PNLA
Professional Negligence Lawyers Association

Bristol Conference

Wednesday 5th February 2020

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PNLA Introduction

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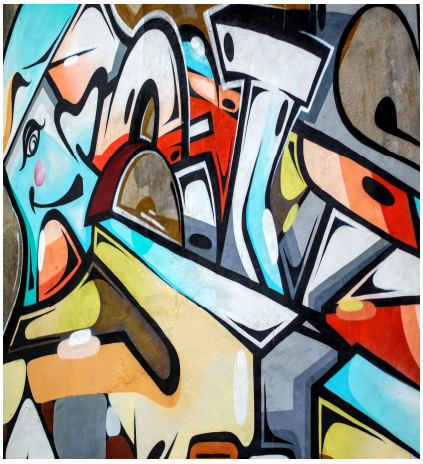

"lux legis viam monstrat"

The light of the law shows the way?

Professional negligence and liability practitioners will find this conference an essential update taking account of the legal developments and general trends and issues arising in dispute resolution in this sector and more. The speakers are drawn from a diversity of backgrounds whilst all offering the benefit of many years of experience to share with us.

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THREE SECTIONS

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Information for individuals and businesses with claims looking for assistance

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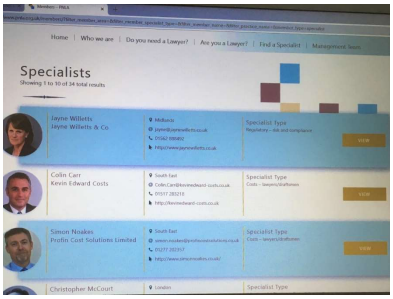

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William Flenley QC
Hailsham Chambers

‘Chairman’s Address
- 2019 The Year in Damages’

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2019 – The Year in Damages

William Flenley QC

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- "the assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions."
- Lord Briggs JSC in *Perry v Raleys*

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Topics

- Loss of a chance in the Supreme Court
- *Saamco* after the Court of Appeal in *Manchester Building Society*
- Contributory negligence in professional negligence claims

Loss of a Chance

- *Perry v Raleys* approves *Allied Maples*
  - *What the claimant would have done:* balance of probabilities
  - *What third parties would have done:* loss of a chance assessment, percentages

In what type of case is Loss of a Chance applied?

- Negligent conduct of litigation (or quasi-litigation)
- Negligence re client entering into a transaction
  - Lost opportunity to enter into a transaction with a specific third party
  - Lost opportunity to make profits in general ?

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Problematic Issues

- Is the loss of a chance doctrine applied in cases where the third party gives evidence at the professional negligence trial?
- How to assess multiple contingencies

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Loss of a Chance: assessing what the claimant would have done

- Balance of probabilities
- Burden of proof on claimant
- Full rigour of cross-examination at p.n.trial
- Lost litigation: would the claim have been an honest claim?
- What the claimant would have done at a notional trial

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Evidence which would not have been available at the notional trial

- *Edwards* and the missed opportunity
- Issue as to whether the claimant's claim would have been honest (see previous slide)

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Manchester Building Society (CA) (1)

' (1) It is first necessary to consider whether it is an "advice" case or an "information" case…

(2) It will be an "advice" case if it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction", that "his duty is to consider all relevant matters and not only specific matters in the decision" and that he is "responsible for guiding the whole decision-making process".

(3) If it is an "advice" case, then the negligent adviser will have assumed responsibility for the decision to enter the transaction and will be responsible for all the foreseeable financial consequences of entering into the transaction.

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Manchester Building Society (CA) (2)

(4) If it is not an "advice" case, then it is an "information" case and responsibility will not have been assumed for the decision to enter the transaction.

(5) If it is an "information" case, the negligent adviser/information provider will only be responsible for the foreseeable financial consequences of the advice and/or information being wrong.

(6) This involves a consideration of what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable.'

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- The difference between 'advice' cases and 'information' cases
- Is there a further *Saamco* filter on damages in some cases?

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Contributory negligence in professional negligence claims

- Claims where it is alleged that the client failed to detect an error of the defendant professional
- Claims where the alleged contributory negligence fell within the province of the claimant, eg lenders and businessmen

John Virgo
Guildhall Chambers

'SIPPs – The Berkeley Burke Saga'

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SINGLE ASSET SIPPS PROVIDER LIABILITY AND THE BERKELEY BURKE SAGA

John Virgo

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Outline of talk

1. Typical scenario?
2. Key Issues?
3. Current litigation landscape?
4. Main bases of claim?
5. Additional bases of claim?
6. Limitation Act issues?
7. Quantum?

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Typical scenario

- C has a modest pension fund invested in a PPP or OPS
- C contacted by unregulated introducer and recommended to transfer fund to a SIPP so as to access a high performing investment (sic)
- SIPP provider accepts the transfer and makes the investment through the SIPP envelope
- The investment fails
- Introducer pockets commission paid by investment provider
- SIPP administrator earns fees from SIPP

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Key Issues?

- Unregulated introducer is uninsured and not worth suing
- SIPP operator is regulated but has no duty to advise on the suitability of the SIPP or the "wrapped" investment
- As an "execution only" provider what duties does the SIPP operator owe to its customer?

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Current landscape

1 *Adams v Carey Pensions UK LLP*

2 *Berkeley Burke SIPP Administration*

(a) [2017] EWHC 2396

Teare J – FOS and JR

(b) [2017] EWHC 3108

HHJ Russen QC GLO – default judgment 25 July 2019

(c) [2018] EWHC 2878 (Admin)

Appeal – mid October 2019?

3 *Liberty SIPP*

Managed action for trial later this year

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Berkeley Burke and Due Diligence duty?

- Factual background conformed to typical scenario
- Mr Charlton persuaded by unregulated introducer to transfer his PPP fund of c£24k to BB to invest in japtropha trees in Cambodia offered by Sustainable AgroEnergy plc which was operating a fraudulent scam
- Investment made in September 2011 and lost by February 2012
- So began C's heroic quest to recover his losses…

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Mr Charlton's saga

- Complaint to BB and then FOS in September 2012
- FOS determination in his favour in 2014
- Under threat of JR by BB, FOS agrees to re-consider
- February 2017 – new determination in Mr C's favour
- Permission to appeal under Arbitration Act rejected: October 2017 (Teare J)
- JR challenge rejected by Jacobs J in 2018

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Due Diligence

- Basis of FOS decision was that BB breached duties framed around PRIN 2 (conduct business with due care and skill) and 6 (TCF)
- BB only checked to see if investment was HMRC compliant and identified that it would not be routinely valued
- No investigation as to whether trees planted or if Sustainable AgroEnergy had title to them

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Scope of Duty

- Identified SA as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence
- Considered whether SA was appropriate for a pension scheme
- Ensured that the investment was genuine and not a scam, or linked to fraudulent activity
- Independently verified that SA's assets were real and secure, and the investment operated as claimed
- Ensured that the investment could be independently valued, both at point of purchase and subsequently
- Ensured C's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could be a scam

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COBS 2.1.1R

PRIN provisions are not enforceable by private investors but are echoed in COBS 2.1.1 R i.e. the client best interest rule which may therefore equally impose DD duties on the SIPP operator

- HMRC “sippable”?
- Recognised legal title?
- Capable of being valued?
- Fraud?
- Capable of being realised?
- Appropriate?
- Burden on trustee?
- Status/ bona fides of introducer?
- FCA warning notices?

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Key FCA publications

DD duties implicit in the key FCA publications and accepted by Jacobs J in *ex parte Charlton* and a key issue in *Adams* and in the GLO and Liberty SIPP litigation

- Self-Invested Personal Pensions (SIPP) operators – A report on the findings of a thematic review – September 2009
- Self-Invested Personal Pensions (SIPP) Operators – a report on the findings of a thematic review October 2012
- FSA Alert issued on 18 January 2013 (Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP)
- **FCA SIPP Operator Guidance October 2013**
- FCA Further Alert dated 28 April 2014 (Pension transfers or switches with a view to investing pension monies into unregulated products through SIPPs)
- "Dear CEO" letter of 21 July 2014
- FCA alert published on 2 August 2016, and
- FCA Alert dated 24 January 2017 (Advising on pension transfers – our expectations)

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Statutory basis of claim – s27 FSMA

Section 27 – Financial Services and Markets Act 2000

'*27(1) An agreement made by an authorised person ("the provider") — (a) in the course of carrying on a regulated activity (not in contravention of the general prohibition), but (b) in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition, is unenforceable against the other party.*

27(2) The other party is entitled to recover — (a) any money or other property paid or transferred by him under the agreement; and (b) compensation for any loss sustained by him as a result of having parted with it'

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Section 27, FSMA continued

In the case of unregulated introducers:

(1) They advise on the SIPP and the underlying investment: RAO, Art. 53

(2) They arrange the SIPP: RAO, Art. 25 *Personal Touch Financial Services Ltd v SimplySure Limited et al* [2016] EWCA Civ 461

(3) The SIPP operator knows of the arranging and ought to appreciate the arrangement is likely to be the product of advice: *SIB v Scandex Capital Management A/S* [1998] 1 WLR 712

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Section 27, Defences

- Section 28 and application for order it would be just and equitable to allow enforcement

  But – surely not where SIPP operator knows of the perimeter breach: *Re Whiteley Insurance Consultants (a firm)* [2008] EWHC 1782 (Ch)

  But – surely not given need to ensure SIPP operators are an effective gateway to protect the retail market?

- Disclaimers?

  But – surely not given COBS 2.1.2 R

- COBS 11.2.19R (1)

  But – surely cannot override s27?

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Joint enterprise

ICS v West Bromwich Building Society [1999] Lloyd's Rep PN 496

Sea Shepherd UK v Fish & Fish Ltd [2015] AC 1229

Per Lord Sumption "*...the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious*"

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Additional bases of claim?

As the SIPP fund provides death benefits, it is arguable that a disclosure duty arises i.e. a duty "*to disclose all facts known to [the provider] which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer*": *Banque Financière de la Cité S.A. [1991] 2 A.C. 249*

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Disclosure duty?

- SIPP contracts are not usually seen as insurance contracts despite the life cover component
- The insured risk (?) is the life of the policyholder not the risk of reduced provider payment
- *AMP Financial Planning PTY Limited v CGU Insurance Limited* [2005] FCAFC 185: "*The precise content of the concept of utmost good faith depends on the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. ...*"

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Governey and another v IBRC Assurance Company Ltd [2016] IESC 78

Investment via a life wrapper which was high-risk and unlikely to be a reliable source of payment of death benefit

Laffoy J at [92]: "*I am satisfied that the contract entered into by [the investor] with Anglo was not, in substance, a contract of insurance. In substance it was a contract under the terms of which [the investor] was to invest a sum of money in the Fund managed by Anglo and to receive a return on the investment in accordance with the terms of the contract documents*"

Not helpful if followed here…

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Accessory liability ?

"*Where an adviser undertakes, whether pursuant to a contract and for consideration or otherwise, to advise another as to its financial affairs it is commonplace for the courts to find that the adviser has placed himself under fiduciary obligations to that other*" : *ICS*

Accessory liability may then attach to the providers if they assisted or facilitated the breach – and did so "dishonestly"

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Accessory liability continued

- By agreeing to incept the "wrapper" and using it as a vehicle for onward investment, providers may be seen to facilitate the breach of the introducer's fiduciary duty
- As to whether that assistance was "dishonest" the Supreme Court has now made it plain that the test is objective: see *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67 and in particular Lord Hughes at [62] "*if by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.*" It is arguable that by writing business which facilitates investments into high-risk and potentially fraudulent schemes in circumstances where the providers have identified these risks and decided to turn a blind-eye to them, then judged by ordinary commercial standards, most people would regard this as "dishonest"

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Limitation Act issues?

What is the date for accrual of any cause of action in tort? Various candidate dates:

- Date of SIPP establishment creating liability for provider fees?
- Date of irrevocable instruction to effect a pension transfer? Cf OPS/ WP fund/ Loss of enhanced allocation/ "cash to cash"
- Date of onward investment?
- Date investment falls in value?

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Quantum (1)

Section 28(2) of FSMA: "*The amount of compensation recoverable as a result of that section is — (a) the amount agreed by the parties; or (b) on the application of either party, the amount determined by the court*"

Starting point is a comparison between the value of the SIPP investment and the notional value of the counterfactual surrendered pension

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Quantum (2)

"*As the law stands, any claimant who seeks substantial damages arising from a [adviser's] negligent failure to give him proper advice must satisfy three separate conditions, namely by showing (i) what advice in all the circumstances should have been given by a normally competent [adviser]; and (ii) what action the claimant would on the balance of probability have taken if he had received such advice; and (iii) that in the light of (i) and (ii), the loss which he has suffered was in fact caused by the failure to give the relevant advice. Only after the relevant loss has been identified in this manner will questions of quantification arise*"

Boateng v Hughmans (a firm) [2002] EWCA Civ 593

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Finally ….

Any questions?

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Q&A

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David Chase
&
Andy Lyalle
Temple Legal Protection

‘PNLA ATE SCHEME’

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Don't talk to me about ATE!

David Chase
Deputy Underwriting Manager

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You're too expensive.

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(aii) Pre-issue, without an Adjudication.	**7.5%**	
(bi) Post-Issue, within 120 days of issue of proceedings.	**12.5%**	
(bii) Post Issue, more than 120 days after Issue of proceedings but up to 45 days before trial.	**17.5%**	
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Oliver Manley
Guildhall Chambers

'Professional Negligence Update – Limitation Issues in Mortgage Claims'

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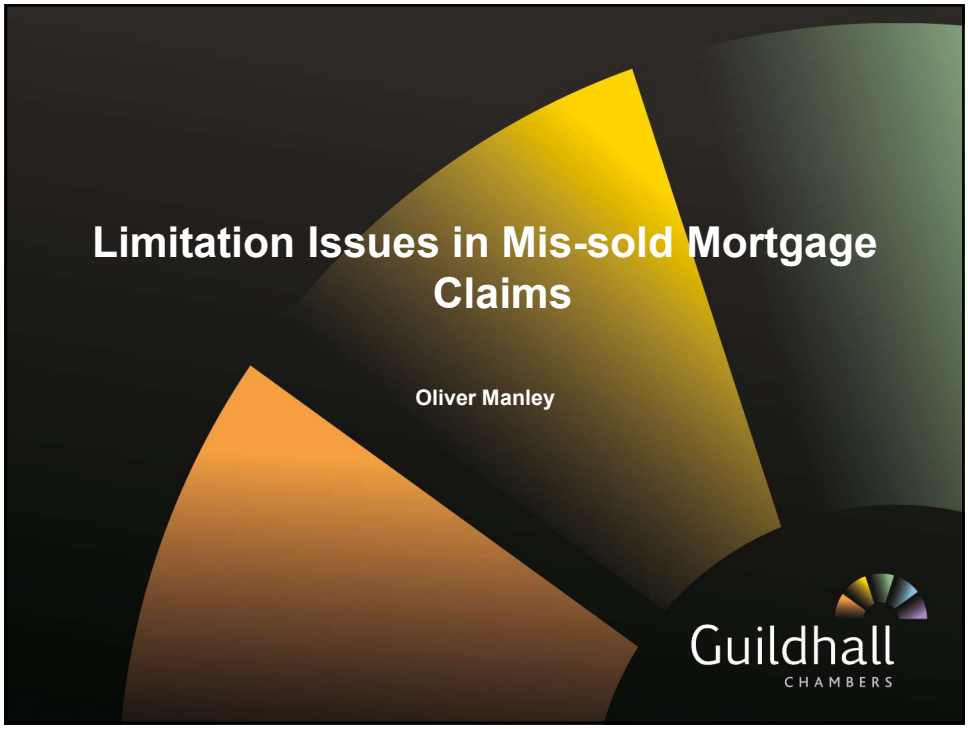

Introduction

- Limitation Act 1980
- Date of accrual in contract and tort claims
- Haward v. Fawcett [2006] 1 WLR 682
- Constructive Knowledge
- Relevance of Expert Advice
- Deliberate Concealment
- Equitable Remedies
- Case Study from Practice

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Limitation Act 1980

Section 2 Time limit for actions founded on tort.

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 5 Time limit for actions founded on simple contract.

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

'Knowledge required for bringing an action', required knowledge is 'material facts about the damage', 'damage attributable in whole or in part to the act or omission', 'identity of the Defendant' and 'knowledge which he might reasonable have been expected to acquire'.

Section 32 Postponement of limitation period in case of fraud, concealment or mistake.

(b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

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Date of Accrual…….contract

In claims for breach of contract the cause of action accrues when the breach occurs, whether or not damage is suffered at that time. Thus, where the professional person does something contrary to the express or implied terms of his retainer, time begins to run (at least for the contractual claim) on the date of that act.

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch. 384 In respect of an omission it was held that the solicitors' obligation to register the option continued until the date when effective registration became impossible

Bell v Peter Browne & Co **[1990] 2 QB 495,** in respect of the continuing duty issue the court held that the contractual claim accrued in 1978 and was therefore statute-barred. The fact that the solicitors could have remedied their breach at any time before the wife sold the house did not mean that there was a continuing breach of contract right up to 1986.

Capita (Banstead 2011) Ltd v RFIB Group Ltd [2016] Q.B. 835 A decision of the Court of Appeal where, by a majority, the Court of Appeal held that there was no continuing duty to correct earlier errors even when there was a continuing retainer.

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Date of Accrual……tort

In claims based in tort the cause of action accrues when the claimant suffers actionable damage. The damage must be 'real damage as distinct from purely minimal damage'.

Cartledge v E Jopling & Sons Ltd [1963] A.C. 758

This may be when the breach of duty occurs or it may be at some later date, for example, when the client acts in reliance on negligent advice.

***Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 W.L.R. 498*).**

If a claimant suffers damage which is irrecoverable in law, that does not start the limitation period running

Law Society v Sephton [2006] UKHL 22; [2006] 2 A.C.

The relevant issues are therefore: what type of damage is the defendant liable for and what was the first point at which the Claimant suffered the same. It matters not for the purposes of establishing primary the primary limitation period for section 2 whether the Claimant himself was aware of any damage suffered at all.

***Forster v Outred & Co* [1982] 1 WLR 856**

Importance of the distinction between 'immediate loss' and contingent loss cases whereby the former it is as soon as the transaction is entered into that the loss arises whilst the latter there is only the possibility that some loss might arise in the future (Law Society v Sephton [2006] UKHL 22; [2006] 2 A.C

***Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 WLR 1627**

Limitation was found to run from the date of the first missed mortgage payment and therefore the claim was statute barred.

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S.14A Knowledge

The knowledge required for time to run under section 14A is (a) material facts about the damage in respect of which damages are claimed; and (b) of the other facts relevant to the current action mentioned in subsection (8) of the 1980 Act

***Halford v Brookes [1991] 1 W.L.R. 428* at 443** Lord Donaldson MR confirmed that it is not necessary that a person should know something 'for certain and beyond possibility of contradiction' for time to run but it is enough that he knows 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence".

***Nash v Eli Lilly & Co* [1993] 1 WLR 783** it was held that knowledge: 'is a condition of mind which imports a degree of certainty and that the degree of certainty which is appropriate for this purpose is that which, for the particular plaintiff, may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice'.

Birmingham Midshires Building Society v Wretham [1999] P.N.L.R. 685 If a loss appears to be so minor or trivial then time will not run contrast with *Hunt v Optima (Cambridge) Ltd [2014] EWCA Civ 714).*

Haward v Fawcetts (A Firm) [2006] UKHL 9

A claimant does not need to have known each and every particular of breach of duty which is subsequently pleaded. It is sufficient that he has broad knowledge of the essence of his complaint.

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Haward v. Fawcett (2006)

Per Lord Nicholls….

"Knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence: '**Suspicion particularly if it is vague and unsupported will indeed not be enough**, but reasonable belief will normally suffice…'

AND…..

"For time to start running there needs to have been something which **would reasonably cause Mr Haward to start asking questions about the advice he was given**".

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Constructive Knowledge

Webster v Cooper & Burnett [2000] PNLR 2040 CA

In deciding whether a claimant should reasonably have gained the necessary knowledge from facts observable or ascertainable by him the court will usually expect a claimant to have appreciated the significance of written materials sent to him

Henderson v Temple Pier Co Ltd [1988] 1 W.L.R. 1540 CA

where a claimant entrusts the conduct of his claim to someone else (for example, a firm of solicitors) he will be fixed with the knowledge of the facts which were ascertainable by that person.

***Wilson v Lefevre, Wood & Royle* [1996] PNLR 107**

Held that what the defendant tells the claimant after the negligence has occurred may be of relevance when considering whether the person had or should be treated as having notice of facts observable or ascertainable which he might reasonably have been expected to acquire.

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Expert Advice?

Gravgaard v Aldridge & Brownlee (A Firm) **[2004] EWCA 1529**

Court of Appeal held that the claimant should have sought legal advice about her rights in connection with a charge she had granted over her home in 1988 more than three years before proceedings were issued. Had she done so she would have been advised of her potential claim against her former solicitors.

Johnson v Ministry of Defence [2012] EWCA Civ 1505

Held that there is "an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done"

Harris Springs Ltd v Howes [2007] EWHC 3271 (TCC); [2008] B.L.R. 229

It was held that where a claimant continued to rely upon the defendant for advice and the defendant does not inform him that there is a problem, the claimant will not be fixed with constructive knowledge.

Lloyds Bank Plc v Crosse & Crosse (a firm) **[2001] PNLR 830**

The scope of the retainer in answer to this question will always be significant.

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S.32 Deliberate Concealment

Arcadia Group Brands v Visa Inc [2014] EWHC 3561 (Comm)

The claimants sought to rely on section 32 on the grounds that the defendants had deliberately concealed a number of facts relevant to their claims. The Court of Appeal rejected this assertion stating the provision was to be interpreted narrowly. Section 32 is for the discovery of facts which are '*essential for a claimant to prove in order to establish a prima facie case*' and not just those which would make the claimant's case stronger.

Cave v Robinson Jarvis & Rolf (a firm) **[2002] UKHL 18, [2003] 1 AC 384**

Held that deliberate concealment for the purposes the 1980 Act included a deliberate breach of duty either concealed or undisclosed and committed in circumstances such that it was unlikely to be discovered for some time and also the taking of active steps to conceal a breach of duty after becoming aware of it.

Burnden Holdings (UK) Limited (Respondent) v Fielding and another (Appellants) **[2018] UKSC14**

Suitable for summary judgment? Held: 'The in-depth analysis of this difficult question would take the court into a potential **minefield of difficulties** which surround section 32' and '**Whatever the correct interpretation of section 32(2), there would still be fact intensive issues calling for a trial. It is sufficient for present purposes for me to conclude that the appeal in relation to section 32 should be dismissed because the issue is unsuitable for summary judgment'**

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s.36 Equitable jurisdiction and remedies

s.36 Provides the standard time limits 'shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940'.

***Fuller v Happy Shopper Markets Ltd and another* - [2001] 1 WLR 1681 (applying *Hanak v Green* [1958] 2 QB 9.** Held 'An equitable (or transaction) set-off is a cross-claim arising out of the same transaction as the claimant's claim or one so closely connected that it operates in law or in equity as a complete or partial defeasance of the claimant's claim: see the *Aectra* case, p 1649 a– b per Hoffmann LJ. The cross-claim is so closely connected if it would be **unconscionable** for the claimant to insist on satisfaction for his claim without giving credit for the claim made against him by the other party. Equitable set-off operates not merely procedurally, but substantively as a defence'.

Paragon Finance Plc v DB Thakerar & Co (A Firm) [1999] 1 ALL ER 400 *where the application of the Limitation Act 1980 by analogy and the effect of the doctrine of laches is considered. On the facts the CA found the claim statute barred.*

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Case Study

The case involved a claim for professional negligence, breach of statutory duty and breach of contract arising from a mortgage advance.

The essential elements of the alleged breaches were that:

- the Defendant incorrectly represented their incomes on their mortgage application,
- failed to carry out any valuation of the property,
- gave negligent advice on the product by recommending a substantial increase in the loan amount on an interest only basis;
- Failed to secure the mortgage as promised which in turn created a title trap for the Claimants.

D made an application for summary judgment/strike out on limitation grounds (relying on *Booker v RT Financial Services UK Ltd* [2016] EWHC 3186 (Ch); *CGL Group Ltd v Royal Bank of Scotland* [2016] EWHC 281 (QB) and *Nobu Su v Clarksons Platou Futures Ltd* [2017] 1 Lloyd's Rep 568 which was met by the Claimants arguing due to section 32 and equitable set off an such application could not be decided summarily. Result the application was withdrawn shortly before the hearing. The case now proceeds to trial.

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Lucy Walker
Guildhall Chambers

‘Cryptocurrencies: growth area for claims in the 2020s?’

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HI HANSCOMB INTERCONTINENTAL

Cryptoassets and potential claims

Lucy Walker

Guildhall CHAMBERS

What will we talk about today?

- What is a cryptoasset/ cryptocurrency?
- Legal and regulatory analysis of cryptoassets:
  - the legal nature of cryptoassets;
  - the regulatory treatment of cryptoassets in the United Kingdom.
- Why do cryptoassets matter?
- What sort of claims may arise in relation to cryptoassets?

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What is a cryptocurrency?

- A useful starting point is to look at the legal nature of 'currency' or 'money'.
- The modern concept of 'money' or 'currency' is legal tender, issued by a sovereign government or central bank which is universally accepted as discharge of a debt or payment for goods and services, or a means of transfer of value. (*Halsbury's Laws of England, Volume 49*, paragraph 1).
- The Bank of England is the sole issuer of bank notes (legal tender) in England and Wales.

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What is a cryptocurrency?

In the UK 'money' is:

- a medium of exchange, (you can use it to pay someone and transfer value);
- a unit of account, (you can maintain books of account with reference to the relevant unit);
- a store of value, (you can use it to save and invest).

(The Wealth of Nations, Adam Smith).

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What is a cryptocurrency?

Is cryptocurrency 'money' ?

- Money can be segregated into cash and credit.
- Cash is typically legal tender: a form of money which passes freely through the community as final discharge of debts and payment for commodities, being accepted without reference to the character or credit of the person who offers it, *(Moss v. Hancock*, [1899] 2 Q.B. 111).

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What is a cryptocurrency?

A medium of exchange?

- cryptocurrencies can be used as media of exchange in some communities as they can be used to facilitate the exchange of goods and services;
- but, cryptocurrencies are not commonly used as a measure of the value of the goods and services; and
- cryptocurrencies are not universally accepted as a means of exchange.

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What is a cryptocurrency?

A unit of account?

- To be a permanent 'unit of account' a unit must be recognised under the laws of the relevant jurisdiction;
- the unit must be capable of being used across a variety of transactions, over time, between several people;
- presently, this does not apply to cryptocurrencies and so a cryptocurrency cannot be a recognised unit of account.

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What is a cryptocurrency?

A store of value?

- As we have seen, the value of a cryptocurrency is not fixed to any sovereign currency and no single entity is liable for the perceived value;
- thus a decentralised cryptocurrency cannot be a unit of account.

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What is a cryptocurrency?

A 'cryptocurrency' is:

- a digital representation of value;
- not issued by a central bank, government or other central issuing authority;
- not generally linked to, or backed by the value of any sovereign ('fiat') currency; and
- no single issuer is liable for the perceived value of a cryptocurrency.

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Cryptocurrency: e-money?

Is cryptocurrency 'e-money' for regulatory purposes?

- cryptocurrency does not qualify as 'e-money' in the UK because it is permissionless and decentralised.
- Further, cryptocurrency does not qualify as 'e-money' because there is no issuer against which a claim can be made.
- The above view is shared by the International Monetary Fund and the European Central Bank which view cryptocurrencies as a '*digital representation of value*'.

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What is a cryptocurrency?

- Cryptocurrencies are created or 'mined' using computing protocol and blockchain technology.
- (Some of the scam cryptocurrencies did not use blockchain technology).
- The cryptocurrency exists only as an encrypted file on a hard drive or mobile device.
- In very basic terms, a cryptocurrency amounts to the ownership of a cryptographic address.
- The person who 'mined' the cryptocurrency unit owns the address and can access the encrypted wallet file using a private key.

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What is a cryptocurrency?

- The owner of the cryptographic address can then transfer the ownership of that address by sending value to another address which is a wallet address stored on a hard drive or other device.
- All transactions are recorded on the 'blockchain'.

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Blockchain: the technology which facilitates cryptoassets

- 'Blockchain' or 'distributed ledger technology' ("**DLT**") facilitates cryptoassets.
- A blockchain is a decentralised ledger which records transactions in successive, sequential 'blocks'.
- Each 'block' contains data and a code which directs the block back to the dataset of the previous block, all the way back to the original or 'genesis' block.

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Cryptoassets: property?

- LawTech Delivery Panel Legal Statement on Cryptoassets (November 2019) opined that the question of whether English law would treat a particular cryptoasset as property ultimately will depend on the features of the asset.
- The LawTech Delivery Panel statement is not a statement of the law and nor does it comprise authority.
- However, the Legal Statement is persuasive.

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Cryptoassets: property?

The LawTech Delivery Panel concluded that cryptoassets can be treated in principle as property:

- cryptoassets have all the indicia of property;
- the distinctive features of some cryptoassets such as intangibility, cryptographic authentication, use of DLT and decentralisation do not disqualify a cryptoasset from being property; and
- cryptoassets are not disqualified from being property just because they are pure information or cannot be classified as a thing in action or a thing in possession.

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Cryptoassets: chose in action or chose in possession?

- A cryptoasset is not a chose in possession because it is virtual and intangible and therefore, cannot be subject to physical possession.
- A cryptoasset is not a chose in action because it is virtual and does not embody a right that can be enforced by action.
- There could be a (helpful) third classification though, (see *Armstrong v. Winnington).*

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Regulatory treatment of cryptoassets in the UK

- Currently, cryptoassets are outside the UK regulatory perimeter created pursuant to the Financial Services & Markets Act 2000, (the "**FSMA**").
- The Financial Conduct Authority, (the "**FCA**") consulted during 2019 on its guidance and whether to bring cryptoassets and other products derived from cryptoassets into the regulatory perimeter.
- FCA published Policy Statement PS19/22 in July 2019.

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Regulatory treatment of cryptoassets in the UK

The FCA has identified two categories of cryptoasset that will fall to be regulated:

- cryptoasset tokens that fall within the definition of 'e-money'; and
- 'security tokens' which are tokens that provide rights and obligations similar to specified investments under the Regulated Activities Order and MiFID II.

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Regulatory treatment of cryptoassets in the UK

- Derivative products such as futures, options and contracts for differences with cryptoassets as the reference asset have been marketed in the UK.
- Derivative products comprise financial instruments for the purposes of MiFID II and will be subject to regulation in the UK.
- 'Initial Coin Offerings' with features similar to the private placement of securities, crowdfunding or collective investment schemes will also be regulated.

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Regulatory treatment of cryptoassets in the UK

- Cryptoasset tokens that are neither security tokens nor e-money will fall outside the regulatory perimeter.
- This includes 'exchange tokens' which are cryptoasset tokens that are used as a means of exchange but fall outside the definition of 'e-money' because they are decentralised and permissionless.
- The FCA and HM Treasury will continue to review and consult on whether further regulation of cryptoassets is required.

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Taxation and anti-money laundering issues

- Cryptoassets are within the perimeter of the Fifth Anti-Money Laundering Directive which will soon be transposed into English law.
- Important to note the tax treatment of dealings in cryptoassets.
- HMRC consider that dealings in cryptoassets amount to an investment activity in a capital asset, giving rise to a liability to Capital Gains Tax.

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Why do cryptoassets matter?

- Lawyers will need increasingly to understand the nature of cryptoassets and the blockchain technology underpinning it.
- Internal and external clients may require advice in connection with cryptoassets:
  - regulatory advice on how to create, offer, deal in, purchase or exchange cryptoassets;
  - advice in connection with the acceptance of cryptoassets as consideration for the supply of goods and services;

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Why do cryptoassets matter?

- advice in connection with the creation of security over cryptoassets to secure indebtedness;
- advice in connection with cryptoassets held, sold or purchased by individuals in the context of divorce, family proceedings, tax planning and/or property transactions; and
- contentious advice in relation to cryptoassets that have been lost, stolen or otherwise misappropriated.

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Claims and remedies

- The importance of classifying cryptoassets as property becomes clear when one considers the types of claims and issues that can arise and the availability of:
  - injunctive relief; and/or
  - equitable relief.
- Injunctive relief (for example a proprietary injunction or a freezing order) would not be available if cryptoassets were not, in principle, a form of property.

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Claims and remedies

Recent cases have accepted that cryptoassets may in principle be a form of property:

- *Vorotyntseva v. Money -4 Limited*: grant of a worldwide freezing order in relation to Bitcoin and Ethereum;
- *Liam David Robertson v. Persons Unknown*: grant of an asset preservation order in relation to cryptoassets;
- *AA v. Persons Unknown*: grant of a proprietary injunction in relation to Bitcoin.

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Questions?

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Q&A

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Followed by: Lunch 13:00 until 14:00

FEEDBACK

We really appreciate the feedback forms – they help us to improve our service to you.

Please place completed forms in the Feedback Form Box

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Klaudia Aliaj

Director

Anexsys eDisclosure and Digital Forensics

"Disclosure Update including the Business and Property Courts Pilot"

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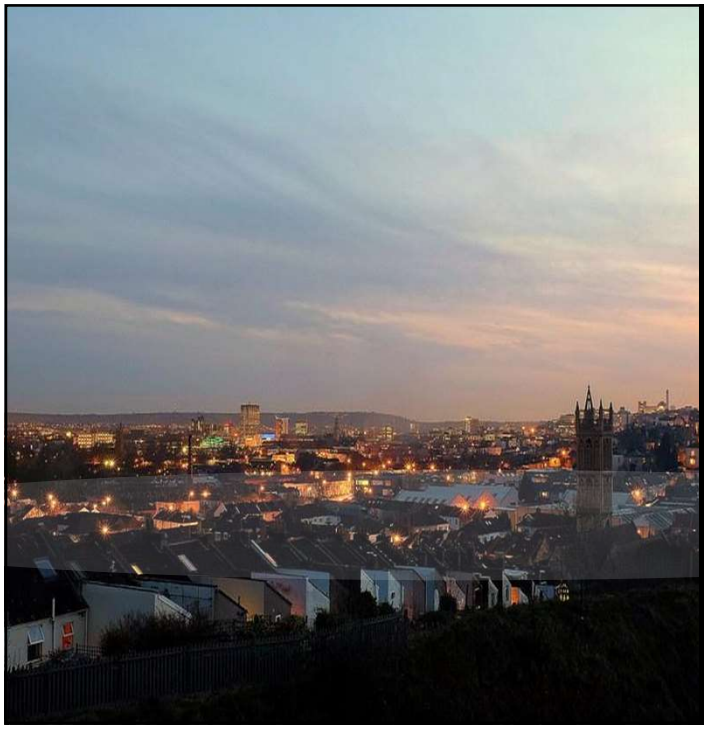
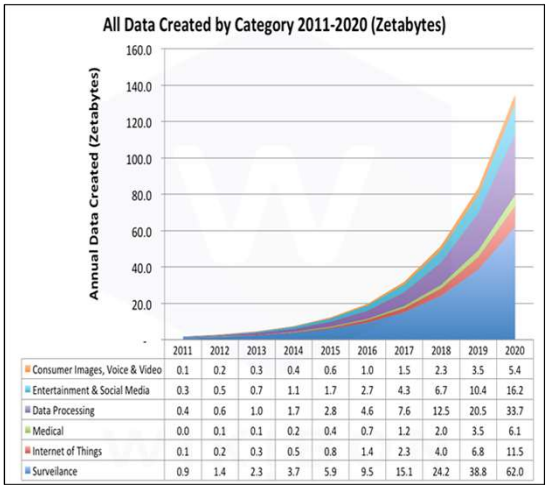


PNLA
Professional Negligence Lawyers Association

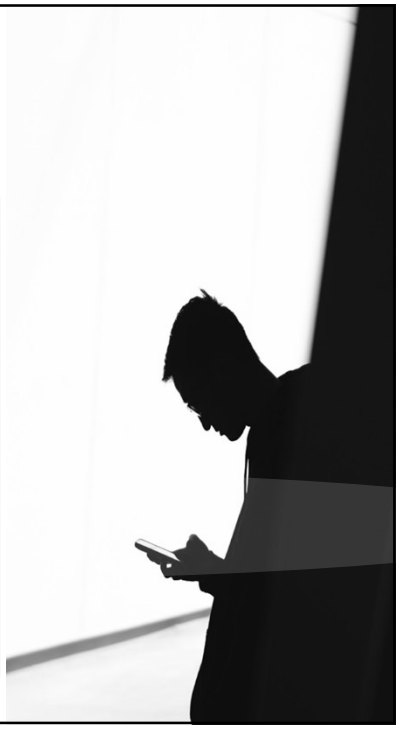
Disclosure Update PNLA 5 February 2020

anexsys

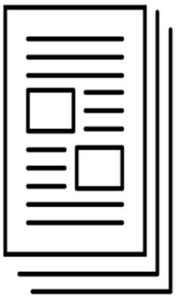
The data we create



	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Consumer Images, Voice & Video	0.1	0.2	0.3	0.4	0.6	1.0	1.5	2.3	3.5	5.4
Entertainment & Social Media	0.3	0.5	0.7	1.1	1.7	2.7	4.3	6.7	10.4	16.2
Data Processing	0.4	0.6	1.0	1.7	2.8	4.6	7.6	12.5	20.5	33.7
Medical	0.0	0.1	0.1	0.2	0.4	0.7	1.2	2.0	3.5	6.1
Internet of Things	0.1	0.2	0.3	0.5	0.8	1.4	2.3	4.0	6.8	11.5
Surveilance	0.9	1.4	2.3	3.7	5.9	9.5	15.1	24.2	38.8	62.0

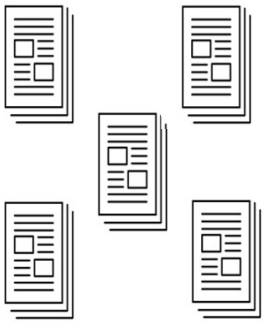


Initial Disclosure



- Provided with Statements of Case
- Key documents upon which parties rely
- 200 documents / 1,000 pages
- Dispensed with by agreement or order

Extended Disclosure

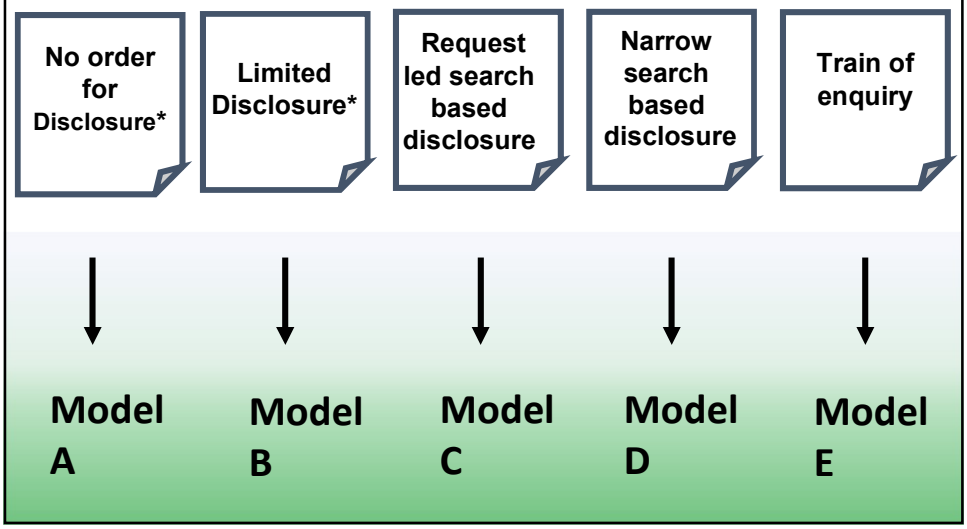


- Requires determination of issues
- Parties must decide on models
- Requires completion of the “DRD”
- Must be reasonable and proportionate

The Disclosure Pilot Scheme

- Selective Approach – Moving away from Standard Disclosure
- Cooperation
- Use of Technology

Disclosure Models – Pilot Scheme



A Shift in Culture

- Selective Approach – Moving away from Standard Disclosure
- Cooperation
- Use of Technology

Reducing Data Volumes

> ***where the review universe is in excess of 50,000 documents… they*** **(the parties)** ***should set out reasoning as to why such tools will not be use***

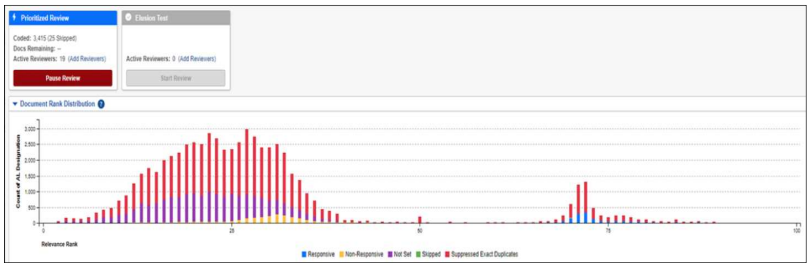
DRD s.2

Question 14

TAR: Continuous Active Learning

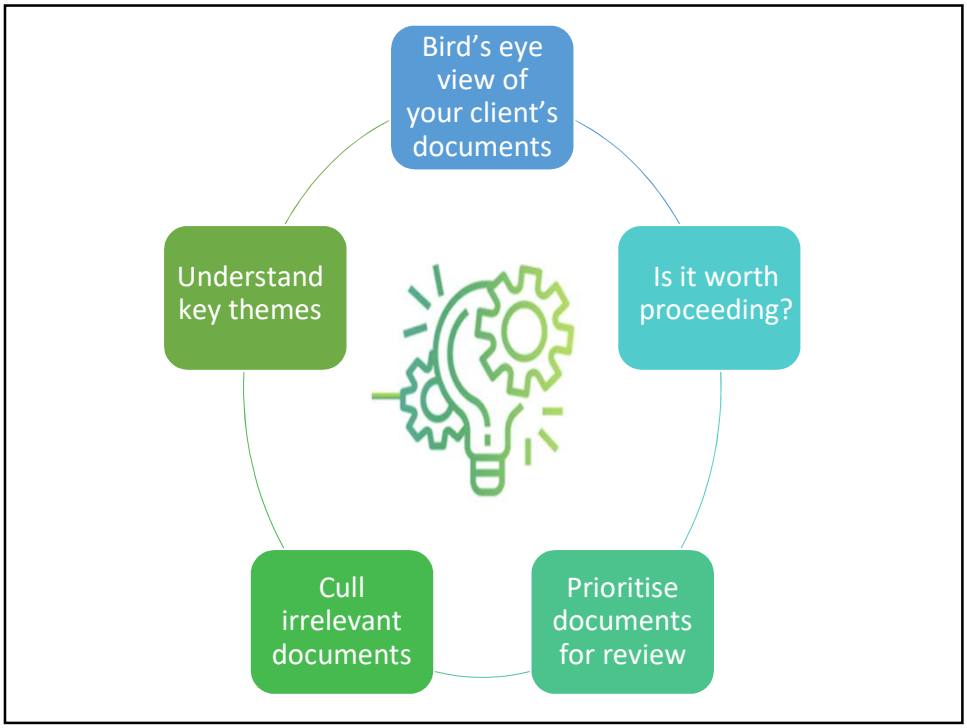
- Reviewer tags document as relevant / not relevant
- System learns from decisions made
- Platform continuously updates and ranks documents
- Routine sampling and QC of documents

TAR: Continuous Active Learning

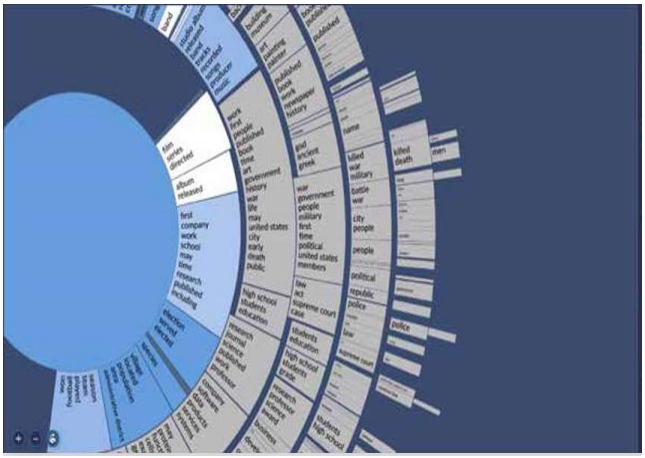


Further Technologies Available

- Email Threading
- Early Case Assessment Tools



Early Case Assessment



Legal representatives who have the conduct of litigation on behalf of a party to proceedings…are under the following duties to the court:

(1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;

PD51
3.2(1)

Documents to be preserved…include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business. Preservation includes, in suitable cases, making copies of sources and documents and storing them.

PD51
4.1

Case law update

- **UTB LLC v Sheffield United Ltd & Ors [2019] EWHC 914 (Ch)**

Q&A

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Andrew Burnette
Partner
Burges Salmon
'The Claimant Perspective'

v

Marcus Thomson
Partner
DAC Beachcroft
'The Defendant Perspective'

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Claimant v Defendant Perspectives

Andrew Burnette – Burges Salmon LLP
Marcus Thomson – DAC Beachcroft LLP

Claimant v Defendant Perspectives – PNLA Conference (Bristol) 5 February 2020

Introduction

Topics to be covered (time permitting):

- **Is mediation still fit for purpose?**
- **Is Adjudication a credible alternative?**
- **Disclosure/Privilege/Part 18 Wars**
- **Is cost budgeting reducing costs in prof neg claims?**
- **Contributory Negligence**
- **Future gazing….**

Is Mediation it still fit for purpose?

Burges Salmon

C Perspective: Its effectiveness seems to be declining.

- **Are we mediating for the right reasons?**
- **Are we mediating at the right time?**
- **Are we forgetting the real purpose of a position statement?**
- **Are we, as lawyers, interfering too much with what is supposed to be a commercial negotiation between the parties?**
- **Are parties always coming with appropriate authority?**
- **Are we being realistic with our clients in advance about what the parameters of a negotiated settlement are likely to be?**
- **Why does it take so long to document settlements?**

IS MEDIATION STILL EFFECTIVE?

DAC BEACHCROFT

D PERSPECTIVE

- *" …. mediation is oversold, not always effective, and perhaps most importantly …… dead expensive."* Gazette – 27 January 2020
- Choice of mediator:
  - Experience and background;
  - Personality and style.
- Position statement: it's not a statement of case!
- Preparation
  - Risk assessment (quantitative and qualitative)
  - BATNA, WATNA and MLATNA
- Opening statement: what's it for and who should make it?

Claimant v Defendant Perspectives – PNLA Conference (Bristol) 5 February 2020

Is Adjudication a credible alternative?

Burges Salmon

C Perspective: Not unless Ds start finding reasons to use it rather than to dismiss it.

- **"What's that then"?**
- **Don't want to be a guinea pig.**
- **Case isn't suitable – witness / expert evidence.**
- **Too fast for "proper justice".**
- **Perceived bias of adjudicators.**
- **Fear of the "wrong" outcome.**
- **"We don't <u>want</u> the process to be quick and cheap for your client".**
- **Use for single issues?**
- **What happened to using the telephone??!**

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IS ADJUDICATION A CREDIBLE ALTERNATIVE?

DAC BEACHCROFT

D PERSPECTIVE:

- A tool of doubtful utility.
- Unpopular with claimants and defendants alike.
- Not appropriate where key facts in dispute or expert evidence required.
- Non-binding unless parties opt for finality.
- Early Neutral Evaluation – the consistently-overlooked alternative to mediation.
- CPR 3.1(2)(m): the court may take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.

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DISCLOSURE/PRIVILEGE PART 18 WARS

DAC BEACHCROFT

D PERSPECTIVE:

- Disclosure Pilot Scheme – teething troubles:
  - "Issues for Disclosure" – doesn't mean every issue in dispute!
  - Cooperation
  - Proportionality
- Concepts of confidentiality and legal professional privilege widely misunderstood.
- Requests for information about D's insurance cover: C not entitled unless information relevant to issues in dispute.
- Part 18: genuine request for clarification or points scoring?

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Disclosure/Privilege/Part 18 Wars

Burges Salmon

C Perspective:

- **Endless Disclosure - Protocol v Initial v Extended**
- **Front-loading of cost – does it act as a deterrent?**
- **Do Judges understand what they are deciding?**
- **Requests for insurance details outside of the disclosure regime, e.g. Rule 9.2 of the SRA Indemnity Insurance Rules (but one name, address and policy number).**
- **Sensible tactical use of Part 18, e.g. contributory negligence.**

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Is cost budgeting reducing costs?

Burges Salmon

Claimant Perspective: No!!!

- **Front-loading the costs (+disclosure pilot)**
- **Increased correspondence**
- **Another thing to fall out over**
- **Satellite applications**
- **Nearly impossible to avoid a CMC**
- **Subjectivity of "reasonable and proportionate"**
- **Gaming the estimate…**
- **Still takes forever to dispose of costs post-trial!**

Claimant v Defendant Perspectives – PNLA Conference (Bristol) 5 February 2020

IS COSTS BUDGETING REDUCING COSTS?

DAC BEACHCROFT

D PERSPECTIVE:

- Key battleground in litigated cases.
- C's budget frequently excessive.
- Structural problems with budgeting exercise:
  - Inconsistent judges.
  - D's budget artificially low.
  - Just an inspired guess?
  - Time/costs allowed for budgeting too limited?
  - Incurred costs and hourly rates.

Contributory Negligence

Burges Salmon

C Perspective: Ds persist in contending for grossly over-inflated contributory negligence discounts.

- **Read the case law!**
- **Section 1(1) of the Law Reform (Contributory Negligence Act) 1945 includes a reference to "*share of responsibility*".**
- **Burden of proof is on D.**
- **Frequently no causative potency – what difference would it have made?**
- **Be sensible and invariably Cs will be too! Always advise on it.**

Claimant v Defendant Perspectives – PNLA Conference (Bristol) 5 February 2020

CONTRIBUTORY NEGLIGENCE

DAC BEACHCROFT

D PERSPECTIVE:

- Judges slow to find contributory negligence in professional negligence claims.
- But when contributory negligence is proved, the discount tends to be significant.
- Causative potency: decision of Bryan J in Assetco Plc v Grant Thornton LLP [2019].
- It's not only defendants who overlook the need to establish causation!

Future Gazing….

Burges Salmon

Contacts

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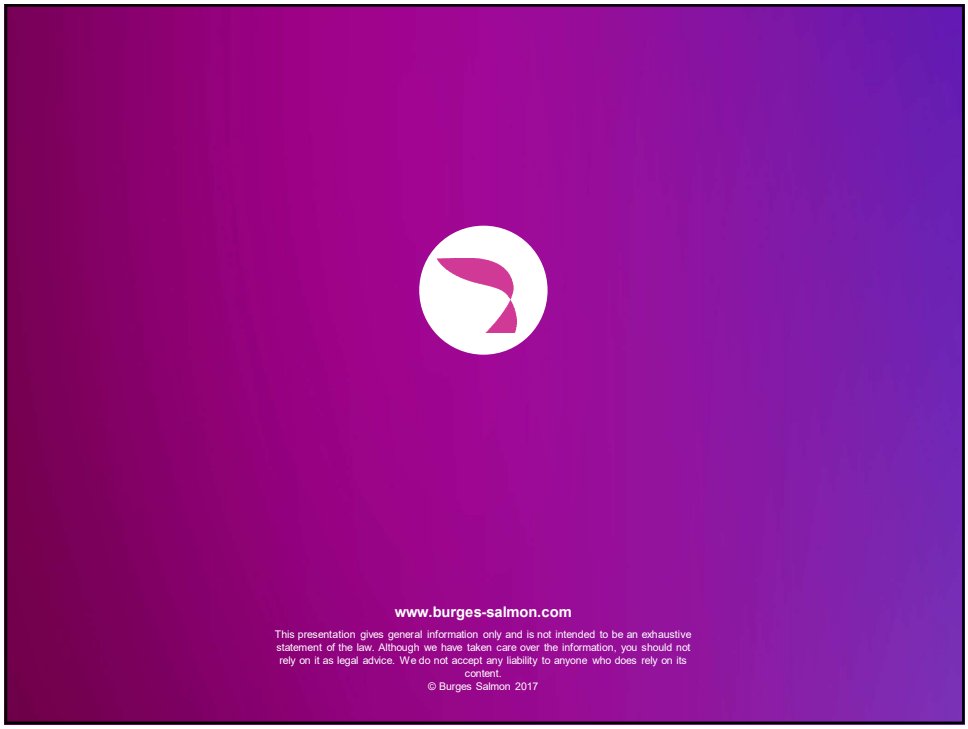

Panel discussion session

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Q&A and Chairman's Closing Remarks

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Thank you to William Flenley QC

Thank you very much for attending

We hope to see you again soon

Edinburgh – 7 May 2020
London – 20 May 2020

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PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

BRISTOL CONFERENCE

5th February 2020

PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION
BRISTOL CONFERENCE
Wednesday 5th February 2020

0900–0925 Registration and Refreshments
0925–0930 PNLA Introduction

0930–0950 **"Chairman's Address – 2019 – The Year in Damages"**
William Flenley QC, Hailsham Chambers

0950–1035 **"SIPPs – The Berkeley Burke Saga"**
John Virgo, Guildhall Chambers

1035–1045 **Questions and discussion**

1045–1100 Refreshments

1100–1115 Speaker to be confirmed

1115–1200 **"Professional Negligence Update – Limitation Issues in Mortgage Claims"**
Oliver Manley, Guildhall Chambers

1200–1245 **"Cryptocurrencies: growth area for claims in the 2020s?"**
Lucy Walker, Guildhall Chambers

1245–1300 **Questions and discussion**

1300–1400 Lunch

1400–1445 **"Disclosure Update including the Business and Property Courts Pilot"**
Klaudia Aliaj, Director, Anexsys eDisclosure and Digital Forensics

1445–1500 **Questions and discussion**

1500–1515 Refreshments
1515–1615

"The Claimant Perspective"
Andrew Burnette, Partner, Burges Salmon
v
"The Defendant Perspective"
Marcus Thomson, Partner, DAC Beachcroft

1615–1630 **Chairman's closing remarks, questions and discussion session**

PROFESSIONAL NEGLIGENCE AND LIABILITY
BRISTOL CONFERENCE
Bristol Marriott Royal Hotel, College Green, Bristol, BS1 5TA
Wednesday 5th February 2020
ATTENDEES (1 of 2)

Klaudia Aliaj	Anesxys	London
Caroline Brown	Burges Salmon LLP	Bristol
Andrew Burnette	Burges Salmon	Bristol
Colin Carr	Kevin Edward	Liverpool
David Chase	Temple Legal Protection Ltd	Guildford
Andrea Cohen	PNLA/Weightmans	Cheshire
David Cook	DRC Forensics Ltd	Bristol
Chris Cooney	Campbell Courtney & Cooney	Surrey
Karen Cornwell	Kennedys Scotland	Glasgow
Duncan Crine	Freeths LLP	Oxford
Nicholas Davidson QC	4 New Square	London
William Flenley QC	Hailsham Chambers	London
Chris Gahagan	DRC Forensics Ltd	Bristol
Sean Gibbs	Hanscomb Intercontinental Limited	Cheltenham
James Hall	Hardwicke Chambers	London
Paul Hopkins	Geldards LLP	Cardiff
Simon Howarth	Hailsham Chambers	London
Christopher Jolly	Middletons Solicitors	Warminster
Michael Lent	Lakehouse Risk Services Limited	London
Kendal Litherland	Shakespeare Martineau	Birmingham

Andy Lyalle	Temple Legal Protection Ltd	Guildford
Katy Manley	PNLA President	Cheltenham
Oliver Manley	Guildhall Chambers	Bristol
Alessandro Morgan-Gianni	DWF Law LLP	Bristol
Charlotte Potter	TLT Solicitors	Bristol
Andrew Reid	Moore Blatch LLP	Southampton
Cathryn Selby	Nelsons Solicitors Ltd	Derby
Bejal Solanki	DLG Legal Services	Bromley
Dr Giuseppe Spoto	Wilbraham Place Practice	London
James Taylor	Wards Solicitors	Bristol
Samuel Taylor	Loxley Solicitors Ltd	Glos
Marcus Thomson	DAC Beachcroft	Bristol
John Virgo	Guildhall Chambers	Bristol
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Contacts:

Matthew Pascall

Senior Underwriting Manager

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

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

David Chase

Deputy Underwriting Manager

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

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

Nicholas Ellor

Senior Underwriter

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

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

Jacob White

Underwriter

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

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

Amy Edgington

Underwriting Support Manager

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

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PNLA
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INTRODUCTION

- “lux legis viam monstrat” -
The light of the law shows the way

Professional negligence and liability practitioners will find this conference an essential update taking account of the legal developments and general trends and issues arising in dispute resolution in this sector and more. The speakers are drawn from a diversity of backgrounds whilst all offering the benefit of many years of experience to share with us.

PNLA Introduction

William Flenley QC
Hailsham Chambers

‘Chairman’s address’

"2019 – The Year in Damages"

hailshamchambers

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William Flenley QC

Call: 1988 | Silk: 2010
william.flenley@hailshamchambers.com

Overview

William specialises in professional liability, contract and insurance law. He is co-author of the leading text, *Flenley & Leech, Solicitors' Negligence and Liability*, of which the fourth edition is now being prepared, and contributed the sections on causation and *Saamco* in *Professional Negligence and Liability*. For many years, he has been recommended for professional negligence by each of the main directories. From 2013-2015, he was Chairman of the Professional Negligence Bar Association, and in 2014 was elected a Bencher of the Middle Temple. In 2016, *the Legal 500* placed him in the first rank of Professional Negligence Silks.

In 2016, *Chambers UK* stated that William is "frequently instructed to act in the most sophisticated matters at the cutting edge of the field". Two of his recent cases exemplify that. In *Group Seven v Nasir* [2017] EWHC 2466 (Ch), William's clients successfully defeated a €10m claim, heard during an 8 week trial, when the judge accepted William's submission as to the mental element required for accessory liability. In *Main v Giambrone* [2017] EWCA Civ 1193, William made submissions as to the impact of the Supreme Court's *BPE* and *Redler* decisions on professionals' liability for breach of trust. The defendants are seeking permission to appeal to the Supreme Court.

Professional negligence

Accountants & auditors

William acts in complex and large-scale claims against auditors and accountants. This includes advising in the defence of a £20m claim against auditors for alleged failure to report fraud, and a £5m claim against auditors in relation to the sale of a national chain of retailers.

Insurance brokers

William's work involving insurance brokers includes acting in the defence of a £4.6m claim for alleged failure to advise of burglar alarm warranty, and a £500,000 claim for alleged failure to advise on the correct amount of cover for business interruption, both of which settled shortly before trial. In this area William additionally benefits from his substantial experience of dealing with insurance coverage disputes between insured and insurer.

Financial professionals

William is active in this area of work and has acted for financial advisors in a 14-party claim under the Financial Services and Markets Act and at common law, listed for a 4 week trial before it settled, and a £500,000 claim against financial advisors in relation to their alleged promotion of an investment bond which failed.

Lawyers

William is co-author of the leading text Flenley & Leech, *Solicitors' Negligence & Liability*, now in its third edition. He regularly advises and appears in high value and complex claims against lawyers. Recent cases include *Group Seven* and *Giambrone*, both mentioned at the start of this c.v.

Surveyors & valuers

William is very familiar with claims against surveyors and valuers, including mortgage lenders' and contribution claims. He wrote the discussion of *SAAMCo* in *Professional Negligence and Liability* (ed.Simpson). In *Nationwide BS v Dunlop Haywards* [2010] 1 WLR 258, a lenders' claim, he obtained an order that fraudulent surveyors pay contribution of £4.5m. He also acts in claims by purchasers against surveyors, and recently represented surveyors in a complex case as to whether purchasers should give credit for improvements to their property after the date of the surveyors' negligence.

Mediation

William is a trained mediator and, at the invitation of the parties, recently gave early neutral evaluation of a claim's merits. He also appears as a mediation advocate, advising on whether and when to mediate and preparation for mediation, settling mediation statements and appearing at mediations.

Insurance coverage

William regularly deals with a variety of issues relating to insurance coverage, particularly in connection with professionals, often appearing at arbitrations, as well as acting as an arbitrator in this context. Recent work has involved a £10m coverage dispute in relation to insurance of wind farms, which settled, and successfully showing lack of cover under the Solicitors' Minimum Terms in relation to over 50 claims.

Arbitration and Adjudication

William appears at arbitrations and as an arbitrator (see the last heading), and has been involved in the launch of an Adjudication scheme for professional liability cases. He has acted as an adjudicator under that scheme, having previously undertaken a short course in Adjudication at University College, London.

What others say

"His technical attention to detail is fantastic and we are confident that he'll sort through everything carefully and properly." *Chambers UK, 2020*

"An outstandingly good performer in his field." *Chambers UK, 2020*

"When it comes to professional liability, there can be few at the Bar who are as knowledgeable and as skilled as he is" *Legal 500, 2020*

"He is outstanding technically, and just completely straightforward and transparent – no pomposity or flannel. I know he gives me the right advice, without any attached motive" *Chambers UK, 2019*

"An impressive advocate with some fearsome intellect. He instantly gets to the nub of the issues and comes up with novel arguments to blow the other side's case out of the water" *Chambers UK, 2019*

"He is fabulously persuasive in court and his advice is clear, concise and utterly reliable" *Legal 500, 2019*

"He has phenomenal knowledge and an amazing mind. Judges really listen to him. He's a great talent" "Extremely knowledgeable in dealing with complex solicitors' claims" *Chambers UK, 2018*

"He is approachable and user-friendly, and has the gravitas required to intimidate the opponent" *Legal 500, 2017*

"William Flenley is concise, and incredible likeable as well." *Chambers UK, 2017*

"Technically very strong" *Legal 500, 2016*

Chambers UK, 2016 said that he "has a wealth of experience acting in all kinds of major negligence claims, including those brought against barristers, financial advisers and insurance brokers. Frequently instructed to act in the most sophisticated matters at the cutting edge of the field."

"'Extremely tenacious and thorough'". *Legal 500, 2015*

"an eye for detail and is very good at thinking outside the box." 'He is very clever, meticulous in his approach and an excellent cross-examiner'." *Chambers UK, 2015*

"excellent analytical skills." *Legal 500 2014*

"a real favourite of large insurers, and a lawyer with particular expertise on solicitors' negligence cases. 'Meets deadlines, gives clear advice and is also exceedingly nice'. 'He's a quick-witted advocate'." *Chambers UK, 2014*

Notable cases

Group Seven v Nasir [2018] PNLR 6, (Ch Div), the mental element of dishonest assistance in breach of trust, in the context of a claim against a solicitor and an accountant.

Various Claimants v Giambrone [2018] PNLR 2, breach of trust and the application of *BPE* and *Saamco* to claims against lawyers.

Purrunsing v A'Court [2016] 4 WLR 81, (Ch Div), identity fraud, liability of lawyers acting for buyer, and for seller. Widely discussed in the legal press.

Harding Homes v BDB [2015] EWHC 3329 (Ch), successfully proved that solicitors who admitted negligence re banking security documents had caused no loss.

Edwin Coe v Aidiniantz [2015] 1 Costs L0 129, assessment of solicitor's costs, s.70 Solicitors Act 1974.

Credit & Mercantile v Nabarro [2015] PNLR 14 (Ch Div), achieved summary judgment for the defendant in limiting damages for professional negligence to diminution in value.

Nationwide BS v Davisons [2013] PNLR 12. Court of Appeal authority on claims against solicitors for breach of trust and allegations of breach of strict contractual duty.

St Anselm v Slaughter & May [2013] EWHC 125 (Ch), acting for the defendant, struck out half of claim on limitation grounds.

Hellard v Irwin Mitchell [2013] PNLR 8 implied waiver of privilege as to evidence of barristers.

Nationwide BS v Dunlop Haywards [2010] 1 WLR 258, [2009]. An important decision on contribution between valuers and solicitors in lenders' claims.

Pickthall v Hill Dickinson LLP [2009] EWCA Civ 643, and [2009] PNLR 10. Limitation and abuse of process.

Taylor Walton v Laing, [2008] PNLR 11. Solicitors' negligence, successful strike out of relitigation as abuse of process (also the subject of a feature article in *The Times*).

Stone Heritage v Davis Blank Furniss, [2007] EWCA Civ 765, [2007] 31 EG 80 (CS): successful appeal on scope of solicitor's duty to give commercial advice.

Luke -v- Wansbroughs [2005] PNLR 2, QBD: duty of barristers and solicitors in the conduct of litigation.

Luke -v- Kingsley Smith & Co [2004] PNLR 12, QBD: test in law as to when solicitors and barristers may seek contribution from each other.

Laib -v- Aravindan [2003] EWHC 2521, QBD, The Times, 13 November 2003: claim for loss of litigation, accrual of cause of action.

Direct Line Insurance v Khan [2002] Lloyd's Rep IR 364, CA: insurance; joint policy; whether fraud of one policyholder entitled insurers to recover sums paid to both policyholders.

Ruparel v Awan [2001] Lloyd's Rep PN 258, Ch D. Enforcement of solicitors' undertakings and the Partnership Act; whether work done in the ordinary course of solicitor's business.

Jenmain Builders v Steed & Steed [2000] PNLR 616,CA. Measure of damages for professional negligence, whether loss of profits recoverable.

Matlock Green Garage Ltd v Potter Brooke-Taylor & Wildgoose [2000] Lloyd's Rep PN 935, QBD: measure of damage for solicitors' negligence leading to loss of business tenancy; valuation of tenancy.

Nationwide BS v Balmer Radmore [1999] Lloyd's Rep PN 241, [1999] PNLR 606, Ch D. Managed list of 400 cases relating to solicitors' liability to mortgage lenders, contributory negligence in solicitors' cases, breach of fiduciary duty, relevance of surveyors' negligence. Specifically, William acted as junior counsel in:

- *Nationwide Building Society v. A.T.M. Abdullah* [1999] Lloyd's Rep PN 616, Ch D: causation, role of surveyors
- *Nationwide Building Society v Vanderpump & Sykes* [1999] Lloyd's Rep PN 422, Ch D: fraud/breach of fiduciary duty.
- *Nationwide Building Society v Littlestone & Cowan* [1999] Lloyd's Rep PN 625: terms of solicitor's duty to report to lender.

Bristol & West Building Society v. Daniels & Co [1997] PNLR 323,Ch D. Solicitors' negligence/breach of fiduciary duty.

Melinek & Back [1997] BPIR 358, The Times 10 April 1997, ChD. Solicitors' negligence, insolvency law.

Mahoney v. Purnell [1996] 3 All ER 6 QBD. Solicitors' negligence, accountants' negligence, undue influence.

R v. Poole BC, ex parte Cooper 27 HLR 605, Crown Office List. Judicial review, homelessness.

Irtelli v. Squatriti [1993] QB 83, CA. Contempt of court.

Further information

Publications

Co-author, *Solicitors' Negligence and Liability* (Flenley & Leech, 3rd ed., 2013).

An original contributor to *Professional Negligence and Liability* (Informa): sections on *SAAMCo*, causation, mitigation, contribution.

A former contributor to *Cordery on Legal Services*.

Formerly assistant general editor, *Lloyd's Reports: Professional Negligence* (2000-2003).

Ough and Flenley, *The Mareva Injunction and Anton Piller Order* (2nd ed., 1993): freezing orders, search and seizure orders.

He has spoken at professional negligence events organised by CLT, Informa, Lexis Nexis, the insurers' Professional Indemnity Forum, the Professional Negligence Law Association, and the Professional Negligence Bar Association (PNBA), including webinars. From 2007 until 2010 he was co-chair of the annual PNBA Lawyers' Liability Day.

Education: MA (Oxon) (Jurisprudence) (1985), Open Exhibition; LL M (Cornell Law School, USA), St Andrew's Society of the State of New York Scholar (1986); BCL (Oxon) (1987), Middle Temple Astbury scholarship (1988), Mediation training (ADR Chambers).

Appointments: Part-time lecturer in Law, London School of Economics, 1988-89. Bencher of the Middle Temple, 2014.

Committees

Executive Committee, Professional Negligence Bar Association, 2004-2015; Vice-Chairman 2011 to 2013; Chairman 2013 to 2015.

Since 2015 he has sat on a committee seeking to introduce a scheme of Adjudication to Professional Liability cases.

Member, Board of Management, Thames Reach Housing Association, a charity for people who are homeless or in danger of homelessness in London.

ICO Data protection registration number: **Z6874737.** William Flenley QC is a barrister regulated by the Bar Standards Board. Click to view **William Flenley QC's Privacy Notice**

2019 – The Year in Damages

William Flenley QC

- "the assessment of causation and loss in cases of professional negligence has given rise to difficult conceptual and practical issues which have troubled the courts on many occasions."
- Lord Briggs JSC in *Perry v Raleys*

Topics

- Loss of a chance in the Supreme Court
- *Saamco* after the Court of Appeal in *Manchester Building Society*
- Contributory negligence in professional negligence claims

Loss of a Chance

- *Perry v Raleys* approves *Allied Maples*
  - *What the claimant would have done:* balance of probabilities
  - *What third parties would have done:* loss of a chance assessment, percentages

In what type of case is Loss of a Chance applied?

- Negligent conduct of litigation (or quasi-litigation)
- Negligence re client entering into a transaction
  - Lost opportunity to enter into a transaction with a specific third party
  - Lost opportunity to make profits in general ?

Problematic Issues

- Is the loss of a chance doctrine applied in cases where the third party gives evidence at the professional negligence trial?
- How to assess multiple contingencies

Loss of a Chance: assessing what the claimant would have done

- Balance of probabilities
- Burden of proof on claimant
- Full rigour of cross-examination at p.n.trial
- Lost litigation: would the claim have been an honest claim?
- What the claimant would have done at a notional trial

Evidence which would not have been available at the notional trial

- *Edwards* and the missed opportunity
- Issue as to whether the claimant's claim would have been honest (see previous slide)

Manchester Building Society (CA) (1)

' (1) It is first necessary to consider whether it is an "advice" case or an "information" case…

(2) It will be an "advice" case if it can be shown that it has been "left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction", that "his duty is to consider all relevant matters and not only specific matters in the decision" and that he is "responsible for guiding the whole decision-making process".

(3) If it is an "advice" case, then the negligent adviser will have assumed responsibility for the decision to enter the transaction and will be responsible for all the foreseeable financial consequences of entering into the transaction.

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Manchester Building Society (CA) (2)

(4) If it is not an "advice" case, then it is an "information" case and responsibility will not have been assumed for the decision to enter the transaction.

(5) If it is an "information" case, the negligent adviser/information provider will only be responsible for the foreseeable financial consequences of the advice and/or information being wrong.

(6) This involves a consideration of what losses would have been suffered if the advice and/or information had been correct. It is only losses which would not have been suffered in such circumstances that are recoverable.'

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- The difference between 'advice' cases and 'information' cases
- Is there a further *Saamco* filter on damages in some cases?

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Contributory negligence in professional negligence claims

- Claims where it is alleged that the client failed to detect an error of the defendant professional
- Claims where the alleged contributory negligence fell within the province of the claimant, eg lenders and businessmen

John Virgo
Guildhall Chambers

‘SIPPs – The Berkeley Burke Saga’

JOHN VIRGO

CALL: 1983

"He's thorough and very detail-oriented."
Chambers UK 2020

Email: john.virgo@guildhallchambers.co.uk
Tel: 0117 930 9000

John is a specialist commercial barrister, with a strong practice emphasis on high-value financial product mis-selling litigation.

He has appeared in all the leading mis-selling cases, including: lead counsel appointment in a group pension mis-selling action (**Cocking v Prudential**); acting in a 400 strong group action in the Commercial Court on behalf of Equitable Life's trapped annuitants (**Abeles and Others v Equitable Life Assurance Society**); acting for Zurich Life to defend claims for product mis-selling arising out of the collapse of the Bahamian Imperial Consolidated Fund (**Seymour v Caroline Ockwell & Co; Zurich IFA Ltd**); acting for investors into the AIG Enhanced Variable Rate Fund who suffered substantial losses following its collapse (**Rubenstein v HSBC Bank**);acting for a number of high net worth individuals and businesses in relation to the mis-sellingof interest rate hedging products (**Rowley and Green v Royal Bank of Scotland**).

He has acted in a number of leading cases concerned with the manipulation of LIBOR (**Graiseley Properties Ltd v Barclays Bank Plc**; **Hotel de France Ltd v Lloyds**(off-shore litigation in Jersey);**Rhino Enterprises Ltd v Barclays Bank Plc** and **Longford Securities Ltd v Royal Bank of Scotland**). He is currently acting in a multi-million pound claim against the Royal Bank of Scotland relating to an aborted Commercial Mortgage Backed Securities issuance.

John is instructed nationwide in complex and substantial disputes where his advocacy and forensic skills are highly valued. He is also retained off-shore in Isle of Man and Jersey.

PRACTICE AREAS

- Banking & Finance
- Professional Negligence
- international / offshore

BANKING & FINANCE

Instructing John Virgo "ensures the solicitor has a smooth ride", say commentators. John Virgo "dazzles sources with his extremely clear, thorough and comprehensive advice" - Chambers UK 2013.

John represents clients in complex and substantial commercial disputes in England & Wales and the Isle of Man. He enjoys working as a team, with clients, solicitors and other junior and leading barristers.

John welcomes instructions in the following areas:

- Financial Services Product Mis-Selling including rate swap mis-selling and LIBOR related claims
- Commercial Contract Disputes
- Professional negligence & indemnity (financial advisers, product providers, fund managers and accountants)
- Insurance - coverage disputes

John has wide ranging sector knowledge, including experience in, amongst others, the following sectors:

- Financial services
- Banking and finance
- Accountancy
- Insurance
- Business appraisals

WHAT OTHERS SAY

Chambers UK 2016 - "He has an encyclopaedic knowledge of financial services disputes, and is very deeply steeped in case law and factual knowledge." "He fights his corner for the client and he's a very good guy."

Chambers UK 2015 - "He is incredibly well prepared and a very persuasive advocate."

Chambers UK 2013 - "He is considered a 'linchpin' for many a dispute resolution team across the country. He is a first choice for a number of solicitors as he is 'hard-working, cheerful, open-minded, imaginative and very easy to work with'."

Chambers UK 2012 - John Virgo "always delivers". His extensive grasp of the financial services sector is reflected in his recent work for Zurich Life in defence of claims of product mis-selling.

RECENT CASES

- PDHL v Financial Conduct Authority [2016] UKUT 0129 (TCC) – powers of FCA to close debt management company
- PDHL v Financial Conduct Authority [2016] UKUT 0130 (TCC) – powers of FCA to suspend order closing debt management company
- PA(GI) LTD v GICL 2013 LTD and another [2015] EWHC 1556 (Ch) – whether a Part VII business transfer passed liability for PPI mis-selling to new insurer
- Suremime Limited v Barclays Bank plc [2015] EWHC 2277 (QB)– whether Bank owes duty of care to carry out Interest Rate Hedging Review with care and skill
- Battrick v. Royal Bank of Scotland Plc [2013] EWHC 4848 (QB) – use of expert evidence in interest rate hedging litigation
- Rowley & Green v Royal Bank of Scotland 2013 EWCA Civ 1197; [2012] EWHC 3661- Liability of bank for interest rate swap mis-selling).
- Rubenstein v HSBC Bank [2012] EWCA 1184; [2011] EWHC 2304 - Liability for negligent investment advice to invest in AIG Enhanced Variable Rate Fund.
- Ollerenshaw & Green v FSA [2012] UKUT B60 TCC- FSA disciplinary proceedings for alleged failings to supervise mortgage brokers selling of suitable mortgage products.
- AXA Sun Life Services Plc v Mortgage UK Financial Services Ltd & Others [2011] EWCA Civ 133- Cconstruction of exclusion clauses in appointed representative agreements; scope of UCTA.

PROFESSIONAL NEGLIGENCE

"Financial services mis-selling expert John Virgo continues to thrive and earns praise for his 'sense of humour, fast brain and tremendous advocacy'.

John is someone who “gives his all to a case' and is often involved in cases of some significance" - Chambers UK.

John represents claimants and defendants in complex and substantial professional negligence & indemnity disputes in England & Wales and the Isle of Man. He enjoys working as a team, with clients, solicitors and other junior and leading barristers.

John welcomes instructions in bringing and defending claims against the following professionals:

- Financial advisors
- Accountants, including insolvency practitioners and auditors
- Solicitors
- Barristers
- Surveyors
- Engineers

WHAT OTHERS SAY

Chambers UK - "John has a broad commercial litigation practice, and is also widely recognized for his expertise in professional negligence claims concerning the mis-selling of financial products."

RECENT CASES

- Bunney v Burns Anderson 2007 EWHC 1240 - Acted for claimant in challenge to the scope of jurisdiction of the Financial Ombudsman Service in high value claims.
- Brinsons v Financial Ombudsman Service [2007] EWHC 2534 - Acted for the applicant in a challenge to the scope of jurisdiction of the Financial Ombudsman Service over mortgage-endowment linked mis-selling claims.
- Baker v Clark [2006] EWCA Civ 464 - Acted for defendant/respondent in case concerning efficacy of trustee exoneration clauses protecting occupation pension scheme trustees.

INTERNATIONAL / OFFSHORE

John's specialist practice in financial services work has attracted off-shore demand and has centred on instructions from firms of advocates on the Isle of Man and in Jersey. He has recently advised on and assisted in:

- A series of mediations in connection with investor losses caused by the collapse of the Louis Group Structured Fund, based in the Isle of Man (the claims arose from negligent recommendations to invest in the fund)
- Proceedings (on-going) in the Isle of Man Courts of Justice relating to the compliance procedures of a well-known island-based insurer (RL360)
- A high-value claim brought in the Isle of Man Courts of Justice against Moore Stephens Financial Services Ltd
- A significant LIBOR-rigging claim brought by a leading hotelier in the Royal Court of Jersey against Lloyds TSB Offshore

He is currently engaged in a multi-million-pound claim arising from the mis-handling of litigation against Barclays Bank plc in proceedings conducted before the Supreme Court of Gibraltar.

He also sits as a commercial arbitrator in the London Court of International Arbitration (his most recent hearing relating to a dispute between a Russian importer of cosmetic oils and a UK supplier).

RECENT CASES

- Russell Adams v Carey Pensions (UK) LLP, High Court (Ch) (judgment pending)
- Mohammed Arif and Others v Berkeley Burke SIPP Administration Limited [2017] EWHC 3108 (Comm)
- Paul Jackson v TenetConnect Limited and Others [2017] EWHC 1308 (QB)

RECOMMENDATIONS

- Chambers UK 2014
- Legal 500 2008

APPOINTMENTS:

- Arbitrator with the Centre for Business Arbitration
- External adviser to the Irish Pensions Board

MEMBERSHIPS:

- Bristol Chancery & Commercial Bar Association
- Professional Negligence Bar Association

EDUCATION:

- MA (Oxon)
- Worcester College, Oxford Graduated in Jurisprudence

RECENT NEWS

- Berkeley Burke ordered to pay £1m to cover legal cost of investors
- John Virgo to speak at MBL Seminar: Financial Product Mis-Selling - Latest Scandals
- John Virgo speaking at Financial mis-selling conference 2017
- Bank settles on second day of trial in first case to address the direct application of the COBS Rules to a mis-sold swap
- Guildhall Chambers quiz night goes down a "sturm" - September 2015

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SINGLE ASSET SIPPS PROVIDER LIABILITY AND THE BERKELEY BURKE SAGA

John Virgo

Guildhall CHAMBERS

Outline of talk

1. Typical scenario?
2. Key Issues?
3. Current litigation landscape?
4. Main bases of claim?
5. Additional bases of claim?
6. Limitation Act issues?
7. Quantum?

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Typical scenario

- C has a modest pension fund invested in a PPP or OPS
- C contacted by unregulated introducer and recommended to transfer fund to a SIPP so as to access a high performing investment (sic)
- SIPP provider accepts the transfer and makes the investment through the SIPP envelope
- The investment fails
- Introducer pockets commission paid by investment provider
- SIPP administrator earns fees from SIPP

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Key Issues?

- Unregulated introducer is uninsured and not worth suing
- SIPP operator is regulated but has no duty to advise on the suitability of the SIPP or the "wrapped" investment
- As an "execution only" provider what duties does the SIPP operator owe to its customer?

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Current landscape

1 *Adams v Carey Pensions UK LLP*

2 *Berkeley Burke SIPP Administration*

(a) [2017] EWHC 2396
Teare J – FOS and JR

(b) [2017] EWHC 3108
HHJ Russen QC GLO – default judgment 25 July 2019

(c) [2018] EWHC 2878 (Admin)
Appeal – mid October 2019?

3 *Liberty SIPP*

Managed action for trial later this year

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Berkeley Burke and Due Diligence duty?

- Factual background conformed to typical scenario
- Mr Charlton persuaded by unregulated introducer to transfer his PPP fund of c£24k to BB to invest in japtropha trees in Cambodia offered by Sustainable AgroEnergy plc which was operating a fraudulent scam
- Investment made in September 2011 and lost by February 2012
- So began C's heroic quest to recover his losses…

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Mr Charlton's saga

- Complaint to BB and then FOS in September 2012
- FOS determination in his favour in 2014
- Under threat of JR by BB, FOS agrees to re-consider
- February 2017 – new determination in Mr C's favour
- Permission to appeal under Arbitration Act rejected: October 2017 (Teare J)
- JR challenge rejected by Jacobs J in 2018

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Due Diligence

- Basis of FOS decision was that BB breached duties framed around PRIN 2 (conduct business with due care and skill) and 6 (TCF)
- BB only checked to see if investment was HMRC compliant and identified that it would not be routinely valued
- No investigation as to whether trees planted or if Sustainable AgroEnergy had title to them

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Scope of Duty

- Identified SA as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence
- Considered whether SA was appropriate for a pension scheme
- Ensured that the investment was genuine and not a scam, or linked to fraudulent activity
- Independently verified that SA's assets were real and secure, and the investment operated as claimed
- Ensured that the investment could be independently valued, both at point of purchase and subsequently
- Ensured C's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could be a scam

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COBS 2.1.1R

PRIN provisions are not enforceable by private investors but are echoed in COBS 2.1.1 R i.e. the client best interest rule which may therefore equally impose DD duties on the SIPP operator

- HMRC "sippable"?
- Recognised legal title?
- Capable of being valued?
- Fraud?
- Capable of being realised?
- Appropriate?
- Burden on trustee?
- Status/ bona fides of introducer?
- FCA warning notices?

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Key FCA publications

DD duties implicit in the key FCA publications and accepted by Jacobs J in ***ex parte Charlton*** and a key issue in ***Adams*** and in the GLO and Liberty SIPP litigation

- Self-Invested Personal Pensions (SIPP) operators – A report on the findings of a thematic review – September 2009
- Self-Invested Personal Pensions (SIPP) Operators – a report on the findings of a thematic review October 2012
- FSA Alert issued on 18 January 2013 (Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP)
- **FCA SIPP Operator Guidance October 2013**
- FCA Further Alert dated 28 April 2014 (Pension transfers or switches with a view to investing pension monies into unregulated products through SIPPs)
- "Dear CEO" letter of 21 July 2014
- FCA alert published on 2 August 2016, and
- FCA Alert dated 24 January 2017 (Advising on pension transfers – our expectations)

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Statutory basis of claim – s27 FSMA

Section 27 – Financial Services and Markets Act 2000

'*27(1) An agreement made by an authorised person ("the provider") — (a) in the course of carrying on a regulated activity (not in contravention of the general prohibition), but (b) in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition, is unenforceable against the other party.*

27(2) The other party is entitled to recover — (a) any money or other property paid or transferred by him under the agreement; and (b) compensation for any loss sustained by him as a result of having parted with it'

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Section 27, FSMA continued

In the case of unregulated introducers:

(1) They advise on the SIPP and the underlying investment: RAO, Art. 53

(2) They arrange the SIPP: RAO, Art. 25 *Personal Touch Financial Services Ltd v SimplySure Limited et al* [2016] EWCA Civ 461

(3) The SIPP operator knows of the arranging and ought to appreciate the arrangement is likely to be the product of advice: *SIB v Scandex Capital Management A/S* [1998] 1 WLR 712

Section 27, Defences

- Section 28 and application for order it would be just and equitable to allow enforcement

  But – surely not where SIPP operator knows of the perimeter breach: *Re Whiteley Insurance Consultants (a firm)* [2008] EWHC 1782 (Ch)

  But – surely not given need to ensure SIPP operators are an effective gateway to protect the retail market?
- Disclaimers?

  But – surely not given COBS 2.1.2 R
- COBS 11.2.19R (1)

  But – surely cannot override s27?

Joint enterprise

ICS v West Bromwich Building Society [1999] Lloyd's Rep PN 496

Sea Shepherd UK v Fish & Fish Ltd [2015] AC 1229

Per Lord Sumption "*…the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious*"

Additional bases of claim?

As the SIPP fund provides death benefits, it is arguable that a disclosure duty arises i.e. a duty "*to disclose all facts known to [the provider] which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer*": *Banque Financière de la Cité S.A. [1991] 2 A.C. 249*

Disclosure duty?

- SIPP contracts are not usually seen as insurance contracts despite the life cover component
- The insured risk (?) is the life of the policyholder not the risk of reduced provider payment
- *AMP Financial Planning PTY Limited v CGU Insurance Limited* [2005] FCAFC 185: "*The precise content of the concept of utmost good faith depends on the legal context in which it is used. In the context of insurance, the phrase encompasses notions of fairness, reasonableness and community standards of decency and fair dealing. …*"

Governey and another v IBRC Assurance Company Ltd [2016] IESC 78

Investment via a life wrapper which was high-risk and unlikely to be a reliable source of payment of death benefit

Laffoy J at [92]: "*I am satisfied that the contract entered into by [the investor] with Anglo was not, in substance, a contract of insurance. In substance it was a contract under the terms of which [the investor] was to invest a sum of money in the Fund managed by Anglo and to receive a return on the investment in accordance with the terms of the contract documents*"

Not helpful if followed here…

Accessory liability ?

"*Where an adviser undertakes, whether pursuant to a contract and for consideration or otherwise, to advise another as to its financial affairs it is commonplace for the courts to find that the adviser has placed himself under fiduciary obligations to that other*" : *ICS*

Accessory liability may then attach to the providers if they assisted or facilitated the breach – and did so "dishonestly"

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Accessory liability continued

- By agreeing to incept the "wrapper" and using it as a vehicle for onward investment, providers may be seen to facilitate the breach of the introducer's fiduciary duty
- As to whether that assistance was "dishonest" the Supreme Court has now made it plain that the test is objective: see *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67 and in particular Lord Hughes at [62] "*if by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards*." It is arguable that by writing business which facilitates investments into high-risk and potentially fraudulent schemes in circumstances where the providers have identified these risks and decided to turn a blind-eye to them, then judged by ordinary commercial standards, most people would regard this as "dishonest"

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Limitation Act issues?

What is the date for accrual of any cause of action in tort? Various candidate dates:

- Date of SIPP establishment creating liability for provider fees?
- Date of irrevocable instruction to effect a pension transfer? Cf OPS/ WP fund/ Loss of enhanced allocation/ "cash to cash"
- Date of onward investment?
- Date investment falls in value?

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Quantum (1)

Section 28(2) of FSMA: "*The amount of compensation recoverable as a result of that section is — (a) the amount agreed by the parties; or (b) on the application of either party, the amount determined by the court*"

Starting point is a comparison between the value of the SIPP investment and the notional value of the counterfactual surrendered pension

Quantum (2)

"*As the law stands, any claimant who seeks substantial damages arising from a [adviser's] negligent failure to give him proper advice must satisfy three separate conditions, namely by showing (i) what advice in all the circumstances should have been given by a normally competent [adviser]; and (ii) what action the claimant would on the balance of probability have taken if he had received such advice; and (iii) that in the light of (i) and (ii), the loss which he has suffered was in fact caused by the failure to give the relevant advice. Only after the relevant loss has been identified in this manner will questions of quantification arise*"

Boateng v Hughmans (a firm) [2002] EWCA Civ 593

Finally ….

Any questions?

Q&A

David Chase
&
Andy Lyalle
Temple Legal Protection

PNLA ATE SCHEME

David Chase
Deputy Underwriting Manager

temple legal protection

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

Having started his career in ATE insurance in 2006 at FirstAssist, David gained experience in litigation funding as an analyst at Burford Capital, before joining Temple Legal Protection in late 2013. Having worked for over 12 years in this evolving market.

David has worked with many of the leading law firms in the British Isles. He has extensive and varied experience in risk analysis, case management and long-term relationship management. One of David's specialisms is his management of our fully-delegated schemes.

In his role as Deputy Underwriting Manager, David considers a very wide variety of non-injury litigation including all types of commercial litigation, group actions, professional negligence cases, insolvency actions and contentious probate. He combines strategic activities – evaluating developments such as the impact of ADR on the commercial litigation sector – with expert underwriting in order to assist customers in making efficient and timely use of our litigation (ATE) insurance and funding products.

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Andy Lyalle
Senior Business Development Manager

temple legal protection

Andy has worked in Legal Services for Twenty Five Years. After obtaining a 2:1 Law Degree and a Distinction in The Legal Practice Course he embarked upon an in house career at RAC Legal Services in Bristol. During this fourteen year period Andy was a Legal Advisor for four years and Legal Network Manager for ten years. A role which he developed and made his own. This was a hybrid role that involved technical legal work and also business and relationship management.

He achieved the RAC Chairman's Award in 2001 for "sales excellence" and has a star named after him as a result!

During the above period Andy managed a large panel of external solicitors and the work that RAC Legal Services processed on behalf of thousands of RAC Members and BTE LEI clients. Predominantly this work was personal injury but he also managed a panel of criminal law barristers chambers who represented RAC members and policy holders. He also managed the BTE claims which involved commercial and dispute resolution claims which involved a large number of employment cases. Andy managed a large costs centre and profit centre during his time at RAC and was also involved in the development of its high profile in house practice. He also designed and implemented a BTE LEI policy for RAC Members and an ATE Insurance policy which panel solicitors could use for their clients under a collective conditional fee agreement.

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Andy Lyalle
Senior Business Development Manager

Following the acquisition of RAC by Aviva in 2005 Andy remained to work with both organisations for another three years. He then decided to move into business development completely in early 2009. His first two and a half years were at Temple Legal Protection whereby he added many solicitor clients to the business working across the personal injury, clinical negligence, commercial and employment departments. Following this excellent and successful experience Andy set up his own consultancy business which enabled him to work with many legal providers and solicitors including cost drafting companies, medical agencies, litigation/disbursement funders, claims management companies and solicitors firms. He also put together a panel of solicitors for the first real time legal services aggregator platform on line.

After wearing many hats Andy was attracted to becoming part of a team again at a legal services provider with an excellent brand, team, reputation and product offering. Temple ticked all of these boxes and he is delighted to be back as Senior Business Development Manager. Based in our Bristol office but working Nationwide Andy enjoys meeting our existing and potential clients. He will listen to your requirements and work with you and our team to make sure that we add value to your business. His attitude is to find ways of making things happen and work successfully as opposed to discovering obstacles. Working predominantly in the Commercial Dispute Resolution team he will be pleased to hear from you to discuss our ATE Insurance and Funding products which are all under one roof. He will also be pleased to talk to you about our BTE Employment Protection Schemes and Personal Injury and Clinical Negligence ATE Insurance and Funding products and steer you in the right direction.

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Don't talk to me about ATE!

David Chase
Deputy Underwriting Manager

Don't talk to me about ATE!

You don't like the cases we send you.

You're too expensive.

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

You don't like the cases we send you.

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

You're too expensive.

temple legal protection

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

You're too expensive.

temple legal protection

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

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

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

temple legal protection

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

A question for you?

temple
legal protection

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

Oliver Manley
Guildhall Chambers

‘Professional Negligence Update – Limitation Issues in Mortgage Claims’

OLIVER MANLEY

CALL: 2005

"He has a good manner with clients and inspires confidence."
Legal 500

Email: oliver.manley@guildhallchambers.co.uk
Tel: 0117 930 9000

Oliver is a commercial and personal injury barrister with considerable experience in resolving all manner of disputes arising from his practice areas. He regularly appears in both the High Court and County Court and is consistently instructed in cases at all stages, from advisory, pre-action, interlocutory applications, trial, costs and appeals.

Oliver has been invited and thereafter spoke at the annual Professional Negligence Lawyers Association (PNLA) conference and the Public Law Project annual conference. He is also happy to offer talks and presentations specifically tailored to instructing solicitors needs if required.

PRACTICE AREAS

- Commercial
- Personal Injury
- Professional Negligence
- Technology & Construction
- Costs & Litigation Funding
- Inquests

COMMERCIAL

Oliver has an impressive and diverse commercial/chancery practice and has consistently accepted instructions in:

- Contractual disputes
- Debt Claims
- Sale and supply of goods and services
- Agency agreements
- Construction
- Partnership disputes
- Consumer credit
- Mortgage possession
- Commercial property disputes
- Restrictive covenants
- Professional negligence
- Costs

NOTABLE CASES:

- Healys LLP v Partridge and anor [2019] EWHC 2471 (Ch)- Concerned recovery of solicitor's fees and dealt with whether a CFA can also be a CBA within the meaning of section 59 the Solicitors Act 1974.
- Forklift Truck Ltd v Mollertech Ltd - MT trial involving novation and subrogation arising from bulk hire contracts.
- Freefoam Plastics UK Ltd v J - MT contract trial. Involves validity of personal guarantee.
- M & 14 others v Freightliner Heavy Haul Ltd- High Court breach of contract claims where successfully represented 15 train drivers.
- DGD & ALD v Abbey National Plc (Santander UK Plc)- Professional negligence/breach of contract claim in respect of mis-sold mortgage involving subrogation and misrepresentation.
- Landmark Entertainment Ltd v Evergreat Ltd - Debt case involving historic intra-company loans worth in excess of half a million.
- Wardell & Standish (joint trustees in bankruptcy) v AMJ & Anor- Case involving defending multiple claims from trustees in bankruptcy against former director of the Company. Resulted in successful split of equity in the property.
- Vale of Glamorgan Council v Late Margaret Judith Tailby, JMT- Case in Lands Tribunal defending claim for care home fees after unperfected gift on basis of rule in Strong v Bird.
- Tremorfa Limited v Amser Buildings Services Limited- MT construction dispute involving technical issues arsing from the installation of fire and security systems.
- R J L & T R D v Wye Construction Services Limited- MT construction dispute.
- Dr AG v Dr MO, Dr EW, Cwm Taf University Health Board & Ors- Defending the LHB from multiple claims made by former locum doctor. Includes claims for negligent misstatement and breach of data protection.
- The Bute Development Company Limited v V & C- Defending claim for adverse possession of land. Resisting security for costs application.
- Williams & Williams v W - Successfully appealed against Party Wall award.
- The Estate of Joseph Elfed Davies - Contentious probate matter in estate worth over £2m. Acting for executors. Involves complex historic trust of farmland.
- GH v PRL In The Matter of the Estate of the Late Dorothy Lavender -Ongoing contentious probate matter in the RCJ. Issues of capacity in respect of all parties and consequent Court of Protection proceeding leading to stay.
- Steddy Ltd v E - Injunction proceedings restraint of trade.
- KB-P & SBP v A (a firm) - Complex professional negligence matter involving solicitors who were advising on a Spanish property scam. Case turned on extent to which adjacent tooth principles could apply relying on Emptage. Disposed of under the Adjudication pilot scheme after obtaining an order at CCMC for such an adjudication to take place.
- G v H (a firm) LLP- Led in High Court case involving negligent immigration advice - Involved complex assessment of both general and special damage in circumstances where the immigration position remains uncertain. Successfully obtained stay at CCMC held in RCJ until immigration status resolved. Led to settlement of case by insurers.
- N J T v R J T & PS- Defended claim for harassment arising over property dispute. Four day trial dismissed after day two after successful half time submission. Subsequent appeal resisted.
- Neal Environments Ltd v LN, BN, SN v TH & WN- Advising Company and Directors over a numbers of years on long running dispute with other company directors. Dealing with ET claims, resisting petitions for unfair prejudice, successfully removed directors and settled their shares.

PERSONAL INJURY

Oliver has built a successful and substantial practice in Personal Injury. He covers all areas of negligence and represents both Claimants and Defendants. He deals predominantly with Multi Track work but is also happy to be instructed on FT work, if appropriate. He is regularly instructed to appear at CCMCs, interlocutory applications and of course trials. Oliver accepts instructions to deal with matters on a CFA with no uplift. He will not charge for his initial advice should the case lack prospects.

Oliver is approachable, has considerable experience and is noted for his ability to instil the complete confidence of both his professional and lay clients.

PROFESSIONAL NEGLIGENCE

Oliver was recently led in a case in the High Court involving the provision of negligent immigration advice by solicitors. The case threw up novel legal issues particularly in the quantification of damages and whether the loss of employment due to the Claimant's loss of immigration status should be quantified by using recognised methods from the personal injury jurisdiction.

In addition Oliver had acted professional negligence cases in banking and financial services including: mis-sold mortgages, negligence financial advice and negligent legal advice.

TECHNOLOGY & CONSTRUCTION

Oliver has regularly represented both Claimants and Defendants in complex construction disputes and conducted numerous multi track trials in cases involving both residential and commercial construction projects. He regularly appears for developers, architects, sub-contractors and owners of residential property.

COSTS & LITIGATION FUNDING

In addition to conducting detailed assessments Oliver is also particularly interested in the extent to which the failure to engage in forms of ADR can impact on the recoverability of costs. Recently he successfully obtained a direction at CCMC stage for a case to be subject to the adjudication pilot scheme for the settlement of professional negligence cases before being able to progress to trial.

INQUESTS

Oliver has been regularly instructed at Inquests on behalf of medical professionals, employers and other interested parties.

NOTABLE CASES:

- Re: Haines - Inquest into death of elderly patient in care. Allegations of poor care following severe bed sores. Appeared on behalf of nurse in charge of the home.
- Re: Walker - Appearing as Counsel for the driver of a vehicle at an inquest where a verdict of suicide was recorded after a pedestrian stepped into the motorway
- Re: Cunningham - Appearing as Counsel for the owners of a care home at an inquest where it was alleged that a 22-year old autistic man been forced to swallow a surgical glove.

EDUCATION:

- BVC (Very Competent) (2005)
- PgDip (Merit) (2004)
- BA (Hons) History (2002)

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PNLA CONFERENCE

BRISTOL

5th February 2020

Limitation Issues in Mis-sold Mortgage Claims

Due to the nature of mortgage transactions, being for the most part long term financial arrangements, it is somewhat inevitable that many potential claims will face limitation problems. The tendency on the part of the financial institutions in defending such claims is to argue that they are 'transactional' claims for which time starts to run on the date that they mortgage was entered into. This will usually lead to an application for summary and/or strike out on the basis of the claim being statute barred (see *Booker v RT Financial Services UK Ltd* [2016] EWHC 3186 (Ch); *CGL Group Ltd v Royal Bank of Scotland* [2016] EWHC 281 (QB) and *Nobu Su v Clarksons Platou Futures Ltd* [2017] 1 Lloyd's Rep 568).

This talk will consider some of the issues that arise in such claims and how such applications might be countered by the Claimant by reference to a specific example that the author has recently encountered in practice.

Limitation Act 1980

In order to consider properly the issues arsing in such claims it is necessary to review the current state of the law in the area of limitation which, whilst familiar to most, if not all present, is nonetheless important to have at the forefront of ones mind.

In respect of claims founded on tort or simple contact the Limitation Act 1980 provides that claims are barred after the expiration six years from the date on which the cause of action accrues.

Section 2 Time limit for actions founded on tort.

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 5 Time limit for actions founded on simple contract.

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

In the case of persons under a disability (defined as infants or persons of unsound mind) the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred).

Section 28 Extension of limitation period in case of disability.

(1)Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of

six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

The limitation period is also extended in cases of fraud, concealment or mistake.

Section 32 Postponement of limitation period in case of fraud, concealment or mistake.

(1)Subject to subsection (3) subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a)the action is based upon the fraud of the defendant; or

(b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c)the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2)For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3)Nothing in this section shall enable any action—

(a)to recover, or recover the value of, any property; or

(b)to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4)A purchaser is an innocent third party for the purposes of this section—

(a)in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b)in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

(4A)Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.

(5)Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).

Section 14A importantly provides for a later date of limitation where the relevant facts as to the cause of action are not known at the date of accrual.

Section 14A **Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.**

(1)This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2)Section 2 of this Act shall not apply to an action to which this section applies.

(3)An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4)That period is either—

(a)six years from the date on which the cause of action accrued; or

(b)three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

(5)For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6)In subsection (5) above "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both—

(a)of the material facts about the damage in respect of which damages are claimed; and

(b)of the other facts relevant to the current action mentioned in subsection (8) below.

(7)For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8)The other facts referred to in subsection (6)(b) above are—

(a)that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b)the identity of the defendant; and

(c)if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9)Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10)For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a)from facts observable or ascertainable by him; or

(b)from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

However, it should be noted that these provisions only cover actions brought in tort and not those in contract, although for present purposes it is highly likely that for this type of claim that the pleadings would advance claims in both due to the coextensive duties arising (*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and Su *v Clarksons Platou Futures Ltd and another [2018] EWCA Civ 111)*.

Date of Accrual in Contract Claims

In claims for breach of contract the cause of action accrues when the breach occurs, whether or not damage is suffered at that time. Thus, where the professional person does something contrary to the express or implied terms of his retainer, time begins to run (at least for the contractual claim) on the date of that act. However, in respect of an omission the position is somewhat more complex. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch. 384* it was held that the solicitors' obligation to register the option continued until the date when effective registration became impossible, and that an action for breach of contract against the solicitors could be begun up to six years from the date when the obligation lapsed. In *Bell v Peter Browne & Co* [1990] 2 QB 495, in respect of the continuing duty issue the court held that the contractual claim accrued in 1978 and was therefore statute-barred. The fact that the solicitors could have remedied their breach at any time before the wife sold the house did not mean that there was a continuing breach of contract right up to 1986. The influence of *Midland Bank Trust Co Ltd* has been further reduced by the decision of the Court of Appeal in *Capita (Banstead 2011) Ltd v RFIB Group Ltd [2015] EWCA Civ 1310; [2016] Q.B. 835* where, by a majority, the Court of Appeal held that there was no continuing duty to correct earlier errors even when there was a continuing retainer.

Date of Accrual in Tortious Claims

In claims based in tort the cause of action accrues when the claimant suffers actionable damage (*Cartledge v E Jopling & Sons Ltd [1963] A.C. 758*). The damage must be 'real damage as distinct from purely minimal damage'. This may be when the breach of duty occurs or it may be at some later date, for example, when the client acts in reliance on negligent advice. Where the claimant is unaware that he has suffered damage until many years after the event, the basic limitation period would effectively prevent him from obtaining any remedy. If a claimant suffers damage which is irrecoverable in law, that does not start the limitation period running (*Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 W.L.R. 498*).

The relevant issues are therefore: what type of damage is the defendant liable for and what was the first point at which the Claimant suffered the same. It matters not for the purposes of establishing primary the primary limitation period for section 2 whether the Claimant himself was aware of any damage suffered at all (Law Society v Sephton [2006] UKHL 22; [2006] 2 A.C).

In *Forster v Outred & Co* [1982] 1 WLR 856 (approved subsequently in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 WLR 1627 the question was answered thus:

"What is meant by actual damage? Mr. Stuart-Smith says that it is any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. It was also suggested in argument … that 'actual' is really used in contrast to 'presumed' or 'assumed"

Subsequent cases have sought to draw the distinction between 'immediate loss' and contingent loss cases whereby the former it is as soon as the transaction is entered into that the loss arises (*Forster Outred & Co [1982] 1 W.L.R. 86*) whilst the latter there is only the possibility that some loss might arise in the future (Law Society v Sephton [2006] UKHL 22; [2006] 2 A.C).

Financial 'Advice' Cases

Consistently with the approach to claims involving financial advice is that a claimant will suffer loss and damage when he makes an investment or otherwise acts to his detriment in reliance upon negligent advice (*Martin v Britannia Life Ltd [2000] Lloyd's Rep. P.N. 412*). In *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863 the claimant had transferred from his occupational pension scheme to a more risky scheme in reliance on the defendant's advice. Relying on the decision of the House of Lords in *Law Society v Sephton* the claimant argued that mere exposure to risk was not itself loss, but was equivalent to the exposure to a contingency. The Court of Appeal rejected this argument. (See also *Davy v 01000654 Ltd (Formerly Heather Moor & Edgecomb Ltd) [2018] EWHC 353 (QB)*)

Section14A

The knowledge required for time to run under section 14A is (a) material facts about the damage in respect of which damages are claimed; and (b) of the other facts relevant to the current action mentioned in subsection (8) below'. For the purposes of these provisions a person is deemed to know matters which he ought reasonably to have observed or ascertained or (in appropriate circumstances) learnt from experts.

As well as having the requisite knowledge a claimant must also have the right to bring the claim for time to run against him. It is for the claimant to prove that the "starting date" was within three years of the issue of proceedings (subject to the 15 year long stop provision) (*Haward v Fawcetts (A Firm) [2006] UKHL 9; [2006] 1 W.L.R. 682*).

In *Halford v Brookes [1991] 1 W.L.R. 428* at 443 Lord Donaldson MR confirmed that it is not necessary that a person should know something 'for certain and beyond possibility of contradiction' for time to run but it is enough that he knows 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence". In *Nash v Eli Lilly & Co* [1993] 1 WLR 783 it was held that knowledge: 'is a condition of mind which

imports a degree of certainty and that the degree of certainty which is appropriate for this purpose is that which, for the particular plaintiff, may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice'. In *AB v Ministry of Defence [2012] UKSC 9; [2013] 1 A.C. 78* a firmly held belief was sufficient to justify begin to investigate a claim lies against the defendant.

Accordingly the reference to '*material facts about the damage'* should be taken to mean such facts as would lead a reasonable person to consider the damage sufficiently serious to justify instituting proceedings against defendant who did not dispute liability and was able to satisfy a judgment. This is concerned with the degree of damage suffered, not with any knowledge of the cause of that damage.

There is a subjective and objective test. First, what the person knows or is to be treated as knowing and second, whether a reasonable person with that knowledge would have considered the damage sufficiently serious to institute proceedings (*Haward v Fawcetts (A Firm) [2006] UKHL 9*). If a loss appears to be so minor or trivial then time will not run (*Birmingham Midshires Building Society v Wretham [1999] P.N.L.R. 685* contrast with *Hunt v Optima (Cambridge) Ltd [2014] EWCA Civ 714).*

Damage was attributable in whole or in part to the act or omission

If a person is to know that damage is attributable to the act or omission of a third party, he needs to know that he has suffered damage. The claimant does not need to have known each and every particular of breach of duty which is subsequently pleaded. It is sufficient that he has broad knowledge of the essence of his complaint *(Haward v Fawcetts (A Firm) [2006] UKHL 9).*

However a claimant who thinks he knows that damage is capable of being attributed to the act or omission alleged to constitute negligence, but would need to check with an expert before he could properly be said to know that it was, falls on the other side of the line (*Spargo v North Essex DHA [1997] 8 Med. L.R. 125).* Importantly where a claimant reasonably attributes the loss to other causes will not have sufficient knowledge *(Haward v Fawcetts (A Firm) [2006] UKHL 9).*

Knowledge which the claimant might reasonably have been expected to acquire

In the context of the equivalent provision governing claims for personal injuries[391] the test is essentially objective: what would a reasonable person who had suffered the injury have done? Any special characteristics of a particular claimant can be taken into account under s.33 of the Limitation Act 1980.[392] There is no equivalent to s.33 for claims falling within the scope of s.14A.[393] But the test under s.14A is also objective. The wording used is knowledge "which he might reasonably be expected to acquire". This means that "in general the court must have regard to the characteristics of a person in the position of the claimant, but not to characteristics peculiar to the claimant and made irrelevant by the objective test imposed by subs.(10)".[394] This can include the claimant's belief that he has a claim against a third party.[395]

Constructive Knowledge

In deciding whether a claimant should reasonably have gained the necessary knowledge from facts observable or ascertainable by him the court will usually expect a claimant to have appreciated the significance of written materials sent to him (*Webster v Cooper & Burnett [2000] PNLR 2040 CA)*. Further, where a claimant entrusts the conduct of his claim to someone else (for example, a firm of solicitors) he will be fixed with the knowledge of the facts which were ascertainable by that person (*Henderson v Temple Pier Co Ltd [1988] 1 W.L.R. 1540 CA).*

Expert advice

In deciding whether it was reasonable for a claimant to have sought appropriate expert advice the court will take into account the knowledge which the claimant had of the facts relevant to his potential claim. In *Gravgaard v Aldridge & Brownlee (A Firm)* [2004] EWCA 1529 the Court of Appeal held that the claimant should have sought legal advice about her rights in connection with a charge she had granted over her home in 1988 more than three years before proceedings were issued. Had she done so she would have been advised of her potential claim against her former solicitors.
There is, in practice, "an assumption that a person who had suffered a significant injury would be sufficiently curious to seek advice unless there were reasons why a reasonable person in his position would not have done (see *Johnson v Ministry of Defence [2012] EWCA Civ 1505*).

Section 14A (10) ensures that a claimant who has sought the appropriate expert advice which it was reasonable for him to seek will not be fixed with constructive knowledge of facts of which he should have learnt as a result of having done so if the expert advisor fails to inform him of them. In *Harris Springs Ltd v Howes [2007] EWHC 3271 (TCC); [2008] B.L.R. 229* it was held that where a claimant continued to rely upon the defendant for advice and the defendant does not inform him that there is a problem, the claimant will not be fixed with constructive knowledge. The scope of the retainer in answer to this question will always be significant (see *Lloyds Bank Plc v Crosse & Crosse (a firm)* [2001] EWCA Civ 366, reported at [2001] PNLR 830).

Deliberate Concealment

Section 32, provides:

32 Postponement of limitation period in case of fraud, concealment or mistake.

(1)Subject to subsection (3) subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a)the action is based upon the fraud of the defendant; or

(b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c)the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2)For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(3)Nothing in this section shall enable any action—

(a)to recover, or recover the value of, any property; or

(b)to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(4)A purchaser is an innocent third party for the purposes of this section—

(a)in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and

(b)in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.

(4A)Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.

(5)Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).

It is important to note that this jurisdiction is interpreted narrowly. *In Arcadia Group Brands v Visa Inc [2014] EWHC 3561 (Comm) the* claimants sought on section 32 on the grounds that the defendants had deliberately concealed a number of facts relevant to their claims. The Court of Appeal rejected this assertion stating the provision was to be interpreted narrowly.

Section 32 is for the discovery of facts which are '*essential for a claimant to prove in order to establish a prima facie case*' and not just those which would make the claimant's case stronger.

Further on the issue of how 'deliberate' the concealment needs to be, *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384 held that deliberate concealment for the purposes the 1980 Act included a deliberate breach of duty either concealed or undisclosed and committed in circumstances such that it was unlikely to be discovered for some time and also the taking of active steps to conceal a breach of duty after becoming aware of it.

Other avenues for avoiding Limitation

It is likely in the field of mis-sold mortgages that the lender will be seeking possession by way of counterclaim which does provide the potential to plead other equitable forms of relief and reply on section 36 of the 1980 Act, which provides as follows:

36 Equitable jurisdiction and remedies.

(1)The following time limits under this Act, that is to say—

(a)the time limit under section 2 for actions founded on tort;

(aa)the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;

(b)the time limit under section 5 for actions founded on simple contract;

(c)the time limit under section 7 for actions to enforce awards where the submission is not by an instrument under seal;

(d)the time limit under section 8 for actions on a specialty;

(e)the time limit under section 9 for actions to recover a sum recoverable by virtue of any enactment; and

(f)the time limit under section 24 for actions to enforce a judgment;

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

(2)Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

Clearly the equitable jurisdiction of set off and potentially specific performance can be relied upon in limitation cases if the circumstances provide. The lead case on the concept of equitable set off is still *Hanak v Green* [1958] 2 QB 9. However, these principles have been considered more recently in *Fuller v Happy Shopper Markets Ltd and another* - [2001] 1 WLR 1681 where it was observed:

'An equitable (or transaction) set-off is a cross-claim arising out of the same transaction as the claimant's claim or one so closely connected that it operates in law or in equity as a complete or partial defeasance of the claimant's claim: see the *Aectra* case, p 1649 a– b per Hoffmann LJ. The cross-claim is so closely connected if it would be unconscionable for the claimant to insist on satisfaction for his claim without giving credit for the claim made against him by the other party. Equitable set-off operates not merely procedurally, but substantively as a defence'.

However any success in avoiding limitation would still need to take account of the observations in *Paragon Finance Plc v DB Thakerar & Co (A Firm) [1999] 1 ALL ER 400* where the application of the Limitation Act 1980 by analogy and the effect of the doctrine of laches is considered.

Case Study:

The brief facts were as follows:

The case involved a claim for professional negligence, breach of statutory duty and breach of contract arising from a mortgage advance. The essential elements of the alleged breaches are that the Defendant incorrectly represented their incomes on their mortgage application, failed to carry out any valuation of the property, gave negligent advice on the product by recommending a substantial increase in the loan amount and that it was on an interest only basis and failed to secure the mortgage as promised which in turn created a title trap for the Claimants. Notably in this case the Defendant had to accept that the mortgage was grossly under secured and to date did not disclose any valuation of the property. They sought to rectify this error by claiming increased security over another title registered to the Claimants by way of counterclaim (subrogation) and possession. They made an application for summary judgment/strike out on limitation grounds which was met by the Claimants arguing due to section 32 and equitable set off an such application could not be decided summarily. Result the application was withdrawn shortly before the hearing. The case now proceeds to trial.

20th January 2020

Oliver Manley

Guildhall Chambers
23 Broad Street
Bristol

[NB. These notes are not intended to be used for the purpose of providing legal advice]

Lucy Walker
Guildhall Chambers

‘Cryptocurrencies: growth area for claims in the 2020s?’

LUCY WALKER

CALL: 2008

SOL: 1998

"Specialises in advisory work for clients in the financial sector"
Legal 500 2020

Email: lucy.walker@guildhallchambers.co.uk
Tel: 0117 930 9000

Lucy is a specialist in consumer credit and in the financial services regulatory regime. Lucy undertakes contentious work and non contentious advisory work in relation to all aspects of financial services regulation, including consumer credit, the mortgage and home finance regulatory regime, payment services, cryptocurrencies and cryptoassets, financial promotion, crowd funding, peer to peer lending and general banking and commercial matters, including data protection and the General Data Protection Regulation.

PRACTICE AREAS

- Consumer Credit
- Mortgage and home finance
- Financial Services
- Banking
- Commercial
- International and Off-shore

CONSUMER CREDIT

Lucy undertakes both contentious work and provides non contentious and strategic advice to consumer credit firms on all aspects of the consumer credit regulatory regime including:

- The FCA authorisation process for credit and consumer hire firms
- FCA supervision issues including consumer credit regulatory reporting and notification issues
- Financial promotions for credit and hire products
- Advising on regulated and exempt credit and hire agreements
- Drafting standard form documentation
- Post contractual matters including cancellation and the supply of post contractual information
- Default and enforcement procedures, including unfair relationships
- Regulatory enforcement action against credit and hire firms, including the imposition of requirements and limitations on Part 4A Permission
- Interrelationship between the consumer credit regulatory regime and the Part XX regime for exempt professional firms
- The regulatory regime for Crowd Funding and Peer to Peer (P2P) lending
- Judicial review of FCA and FOS consumer credit decisions

MORTGAGE AND HOME FINANCE

Lucy provides contentious and non contentious advice on all aspects of the mortgage and home finance regulatory regime including:

- The Mortgage Credit Directive
- Regulated mortgage contracts, regulated home finance products and buy to let lending products
- Advising and selling standards
- Financial promotion for mortgage and home finance products
- Drafting standard form documentation
- Regulated and exempt mortgage contracts
- Enforcement of regulated mortgage contracts
- Interrelationship with the consumer credit regulatory regime
- Judicial review of FCA and FOS mortgage and home finance decisions

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FINANCIAL SERVICES

Lucy has wide experience advising banks and other regulated firms in relation to all aspects of the financial services regulatory regime, including the financial promotion regime, the promotion and regulation of crowd funding, peer to peer lending, cryptocurrencies and cryptoassets and in relation to payment services issues, including implementation of the revised Payment Services Directive and the Payment Services Regulations 2017. Lucy also advises on data protection issues including all aspects of the forthcoming General Data Protection Regulation.

BANKING

Lucy undertakes both contentious and non contentious work in respect of all aspects of:

- Loan and security documentation including corporate and personal guarantees
- Cheques and bills of exchange
- Security realisation and mortgage disputes
- General bank and lender recovery issues
- Asset finance and leasing
- Letters of credit and trade finance
- Data Protection including all aspects of the General Data Protection Regulation

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COMMERCIAL

Lucy's commercial experience includes:

- Sale of goods and supply of services
- Unfair contract terms
- General contract and debt recovery
- Data Protection including all aspects of the General Data Protection Regulation

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INTERNATIONAL AND OFF-SHORE

Lucy regularly advises offshore and overseas banks and financial institutions on a broad range of financial services regulatory issues, financial promotion and contractual issues and disputes. Recent examples include:

- Advising an offshore bank on the Mortgage Credit Directive and the regulated mortgage regime in the UK including advice on the types of secured lending product which could be offered to UK borrowers.
- Advising an overseas financial institution on the financial promotions regulatory regime and the promotion of products to UK resident customers.
- Advising a Luxembourg Bank on the implications of Brexit and the ability to passport into the UK for the purpose of providing regulated banking and lending products.
- Advising a US asset finance lender on a contractual dispute with a Kenyan borrower.

RECOMMENDATIONS

- Legal 500 2014
- Legal 500 2013
- Legal 500 2011
- Chambers UK 2009

MEMBERSHIPS:

- Vice Chairman, Theatre Royal Bath
- Member, Advisory Board to the Dean of the Faculty of Business and Law, University of the West of England

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EDUCATION:

- BA Joint Hons, History & Politics, Dunelm

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Professional Negligence Lawyers' Association

Cryptoassets

Notes

1. What is a cryptoasset?

- The blockchain: distributed ledger technology that facilitates the creation of cryptoassets.
- What is a cryptoasset/ cryptocurrency?
    - Is it money?
    - Is it property?
    - Is it a chose in action, or a chose in possession?
    - Is it electronic money?

Source materials:

- LawTech Delivery Panel Legal Statement on Cryptoassets and Smart Contracts, UK Jurisdiction Taskforce, November 2019.
- 'The Future of Money', speech by Mark Carney, Governor of The Bank of England, 2nd March 2018.
- 'The Wealth of Nations', Adam Smith.
- Electronic Money Regulations 2011.

2. The regulatory status of cryptoassets

- The classifications posited by the Financial Conduct Authority, (the "**FCA**"):
    - utility tokens;
    - security tokens;
    - exchange tokens.
- Regulation of activity connected with cryptoassets; activity carried on by trading platforms, cryptocurrency exchanges and in relation to derivative products with cryptocurrency as the reference asset.
- Anti-money laundering and taxation issues.

Source materials

- LawTech Delivery Panel Legal Statement on Cryptoassets and Smart Contracts, UK Jurisdiction Taskforce, November 2019.
- FCA Guidance on Cryptoassets, Policy Statement PS19/22, July 2019.
- 5th Anti Money Laundering Directive, EU Directive 2018/843.
- FCA/HM Treasury/ Bank of England Cryptoassets Taskforce Final Report, October 2018.

3. Disputes, problems and potential claims connected with cryptoassets

- Application of existing common law concepts to cryptoassets:
    - The significance of treating cryptoassets as property.
    - Loss, theft and mis-appropriation of cryptoassets; how can a cryptoasset be traced and what remedies might be available?
    - Taking security over cryptoassets and priority of security.
    - Breach of contract; can a 'smart contract' be susceptible to breach?
    - Mistake.
    - Negligence.
    - Equitable remedies.

Source materials

- *AA v. Persons Unknown* [2019] EWHC 3556 (Comm).
- *Robertson v. Persons Unknown (unreported).*
- *B2C2 Ltd v. Quoine Pte Ltd* [2019] SGHC(I) 03.
- *Ramona ANG v. Reliantco Investments Limited* [2019] EWHC 879 (Comm).
- *Elena Vorotyntseva v. (1) Money -4 Ltd (2) Sergey Romanovskiy (3) Konstantin Zaripov* [2018] EWHC 2596 (Ch).
- *Armstrong DLW GmbH v. Winnington Networks* [2013] Ch 156.

Q&A

Klaudia Aliaj
Director
Anexsys eDisclosure & Digital Forensics

‘Disclosure Update including the Business and Property Courts Pilot’

Klaudia Alia
Director
Anexsys eDisclosure & Digital Forensics
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Klaudia leads Anexsys' eDisclosure and Digital Forensics department in London.

Her experience in the industry includes being part of the data collections team at Barclays Bank as well as being the first hire within the litigation support team in EMEA for Gibson Dunn & Crutcher LLP.

Klaudia has handled complex global cases using a wide range of tools and workflows, including predictive coding.

Disclosure Update including the Business and Property Courts Pilot

Anexsys Head of eDiscovery services Klaudia Aliaj will provide attendees with an update on the practical effects of the changes to disclosure rules introduced by the Disclosure Pilot Scheme ("**DPS**").

During the presentation an introduction to the disclosure landscape will be provided, as well as an explanation of the background to the implementation DPS and why this was deemed necessary. The aims of the DPS will be discussed, in particular, the goal of creating a shift in the culture of disclosure and how it aims to achieve this.

The update will concentrate on key provisions of the DPS, including, but not limited to:

- The Disclosure Models introduced by the DPS
- The Disclosure Review Document, which has replaced the Electronic Disclosure Questionnaire
- Preservation of documents for the purposes of disclosure
- The introduction of Initial Disclosure and Extended Disclosure
- The general use of technology under the DPS

Reference will be made to pre-DPS case law regarding eDisclosure technology. An assessment of the practical effects of the judgments handed down since the introduction of the DPS, which have clarified the provisions of the DPS will be provided. The following cases will be discussed:

- **UTB LLC v Sheffield United Ltd & Ors**
- **Vannin Capital PCC v RBOS Shareholders Action Group Ltd**

The update will include best practices on how to implement eDisclosure technology to meet the requirements of the DPS. Insight into the following eDisclosure technologies will be provided:

- Technology Assisted Review and the benefit of using Continuous Active Learning to reduce the scope of a disclosure exercise
- Bespoke technologies that can be implemented to avoid repetitive tasks required under the DPS
- Using eDisclosure technology to ensure preservation requirements are adequately met.
- A general overview of how using machine learning can assist with the management of cases under the DPS.

The importance of cooperation between parties and early engagement on disclosure matters will be emphasised. Methods for pre-action assessment of data, which enable an understand of documents from the outset of a case will be discussed.

The update will consider the future of disclosure and the need for law firms and legal practitioners from all backgrounds to understand and engage with the aims of the DPS to ensure that the proportionate management of litigation becomes a reality.

Q&A

‘The Claimant Perspective’
Andrew Burnette
Partner
Burges Salmon

v

‘The Defendant Perspective’
Marcus Thomson
Partner
DAC Beachcroft

Andrew Burnette
Partner

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Overview

Andrew is a partner in the firm's dispute resolution team and specialises in the following:

- High value and/or complex professional negligence claims, particularly against solicitors, surveyors/valuers, financial advisors and brokers, actuaries, auditors, accountants and engineers. Andrew has particular experience acting for both traditional and specialist lenders to recover distressed loans secured against residential and commercial property.
- Company and shareholder disputes, including unfair prejudice petitions and derivative actions.
- Contractual disputes across a wide variety of subject and sectors, including advice on termination and following the sale/acquisition of companies.
- Obtaining urgent injunctive relief to protect a client's commercial interests, including freezing orders and search orders.
- Product liability, with a particular focus on recall and recovering losses.

Andrew has led successful proceedings up to the Court of Appeal and has experience of arbitration before the main international bodies, expert determination and mediation. He is authorised by the High Court to act as a Supervising Solicitor for parties wishing to execute Search Orders and he accepts instructions to adjudicate on professional negligence disputes.

Andrew is a member of the Professional Negligence Lawyers' Association and the International Bar Association.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Marcus Thomson

Partner

Bristol

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Marcus has been dealing with professional indemnity work since 1993, both in private practice and in-house. He specialises in defending claims against solicitors and deals with cases arising from all areas of private practice. He has over twenty years' experience in this area and has acted for a number of national and international law firms.

- *Santander UK plc v RA Legal Solicitors [2014] EWCA Civ 183* (breach of trust)
- *Hickman v Blake Lapthorn [2006] EWHC 12 (QB)* (personal injury under-settlement and apportionment between solicitors and counsel)
- *UCB Home Loans Corporation Ltd v Soni and another [2013] EWCA Civ 62* (vicarious liability of solicitor for frauds perpetrated by a partner)

Marcus also deals with claims against surveyors, valuers and accountants has a particular interest in the law of insurance, regularly advising insurers on coverage.

Marcus joined the firm from Travelers Insurance Company in 2002 and was made a partner in 2004.

Expertise

- Dispute Resolution
- Insurance
- Professional Liability

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Notes: -

Q&A

Chairman's Closing Remarks