



**PROFESSIONAL NEGLIGENCE
LAWYERS' ASSOCIATION**

**PROFESSIONAL NEGLIGENCE
AND LIABILITY UPDATE**

LONDON CONFERENCE

9th October 2019



**PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION
LONDON CONFERENCE
Wednesday 9th October 2019**

- 0900–0925 Registration and Refreshments
0925–0930 PNLA Introduction
- 0930–0950
Chair's Keynote Address
Mark Lomas QC – Independent Mediators
- 0950–1035
“Loss of a Chance”
Ben Quiney QC – Crown Office Chambers
- 1035–1045 Questions and Discussion
1045–1100 Refreshments
- 1100–1145
“Wills and Probate negligence update”
Charles Holbech – Radcliffe Chambers
- 1145–1200 **“Temple Legal Protection’s Perspective – Litigation Insurance & Funding Update”**
David Pipkin – Director – Underwriting Division – Temple Legal Protection
- 1200–1245
“Professional Negligence in Matrimonial Finance”
Oliver Wise - Queen Elizabeth Building
- 1245–1300 Questions and Discussion
1300–1400 Lunch
- 1400–1445
**“Agents - some problems with vicarious liability in a commercial context
– Morrisons, Frederick and all that”**
Paul Marshall – Cornerstone Chambers
- 1445–1530
“Claims against employment law practitioners”
Ivor Adair – Partner - Fox & Partners
- 1530–1545 Refreshments
- 1545–1630
“Claims against Insolvency Practitioners”
Tom Shepherd – 4 New Square Chambers
- 1630–1700 Questions and Discussion – Chairman’s closing remarks



**PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE**

The Hardwick Suite, The Law Society 113 Chancery Lane, London, WC2A 1PL

Wednesday 9th October 2019

ATTENDEES (1 of 2)

Ivor Adair	Fox & Partners	London
Tracey Atallah	The Specter Partnership Limited	London
Bruce Bourne	Bruce Bourne Associates	Wimborne
Colin Carr	Kevin Edwards Costs Ltd	Liverpool
David Chase	Temple Legal Protection Limited	Guildford
Chris Cooney	Campbell Courtney & Cooney	Surrey
Dickon Court	Foot Anstey LLP	Plymouth
Christopher Cox	Cox Minhas & Co Ltd	Brixworth
Nicholas Davidson QC	4 New Square	London
Alex Forster	Roythornes Ltd	Spalding
Peter Gould	Simons Muirhead & Burton LLP	London
Charles Holbech	Radcliffe Chambers	London
Bill Holohan	Holohan Lane Solicitors	Dublin
Robert Johnson	Healys LLP	London
Ben Leandro	Kingston Smith Group Services Ltd	London
Michael Lent	Lakehouse Risk Services Limited	London
Mark Lomas QC	Independent Mediators	London
Ben Longworth	Farrer & Co LLP	London
Katy Manley	PNLA President	Cheltenham
Paul Marshall	Cornerstone Chambers	London

Kathy McGillie	Tughans LLP	Belfast
Geoff Mesher	Tempest Forensic Accounting	Wales
Pradeep Oliver	Cripps LLP	Tunbridge Wells
David Osborne	Fraser Dawburns LLP	Norfolk
Joanna Osborne	Edwin Coe LLP	London
David Pipkin	Temple Legal Protection Limited	Guildford
Ben Quiney QC	Crown Office Chambers	London
Sarah Rutnah	Dentons UK and Middle East LLP	London
Tom Shepherd	4 New Square	London
Shirin Vakilzadeh	Simons Muirhead & Burton LLP	London
Rhys Williams	Howden UK Group Ltd	London
Oliver Wise	Queen Elizabeth Building	London



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Duncan Lamont - Charles Russell Speechlys

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Contacts:

Matthew Pascall

Senior Underwriting Manager

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

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David Chase

Deputy Underwriting Manager

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

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Nicholas Ellor

Senior Underwriter

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

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Jacob White

Underwriter

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

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Amy Edgington

Underwriting Support Manager

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

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INTRODUCTION - *Different Perspectives*

Professional negligence and liability event suitable for all practitioners. Topics involving 'Different Perspectives' bringing together mainstream professional negligence practitioners with expert lawyers who may be needed to assess liability, causation and financial loss. Topics include recent developments in quantification of 'loss of a chance', perspectives from a mediator and disputes involving vibration white finger injury litigation, wills & probate, matrimonial finance, vicarious liability of agents, insolvency practitioners and employment law and practice.





Mark Lomas QC
Independent Mediators

Chair's Keynote Address



Mark is a leading mediator with extensive experience in the commercial and common law fields, having mediated a wide variety of high-value commercial and insurance disputes. He was appointed recently as lead mediator in a seven-party dispute valued at over £120m that was settled after four days of mediation.

Mediation experience

Mark became an Accredited Mediator with ADR Group in 2001; he was a Panel Member and Registered Mediator with Littleton Dispute Resolution Services Limited from 2001 to 2009. He ceased practice as an advocate to devote his full time to mediation in June 2009 when he joined Independent Mediators.

Mark has acted as sole or lead mediator in over 90 mediations a year since joining Independent Mediators in 2009, covering a wide variety of disputes in all areas of law listed overleaf, but with a particular emphasis on commercial, professional negligence and insurance cases following his many years of specialisation in those fields while in practice as a junior and a silk.

Mark also acts as arbitrator in commercial and insurance based disputes as a member of Littleton Chambers' International Arbitration Group.

Mark mediates regularly in all commercial, common law and related fields but has a particular reputation in the fields of professional negligence and insurance. He regularly conducts mediations in values ranging between £10m plus to £500k or less in a variety of areas including those listed below. His largest mediation to date was a 7 party commercial dispute worth over £120m involving four international insurers, settled in 4 days of mediation over two weeks.

He has been listed for some years in the top tier of mediators in the UK section of both Legal 500 and Chambers and Partners, the well known international legal directories. Past comments include: *His manner is 'amiable, polished and gentlemanly. He has a good sense of humour, and clients enjoy his company'.* He nevertheless *'asks tough questions, forces confrontation of issues'*, and wins confidence through a *'phenomenal grasp of detail'*. Strategically he has demonstrated outstanding creativity with great *'persistence and resilience'*.

Solicitors say he has 'a huge amount of legal experience' and 'a clear grasp of complex issues with the right level of persuasion', and describe his approach as 'confident and always in control; helpful, no nonsense, and all with a touch of humour'.

Directories

Legal 500 2019

Mark Lomas QC is 'one of the best mediators around; he has gravitas and quickly gets to the heart of what has to be done to resolve a dispute and is dogged in seeking a settlement, often going well beyond his original brief if permitted by the parties to do so'. One of the UK's busiest commercial mediators, Lomas averages 90 mediations a year; he regularly acts as sole or lead mediator in mediations, covering a wide variety of disputes in areas including commercial contract, professional negligence (against solicitors, accountants, architects, financial advisers and insurance brokers), insurance, banking and financial services, general common law disputes, construction, probate, and trusts.

Chambers & Partners 2019

Mark Lomas QC is considered by clients to be "very good on both legal analysis and at gaining the confidence and trust of parties," and "a master of the art of getting the deal done." He mediates high-value disputes in a range of areas including construction, employment, finance and professional negligence.

Who's Who Legal: Mediation 2018

Listed as one of the World's top mediators in this International Directory **Mark Lomas QC** is an "exceptional" mediator and wins praise from sources who highlight his particularly impressive experience in mediating insurance and professional negligence disputes. Mark has been listed in this directory since the first edition in 2011.

Who's Who Legal: Thought Leaders - Mediation 2018

Mark features in WWL Thought Leaders for a second year. This is a new section launched in 2017. Who's Who Legal explain this new feature as 'bringing together for the first time the insight, expertise and wisdom of some of the world's foremost practitioners. They report that these practitioners obtained 'the highest number of nominations from peers, corporate counsel and other market sources in their most recent research cycle.'

Who's Who Legal: UK Bar: Mediation 2017

Only 20 individuals are selected. Mark also features on the list of 'most highly regarded silks' of which only four are listed in total. The "first-rate" **Mark Lomas QC** is known for handling difficult mediations and the parties involved with "an assured and calm manner". He comes strongly recommended by peers for his proficiency in mediations relating to professional negligence, insurance and marine and quadrant-related disputes.

Areas of practice

Mark has acted as sole or lead mediator in a wide variety of disputes ranging from multi-million pounds to tens of thousands of pounds in areas including:

- **Commercial contract disputes** involving sale of goods and businesses, property development, construction and sale of property, information technology, intellectual property, commercial supply, publishing, joint venture agreements and other areas;
- **Solicitors' negligence** in the conduct of litigation, mortgage lending, conveyancing, sale of businesses, commercial deals, taxation, probate, divorce, bankruptcy and other areas;
- **Barristers' negligence** in the conduct of litigation and advice in various areas;
- **Surveyors', Quantity Surveyors' and Architects' negligence** in building design, valuation, construction, mortgage lending and sale of residential, commercial and development property;
- **Accountants' negligence** in auditing and accounting services and advising on tax and other matters;
- **All aspects of Lenders' claims**, including issues as to scope of duty, securitisation and recoverable loss;
- **Financial Advisers' negligence** in advising and selling pension and tax management schemes, and the mis-selling of investments generally;

- **Banking and Financial Services**, including the mis-selling of swaps and other financial instruments;
- **Insurance disputes** in the commercial and professional indemnity fields;
- **Common law and tort-based claims** in a wide variety of matters both corporate and personal;
- **Property dispute** arising out of a criminal confiscation order, in what is believed to have been the first mediation in which the Serious Fraud Office was a party.
- **Contested Wills and Probate**
- **Construction dispute** in the residential, commercial and developments fields;
- **Trusts**

Clients comments

Comments relating to performance as a mediator include:

"Mark Lomas has to be one of the best mediators I have instructed in the last ten years. I am amazed I haven't used him before. He helped the parties achieve a fantastic result."

"Excellent. Papers delivered very late, but was on top of issues and brought a case that was not going to settle to the settlement table. Clients are delighted."

"Conducted in a very professional and amicable manner."

"Very good. Mark Lomas QC was well prepared and able to establish a relationship of trust and openness with both parties which contributed greatly to the settlement."

"Absolutely brilliant. His legal knowledge commanded respect from three aggressive solicitors and he had excellent communication skills and determination to succeed."

"Tested the case firmly and kept the parties engaged and moving towards a deal. Great job."

"Very good. He grasped the issues quickly and was effective in making the client and the opposition see the risk factors, which helped facilitate a speedy settlement."

"Obviously, Mr Lomas has a huge amount of legal experience. An iron hand in a velvet glove. The case settled which was the aim of the day."

"Very good. Clear grasp of complex issues and the right level of persuasion."

"Excellent. Mr Lomas had a very good way of handling our clients and wears his learning lightly."

"Mark Lomas was confident and always in control. Impressive performance in a delicate case. Would use him again."

"Calm and authoritative. He brokered a realistic settlement within the timeframe. "

"Excellent. Established as informal an atmosphere as possible in the circumstances. Sensitive and clear understanding of the issues and personalities in the room."

"Very good approach to a complex case. Worked very hard to bring together parties with extremely divergent views about the likely outcome at trial."

"Very good. Helpful, no nonsense, and all with a touch of humour."

"Excellent. Mark Lomas has a very easy manner and encourages frankness without appearing to exert pressure."

"I cannot praise Mr Lomas enough, both for his handling of some difficult issues in the mediation and the way in which he put the lay clients at ease."

"Friendly and efficient. He got to grips with all the relevant issues and was very helpful in getting the parties to make steady progress throughout the day."

"Excellent. We thought the claim would be difficult, if not impossible, to settle and were extremely pleased that the mediator was able to prove us wrong."

"First class. Exceeded my expectations and achieved a most satisfactory result where it hardly seemed possible. His doggedness paid off. 10 out of 10."

"Excellent – achieved the impossible!"

"Please extend our sincere appreciation to Mark for the way he mediated this dispute. Mark's grasp of the issues, his considered presentation to the parties at the outset and skilled interaction with all parties to bring about a resolution is why we recommend him time and again. Without the result that Mark helped to achieve, our client's business would not have survived."

"He was extremely helpful in moving the parties toward settlement and helping us to fully consider the strengths and weaknesses of our respective positions. He contacted me the night before and I felt completely assured that he understood the salient issues. The facts of the case were complex but he understood the respective parties' positions and helped us achieve settlement."

"The Mediator was very competent and pragmatic. He emphasised the elements of the case that most needed addressing and prevented the parties from being side-tracked by less important issues. He made sure that all parties were making constructive offers and that momentum was maintained. He managed the expectations of the parties very well and assisted the parties with resolving the issues."

"Mark called me the evening before and it was clear from our conversation that he had already worked out what the central issues in the dispute were. ... Mark certainly gained the confidence of my client quickly. I thought he did an excellent job. He has a good way of getting to the nub of the dispute and he also has a good way of telling off the lawyers if he thinks they are being unreasonable!"

"Very impressive. He kept the momentum going and the pressure on both sides in a calm and relaxed manner. Adopted a firm approach with the client and with each side, and was very hands on, which is what was needed on the day."

"Excellent. Thoughtful, experienced and effective. Resulted in a good outcome for both sides."

"I was very impressed with how Mark moved the parties beyond the initial impasse to a settlement. I found him to be a very effective mediator and would not hesitate to recommend him."

"Mr Lomas dealt with the matter professionally and sympathetically throughout. The mediation on the day was extremely well structured and he built an excellent relationship with both lay clients and lawyers. Everyone came away from the mediation feeling that real progress had been made."

Professional memberships

- International Mediation Institute Certified Mediator
- CMC Registered Mediator
- Member of the London Court of International Arbitration
- Member of the Chartered Institute of Arbitrators
- Member of PNBA
- Member of Association of International Arbitration

Professional background

Mark was called to the English Bar in 1977 and appointed Queen's Counsel in 2003; he practiced as junior and leading counsel at the Commercial and Common Law Bar for over 30 years with a particular specialisation in Professional Liability and Insurance.

Mark has been mediating regularly since 2001, in combination with continuing practice at the commercial and common law bar. Since taking silk in 2003 mediation made up an increasing part of his overall practice, combined with the conduct of a number of large cases in the High Court. A recent reported case in the commercial field was *Mainstream Properties v Young* IRLR [2005] 964 in which he successfully defended a claim for deliberate inducement of breach of contract in the High Court and in the Court of Appeal, during which the test for intent in the tort of inducement was re-defined and subsequently upheld by the House of Lords. His most recent professional negligence case was *Daniels v Deville* in 2008, where he achieved summary dismissal of all claims against a firm of solicitors in the second week of a multi-party multi-million pound claim.

In June 2009 Mark ceased practice as an advocate to devote his full time to mediation and arbitration.

Training/talks/books/articles

He regularly conducts training sessions for in-house for law firms, insurance companies and Others to enable them to represent their clients more effectively in mediation. In 2016 he chaired the annual conference of the PNLA in Southampton.

Contact details

Independent Mediators

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Chief Executive

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DEVELOPMENTS IN THE APPROACH OF P.I. INSURERS TO SETTLEMENT

A MEDIATOR'S PERSPECTIVE

Mark Lomas QC

Independent Mediators

PART I INSURERS' GENERAL APPROACH

Historical Note

- **The Ancien Regime**
- **P I Insurers: Early Advocates for Mediation**
- **Identifying Fighters and Settlers**

Cases Insurers are Prepared to Settle

- **Not at Any Price**
- **Importance of the Limit of authority**
- **Problem of Shifting Quantum**
- **Possibility of Division in the Enemy Camp**

Cases Insurers Decide to Fight

- **Allegations of Conduct – Dishonesty / BFD / Impropriety**
- **Generic Issues they want Determined**
- **Cases Deemed to be Wholly without Merit**

PART II TRENDS - LONG TERM AND RECENT

Long Term

- **Insurers (like eggs) Start Soft and Harden Up**
- **Insurers Thrive on Uncertainty – but not forever**

Recent

- **Drying up of Lenders' Claims**
- **What has Replaced them?**

PART III INSURER/INSURED AND INTER-INSURER DISPUTES

- **Coverage Disputes**
- **Contribution Claims between Professional Co-Defendants**
- **Battles between Layers**
- **Aggregation – both ways**

PART IV SIGNS AND PORTENTS

- **Hardening of Attitudes to Settlement?**
- **Hardening of the Market?**
- **Disenchantment with Mediation?**



Ben Quiney QC
Crown Office Chambers

“Loss of a Chance”

"clever, practical and easy to work with."
(Legal 500 2016)



Recommendations

In the recent editions of **Chambers and Partners** and **Legal 500** Ben is identified as a Leading QC in his core areas of work, such as Insurance, Property Damage, and Professional Negligence. He is described in Chambers and Partners 2019 and Legal 500 2018 as:

"A hard-working and meticulous barrister who is very good on his feet."

"Responsive, incisive, clear and an excellent strategist."

"Very bright and eloquent."

"He exudes total confidence in his case and he is a good cross-examiner."

"A rare calmness in the face of adversity, which is a massive attribute when dealing with difficult and complex cases."

'Ferociously intelligent but at the same time very down to earth and approachable'

Previously, Chambers and Partners and Legal 500 have described him as:

- *"Very calm, very intelligent, highly responsive, fun to deal with and a good strategist."*
- *"He is very dedicated, always on top of the details and very pragmatic."*
- *"He is excellent, very good at what he does and particularly good at difficult coverage cases."*
- *"His client care is excellent and he's always open to new ideas."*
- *"clever, practical and easy to work with."*
- *"A real fighter."*
- *"He is incredibly bright, he gets to the kernel of the problem very quickly. He is very practical and pragmatic in his approach."*
- *"A great advocate and a very tough opponent."*



Career Summary

He has practised at Crown Office Chambers since its formation, and 1 Paper Buildings prior to merger. Before coming to the Bar he was awarded a first class degree in law and went onto take the BCL postgraduate degree. After University he worked as a tax trainee with Ernst Young. During this period he received intensive training and experience in accounting, finance and corporate tax matters and techniques.

Practice

Ben practises in all areas of common law and commercial litigation. He specialises in commercial and insurance disputes, construction, and professional negligence. Ben has fought cases in the specialist divisions of the High Court, the Court of Appeal, the Privy Council and the Supreme Court. He has a wide range of experience in domestic and international Arbitrations in a variety of jurisdictions.

Construction & Engineering

Ben has wide experience in construction disputes including trial work in the TCC, Arbitrations (domestic and international), and Adjudications. He has dealt with cases for both employers and contractors. Ben regularly works on insurance issues arising from construction projects, including claims under CAR, PI, Property, and Liability policies.

Ben has wide experience of arbitrations and has acted in ICC, DIA, LCIA, LMAA, ARIAS, SIAC, and ad hoc arbitrations.

Ben has particular experience in cases involving construction professionals. The cases that he has been involved in have included allegations against professionals including architects, engineers, M&E Consultants, and quantity surveyors. Ben has experience of most standard form contracts, including JCT, ICE, NEC, FIDIC, and professional terms (such as ACE, RIBA, RICS). In the latest edition of **Chambers and Partners** he is identified as a Leading QC in Construction Professional Negligence.

Selected Cases

- **Waterside Developments v Thomas Barnes & ors** – Ben is acting in the TCC for engineers involved in the construction of a large wharf side development in Manchester. The multi-party dispute raises interesting questions as to the inter-relationship of engagements and damages (**BLM**).
- **Blue Manchester v North West** – Ben is acting for the leaseholder in a long running dispute concerning the construction and management of a landmark building in Manchester. It raises complex issues on landlord and tenant claims, engineering of facades, and the scope of allegedly necessary remedial works (**JMW**).
- **Carillion Construction Ltd v Woods Bagot Europe Ltd [2016] B.L.R. 382 & [2017] BLR 203** – Ben acted for Defendant engineers in a £multi-million claim arising from an alleged failure to design services of the Rolls Building. Complicated allegations of law relating to the interpretation of contracts and settlement agreements arose, in addition to significant technical matters of acoustic

engineering and delay analysis. It also featured a number of preliminary arguments, including resolution by the Court of Appeal of key uncertainties relating to delay analysis. **(BLM)**.

- **Broom v Fluid** – Ben acted for engineers in a claim arising from a private development that appeared on the “Grand Designs” programme and is alleged to require significant remedial works. This is a multi-million pound dispute that raises very difficult engineering issues as it is an “iceberg” house sunk into a small area of land in North London. Difficult questions of scope of duty, technical evidence and quantification arise, along with the unique feature of the building having its own television programme about it. Issues also arose as to the management of the case **[2018] EWHC 1266 (TCC) (BLM)**.

Construction Insurance

Ben frequently advises on insurance disputes arising from construction projects. This includes claims and recoveries. Recent projects he has acted on include:

- Coverage issues arising from a large PFI Hospital project.
- CAR and PI coverage issues with respect to multiple power stations across Europe.
- Professional Indemnity and CAR claims following the modernisation of a major railway system.
- Coverage issues arising from landlord’s claims following a major fire in a South London nightclub.
- Coverage issues arising from a prestigious University project.
- Recoveries arising from fires on various projects, including a major National Trust Property.

Adjudications and Enforcements

Ben has extensive experience in complex and high value adjudications. He deals with adjudications from start to finish, including enforcement. Adjudications and enforcements have included:

- **A Large University Project** – Ben is acting for an architect in a complex and multi-million pound adjudication dealing with the nature and extent of the duties of various professionals and the difficulties arising from works on listed buildings **(DWF)**.
- **Dawnus Construction Holdings v Amey LG Ltd [2017] EWHC B13 (TCC)** – a dispute dealing with agreed dispute resolution provisions in back to back contracts;
- **TEN v Black** – an adjudication enforcement proceedings in the TCC arising from a significant North London development **(Mills & Reeve)**;
- **A Large London Hotel Development** – Ben acted for a developer in a series of multi-million pound adjudications arising from a serious fire in a very prestigious London development. The series of adjudications have focused on the cause and culpability for a large fire, operation of a JV agreement, liquidated damages, and the role of project managers **(Howard Kennedy)**.
- **Hart v Larchpark & Fidler [2008] 1 BCLC 589 & [2007] BLR 30** – an adjudication enforcement dealing with multiple issues including: the Adjudicator’s jurisdiction; written contracts and time limits; stays under the insolvency rules; and default judgments;
- **Bennett (Electrical) Services v Inviron [2007] EWHC 49 (QB)** – an enforcement raising defences based on the Adjudicator’s jurisdiction and forms of contracts.
- **ALE v MSD [2006] EWHC 2080 (TCC)** – an adjudication enforcement dealing with the Adjudicator’s jurisdiction under the 1996 Act, contracts, estoppel, and insolvency.

Property Damage

Ben undertakes all areas of property damage work. He deals with coverage, recoveries and defences. Ben has extensive experience of very large fire claims and disaster litigation. He has been involved in the TCC and Commercial Court multi-million pound litigation arising from major fires.

In the latest edition of **Chambers and Partners** he is identified as a Leading QC.

Selected Cases

- **Boots v Schneider** – Ben acted for Schneider, manufacturer of a component that is alleged to have caused an electrical fire. The fire is alleged to have caused £20m of damage (**Zelle**).
- **2 Entertain v Sony** – Ben is acting for Sony in defending a multi-million pound bailment claim arising from an arson during the London Riots 2011. The case raises various interesting issues ranging from the effect of limitation and majeure clause to liability of warehousemen to causation and quantification (**DAC Beachcroft**)
- **Howmet v EDL & ECS 157 Con. L.R. 1 & [2016] B.L.R. 555** – Ben acted for a factory owner in a recovery action resulting from a serious fire that caused £20+m losses arising from an alleged failure of fail safe devices. This case dealt with significant arguments relating to scope of duty, causation and novus actus (**RPC**).
- **Cadbury v ADT [2011] BLR 661 , [2012] BLR 441 & 145 Con. L.R. 147** – Ben acted for the Claimants against Defendant engineers in this £100m+ recovery action involving the destruction by fire of a large popcorn factory in Pontefract, arising from the installation and operation of a CO2 fire suppression system. This case was one of the Lawyers top 20 cases of 2011 (**DAC Beachcroft**).

Professional Liability

He has advised upon and dealt with a variety of professional negligence cases, including those involving accountants, tax consultants, lawyers, insurance professionals, construction professionals and emerging professions.

In the latest editions of **Chambers and Partners** and **Legal 500** he is identified as a Leading QC in Professional Negligence

Selected Cases

- **Perry v Raleys Solicitors [2017] P.N.L.R. 27** – Ben is acting as part of the team defending the series of claims arising from the alleged under-settlement of miner's VWF claims by, amongst others, Raleys solicitors. **Perry** is a key Supreme Court decision reviewing important issues for solicitors' negligence. It deals with the test for lost chances and honesty, the principles in **Allied Maples**, and questions of the Court of Appeal's jurisdiction (**BLM**).
- **The Ingenious Litigation** – Ben is acting for accountants in the Ingenious Litigation, which is one of the **Lawyers Top Cases of 2018**. It is a class action of 100s of high net worth individuals arising from a £1.5bn tax management fund. The claims are varied and complex. The

Claimants are a number of investors in Ingenious Media's film/game investment partnerships who are seeking recoveries after allegations of tax avoidance by HMRC and adverse findings in the Tax Tribunals. The action centres on the claim that investors were assured that these partnerships were entirely legitimate trading businesses seeking to make profit through financing films and video games, such as Avatar. Liabilities that have arisen from the decisions of HMRC and the Tribunals are alleged to exceed £500m. The Defendants include tax advisors, accountants and banks. The case is being managed by Morgan J in the Chancery Division (**Kennedys**).

Brokers Negligence

He regularly acts for and against Insurance Brokers. Recent cases have included:

- ***Ram Recycling v DRC and ors* [2012] EWHC 1736 Comm, [2012] EWHC 2464 (Comm) & [2012] EWHC 2757 (Comm)** was a multi-party dispute in the Commercial Court dealing with issues relating to broker's and sub-broker's negligence, breach of warranty of authority, and coverage.
- ***British Gymnastics v Zurich, Brit & Perkins Slade* [2017] EWHC 2500 (Comm)** – Ben acted for brokers in this long running multi-million pound coverage dispute arising from cover issued to the British Gymnastics Association. Issues arose relating to cover, non-disclosure, claims made policies, the practice in the Lloyds Market, brokers' duties, and causation.

Accountants' Negligence

Ben is acting for a number of accountants in different large value claims facing allegations ranging from failures to advise with respect to large financial investments for high net worth lottery winners to the management of Inland Revenue investigations (and COP9). This includes various tax management schemes arising from property, film finance, and investment schemes. Before coming to the Bar Ben worked at Ernst & Young.

IFAs and Investment Schemes

He has advised on and acted in various cases involving investment schemes, tax management schemes, and related investment advice. This has included property investments, film finance schemes and various corporate re-structuring issues. Ben is currently involved in the **Ingenious litigation**.

Construction Professionals

Ben regularly acts for all types of construction professionals. Recent cases have included:

- Services engineers: ***Carillion Construction Ltd v Woods Bagot Europe Ltd* [2016] B.L.R. 382 & [2017] BLR 203**;
- Structural engineers: ***Bloom v Fluid* [2018] EWHC 1266 (TCC) & *Mirant Asia-Pacific***



Construction (Hong Kong) Limited and others v. Ove Arup & Partners International Limited and others [2005] PNLR 10;

- Fire safety engineers: **Howmet v EDL & ECS 157 Con. L.R. 1 & [2016] B.L.R. 555 & Cadbury v ADT [2011] BLR 661, [2012] BLR 441 & 145 Con. L.R. 147);**
- Surveyors: **Bank of Ireland v Phillip Pank Partnership [2014] EWHC 284 (TCC & Catlin Estates Limited v. Carter Jonas [2006] PNLR 273;** and
- Architects: **Maribo v CZL.**
- Technical Auditors: **Liberty v Campagna (2011) 27 Const LJ 275**

Insurance & Reinsurance

He advises upon and litigates all insurance related disputes, including: D&O, PI, PL & EL policy disputes; dealing with insolvent insureds and insurance companies; subrogated recovery claims (including disaster claims); and all coverage issues (including non-disclosure, notification, moral hazard, and warranty cases). Insurance issues frequently arise in all other areas of Ben's practice, such as Professional Negligence and Construction.

Ben has wide experience of arbitrations and has acted in ICC, DIA, LCIA, LMAA, ARIAS, SIAC, and ad hoc arbitrations.

In the latest edition of **Legal 500** and **Chambers and Partners** he is identified as a Leading QC in Insurance.

Selected Cases

Fire, Flood and other Disaster Claims

en has extensive experience of very large fire claims and disaster litigation. He has been involved in TCC and Commercial Court multi-million pound litigation arising from major fires such as: **Primark v Magna, Cadbury v ADT, Southwark v Greenacre, Howmet v ECS, Wheeldon v Millennium Ins, CPG v Great Lakes, V A Laundry v Sterling Ins, Boots v Schneider, and 2 Entertain v Sony.** He was part of the team of Counsel working on the **Buncefield litigation** for Total, including dealing with the disclosure dispute in that litigation; **[2008] EWHC 2218 (Comm).** He advises on both the coverage and recovery elements of this category of cases.

D&O Insurance

Ben is regularly instructed to advise and act on disputes dealing with Directors and Officers policies. Ben has particular expertise in this area as a result of his experience with Directors' Duties cases. Recent cases have included:

- A coverage dispute arising from alleged wrongful trading activities in the green energy market.
 - Issues arising from directors disqualification proceedings and alleged wrongful trading in the running of a major charity.
-

- A dispute relating to whether defence costs should be indemnified in a long running financial fraud case.
- Coverage issues arising from US Securities prosecutions involving Russian nationals in the energy sector.

Professional Indemnity Claims

Ben regularly advises on all issues connected to professional indemnity disputes. Recent work includes:

- Advice on aggregation of claims arising from various conveyancing transactions.
 - Advice on the inter-relationship between contractual and non-contractual exclusions.
 - Advice on the scope of cover for IFAs.
 - Advice on the effective of a deliberate or reckless act of a professional on cover.
 - Advice on the impact of US claims on the management of the Lloyd's Market and Lloyd's brokers.
- **Wheeldon v Millennium Insurance [2017] BLR 234, [2018] Lloyd's Rep. I.R. 693 and [2019] 4 WLR 56** – Ben successfully represented a recycling company seeking to recover insurance monies due to a fire, which raises issues of coverage, warranties, the recycling industry and technical evidence. The decision in the Court of Appeal is now the leading case on how the Court will approach appeals from the TCC **[2019] 4 WLR 56 (Towers Hamlin)**.
 - **British Gymnastics v Zurich, Brit & Perkins Slade** – Ben acted for brokers in this long running multi-million pound coverage dispute arising from cover issued to the British Gymnastics Association. Issues arose relating to cover, non-disclosure, claims made policies, the practice in the Lloyds Market, brokers' duties, and causation. In addition there was a particular dispute as to the placing and management of excess cover, which Ben successfully argued could not be added as new allegations to the claim close to trial; **British Gymnastics v Zurich, Brit & Perkins Slade [2017] EWHC 2500 (Comm)**. (Mills & Reeve)
 - **Curzon Capital v Pembroke Managing Agency**, Ben acted in an insurance dispute arising from various warranties provided on a multi-million euro asset purchase involving a shopping centre in Vienna, which raised coverage arguments, technical evidence and issues of Austrian law (**CMS**).
 - **LIBOR** – Ben acted in an ICC arbitration for a trader facing prosecution arising from the well-publicised alleged Libor manipulation on issues arising from available D&O cover (**Fenchurch Law**).
 - **Genesis v Allianz [2014] EWHC 3676 (QB)** – Ben successfully represented Allianz at trial following Allianz's declinature of the Claimant's claim on the basis that it, by its director, had committed (or procured) arson of the business premises (and its contents) (**DACBeachcroft**).

Commercial

Ben has a wide experience of commercial matters, including: sale of goods; contractual disputes; civil fraud, company law and insolvency issues; guarantees and indemnities; passing off and intellectual property matters; jurisdictional disputes; and fiduciary obligations and equitable remedies.

Ben has wide experience of arbitrations and has acted in ICC, DIA, LCIA, LMAA, ARIAS, SIAC, and ad hoc arbitrations. Ben has been called to the BVI Bar.

Selected Cases

Directors' Duties Cases

Ben has particular expertise in director's cases and has been described in the legal directories as an expert in this field. He regularly advised on Directors & Officers Insurance claims arising from such issue. He successfully argued in the Court of Appeal the novel point that directors owe special and particular duties of disclosure in **Item Software v. Fassihi and others** [2005] 2 B.C.L.C. 91 (CA), which is now a core case in this area. He acts for both companies and directors/employees. These cases often involve allegations relating to breach of fiduciary duty, restrictive covenants, copyright, passing off, economic torts, and accessory liability. He has taken to trial a number of such cases including:

- **Crowson Ltd v Concept Ltd** [2008] F.S.R. 14;
 - **Markel & QBE v SGC & ors** [2009] Lloyd's Rep IR 77 & [2008] EWHC 3087 (Comm) & [2009] EWCA Civ 790;
 - **Berryland Books v BK Books & ors** [2009] 2 B.C.L.C. 709 & [2010] All ER (D) 209 (Dec);
 - **Premier Waste Management Limited v Towers** [2010] EWHC 2440 (Ch) and [2012] BCC 72 ;
 - **Templeton Insurance Ltd v Motorcare Warranties Ltd** [2012] All ER (D) 75 (Apr), [2012] EWHC 2309 (QB) and [2013] All ER (D) 32 (Feb); and
 - **St Vincent European General Partner Ltd v Robinson** [2018] EWHC 1230 (Comm) & [2018] EWHC 1442 (Comm).
- **SDI v Rangers FC** – Ben is acting for Rangers Football Club in a long running dispute between it and Sports Direct. This raises issues relating to the interpretation of a distribution agreement and the appropriateness of injunctive relief, [2018] EWHC 2948 (Comm), [2019] EWHC 207 (Comm), [2019] EWHC 591 (Comm) and [2019] EWHC 1929 (Comm) (Mills & Reeve).
 - **St Vincent European General Partner Ltd v Robinson** [2018] EWHC 1230 (Comm) & [2018] EWHC 1442 (Comm) – Ben is acting for property advisers involved in the multi-million pound sale of commercial properties in Poland. The Claimant alleged that various parties had been involved in breaches of fiduciary duty, sales at under value, breaches of contract and an unlawful means conspiracy. This involved unsuccessful applications to join a number of additional Defendants, including Ben's client (Mills & Reeve).
 - **ICC Arbitration** – Ben acted for an importer of rock salt in a £million+ arbitration dealing with documentary credits and force majeure clauses (Rustem Guardian).
 - **LMMA Arbitration** – Ben acted for an importer in a multi-million pound international sale of goods dispute (Rustem Guardian).
 - **MPA v HPI (2017, BVI)** – Ben was instructed in enforcement proceedings in the BVI Courts arising from a multi-million dollar Panamanian Arbitration award determining a dispute involving the operation of an Ecuadorian Port (Appleby).
 - **Internovia Litigation** – Ben is acting for companies in a multi-million pound complex shareholder dispute regarding mines in Brazil in the Commercial Court (Candey Parker).



Freezing Injunctions, Search Orders, and other interim remedies

Ben has extensive experience of with and without notice urgent applications, such as:

- **Markel & QBE v SGC [2009] Lloyd's Rep IR 77 & [2008] EWHC 3087 (Comm) & [2009] EWCA Civ 790** (freezing injunction, surety bonds, civil fraud & directors' duties);
- **RBS Invoice Finance Ltd v Karia [2008] All ER (D) 131 (May)** (civil fraud, freezing injunctions and factoring);
- **Schmid v Fortmann [2007] All ER (D) 107 (Oct)** (property orders, civil fraud and resulting trusts); and
- **Templeton Insurance Ltd v Motorcare Warranties Ltd [2012] All ER (D) 75 (Apr) , [2012] EWHC 2309 (QB) and [2013] All ER (D) 32 (Feb)** (contempt of court, freezing injunctions, and civil fraud).
- **St Vincent European General Partner Ltd v Robinson [2018] EWHC 1230 (Comm) & [2018] EWHC 1442 (Comm)**
- **SDI v Rangers FC [2018] EWHC 2948 (Comm) and [2019] EWHC 207 (Comm)**

Product Liability

Ben regularly works on technical cases involving defective products. His main focus is on disputes where products have failed causing financial losses. For example, he often deals with claims in a sale of goods context or where defective products cause damage to buildings and plant, such as by fire or flood. Ben has dealt with cases covered by most standard form contracts and often has to deal with issues relating to limitations and exclusions.

Selected Cases

- **Boots v Schneider** – is acting for Schneider, manufacturer of a component that is alleged to have caused an electrical fire. The fire is alleged to have caused £20m of damage. The complex and multi-party 6 week trial is listed for Autumn 2018 in the TCC (**Zelle**).
- **Howmet v EDL & ECS 157 Con. L.R. 1 & [2016] B.L.R. 555**, Ben acted for a factory owner in a recovery action resulting from a serious fire that caused £20+m losses arising from an alleged failure of fail safe devices. This case dealt with significant arguments relating to scope of duty, causation and novus actus (**RPC**).
- **Bembridge Marine v Allen & ors [2012] EWHC 2213 (TCC)**, Ben defended the supplier of bolts and gratings in a £7m sale of goods claim in the TCC. The case raised issues of contractual formation, sale of goods, and limitations of liability. He succeeded in enforcing ASD's limitation of liability clause in its standard contract terms, which was found to cap the recoverable damages at £705 rather than £7million (**DAC Beachcroft**).
- **Cadbury v ADT [2011] BLR 661, [2012] BLR 441 & 145 Con. L.R. 147** Ben acted for the Claimants against Defendant engineers in this £100m+ recovery action involving the destruction by fire of a large popcorn factory in Pontefract, arising from the installation and operation of a CO2 fire suppression system. This case was one of the Lawyers top 20 cases of 2011 (**DAC Beachcroft**).



International Arbitration

Ben has wide experience of arbitrations, both domestically and internationally. This is in all his core areas, with particular emphasis on Insurance and Construction arbitrations. This has included acting in ICC, LCIA, LMAA, ARIAS, DIA, SIAC, and ad hoc arbitrations. Ben has also acted on Arbitration appeals and enforcement actions in different jurisdictions, such as in the BVI. He is also happy to act an Arbitrator.

Selected Cases

Examples of arbitrations he has acted in include:

- Multiple insurance claims arising out of five significant energy projects being heard in Denmark.
- Defending a professional indemnity insurance claim arising from various claims against accountants brought by high net individuals.
- A claim under a D&O Policy connected to the various LIBOR actions arising from the recent financial crash.
- An arbitration in Singapore dealing with an insurance claim arising from a significant transport network collapse.
- A series of arbitrations arising from significant commodities transactions and international trade issues.
- An insurance claim arising from the collapse of a bridge in Russia.
- A claim under a D&O Policy arising from proceedings in the USA and allegations of multi-billion tax fraud in Russia.

Reported Cases

- **SDI v Rangers FC [2019] EWHC 591 (Comm) and [2019] EWHC 1929 (Comm)** – Football Contracts, contractual interpretation, and the mechanics of renewal rights.
 - **Perry v Raleys Solicitors [2019] 2 W.L.R. 636** – solicitors negligence, causation and the application of Allied Maples.
 - **SDI v Rangers FC [2019] EWHC 207 (Comm)** – Amendments of Particulars of Claim, Football Contracts, and contractual interpretation.
 - **Wheeldon v Millennium Insurance [2019] 4 WLR 56** – Appeals from TCC, Fires and Waste Management, and Property Insurance.
 - **SDI v Rangers FC [2018] EWHC 2948 (Comm)** – Football Contracts, freezing injunctions, interpretation of a distribution agreement, and the appropriateness of injunctive relief.
 - **St Vincent European General Partner Ltd v Robinson [2018] EWHC 1230 (Comm) & [2018] EWHC 1442 (Comm)** – Economic Torts, Company law, the calculation of damages, Banking and finance, freezing injunctions, and the late addition of parties.
 - **Broom v Fluid [2018] EWHC 1266 (TCC)** – engineering dispute, iceberg house on “Grand Designs”, and case management procedure.
 - **Wheeldon v Millennium Insurance [2018] Lloyd’s Rep. I.R. 693** – Fires and Waste Management, Property Insurance, and the interpretation of conditions precedent and warranties.
 - **British Gymnastics v Zurich, Brit & Perkins Slade [2017] EWHC 2500 (Comm)** – Gymnastics, Liability Policies, and the late Addition of Parties.
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- **Perry v Raleys Solicitors** [2017] P.N.L.R. 27 – solicitors negligence, causation and the application of Allied Maples.
- **Dawnus Construction Holdings v Amey LG Ltd** [2017] EWHC B13 (TCC) – adjudication and dispute resolution procedure.
- **Wheeldon v Millennium Insurance** [2017] B.L.R. 234 – Fire claim, experts and conflicts of interest.
- **Carillion Construction Ltd v Woods Bagot Europe Ltd** [2017] BLR 203 – Construction contracts and extensions of time.
- **Howmet Ltd v Economy Devices Ltd** [2016] B.L.R. 555 – Fire claim, product liability, corporate knowledge and causation.
- **BPC Hotels Ltd v Wright Hassall LLP** [2016] EWHC 1286 (TCC) – solicitors’ and barrister’s negligence, strike out and scope of retainer.
- **Carillion Construction Ltd v Woods Bagot Europe Ltd** [2016] B.L.R. 382; 166 Con. L.R. 52 – Construction contracts, completion dates and liquidated damages.
- **Howmet Ltd v Economy Devices Ltd** 157 Con. L.R. 1 – Fire claim and product liability.
- **Genesis v Allianz** [2014] EWHC 3676 (QB) – Insurance declinature when arson by an insured.
- **Bank of Ireland v Phillip Pank Partnership** [2014] EWHC 284 (TCC) – Post-Mitchell decision on defects in cost budgeting.
- **Daniel v Mode** [2013] EWHC 3614 (TCC) – strike out/summary judgment on a fire claim at a very early stage.
- **Templeton Insurance Ltd v Motorcare Warranties Ltd** [2013] All ER (D) 32 (Feb) – Court of Appeal on contempt of court for breach of freezing injunctions and sentencing; reduced to suspended sentence.
- **Cadbury v ADT (No.2)** 145 Con. L.R. 147 – interim payments on account and “no loss” arguments.
- **Rivercove v Euro Rubberlines** [2012] EWHC 2593 (TCC); **Environmental Law Monthly Volume 21 Issue 11** – oil pollution.
- **Ram Recycling v DRC and ors** [2012] EWHC 2757 (Comm) – insurance brokers, security for costs, and re-opening decisions.
- **Cadbury v ADT** [2012] BLR 441 – Engineer’s negligence, contract formation, sale of goods, and contributory negligence.
- **Ram Recycling v DRC & ors** [2012] EWHC 2464 (Comm) – insurance brokers, coverage and security for costs.
- **Templeton Insurance Ltd v Motorcare Warranties Ltd** [2012] EWHC 2309 (QB) – contempt of court for breach of freezing injunctions and sentencing.
- **Bembridge Marine v Allen & ors** [2012] EWHC 2213 (TCC) – sale of goods and limitation of liability clauses.
- **Ram Recycling v DRC & ors** [2012] EWHC 1736 Comm – insurance brokers, coverage and summary judgment.
- **Templeton Insurance Ltd v Motorcare Warranties Ltd** [2012] All ER (D) 75 (Apr) – contempt of court, freezing injunctions, civil fraud and breach of insurance binders.
- **Premier Waste Management Limited v Towers** [2012] BCC 72 – director’s duties and fiduciaries (CA).
- **Cadbury v ADT** [2011] BLR 661 – Engineer’s negligence, contract formation, sale of goods, and contributory negligence.
- **Liberty v Campagna** (2011) 27 Const LJ 275 – Latent Defects insurance and the duties of technical auditors.
- **Berryland Books v BK Books & ors** [2010] All ER (D) 209 (Dec) – Torts of conspiracy and breach of fiduciary duty (CA).
- **Premier Waste Management Limited v Towers** [2010] EWHC 2440 (Ch) – Directors’ duties and

fiduciaries.

- **Berryland Books v BK Books & ors** [2009] 2 B.C.L.C. 709 – directors’ duties, civil fraud, publishing and copyright, and accessory liability.
- **Markel & QBE v SGC & ors** [2009] Lloyd’s Rep IR 77 – Surety bonds, insurance binders, civil fraud & directors’ duties (also [2008] EWHC 3087 (Comm) & [2009] EWCA Civ 790).
- **Buncefield** [2008] EWHC 2218 (Comm) – disclosure obligations, specific disclosure and pre-action reports.
- RBS Invoice Finance Ltd v Karia [2008] All ER (D) 131 (May) – civil fraud, freezing injunctions and factoring.
- **Crowson Ltd v Concept Ltd** [2008] F.S.R. 17 – civil fraud, directors’ duties, confidential information, and database rights.
- **Hart v Larchpark & Fidler** [2008] 1 BCLC 589 – security for costs.
- Schmid v Fortmann [2007] All ER (D) 107 (Oct) – civil fraud and resulting trusts.
- **Hart v Larchpark & Fidler** [2007] BLR 30 – Adjudicator’s jurisdiction under the 1996 Act (written contracts and time limits), stays under the insolvency rules and default judgments.
- **Bennett (Electrical) Services v Inviron** [2007] EWHC 49 (QB) – Adjudicator’s jurisdiction under the 1996 Act (written contracts)
- **ALE v MSD** [2006] EWHC 2080 (TCC) – Adjudicator’s jurisdiction under the 1996 Act (written contracts and estoppel) and insolvency.
- **Catlin Estates Limited v. Carter Jonas** [2006] PNLR 273 – Building surveyors, title to sue, and professional negligence.
- **Margate Theatre Trust v. White (t/a A1 Moling Services) & AXA** [2006] Lloyd’s Rep IR 93 – scope of insurance and deemed knowledge of insurer on specialist business.
- **Mirant Asia-Pacific Construction (Hong Kong) Limited and others v. Ove Arup & Partners International Limited and others** [2005] PNLR 10 – Engineers professional negligence, assumption of responsibility and concurrent contractual and tortious duties.
- **Item Software v. Fassihi and others** [2003] 2 B.C.L.C. 1 (Ch Div) & [2005] 2 B.C.L.C. 9 – Directors’ duties, confidential information, and theft of database (CA).
- **Re Cooling Equipment Wholesale Ltd** [2002] 2 B.C.L.C. 745 – Compulsory winding up petition and sale of goods.

Qualifications

- Birkdale School, Sheffield.
- University College, Oxford. BA (Hons) in Law – First Class.
- Tax Trainee with Ernst & Young
- University College, Oxford. BCL.
- Admitted to Gray’s Inn. Awarded the Lord Birkenhead Scholarship.
- Inns of Court School of Law.
- Called to the Bar.
- Tenant at Crown Office Chambers (previously One Paper Buildings).
- 2014 Appointed QC
- 2017 Called to the BVI Bar.

SEMINARS



Ben regularly gives seminars in his areas of expertise. He is happy to do so as part of in-house training. In the past few years he has given seminars on the following topics: Insurance Act 2015; liquidated damages; insurance claims; fire and disaster claims; bonds & guarantees; expert evidence; conflicts of interest; privilege and the law of evidence; damages; the new Companies Act 2006; directors' duties; interim commercial remedies; restrictive covenants; and the Law Commission reform of Insurance Law.

Memberships

- LCLCBA
- TECBAR
- COMBAR
- PNBA

Recommendations

"Very calm, very intelligent, highly responsive, fun to deal with and a good strategist."
Chambers & Partners 2018

"He is very dedicated, always on top of the details and very pragmatic."
Chambers & Partners 2018

"He is excellent, very good at what he does and particularly good at difficult coverage cases."
Chambers & Partners 2018

"Ferociously intelligent but at the same time very down to earth and approachable."
Legal 500 2017

"Particularly good at oral advocacy."
Chambers & Partners 2017

"His client care is excellent and he's always open to new ideas."
Chambers & Partners 2017

"He has great attention to detail, is very tenacious and very bright."
Chambers & Partners 2016

"Extremely user-friendly - very clear in the way that he explains things."
Chambers & Partners 2016

"He is incredibly bright, he gets to the kernel of the problem very quickly. He is very practical and pragmatic in his approach."

"He is an ingenious lawyer, and one of those practitioners that just loves the law."



Notes: -

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Q&A



Charles Holbech
Radcliffe Chambers

“Wills and Probate negligence update”



Radcliffe Chambers

Charles Holbech

Call: 1988

Barrister

E: cholbech@radcliffechambers.com

"He's good for the particularly contentious matters and is very quick thinking. He is a committed practitioner and always goes the extra mile for his clients.

He is forceful and a go-to person if you have a fraught dispute."

Chancery: Traditional, Chambers HNW 2018

Charles Holbech specialises in private client work, both contentious and non-contentious, and increasingly involving technical advice on tax, trusts and estates. Whether advising in conference, on paper, or in court, Charles applies a detailed, but clear, analysis to complex issues. Charles is recognised by Chambers UK Bar, Chambers HNW and The Legal 500 UK Bar as a leading junior for Chancery and private client work. Charles is regularly instructed in reported cases and writes extensively on estate planning, Inheritance Tax and trusts. He has also edited Halsbury's Laws of England on Inheritance Tax.

TRUSTS

Charles regularly advises trustees in relation to trust, tax, and property issues. He has extensive experience in trust drafting, the use of trusts in tax planning, and in matters relating to trust administration. He is also sought out for his trust litigation skills and experience. He appeared in a leading case in the High Court on the construction of a provision in a 1948 trust for the benefit of “statutory next of kin”. The issue was whether adopted children were entitled, as a matter of construction, and having regard to the European Convention on Human Rights: *Re Erskine Trust* [2012] EWHC 732 (Ch). He has developed a speciality in contentious trust disputes involving claims for breach of trust, removal of trustees, and challenges to the exercise of trustees’ discretions. Charles had a notable recent success in *Newman v Clarke* [2017] 4 WLR 26 in striking out a claim that a trustee was in breach of the rule against self-dealing, on the grounds that that rule did not apply to the unilateral exercise of rights vested in the trustee prior to his appointment as a trustee. Charles is a member of the Society of Trust and Estate Practitioners and of the Association of Contentious Trust and Probate Specialists. Charles regularly lectures, and writes articles, on trusts and trustees.

WILLS AND ESTATES

Charles has considerable experience in relation to wills, probate and administration, and succession. He is experienced in will drafting, and in tax planning through wills. Charles has appeared in the Privy Council in a leading case on the construction of wills: *Sammut v Manzi* [2009] 1 WLR 1834. He also has considerable experience and expertise in claims relating to the estates of deceased persons such as probate claims, proprietary estoppel, and family provision claims. He appeared in the Court of Appeal in a leading case on proprietary estoppel: *Campbell v Griffin* [2001] EWCA Civ 990; and in the High Court on constructive trusts: *Thomson v Humphrey* [2009] EWHC 3576 (Ch). Charles has a particular interest in claims to set aside wills on the grounds of undue influence, want of knowledge and approval, lack of testamentary capacity, and/or forgery. He appeared in *C v D* [2012] EWHC 3214 (Ch), a case considering whether a spent conviction could be adduced as evidence of propensity for dishonesty. He has given many lectures on these issues, and has advised on and appeared in many cases in this area.

Charles has appeared in two of the leading cases on claims by adult children for reasonable provision out of the estate of a deceased parent: *Robinson v Bird* [2003] WTLR 529 and *Garland v Morris* [2007] 2 FLR 528. He regularly advises and acts in Inheritance Act claims. Most of these claims are settled. Court of Protection Charles is experienced in all matters relating to patients, mental health, the Court of Protection, lasting powers of attorney, statutory wills, and the appointment of deputies. He has appeared many times in the Court of Protection.

TAX AND ESTATE PLANNING

Charles' advice is increasingly in demand on tax, and tax planning issues facing individuals, trustees, and personal representatives. He regularly advises on the availability of business and agricultural property relief. Charles has edited Halsbury's Laws of England on Inheritance Tax. He has also written two privately-published booklets, on estate planning through wills, and on Inheritance Tax planning and trusts. Charles contributed the chapter on taxation in the current edition of Mortimer, Williams and Sunnucks on Executors, Administrators and Probate. He is frequently asked to lecture on tax by professional organisations. He was one of the invited speakers at the 2015 IBC Inheritance Tax conference.

PROPERTY

Charles' expertise covers the whole field of property and land law, including commercial and residential landlord and tenant disputes, manorial rights, markets and fairs, leasehold enfranchisement, possession proceedings, mortgages, easements, restrictive covenants, options, conveyancing, boundary disputes, dilapidation claims, licences, adverse possession, land registration, rights of co-owners, applications for sale of land, planning, trusts of land, land taxation, overage agreements, proprietary estoppel, property related negligence and insolvency, and equitable claims as they affect land.

PROFESSIONAL LIABILITY

Charles has a particular interest in professional negligence and has lectured extensively upon negligence claims relating to wills. He has addressed the Professional Negligence Lawyers' Association's annual conference on two occasions on professional negligence in the private client context.

RECOGNITION

Recent directory editorial comment has included the following:

- *“A real expert on tax and he always knows how to work through even the most complex of problems. His advice is always very helpful and is spot-on. His technical skills are outstanding and he has a very strong grasp of some of the most complex legal concepts.”* (Chancery: Traditional, *Chambers UK Bar 2019*)
- *“He’s good for the particularly contentious matters and is very quick thinking. He is a committed practitioner and always goes the extra mile for his clients. He is forceful and a go-to person if you have a fraught dispute.”* (Chancery: Traditional, *Chambers HNW 2018*)
- *“Excellent on really complex and intricate details.” “He really knows his stuff.”* (Chancery: Traditional, *Chambers UK Bar 2018*)
- *“Very meticulous and methodical.”* (Private Client: trusts and probate, *The Legal 500 UK Bar 2017*)
- *“A pragmatic barrister who gets to the crux of the matter and offers sensible, straight forward advice” which “invariably chimes with the objectives of the clients.”* (Chancery: Traditional, *Chambers UK Bar 2017*).
- *“He is academically bright, has great technical skills and can assimilate and deal with a great amount of detail and documentation.”* (Chancery: Traditional, *Chambers UK Bar 2016*)
- *“Superb on detail and particularly technical points of law”* (Private Client: trusts and probate, *The Legal 500 UK Bar 2016*)

PUBLICATIONS

Charles is the sole contributor of *White v Jones* liability for negligent advice published in *Oxford Journals* – October 2016. He also wrote *A hard case to make: Bromley v Breslin* [2015] published in *Trusts & Estates Law Journal* July/Aug 2016, and the chapter on *Taxation* in *Williams Mortimer & Sunnucks on ‘Executors, Administrators & Probate’* (2018) published by Sweet and Maxwell.

In 2012 Charles wrote an article entitled *Has the golden rule lost its lustre?* which was published in *Trusts and Estates Law & Tax* April 2012.

QUALIFICATIONS

Christ Church, Oxford – Classics Mods; BA in Law

MEMBERSHIPS

- Association of Contentious Trust and Probate Specialists (ACTAPS)
- Society of Trust and Estate Practitioners (STEP)
- Chancery Bar Association



Radcliffe
Chambers

Professional negligence: wills and probate
Charles Holbech
Radcliffe Chambers

1

Failure to procure execution of valid will

- Feltham v Freer Bouskell [2013] 2 FLR 668
 - solicitor's failure to chase medical expert within 10 days
 - negligent failure to act on medical report by taking further instructions from testatrix
 - when had accepted instructions
 - causation: valid will would have been executed by testatrix on balance of probabilities
- Loss of a chance
 - claim by disappointed beneficiary
 - issue what 3rd party (testatrix) would have done if properly advised
 - obiter: damages can be assessed on loss of chance basis
- Damages
 - amount to settle probate claim
 - costs

2

Failure to observe golden rule

- Key v Key [2010] WLR 2020
 - solicitor's failure to observe golden rule
 - 89 year old testator
 - recently bereaved
 - led to costs of successful probate claim to set aside will
 - Judge joined solicitor as party re costs
 - s. 51 of Senior Courts Act 1981
- Perrins v Holland [2009] EWHC 2558 (Ch)
 - failure to comply with rule
 - not cause of litigation
- Wharton v Bancroft [2011] EWHC 3250 (Ch)
 - criticism of failure to follow golden rule misplaced
 - job to take will of dying man
 - own assessment of capacity
 - detailed attendance note

3

Failure to ensure due execution

- **Esterhuizen v Allied Dunbar Assurance [1998] 2 FLR 668**
 - one witness
 - failure by solicitor to supervise execution
- **Gray v Richards Butler [2000] WTLR 143**
 - witnesses not present at the same time when testator signed
 - no liability: comprehensive written instructions as to execution
- **Humberstone v Martin Tolhurst Partnership (a firm) [2004] EWHC 151**
 - will not signed by testator (checked by secretary)
- **Marley v Rawlings [2015] AC 129**
 - husband and wife signed wrong wills
 - rectification of survivor's will ordered by Supreme Court: clerical error
 - solicitor ordered to pay parties' costs: costs payable by solicitor's insurers

4

Failure to advise that joint tenancy be severed

- **Carr-Glynn v Frearsons [1999] Ch 326**
 - negligent failure to advise testatrix to sever joint tenancy
 - part of will-making process to ensure that effect given to testator's intentions
 - loss to specific devisee of severed share
- **Shah v Forsters [2017] EWHC 2433 (Ch)**
 - husband and wife joint tenants
 - wife predeceased husband
 - claim by her PRs that solicitors failed to advise that joint tenant be severed
 - consequent loss to estate
 - claim dismissed
 - duty to advise as to effects of severance
 - but wife had decided not to sever for time being
- **Not loss of chance case**
 - claim by executors for loss to estate
 - testatrix not a third party
 - balance of probabilities

5

Negligent advice or failure to advise

- **Fraser v McArthur Stewart [2009] PNLR**
 - wrong advice that testator could not legally leave croft to pursuers
 - only to single beneficiary
 - no liability to pursuers as will implemented testator's instructions
 - even if instructions based on negligent advice
- **Gibbons v Nelsons [1999] Ch 326**
 - solicitor must know:
 - what benefit testatrix wishes to confer
 - on whom
 - no knowledge and no convincing evidence as to testatrix's intentions
 - because solicitor failed to ascertain testatrix's intentions
- **Herring & Hartley v Shorts Financial Services [2016] W.T.L.R. 1203**
 - claims against financial adviser and solicitor
 - solicitor's duty to make suitable inquiries as to facts on which testatrix's intention based

6

Claims by PRs re post-death loss

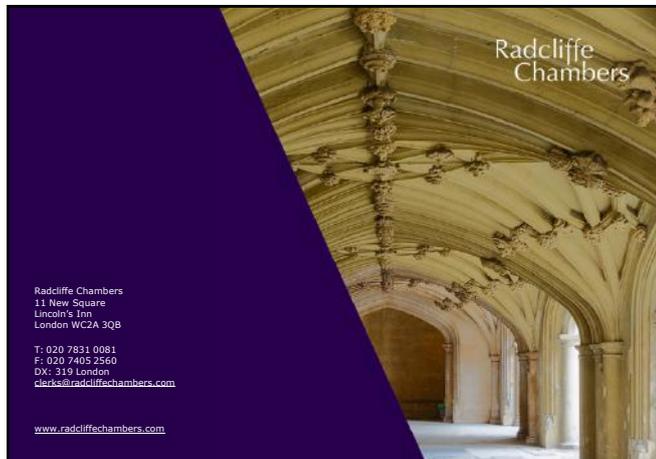
- Chappel v Somers & Blake [2003] 3 All ER 1076
 - PRs can sue for loss to estate in course of administration
- Matthews v Hunter Robertson [2008] PNLR 35
 - no claim by PRs re post-mortem loss
 - insufficient proximity
 - limitation period would not run until death
- Steven v Hewats [2013] CSOH 60
 - no claim by PRs re IHT payable by estate re lifetime gift with ROB
 - no loss suffered by deceased in lifetime which can be transmitted to PRs
 - possible claim by residuary beneficiary
- Negligent advice causing IHT liability on death of client
 - arguable claim by PRs and/or residuary beneficiaries
 - Vinton v Fladgate Fielder [2010] EWHC (Ch) 904
 - Rind v Theodore Goddard [2008] PNLR 459

7

Limitation

- Defective will
- 6-year limitation period commences on date of death
 - Nouri v Marvi [2010] PNLR 7, para. 23
 - will ambulatory until death
- 15-year long-stop: s. 14B Limitation Act 1980
 - from date of Will

8



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9



David Pipkin
Director
Underwriting Division
Temple Legal Protection

"General Insurance Market Update"

David Pipkin
Director
Underwriting Division

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legal protection

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

As an Associate at Davies Arnold Cooper for over a decade he managed a team of lawyers and acted for defendants in personal injury and general insurance litigation. In this role, he became involved in the early development of the ATE market, assisting the ABI in their involvement

in the Court of Appeal test cases such as Callery v Gray. As the London representative for FOIL he was involved in the liability insurers' approach to ATE and worked with the government and judiciary in several key consultations. He was a member of the CILEX National Council for over 15 years and was CILEX President in 1995/6.

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



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Temple Litigation Insurance Update
9th October 2019

David Pipkin, Underwriting Director
David Chase, Deputy Underwriting Manager

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Surfing the Net

- Snapshot of law firm activity on the net promoting legal services for professional negligence claims
- PNLA Members in the forefront
- ATE/Litigation insurance is being promoted
- Notable websites - Irwin Mitchell - Lime Solicitors - Barlow Robbins - Healys
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- New Interest funding calculator - a "ready reckoner"
- Interest remains at 10%

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- Legal Futures Roundtable Report in association with Temple: the future for Commercial ATE
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Questions? temple
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9



Oliver Wise
Queen Elizabeth Building

**“Professional Negligence in Matrimonial
Finance”**



Oliver Wise

CALL: 1981

clerks@qeb.co.uk

Oliver has extensive experience in matrimonial financial cases and significant expertise in professional negligence cases relating to family law, both for solicitors and claimants. In the first 15 years of Oliver's career at the Bar, before specialising in matrimonial finance and professional negligence work, he acted in a broad range of cases, including cases in the Queen's Bench, Chancery and Family Divisions, which gave him a breadth of experience enabling him to deal with a wide range of non-family legal issues arising in family cases. He believes in giving clear and realistic strategic advice at the earliest opportunity. Oliver accepts direct access cases.

Oliver was brought in as the leading junior at the Supreme Court stage in *Prest v Petrodel* [2013] 2 AC 415: the case about the jurisdiction to make orders against companies in matrimonial litigation.

He represented a solicitor who had to admit contempt of court for unauthorised disclosure before the Divisional Court in *Davies v Welch* [2011] 1 FLR 1241.

With Tim Amos QC Oliver was brought in at the appeal stage to represent the appellant husband in *Robson* [2011] 1 FLR 751, a big money case in the Court of Appeal.

Oliver represented the husband in the High Court and on appeal in the Court of Appeal in the leading case of *Behzadi* [2009] 2 FLR 649.

He was instructed by Beachcrofts as Senior Counsel for the defendant solicitors in the leading solicitors and barristers matrimonial negligence case of *Williams v Thompson Leatherdale and Francis* [2009] 2 FLR 730.

He has acted as Senior Counsel for the Crown (instructed by HM Customs & Excise because of the implications of foreign divorce law) in the Court of Appeal (Criminal Division) in *R v Fuller* [2006] WTLR 863. He has been instructed by the Attorney General, the Queen's Proctor and the Legal Services Commission in a range of family cases.

Appointments and Memberships

Oliver is a member of the Family Law Bar Association and the Professional Negligence Bar Association. He is a legal assessor to the Nursing & Midwifery Council.

Cases and publications

Prest v. Petrodel Resources Limited [2013] UKSC 34, [2013] 4 All ER 673, [2013] 3 WLR 1, [2013] 3 FCR 210, [2013] 2 FLR 732, [2013] Fam Law 953
Robson v Robson [2011] 1 FLR 751 (Court of Appeal)
Davies v Welch [2011] 1 FLR 1241 (Queen's Bench Division) *Williams v Thompson Leatherdale* [2009] 2 FLR 730 (Queen's Bench Division)
Behzadi v Behzadi [2009] 2 FLR 649 (Court of Appeal)
R v Fuller [2006] WTLR 863 (Court of Appeal)
Johnson v Unisys [2003] 1 AC 518 (House of Lords)
R v LSC ex p. W [2000] 1 WLR 2502 (Court of Appeal)

Specialist Contributing Editor to *Jowitt's Dictionary of English Law* (3rd edition, 2010)

Education & Personal

Oliver read law at Magdalene College, Cambridge, after which he was awarded a major scholarship by Lincoln's Inn. Upon completion of his pupillage, he became a tenant in Queen Elizabeth Building.

Oliver is married with three children. He plays cricket and real tennis.

PNLA LECTURE
PROFESSIONAL NEGLIGENCE IN MATRIMONIAL FINANCE

Starkey v. Withers (1987), unreported, Bush J
Williams v. Thompson Leatherdale [2009] 2 FLR 730, [2009] PNLR 15, Field J
Moher v. Moher [2019] EWCA Civ 1482, CA
Kelley v. Corston [1998] QB 686, CA
Arthur JS Hall v. Simons [2002] 1 AC 615, HL
Pounds v. Pounds [1994] 1 WLR 1535, CA
Warden v. Warden [1982] Fam 10, CA
Richardson v. Richardson [1994] 1 WLR 186, Thorpe J
Jones v. Jones [2001] Fam 96, CA
Westbury v. Sampson [2002] 1 FLR 166, CA
Barder v. Caluori [1988] AC 20, HL
Tee v. Tee and Hillman [1999] 2 FLR 613, CA
Oates v. Harte Reade [1999] 1 FLR 1221, Singer J
Shade v. The Compton Partnership [2000] PNLR 218, CA
Richards v. McKeown [2017] EWCA Civ 2374, CA
A v. Hoare [2008] 1 AC 844, HL
Khan v. Falvey [2002] Lloyd's Rep P.N. 369, CA
Hatton v. Chafes [2003] PNLR 24, CA
Cohen v. Kingsley Napley [2006] PNLR 410, CA
Law Society v. Sephton & Co [2006] 2 AC 543, HL
Radmacher v. Granatino [2011] 1 AC 534, SC
Xydhias v. Xydhias [199] 2 All ER 386, CA
Rose v. Rose [2002] 1 FLR 978, CA
Dickinson v. Jones Alexander [1993] 2 FLR 521, Douglas Brown J
Johnson v. Gore Wood [2002] 2 AC 1, HL
Channon v. Lindley Johnstone [2002] PNLR 884, CA
Hodgson v. Trapp [1989] AC 807, HL
Green v. Collyer-Bristow [1999] Lloyd's Rep P.N. 798, 813, Douglas Brown J

Do not be too fearful

Much greater generosity

Starkey v Withers

The big money case now

Foreseeable future change to the law

Range of professional negligence claims

Tax tips

Too much for your client?

The Jewish wife

The need for court approval

Mistakes that family lawyers make

Child maintenance – no jurisdiction

Prompt remedial action

Capital order without jurisdiction

Expiring maintenance pending suit

Periodical payments and arrears

Variation

Limitation

OLIVER WISE



Notes: -

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Q&A



Paul Marshall
Cornerstone Chambers

“Agents - some problems with vicarious liability in a commercial context – Morrisons, Frederick and all that”

Paul Marshall

Called

1991

Telephone

0207 242 4986

Clerk

Sam Collins



Paul specialises in litigation and dispute resolution in contract law, civil commercial fraud, professional negligence and company law.

Paul is praised for his "strong analysis" (*Legal 500*) and "attention to detail" (*Chambers and Partners*). He is "a very tough opponent and very good in a difficult case" (*opposing QC*) and "a delight to work with" (*Chambers and Partners*). He is noted for his willingness to "think outside the box" (*instructing solicitor*), his capacity for lateral thinking (*Chambers and Partners*) and for being "unflappable" (*Chambers and Partners*).

Profile

Most of Paul's work is in the High Court, but as a result of his expertise in contract law he also undertakes advisory work that has included advising a global-brand computer manufacturer on the SPA for a UK facility. He has given evidence as an expert witness on English contract law in legal proceedings in Canada and in Italy.

Contract work has ranged from contested distribution licences for innovative Texan oil pipeline valves (including UK and EU competition issues) to disputed film distribution rights, to acting for an international airline on finance leasing claims. He has long experience of injunctions and was junior counsel in *Hone and ors v HMRC* [2015] 1 Ch 309, one of the most important decisions in recent years in this area of law (Stephen Gee QC, *Commercial Injunctions*, 6th edition).

Recent work has involved claims against banks and other financial institutions for mis-sold swaps, structured derivatives and SCARPS where he has secured successful outcomes for clients against all the major UK retail banks. He is a regular contributor to the *Butterworths Journal of International Banking and Financial Law* and a

noted critic of the doubtful legal doctrine of 'contractual estoppel' and 'basis clauses', criticism the justification for which has recently been recognised in the Court of Appeal judgment in *First Tower Trustees Ltd v CDS*[2018] EWCA Civ 1396.

He edited the last two editions of Atkin's Court Forms Vol 18(1) Equitable Remedies, and previously edited Atkin's Vol 35, *Sale and Supply of Goods and Services*.

Paul has wide experience of commercial fraud, related economic torts and money laundering. he acted for the successful claimant in *Purrunsing* [2016] EWHC 789, [2016] 4 WLR 16 a landmark decision concerning a Dubai-based identity fraud. For many years he was the author of the Chancery Bar Association guidance on AML law and regulation, adopted by the Bar Council before it issued its own guidance. He has written on money laundering both for the professional press and the *Financial Times*.

He is regularly instructed in claims that concern shareholder rights (*Swain v Swain Plc*[2015] EWHC 660 (Ch) - a successful claim for unlawful means conspiracy to alter shareholder rights and breach of valuation mandate), directors' duties, claims for unfair prejudice and claims relating to company charges.

He is a long-standing member of the editorial board of the loose-leaf practitioners' encyclopaedia, *Butterworths Corporate Law Service* (Company Law).

Directory Quotes

For many years Paul has been ranked as a leading barrister (Commercial Dispute Resolution) by Chambers & Partners and a leading barrister (Commercial Litigation) in the Legal 500. Comments have included:

"Performs at a high level and is great at cross-examination." "He understands the law and he fights the client's corner." *Chambers and Partners 2019*

"Meticulous and decisive in preparing and presenting the case in court." *The Legal 500 2018*

"Highly capable and very good with clients." "He brings very good independent legal analysis, backed up with an evident willingness to understand every aspect of the client's situation." *Chambers & Partners 2018*

"A very bright and hardworking barrister with a good client manner." - *Legal 500 2017*

"A strong advocate and a very good lawyer." *Legal 500 2016*

"Capable and good with clients." *Chambers & Partners 2017*

"He really goes above and beyond..." *Chambers & Partners 2016*

"Praised for his strong analysis." *Legal 500 2015*

"He's a very thorough, dogged and determined lawyer who is both inventive and courageous." "He's very conscientious, his attention to detail is excellent, and he thinks outside the box." *Chambers & Partners 2015*

"A tough opponent in a difficult case" *Chambers & Partners 2014*

Practice areas

Commercial and Regulatory

Overview

Domestic and international business law, financial regulatory law, banking, commercial fraud including money laundering and company law.

The majority of Paul's work is in the High Court of Justice, usually in the Chancery Division, and in the Court of Appeal.

Expertise:

- Financial regulatory law and banking including mis-selling by regulated persons of financial products.
- Commercial licensing and leasing, including aircraft.
- International and domestic sales and carriage of goods.
- Economic torts (such as conspiracy), domestic and international commercial fraud and money laundering.
- Equitable doctrines and remedies including commercial secrets and confidentiality/ injunctions.
- EU and domestic competition law.
- Company law including shareholder rights and remedies, directors' duties and corporate governance.
- Related aspects of professional negligence.
- Public procurement.

Publications

English judges prefer bankers to nuns: changing ethics and the Plover bird

1st September 2019

Paul Marshall has published a new article in the Butterworths Journal of International Banking and Financial Law ([https://store.lexisnexis.co.uk/products/butterworths-journal-of-international-banking-and-financial-law-skuuksku02692694JIBL72080/details?](https://store.lexisnexis.co.uk/products/butterworths-journal-of-international-banking-and-financial-law-skuuksku02692694JIBL72080/details?gclid=Cj0KCQjwiILsBRCGARIsAHKQWLMIXTVxldopwFJJHHxb2xSINtQokrVXM9rx613gtmdYwzf6hNv7mKMaA)

[gclid=Cj0KCQjwiILsBRCGARIsAHKQWLMIXTVxldopwFJJHHxb2xSINtQokrVXM9rx613gtmdYwzf6hNv7mKMaA](https://store.lexisnexis.co.uk/products/butterworths-journal-of-international-banking-and-financial-law-skuuksku02692694JIBL72080/details?gclid=Cj0KCQjwiILsBRCGARIsAHKQWLMIXTVxldopwFJJHHxb2xSINtQokrVXM9rx613gtmdYwzf6hNv7mKMaA)
judges prefer bankers to nuns: changing ethics and the Plover bird (paywall).

In the article, he suggests financial institutions receive more favourable treatment by the English courts than the courts' treatment of ordinary litigants.

Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles

10th May 2018

Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles, Butterworths Journal of International Banking and Financial Law (LexisNexis) (2018) 5 JIBFL 282.

In this article ([/cmsAdmin/uploads/jibfl-may-2018-pag-marshall-\(2\).pdf](/cmsAdmin/uploads/jibfl-may-2018-pag-marshall-(2).pdf)), Paul considers the approach of the Court of Appeal in *Property Alliance Group Limited v The Royal Bank of Scotland* to the mis-selling claims made by PAG and the court's rejection of a duty of care owed by RBS.

Atkin's Encyclopaedia Of Court Forms in Civil Proceedings

1st April 2018

Paul has edited the chapter on 'Equitable Remedies', in *Atkin's Encyclopaedia Of Court Forms in Civil Proceedings* (<https://lexisweb.co.uk/guides/sources/atkin-s-court-forms>) 18(1), (2nd edn, Lexis Nexis, 2018).

Travels in unreality: hard cases for SMEs and the making of English financial law

1st October 2017

Travels in unreality: hard cases for SMEs and the making of English financial law, Butterworths Journal of International Banking and Financial Law (LexisNexis) (2017) 9 JIBFL 540.

In this article ([/cmsAdmin/uploads/\(2017\)-9-jibfl-540-travels-in-unreality-hard-cases-for-smes.pdf](/cmsAdmin/uploads/(2017)-9-jibfl-540-travels-in-unreality-hard-cases-for-smes.pdf)), Paul analyses the present unsatisfactory state of English law on swaps mis-selling.

16th November 2016

Paul Marshall (/barrister/paul-marshall/) has authored an article for Trust and Estates Law & Tax Journal in which he considers the case of *Purrusing v A'Court & Co and House Owners Conveyancing (2016)*. The case concerns relief from liability for breach of trust under the Trustee Act 1925.

Paul who acted for the claimant in the case notes that the decision represents an interesting, and salutary, instance of the interaction between regulatory law and the law of trusts.

Butterworths Corporate Law Service

1st September 2016

Member of the Editorial Board

Butterworths Atkin's Court Forms - Equitable Remedies

1st September 2016

[Forthcoming] Butterworths Atkin's Court Forms 'Equitable Remedies' (Editor).

Paul is editor of the current edition (Volume 18(1)).

Butterworths Journal of International Banking and Financial Law

1st September 2016

Paul regularly writes for the press and the legal journals including the Financial Times, Lloyd's Maritime and Commercial Law Quarterly, the Company Lawyer. He is regularly invited to contribute to Butterworths Journal of International Banking and Financial Law (JIBFL). Recent articles include:

- Fault Lines in English Financial Law, *Thornbridge Limited v Barclays Bank plc* [2015] EWHC 3430, [2016] 5 JIBFL 266.
- 'Humpty Dumpty is broken: unsuitable and inappropriate swaps transactions' [2014] 11 JIBFL 679 (Crestsign

v *Natwest and RBS* [2014] EWHC (Ch) 3043).

- 'Novating mis-sold swaps: the poverty of narrowly contractual analysis' [2015] 1 JIBFL 11 (*Bailey and Anr. v Barclays Bank plc* [2014] EWHC 2882).
- Interest rate swaps and the sale of the unknown (*Green and Rowley v RBS* [2013] EWCA Civ 1197).

A Practitioner's Guide to UK Money Laundering Law and Regulation

4th December 2015

(Sweet & Maxwell 3rd Ed 2015)

(Editor Ben Kingsley, Slaughter and May) Paul contributed the chapters on Civil Liability and the Application of AML Legislation to International Transactions.

Butterworths Atkin's Court Forms - Sale and Supply of Goods and Services

1st May 2010

(2010)

Volume 35, Editor.

Paul is author of the Chancery Bar Association Guidance on money laundering – guidance that was recommended by the Bar Council until it issued its own guidance in 2016.

Services

In November 2016, he spoke at the Professional Negligence Lawyers' Association annual conference on the Purrusing decision. In 2016 he spoke on money laundering and corporate transparency at the Midlands Annual Fraud Forum. In 2015 he spoke at a joint seminar of the International Committee of the Bar Council with the Deutscher Anwaltverein with its Arbeitsgemeinschaft Bank-und Kapitalmarktrecht on regulatory approaches to financial mis-selling in England and Germany. He regularly takes part in training seminars/webinars for solicitors.

Associations

- Commercial Bar Association (COMBAR)
- Chancery Bar Association (ChBA)
- International Bar Association (IBA)
- Member of the Chartered Institute of Arbitrators (MCI Arb.)



Notes: -

A series of horizontal dashed lines provided for taking notes.



Ivor Adair
Partner
Fox & Partners

“Claims against employment law practitioners”



Ivor Adair

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FOX

Fox & Partners
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London EC2N 2DL

Ivor has considerable experience of conducting litigation in both High Court disputes and significant employment tribunal matters, as well as experience in many other aspects of employment, partnership and data protection law.

He regularly advises on sensitive partner and employee exits from professional services firms and in the financial services sector. His deep understanding of the sector was bolstered in 2018 following a course focused on Financial Services and Markets Regulation. He has also acted for senior executives, NHS Chief Executives, medical professionals, professional music performers and sports professionals, including a number of high profile football coaches and managers. Ivor's experience includes disputes arising out of breach of contract, including in relation to remuneration (incentive arrangements, carried interest and good leaver/bad leaver provisions), restrictive covenants matters and in professional negligence claims against firms of solicitors in relation to their employment law advice. He has also advised in arbitration proceedings.

His work demands a detailed understanding of professional regulatory matters, data protection rights and workplace privacy issues. In 2018 he presented to the membership of the American Bar Association on UK data protection, the GDPR and privacy issues.

During Ivor's career he has represented claimants in high-value and complex whistle-blowing claims, discrimination claims (including a sexual orientation discrimination claim concerning the "outing" of an individual, appealed to the Court of Appeal), executive work stress claims (overwork and or bullying) and TUPE claims. A number of his cases have established legal precedents. He appeared for the group of musicians who, in a ground-breaking claim, sought an injunction to require the National Theatre to reengage them to play their instruments in the production of *War Horse* following their dismissal: *Ashworth & Ors v The Royal National Theatre* [2014] EWHC 1176. The case had significant legal implications and received considerable press coverage.

He gives clear and pragmatic advice and is known to be highly strategic in the conduct of litigation. Ivor also has a particular interest in legislative change affecting the workplace and sits on the Legislative and Policy Committee of Employment Lawyers Association.

Ivor qualified at Slater and Gordon lawyers in 2006. He joined Fox & Partners as a Partner in 2018 with over 12 years' experience in employment law. He is a qualified Solicitor-Advocate with Higher Rights of Audience (civil).

"very talented", "highly rated" and "recommended", (**Legal 500 – Employment: senior executives**).

"incredibly strategic and very bright, and he has very good attention to detail" (**Chambers – Employment**).

Professional negligence claims against employment practitioners

Ivor Adair
Fox & Partners
October 2019



1

The practice of employment law

- Context / vantage point from which the missteps can be understood.
- The burden of specialism.
- Time limits, differing triggers and different tests / hurdles for extensions.
- A single matter comprising variegated claims of varying complexity, merits and value.
- Working to tight deadlines in rapidly evolving matters with sketchy instructions. Proceed in haste, repent at leisure.



2

The practice of employment law

- Interaction with more specialist Counsel - deference risks / the positive duty to apply expertise.
- The seduction of uncapped claims.
- No costs shifting environment and costs versus benefits evaluations.
- Advising (or providing information to) vulnerable or highly emotional clients.
- Legal developments across statutory claims that have significance as to the construction of pleadings, strategy and tactics (cf. the effect of *Timis v Osipov* and *NHS Manchester v Fecitt and others*).



3

The practice of employment law

- Contemporary, partnership, arbitration, alternative remedy or business protection issues can arise, though most employment practitioners are statutory claim specialists.
- Personal injury stress, overwork or bullying cases, often have discrimination and or harassment aspects (time limit issues, absence of requirement to establish foreseeability).
- Psychological impediments / cognitive biases, particularly in whistleblowing claims.
- The client who argues that he might have had a more favourable outcome if the matter had been litigated.
- Negotiating settlement agreements – failure to identify claims - #MeToo issues and gagging clauses.



4

Agouman v Leigh Day

- Guidance on the particular standard to be applied to a specialist, relevance of the sophistication of client and context.
- Facts:
- LD acted for 30,000 nationals and residents of the Ivory Coast in a claim for damages arising from a discharge of chemical waste.
- Mr Day, described his role as "supervisory" with no direct involvement on a day to day basis.
- In view of the possibility of settlement, LD set up "Team Payments" comprising two paralegals to analyse the difficulties involved in distribution any settlement sum.



5

Agouman v Leigh Day

- Litigation was settled in September 2009. Over 9,000 of the claimants were children. McDuff J approved the settlement on behalf of the children and other protected claimants, including payment to an Ivorian bank.
- Disputes arose between LD and local representatives of the claimants.
- In early 2010, LD entered into agreements, the result of which was that around 23,000 of the claimants were paid their share of the settlement sum, but the balance was transferred to another account and 6,624 received nothing.
- Not disputed that LD was under a duty to exercise reasonable skill and care to make safe arrangements for receiving the settlement sum, for safeguarding it pending distribution and for distributing it to the proper recipients.



6

Agouman v Leigh Day

- Smith J considered that the paralegals who formed "Team Payment" did not have the necessary knowledge or experience for the task of identifying a secure and efficient payment system. The job was "too important to be left to two inexperienced paralegals".
- As regards the standard against which LD should be judged, Smith J held this should be the standard of a reasonably competent firm of solicitors with a department specialising in group litigation for unsophisticated clients arising from events in poor and unstable countries.
- Smith J acknowledged that the test of whether LD fell short of that standard was to judge it by what a respectable body of practitioners would regard as competence but did not find it an easy test to apply.
- Interesting as although the negligence claim did not relate directly to legal advice given by LD or its conduct of the litigation, the court held that the firm was negligent.



7

Framing the special professional skill

- *Eckersley v. Binnie & Partners* per Bingham L.J., "The law requires of a professional man that he live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skill".
- See *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP (formerly SJ Berwin LLP)* at first instance. The relevant standard of skill and care was that of the specialist employment lawyer willing to do work relating to the matters arising when a corporate client was contemplating ending the employment of a chief executive.
- See *Wright v Lewis Silkin LLP* at first instance. The relevant specialisation was employment law, including multi-national, cross-border work.



8

Wright v Lewis Silkin LLP

- C was approached to run a vast sports project in India. LS was instructed to draft an employment contract for C. A "Heads of Terms" document for C, which provided that in the event of termination of C's employment, C would receive a severance payment of £10 million. The employer's parent company guaranteed the obligation.
- The terms were expressly governed by English law, but the question of jurisdiction was left open.
- C was dismissed and the Company refused to pay the severance. He claimed for damages in England. The Company challenged the courts jurisdiction and it was 3 years before he was awarded a judgment of £10.3 million. C made several attempts to enforce the judgment in India, with no success.



9

Wright v Lewis Silkin LLP

- C claimed LS was negligent in failing to advise on securing effective means of enforcement and on failing to advise on or include an exclusive jurisdiction clause with explicit provision for service of proceedings in the UK.
- At first instance the judge found:
- LS not at fault in failing to advise in advance for means of enforcement.
- LS had not advised about the inclusion of a jurisdiction clause. That was a breach of duty. As a result the Claimant had been under a misapprehension that the choice of law clause carried with it a choice of jurisdiction (they are distinct issues).
- Had the contract contained an exclusive jurisdiction clause, the Claimant's litigation against the company would have proceeded more smoothly and he would have had a 20% chance of recovering the severance payment, if necessary because the companies would have been shamed in leaving a London judgment unsatisfied. Awarded £2m in damages plus £40k in wasted costs.



10

Wright v Lewis Silkin LLP

- LS appealed on several grounds including:
- Even if the Heads of Terms had contained an exclusive jurisdiction clause, there was no realistic chance of the respondent making any recovery.
- The respondent's loss of a 20% chance of recovering the severance payment was too remote and/or outside the scope of the duty which the solicitors owed in relation to the jurisdiction issue.



11

Wright v Lewis Silkin LLP

- The CoA applied its decision in *Wellesley Partners LLP v Withers LLP* - in cases of concurrent liability in contract and in tort, the narrower test of remoteness of damage applicable in contract applies.
- Accordingly, LS only liable for damage resulting from their breach if, at the time of making the contract, a reasonable person in LS's position would have had damage of that kind in mind as not unlikely to result from the omission of an exclusive English jurisdiction clause.
- When the contract was entered into, the employer was a substantial business with valuable assets. C and LS could not reasonably contemplate that within a few years it would fall into financial difficulties and would be unable to meet its debts, including meeting a foreign judgment.
- Query whether the result would have been different had the test of remoteness in tort applied? Arguably yes, because in tort, possible, even if unlikely, losses may be recovered.



12

Chweidan v Mischcon De Reya Solicitors

- C sold hedge funds. He instructed MdR in relation to claims against his employer for unfair dismissal and discrimination in relation to his redundancy and underpaid bonus.
- After disclosure MdR sought an amendment to the claims to include claims of a failure to make reasonable adjustments. The application was refused, but the tribunal found in favour of C in his unfair dismissal and unlawful direct disability discrimination claims. Claims of unlawful direct and indirect age discrimination and disability-related discrimination were unsuccessful.
- The Employer appealed and the unlawful discrimination findings were overturned. MdR failed to lodge a cross-appeal in relation to the age discrimination claim in time and admitted breach in relation to that.



13

Chweidan v Mischcon De Reya

- Ultimately C was awarded a capped claim of £68,000, but had a costs bill that exceeded that sum.
- C alleged that MdR was in breach of duty and/or contract for failing to advise on the possibility of a claim that the employer had failed to make reasonable adjustments and that the cross-appeal to the EAT, had more than a minimal prospect of success in any remitted claim.



14

Chweidan v Mischcon De Reya

- As to the reasonable adjustments claim:
- Nothing in C's initial instructions to suggest that he was put at a substantial disadvantage by a practice that the employer ought to have adjusted for him as a disabled person.
- Information concerning the criteria relevant to redundancy selection and bonus assessment was not available prior to issuing proceedings.
- Only upon disclosure and the exchange of witness statements did a claim based on a failure to make reasonable adjustments emerge with any clarity.
- MdR was entitled to assume that C's instructions were correct until something occurred that would indicate to a prudent solicitor that further enquiries should be made.
- When that occurred it was acted upon promptly and appropriately, albeit it was by then too late.



15

Chweidan v Mischcon De Reya

- As to the cross appeal, held although the chances of success were limited, there was more than a negligible prospect of C succeeding on appeal and, having done so, proving his unlawful age discrimination claims.
- Damages were awarded for the lost opportunity.
- An unusual feature of the case was that there was a remedies hearing in respect of unlawful disability discrimination, initially found substantiated. Held that decision provided the best indication available of the probable value of the unlawful age discrimination claim.
- The principles applicable when assessing loss of chance were explained as follows.



16

Chweidan v Mischcon De Reya

- The claimant must prove that the underlying claim has a real and substantial prospect of success.
- If it has, the court will evaluate that prospect, making a realistic assessment of what would have been the claimant's prospects of success had the original litigation proceeded.
- The court should assess the likely level of damages which the claimant would most probably have recovered in the underlying action and discount that sum to reflect the uncertainties of recovering it.
- In some loss of a chance cases it may be appropriate to view the prospects on a fairly broad brush basis while in other cases it may be correct to look at the prospects in greater detail.
- The availability of oral and documentary evidence and the possibility of settlement also had to be factored in.
- Where there were "separate hurdles" to overcome, the percentage prospects on each should be multiplied together to give an overall lower percentage prospect of success.
- The judge assessed C's chance of succeeding in his underlying claim at 18%. Accordingly damages were quantified at 18% of the figure which had been assessed at a previous remedies hearing. A net award of c £66k.



17

Commodities Research Unit International (Holdings) Ltd & Ors v QSP Residual Recoveries LLP

- CRU brought proceedings for professional negligence against solicitors in relation to the termination of the employment of their CEO.
- CEO's express terms made up of 3 main contractual documents. A statement of terms, an addendum which related to LTIP (the drafting of which was described as a pigs' ear) and general conditions of service which were incorporated by reference, and contained a PILON clause.
- The LTIP provided for a payment to the CEO of a percentage of the sales proceeds, if it was sold for £11 million or more.
- It was agreed that the LTIP would not apply if his employment terminated, but this was later forgotten.
- Solicitors were not shown the general conditions of service so were not aware of the PILON.
- C compromised a claim with the CEO for £1,350,000 by a settlement agreement.



18

Commodities Research Unit International (Holdings) Ltd & Ors v QSP
Residual Recoveries LLP

- Main line of attack was the solicitors had been employed to advise on the meaning of the LTIP clause; that in order to give that advice they should have asked for further documents made at the time of the making of the LTIP; that if they had done so it would have been discovered that the CEO had no entitlement under the LTIP and litigation would have been avoided.
- At first instance it was found, the defendants had not been instructed to advise on the interpretation of the LTIP or whether it would remain in force after the termination of employment.
- However, there was a breach of duty in failing to request sight of, the general conditions of service which would have identified the PILON. Had correct non-negligent advice been given on the vesting of the final 25 per cent of the LTIP (the effect of the PILON), the CEO would not have been offered the final 25 per cent of the LTIP in the settlement.
- NB: unchallenged expert evidence from a specialist employment law expert, Julian Roskill.
- The judge ordered D to pay C £118,125 in damages and 40% of C's costs.



19

Commodities Research Unit International (Holdings) Ltd & Ors v QSP
Residual Recoveries LLP

- Both parties appealed. One of C's grounds focussed on a submission in terms if the Firm had asked for the whole file in relation to the former CEO, this would have showed the CEO would have no entitlement under the LTIP if he left the group before his rights were triggered by a sale of the group.
- In dismissing applications for permission to appeal CoA noted the Firm was instructed at very short notice, the solicitors only received the papers put together by the client on the morning of the meeting, and there was no prior indication of any precise topics on which her advice was sought. Since that the question of the LTIP was put to one side, there was no reason for the Solicitor to advise at that stage that further steps needed to be taken to investigate the full terms of the former CEO's employment.



20

Reflections

- Negligence claim outcomes in the employment law context tend towards modest awards on a loss of chance basis, with the result that the economics do not favour the victim of bungled litigation (see *Chweidan v Miscon De Reya* - high value claims can result in modest awards).
- The evaluation of substantial disclosure and proportionality of costs risks are a deterrent.
- Securing ATE in these claims can be a challenge.
- Reputational concerns remain a significant lever in resolving claims.
- There are likely to be claims against those who: miss time limits or negligently advise to include uncapped claims in unfair dismissal or other claims, or fail to have regard to legal developments in a very fast moving area of practice, or fail to advise adequately on the costs versus benefits of the available paths.



21

- Timis v Osipov [2018] EWCA Civ 2321
- NHS Manchester v Fecitt and others [2012] IRLR 64
- Agouman v Leigh Day [2016] EWHC 1324 (QB)
- Wright v Lewis Silkin LLP [2016] EWCA Civ 1308
- Eckersley v. Binnie & Partners (1998) 18 Con. L.R.
- Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146
- Chweidan v Mischcon De Reya Solicitors [2014] EWHC 2685 (QB)
- Commodities Research Unit International (Holdings) Ltd & Ors v QSP Residual Recoveries LLP [2017] EWCA Civ 1197



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"An unbelievably good advocate for his level of call, who is meticulous in his preparation and completely dedicated to the case."
- Chambers & Partners 2019

Tom Shepherd specialises in Commercial Litigation, including Professional Liability disputes, Civil Fraud, Company, Insolvency and Financial Services. Tom's qualities have been consistently recognised in the legal directories:

- **A relentless will to win:** *"combines a ferocious appetite for work with a really very sharp legal mind"; "a will to win in every case, however tricky"; "meticulous in his preparation and completely dedicated to the case"*
- **First-rate advocacy:** *"an unbelievably good advocate for his level of call"; "very punchy"; "a very tenacious and skilful advocate"; "aggressive when he needs to be and sensible in his deliveries in court"*
- **In-depth legal analysis:** *"extremely good on the law"; "rigorously thorough and responsive"; "very detailed in his approach"; "very authoritative"; "always keeps a commercial outlook and has very strong tactical judgement"*
- **A modern approach:** *"very personable"; "very user-friendly and good at staying in touch and being practical"; "very strong on his feet and has a good client manner"; "a pleasure to work with"*

Tom has recently acted in significant, high-value litigation as part of larger legal teams, both at first instance and in the Court of Appeal. He also appears in his own right in the High Court and County Court as well as before professional regulatory panels. He has extensive experience of trial advocacy, including the cross-examination of a variety of witnesses, and as a sole advocate his opponents frequently include more senior practitioners. Tom was appointed as Junior Counsel to the Crown (Attorney General's B Panel) in June 2016.

Further details of Tom's practice areas can be found via the links at the bottom of this page. Recent highlights include:

- *Willers v Joyce* [2018] EWHC 3424 (Ch): acting for the successful defendants in the first case in English legal history of alleged malicious prosecution of civil proceedings since the recognition of the tort by the Supreme Court [2016] UKSC 43. Five-week Chancery Division trial before Rose J. Extensive trial preparation and conducting cross-examination of factual and expert witnesses. Click [here](#) for a case note. Led by **Paul Mitchell QC**.
- *Rollerteam Ltd v Riley* [2018] EWHC 1065 (Ch): claim against shadow director for alleged misappropriation of gate receipts of the Sherlock Holmes Museum and dispute arising out of settlement agreement. Tom acted on various successful interim

applications relating to the release of monies held in escrow and the sale of a substantial property under the settlement agreement, before appearing at the trial/inquiry at which the applicants' claims succeeded in full. Led by **Neil Hext QC**.

- *Celsa v Benson & ors* (2018): representing one of seven defendants to a claim by the UK's largest steel manufacturer for unlawful means conspiracy arising out of the alleged misappropriation of hundreds of tonnes of by-products from the steel manufacturing process at a plant in South Wales. Settled on confidential terms.
- *Re: a Championship football club* (2018): acting for the claimant private investment fund on an action against solicitors arising out of the alleged negligent advice and drafting of certain transactional and security documentation for a £6m loan in connection with the proposed refinancing of a Championship football club.
- *Re: a Debt Management Company* (2017): successfully representing a substantial commercial debt management company on an application before the Regulatory Decisions Committee of the FCA for permission to carry out regulated activities. Tom was involved at all stages of the proceedings, which resulted in only the second such successful application at the time and a complete change of approach by the FCA to future applications.

Privacy Policy

Click here for a **Privacy Policy** for Tom Shepherd.

Areas of Expertise

Commercial Dispute Resolution

Tom is ranked as a leading junior by Chambers and Partners in the field of Chancery: Commercial (2019): *"An unbelievably good advocate for his level of call, who is meticulous in his preparation and completely dedicated to the case"*. *"He is very punchy as an advocate and very hard-working"*.

Tom's practice covers all aspects of commercial and corporate litigation. His practice draws on his experience in the fields of insolvency and company law, professional liability, civil fraud and banking / financial services. He has recently acted as junior counsel in several high-value pieces of litigation but also has considerable experience of trial advocacy on his own account.

Key cases include:

- *Willers v Joyce* [2018] (judgment awaited): representing the defendants in the first case in English legal history of alleged malicious prosecution of civil proceedings since the recognition of the tort by the Supreme Court [2016] UKSC 43. Five-week Chancery Division trial before Rose J. Extensive trial preparation and conducting cross-examination of factual and expert witnesses. Led by **Paul Mitchell QC**.
- *Rollerteam Ltd v Riley* [2018] EWHC 1065 (Ch): claim against shadow director for alleged misappropriation of gate receipts of the Sherlock Holmes Museum and dispute arising out of settlement agreement. Tom acted on various successful interim applications relating to the release of monies held in escrow and the sale of a substantial property under the settlement agreement, before appearing at the trial / inquiry at which the applicants' claims succeeded in full. Led by **Neil Hext QC**.
- *Breckons & Ors v Powerscourt Services Ltd & Ors* [2015] EWHC 1330 (Ch): acting for the defendants to a claim alleging fraud and deceit in relation to an investment in farmland in Argentina. Successfully applying to strike out the claim and discharge a freezing order on the ground of material non-disclosure.
- *Sharma v Sharma* [2014] BCC 73, [2013] EWCA Civ 1287: successfully representing the Respondent in the Court of Appeal, subsequent to a two-week High Court trial [2012] EWHC 2529 (Fam) relating to the ownership of a multi-million-pound dental business and associated allegation of breach of fiduciary duty and diversion of corporate opportunities.
- A dispute between family members arising out of a property development business, dating back to the early 1990s. Successful strike-out of key parts of defence and resisting appeal against the same. Numerous successful applications for interim payments ahead of trial to be listed in 2019.
- A dispute between members of a substantial property consortium with a portfolio worth in excess of £20m, involving

difficult issues of expert valuation evidence. Led by **David Halpern QC**.

- Acting for a reseller of telecommunications services in a substantial breach of contract claim (worth c.£6m) for failure to pay sums due in respect of the purchase of a large customer base and consequential losses. Led by **Neil Hext QC**.
- Successful pursuit of injunctive proceedings for a R&D tax specialist which had launched the first ever UK Championship of 'Brit Pong' – the UK version of Beer Pong – against the marketing company it had instructed to promote the event.
- A substantial partnership dispute relating to a waste oil collection and sale business. Obtained judgment subsequent to five-day trial and taking of an account, including the cross-examination of forensic accountants.
- Successfully defending a claim brought under a personal guarantee by a commercial money lender. Three-day trial involving expert handwriting evidence, the proper construction of the document under question and penalty clauses.
- Acting for a well-known high street retail pawnbroker and loan provider in a dispute arising out of a series of franchise agreements.
- Successfully defending a claim brought by a well-known bloodstock auctioneer relating to the sale of a racehorse (instructed as sole counsel). Three-day multi-track trial involving multiple claims and defendants.
- A claim brought by a well-known classic car dealer in relation to the alleged sale of a Porsche 911 1973 RSR. Three-day multi-track trial.
- A claim by a former partner against a major accounting firm for misrepresentation and negligent misstatement. Issues involved the proper construction of an LLP Deed and whether the claim was barred by the rule in *Henderson v Henderson*.
- Acting for the former agent of a well-known professional footballer in a \$2.5 million claim relating to the exploitation of the player's image rights and connected claims for inducing breach of contract and conspiracy.
- Advising a major software developer in relation to a dispute arising out of a multi-billion-pound government contract. Settled under confidential terms.

Corporate Insolvency

Tom is ranked as a leading junior in the directories:

- Legal 500: Insolvency (2019): "*A very tenacious and skilful advocate but also extremely good on the law*".
- Chambers and Partners: Restructuring/Insolvency (2019): "*Tom is rigorously thorough and responsive, while he also always keeps a commercial outlook and has very strong tactical judgement*". "*He is very strong on his feet and has a good client manner. He is aggressive when he needs to be and sensible in his deliveries in court*".

Tom is frequently instructed in high-value, contentious insolvency matters, often with elements of fraud. Tom has appeared before the Court of Appeal (as sole counsel) and in numerous High Court trials and contested applications. Tom has experience of dealing with a wide range of corporate insolvency matters, including winding-up petitions, administrations, CVAs, injunctions to restrain presentation and advertisement of winding-up petitions, validation orders, and disputes involving transactions at an undervalue and preferences. He has particular expertise of cases involving cross-border fraud and acting in defence of claims against insolvency practitioners. Tom is happy to consider acting on a Conditional Fee Agreement, where appropriate.

Tom was appointed as Junior Counsel to the Crown (Attorney General's B Panel) in June 2016 and has significant experience of acting for and against the Secretary of State in directors' disqualification proceedings.

A selection of his most significant cases:

- Acting for the respondent to a claim by liquidators relating to a property portfolio worth in excess of £4 million. The claim involved allegations of forgery (including expert documentary evidence relating to Deeds of Trust), alleged transactions at an undervalue and the enforceability of security obtained pursuant to related ongoing litigation in Nigeria (including whether the English Court could go behind orders obtained in the High Court, Plateau State).
- Acting for the former director of a company which specialised in the adaptation and film production of Shakespeare plays for children, in defence of claims for alleged misfeasance, transactions at an undervalue and preferences.
- Advising a commercial lender in relation to the enforceability of certain security documentation arising out of the takeover of a well-known professional football club.
- Acting on a hotly contested, urgent pre-pack administration application involving a manufacturer and retailer of luxury handmade mobile phones.
- Defending a claim against the former administrator of a company under para 75 of Sch B1 arising out of a pre-pack sale of

- assets and book debts at an alleged substantial undervalue.
- Representing the Secretary of State for Business, Energy and Industrial Strategy in director's disqualification proceedings subsequent to a £6m+ insolvency, arising out of the collapse of a plc which provided cash collection, counting, processing and banking services to a wide range of cash businesses.
 - Acting on an application to restrain presentation of a winding-up petition against a substantial telecoms company.
 - Advising the operating company of a major and well-known professional sports league in relation to certain prescribed consequences on the happening of an insolvency event.
 - Advising a landlord on a prospective challenge to a CVA involving issues of guarantee stripping and the provision of incomplete financial information at the meeting of creditors.
 - Acting for the liquidator in a successful claim to recover a yacht transferred by the company for nil consideration.
 - Acting for the liquidator on a successful transaction at an undervalue and misfeasance claim: fully contested multi-track trial.
 - *Blue Monkey Gaming Ltd v Hudson, Bushby & Bower* [2014] All ER (D) 222: successfully defending the joint administrators of a nationwide chain of amusement arcades against a multi-million-pound claim in conversion brought by a supplier of gaming machines. Two-week High Court trial.
 - *Bristol Alliance (No 1) Ltd & others v Bennett & Cadwallader* [2013] EWCA Civ 1626: an appeal to the Court of Appeal concerning the entitlement of various parties to funds in excess of £0.5 million held in escrow by a landlord.
 - Defending the director of a property services company against allegations of fraudulent and wrongful trading and breach of fiduciary duty arising out of the alleged wrongful declaration of dividends.
 - *Re Sidley Sports Club* (Registrar Derrett, unreported, 26 July 2013): obtained a winding-up order of a sports and social club pursuant to the Court's equitable jurisdiction. Advising the liquidator of a former development agency as to the status of certain funds and grants in excess of £3 million. Involved an alleged *Quistclose* trust and issues of tracing.

Personal Insolvency

Tom is ranked as a leading junior in the directories:

- Legal 500: Insolvency (2019): "A very tenacious and skilful advocate but also extremely good on the law".
- Chambers and Partners: Restructuring/Insolvency (2019): "Tom is rigorously thorough and responsive, while he also always keeps a commercial outlook and has very strong tactical judgement". "He is very strong on his feet and has a good client manner. He is aggressive when he needs to be and sensible in his deliveries in court".

Tom acts for and advises private individuals and insolvency practitioners on all aspects of the bankruptcy process and regularly appears before the Insolvency and Companies Court Judges. His experience includes applications to set aside statutory demands, claims for transaction avoidance, IVAs, rescission, annulment and associated applications.

A selection of his most significant cases:

- A three-day trial of a bankruptcy petition presented by HMRC involving a jurisdictional challenge under s.265 of the Insolvency Act 1986. Issues involved whether HMRC was entitled to obtain flight records under s.29 of the Data Protection Act 1998 and whether the respondent had carried on a business in the jurisdiction in the relevant period.
- Acting for the Trustee in Bankruptcy in proceedings involving the execution of bench warrants (at Heathrow airport, as the bankrupts sought to leave the jurisdiction) and subsequent conduct of three-day private examination. The upshot was the discovery of numerous assets and bank accounts in India.
- Representing a group of opposing creditors on a highly contentious and complex bankruptcy matter involving competing claims and issues of priority between three separate firms of solicitors in respect of unpaid legal fees. The case involved undertakings given in related proceedings in the Family Division and a jurisdictional challenge on the grounds of collateral purpose and improper motive.
- *Ariel v HMRC* [2016] EWHC 1674 (Ch): acting for a trustee in bankruptcy on an application under s.303 of the Insolvency Act 1986 relating to the service by HMRC of a third-party information notice under Sch 36 Finance Act 2008. This was the first time HMRC had served such a notice on an insolvency practitioner, notwithstanding that the power had existed for c.20 years.
- Acting for a group of opposing creditors (solicitors firms who were owed substantial fees) who objected to bankruptcy petition on the grounds of collateral purpose and improper motive. Confidential settlement achieved.
- Successful application to annul a 6-year-old bankruptcy order on the grounds of lack of capacity (owing to a long-term

chronic mental impairment, which included an irrational phobia of opening mail).

- *Chadwick v Burling* [2015] 3 Costs LR 589: acting for the successful trustee in bankruptcy on an appeal against an order for possession and sale of two properties, subsequent to an unsuccessful application for relief from sanctions by the respondent. Warren J held that the fact that the respondent was a litigant in person could be a relevant factor only at the margins of the third stage under *Denton*.
- Acting for a trustee in bankruptcy on a successful claim to recover a property and substantial transfers into an Egyptian bank account.
- Defending a claim by a trustee in bankruptcy in relation to the alleged sale at an undervalue of a property subsequent to a deed of settlement and related issues involving a property and funds held in Andorra.
- Acting for the respondent to a statutory demand for c.€49m issued by an Irish Bank.
- Obtaining an order for the disclosure and production of documents by a bankrupt, and a warrant for the bankrupt's arrest following non-compliance with the order.
- Acting for joint trustees appointed under an Insolvency Administration Order, in a claim to recover substantial sums paid as transactions at an undervalue.
- Acting for Heritable Bank plc (in administration) on an application to set aside a statutory demand for £1.3 million. Issues included a claim against the Bank for alleged interference with LPA receivers.
- *Sands & Treharne v Wright* [2010] BPIR 1437: defending an application by a trustee under s.284 IA for a declaration that payments made by a bankrupt were void.

Civil Fraud

Tom has vast experience of bringing and defending claims across the full spectrum of civil fraud: from highly sophisticated corporate/investment schemes and cross-border fraud in the context of a large-scale insolvency to the alleged misappropriation of hard cash (in an arcade gaming business) and physical assets (in the form of hundreds of tonnes of by-products from the steel manufacturing process at a plant in South Wales).

Tom has regularly obtained (and defended applications for) urgent freezing injunctions and search orders (including applications to discharge and vary such orders) and related interim measures.

His recent cases include:

- *Celsa v Benson & Ors*: representing one of seven defendants to a claim by the UK's largest steel manufacturer for unlawful means conspiracy arising out of the alleged misappropriation of hundreds of tonnes of by-products from the steel manufacturing process at a plant in South Wales. Settled on confidential terms.
- A substantial claim against a bloodstock agent arising out of the alleged payment of secret commissions, bribes and "luck money" subsequent to the purchase of racehorses.
- *Breckons & Ors v Powerscourt Services Ltd & Ors* [2015] EWHC 1330 (Ch): acting for the defendants to a claim alleging fraud and deceit in relation to an investment in farmland in Argentina. Successfully applying to strike out the claim and discharge a freezing order on the ground of material non-disclosure.
- A claim against an IFA and related parties for deceit, breach of trust and dishonest assistance arising out of the misappropriation of substantial funds paid into a series of offshore investment schemes/scams. Settled on confidential terms.
- *Zavgorodnya v Lever*: acting for a high net worth Ukrainian citizen in a claim to recover substantial sums misappropriated in connection with a residential construction project in Knightsbridge. Successful strike-out of Defence on Day 1 of High Court Trial.
- A claim for c.£5m arising out of the misappropriation of cash and assets in a substantial adult gaming centre business, dating back to the 1980s.
- Representing two defendants in a multi-party claim for c.£20 million involving allegations of deceit and unlawful means conspiracy arising out of the alleged unauthorised lending of substantial sums to a boutique hotel operator.
- Defending a former director of a tax advisory firm against allegations of fraudulent misappropriation of sums in excess of £5 million. The case involved issues relating to the scope of a proprietary freezing injunction and the interplay between confiscation and restitution orders obtained in the Crown Court.
- Defending a claim for fraudulent misrepresentation and for deceit arising out of the sale of an international logistics company.
- Represented a Kazakh-based defendant in a multi-million-pound fraud claim brought by a Kazakh Bank against seventeen



defendants.

Professional Liability

Tom is regularly instructed in claims for and against a wide range of professionals. He has experience of actions involving auditors, accountants, investment advisors, insolvency practitioners, solicitors and IT professionals.

Recent cases include:

- Defending a claim against solicitors arising out of the alleged negligent conduct of a substantial Chancery Division claim. Led by **Graeme McPherson QC**.
- Acting for the claimant private investment fund on an action against solicitors arising out of the alleged negligent advice and drafting of certain transactional and security documentation for a £6m loan in connection with the proposed refinancing of a Championship football club.
- Representing the claimants in a substantial action against solicitors, tax advisors and the operators of a high-risk tax mitigation/spread-betting scheme.
- Successfully defending a claim brought by an IT services company for services allegedly provided to a major IT company in Sweden, subsequent to a three-day trial. Trial judge remarked on his “*neat cross-examination*” of the Claimant’s key witness.
- A claim against solicitors subsequent to an Employment Tribunal claim for caste discrimination and victimisation against the claimant’s former employers.
- A claim against tax advisors and solicitors arising out of an unsuccessful stamp duty land tax mitigation scheme.
- Defending a claim against solicitors relating to the alleged failure to conduct searches that would have revealed the existence of a sewerage pipe beneath a residential property development site. Included difficult questions relating to contemporaneous file notes and the proper approach to valuation of the site in question.
- Acting on a claim against solicitors arising out of the failure to secure a new commercial lease pursuant to the 1954 Landlord and Tenant Act.
- A claim against the administrator of a series of pensions schemes arising out of the alleged negligent miscalculation of benefits and overpayment to scheme members. Led by **Graham Chapman QC**.
- Defending a claim against a provider of medico-legal services.
- A claim against a leading firm of IT consultants relating to a Payment Card Industry Data Security Standard audit of a company which provided online real-time booking facilities for the UK tourist industry.
- Defending a claim against solicitors in relation to the alleged negligent drafting of a share sale agreement and failure to comply with certain provisions of the Companies Act 1985.
- A claim against patent and trademark attorneys arising out of the alleged negligent provision of advice in connection with the manufacture of satellite equipment.
- Defending a claim against a firm of solicitors arising out of the fraudulent execution of a series of mortgage deeds.
- Acting for the liquidators of a company in relation to very substantial claims in negligence against former solicitors and auditors.

Banking and Finance

Tom frequently appears on behalf of major banks and financial institutions in relation to the enforcement of guarantees, loan agreements, hire purchase agreements, claims for possession and other applications. He also has substantial experience acting for and against the Financial Conduct Authority.

A selection of his most significant cases:

- *Re: a Debt Management Company* (2017): successfully representing a substantial commercial debt management company on an application before the Regulatory Decisions Committee of the FCA for permission to carry out regulated activities. Tom was involved at all stages of the proceedings, which resulted in only the second such successful application at the time and a complete change of approach by the FCA to future applications.
- Acting for a commercial lender in relation to the enforceability of certain security documentation arising out of the takeover of a well-known professional football club.

- Advising the assignee of a portfolio of commercial debt in relation to remedies following the breach of a settlement agreement and the enforceability of various guarantees.
- Acting for the FCA on a claim involving a purported forex trading company/scheme. Obtaining urgent freezing and other interim relief.
- *Financial Conduct Authority v Cavendish Moore Ltd & others*: acting for the FCA in a ‘land banking’ dispute involving over 500 investors in ten subject schemes.
- Defending a conspiracy claim for in excess of £10m brought by the administrators of a now defunct bank, against a senior partner of a well-known international wealth management group. Settled on confidential terms subsequent to the making of a strike out application.
- *Barclays Bank plc v Ball & Clarke*: an appeal concerning advice given by a leading firm of accountants, and statements allegedly made by an employee of a leading high street retail bank, in relation to the Enterprise Finance Guarantee Scheme.
- Advising a commercial bank on the enforceability of a series of cross-guarantees and other security valued in excess of £4 million.
- Acting as sole counsel for a leading high street retail bank in a mortgage dispute involving allegations of fraud, undue influence and misrepresentation.
- Defending a claim by a senior Nigerian barrister against a leading high street retail bank concerning allegations of fraud and breach of mandate. Successful settlement after two days cross-examining the claimant.

Chancery

Tom has considerable expertise in Chancery litigation and Chancery-related professional negligence claims.

Examples of his recent work in this area include:

- Defending a claim against the former administrator of a company under para 75 of Sch B1 arising out of a pre-pack sale of assets and book debts at an alleged substantial undervalue.
- A claim against the administrator of a series of pensions schemes arising out of the alleged negligent miscalculation of benefits and overpayment to scheme members.
- Advising the operating company of a major and well-known professional sports league in relation to certain prescribed consequences on the happening of an insolvency event.
- *Sharma v Sharma* [2014] BCC 73, [2013] EWCA Civ 1287: successfully representing the Respondent in the Court of Appeal, subsequent to a two-week High Court trial [2012] EWHC 2529 (Fam) relating to the ownership of a multi-million-pound dental business and associated allegations of breach of fiduciary duty and diversion of corporate opportunities.
- *Bristol Alliance (No 1) Ltd & others v Bennett & Cadwallader* [2013] EWCA Civ 1626: an appeal to the Court of Appeal concerning the entitlement of various parties to funds in excess of £0.5 million held in escrow by a landlord (2013).
- _____

Information Technology

Tom has experience of IT-related disputes (both as sole and junior counsel). Recent cases include:

- Acting for a reseller of telecommunication services in a substantial breach of contract claim (worth c.£6m) for failure to pay sums due in respect of the purchase of a large customer base and consequential losses.
- Successfully defending a claim brought by an IT services company for services allegedly provided to a major IT company in Sweden, subsequent to a three-day trial. Trial judge remarked on his “*neat cross-examination*” of the Claimant’s key witness.
- A claim against a leading firm of IT consultants relating to a Payment Card Industry Data Security Standard audit of a company which provided online real-time booking facilities for the UK tourist industry.
- Defending a claim by solicitors against an IT services company for alleged mis-selling of volume licences and loss/corruption of data.
- Defending a claim by an IT consultant in relation to the implementation of a well-known e-commerce software solution.
- Advising a major software developer in relation to a dispute arising out of a multi-billion-pound government contract. Settled under confidential terms.



Sports Law

4 New Square maintains a very strong Sports practice and continues to be widely recognised and regarded for offering expertise in the field of Sports law – both in the sub-specialities of sports disciplinary law and commercial sporting disputes. Tom is willing to consider instructions on a pro bono basis where appropriate.

Recent cases include:

- Defending a semi-professional rugby player in proceedings before the NADP relating to the alleged use of anabolic steroids (2017).
- Successfully defending a claim brought by a well-known bloodstock auctioneer relating to the sale of a racehorse (instructed as sole counsel). Three-day multi-track trial involving multiple claims and defendants (2015).
- Advising the operating company of a major and well-known professional sports league in relation to certain prescribed consequences on the happening of an insolvency event (2015).
- Acting for the former agent of a well-known professional footballer in a \$2.5 million claim relating to the exploitation of the player's image rights and connected claims for inducing breach of contract and conspiracy (2014).

Qualifications & Memberships

Tom is a member of the Young COMBAR Committee and a member of the Chancery Bar Association.

Tom read Law and French at Bristol University and graduated with First Class Honours in 2006. He then undertook the BCL at St Hugh's College, Oxford. During his undergraduate studies, he won the Stephenson Harwood prize for the best performance in Contract Law and also won the ESU National Mooting Competition and the University of Bristol Mooting Competition. He was awarded major scholarships by Lincoln's Inn and graded 'outstanding' on the Bar Vocational Course.



Claims against Insolvency Practitioners

PNLA
London Conference
9 October 2019

Tom Shepherd | 4 New Square

1

Key Principles

A brief overview

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“Insolvency Practitioner”

- Liquidator
- Provisional Liquidator
- Administrator
- Administrative Receiver
- Supervisor of CVA (nominee?)
- Trustee in Bankruptcy
- Supervisor of IVA (nominee?)
- Insolvency Administration Order

3

Duty

- Contract? Pre- vs Post-appointment?
- Tort?
- *Re Coniston Hotel* [2013] 2 BCLC 405: "Professional negligence proceedings for acts prior to the administration have as their objective the compensation of the claimant for personal losses caused by breach of a common law duty owed to him personally because of some retainer. The issues are very substantially different, and so is the procedure for their resolution".
- Statutory duties
- Liquidators: s.212 IA 1986: "has acted as liquidator... or administrative receiver of the company and... has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company"
- Administrators: para 75 Sch B1: "has breached a fiduciary or other duty in relation to the company, or... has been guilty of misfeasance"
- Trustees in bankruptcy: s.304: "that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in the carrying out of his functions"

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Breach

- Insolvency practitioners: the standard of skill and care
- *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760: "... An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner".
- A lack of funds?
- Reliance on legal advice?
- Sale of assets / business?
- Regulatory bodies / SIPs / "Dear IP" letters
- Expert evidence?
- *BA v Spencer* [2015] Pens. L.R. 519
- *Pantelli v Corporate City Developments* [2011] P.N.L.R. 12
- *Re Colt Telecom (No.2)* [2003] B.P.I.R. 324
- Exceptions?

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Causation and Loss

- Basic principles
- "But for" causation
- Remoteness
- Failure to advise / lost chances and insolvency
- *De Marco v Bulley Davey* [2006] P.N.L.R. 27
- Failure to investigate / bring proceedings?
- Undervalue sale of assets / business
- Equitable compensation / liability to account?
- IPs as fiduciaries; *AIB v Mark Redler & Co* [2015] A.C. 1503
- Restitutionary / disgorgement "damages"?

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Recent Developments

A selection of key cases

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Everyone's a crook / The never-ending story (1)

Re Coniston Hotel (Kent) LLP (In liquidation) [2015] EWCA Civ 1001

The Cast

- "The LLP": formed 6 September 2007; sole asset – a hotel development
- "The Members": Mr Bernsten and Mr Richardson
- "The Bank": NatWest Bank Plc (and in particular the GRG)
- "The JAs": insolvency advisors and subsequently joint administrators
- "KF": Knight Frank

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Everyone's a crook / The never-ending story (2)

The Facts

- The Bank loaned to the LLP c.£4.2m to fund the development.
- Hotel due to open in April 2010 but extended to mid-June.
- 3 June 2010 – the Bank withdraws support.
- The JAs are retained by the Members to assist/advise. Letter of engagement states that JAs undertaking primary duty of care to the Bank.
- KF engaged to value the hotel: £2.5-£3m in existing state, £3.75-£5m completed, £5.5m with established trading.
- The Bank commits no further funds.
- 22 June 2010 – the LLP enters administration. The JAs are appointed.
- JAs conclude insufficient funds to open and trade. Tenders for marketing of the hotel: KF appointed to sell.
- Bidding process – hotel sold to West Register for £4.25m.

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Everyone's a crook / The never-ending story (3)

The central allegations

- The Bank should not have withdrawn funds
- The JAs should have squeezed more money out of the Bank
- The Hotel could have been saved as a going concern
- Instead it was undervalued by KF & sold for too little to West Register (when it was really worth £7m)
- Everyone was in cahoots
- The Tomlinson Report
- There should be a trial – to “examine” the JAs’ conduct

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Everyone's a crook / The never-ending story (4)

Proceedings

- The Members commenced proceedings against the JAs on 1 August 2011 pursuant to paragraphs 74 & 75 of Sch B1 to the 1986 Act
- Round 1: strike out/summary judgment by Norris J - [2013] EWHC 93 (Ch)
- Round 2: summary judgment by Morgan J – [2014] EWHC 397 (Ch)
- Round 3: strike out/summary judgment by Morgan J - [2014] EWHC 1100 (Ch)
- Round 4: appeal refused by CofA [2015] EWCA Civ 1001
- Round 5: permission to appeal refused by SC

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Everyone's a crook / The never-ending story (5)

Key conclusions: Norris J

- Claims under paragraph 74
- Brought by reference to applicant’s standing as creditor or member
- Directed to regulating the conduct of the administration but that is not the limit
- Focus is on “unfair harm”; *“will ordinarily mean unequal or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of the administration”*
- Distinct from case centred on breach of fiduciary or other duty (which should be under para 75)
- Claims under paragraph 75
- “Misfeasance” is a reference to wrongdoing covered by s.212 of the 1986 Act
- *“Concerned with wrongful conduct of the administrator in relation to the company or the LLP, which can be pursued by an office holder a creditor or a contributory”*
- Relief is for the benefit of the LLP or company – not the applicant.
- Claim in respect of breach of duty pre-appointment fell outside the scope of paragraphs 74 and 75.
- A claim under paragraph 74 does not disappear simply because the LLP is no longer in administration.
- Claim allowed to proceed in modified form.
- Be very careful with allegations of fraud and dishonesty

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Everyone's a crook / The never-ending story (6)

Key conclusions: Morgan J v.1

- Analysis of the interaction between the claim against the Bank and the claim against the JAs
- Bank claim had been summarily dismissed by Master Leslie; Richard Salter QC (sitting as DHC) had dismissed appeal; and Briggs LJ refused application to appeal.
- Claim by the Members not the LLP – but central allegation that the Bank was obliged to fund the development.
- Determined that there was no obligation on the Bank to continue funding.
- Members were unable to show any new material to demonstrate that the decision was wrong.
- “Rescue Claim” summarily dismissed
- But the “Undervalue Claim” and the “Examination Claim” survive...

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Everyone's a crook / The never-ending story (7)

Key conclusions: Morgan J v.2

- The “Undervalue Claim” by now was fully(ish) pleaded as sale at an undervalue due to a conspiracy to defraud.
- Consideration of the Code of Conduct for the Bar r.C9, and *Medcalf v Mardell* [2003] 1 AC 120 re pleading of fraud.
- Key distinction between (a) alleging negligence in advice given / marketing process / handling of negotiations, and (b) alleging complete fraud / sham.
- No need to determine the extent of the authority given to the LLP.
- Lack of expert evidence on behalf of the Members.
- Lack of support in the documents on behalf of the Members (post-disclosure): clear marketing steps taken.
- Lack of reality in the claim: should not have been pleaded.
- The “Examination Claim”
- To fall within paragraph 75 there must be a breach of duty which has caused loss.
- For a particular applicant to bring a claim they must show they have “sufficient interest” in the relief sought.
- Once other claims had fallen away, the possible relief (fees repaid by the JAs) was less than the outstanding debt to the Bank -> the Members had no interest in the claim and so no standing.

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Everyone's a crook / The never-ending story (8)

Key conclusions: CofA (Arden, Longmore, Jackson LLJ)

- Appeal against both Morgan v.1 and v.2.
- Rescue Claim
- Alleged conflict of interest; and alternative sources of funds
- Conflict of interest fails to take into account Letter of Engagement: JAs authorised to disclose information.
- No reality in each or any of the alleged sources of funds.
- Undervalue Claim
- In the face of the marketing steps taken, conspiracy claim unrealistic.
- Examination Claim
- Any repayment would go to the Bank not the Members, so Morgan J correct to strike out.

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Everyone's a crook / The never-ending story (9)

Lessons

- Analyse relationship with claims against others (e.g. the Bank)
- Focus on the relief being sought
- Importance of pleadings even in Companies Court
- The care required when alleging fraud
- Have a proper evidential basis – and scrutinise the claimants' purported evidence
- Consider the different avenues for costs

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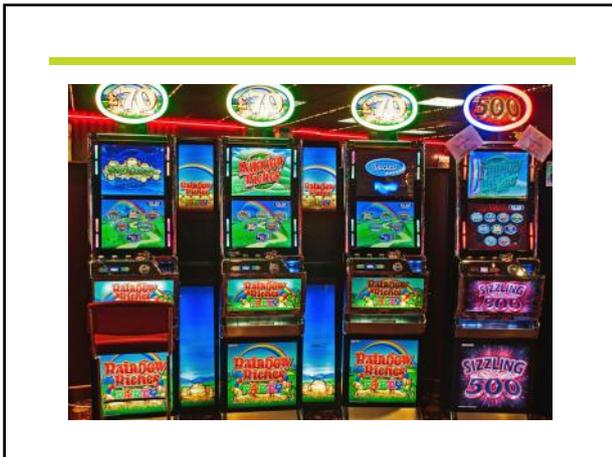
Fruit Machines, Blue Monkeys and ROT Claims (1)

- *Blue Monkey Gaming v Hudson & ors* [2014] All ER (D) 222
- Frankice (part of Agora Group): OpCo
- > 100 AGCs (M25 corridor)
- > 4000 gaming machines on site
- December 2009: Administrators appointed over Agora Group
- Agora Group owes Close (QFCH) c.£24m
- MDM: supplied gaming machines since 1995
- Dec 2009 (Administration): MDM claimed to be owed c.£4m for c.586 unpaid gaming machines supplied on ROT terms
- *“Terms strictly 30 days net. The legal ownership of goods herein is retained by the Seller until full and final settlement is made”*

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Fruit Machines, Blue Monkeys and ROT Claims (2)

- Dec 2009: MDM returns ROT Questionnaire:
- Attaches invoices (but inventory “not possible as yet”)
- “Our stock number is on every machine”
- “We have left the machines at the various sites to aid trade whilst Administration”
- Neither party takes steps to identify machines
- Admins (and MDM) negotiate with potential purchasers
- Trading administration: machines generate substantial profits
- July 2010: still no sale; MDM ‘demands’ return of machines
- Admins’ internal email: “He got quite upset, stressing we have had profit from these machines for some time. I said this was not our problem and that he should have secured a profit-share agreement in writing at the outset...we haven’t actually done too badly out of them”
- Dec 2010: Asset Sale Agreement

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Fruit Machines, Blue Monkeys and ROT Claims (3)

- June 2011: MDM sues admins for conversion
- Dec 2012: Blue Monkey on the scene (assignment)
- Dec 2013: trial of conversion claim
- June 2014: judgment of HHJ McCahill QC (sitting as HCJ):
- (1) MDM had consented to machines remaining in possession of Frankice to be used free of charge for duration of administration
 - Failure to apply for continued use as an expense under para 43(3)
 - Failure to apply under para 74 (unfair harm creditor’s interests)
 - MDM’s consent at the outset had continued throughout (at [541]-[543])
 - Compare *Game* (but no pre-existing rental agreement here)
- (2) MDM had never made a clear, genuine or unequivocal demand for delivery-up
- “For the avoidance of doubt, our client requires the return of its property supplied both pre-administration and post-administration and which property remains subject to our client’s rights of retention of title...”

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Fruit Machines, Blue Monkeys and ROT Claims (4)

- (3) Admins not obliged to identify MDM's property for it (merely to permit and supervise access)
- Admins had produced "desktop inventory"; BMG argued detailed inventory + identification
- Four Private Investment Funds v Lomas [2009] BCC 632, Blackburne J (at [47])
- HHJ McCahill in *Blue Monkey* (at [155] and [177])
- (4) Quantum: possible formulations:
- Compensation = loss to C = (i) Depreciation in market value (BMG's expert: £400k) or (ii) Loss of rental? (MDM had no licence, no loss)
- Wrotham Park = what C could have extracted from D / loss of opportunity to bargain (per Chadwick LJ in *WWF*)
- Restitutionary damages = how much would D have had to pay to use the converted goods ("user damages"). *Strand Electric*? Objectively assessed / market rate. Hypothetical profit share? (? MDM licence)
- Disgorgement damages = stripping of profits made by D as a result of wrongdoing. *AG v Blake*: "cynical and deliberate" breach may not be enough. Subjectively assessed based on what D made.

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Where Angels fear to tread... (1)

Re Angel House Developments Ltd [2018] Bus. L.R. 1903

The Cast

- AHDL: company incorporated 29 March 2007.
- Mrs Davey: sole shareholder and director of AHDL. Also owner of a number of other "Angel" companies.
- Dunbar Assets Plc: creditor and floating charge holder.
- JAs: joint administrators of AHDL.
- APAM: boutique firm of property managers and sales agents

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Where Angels fear to tread... (2)

The Facts

- AHDL purchased "Angel House" for £11m from Angel Heights Ltd in 2007.
- 4 September 2007 Dunbar loan £16m secured by fixed and floating charges.
- Planning applications made: unsuccessful/unpursued.
- 30 June 2012: loan expired.
- 31 August 2012: further planning application.
- 12 October 2012: various "Angels" go into administration.
- 10 December 2012: Savills provide valuation report - £6m w/o pp; £8m with 2012 application.
- 27 December 2012: JAs appointed as joint administrators.
- Lack of co-operation from JD.
- APAM instructed to manage and subsequently market Angel House.
- 2012 application not funded by Dunbar and allowed to lapse.
- Failed attempt at a funded rescue by various "characters".
- December 2013 "Angel House" sold for £17.05m to Cubitt.

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Where Angels fear to tread... (3)

The key allegations (against the JAs)

- JAs acted in breach from the outset in their approach to the administration (and in particular (a) lack of consultation with JD regarding objectives of admin, (b) reliance on Savills' report, and (c) assisting Dunbar)
- JAs should not have appointed APAM (in particular (a) without a beauty parade, (b) as it was not independent, (c) as it was not competent, and (d) its terms were too generous)
- JAs failed to obtain a proper price for Angel House (in particular (a) allowing the planning to lapse, (b) inadequate agent, (c) inadequate marketing, and (d) unrealistic timescales)
- JAs acted in breach in failing to explore and pursue a funded rescue
- JAs acted in breach in failing to exercise independent judgment
- These were breaches of fiduciary duty

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Where Angels fear to tread... (4)

Legal issue (1): the hierarchy of statutory objectives

- See paragraph 3 of Sch B1 to the 1986 Act.
- Obj 1: rescuing the company as a going concern,
- Obj 2: achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration),
- Obj 3: realising property in order to make a distribution to one or more secured or preferential creditors.
- Hierarchy from Objectives 1 to 3 (subject to a point that Obj 2 is to be followed where it is to the benefit of creditors as a whole).
- Two preconditions to select Objective 3: the administrator
 - (a) thinks that it is not reasonably practicable to achieve either Obj 1 or 2 and
 - (b) does not unnecessarily harm the interests of the creditors of the company as a whole
- Snowden J:
 - JAs not required to consult with directors/shareholders re: objectives
 - Parliament had afforded a degree of latitude to JAs (beware of hindsight)
 - Decision not to go for Obj 1 only open to challenge if made in bad faith or was clearly perverse

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Where Angels fear to tread... (5)

Legal issue (2): duties when pursuing Objective 3 (sale)

- Administrators are agents of the co (see para 69 of Sch B1) and so fiduciaries. But what is the content of their duty as fiduciaries?
- JD's position: quasi-trustees and owe duties to:
 - Sell "under every possible advantage" to the beneficiaries
 - Secure "a proper competition" to obtain the best price
 - Investigate higher offers even at a late stage
 - Not to advance the interests of one party at the expense of any other
 - Burden on fiduciary to justify the sale
 - Fiduciary bears personal liability for loss
- Snowden J:
 - Duty owed to co "to take reasonable care to obtain the best price which the circumstances of the case permit" (*Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410 ; *Re Charnley Davies Ltd*)
 - JAs did not owe the heightened duties of a trustee selling trust property.

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Where Angels fear to tread... (6)

Legal issue (3): reliance on professionals

- Relevant factual background: APAM had been suggested by Dunbar and provided advice directly to Dunbar.
- JD's position: JAs' acted in breach of duty in relying on APAM
- Trustees may be liable for breach of trust even though they have followed professional advice if their decision, judged objectively, is "unreasonable" (and in that sense beyond their powers) and detrimental to the trust (*Pitt v Holt* [2013] AC 108 AC at [78])
- Analogy with trustees investing money on mortgage who instruct agents suggested by the mortgagors (*Fry v Tapson* (1884) 28 Ch.D. 268, *Shaw v Cates* [1909] 1 Ch 389 etc).
- Snowden J:
 - JAs were at liberty to consult with creditors in order to ascertain their views
 - The selection of APAM at the bank's instigation was not, of itself inappropriate
 - JAs had reasonably concluded that APAM could provide the necessary independent marketing and sales advice
 - Claim therefore dismissed

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Q&A

Chair's closing remarks