CHRE v (1) NMC; (2) Kingdom (2007). Administrative Court. Beatson J. Acting for nurse defending statutory appeal brought by the CHRE. The case establishes there is a judicial discretion whether or not to remit a case 'under-prosecuted' by the NMC.

Jessup v Wetherell [2007] 98 BMLR 60, [2007] ACD 79. PNLR 10. High Court. Silber J. Successful application for summary determination of solicitors' negligence claim on limitation grounds.

Sinclair v Woods of Winchester Ltd & Anor (2005) 102 Con LR 127. TCC. HHJ Coulson QC. Appeal from construction arbitration. Successful defence of application to remove the arbitrator.

Sangster v Biddulphs [2005] PNLR 33. High Court. Etherton J. Solicitors' negligence. Preliminary issue whether claimant relied on solicitor held out as partner.

Kesslar v Moore & Tibbits [2005] PNLR 17. Court of Appeal. Solicitors' negligence. Claimant suing successor practice. Issue was whether the correct defendant could be substituted after limitation had expired.

Aldi, B&Q, Grantchester v Holmes Building Ltd & Ors (2004). TCC. HHJ Seymour QC. Multi-party construction litigation. Led by Patrick Lawrence QC. Acting for specialist sub-contractor in one of the largest construction cases to come to court in 2004. Arising out of the subsidence of 2 supermarkets on reclaimed land.

Taylor v Anderson and Another, The Times 22 November 2002, (2003) RTR 21. Court of Appeal. Whether a fair trial possible in an apparently stale claim brought by a claimant under a disability.

Griffiths v Last Cawthra Feather [2002] PNLR 27. High Court. Solicitors' negligence. Issue was the date and method the court should adopt in assessing loss in a case arising out of the acquisition of property with an onerous repairing obligation.

Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321. Led by Michael Pooles QC. Successful appeal to the House of Lords. The leading case on nuisance by tree roots.

Recommendations

"He is astute, concise and strategic he has gravitas in court, an exceptional knowledge of the law and is very commercial in his approach" *Legal 500 2019*

"He offers a technically brilliant, commercial approach and he's excellent with clients, as well as robust in court" "A very solid performer. He really understands his cases and he's very thorough and effective" Chambers UK 2018

"Very bright, responsive, and has an easy manner but is tough when required" Legal 500 2017

"He has excellent technical knowledge, a great grasp of the law and a very commercial approach." Chambers UK 2017

"Very thorough, experienced and good with clients." Legal 500 2016

"He is personable, enthusiastic and his advocacy skills are second to none. His manner in conference is impeccable and his pleadings are thorough and robust. He gets to the heart of a case very quickly, is extremely intelligent and makes even the most dry of cases fun. It is always a pleasure to work with him." *Chambers UK 2016*

"He is very good on paper and his advice is very clear and concise." Legal 500 2015

"is concise, clear, practical and commercial. He's intellectually very able and 'a very good, confident speaker who doesn't talk nonsense'." *Chambers UK 2015*

"able to grapple with complex issues very quickly. He provides pragmatic advice in a way which is easy to understand." *Legal* 500 2014

"a clear, practical and commercial barrister, he has an extremely strong reputation amongst his peers. 'An impressive advocate who is good at thinking on his feet. He's a skilled draftsman, and provides very thorough analysis of a case'." Chambers UK 2014

"noted for his meticulous and detailed approach." Legal 500 2013

"a calm and effective communicator who takes a practical approach to his work is 'a very safe pair of hands and a pleasure to work with'." Chambers UK 2013

"intelligent, insightful and concise." Legal 500 2012

"known for the easy to digest, sound, practical advice he provides on a wide range of professional negligence matters. Such is his reputation that solicitors trust him with some of their more difficult cases." *Chambers UK 2012*

"exceptionally bright, and delights clients with his 'well-written, concise advice and pleadings'." Chambers UK 2011

"quick-thinking Simon Wilton is 'astoundingly good on his feet' and impresses sources by constantly winning his cases. His practice covers a wide range of professions." *Chambers UK 2010*

Further information

Education

Simon was educated at the University of Sussex and the Université de Montpellier, where he took a 1st class degree in English with French. He acquired a Diploma in Law from City University, followed by the Bar Vocational Course at the Inns of Court School of Law where he was graded very competent. He was a Karmel scholar at Gray's Inn.

Memberships

Simon is on the executive committee of the Professional Negligence Bar Association and is a member of the London Common Law, Commercial Bar Association and the Chancery Bar Association.

Lectures

He lectures widely to solicitors' firms and insurers, and to professional bodies including the Professional Negligence Lawyers' Association and the Professional Negligence Bar Association. He was formerly an editor of the much lamented Lloyd's Reports (Professional Negligence) series of law reports. He continues to edit the 'Damages' chapter in Professional Negligence and Liability.

ICO Data protection registration number: Z9162795. Click here to view Simon Wilton's Privacy Notice

DEVELOPMENTS ACROSS THE WATER

Simon Wilton, Hailsham Chambers, 4 Paper Buildings, Temple, London.

This talk will focus on key recent case-law in the England and Wales jurisdiction, and will also outline the new adjudication scheme set up by the Professional Negligence Bar Association (the scheme rules and guidance notes are attached).

The topics and case-law to be discussed will be as follows:

<u>Difficulties in establishing duties of care on the part of defendants providing</u> information to third parties

NRAM Ltd (formerly NRAM Plc) v Steel [2018] UKSC 13; [2018] 1 WLR 1190.

Playboy Club London Ltd v Banca Nazionale Del Lavoro SPA [2018] UKSC 43; [2018] 1 WLR 4041.

The continuing evolution of 'the SAAMCo principle': if a duty is owed and breached, when are losses 'within the scope of the duty' and so recoverable?

Manchester Building Society v Grant Thornton UK LLP [2019] EWCA Civ 40; [2019] 1 WLR 4610.

<u>Claims against solicitors in respect of mishandled litigation: what needs to be proved, how, and on what basis?</u>

Jean Edwards v Hugh James Ford Simey [2018] EWCA Civ 1299; [2018] PNLR 30.

Perry v Raleys Solicitors [2019] UKSC 5; [2019] 2 WLR 636.

Moda International Brands Ltd v Gateley LLP [2019] EWHC 1326 (QB); [2019] PNLR 27

Recovering the costs of litigation from the losing party's (1) insurers; (2) lawyers

Travelers Insurance Co. Ltd v XYZ [2018] EWCA Civ 1099; [2018] Lloyd's Rep IR 636.

Various Claimants v Giambrone & Law (A Firm) & Ors & AIG (Europe) Ltd [2019] EWHC 34 (QB); [2019] 4 WLR 7.

Willers v Joyce & De Cruz Solicitors & Ors. [2019] EWHC 2183 (Ch)

PNBA PROFESSIONAL NEGLIGENCE ADJUDICATION SCHEME

Index

Item	Description	Page Number
1.	Introduction to the Pilot Scheme by	2
	Mrs Justice Carr and Mr Justice	
	Fraser	
2.	Introduction to the PNBA	3
	Professional Negligence Adjudication	
	Scheme	
3.	Contact details for the Chair of the	3
	PNBA	
4.	Rules of the PNBA Professional	4-8
	Negligence Adjudication Scheme	
5.	Guidance Notes	9-19
6.	Adjudicator Appointment Standard	20-22
	Terms of Business	

INTRODUCTION TO THE PILOT SCHEME FROM

MRS JUSTICE CARR AND MR JUSTICE FRASER

Pilot Scheme for Professional Negligence Claims

Adjudication has, in the construction sphere, been seen as a considerable success since its conception

in 1996, helping to resolve a great many disputes without the need for the parties to become involved

in litigation or arbitration. They still have the opportunity to do so, of course, but in a very large

number of cases both parties are content to accept the decision of the adjudicator. They therefore

have a decision much faster, and very much cheaper, than they would were they to litigate.

Due to these advantages a pilot scheme for adjudication in professional negligence disputes was

launched under the supervision of Mr Justice Ramsey in February 2015. This scheme is now being re-

launched in a much expanded version. The main changes are the availability of the scheme to claims

against a wider range of professional, removal of the limit on the value of the dispute, which had been

fixed at £100,000, and the introduction of "banding" in terms of the cap on the fee payable to the

adjudicator. The Scheme Rules have been refined, and are now accompanied by detailed guidance

notes. These notes provide useful explanation to those not familiar with the operation of adjudication.

These changes have been accomplished by a working party set up at the direction of Master of the

Rolls and have included representatives from the Ministry of Justice, the Professional Negligence Bar

Association, the Association of British Insurers and the Professional Negligence Law Association.

Particular credit must go to Ben Patten QC who has borne the brunt of the re-drafting.

Alternative Dispute Resolution in all its forms presents real advantages to parties involved in disputes.

This scheme remains fully voluntary and both parties to a dispute must agree to adopt it.

We commend it.

Mrs Justice Carr and Mr Justice Fraser

INTRODUCTION TO THE PNBA ADJUDICATION SCHEME

The PNBA Adjudication Scheme is a successor to the Pilot Scheme for Professional Negligence

Claims launched under the supervision of Mr Justice Ramsey in February 2015 and re-launched with

the support of Mrs Justice Carr and Mr Justice Fraser in May 2016, assisted by a working party set up

at the direction of the Master of the Rolls.

Much of the drafting of the Scheme Rules, produced for the purposes of the Pilot Scheme, was

undertaken by Ben Patten QC. Some limited subsequent revision has been undertaken by William

Flenley QC, Simon Wilton and Ivor Collett.

The current Scheme Rules are intended to enable parties to employ adjudication as a form of ADR,

in circumstances where the Professional Negligence Pre-Action Protocol now encourages the parties

to consider the use of ADR, and adjudication in particular.

As in the Pilot Scheme the Chair of the PNBA continues to fulfil a role of nominating adjudicators

(where the parties choose that course) or registering the appointment of adjudicators (where the

parties themselves choose an adjudicator). The PNBA has also set up a panel of adjudicators who

are eligible for nomination if the parties wish that to happen.

William Flenley QC

Simon Wilton

Ivor Collett

October 2018

CHAIR OF THE PNBA: CONTACT:

Professional Negligence Bar Association - Chair

Currently Caroline Harrison QC – 2 Temple Gardens, Temple, London, EC4Y 9AY.

Telephone: (020) 78221200.

Email: clerks@2tg.co.uk

PNBA 5 February 2019

RULES OF THE

PNBA PROFESSIONAL NEGLIGENCEADJUDICATION SCHEME

Introduction

1. The following scheme applies where the parties to a dispute agree to refer that dispute to adjudication under the PNBA Professional Negligence Adjudication Scheme. Paragraphs 12, 14 and 15 provide alternative ways in which the scheme can operate, but the parties may vary the terms of the scheme as they see fit, subject always to the agreement of the Adjudicator.

Commencement of Adjudication

- 2. A "dispute" arises where:
 - 2.1. a claimant alleges that the defendant/respondent acted in breach of the duties owed by him to the claimant and seeks a remedy in the form of an award of damages or other form of compensation arising from that alleged breach of duty; and
 - 2.2. the defendant/respondent denies that allegation and/or denies that the claimant is entitled to that remedy; and
 - 2.3. both the claim and the denial are contained in writing.
- 3. A dispute suitable to be referred to adjudication may:
 - 3.1. be the entire disagreement between the parties; or
 - 3.2. be a disagreement which is one of a number of "disputes" between the parties or which forms part of a larger "dispute" or may be an issue or issues within the larger dispute;
 - 3.3. involve more than one defendant/respondent and, if all parties agree, related disputes between a number of parties can be referred to adjudication together (save that any change in the Rules requires the agreement of the Adjudicator).
- 4. If both the claimant and the defendant/respondent agree in writing to be bound by the provisions of this scheme, which agreement involves identification of the dispute to be referred, a claimant or a defendant/respondent ("the Referring Party") may refer a dispute to adjudication by serving a notice of intention to refer the dispute to adjudication upon the other party ("the Notice of Referral").
- 5. The Notice of Referral shall:
 - 5.1. set out the dispute, identifying the disputed issues which the parties require the Adjudicator to determine;
 - 5.2. identify the parties to the dispute;

- 5.3. attach a copy of the agreement in writing to be bound by the provisions of the scheme.
- 6. The Referring Party shall, at the same time, send a copy of the Notice of Referral to the Appointing Body, together with either (i) a request for the appointment of an adjudicator or (ii) notice of the identity of an agreed individual who has agreed to act as the adjudicator. The Appointing Body is the Chair of the Professional Negligence Bar Association.
- 7. Within five working days of receipt of the Notice of Referral the Appointing Body shall either:
 - 7.1. nominate an adjudicator ("the Adjudicator") and shall, at the same time, communicate the fact of that nomination to the parties; or
 - 7.2. if the parties have agreed upon the identity of an individual nominated to act as the adjudicator ("the Adjudicator"), shall write to the parties and to the Adjudicator confirming the nomination.

Unless otherwise agreed with the Appointing Body, the parties agree to the Adjudicator being appointed on the terms and conditions attached ("the Adjudicator's Terms").

- 8. Within five working days of his nomination the Adjudicator shall write to the parties:
 - 8.1. confirming whether he is able to accept the appointment and on what terms (including his hourly rate);
 - 8.2. making any appropriate disclosures pursuant to paragraph 1.2 of the Adjudicator's Terms and paragraph 20 of the Guidance Notes;
 - 8.3. sending the Adjudicator's Terms signed by the Adjudicator to the parties for signature by each of them and return to him.
- 9. The date of the Adjudicator's appointment shall be the date of receipt by him of the Adjudicator's Terms signed by all parties.
- 10. Within five working days of his appointment the Adjudicator shall write to the parties:
 - 10.1. confirming his appointment, the date of that appointment and his agreement to abide by the Adjudicator's Terms;
 - 10.2. giving directions for the exchange of witness evidence and/or submissions so that (subject to paragraph 14.3 below) he can provide a decision to the parties within 56 days of the date of his appointment (which period may be extended by agreement between the parties) or, in his absolute discretion, fixing a telephone conference to discuss such directions.

Conduct of the Adjudication

- 11. The Adjudicator will decide the dispute on the facts and according to the law and:
 - 11.1. may decide questions relating to his own jurisdiction (subject always, in the event the parties agree to be bound in paragraph 12 below, to the right of any party to challenge his decision as to his jurisdiction by legal proceedings or in arbitration);
 - 11.2. may take the initiative in ascertaining the facts or law;
 - 11.3. may call for the production of documents by either party;
 - 11.4. will generally decide the dispute on documents alone but may, in an appropriate case, ask the parties to attend a hearing and/or to participate in a telephone conference;
 - 11.5. where a party is claiming to be paid any sum by way of damages or other compensation shall determine whether any sum is payable and if so then how much, and may when doing so include a further sum by way of interest;
 - 11.6. may decide which party shall pay his own fees and disbursements and, where the parties confer upon him the power to do so, may direct one party to pay some or all of the other party's costs and disbursements and for that purpose may assess the amount of any such costs and disbursements;
 - 11.7. will act as impartial adjudicator and not as the servant or agent of the parties;
 - 11.8. will comply with the principles of procedural fairness.

12. The Decision of the Adjudicator:

- 12.1. will be in writing;
- 12.2. will be a reasoned decision, which tells the parties why they have won or lost and what, sum, if any, is payable by one party to the other;
- 12.3. [will be binding upon the parties until the dispute is finally determined by legal proceedings, by arbitration (if any relevant contract between the parties provides for arbitration or the parties otherwise agree to arbitration) or by agreement]
 - [will be binding upon the parties subject only to paragraph 17 below, and will not be subject to appeal, whether under s.69 of the Arbitration Act 1996 or otherwise]*.
 - *Delete one of the two alternatives
- 13. The Adjudicator may on his own initiative or on the application of a party correct his Decision so as to remove a clerical or typographical error arising by accident or omission. Any correction of the Decision must be made within five working days of the delivery of the Decision to the parties. As soon as possible after correcting the Decision in accordance with this paragraph, the

Adjudicator must deliver a copy of the corrected Decision to each of the parties to the contract. Any correction of the Decision forms part of the Decision.

14. The Adjudicator:

- 14.1. [shall be entitled to direct one party to pay all or part of his own fees and disbursements or may direct that his own fees and disbursements be paid by the parties in whatever proportion he sees fit (and the parties shall be jointly and severally liable for those fees and disbursements notwithstanding any direction that one party should pay those fees and disbursements or that they be apportioned in any way), but shall have no power to award any party its other costs of and occasioned by the dispute].
- 14.2. [shall be entitled to direct one party to pay all or part of his own fees and disbursements or may direct that his own fees and disbursements be paid by the parties in whatever proportion he sees fit (and the parties shall be jointly and severally liable for those fees and disbursements notwithstanding any direction that one party should pay those fees and disbursements or that they be apportioned in any way), and to direct one party to pay all or part of the costs and disbursements of the other party and shall do so either in his complete discretion or, where the parties have specifically agreed his jurisdiction, according to the terms of that agreement]*
 - *Delete one of the two alternatives. The Parties are directed to the Guidance Notes for assistance as to how they might specifically agree the Adjudicator's jurisdiction to award costs.
- 14.3. Unless otherwise stated, all sums payable by way of fees, disbursements or costs shall be paid within 21 days of the determination of the sums which a party is required to pay and the Adjudicator shall be entitled to require the payment of his own fees and disbursements before the Decision is released to the parties, in which event the 56 day period in paragraph 10.2 above shall be automatically extended until those fees and disbursements are paid.
- 15. All documents produced for the purposes of the adjudication, all statements made during the conduct of the adjudication and the Decision will be private and confidential as if the same were documents produced for, or statements made in, the course of a mediation save that:
 - 15.1. [the Decision will cease to be confidential within 21 days of its release to the parties;]

[the parties may refer to the Decision in the context of enforcement proceedings under paragraph 17] *;

- *Delete one of the two alternatives
- 15.2. in the event that the parties have agreed in paragraph 12.3 to be bound until the dispute is finally determined, all documents produced for the purposes of the adjudication, all statements made during the conduct of the adjudication and the Decision itself may be disclosed in subsequent legal proceedings or arbitration as referred to in paragraph 12.3;
- 15.3. nothing in this provision shall be taken as requiring any party to disclose documents or reveal information which is the subject of legal or "without prejudice" privilege.

16. In the event that the Adjudicator resigns, the parties may seek the appointment of another adjudicator by the Appointing Body or choose another adjudicator to be registered by the Appointing Body or dispense with adjudication.

Enforcement

17. The parties agree that any sum which the Adjudicator decides is payable by way of compensation or damages (including any interest), and that any sum payable by way of fees, disbursements or costs, shall become due and payable as a debt within 21 days of the Decision (so far as concerns any sum payable by way of compensation or damages or interest), and within 21 days of the appropriate direction for the payment of fees, disbursements or costs (so far as the payment of fees, disbursements and costs are concerned). The Decision and any direction for the payment of fees, disbursements or costs shall be enforceable by proceedings and an application for summary judgment in the Courts. On such application, subject to any challenge on the basis of jurisdiction or procedural unfairness, it will be no defence that the Adjudicator erred in fact or law.

Rights of the Adjudicator

- 18. By agreeing to refer the dispute to adjudication under the scheme the parties agree that the Adjudicator may, in his own right, enforce those terms of the scheme which govern his entitlement to fees and disbursements and his limitation of his liability. Solely to the extent necessary to do so, he may refer to the Decision and any determination in respect of the payment of fees, disbursements or costs for that purpose.
- 19. The Adjudicator is not liable for anything done or omitted in the discharge of his functions as adjudicator, save (1) if and to the extent that he acts in bad faith and (2) that nothing in this provision shall prevent any party making a complaint to an appropriate Regulator concerning matters of service or misconduct.

Other Proceedings

- 20. The parties agree that, if in paragraph 12.3 the parties have agreed to be bound by the Decision subject only to paragraph 17 any existing legal proceedings shall be stayed. If in paragraph 12.3 the parties have agreed to be bound until the dispute is finally determined:
 - 20.1. any legal proceedings already commenced shall be stayed as soon as practicable after the Notice to Refer and no application to lift the stay will be made before 56 days from the date of the Decision;
 - 20.2. save for enforcement proceedings under paragraph 17, no proceedings shall be commenced, until 56 days after the date of the Decision, but nothing in this provision shall prevent a claimant from commencing proceedings when required to do so for limitation purposes.

Other

21. The parties may only adapt these Rules by agreement in writing. If the change is made before the appointment of the Adjudicator it should be drawn to his attention and his agreement is required if he is to act. If the change is made after the appointment of the Adjudicator his agreement is required if he is to continue to act.

PNBA ADJUDICATION SCHEME

FOR PROFESSIONAL NEGLIGENCE CLAIMS

GUIDANCE NOTES

1. These Guidance Notes are intended to provide guidance in respect of the "Rules of the PNBA Professional Negligence Adjudication Scheme" ("the Rules"). In the event of a conflict between the Guidance Notes and the Rules, the Rules take precedence.

Introduction

- 2. The PNBA Professional Negligence Adjudication Scheme ("the Scheme") is an idea based upon the statutory adjudication scheme which enables parties to a construction dispute to obtain a swift interim decision on disputes. The intent behind the Scheme is to enable parties to a professional negligence dispute to obtain a quick adjudication of their dispute, at relatively minimal cost, which will be binding upon the parties unless one or both of them are so dissatisfied that they wish to take the matter to a court or arbitration hearing. It should be seen as a form of ADR. It is not intended to supplant other forms of ADR (although it may do so) and it does not oust the jurisdiction of the court or arbitral tribunal, but in an appropriate case it does offer parties to a professional negligence dispute the opportunity to obtain a reasoned decision which will either resolve the dispute or steer the parties towards resolution. The Pre-Action Protocol for Professional Negligence now requires claimants to consider adjudication at the Letter of Claim stage: see paragraphs 6.2(i) and 12.2(d).
- 3. Although ADR is not compulsory, the court will expect the parties to have considered ADR. A party's refusal to engage with ADR (including its failure to respond to an invitation to participate in ADR) might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs.

Essential Elements of the Scheme

- 4. Detailed guidance on the Scheme is provided below, but its critical elements are as follows:
 - 4.1. the parties must agree to be bound by the Rules (participation in the Scheme is entirely voluntary, but once committed the parties are required to see the process through);
 - 4.2. once the parties have agreed to participate, they can ask for an Adjudicator to be selected by the Chair of the Professional Negligence Bar Association from a panel of barristers who

- specialise in professional negligence disputes or they can agree to appoint their own Adjudicator, with registration of the nomination by the Chair of the Professional Negligence Bar Association;
- 4.3. the Adjudicator will ask for evidence and written submissions from the parties; she/he *may* request a short hearing;
- 4.4. within 56 days of her/his appointment the Adjudicator will provide a reasoned written decision;
- 4.5. that decision will be legally binding upon the parties unless and until altered by a court or arbitral tribunal (unless the parties have opted for finality);
- 4.6. the parties will be jointly liable for the Adjudicator's fees, which will be within a set limit, but the Adjudicator will have the power to require that the losing party pays all or most of her/his costs (the parties may agree that she/he will have a broader power to award costs);
- 4.7. unless the parties agree otherwise, the Adjudicator's decision will not be confidential.

Which Disputes are Appropriate for the Scheme?

- 5. The Scheme is intended for "professional negligence" disputes (including professional liability disputes more broadly). There is no precise definition of "professional negligence", but as a generality the Scheme is intended to apply to disputes between professional persons such as lawyers, valuers, accountants and so forth and their clients. In the usual case the professional person is likely to be represented by solicitors appointed by insurers, but that is not always so. "Professional negligence" disputes are thought to be particularly suitable for a scheme of this kind because usually, but not always, the facts are reasonably clear from documents and usually, but not always, the issue of whether a breach of duty has occurred, or whether recoverable loss has been caused, can be ascertained without the assistance of experts or with very limited expert assistance.
- 6. "Dispute" within the meaning of the Rules is deliberately broad. It may mean everything that a claimant complains about. It may mean one aspect of the claimant's complaint. If the disagreement between the parties is made up of a number of discrete areas of contention the parties *may* decide that only one or some of these should be referred to adjudication. Thus, for example, a claimant's case against a professional person may involve a large number of disputed issues, but the case may stand or fall by the resolution of one of them. Alternatively, the resolution of one aspect of the claimant's overall "dispute" may unlock settlement.
- 7. However, not every "professional negligence" dispute will be suitable for the Scheme:
 - 7.1. disputes which *genuinely* require complex expert evidence to enable a decision to be made on issues of breach of duty (or, possibly, causation) may not be suitable; for these reasons the Scheme is not thought to be suitable to many clinical negligence cases;

- 7.2. disputes which *genuinely* require witness evidence (and extensive cross-examination) to enable a decision to be made on issues of breach of duty (or, possibly, causation) may not be suitable; for example, disputes which centre upon allegations of dishonesty are probably unsuitable;
- 7.3. disputes where, for some other reason, the losing party to an Adjudication is reasonably likely to think that Adjudication did not offer a fair platform for that party to present its case may not be suitable; professional negligence disputes vary enormously and there may be disputes which are unsuitable because of unusual facts (for example, disputes where the evidence of a third party is genuinely critical); the Scheme is only likely to be effective as a means of ADR if the participating parties go into it believing it offers a real prospect of providing a fair result;
- 7.4. parties to disputes involving construction professionals who *may* have the availability of the statutory scheme should give very careful consideration to the desirability of the Scheme.
- 8. The Scheme is thought to be particularly useful for disputes where the input of an experienced practitioner who is entirely independent of the parties might assist where a crucial point at issue has become an obstacle to settlement. The Adjudicator's decision on the issue then provides an answer which is binding unless and until the "losing" party takes the matter further after the Adjudication (where the parties have reserved the right to do so).
- 9. Some disputes may be unsuitable for the Scheme unless it can be adapted (with the agreement of the Adjudicator). For example it may be that a critical dispute involves three or more parties typically a claimant and a number of separate professional persons. The Rules are not drafted with "multi-party" adjudication in mind, but there is no reason why the parties cannot agree to adapt the Rules so that this is possible. The Scheme is entirely consensual.
- 10. It would be wrong to be prescriptive about the kinds of disputes which are particularly suitable for the Scheme. However, as a generality, the Scheme may be a particularly attractive ADR option in the following circumstances:
 - 10.1. disputes where the *real* financial value of the claim is modest, so that the legal costs of taking the claim all the way to trial or arbitral hearing (particularly disputes which are at risk of becoming disputes about costs) will be disproportionately high;
 - 10.2. disputes where one or other party lacks the financial resources to take the claim all the way to trial or arbitral hearing;
 - 10.3. disputes where mediation has failed or is likely to be ineffective because there is such a difference of opinion on the merits that the chances of consensual resolution are slim;
 - 10.4. disputes where, perhaps for costs reasons, the parties prefer adjudication to mediation;

10.5. disputes where there is a difference of legal opinion as to the proper meaning of a document, or the legal significance of a series of well recorded events.

When can the Scheme be used?

- 11. The Scheme can be employed at any time during the course of a dispute. Plainly the chief benefit of the Scheme as a means of ADR is that it can be employed early and in time to effect costs savings, but in just the same way as the parties may decide to go to mediation after disclosure or exchange or witness statements or exchange of experts' reports, the Scheme is available as a form of ADR at any point.
- 12. The Rules presuppose that a "dispute" has been, or can be, clearly identified. That indicates that, absent unusual facts, the parties will generally wish to pursue the pre-action protocol process at least to the stage of identifying a dispute (and the reasons for a dispute) before they consider proceeding with the Scheme. The Rules envisage that this has happened, although there is nothing to prevent the parties adapting the Rules if the circumstances justify that course. Furthermore, there is nothing to stop a claimant *proposing* Adjudication when writing a Letter of Claim, and indeed claimants need to consider whether to do so under the terms of the Professional Negligence Pre-Action Protocol.

How is the Scheme Engaged?

- 13. The parties must agree *in writing* that a dispute will be referred to Adjudication under the Scheme. Agreement here presupposes agreement to two things: (1) the parties must agree what "dispute" is being referred and (2) they must agree to be bound by the Rules. Both aspects of the agreement require some commentary.
- 14. One of the risks in this process is that Party A will understand that it has agreed to refer dispute X to Adjudication whilst Party B will understand it has agreed to refer dispute Y. The disagreement may simply be a matter of presentation/characterisation but it may also be a matter of substance. Although the Rules accord the Adjudicator the power to determine questions relating to her/his own jurisdiction, it is plainly undesirable that an adjudication proceeds against the background of a dispute as to what it is about. There is no magic formula for preventing such disputes and it would be undesirable for the parties to have to elaborate every argument they intended to advance in order to identify what it is that is to be decided by the Adjudicator. It is recommended that parties take care to attempt to define the dispute. It may be desirable to do so by reference to identified parts of the pre-action correspondence.

15. In agreeing to be bound by the Rules the parties need to bear in mind that the Rules provide alternative options as to the finality of the Decision, the Adjudicator's power to award costs and confidentiality. These *must* be completed as part of the agreement in writing. A copy of the completed Rules should be provided to the Appointing Body. Agreement to be bound by the Rules does not mean that the Rules cannot be adapted subsequently (for example should one party decide that it wishes the Decision to be confidential). However, at that stage changes can only be consensual and a row about what was intended could derail the process. The Adjudicator has no power to change the Rules and it is critical that the parties give full consideration to the way in which they intend the Adjudication to proceed before they agree to engage in the Scheme.

Who is the Adjudicator and what duties as to impartiality do they owe?

- 16. If the parties wish the Chair of the PNBA to nominate the Adjudicator then the Adjudicator will be a senior barrister experienced in professional negligence disputes or a retired judge. Subject to the matters below, she/he will be selected by the Chair of the Professional Negligence Bar Association from a panel drawn up for the purposes of the Scheme. She/he may be either a "senior junior" barrister or a QC or retired judge (if available), depending upon the nature of the case and the value of the claim.
- 17. The identity of the members of the PNBA's panel will be publicly available and the list will be updated from time to time. That means that the parties can inform the Appointing Body if there is someone whom (for whatever reason) they do not wish to be appointed. It also means that they can express a joint preference for whom they would like to appoint, although there is no guarantee this person will be available. Parties are encouraged at the very least to provide the Appointing Body with such information as to the seniority of the person (whether retired judge or QC or senior junior) they desire and any financial restraints under which they may be operating so that the Appointing Body can select an Adjudicator of corresponding seniority, and any further information about the dispute which it may be relevant for the nominated Adjudicator to see in order to decide whether to accept the appointment.
- 18. As an alternative to inviting the Chair of the PNBA to nominate an Adjudicator there is nothing to stop the parties jointly agreeing to use their own chosen Adjudicator and if that person has agreed to act then they should inform the Chair of the PNBA of the appointment so that the appointment can be registered.
- 19. Before undertaking the appointment the Adjudicator will consider the nature of the dispute and the time limits and by accepting the appointment she/he confirms that she/he is competent to provide a Decision and (subject to unforeseen issues) can do so within the time envisaged by the Rules. It is the responsibility of the individual concerned and not the Chair of the PNBA to ensure that she/he is sufficiently expert and in other respects an appropriate person to adjudicate upon the dispute.

- 20. The Adjudicator should be someone independent of the parties without any interest in the Dispute and:
 - 20.1 before and throughout the adjudication process, an Adjudicator shall disclose all interests, relationships and matters likely to affect the Adjudicator's independence or impartiality or which might reasonably be perceived as being likely to do so;
 - 20.2 whether or not an Adjudicator is required to make a disclosure under 20.1, an Adjudicator shall disclose the number of sets of instructions which he or she has received, or worked on, in the past year from either (i) any of the parties or (ii) the insurer (if known), including after the event insurer, of any of the parties or (iii) the solicitors representing any of the parties;
 - 20.3 where an Adjudicator becomes aware that he or she is incapable of maintaining the required degree of independence or impartiality, the Adjudicator shall promptly take such steps as may be required in the circumstances, which may include withdrawal from the adjudication process.

What will it cost?

- 21. This is an important consideration and it is raised at this point because (a) the Appointing Body will attempt to nominate an Adjudicator of a due seniority and expense, and (b) any Adjudicator agreeing to act will provide the parties with her/his hourly rates on appointment.
- 22. One of the key drivers behind the Scheme is that it should be a cost-effective way of enabling parties to resolve disputes. The cost of the Decision is a critical element. In an ideal world, cases of modest value would "cost" modest sums to resolve, but the reality is more complicated. Modest cases may involve substantial quantities of documentation, or extremely difficult points of law. If the Adjudicator decides she/he requires a hearing (see below) that can add to the costs. By contrast, Decisions in larger value cases may involve a relatively short, if knotty, point of law or construction.
- 23. As a matter of general approach, parties considering Adjudication under the Scheme may wish to do their best to agree with each other, and then inform the Appointing Body, of their cost anticipation.

The following guidance (as at October 2018, the figures will have to be updated over time) may be helpful:

Category of Dispute	Decision Cost Ceiling	Comment
"A"	£5,000 (excl VAT)	Cases with small value and where the parties (or one of them) faces resourcing

		difficulties. Parties may have to accept that an Adjudicator trying to deliver a Decision within this cost bracket is going to be less senior and may spend less time than he or she would ideally like to in reaching the Decision
"B"	£10,000 (excl VAT)	Cases with greater value, but where the likely legal costs of proceedings are none the less significant when considered as a proportion of the value of the claim.
"C"	Unlimited	Unusual cases falling into neither "A" nor "B". This is not an invitation to the Adjudicator to charge what he or she wishes, but there may be cases where, because of their complexity, the issues involved and/or the seniority of the Adjudicator the parties are prepared to go over the £10,000 ceiling

- 24. If the Appointing Body has this kind of information, it can be guided as to how senior an Adjudicator to nominate and the person appointed can, if appropriate, raise the issue of her/his fees at an early stage with the parties.
- 25. Of course another element of cost (and one which may be as important) is what the parties choose to spend on contesting the Adjudication. This will depend entirely upon their resources, their perception of the need to expend legal costs and the issues relevant to the dispute. It is to be hoped that parties will bear in mind the importance of proportionality in expending costs. For most professional negligence disputes Adjudicators are likely to wish to see critical documents and short written submissions. Occasionally they may be assisted by oral submissions. There may be cases where, exceptionally, an Adjudicator chooses to ask for a short evidential hearing. By and large it would serve to undermine the utility of adjudication as a form of ADR if the parties chose to treat it as a form of litigation. This sentiment is reflected in the way in which the Rules treat costs (see below).

How will the Adjudication Proceed?

26. The Adjudicator is appointed once the parties have signed her/his terms and conditions. Once appointed the Adjudicator will contact the parties so as (1) to confirm her/his appointment (2) give the parties details of her/his hourly rates and (3) give directions or fix a telephone conference so that directions can be given.

- 27. The directions will be appropriate to the nature of the dispute. In the usual case the Adjudicator will set a timetable for the service of evidence and submissions. She/he may express a view on what form "evidence" might take. It could consist of the provision of a solicitor's file. It could be witness statements attaching documents. Whilst the Rules do not envisage a conventional process of disclosure they do permit the Adjudicator to call for one party to provide documents. It is very important to bear in mind that the Adjudication will take a maximum of 56 days from the date of appointment. The Adjudicator is likely to fix tight deadlines. There will be little or no room for slippage. The parties are encouraged to anticipate this process by ensuring that they do not agree to refer a dispute to Adjudication unless they are ready willing and able to provide evidence and submissions within a few weeks of the appointment. It is likely to help if the parties give some thought at the outset to an agreed bundle of the key documents which can form the core of the evidence which the Adjudicator will require.
- 28. The Adjudicator has broad powers enabling her/him to come to a decision. She/he can decide what is in dispute and what is not. She/he can pursue lines of argument which are not pursued by either party. She/he is constrained by the rules of procedural fairness so that the parties know if and when this happens, but she/he is not bound either to disregard an argument because one party did not press it, or spend a long time considering a particular facet of the dispute just because one party thinks it important.
- 29. The Adjudicator will decide procedure. She/he may decide for simultaneous exchange of evidence or submissions or she/he made decide for sequential exchange. She/he may decide to ask for a short hearing for submissions, or a telephone conference, or the exercise may be conducted entirely on the documents. In some circumstances it may be appropriate for there to be a short hearing or a site inspection.
- 30. At the end of the process and within 56 days of appointment the Adjudicator will produce a reasoned written Decision. The Decision may not cover every single point raised, but it will address the most important points and will enable the parties to tell why they have won or lost. Adjudicators will be acutely aware of the importance to the parties of the Decision being seen to be fair and (in so far as is practicable given resources) comprehensive.

What is the status of the Decision?

31. What distinguishes Adjudication from other forms of ADR such as early neutral evaluation is that the Decision is binding. If the Adjudicator decides that the claimant is entitled to compensation, compensation including any interest awarded has to be paid by the defendant/respondent within 21 days of the Decision. If payment is not made the sum payable is a debt which can be enforced summarily in the Courts. Any sum payable by way of fees, costs or disbursements is also recoverable by the entitled party as a debt payable within 21 days of the corresponding determination in the same way. If the Adjudicator decides that the claimant's claim fails the claimant has no entitlement.

- 32. There is no appeal, but (unless the parties have elected for finality) the Decision is only temporarily binding: it stands unless and until the dispute is determined by a court or an arbitral tribunal. That means that the losing party has to live with the consequences of the Decision unless and until a court or arbitral tribunal gives a different ruling on the dispute. In practice this means that a claimant would have to start proceedings (or recommence proceedings which have been stayed) in order to bring her/his professional negligence claim against the defendant/respondent. Alternatively the defendant/respondent would have to commence proceedings to seek declaratory relief that it was not liable or that the compensation ordered by the Decision was excessive. The party bringing those proceedings might be at special costs risk if, having taken the matter to court/arbitration, the judge or arbitral tribunal decided against that party.
- 33. The parties can elect for finality. When they agree to refer a dispute to Adjudication they can decide that they will be bound by the result. This may be an attractive option, particularly for a modest claim where legal costs of continuing the dispute will be disproportionate.

What Costs Orders can be made?

- 34. It is very important that before the parties agree to adjudication under the Scheme they consider how they want the issue of legal costs to be dealt with. Paragraphs 14.1 and 14.2 of the Rules provide the parties with a choice: they can either limit the Adjudicator's power to award costs to his power to determine which party is liable for his own fees and disbursements (paragraph 14.1), or the parties can decide to give her/him some other power which could be the power to award the costs of the entire dispute, or could be something else (paragraph 14.2).
- 35. In the simple case where the Adjudicator only has the power to order the parties to bear her/his fees and expenses in such proportion as she/he sees fit, that power will be exercised in a very similar fashion to the power of a court or an arbitral tribunal to award costs. She/he will have a very broad discretion but the guiding principle will be who has won and who has lost. The Adjudicator will not have the power to award one party any part of her/his/its own costs of fighting the Adjudication. Still less will he/she have the power to award one party her/his/its costs of and occasioned by the dispute. If the parties want the Adjudicator to have these limited powers they should select the option of paragraph 14.1
- 36. If the parties wish to give the Adjudicator a different power over the award of costs they should select the option of paragraph 14.2. The default position under paragraph 14.2 is that the Adjudicator has the power to award the costs of and occasioned by the dispute. This would include her/his own fees and disbursements, the legal costs of fighting the Adjudication and the other legal costs of the dispute (for example the costs of early investigations by solicitors and legal advice). Here too the Adjudicator would approach entitlement to costs in a very similar fashion to the power of a court or an arbitral tribunal to award costs. She/he will have a very broad discretion but the guiding principle will be who has won and who has lost.

- 37. But the parties are not limited by the default position. Depending on their particular needs, they may decide, before they agree to Adjudication, that they want the Adjudicator to exercise a different power to award costs. One possibility is that the parties decide that irrespective of the result they do not want any award of costs. They can direct that the Adjudicator's fees and disbursements will be paid by them equally, or in particular proportions irrespective of the result and that she/he shall have no power to award costs. Many mediations proceed on this basis and it should be kept in mind that Adjudication is a form of ADR. Alternatively the parties may decide that the Adjudicator shall have power to award her/his own fees and disbursements and the parties' reasonable costs of fighting the Adjudication, but not any wider costs. Still further, they could give the Adjudicator the power to award the costs of the dispute, but only from a certain date.
- 38. The parties should be aware that, provided she/he is given clear and specific powers, the Adjudicator can approach costs in a much more sophisticated way than would be the case under the general discretion applied by courts and tribunals. Examples of limited costs shifting regimes which the parties could impose upon the Adjudicator include:
 - 38.1. costs awards only if the Adjudicator considers that a party has behaved "unreasonably";
 - 38.2. costs capping in the event that the Adjudicator awards costs they will be limited or capped to an amount no higher than say £20,000;
 - 38.3. costs capped by reference to the award for example a successful claimant would not recover costs exceeding the value of compensation;
 - 38.4. where the claimant is unsuccessful no costs liability beyond available BTE / ATE cover.
- 39. The intention behind giving the parties the ability to decide their own costs regime is to make it easier for them to agree to use Adjudication under the Scheme as a form of ADR. Parties are encouraged to have regard to finding the costs regime that is most likely to make Adjudication attractive to both of them.
- 40. Depending upon the powers accorded to the Adjudicator and his or her decision one party may be liable for all or most of the Adjudicator's fees and disbursements. The Adjudicator will invoice the parties accordingly. However, it is important to point out that, notwithstanding that decision, as in construction adjudication the parties are ultimately jointly and severally liable for the Adjudicator's fees: if the losing party fails to pay the Adjudicator the winning party will have to do so, although she/he can then recover those costs from the losing party.

Confidentiality

41. The process of Adjudication is intended to be confidential but, unless the parties have agreed to the contrary, the Decision is not. This may seem irrational, not least because the Decision will necessarily refer to the documents and submissions from which it is drawn, but there is a reason for it. As has been stated, Adjudication is intended to be a form of ADR. Whilst it is envisaged that most cases will be resolved because the losing party will abide by the Decision, experience in construction adjudication has shown that a substantial number of cases are resolved by agreement

during the process of Adjudication. Moreover even after an Adjudicator produces her/his Decision, the parties may decide, as part of a resolution of the dispute (or more likely, a larger dispute of which the referred dispute forms part), that they both want the details to remain confidential. Confidentiality can be an important issue to parties who are close to settlement.

- 42. On the other hand, the reason that the Scheme provides for the option of the Decision becoming "open" is that many claimants (and some defendants/respondents) ascribe value to the notion of public evaluation or declaration. That will not always be the case. The parties can opt for confidentiality from the outset. Thus for example, if the parties have elected arbitration as their primary means of dispute resolution because confidentiality is important to one or both of them, it may deter the parties from employing the Scheme if they cannot ensure that the process including the Decision is confidential.
- 43. It is important to note that the Adjudicator must keep all the information provided to him by way of evidence and legal submissions confidential. This is provided for in her/his standard terms.

STANDARD TERMS OF INSTRUCTION FOR ADJUDICATOR

ADJUDICATION AGREEMENT

AGREEMENT MADE THIS day of 201-

BETWEEN:

Party A: [Name]

[Address]

[Telephone]

[Email]

Party B: [Name]

[Address]

[Telephone]

[Email]

(together referred to as "the Parties" and each a "Party")

AND:

The Adjudicator: [Name] [Address] [Email] [Telephone]

1. The Appointment of the Adjudicator

- 1.1. Pursuant to the PNBA Professional Negligence Adjudication Scheme, the Adjudicator has been appointed to adjudicate a dispute in accordance with the Rules of the Scheme ("the Rules") and the Parties have agreed to be bound by these terms. The dispute is identified in the Notice of Referral as defined in the Rules.
- 1.2. The Adjudicator has disclosed to the Parties to the best of his knowledge any prior dealings he has had with either of them and any interest he has in the dispute and such other matters as may be required by paragraph 20 of the Guidance Notes. Subject to the terms of any such disclosure, the Adjudicator and the Parties agree that the Adjudicator is neutral and independent from the Parties and the dispute and that the Adjudicator does not give legal advice.
- 1.3. The Adjudicator will continue to comply with paragraph 20 of the Guidance Notes and if at any stage the Adjudicator becomes aware of any circumstances which might reasonably be considered to affect the Adjudicator's capacity to act impartially, the Adjudicator will immediately inform the Parties of those circumstances. The Parties will then confer and if agreed may continue with the Adjudicator. In the event that the Adjudicator resigns or can no longer continue, the Parties may seek the appointment of another Adjudicator by the

- Appointing Body or agree their own replacement Adjudicator to be registered by the Appointing Body or dispense with adjudication.
- 1.4. The Adjudicator shall not be liable to any of the Parties for any act or omission or default of the Adjudicator in connection with the adjudication other than as a result of his own wilful misconduct or bad faith. Nothing in this provision shall prevent a Party from making a complaint to an appropriate Regulator concerning matters of service or misconduct.
- 1.5. The Parties agree that they will not seek to call the Adjudicator to give evidence in any judicial or arbitral proceedings arising out of or in any way in connection with the subject matter of the dispute. Any notes of the Adjudicator are confidential to the Adjudicator and shall not be available to the Parties at any time, nor subject to subpoena or summons or other procedure for production as evidence in any court, tribunal or other judicial hearing or proceeding.
- 1.6. Any Party who seeks (whether successfully or not) to require the Adjudicator to give evidence and/or provide documents concerning the adjudication in any arbitral or judicial proceedings arising out of or in any way in connection with the subject matter of the dispute hereby agrees absent wilful misconduct to indemnify the Adjudicator against any costs, expenses or disbursements including legal expenses incurred in responding to any such attempt by that Party.

2. The Adjudication

- 2.1. The Adjudicator will decide the dispute according to the Rules.
- 2.2. The Adjudicator may communicate with a Party or the Parties orally or in writing, but will endeavour to communicate with them jointly.
- 2.3. The Adjudicator will decide issues of costs according to the Rules.
- 2.4. The Adjudicator will treat all documents produced for the purposes of the adjudication and all statements made during the conduct of the adjudication as private and confidential as if the same were documents produced for, or statements made in, the course of a mediation.
- 2.5. All documents and copies of documents produced by either of the Parties to the Adjudicator will be securely destroyed by the Adjudicator at the end of the adjudication process.
- 2.6. The Adjudicator will treat the Decision as private and confidential as if the same were a document produced for or in the course of a mediation if the Parties have elected to treat the Decision as confidential pursuant to the Rules.

2.7. The Adjudicator will not accept appointment as an arbitrator in or act as an advocate in or provide advice to a Party to an arbitral or judicial proceeding relating to the dispute.

3. The Adjudicator's Fees

- 3.1. The Adjudicator will charge a fee commensurate with the time expended in producing the Decision.
- 3.2. The Adjudicator will provide the parties with his hourly rates on appointment.
- 3.3. As soon as practicable after appointment, which may be after receipt of evidence and submissions, the Adjudicator will provide an estimate of his fees.
- 3.4. In the event that the Adjudicator incurs expenses in conducting the Adjudication these shall be recoverable in the same way as fees.
- 3.5. After provision of the Decision and after any subsequent determination in respect of the costs of the Adjudication the Adjudicator will address a VAT invoice to either or both of the Parties, depending upon his Decision (or later determination in respect of costs), or their solicitors as their agents, and the Adjudicator's fees and any expenses will be paid within 21 days of the date of the invoice. In his absolute discretion, the Adjudicator shall be entitled to require the payment of the Adjudicator's fees and any expenses up to the date of the Decision before the Decision is released to the Parties, in which event the 56-day period in the Rules shall be automatically extended until those fees and any expenses have been paid.
- 3.6. In the event of the parties resolving the dispute before the Adjudicator produces the Decision, or otherwise deciding not to continue with the Adjudication, the Adjudicator will be remunerated for the time actually spent working on the Adjudication together with any incurred and non-refundable expenses.

4. Legal Status

4.1. These Terms shall be subject to the Law of England and Wales and the Courts of England and Wales shall have exclusive jurisdiction to hear and determine all disputes that may arise out of any agreement between either party and the Adjudicator pursuant to these terms and the Rules.

Party A		
Name of signatory:		
Position or office held:		
Party B		
Name of signatory:		
Position or office held::		
A 11 - 12		
Adjudicator		
Name of adjudicator:		

The Parties and the Adjudicator have executed this as an Agreement on the date set out above.



Q&A



Damian Kilpatrick Managing Director & Michael Davis Director of Financial & Professional Services

Aon Ireland

"Markets Update" from Aon Ireland





Damian Kilpatrick Managing Director

damian.kilpatrick@aon.ie

Damian Kilpatrick has over two decades of experience in insurance broking with particular emphasis on the implementation and servicing of insurance programmes for large national and international organisations (Global Inward and Outward). He maintains strong experience in the design and placement of Construction, Property, Business Interruption and Liability policy wordings to reflect the complex risk needs of various organisations. He has worked on the placement and servicing of a number of large Construction and Operational Projects in both Private and Public Sector including Public Private Partnerships and PFI, nationally and internationally.



Michael Davis Director of Financial & Professional Services Michael.e.Davis@aon.ie

Michael Davis is a financial lines insurance professional, focused primarily on the provision of specialist risk management and insurance services to professional organisations. As Director of the Financial & Professional Services practice for Aon Commercial Risk Solutions in Ireland he has been fortunate to work closely with many leading local and international firms, providing expert advice, negotiation and placement of Professional Indemnity and other financial lines insurances.

Our Financial & Professional Services practice is a dedicated team serving industry sectors including financial institutions, financial & professional services, funds, construction, technology, power, energy utilities, healthcare, pharmaceutical, life science and media. https://www.aon.com/ireland/default.jsp



Professional Indemnity Markets Update

Presented by: Damian Kilpatrick, Managing Director | Michael Davis, Director of Financial & Professional Services



Introduction

Your ONE Aon Team Today



Damian Kilpatrick Managing Director



Michael Davis Director of Financial & Professional Services



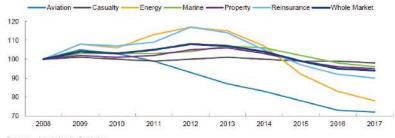
PI Markets Update | pre Q2 2019





Decile 10 Review

Indexed risk adjusted rate changes by pure year of account



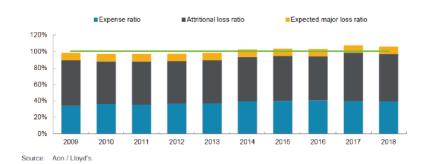
Source: Aon / Lloyd's Statistics.



4 Professional Indemnity | Market Update

Decile 10 Review

On a normalized accident year basis, Lloyd's has been posting underwriting losses since 2014



AON Empower Results®

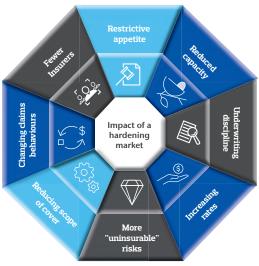
Professional Indemnity | Market Update

Lloyds | Business Planning for 2019

Performance Review activities in three areas

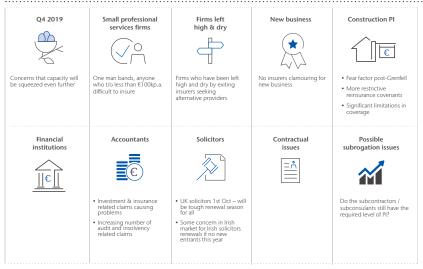


Impact of a Hardening Market



Professional Indemnity | Market Update

Ongoing Challenges



Professional Indemnity | Market Updat



Michael Carrigan Consultant Solicitor Holmes O'Malley Sexton

"The Role of the Independent Expert Conveyancing Solicitor in Professional Negligence Claims"





MICHAEL CARRIGAN Consultant Solicitor

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Michael Carrigan is a Consultant Solicitor in our litigation department and joined the firm in 2016.

Michael specialises in commercial property, professional negligence and dispute resolution. He also practises as an expert witness and as an arbitrator.

Michael qualified as a solicitor in 1969. In 1972 he joined the firm of Eugene F. Collins Solicitors in Dublin where in 1975 he became a Partner remaining as a Partner until the end of 2012 when he became a Consultant. He retired from Eugene F Collins at the end of March 2016.

As a solicitor Michael specialised in commercial property and is now frequently called upon to act as an expert witness in property related disputes including professional negligence claims involving members of the legal profession in Ireland.

Michael is an experienced arbitrator having acted as arbitrator in over 150 domestic arbitrations and three international arbitrations under appointment by the International Chamber of Commerce.

Michael acts for developers, financial institutions, corporate clients and insurers.

PRACTICE AREAS

COMMERCIAL PROPERTY

PROFESSIONAL NEGLIGENCE*

COMMERCIAL LITIGATION AND DISPUTE RESOLUTION



1

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016) Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 (S.I. 255 of 2016)

Procedural changes:

- Case management
 Pre-trial conferences
- Pre-trial conferences
 Certification of readiness for trial
 Witness statements
 Expert evidence
 Time management at trial



2

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

- New Part XI added to Order 39 of the Superior Court Rules comprising Rules 56-61
- Provisions applicable to independent experts and their evidence



What is an Independent Expert? Anyone with knowledge or experience of a particular field or discipline beyond that to be expected of a lay person HOMS 4 Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016) O. 39 r. 57 (1) Duty of expert to assist the Court as to matters within his/her expertise Duty overrides any obligation to any party paying expert's fee HOMS 5

HOMS

6

O. 39 r. 57 (2)

Expert's report must:

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

 disclose any financial or economic interest, direct or indirect, of the expert in any business or activity of the party retaining that expert

- contain statement acknowledging the duty specified in Rule 57 (1), and $\,$

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

O. 39 r. 58 (1)

- Expert evidence restricted to what is reasonably required to enable Court determine proceedings
- Precise issues on which expert is required to give evidence need to be clearly identified
- Expert's report should be limited to addressing those issues



7

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

O. 39 r. 58 (2)

Judge may make orders or directions for expert evidence:

- requiring party proposing to offer expert evidence to identify field in which expert evidence is required and, where practicable, name of proposed expert;
- determining field(s) of expertise in which evidence may be given;
- fixing timetable for delivery and exchange of expert reports;
- determining that evidence on particular issue be given by single joint expert.



8

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

O. 39 r. 58 (3)

- Unless Court for special reason permits, each party may offer evidence from one expert only in particular field of expertise on a particular issue
- Permission for additional expert not to be granted by Court unless satisfied that evidence of additional expert unavoidable for justice to be done to parties



Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

0.30 r 5

Sets out a procedure for a party to put a concise written question or questions concerning the content of an expert's report to an expert instructed by another party or a single expert and for the expert's answers to be treated as part of the expert's report

HOMS

10

Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016)

O.39 rr. 60 – 61

Court has power

- where experts' reports contradict each other, to direct experts to meet privately to discuss with each other their proposed evidence;
- following their meeting to draw up joint report identifying what is agreed and not agreed;
- at the trial to require any opposing experts to be examined and cross-examined (either on the whole or on a specified part of their evidence) one after another, in such order as the trial Judge shall direct;
- Apply the "debate among experts" procedure in accordance with sub-rule 4 following which the judge may permit examination in chief, cross-examination and re-examination as appropriate.

HOMS

11

Personal Experience and Expert Reports

Conveyancing related Professional Negligence Claims against Solicitors

2000 - 2006	7 years	5
2007 - 2009	3 years	14
2010 - 2012	3 years	38
2013 - 2014	2 years	42
2015 - 2016	2 years	35
2017 - 2018	2 years	22
2019		5

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Main Areas

- Solicitors' Undertakings
- · Claims by vendors / purchasers
- · Conflicts of interest
- Requirements for independent advice
- Elderly and vulnerable clients
- · Duty of solicitor to third parties
- Closing by post
- Anti-money laundering



13

- Solicitor will generally be bound by the strict wording of his undertaking
 Apart from civil claim, solicitor may be subject to sanction by Law Society and/or Solicitors Disciplinary Tribunal for professional misconduct
- Lending institutions reliance on solicitors' undertakings and certificates of title
- Acceptable title in 2007 v acceptable title in 2019
- Borrowers unable to repay solicitors are insured
- Undertakings no longer as acceptable as before



14

Vendor / Purchaser's Solicitor

- Identity of property being sold / purchased
 Condition of property
 What's included in the sale
 Title

- Rights of way and other easements
 Planning and other necessary licences
 Subject to Contract and conditionality





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Electronic Transfer of Funds Inherent dangers for both vendor's solicitor and purchaser's solicitor Reliance on Solicitors' undertakings

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16

Hot Tubbing The *debate among experts* procedure Advantages Disadvantages

17







Q&A



Tony Reddy Director Reddy Architecture + Urbanism

"The Role of the Expert Architect in Professional Negligence Cases"



Tony Reddy

AoU, B Arch, FRIAI, RIBA, FRSA, Dip Proj Man, MAPM, Dip Arb, FCI Arb

Chairman, Architect, Project Manager, Arbitrator, Adjudicator, Conciliator, Mediator

E: treddy@reddyarchitecture.com



In his early career, Tony Reddy gained wide experience with Paul Rudolph (New York) & Roche Dinkeloo & Associates (Hamden, Connecticut), Murray & Murray (Ottawa & Dublin), Stephenson Associates and Hope Cuffe & Associates (Dublin).

In 1982, he commenced with Maurice Fitzgerald as Fitzgerald Reddy Associates (now Reddy Architecture + Urbanism).

Through his work as a principal of the firm, he has gained wide recognition as an influential architect and urbanist. His firm's work embraces the design of furniture, interiors, a wide range of building typologies and urban design.

His firm's ability to bring together and lead multi-disciplinary teams appropriate to a budget, coupled with a strong design focus and clear understanding of how people and places interact, has resulted in a wide range of commissions and projects which have contributed to contemporary architecture and the built environment.

Among his firm's key projects are the Eircom Building, Temple Bar West End, Custom House Square (IFSC) and Heuston South Quarter. He is a former President of the RIAI (2004-2005) and a former Joint Chairman of the Sustainable Housing and Communities Committee. He is also a founding Director of The Academy of Urbanism and The Urban Forum both of which promote the importance of quality urbanism in achieving sustainable towns and cities.



Notes: -		



Chair's closing remarks