PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

ENGLAND & WALES - ONLINE CONFERENCE

Getting inside the Case

July 2021

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

ENGLAND & WALES "ONLINE" CONFERENCE

Getting inside the Case

July 2021

21 mins **David McIlroy – Head of Chambers – Forum Chambers**

- "Chairman's Keynote Address - The shape of professional negligence after Manchester MBS v GT"

https://www.forumchambers.com/our-people/david-mcilroy/

27 mins **Peter Lees – Director – Squire Patton Boggs**

"How has the scope of duty test for professional negligence claims been reformulated by the MBS v GT judgment?"

https://www.squirepattonboggs.com/en/professionals/l/lees-peter

12 mins **Sir David Foskett – 39 Essex Street**

- "Keynote Address – I'm Sorry but I can't Apologise"

https://www.39essex.com/barrister/sir-david-foskett/

23 mins **Ben Patten QC– 4 New Square**

- "Design Liability & Professional Negligence: The Cladding Problem and Architects' Liabilities post Grenfell"

https://www.4newsquare.com/barristers/ben-patten-qc/

22 mins **Sian Mirchandani QC – 4 New Square**

- "Design Liability & Professional Negligence: Limitation, Contribution and the Likely Shape of Claim"

https://www.4newsquare.com/barristers/sian-mirchandani/

32 mins **Ben Lynch QC – Fountain Court Chambers**

- "Business Interruption Insurance"

https://www.fountaincourt.co.uk/people/ben-lynch/

53 mins **Paul Marshall - Cornerstone Chambers**

- "The Post Office Scandal - A Study in Judicial Failure"

https://cornerstonebarristers.com/barrister/paul-marshall/

12 mins **Nicholas Ellor - Senior Underwriter - Temple Legal Protection**

- "Litigation Funding Update"

https://www.temple-legal.co.uk/about-us/our-people/

28 mins **Adam Grant - Costs Lawyer - KE Costs Lawyers**

- "Costs Budgeting: Pitfalls to Avoid"

https://kecosts.co.uk/our-management-team/adam-grant/

15 mins **Sean Gibbs - Hanscomb Intercontinental**

- "The role of an Expert Witness"

https://www.hanscombintercontinental.co.uk

27 mins **Ian Mackie FRICS – Managing Director - Berkeley Research Group**

- "Valuation services for real estate and fixed-asset investments"

https://www.thinkbrg.com/people/ian-mackie/

40 mins **Carlo Taczalski & Nicola Atkins – Crown Office Chambers**

- "Practice and procedure in PN claims 2021"

https://www.crownofficechambers.com/barristers/carlo-taczalski/

https://www.crownofficechambers.com/barristers/nicola-atkins/

14 mins **Simon Wilton – Hailsham Chambers – Accredited PNBA Adjudicator**
- "ADR by Adjudication-update"
https://www.hailshamchambers.com/barrister/simon-wilton/

18 mins **Justin Briggs – Partner & Kelly Whittaker – Associate – Burges Salmon LLP**
- "Pensions Professional Negligence Claims"
https://www.burges-salmon.com/our-people/Justin-Briggs
https://www.burges-salmon.com/our-people/Kelly-Whittaker

6 mins **Katy Manley – President – PNLA/Manley Turnbull Solicitors**
- "Conference Closing Remarks"
https://www.pnla.org.uk/members/mrs-katherine-susan-manley-13521/

Total talk time - 5 hrs 50 mins

1 hr - Conference Pack Review
1 hr 30 mins - Questions & Answers via WhatsApp Group and Zoom Wrap Party
Total CPD - 8 hours 20 mins

PNLA
Professional Negligence Lawyers Association

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Duncan Lamont - Charles Russell Speechlys

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Contacts:

Matthew Pascall

Senior Underwriting Manager

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

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

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

Andy Lyalle

Senior Business Development Manager

Andy has 25 years' experience in the legal services sector, working in technical and managerial roles. Andy works predominantly with the Commercial team, meeting existing and potential clients and is always ready to discuss your litigation insurance and disbursement funding requirements.

07936 903767 | andy.lyalle@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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Hanscomb Intercontinental brings together experts advisors and expert witnesses that work across the global onshore and offshore construction, engineering and shipbuilding industries. Our experts span the disciplines of accounting, law, architecture, construction, surveying, ship building and engineering and many are dual qualified holding a professional qualification and legal training.

We undertake both expert advisory as well expert witness work and our experts are practising experts as opposed to testifying experts; our experts continue to work in their profession bringing the latest industry knowledge and best practice expertise to apply in their expert work.

We have offices across the United Kingdom and Ireland and also three international global hubs in New York, Johannesburg and Hong Kong.

We advise on matters ranging from householder disputes in the small claims court of low value through to international disputes being resolved by arbitration that are worth hundreds of millions of pounds.

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BRG is a global consulting firm that helps leading organisations advance in three key areas: disputes and investigations, corporate finance, and strategy and operations. With 1300 people across 46 offices worldwide, we are an integrated group of experts, industry leaders, academics, data scientists, and professionals working beyond borders and disciplines. We harness our collective expertise to deliver the inspired insights and practical strategies our clients need to stay ahead of what's next.

Accounting & Audit Negligence Expertise

BRG professionals utilise their practical audit experience, financial reporting and audit technical knowledge and forensic accounting skills to investigate and advise on alleged audit or accounting irregularities, "black holes", professional negligence and misconduct.

We have experience of providing expert advice to a range of stakeholders including management, auditors, investors, regulators, insurers, insolvency practitioners and their legal advisors. We can provide expert testimony if a matter comes to trial or hearing. Across our team we have experience of working with regulators on enforcement cases against audit firms and with audit partners and firms under investigation. This has given us a deep understanding of how to build-and defend-cases successfully.

We also have specialist expertise in Valuation Negligence including a highly experienced Real Estate practice.

Dispute Resolution, Professional Negligence & Commercial Litigation Experts.

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

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PNLA

Professional Negligence Lawyers Association

David McIlroy
Head of Chambers
Forum Chambers

Chairman's Keynote Address

The shape of professional negligence after Manchester Building Society v Grant Thornton

21 mins

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FORUM CHAMBERS

David McIlroy

YEAR OF CALL: 1995
CALLED TO THE BAR OF GIBRALTAR *PRO HAC VICE*: 2017

MA Law, Gonville & Caius College, Cambridge
Maîtrise en Droit (International and European Law), Université de Toulouse I

David is Head of Chambers at Forum Chambers. He is one of the foremost banking barristers in England. His combination of experience and insight enables him to identify persuasive arguments and to see where the law might be developed in the future. David is Visiting Professor in Banking Law at Queen Mary University of London.

BANKING (UK)

David acts and advises across the full range of financial services disputes and banking transactions, but with a particular focus on the SME sector. David is as comfortable advising in respect of a commercial loan, a mortgage or a guarantee as he is analysing the financial services rules contained in the FCA and PRA Handbooks. David has particular expertise in claims relating to LIBOR manipulation and the manipulation of other benchmarks, in relation to claims about negligent financial advice, and in claims relating to complex financial products. David also advises debtors in cases where there has been an unfair credit relationship, economic duress, or other abusive practices by a bank or other lender.

Recent and ongoing cases:

- *Standish v RBS* [2018] EWHC 1829 (Ch): claim against GRG where the bank acquired the ownership of a family-run business in temporary distress.
- *Scarborough Group v BOS*: multi-million pound claim against BOS for manipulation of LIBOR.
- *R (Mazarona Properties Ltd) v Financial Ombudsman Service* [2017] EWHC 1135 (Admin): Judicial review of the Financial Ombudsman Service's refusal to consider a complaint about the conduct of the Interest Rate Swap Redress Scheme by a bank.
- *Blackwater Services Ltd v West Bromwich Commercial Ltd* [2016] EWHC 3083 (Ch): Interpretation of a market disruption clause in a loan agreement.
- Claims against RBS arising out of GRG and Property Participation Agreements.
- Claims against Lloyds Banking Group related to the Impaired Assets Office of BOS / HBOS at Reading and elsewhere.

- *BOS v Noel Edmonds*: counterclaim by celebrity in respect of loss of business as a result of fraud by dishonest banker.

- Claims arising out of the actions of Banks' Business Support Units.

- *Deane, Murphy, Savage and Wilcox v Coutts & Co* [2018] EWHC 1657 (Ch): claims by footballers arising out of investment advice given in breach of fiduciary duty.

BANKING (EU)

David is a fluent French speaker and holds a Master's Degree in EU law from a French University. David frequently advises on questions of EU law and also regularly advises foreign banks which wish to sell financial services in the UK. David regularly acts on cases which involve conflicts of laws and analysis of foreign laws. David has acted as an expert for the EU on the laws in Albania governing banking and money laundering.

Recent and ongoing cases:

- Advising foreign private banks which wish to enter into mortgages secured on land in the UK as to the UK's regulatory frontier and the conduct of business rules which have to complied with in the event that their activities fall within the UK's regulatory frontier.

- Advising foreign banks on commercial financing agreements and hedging agreements which are subject to English law.

- Acting in a claim by an Indian bank against a guarantor involving questions of Belgian law and Indian law.

MIS-SELLING

David has handled a wide range of claims where investors have been given financial advice which was negligent and or in breach of fiduciary duty. He is able to identify a wide range of causes of action in tort and in equity and to advise on the liability of accessories to wrongdoing. David has also dealt with hundreds of claims of financial mis-selling. He specialises in claims relating to products governed by the ISDA Master Agreement including all types of interest rate hedging products including both vanilla and complex collars and swaps.

Recent and ongoing cases:

- Claim on behalf of high net worth individual against private bank for negligent and unauthorised investments.

- *Deane, Murphy, Savage and Wilcox v Coutts & Co* [2018] EWHC 1657 (Ch): claims by footballers arising out of investment advice to invest in a UCIS in Spanish property given in breach of fiduciary duty.

- Acted on behalf of investor who was advised to invest in UCIS in Cape Verde and t hen to invest into the Connaught Income Fund.
- Acted on behalf of investor who was advised by Merrill Lynch to invest in AIG's Enhanced Fund.
- *Poulton Plaiz Ltd v Barclays Bank Plc* [2015] EWHC 3667 (QB): Interest Rate Swap mis-selling claim
- Hundreds of swaps cases in which a small business was mis-sold an unsuitable interest rate swap or a fixed rate loan which contained an embedded swap.

PROFESSIONAL NEGLIGENCE

David's professional negligence practice relates to claims which have a banking or a commercial element. David is particularly adept at addressing complex questions of causation and loss. David frequently works with others at Forum to devise strategies for handling large numbers of claims for professional negligence relating to banking and finance. David and Phil have acted for thousands of clients who sued solicitors for failing to prevent them being over-charged and mis-sold mortgages by brokers.

Recent and ongoing cases:

- Claims against solicitors for failing to protect the interests of Asian buyers purchasing properties off plan in the North of England.
- Claims against solicitors for professional negligence in the conduct of a mis-selling claim.
- Claim against a solicitor for professional negligence in failing to address the tax consequences of a corporate takeover.
- Claim by banks against quantity surveyor for professional negligence in project monitoring.
- *Right to Buy Litigation* [2015] EWHC 1559 (Ch): Group litigation of claims for professional negligence against solicitors conducting conveyancing under the Right to Buy Scheme.

COMMERCIAL LAW

David deals with commercial disputes and transactions which have a cross-border element. He also deals with complex shareholder disputes, particularly where there have been breaches of fiduciary duties or of financial services or money laundering laws. David brings a common sense approach to commercial litigation. He is able to devise strategies which reflect the client's attitude to risk and maximise the outcomes in their case.

Recent and Ongoing cases

- Multi-million pound shareholder disputes.
- Acting in applications under the Cross-Border Mergers Regulation.
- Drafting facilities documentation for an Egyptian bank.
- Acting in claim involving worldwide freezing injunction.
- Appearing in the Gibraltar Supreme Court in *Magner v Royal Bank of Scotland International Ltd* (2017, Gibraltar) for inspection of witness statements and exhibits under CPR 32.13 in on-going proceedings where it was alleged that the bank had dishonestly assisted breaches of trust.

ACADEMIC QUALIFICATIONS

- PhD, University of Wales
- Maîtrise en Droit (International and European Law), Université de Toulouse I
- MA Law, Gonville & Caius College, Cambridge
- Diploma in French, Gonville & Caius College, Cambridge

SCHOLARSHIPS AND AWARDS

- Major Scholarship, Inner Temple
- Concours Annuel, Université de Toulouse 1ère Mention - European Competition Law
- Tapp Studentship, Gonville & Caius College, Cambridge
- George Long Prize for Roman Law, Cambridge University
- Squire Scholarship, Cambridge University
- Senior Scholarship, Gonville & Caius College, Cambridge
- McNair Law Prize, Gonville & Caius College, Cambridge
- Exhibition, Gonville & Caius College, Cambridge

PROFESSIONAL BODIES

- Financial Services Lawyers Association
- Professional Negligence Lawyers Association
- Franco-British Lawyers Society

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We also operate by appointment from our offices in Manchester and Bristol.

The Shape of Professional Negligence after *Manchester Building Society v Grant Thornton* [2021] UKSC 20

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

The Court in *Manchester Building Society v Grant Thornton*

- Lords Hodge and Sales
- Lord Reed, Lady Black, Lord Kitchin
- Lord Burrows
- Lord Leggatt

- Joint judgment, reshaping the law of professional negligence
- Agree with the joint judgment
- Scope of duty is the key question to resolve cases
- Legal causation is the key question to resolve cases

The good news from *Manchester Building Society v Grant Thornton*

- All 7 judges agreed on the outcome
- Clarity that scope of duty questions apply to clinical negligence as well as all other types of professional negligence
- The artificial and often counter-intuitive distinction between “information” and “advice” has been abandoned
- The counter-factual is no longer determinative of the causation question
- 5 out of 7 judges endorsed a clear set of questions to analyse the elements of a professional negligence claim

Manchester Building Society v Grant Thornton: a quick reminder of the facts

- GT advised MBS that it could use "hedge accounting"
- That advice was wrong
- MBS used long-term (50 year) interest rate swaps to hedge the lifetime mortgages it offered
- The result of GT's incorrect advice was that MBS was not carrying enough regulatory capital
- It closed out the interest rate swaps early at a cost of £32m

Khan v Meadows: the facts

- M asks GP if she is carrying the haemophilia gene
- GP says no, incorrectly
- M gives birth to son would suffers from both haemophilia and autism

The New Shape of the Law of Professional Negligence (1)

- (1) Is the harm which is the subject matter of the claim actionable in negligence? (**the actionability question**);
- (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (**the scope of duty question**);
- (3) Did the defendant breach his or her duty by his or her act or omission? (**the breach question**);
- (4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (**the factual causation question**);
- (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (**the duty nexus question**); and

The New Shape of the Law of Professional Negligence (2)

- (6) Is a particular element of the harm for which the claimant seeks damages irrecoverable:
  (i) because it is too remote, or
  (ii) because there is a different effective cause (including novus actus interveniens),
  (iii) or because the claimant has mitigated his or her loss
  (iv) or because the claimant has failed to avoid loss which he or she could reasonably have been expected to avoid? (including volenti non fit injuria and contributory negligence)

(**the legal responsibility question**)

Where does the *SAAMCO* principle fit in to the new analysis?

- (2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (**the scope of duty question**)
- (5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (**the duty nexus question**);

and possibly

- (6)(ii) Is a particular element of the harm for which the claimant seeks damages irrecoverable because there is a different effective cause (including novus actus interveniens)?

What's the risk?

- Don't worry about whether the professional was giving advice or information, focus on the question: "what was the risk which the advice or information was intended and was reasonably understood to address?"
- GT was asked to advise whether MBS could use hedge accounting for the purposes of regulatory reporting, so it was liable for the losses resulting for its incorrect advice on that risk *even though* the scope of its duty did not extend to evaluating the commercial risks of MBS's proposed strategy
- Dr Khan was not asked to advise on the risk of M having a child with autism, so Dr Khan was not liable for the losses resulting from that being the case

The scope of duty question and the duty nexus question

- The scope of duty question looks at the purpose for which the advice or information was given
- The duty nexus question is designed to separate out from the losses incurred as a result of entering into the transaction, the element of those losses attributable to the defendant's negligent performance of the service which he undertook
- In some cases (e.g. *Khan*), answering the scope of duty question will also answer the duty nexus question
- In other cases, the duty nexus question should be addressed separately and after the court has determined there has been a breach of duty and factual causation has been established

The counterfactual

- The counterfactual question (what would the claimant's loss have been if the information or advice which the defendant gave had been correct?) is a helpful analytical tool in some but not all cases
- The Court warned against "the dangers of manipulation … of the parameters of the counterfactual world"
- "The more limited the advice or information being provided … the more appropriate the counterfactual test is likely to be" (Lord Burrows, concurring)
- The counterfactual question is no longer determinative, but is likely to be used by advocates and judges as a crosscheck

MBS v GT: The minority reports

- Same conclusion, but different routes
- No need for a new structure to professional negligence claims; it is sufficient to focus on the purpose for which the information or advice was given (Lord Burrows, former Law Commissioner)
- The key question is: at the legal causation stage, was there and a causal connection between the advice and the loss, and if so, is it fair and reasonable to impose on the professional adviser liability for the loss? (Lord Leggatt)

Conclusion

- The scope of duty question is here to stay.
- The duty nexus question is also probably here to stay.
- The advice/ information distinction has diminished in importance (though it remains central to financial services regulatory claims)
- The Supreme Court decision does not deliver pre-prepared answers to all the scenarios in which scope of duty questions arise
- We will be talking about *Manchester Building Society v Grant Thornton* for some time to come

Peter Lees
Director
Squire Patton Boggs

How has the scope of duty test for professional negligence claims been reformulated by the Manchester Building Society v Grant Thornton judgment?

27 mins

SQUIRE PATTON BOGGS

Peter Lees

Director

MANCHESTER

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Peter Lees is a director in the Litigation team in Manchester. Peter advises on a wide range of commercial disputes, with a particular focus on defamation and professional negligence claims.

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About

Defamation: Peter has considerable experience of advising clients on defamation matters, as part of the firm's wider reputation management expertise. Peter's commercial and strategic approach is informed by his background; prior to joining the firm, Peter worked in advertising and media for companies including the Telegraph Group, Viacom and Carat.

Professional negligence: Peter advises numerous financial services and commercial clients on negligence claims against professionals including accountants, solicitors, surveyors and patent attorneys. Peter advised Manchester Building Society in its successful Supreme Court appeal against Grant Thornton (*Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20).

Commercial litigation: Peter also advises on a wide range of commercial disputes. In particular, Peter has advised numerous clients on the enforcement of restrictive covenants, building on experience gained acting for the successful franchisor in *Pirtek (UK) Limited v Joinplace Ltd & others* [2010] EWHC 1641 (Ch).

Experience

Defamation

- Advising a healthcare company in respect of claims for malicious falsehood, trademark infringement and copyright infringement.
- Advising a leading football club in respect of a defamatory article about the club and its chairperson.
- Advising a client implicated in the 1MDB scandal on potential defamation claims against a London-based publication.
- Advising a publisher in respect of an article concerning the QAnon conspiracies.
- Advising a healthcare company in respect of defamatory claims made by a sales representative.
- Advising the firm's US LLP to help ensure the removal of a defamatory article about a client's business activities in Africa.
- Advising a charitable trust in respect of risk of defamation claims arising from the implementation of enquiry recommendations.

Professional Negligence

- Advising Manchester Building Society in its successful Supreme Court appeal against Grant Thornton (*Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20).
- Advising numerous banks and building societies on claims against negligent accountants, solicitors and surveyors.
- Advising a leading online retailer on a claim against a negligent accountant (securing a 100% net recovery).

Recognitions

- Reputation management: recognised in *The Legal 500* 2019 as a "key lawyer" and a "name to note" for trade defamation claims, and in *The Legal 500* 2020 as "experienced in handling defamation claims" and "highlighted for reputation management matters".
- Professional negligence/financial services: recognised in *The Legal 500* 2019 as a "rising star" and "recommended", and in *The Legal 500* 2020 as a "rising star" and "key lawyer".
- Commercial litigation: recognised in *The Legal 500* 2019 and 2020 as a "key lawyer" and a "safe pair of hands".

Credentials

Education

- University of Birmingham, B.A., Honors, 1996
- Manchester Metropolitan University, Graduate Diploma, Law, 2005
- Manchester Metropolitan University, L.P.C., 2006

Admissions

- England and Wales, 2008

About Squire Patton Boggs

One of the world's strongest integrated law firms, providing insight at the point where law, business and government meet. We deliver commercially focused business solutions by combining our legal, lobbying and political capabilities and invaluable connections on the ground to a diverse mix of clients, from long-established leading corporations to emerging businesses, start-up visionaries and sovereign nations. More than 1,500 lawyers in 45 offices across 20 countries on five continents provide unrivalled access to expertise.

SQUIRE PATTON BOGGS

Manchester Building Society v Grant Thornton UK LLP
[2021] UKSC 20

A new scope of duty test for professional negligence?

Peter Lees
Squire Patton Boggs (UK) LLP

A new scope of duty test?

SQUIRE PATTON BOGGS

2005-2013:
The business model

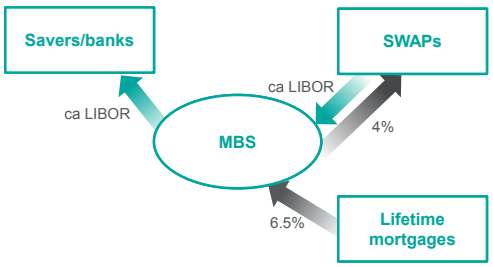
2018-2020:
The trials

2021:
The six questions

2013:
The break costs

The business model

SQUIRE PATTON BOGGS



"If you think you understand IAS 39…

"Hedge accounting is complex. There are very strict requirements to be fulfilled before an entity can take advantage of it. The asset being hedged and the derivative in question have to be formally designated. Various documentary requirements have to be fulfilled prior to the application of hedge accounting. It can only be applied if the hedge is expected to be "highly effective" – that is, the hedge is expected to be between 80% and 125% effective in offsetting changes in fair value attributable to the assets throughout the term of the hedging derivative. Moreover, the hedge must be determined to have actually been effective in practice."

Mr Justice Teare, para. 15

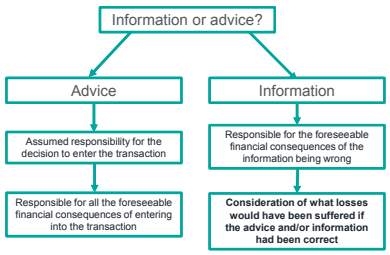
…you haven't read it properly."

2013:

"The Claimant's financial position, properly reported, was wholly different from that which it had previously stated in its audited accounts. The Claimant's profit for 2011 of £6.35m became a loss of £11.44m, and its net assets were reduced from £38.4m to £9.7m. Further, the regulatory capital position of the Claimant was very different. Instead of capital "headroom" … in 2011 of £20.4m there was a deficit of £17.9m. The effect on regulatory capital was twofold. First, without hedge accounting the adverse movement in the swaps reduced the Claimant's capital and, second, the Claimant was required to hold more capital because of the risk of volatility to which it was now exposed."

Mr Justice Teare, para. 18

~~Information or advice?~~



The "six questions"

SQUIRE PATTON BOGGS

"Application of this analysis gives the value of the claimant's claim for damages in accordance with the principle that the law in awarding damages seeks, so far as money can, to place the claimant in the position he or she would have been in absent the defendant's negligence."

"Therefore, in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."

A new scope/purpose of duty test?

SQUIRE PATTON BOGGS

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20

Peter Lees
Squire Patton Boggs (UK) LLP
peter.lees@squirepb.com

https://www.squirepattonboggs.com/en/insights/publications/2021/06/new-scope-of-duty-test-in-professional-negligence

Sir David Foskett
39 Essex Street

Keynote Address

I'm Sorry but I can't Apologise

12 mins

Sir David Foskett

Year called 1972
Silk 1991
david.foskett@39essex.com

David accepts appointments as an arbitrator, mediator or early neutral evaluator, both domestically and internationally, and is available to conduct independent inquiries or chair disciplinary proceedings within corporate and/or public, sporting, educational or similar bodies.

Until his retirement, David was a "highly respected" first instance High Court judge (the Supreme Court in *Mandalia v SSHD* [2015] UKSC 59). He presided over a **number of high profile cases** and dealt with a **wide spectrum of disputes** including commercial and employment matters, education, sporting and leisure-related cases, planning and public law cases (many involving human rights issues) and significant clinical and other professional negligence and personal injury cases. He case-managed and tried substantial multi-party litigation and engaged in significant fact-finding exercises in many cases.

Prior to his appointment as a judge in 2007 he had a distinguished career at the Bar with a broad common law practice, but specialising in professional negligence and general commercial matters. As a QC he represented a kick-boxer in a damages claim and at one stage in his career at the Bar he was standing Counsel to the British Horse Society. He has wide sporting interests with cricket, golf, rugby and athletics predominating. He has been a Fellow of the Chartered Institute of Arbitrators since 1992 and is a member of the LCIA and the ICC. He is also a member of the Court of the Worshipful Company of Arbitrators, a member of the Sport Resolutions Panel of Arbitrators and Mediators and a member of the Disciplinary Panel of the Premier League Judicial Panel.

Prior to becoming a full-time judge he was a CEDR-trained mediator and acted as a mediator in a **wide variety of cases and was widely praised for his style and effectiveness as a mediator.** He is a CMC registered mediator. Through CEDR he is a Complaints Commissioner for the Intercontinental Exchange.

As from 1 June 2019 he has been Chair of the Civil Mediation Council in the UK **(see here.)**

His interest in and identification with dispute resolution began with the publication in 1980 of the 1st edition of 'The Law and Practice of Compromise', now known as 'Foskett on Compromise'. This book is seen as the primary reference point for all issues concerning settlement and is used by practitioners and judges both in the UK and in other common law jurisdictions across the world. The 9th edition was published this year.

In addition to presiding over cases in court as a judge, David has chaired many committees over the years. For example, he was Chair of the Law Reform Committee of the Bar Council prior to his appointment as a judge, chaired the Costs Committee of the Civil Justice Council in relation to the review of Guideline Hourly Rates in 2013-2014 and chaired the Courts Committee of the Judicial College during the time he was Director of Senior Judiciary Training between 2012 and 2016.

He was Treasurer of Gray's Inn in 2018, chaired its regular meetings of Benchers, and chaired its Management Committee in 2009. As Treasurer, he visited Singapore, Hong Kong and South Carolina in 2018 and gave various lectures to practitioners and the judiciary including one entitled "Dispute Resolution in the 21st Century", reflecting in particular on the roles of arbitration and mediation in the current climate. He visited the Law Department of the Nelson Mandela University in Port Elizabeth, South Africa, in 2019 having also visited the Law Department of the University of South Carolina in 2018. He attended the Inter-Pacific Bar Association Conference in Singapore in April 2019 and gave presentations in relation to international arbitration and mediated international disputes in Kuala Lumpur. On 24 June 2019 he spoke to members of the New Mexico First Judicial Bar Association in Santa Fe, New Mexico, on a number of contemporary issues in the field of dispute resolution, particularly in mediation and arbitration, both domestically and internationally (**see here**). On 19 July he spoke to the Executive LLM students at King's College London on 'The Singapore Convention' (**click here to download text**) and to the LLM students at Queen Mary College, London, in October 2019.

In 2019 he completed 9 years as a member of the Council of King's College London of which he is a Fellow. He is the Patron of the KCL Bar and Mooting Society and retains a strong interest in the needs and aspirations of all students and those embarking on careers, including, in particular, law students and young members of the Bar through his continued association with King's College and Gray's Inn. His involvement both with universities and a number of schools over the last few years has enabled him to understand the pressures under which these institutions, including the governing bodies, teachers and students, operate.

He is currently chairing the independent panel (www.foskettpanel.com) which will re-assess the direct and consequential losses suffered by victims of the fraud at HBOS Reading, in line with the recommendations in the Cranston Review led by Sir Ross Cranston.

‘I’m sorry, but I can’t apologise’

Despite having retired from the Bench, one of the more welcome reminders of what it was once like to be an advocate and a Judge is to be invited to preside over student moots. Those invitations continue to arrive.

One problem that might generate the topic for a moot is whether the words that constitute the title to this brief talk would breach the requirement of many motor insurance policies concerning an accident which reads – “Do not admit liability, seek settlement or offer to negotiate.”

Is saying “I would like to apologise, but I am not allowed to” an admission of responsibility for what occurred? It is, of course, one step removed from actually apologising. But what does an apology really constitute?

This talk is not the place for a detailed analysis of what constitutes an apology and, for example, the difference between a “full” apology and a “partial” apology, a distinction made in a good number of jurisdictions across the globe. I would commend an article by Professor Robyn Carroll of the University of Western Australia Law School and two others entitled ‘Apology Legislation and its Implications for International Dispute Resolution’, published in 2015 on the International Bar Association website, for a thorough and learned examination of this whole area.

The authors said, from their perspective, that a 'partial' apology will refer to an apology that offers an expression of regret or sympathy, but does not incorporate an admission of fault or wrongdoing whereas, a 'full' apology will incorporate both.

We do, of course, have our own statutory provision which, in the scale of things, must be ranked as one of the shortest in the statutory lexicon. Section 2 of the Compensation Act 2006 simply provides that "[an] apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty." My limited research has found no case in which its ambit has been tested. That might be a testament to its efficacy. Or, of course, it could be an indictment of its inadequacy.

Professor Carroll and her colleagues are of the view that this provision does not protect from reliance in court upon a full apology as an admission and indeed, when one reads it more than once, there are some unanswered questions about its scope.

Some statutory provisions around the world are very much more detailed and specific. One nearer the other end of the spectrum is one I came across when researching for a lecture in South Carolina about 3 years ago. The US is, of course, a fertile environment for medical malpractice suits.

The South Carolina Unanticipated Medical Outcome Reconciliation Act contains the following provision:

> “In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider, an employee or agent of a health care provider, or by a health care institution to the patient, a relative of the patient, or a representative of the patient and which are made during a designated meeting to discuss the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.”

Anyone who has experience of clinical negligence work will know that an apology, coupled with an explanation for what went wrong will often go a long way to preventing unnecessary litigation and lingering heartache, particularly if there is a genuine “lessons learned” aspect to what is said by the medical practitioners or by those who employ them.

Indeed, some strides have been made in England after the passing of the Health and Social Care Act 2008 enshrining a duty of candour in law for all NHS bodies in England. I cannot claim to be sufficiently in the loop at the moment to say how successful that provision is in achieving its laudable objectives, but I noticed that some updated guidance was given very recently by the Care Quality Commission on meeting the duty of candour and the CQC's Chief Inspector of Hospitals said that the duty "is a crucial part of a positive, open and safe culture." One of the specific actions that providers must take when a notifiable safety incident occurs is "providing truthful information and a timely apology." The guidance, it is said, "makes clear that the apology required to fulfil the duty of candour does not mean accepting liability and will not affect a provider's indemnity cover."

I have not followed through how that guidance would stand the test of legal challenge if such a challenge was mounted, but I would be very glad to know that it was watertight.

But the whole issue of apology legislation or regulation goes much wider than the clinical negligence sphere. Any expression of the sort identified in the South Carolina provision to which I have referred can have a defusing effect on bitterness and anger if uttered in a timely, sincere and open fashion, whether in the medical context or otherwise.

There are many situations confronted by professionals other than medical professionals where an unanticipated outcome occurs for which an apology might be due and which might obviate litigation, or at least make it easier to resolve, when the insurance arrangements of the professional concerned prevent it because of the risk of being seen to admit liability.

Many listening to these few words will know that debates about the relevance or perceived importance of apology legislation have been rumbling on for years. So why is it relevant to mention it now?

Possibly encouraged by the relatively recent passing of the Apologies (Scotland) Act 2016, the Chair of the All Party Parliamentary Group on Alternative Dispute Resolution, John Howell MP, on 1 December last year, used the Ten Minute Rule Motion to introduce a Private Members Bill in the House of Commons to make more detailed legislative provision for apologies than section 2 of the Compensation Act 2006 provides.

I understand that Governmental interest was shown in the idea and discussions continue.

This is, in my view, welcome.

I have said what I am about to say in a number of talks on previous occasions, most recently in New Mexico a couple of years ago.

I do not know if this is a generational thing, but many of my generation will apologise for something even if it is quite plain that the occurrence was not their fault. Perhaps it was the way we were brought up. At a very mundane level, most of us would apologise for bumping into someone in the street even if it was not our fault. But it is not a large step from that to a more serious accident or event with serious consequences where the immediate reaction of the person who is not affected is to say "sorry" or express some regret to the person who was.

I have long thought it unfortunate that insurance policies contain the kind of provision to which I referred earlier and also that when someone does offer an apology, the recipient of the apology, or the recipient's advisers, then tries to create an admission of liability out of a polite and sincere expression of regret.

However, leaving aside my personal views on the merits of legislation which would overcome this problem, in the context of dispute resolution and indeed in the context of some mediations I have conducted, an apology often means far more than the money and it can unlock a door that otherwise seems firmly closed. There is quite a bit written on the question of whether an apology connotes a sign of weakness. Most mediators would say that it does not.

Anyone who gives a talk on this topic or writes an article about it usually refers to the words of the Elton John song, “Sorry seems to be the hardest word.” I am no exception.

All I would say is that, in certain contexts, it may still be one of the hardest words, but in my view, in the 21st century, any barriers to apologising imposed by the law should be removed. Justice can be done without that kind of impediment to civilised behaviour.

Ben Patten QC
4 New Square

"Design Liability & Professional Negligence: The Cladding Problem and Architects' Liabilities post Grenfell"

23 mins

Ben Patten QC

Call: 1986 Silk: 2010

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Clerk: Lizzy Stewart

L.Stewart@4newsquare.com

+442078222032 +447912405153

My number one choice for advice on technical points, and someone who provides excellent strategic advice.

- Chambers & Partners

Ben Patten QC's expertise lies in a range of commercial work, including construction disputes, professional liability claims, commercial litigation and insurance and reinsurance disputes.

Described as "calm under pressure and always willing to stick his neck out on a case" he acts for both claimants and defendants in the TCC, Commercial and Mercantile Courts, Queen's Bench Division, Chancery Division and Arbitrations. He also appears in the Court of Appeal and in expert determinations, mediations and other ADR hearings.

Chambers and Partners has described Ben as greatly respected for his effective manner in court, "he has a very nice way of presenting an argument which appeals to judges hugely," and his 'good commercial instincts'. 'Peers are impressed by his skills as an advocate generally, and particularly note his strength in solicitor negligence cases' as well as the "incredibly calm," "persuasive" approach he demonstrates in his construction and professional indemnity work for a client base of developers, contractors and insurers. Previous editions says of him "You can throw anything his way and he will deal with it." "He has a mild and gentle manner with clients, but is determined and clear in his advice. He is also very effective as an advocate, as he's calm but good at focusing on the right issues and directing judges' attention to them." "Technically he's one of the best around. He is also highly responsive." Ben is also rated as a leading Silk by the Legal 500.

Ben has also been described in the Directories as being "really at the top of his game", "a top performer who has a very concise and effective drafting, advisory and advocacy style" and "a star of the future". In 2009, the year before he took Silk, he was awarded Chambers and Partners Professional Negligence Junior of the Year.

A team player, Ben's style is to roll up his sleeves and get involved. He has considerable experience of very substantial commercial litigation, including group actions and the larger TCC cases. He is relaxed and approachable, whilst at the same time being businesslike and tenacious in pursuing the best outcome for the client. He has a keen sense of the client's commercial interests and can cut through the complexities of a difficult case to get to the heart of the issues.

Ben is the author of "*Professional Negligence in Construction*" [Spon] 2003, a co-editor of the Construction Professionals Chapter in "*Jackson & Powell*" and a co-editor of the Solicitors' Chapter in the *Professional Negligence and Liability Looseleaf*. He is also a frequent lecturer and author of legal articles. Ben is a member of TECBAR, COMBAR, the Professional Negligence Bar Association and the London Common Law & Commercial Bar Association. He has also been called to the Bar in the Republic of Ireland and Northern Ireland and has acted as an arbitrator.

Privacy Policy

Click here for a **Privacy Policy** for Ben Patten QC.

Areas of Expertise

Construction & Engineering

"Eloquent and bright, very good in conference with clients." – *Legal 500, 2020*

"A legal heavyweight, exceptionally bright and very impressive." "He has a superb combination of construction and professional negligence expertise. He is exceptionally good, so easy to get on with, hard-working and dedicated." "Very detail-oriented and a superb cross-examiner." – *Chambers & Partners, 2020*

"Gets to speed quickly with the papers and excellent at drafting submissions." – *Legal 500, 2019*

"Great to work with, very good with clients and commercially astute." "He's thorough and has a good cross-examination style." – *Chambers & Partners, 2019*

Recognised as a Leading Construction Silk by both the Legal 500 and Chambers & Partners. Ben has very considerable experience in construction and engineering disputes. He has appeared in a wide range of cases in the TCC, Arbitrations, Adjudications and the Court of Appeal. He has been described in Chambers and Partners as being greatly respected by clients for being *'"very easy to engage with and always provides sound commercial advice," "he is amazingly calm under pressure, which gives the entire team confidence,"* and for having a*"way of presenting an argument which appeals to judges hugely,"* and *"incredibly calm," "persuasive"* approach; *"a top performer who has a very concise and effective drafting, advisory and advocacy style*"; *"technically he's one of the best around. He is also highly responsive*", *"he is efficient, very clever and knows his stuff." "He has the trust of judges: he never makes a bad point or overblows a submission."*

Recent and current cases include:

- Acting for certificating architects in a claim brought by a number of purchasers.
- Acting for the employers of an auction mart in a dispute with the developer.
- Acting for architects and project managers in relation to a claim in respect of the renovation and development of civic premises.
- Acting for the Claimant in the groundbreaking vicarious liability case of *Biffa Waste Services Ltd. v Maschinenfabrik Ernst Hese Gmbh*, both at first instance in front of Mr Justice Ramsey and in the Court of Appeal (late 2008). The case is now the leading authority on the application of the control test for borrowed employees and of the extent of the application of the "extra hazardous acts" rule in *Honeywill v Stein & Larkin*.
- Acting for the defendant architects in the appeal to the Court of Appeal in *Hunt v Optima*, an appeal from Mr Justice Akenhead, which is the leading authority on duties arising from professional consultants' certificates.
- Acting for specialist contractors against whom a substantial claim was made arising out of a fire on the Isle of Wight.
- Acting for employers in respect of a biogas installation in a claim against the contractor.
- Acting for a firm of contractors in a multi-party dispute concerning piling and ground improvement works for a superstore in Kent.
- Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for a firm of contractors on a dispute concerning variations, extensions of time and loss and expense claims in relation to a residential development in Kensington.
- Acting for a firm of contractors in relation to a dispute over delays to a large development at Southbank London arising from a diesel spillage.
- Acting for a demolition contractor in relation to an inter-related series of adjudications and part 8 disputes concerning contractual interpretation.
- Acting for PI insurers of engineers on a large construction project in Ireland (essentially construction of bridges).
- Acting for UK design and build contractors in adjudication proceedings concerned with plant producing car parts (the issues are engineering).

Recent and current international cases include

- Acting for US contractors in a dispute concerning the construction of a gas pipeline in Nigeria.
- Acting for a Qatari developer in a dispute concerning a mixed use development in Doha.
- Acting for an international construction consultancy group in a dispute over project monitoring in the Caucuses.
- Acting for a Dubai based contractor in a dispute in the Dubai World Tribunal.
- Acting for US engineers in an arbitration concerned with a production plant in Germany where the critical issues concern tooling and engineering.

PFI and related fields

Experience in PFI and related areas:

- Acting for a large contractor in a dispute with a hospital trust
- Acting for a trust in relation to a schools project covering a number of schools
- Acting for the provider of services transporting detainees to secure facilities, courts and hospitals
- Acting for a provider of supplies and other services to a local authority
- Acting for a national housebuilder in respect of expert determination concerning a joint venture
- Acting for a health trust in relation to a dispute with a supplier of outsourced services

Professional Liability

"Excellent judgement and very easy to deal with." – *Legal 500, 2020*

"He is very good at distilling the detail when there are reams of information to dig through, to move the case forward successfully." "He is excellent: quick, confident and approachable. He has the ability to make complicated elements very simple." – *Chambers & Partners, 2020*

"He is very forensic and takes points in a measured but persuasive way. Clients really respect and trust him." "He's a very clear advocate and an extremely courteous opponent, and you can tell the judge has real confidence in him." – *Chambers & Partners, 2020*

"He has an encyclopaedic knowledge of the subject matter, coupled with a fantastic advocacy style. Like a university professor when he needs to be, but then a street fighter when that's appropriate. Watching his advocacy was a masterclass." "He is excellent on detail and provides good, practical advice." – *Chambers & Partners, 2019*

"He provides strong and decisive advice" – *Legal 500, 2019*

Accountants, Auditors & Actuaries

Ben has acted in many claims against accountants and auditors, including claims for negligent audit work, negligent preparation, review and audit of management accounts and negligent advice (including negligent tax advice, both corporate and personal).

Recent and current work includes:

- Acting for a claimant who was given incorrect advice over CGT and the benefits of moving his tax arrangements offshore.
- Acting for claimants against a firm of tax advisers, accountants and auditors concerning tax advice on corporate acquisitions with subsequent auditing advice and Inland Revenue investigations and action.
- Acting for claimants in a dispute with their former accountants concerning the taxation treatment of restaurant tips and the financial structures which might have been put in place so as to minimise the exposure of the business to national insurance contributions.
- Acting for accountants in a claim brought against them by former clients concerning advice in relation to foreign currency loans and the purchase of property bonds.
- Acting for claimants in a dispute with their former accountants concerning advice given in relation to a share sale transaction

and in particular the true and fair treatment of certain profits.
- Acting for auditors in a dispute with former clients concerning their failure to uncover fraudulent transactions undertaken by a former employee.
- Acting for a firm of solicitors against accountants in contribution proceedings in the context of a claim by former clients arising out of a share sale transaction.
- Acting for tax advisers concerning advice in relation to film finance schemes.

Construction Professionals

"He has been very impressive." "He is good on paper, very concise and clear." – Chambers & Partners 2019 – Professional Negligence: Technology & Construction

"A real stalwart in the field. What Ben doesn't know about professional negligence isn't worth knowing." "A very clever, fast and impressive advocate. He is very crisp and develops a good rapport with the judge. He's three jumps ahead." – Chambers & Partners 2018 – Professional Negligence: Technology & Construction

Ben has very extensive experience of acting both for and against architects, engineers, quantity surveyors and project managers. He also has experience of acting for specialist construction concerns such as demolition contractors and contractors carrying out asbestos works where "professional liability" issues often arise. He appears regularly in cases involving construction professionals in the TCC and in Arbitrations. He has considerable experience of construction professional indemnity insurance issues and contribution disputes.

Recent and current cases include:

- Acting for the defendant architect in the appeal to the Court of Appeal in *Hunt v Optima*, a case concerning professional consultant's certificates
- Acting for the design and build contractor of a superstore where substantial settlement was alleged to have been caused by inappropriate vibro-replacement treatment.
- Acting for engineers in relation to their design review and checking obligations concerning soil nailed walls in a railway embankment.
- Acting for a claimant in a dispute with former project managers concerning advice in relation to letters of intent and contractual remedies.
- Acting for engineers in relation to a dispute concerning soil stabilization works in a transport infrastructure project.
- Acting for a project manager in relation to a dispute concerning advice concerning planning on a residential development.
- Acting for a claimant in a dispute with a multi-disciplinary practice of architects, surveyors and project managers in respect of the construction of a health centre.
- Acting for an architect in a dispute over the design and construction of an airport terminal.
- Acting for a claimant against M&E engineers in relation to the design of a heating and ventilation system.
- Acting for a firm of project managers sued in respect of the project management of restaurant fitting out works in central London.
- Acting for engineers in relation to a claim arising out of frozen ground affecting the construction of buildings erected on the site of a former cold storage unit.
- Acting for a lender in a claim against a project monitor.Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for specialist architects in relation to a claim concerning the restoration of a grade II* listed building and ancient monument.

Insurance Brokers & Agents

Ben regularly acts both for and against Insurance Brokers in relation to disputes arising out of coverage difficulties.

Recent and current cases include:

- Acting for insurance brokers in a dispute with former clients arising out of a fire at warehouse premises where there was

insufficient public liability and business interruption cover.

- Acting for insurance brokers in a dispute with former clients arising out of a fire at commercial premises where the insurer avoided on the basis of non-disclosure.
- Acting for a construction contractor in a dispute with insurance brokers over the suitability of design liability insurance as a result of a decision by insurers that the contractor's policy did not respond to damage arising out of certain design defects.
- Acting for insurance brokers in a dispute with a construction contractor concerning policy advice arising in the context of a claim by an injured employee of a sub-contractor.
- Acting for insurance brokers in relation to a dispute with former clients arising out of coverage issues in respect of a claim relating to consultancy services provided to M&E contractors working on a hospital project in Belfast.

Lawyers

Ben has extensive experience of appearing both for and against claimants and defendants in cases involving barristers and solicitors. He has acted in some of the largest and most important disputes concerning lawyers in recent years, including the *TAG* litigation and the *Levicom* case. He recently successfully defended Eversheds in a multi-million pound claim brought by Newcastle Airport, winning both at first instance and in the Court of Appeal. He has covered most aspects of lawyer's negligence including claims arising from commercial, corporate and property transactions, claims arising from mortgage work and other aspects of lending transactions and claims arising from litigation. He has particular experience in disputes arising from, and difficulties arising in relation to, solicitors' professional indemnity insurance *and is experienced in dealing with dishonesty issues*. He is a *a co-editor of the solicitors chapter in the Professional Negligence and Liability Looseleaf.*

Recent and current cases include:

- *Newcastle Airport v Eversheds*
- *Levicom v Linklaters*
- Acting for a firm of solicitors alleged to have given inaccurate advice to a US based engineering consultancy, said to have resulted in a multi-million pound loss
- Acting for a firm of solicitors where the partner was issued with a witness summons to give evidence about client confidential matters in *Young v Young*
- Acting for solicitors in a dispute with former clients and a barrister concerning advice in relation to an appeal against a Customs and Excise ruling on alcohol.
- Acting for a barrister on a wasted costs application.
- Acting for the former partners of a firm of solicitors where a rogue partner was engaged in multiple mortgage fraud.
- Acting for a firm of solicitors involved in a dispute with former clients arising out of commercial litigation in relation to a complex web of business interests.
- Acting for claimants against their former solicitors in relation to advice concerning the purchase and development of a large block of land.
- Acting for a lender in relation to a dispute with a solicitor concerning a fraudulent commercial loan.
- Acting for a solicitor in a claim brought by shareholders in a company which was one part of a corporate joint venture advised by the solicitor.
- Acting for claimants in a dispute with their former solicitors concerning the disposal of substantial overseas business.
- Acting for a firm of solicitors jointly sued with Leading and Junior Counsel in respect of commercial litigation which was allegedly mishandled.
- Acting for solicitors in a dispute with clients about the alleged misappropriation of client funds.
- Acting for solicitors in a dispute over funding and alleged champerty and maintenance.
- Acting for a firm of solicitors sued by a company in respect of the losses sustained by reason of contracts drawn up by the solicitors on the instructions of one of the directors, which instructions were alleged to be unauthorised.
- Acting for a firm of solicitors, sued along with two other firms, in respect of alleged negligence in the conduct of substantial property transactions which were themselves said to be fraudulent transactions.
- Acting for solicitors in relation to alleged negligent advice concerning international litigation and arbitration in different jurisdictions and specifically freezing orders.

Surveyors & Valuers

Ben frequently acts both for and against surveyors and valuers in cases concerning all aspects of property valuation and particularly in cases relating to commercial lending and mortgage fraud.

Recent and current cases include:

- Acting for lending institutions alleging fraud on the part of a valuer.
- A number of actions for substantial lending institutions against different surveyors alleging negligent valuation in respect of both commercial and residential loans.
- Acting for a firm of valuers which contained a “rogue” partner who was involved in a series of fraudulent transactions which led to a number of commercial lending institutions suffering considerable losses.
- Acting or claimants in relation to the allegedly negligent valuation of a development site.
- Acting for a firm of planning consultants in proceedings brought against valuers and planning consultants relating to the acquisition and development of waterside properties.
- Acting for claimants in a dispute with a valuer over the purchase of property suffering from subsidence.
- Acting for a commercial lender in a dispute with a firm of surveyors concerning the valuation of packages of flats for a “buy to let” club.
- Acting for a lender in relation to overvaluation of “buy to let” portfolios.
- Acting for property consultants in a claim concerning allegedly negligent advice on future values.

Financial Services Professionals

- Acting for financial advisers in relation to investment advice given to two trusts, including investment advice concerning investment in Hedge Fund products, and claims brought by those trusts and/or the beneficiaries of the trusts.
- Acting for financial advisers in relation to investment advice concerning pension schemes and permissible investments.
- Acting for the insurers of a large Irish financial advisers concerning policy coverage and potential claims.
- Acting for claimants in a claim against mortgage brokers.

Commercial Dispute Resolution

Ben has substantial experience of commercial litigation in the Commercial Court, the Mercantile Courts and in arbitrations. He has being involved in a number of share sale warranty disputes, sale of goods disputes, disputes concerning licensing agreements and disputes concerning employment and restraint of trade.

Recent and current cases include:

- Acting for a printing concern in seeking injunctive relief against ex employees seeking to contact former clients whilst working with a competitor.
- Acting for a group of aviation companies facing debt claims arising out of service agreements and pension scheme arrangements pre-dating a share sale agreement.
- Acting for one of the joint venture partners in property joint venture in a dispute concerning the allocation of certain profits and losses.
- Acting for an engineering concern in relation to a dispute as to the meaning and effects of contracts between itself and a Swiss and a French concern in relation to the carrying out of certain works at a power station in the UK.
- Acting for the purchaser of a heating and electricity generating system in a dispute with the vendors of the system.
- Acting for solicitors in contribution proceedings against a bank in relation to losses sustained by their mutual clients.
- Acting for the leaseholder of a substantial office block in central London in respect of a delapidations claim.
- Acting for the contractor on a n expert determination in relation to a large government contract for services.
- Acting for the vendors of a construction business in relation to a share sale warranty claim.

Insurance & Reinsurance

Ben is frequently involved in insurance disputes, both in the Commercial and Mercantile Courts and in arbitrations. Many of these disputes arise out of other areas of his practice and in particular he is experienced in disputes concerning Contractors All Risks policies and Professional Indemnity policies.

Recent and current cases include:

- A claim by an employer contemplating proceedings under the Third Party (Rights Against Insurers) Act, for information concerning the contents and claims record of a contractor's policy of insurance.
- An action by insurers against former assureds seeking declarations that the policy was avoided on grounds of fraud.
- A dispute between insurers as to which policy responded to a loss where the assured had claimed against both.
- A dispute between the designer of specialist TV and Film set staging and its public liability insurer on liability for claims by third parties arising out of the collapse of one of its structures.
- A dispute between a construction contractor and its CAR insurer concerning whether losses arising from claims made by the employees of a sub-contractor were covered by the policy.
- Acting for the insurer of a financial services provider in respect of a policy dispute.
- Acting for the insurer of engineers under a professional indemnity policy concerning coverage issues.
- Acting for consulting engineers on policy issues arising out of allegedly defective design in respect of two water treatment plants.
- Acting for professional indemnity insurers in respect of coverage disputes concerning allegedly fraudulent solicitors.
- Acting for CAR insurers in relation to coverage issues arising out of notification and "one claim" disputes.

Property Damage

Ben has extensive experience in property damage cases

- Acting for the claimant in *Biffa Waste Services Ltd and Anor v Maschinenfabrik Ernst Hese GmbH* both at first instance in front of Mr Justice Ramsey and in the Court of Appeal (late 2008). The case is now the leading authority on the application of the control test for borrowed employees and of the extent of the application of the "extra hazardous acts" rule in *Honeywill v Stein & Larkin*
- Acting for specialist contractors against whom a substantial claim was made arising out of a fire on the Isle of Wight.

- Acting for an electrical sub-contractor in a very substantial multi-party case involving a fire at a retail park in Warrington
- Acting for a contractor in relation to asbestos contamination in industrial premises in Kent
- Acting for the CAR insurers of a major contractor in relation to flood damage at a hotel in Mayfair
- Acting for brokers in relation to a dispute over PL coverage in relation to damage to specialist pipework in an intensive care unit in Belfast

International Arbitration

Ben's main expertise lies in construction law and in particular in large construction projects with spin off financial claims. These include: gas pipelines; airport terminal buildings; office developments; airport runways; roads and bridges. He has experience in many different forms of construction contract and most commonly encountered construction issues, including: delay and disruption; variations; defects; certification and partnering. He is also experienced in issues concerning funding arrangements, guarantees and bonds.

Current and recent cases

National Infrastructure Development Co v BNP Paribas

In this case, which is one of a number actions taken by NIDCO to enforce standby letters of credit, Ben acted for the corporate construction arm of Trinidad and Tobago to enforce on-demand bonds to the value of nearly US$59 million. The defendant bank claimed (unsuccessfully) that it was not require to pay by reason of a Brazilian injunction. The case citation is [2016] EWHC 2508 (Comm).

S v H

This is a dispute between a US based turnkey manufacturer of specialist plant and a Swiss company concerning the design, installation and construction of a manufacturing plant in Germany. The legal issues concern contractual obligations, including responsibility for regulatory delays. The value of the claim is still being ascertained but the contract value is in excess of US$60m. The arbitration is conducted under ICC auspices (the law of the Contract is Swiss law). Ben acts for the US concern.

N v F

This was a very substantial dispute concerning a development project in Moscow. Ben acted as one of two leading counsel for one of the parties. The issues concern fraud, breach of fiduciary duty, contractual interpretation, causation and valuation. The claim was put at more than US$500m.

U v A

A series of disputes (some of which were referred to the LCIA) concerning a series of projects and related financial arrangements concerning the development of 8 tower blocks and a separate residential project in Doha, Qatar. The total quantum of the claims exceeded US$100m. Ben acted for the Qatari developer. There were three sets of related proceedings taking place in London and Doha. The Qatari and LCIA proceedings raised issues of contractual construction, bilateral obligations and commercial fraud. Proceedings before the Commercial Court concerned funding arrangements and claims by lenders against the developer. The issues in that claim concerned (1) forum; (2) proper law; (3) issues of agency and authority under Qatari law (4) compromise and ratification and (5) frustration/impossibility. The claim was for repayment of debt obligations in excess of $US35m.

T v N

Ben was engaged in a series of disputes (one of which has been litigated in the Dubai World Tribunal at the DIFC) between a Cypriot contractor and the developer of the Palm in Dubai. The issues concerned extension of time and claims for loss and expense. The value of the claims was very substantial.

E v A

Ben acted for an international construction consultancy concerning loans made to the developer of a mixed use development in Armenia. The allegations concerned project management and monitoring (in particular, alleged failure to detect mismanagement on the part of the developer and to identify likely cost overrun). The value of this LCIA claim was alleged to be in the region of US $25m. In addition to technical issues relating to the project, the issues of law concern the proper extent of a monitoring consultant's duties and the role of contributory fault by the lender.

W v W

This was a dispute concerning the construction of a gas pipeline through Nigeria and other West African states. The contractor's contract was terminated for alleged non-performance, although the contractor contended that the employer had failed to pay its contractual entitlements. The legal issues concerned the true construction of termination clauses, limitation on liability clauses and liquidated and ascertained damages clauses. More general issues concerned delays, extensions of time and defects. There were substantial practical issues concerning discovery from the parties' different manifestations in a number of different jurisdictions. Approximate claim value $120m. Ben acted for the contractor.

SG v KT

This was a dispute brought by a UK dependency against a firm of architects over the design, project management and contract administration of a project to construct a new airport terminal building. Legal issues concerned conflicts of law and jurisdiction between the law of the dependency and the law of the reference and issues over enforcement of interim awards. The more general issue in the case concerned alleged design defects, design coordination between different members of the design team, inspection of contractors' works, delay and reporting of cost overruns. Approximate claim value £15m. Ben acted for the architect.

C v P

This was a dispute concerning the adequacy of the design and construction of the concrete framework for a combined office and residential development in Dublin, Republic of Ireland. The legal issues concerned the proper interpretation of the contract as to the priority of contract documents and the meaning of the variations clauses. General issues concerned design responsibility, defects, extensions of time and loss and expense payments. Approximate claim value €6m. Ben acted for the contractor.

I v C

This is a dispute between an African construction company and a US based design and build contractor concerning the construction of two power generating plants in Liberia. The legal issues concerned alleged misrepresentation, the true meaning of the contract, causes of delay and entitlement to repudiate. The value of the claim was said to be just under US$10m. The arbitration is conducted under ICC auspices. Ben acts for the design and build contractor.

Ben acts as an arbitrator and mediator in construction disputes. He recently acted in a mediation between four parties in relation to a construction project in Northern Ireland.

Mediation

Ben is an accredited mediator and has mediated a range of disputes including:

- a dispute between a design and build contractor and its project architect;
- a dispute between a company and its former solicitors;
- a dispute between a contractor, its sub-contractors and its CAR insurers;
- a dispute between an employer and a design and build contractor;
- a dispute between two religious groups over the property of an unincorporated association.

In addition to mediation, Ben has acted as a conciliator under forms of contract made in the Republic of Ireland and Northern Ireland. He has a very "hands on" approach to mediation and likes to engage with the parties both before and (if appropriate) after the day of the mediation so as to ensure that the parties have the maximum prospect of achieving benefit out of the mediation.

Qualifications & Memberships

B.A. (Oxon) (First Class) Dip Law (City), Called to the Irish Bar in 1998, Called to the Bar of Northern Ireland 2014

Insights

Certainty in Certification – [2014] 9 JIBFL 620B

The decision of the Privy Council in Fairfield Sentry v Migani is of considerable importance to funds which employ certification mechanisms. It will also be of note in relation to instruments employing market-based triggers, for example convertible loan notes. Here we discuss the implications of the decision for certification and those responsible for issuing such certificates.

Jackson & Powell, Professional Liability [2017], co-editor of Chapter 9, Construction Professionals

Professional Negligence and Liability, co-editor Chapter 9, Solicitors

BUILDING ACT 1984

Building regulations 2010: 4(1)(a)

Schedule 1: Functional Requirements

Requirement B3(4) of Schedule 1 is that the building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.

Requirement B3(3) requires measures to be taken, to an appropriate extent where reasonably necessary, to inhibit the spread of fire within the building and to subdivide the building with fire-resisting construction.

Requirement B4(1) is that the external walls of the building shall:

"adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building".

Requirement B4(2): "The roof of the building shall adequately resist the spread of fire over the roof and from one building to another, having regard to the use and position of the building."

BUILDING ACT 1894: Section 6: Provides for publication of guidance.

Approved Document B: [2000 as amended in 2006, 2007, 2010 and 2013]

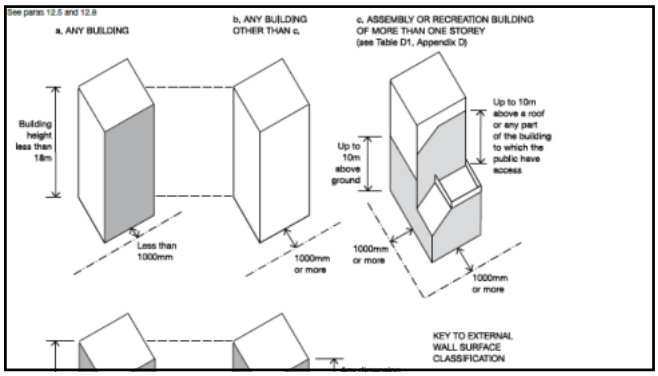
"The Approved Documents are **intended to provide guidance** for some of the more common building situations. However, there may well be alternative ways of achieving compliance with the requirements. **Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet the relevant requirement in some other way."**

Insulation Materials/Products

12.7 In a building with a storey 18m or more above ground level any insulation product, filler material (not including gaskets, sealants and similar) etc. used in the external wall construction **should be of limited combustibility (**see Appendix A). This restriction does not apply to masonry cavity wall construction which complies with Diagram 34 in Section 9.

Cavity Barriers

12.8 Cavity barriers should be provided in accordance with Section 9.
12.9 In the case of a an external wall construction, of a building which, by virtue of paragraph 9.10d (external cladding system with a masonry or concrete inner leaf), is not subject to the provisions of Table 13 Maximum dimensions of cavities in non-domestic buildings, the surfaces which face into cavities should also meet the provisions of Diagram 40.



TYPICAL ALLEGATION

- In breach of contractual and tortious duty the Architect designed the external cladding so that it included Kingspan polyisocyanurate (PIR) insulation Thermawall TW55 behind the brickwork and timber cladding of the façade. This product has a reaction to fire classification of Class E under British Standard BS 13501-1:2007, and is therefore not considered to be 'of limited combustibility'. This is contrary to the Building Regulations (B3 (4) and B4) and section 13.7 of the ADB 2000;

The Bolam Defence

- No professional person commits professional negligence if she acts in accordance with the practice followed by a substantial number of respectable members of that profession
- *He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members would bring but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet*. Bingham LJ in Eckersley v Binnie Partners [1988] 18 Con LR 1
- There was no definitive answer to the question "was Kingspan of limited combustibility" but a large number of architects at the time believed that it was.
- Kingspan was in widespread use and approved by architects, local authority inspectors and building inspectors

The Adams Qualification

- It doesn't matter that I did not think about the point at the time (still less carry out the relevant inquries)
- All that matters is that a competent architect who did think about the point at the time (and carried out the relevant inquiries) could have come to the conclusion that the product was compliant
- Adams v Rhymney District Council [2001] PNLR 4

The Unsafe Practice Response

- The fact that a substantial number of members of the profession adopt a particular practice is no defence to an allegation of professional negligence if the practice is in fact unsafe.
- Edward Wong Finance Co v Johnson Stokes & Master [1984] AC 296
- "The risk inherent in the Hong Kong style of completion as operated in the instant case being foreseeable, and readily avoidable, there can only be an affirmative answer to the third question, whether the respondents were negligent in not foreseeing and avoiding that risk": Lord Brightman
- Here the architect should have perceived the risk that the product was not compliant notwithstanding the fact that it was widely specified, which risk could easily be avoided

The No Logical Foundation Response

- A qualification to Bolam identified by Lord Browne Wilkinson in Bolitho v City Hackney HA [1988] AC 232
- The professional judgment in this instance has to be underpinned by logical analysis (akin to a calculation)
- Further the decision whether or not to specify Kingspan might be a matter of practice in terms of its efficacy as insulation, but the decision whether Kingspan was *compliant* cannot be a matter of professional expertise – it falls into the category of non-professional errors identified in Michael Hyde v JD Williams [2001] PNLR 233
- If there was no satisfactory evidence that Kingspan was compliant there could be no satisfactory basis for the judgment that it was compliant and it is irrelevant that substantial numbers of other professionals made the same mistake.

The Likely Answer

- The decision whether or not a particular product is compliant with the Building Regs is a matter of judgment, not calculation
- The judgment, however, must be rational and based on evidence
- The absence of *any* evidence at the time that a product is compliant is likely to indicate a careless judgment
- However, the position is more difficult where there is *some* evidence (eg contentions by a reputable manufacturer)
- In that case one of the facts which the architect is entitled to take into account is the extent to which others specify the material.

Sian Mirchandani QC
4 New Square

Design Liability & Professional Negligence: Limitation, Contribution and the Likely Shape of Claim

22 mins

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An excellent advocate – tenacious and extremely detailed, identifying potential problems and arguments even before they arise
- Legal 500

"An excellent advocate - tenacious and extremely detailed, identifying potential problems and arguments even before they arise" *- Legal 500, 2019*

"She always gets straight to the key legal points. She provides good, clear written advice and is excellent on her feet. She has a well-earned and deserved reputation as a construction specialist." *- Chambers & Partners, 2020*

"Siân Mirchandani QC is "a tenacious advocate", and "highly respected" for her impressive handling of professional negligence and disciplinary proceedings." - Who's Who Legal 2020

Sian Mirchandani QC has established a broad commercial practice encompassing construction/engineering, professional liability claims, insurance and disciplinary claims in court proceedings, arbitrations and adjudications.

A particular interest in disputes involving construction, IT, technical and scientific elements has led to Siân's strong construction/engineering practice. Siân is accomplished at dealing with complex professional negligence claims and is often instructed in group actions against professionals. Siân also has experience in regulatory and experimental product testing claims, arbitrations and adjudications.

Prior to her successful first application for silk in 2018, Siân was recognised as a Leading Junior by the directories for Construction, Professional Negligence and Disciplinary.

Siân's Legal 500, 2020 review reported Siân's continued ranking in these three areas with client comments:

"utterly tenacious in fighting for her client"

"If you want someone to get the best for a client backed into a corner she would be a marvellous choice of advocate"

"Great analytical skills - excellent drafting and advocacy skills"

In Legal 500, 2019 clients said Siân is *"an excellent advocate - tenacious and extremely detailed, identifying potential problems and arguments even before they arise"* and *"tremendously bright, has a tenacious eye for detail, and brings a new level of strategic thinking to the table".*

Chambers & Partners' 2020 review also reported Siân's ranking continued in these three areas, with client comments:

"She's fantastic: just brilliant to work with and very easy-going and responsive. Very hard-working and diligent."

"Very bright and incredibly determined and tenacious."

"She's incredibly bright, good on the detail and clear and concise with her advice."

"She's a great advocate - very considered and measured."

In Chambers & Partners 2019 Siân's clients had commended her for her approach: *"She is very competent and thorough and hits the right points in the right places"*, *"extremely responsive wherever she is and whatever the time zone. She has a very reassuring demeanour that instils confidence all round"*, *"proactive, helpful"* and *"someone who prepares the case very well".*

Who's Who Legal, 2020 says:

"Siân Mirchandani QC is "a tenacious advocate", and "highly respected" for her impressive handling of professional negligence and disciplinary proceedings."

Who's Who Legal, 2019 says:

"Siân Mirchandani QC is recognised for her superb professional negligence practice."

Winner of Chambers & Partners *'Professional Negligence Junior of the Year'* 2015. Previous directory comments from clients have included:

"My default senior junior"

"She can cut through the complex very quickly"

"She's very strong on complex matters"

"She really gets into the detail and owns a case"

Clients have described Siân as having:

"a sharp mind and excellent attention to detail"

"she is excellent - very pleasant to deal with and extremely robust and effective for her clients."

"a very effective, hard-working practitioner with an eye for detail and the ability to present a highly persuasive argument"

"The great thing about her is that on every occasion her advice is strong, firm and consistent, which allows us to get an excellent settlement"

"Very bright, robust, dedicated and thorough".

Siân has wide and considerable experience of professional liability claims, including claims against accountants and auditors, architects, building inspectors, engineers, financial services professionals, insolvency practitioners, insurance brokers and agents, lawyers (solicitors and barristers), surveyors and valuers, receivers, land management agents, farm management agents, estate agents, clinicians and veterinary surgeons. Qualified as a TECBAR accredited adjudicator.

Siân also has considerable experience of professional disciplinary tribunals (particularly architects and building inspectors), arbitrations, adjudications and mediations. Having qualified from Cambridge University as a veterinary surgeon in 1992, Siân worked in academic and general practice as a veterinary surgeon before coming to the Bar and joining Chambers in 1998.

Privacy Policy

Click here for a **Privacy Policy** for Siân Mirchandani.

Areas of Expertise

Professional Liability

"Provides easy to understand advice in a timely fashion." – *Legal 500, 2020*

"She has always impressed and will thrive in silk." "She knows the case inside out and backwards, and works incredibly hard." – *Chambers & Partners, 2020*

"She is extremely intelligent and quick to grasp the points in a case, providing both legal and commercial advice. She is extremely approachable and is able to deal with difficult instructing clients with calmness and professionalism. Working with her is a pleasure." – *Chambers & Partners, 2020*

"She is tremendously bright, has a tenacious eye for detail, and brings a new level of strategic thinking to the table." – *Legal 500, 2019*

"She is very competent and thorough and hits the right points in the right places." "Extremely responsive wherever she is and whatever the time zone. She has a very reassuring demeanour that instils confidence all round." – *Chambers & Partners, 2019*

"**Siân Mirchandani QC is recognised for her superb professional negligence practice."** – *Who's Who Legal, 2019*

Siân has considerable experience of claims involving professionals of all types. With her professional and scientific background, Siân relishes cases which involve scientific aspects or technical issues, and this has led to a strong practice in the Technology & Construction Court with instructions from a wide range of construction professionals including: architects, structural engineers, civil engineers, building surveyors, approved inspectors, Employer's Agents and project managers.

Siân has become known for adopting a commercial and problem-solving 'can do' approach which has led to instructions on complex cases from employers, contractors and sub-contractors, as well as insurers and professionals. Her 'pure construction' work complements her continuing construction and property professionals' practice.

Siân has particularly developed a practice involving claims arising from design and construction of unusual buildings, and farm or agricultural buildings, where the combination of her veterinary background and her experience in construction claims as well as professional liability claims has given her clients a considerable advantage.

Siân was instructed on a number of high value claims against major firms of valuers involving commercial properties packaged as 'tax efficient' investments in Germany, Denmark and the UK via securitisation transactions ('commercial mortgage backed securities' CMBS). These cases involved complex valuations using yields and estimates of income for hotels (*K/S Lincoln et al v CBRE Richard Ellis);* factory outlet centres (*Capita Alternative Fund Services & Matrix Securities v Drivers Jonas);* a large multi-use warehouse and department store in Germany (*Titan Europe 2006-3 Plc v Colliers International UK Plc*); a group of commercial buildings in London (*Whitetower 2006-3 Plc v Colliers International UK Plc*); a group of four substantial office buildings near the Tower of London (*LRC Holdings v BNP Paribas*).

Siân is regularly instructed on behalf of barristers and solicitors being sued by former clients who value her thorough and quick forensic analysis, followed by clear strategies to bring the claims to an early resolution.

Siân has wide experience of group action claims against solicitors who acted on 'right to buy' schemes and developments where clients 'bought' leasehold interests in individual units (e.g. rooms in student accommodation, care home suites, hotels rooms, 'off

plan' holiday properties) both in the UK and abroad.

Siân has wide ranging experience of acting on claims for and against accounting professionals for various failures to advise on appropriate tax & VAT strategies (e.g. film partnerships, VAT schemes, Research & Development allowances).

Siân has experience of claims involving land agents, estate agents, and claims under the Trusts of Land and Appointment of Trustees Act 1996.

Siân particularly enjoys cases in new fields and jurisdictions, and cases in all areas of her practice which involve working alongside solicitors, and other professionals, as part of an interchangeable team, dealing with vast amounts of documentation, e-disclosure, or claims involving large numbers of sub-claims and group actions. Siân is very familiar with cases involving use of electronic databases and e-documents, rather than conventional paper documents.

Lawyers

Siân has acted in a very wide variety of lawyers' negligence claims, including lost litigation and other 'loss of a chance' and 'package of rights' claims (acting for and against both solicitors and barristers) including:

- *X v Y* Defending solicitor appointed as arbitrator from challenges under sections 24, 33 and 68 Arbitration Act 1996 & allegations of partiality.

- *Naqvi v Harris Cartier Ltd & Others* [2019] EWHC 3042 (QB) – Acting for a barrister sued following unsuccessful claim in ET. Pursued strike out for collateral attack on Tribunal Decision
- *Ahmad v Wood* [2018] PNLR 28 –striking out certain allegations for abusive collateral attack, which resulted in the claim value being dramatically reduced
- *Right to Buy* 'lead cases' litigation – a large scale case managed litigation involving numerous firms of solicitors. Siân acted for one of the major defendants facing thousands of claims arising from their role as conveyancing solicitors acting for council tenants exercising their 'Right to Buy'. The litigation ended in discontinuance by the Claimants at the start of trial.
- *AIB Group (UK) Limited v Mark Redler & Co Solicitors* [2014] UKSC 58 – Supreme Court decision which confirmed that causation of loss must still be proved in a claim for equitable compensation for breach of trust, and the recoverable loss is confined to the loss actually caused by the breach of trust.
- *Arthur J.S. Hall v. Simons* [2002] 1 AC 615 – House of Lords' decision which considered the question of when an attack on a previous court's decision was an impermissible 'collateral attack'. This led to the abrogation of barristers' immunity from suit, a victory for Sian's clients (the defendant solicitors), who following this decision are now able to pursue a contribution from the barristers they had instructed.

Sian's wide ranging experience of lawyers' negligence claims includes:

Pursuing strike out of claims by former clients against barrister acting in an unfair dismissal and discrimination claim
Pursuing strike out of claims by former clients against solicitors acting on their ancillary relief claims alongside their divorce
Acting for the claimant Government agency against lawyers advising and conducting disciplinary matters against teachers
Multi-claimant litigation arising out of a failed development scheme in Cape Verde (*re. Sambala*) – defending the conveyancing solicitors from claims by purchasers of holiday homes 'off plan'
Multi-claimant litigation arising out of a failed development scheme for a care home with assisted living apartments in Northamptonshire – defending the conveyancing solicitors.
Incorrect advice on planning permission requirements
Claims arising out of mismanagement of adjudication proceedings.
Loss of litigation / under settlement
Scope of solicitor's duty to client when more than one professional advisor.
Collateral attacks on existing judgments
Wasted costs applications
Lenders' claims against solicitors for failing to report irregularities on mortgage funded property purchases

Defending various solicitors instructed on a wide or limited basis for alleged negligence in ancillary relief settlements and consent orders following divorce.
Various claims involving alleged conveyancing errors
Various claims against solicitors and barristers acting and advising on matrimonial/ancillary relief matters including issues over pension sharing, company valuations, inadequate disclosure; contact disputes; consent order terms, agreements and Court's approval
Claim against a large commercial firm for alleged errors in drafting of settlement agreement
A claim concerning negligent advice to administrative receivers on sale of assets

Accountants, Auditors & Actuaries

Siân has wide ranging experience of acting for and against accountants, auditors and tax advisers (particularly high net worth individuals' tax deferral and avoidance schemes involving film finance, or other bespoke investment products).

Siân has acted for and against accountants including the following cases:

- Acted for accountants alleged to have mis-handled tax returns for a property owning professional over a number of years
- Acted for accountants alleged to have negligently prepared accounts for a dissolving partnership
- Acted against accountants alleged to have failed to advise correctly about 'research & development' tax relief for a waste management company
- Acted in a lost litigation case against accountants for negligent advice on payment of VAT for EU cross border business activities, resulting in company insolvency
- Acted for accountants alleged to have negligently prepared accounts in the context of a farming partnership dissolution.
- Acted against accountants who advised a 'Lloyds name' negligently about tax mitigation advice
- Acting on the disclosure exercise for the *Chase Manhattan Bank v HIH Insurance.*
- Acted on professional disciplinary proceedings arising out of allegedly negligent advice on tax planning
- Acting for various accountants on negligent tax advice allegations.

Financial Services Professionals

Sian has experience of claims against independent financial advisers, including:

- Acted for defendant financial advisers in a secure capital bond mis-selling claim.
- Claims involving tax avoidance schemes involving film finance
- Pension mis-selling claims.
- Investment mis-selling and client mis-classification claims
- Insurance mis-selling claims.
- Acting on an appointed representatives' claim brought under the Commercial Agents (Council Directive) Regulations 1993 against the represented insurers.

Insurance Brokers & Agents

Sian has acted for a number of the prominent insurance broking practices in the City of London. She has also represented clients against their former insurance brokers in claims concerning selling unsuitable products, failing to advise of necessary products, failure by broker and/or client to give material disclosure to insurer; claims concerning a chain of brokers: introducing, producing, placing brokers, and their respective liabilities to insured and insurer. Sian is often instructed in multi-party disputes where both insurers and brokers are defendants.

Siân's experience in this area includes the following cases:

- Acted for a ship owner against insurance broker for misplacement of risk via an introducing broker and failure to advise of a premium warranty clause.

- Acted in a trial concerning the insurance broker's role as agent for passing on information relating to a claim and advising client as to whether an "event" within the policy had occurred.
- Advised a leading insurance brokerage on a potential claim arising from a dispute over premium refund on a hotels' package commercial combined insurance policy.
- A claim involving insurers' avoidance due to breach of 'deep fat frying' warranty where breach was due to nature of construction of the building housing the restaurant business.
- A dispute amongst brokers in the broking chain over obligations to review incorrect policy documentation for a property portfolio.

Surveyors & Valuers

Siân is regularly instructed to act on behalf of surveyors and valuers, including claims brought by lenders, as well as pursuing valuers when acting for lenders and solicitors in claims arising out of mortgage transactions. Siân has acted in a number of high value claims against valuers concerning 'income generating assets' such as office blocks and other commercial premises. Siân was the leading junior for claims arising out of UK and EU securitisation transactions known as 'commercial mortgage back securities' (CMBS) against major firms of valuers following their valuation of commercial properties packaged a 'tax efficient' investments, having been instructed in the main cases. Siân is very familiar with the valuation methodologies in commercial property valuation for investment purposes and lending practices involved in securitisation transactions and portfolio lending.

Siân's experience in this area includes the following cases:

- *LRC Holdings v BNP Paribas – a claim brought by an investment & litigation vehicle that had taken an assignment of the cause of action against the valuers arising from the valuation of a linked group of four substantial office buildings located near the Tower of London. The Claimant's case was withdrawn shortly before trial.*
- *Whitetower 2006-3 Plc v Colliers International UK Plc* – a high value claim concerning the valuation of a portfolio of central London commercial properties valued at c. £1.5b. The Claimant's case collapsed at trial before final submissions.
- *Titan (Europe) 2006-3 plc v Colliers* – The Court of Appeal overturned the decision of Blair J (reported at [2014] EWHC 3106, (Comm)), that the defendant valuer had negligently overvalued a large commercial property in Germany, for the purpose of inclusion in a portfolio of loans to be securitised by Credit Suisse. For a more detailed note on this case, written by instructed counsel, please click here.
- *Capita Alternative Fund Services v Matrix Securities v Drivers Jonas* – A claim concerning valuation of a factory outlet centre in Kent.
- *K/S Lincoln; K/S Chesterfield; K/S Wellingborough v CB Richard Ellis Hotels Ltd* – Coulson J, in the successful defence of claims concerning hotel valuations brought by Danish property owning vehicles.

Sian has a full range of experience of:

- Claims brought by lenders
- Claims concerning overvaluation of properties including farms and commercial valuations based on rental income and yield.
- Structural survey claims, e.g. failure to detect defects; failure to detect and advise on additional parts; failure to advise of need for additional specialist surveys; failure to advise property based on red shale foundations; property development overvaluations.
- Claims involving new build properties involving NHBC and other 'structural' guarantee policies of insurance

Construction Professionals

"Tenacious, with a sharp and incisive legal mind." – *Legal 500, 2020*

"She always gets straight to the key legal points. She provides good, clear written advice and is excellent on her feet. She has a well-earned and deserved reputation as a construction specialist." – *Chambers & Partners, 2020*

"An excellent advocate – tenacious and extremely detailed, identifying potential problems and arguments even before they arise." – *Legal 500, 2019*

"Proactive, helpful" and "someone who prepares the case very well." – *Chambers & Partners, 2019*

Siân has wide experience of advising and acting for employers, contractors and sub-contractors in disputes brought in the London and regional Technology and Construction Courts, as well as Northern Ireland including:

- *Elaine Naylor & Ors v (1) Galliard Homes LTD (2) Roamquest LTD (3) Galliard Construction LTD (2019)* – Acting for the 80 plus Claimant flat owners in a London tower block against the developer and contractor for losses due to a cladding installation which did not have fire retardant properties, in breach of the building regulations, and the Defective Premises Act 1972
- Advising contractor and insurers in respect of proposed action against project manager and building services engineer where apartments in tower blocks overheat
- Advising road building contractor on pursuit of claims against designer, under indemnity clauses following adjudication of employer's claim against contractor
- Advising police employer on early termination of long term maintenance contracts
- Defending contractor's claim against specialist screed flooring sub-contractor relating to design responsibility issues for floor installed in a care home.
- Defending Employer's claim against contractor for design defects relating to glass façade and M&E installation at a tertiary education college.
- Contractor's claim against sub-contractor installing flooring to a building constructed for the London Olympics: NEC3 contract, issue over whether the adjudication clause was effective.
- Claims arising from detachment of cladding panels from university buildings where installation design had been amended on site
- Contractor's claims against employer for non-payment and repudiation following internal offices fit out contract
- Contractors' claims against employers in large scale construction and re-furbishment contracts concerning government department and educational buildings.
- Contractor's claims against project manager following discovery of defects in demountable buildings in various schools.
- Acting for housebuilder in respect of a group action pursued by home owners arising from defective piling on a large housing estate.
- Employer's claims for early termination of multi-year NEC3 Term Service Contracts
- Employer's claim against project manager and main contractor in construction of process plant including design, management and delay issues.
- Employer's claim against designer, project manager and contractor for negligent design and construction of a commercial showroom.
- Employer's claim against specialist contractor for excessive noise resulting from plant installation for a swimming pool complex.
- Developer's consequential claims against a series of architects for planning breaches in construction of new care home
- Developer's claims against consulting engineers arising out of the heating installation for a multi-unit residential development
- Defending warranty and other claims brought against architect – designer of a multi-use commercial City centre development
- Defending counterclaim against architect brought by housing development company alleging oversized properties were designed

Residential

Considerable experience of residential construction disputes advising and acting for employers, architects, contractors and sub-contractors involving:

Failures to advise on guarantees and certificates on a recently refurbished building
Failures to comply with design brief
Planning breaches resulting in enforcement action
Overrun on costs
Disciplinary actions following complaints
Disputes arising in construction of new replacement building following fire destruction of original listed building

Adjudications

Considerable experience with adjudications including:

Defending civil engineers facing claim for failure to detect a live drain across a housing estate construction site.
Defended a claim by a developer against the employer's agent for calculation errors in certificates
Delay and claims for expense and loss of profit arising from alleged loss of contracts for construction and refurbishment of tertiary education buildings
Claims brought by liquidator following contractor's insolvency
Acting for large contractor against subcontractor concerning final account following the installation of a flue gas desalination plant at a power station.
Multiple disputes referred to single adjudicator.
Passing claims down chains of adjudications following total destruction of a bespoke wooden building by fire
Claims brought by M&E main contractor against sub-contractors and consulting engineers
Claims brought by steelwork contractors against consulting engineer/designers for underscale design in a supermarket building
Claim by interior fitting out sub-contractor against contractor based overseas

Insolvency context:

- Advising insurers of insolvent main contractor on joinder to the construction dispute to pursue an active defence whilst reserving insurers' defences under the insurance policy.
- Advising insurers of architect on pursuit of Part 20 contribution proceedings against sub-contractor via assignment of cause of action from contractor (in liquidation)
- Advising large contractor on pursuit of claims under the Third Party (Rights Against Insurers) Act 1930, against a concrete subcontractor (for defective slipform design, delay and expense) following sub-contractor's insolvency
- Acting for insurers facing claim under 1930 Act following explosion and fire at steel fabrication plant
- Advising and acting for insurers seeking to join action brought against insured following insolvency
- Advising and acting for excess layer insurers in defending claim under Third Party (Rights Against Insurers) Act 1930, arising from construction of a supermarket

Specialist & unusual buildings:

- Advising insurers on a claim due to knotweed contamination of a construction site by a ground clearance contractor
- Employer's claim against planning and design architect for failure to advise adequately on budget for **a 'Grand Design' type conversion of a dis-used water tower.**
- Employer's claim against design architect following delays and budget overrun on **premier league football training facility**
- Acting for a waste recycling company in a claim concerning recovery of payments made to a Dutch company for construction of a **waste recycling plant** following its insolvency.
- Advising a Japanese plant engineering company in respect of claims proposed against the project manager and contractors for an **engineering project based in Eire**.
- Employer's claim against contractor and architect for negligent design and construction of a **swimming pool complex** (arbitration and adjudication)
- A claim by a farmer against a local authority landlord concerning the **negligent farm design** by a farm designer engaged by the local authority
- Acting for design and build contractor (and insurer) in a claim concerning deficient **installation of cow cubicles** resulting in injury, lameness and loss of production.
- Defending developer's claim against architect arising from window design for high-end **beachside property**
- Acting for sub-contractor (M&E) in defence of claim for indemnity arising out of alleged flue fire in a **completely wooden residential building**

Fire, flood nuisance, subsidence & Rylands & Fletcher

- Advising insurers on routes of recovery following failure to install fire stopping and cavity barriers in a newly refurbished

aparthotel development
- Advising insurers on routes for recovery following failure of cavity barriers to contain fire in newly built and refurbished building
- Advising insurers on investigations and routes for recovery following catastrophic gas boiler explosion in block of flats in Kensington
- Advising insurers on claims arising from spread of fire following pipework soldering by metalwork sub-contractor
- Advising and pursuing claims by insurer under Contractors' All Works policy following fire during refurbishment of a nightclub
- Advising insurers on routes of recovery following fire in fast food restaurant
- Advising insurers on routes of recovery following fire in wooden building housing a restaurant
- Advising and pursuing claims following Buncefield explosion
- Acting for designing mechanical engineer defending a claim by M&E contractor following fire in back up power system installed during commercial property refurbishment
- Advising insurers on claims following explosion of a food waste digester
- Numerous subrogated tree root subsidence claims brought by household contents' insurers, including Tree Preservation Orders, planning permission application and appeal from decision.
- Numerous subrogated claims by residential household insurers against contractors:
    - Following poor installation of sanitary ware leading to leak claims.
    - Of adjoining construction of housing estate where re-profiling led to water run-off and inundation of adjoining houses.

Veterinary Surgeons

Experience of acting on claims against veterinary surgeons, and in defending such claims and in disciplinary matters. Particular experience of claims concerning food production animals; milk production and milk losses; equine loss or amenity value claims; loss of opportunity (prize money in racing, show jumping).

Disciplinary

"Siân Mirchandani QC is "a tenacious advocate", and "highly respected" for her impressive handling of professional negligence and disciplinary proceedings." *Who's Who Legal 2020*

"Her calm and authoritative manner inspires confidence in clients." *– Legal 500, 2020*

"Well organised, with a good understanding of clinical issues in cases." *– Legal 500, 2019*

Siân has a significant practice in defending professionals before professional disciplinary bodies, including ARB, RIBA, ACCA, ICAEW, RICS. Sian is a former member of the Disciplinary Panel for the Council of the Inns of Court which is concerned with barristers' conduct and service issues, and was also part of a working party advising the RCVS and drafted the RCVS' current guidance on the roles of expert witnesses. Siân is also a member of the Ethical Conduct Body of the Society of Antiquities.

Siân has advised on and appeared many times before ARB panels defending architects against a range of complaints. Siân's experience in this area includes the following cases:

- Defended approved inspectors before RICS on a claim relating to mis-certification of a retail premises for use as a nursery.
- Defended accountants before the ACCA, on a number of claims arising out of allegedly negligent tax advice re. domicile & alleged falsification of dates on company return documents.
- Defended an insolvency practitioner before the ICAEW on various claims arising out of an administration.
- Defended an architect before the RIBA on charges of breach of copyright and supplanting resulting in no sanction.
- Defended architects following complaints regarding project management of domestic residential construction or renovation projects, as a preliminary to a civil court claim, with the result the claim has not been pursued at all.
- Successfully defended a veterinary surgeon before the disciplinary panel of the RCVS.
- Successfully appealed a decision of the examination body of the RCVS in relation to post-graduate qualification.

Construction & Engineering

"Tenacious, with a sharp and incisive legal mind." – *Legal 500, 2020*

"She always gets straight to the key legal points. She provides good, clear written advice and is excellent on her feet. She has a well-earned and deserved reputation as a construction specialist." – *Chambers & Partners, 2020*

"An excellent advocate – tenacious and extremely detailed, identifying potential problems and arguments even before they arise." – *Legal 500, 2019*

"Proactive, helpful" and "someone who prepares the case very well." – *Chambers & Partners, 2019*

Siân has wide experience of advising and acting for employers, contractors and sub-contractors in disputes brought in the London and regional Technology and Construction Courts, as well as Northern Ireland including:

- *Elaine Naylor & Ors v (1) Galliard Homes LTD (2) Roamquest LTD (3) Galliard Construction LTD (2019)* – Acting for the 80 plus Claimant flat owners in a London tower block against the developer and contractor for losses due to a cladding installation which did not have fire retardant properties, in breach of the building regulations, and the Defective Premises Act 1972
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- Claims arising from detachment of cladding panels from university buildings where installation design had been amended on site
- Contractor's claims against employer for non-payment and repudiation following internal offices fit out contract
- Contractors' claims against employers in large scale construction and re-furbishment contracts concerning government department and educational buildings.
- Contractor's claims against project manager following discovery of defects in demountable buildings in various schools.
- Acting for housebuilder in respect of a group action pursued by home owners arising from defective piling on a large housing estate.
- Employer's claims for early termination of multi-year NEC3 Term Service Contracts
- Employer's claim against project manager and main contractor in construction of process plant including design, management and delay issues.
- Employer's claim against designer, project manager and contractor for negligent design and construction of a commercial showroom.
- Employer's claim against specialist contractor for excessive noise resulting from plant installation for a swimming pool complex.
- Developer's consequential claims against a series of architects for planning breaches in construction of new care home
- Developer's claims against consulting engineers arising out of the heating installation for a multi-unit residential development
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Claim by interior fitting out sub-contractor against contractor based overseas

Insolvency context:

- Advising insurers of insolvent main contractor on joinder to the construction dispute to pursue an active defence whilst reserving insurers' defences under the insurance policy.
- Advising insurers of architect on pursuit of Part 20 contribution proceedings against sub-contractor via assignment of cause of action from contractor (in liquidation)
- Advising large contractor on pursuit of claims under the Third Party (Rights Against Insurers) Act 1930, against a concrete subcontractor (for defective slipform design, delay and expense) following sub-contractor's insolvency
- Acting for insurers facing claim under 1930 Act following explosion and fire at steel fabrication plant
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- A claim by a farmer against a local authority landlord concerning the **negligent farm design** by a farm designer engaged by

the local authority
- Acting for design and build contractor (and insurer) in a claim concerning deficient **installation of cow cubicles** resulting in injury, lameness and loss of production.
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- Acting for sub-contractor (M&E) in defence of claim for indemnity arising out of alleged flue fire in a **completely wooden residential building**

Fire, flood nuisance, subsidence & Rylands & Fletcher

- Advising insurers on routes of recovery following failure to install fire stopping and cavity barriers in a newly refurbished aparthotel development
- Advising insurers on routes for recovery following failure of cavity barriers to contain fire in newly built and refurbished building
- Advising insurers on investigations and routes for recovery following catastrophic gas boiler explosion in block of flats in Kensington
- Advising insurers on claims arising from spread of fire following pipework soldering by metalwork sub-contractor
- Advising and pursuing claims by insurer under Contractors' All Works policy following fire during refurbishment of a nightclub
- Advising insurers on routes of recovery following fire in fast food restaurant
- Advising insurers on routes of recovery following fire in wooden building housing a restaurant
- Advising and pursuing claims following Buncefield explosion
- Acting for designing mechanical engineer defending a claim by M&E contractor following fire in back up power system installed during commercial property refurbishment
- Advising insurers on claims following explosion of a food waste digester
- Numerous subrogated tree root subsidence claims brought by household contents' insurers, including Tree Preservation Orders, planning permission application and appeal from decision.
- Numerous subrogated claims by residential household insurers against contractors:
    - Following poor installation of sanitary ware leading to leak claims.
    - Of adjoining construction of housing estate where re-profiling led to water run-off and inundation of adjoining houses.

Commercial Dispute Resolution

Siân undertakes a wide range of commercial work, including general and international commercial litigation, personal and corporate insolvency, commercial contractual claims. Siân has experience of pursuing freezing injunctions and pre-action disclosure applications.

Examples of Siân's work in this area are included in the cases section below:

- Defended a software developer and two companies against claims of alleged overcharging, fraudulent misrepresentation and deceit, procuring or inducing a breach of contract and conspiracy to injure by unlawful means.
- Advised on claim for alleged negligence in conduct of laboratory testing as part of a pharmaceutical product licence application; pursuit of lost opportunity to obtain pharmaceutical product license; loss of market lead.
- Defended farm food supplier in claim for alleged contamination of animal feed leading to herd deaths and loss of profit.
- Defended farm nutrition adviser in claim for allegedly negligent advice about feeding to a pedigree closed herd.
- A claim for recovery of payments made to a Dutch company for waste recycling plant, following the Dutch company's insolvency.
- A claim against US events lighting company for recovery of fees due to a consultant engaged to assist in acquiring contracts for the Olympic Games at Athens 2004.
- A fraud claim against property development company arising out of avoidance of sale on contracts of apartments.
- Acted on various disputes under the National House Building Council 'Buildmark' scheme.
- A claim for damage to business following disruption of telecommunications' cables.
- A claim for consequential losses and damage caused by supply of defective cattle feed.
- Advised Scottish Power plc in respect of injunctive proceedings brought by new occupier.

Property Damage

Siân has considerable experience of commercial claims, particularly claims involving fires and destruction of commercial and residential property (and contents). Alongside her insurance and reinsurance practice, Siân is regularly instructed by insurers' on recovery & subrogated claims arising out of property damage.

Siân's experience in this area includes the following cases:

- Advised insurers on routes for recovery for claim involving failure of fire separation & cavity barriers in newly built and refurbished buildings leading to fire spread.
- Advised insurers of manufacturer of electronic components used in emergency vehicles on claims arising from fire in a vehicle, including drafting and negotiating 'joint defence' agreement with US manufacturer.
- Advised insurers of a management company on investigations, routes of claim and pursuit of subrogation following a gas boiler explosion leading to severe damage to a block of flats in Knightsbridge.
- Advised insurers on a commercial building spread of fire claim.
- Advised and defended insurers of a supplier of medical equipment implicated in a residential fire involving dependency claims under the Fatal Accidents Act 1976 and building and contents' claim, as well as international product liability and warranty claims against the manufacturer.
- Advised and defended insurers under a Contractors' All Works policy following a fire during refurbishment of a leisure club.
- Advised two separate arms of the same multi-national insurance company as to the meaning and operation of design and operator error exclusions following damage of a food waste digester due to process 'run away' leading to over pressurisation damage.
- Advised a local authority's insurers on expert technical evidence obtained following a fire in a garage that implicated a converted minibus as the cause of the fire, involving claims 'up the line' against manufacturers, suppliers and installers of the wheelchair lift fitted to the vehicle.
- Advised and defended household insurers of residential property adversely affected by run-off of water from adjoining re-profiled building site, resulting in severe inundation of the property.
- Advised insurers of various contractors on investigations, routes of claim and pursuit of subrogation following combustible cladding claims after **Grenfell Tower Fire**.

Insurance & Reinsurance

Sian has wide ranging experience of advising and acting for both insurer and insured on claims concerning policy construction and coverage issues (particularly relating to cladding & fire safety claims, BI relief, property damage). Sian is often instructed in claims where the insurer is the co-defendant, alongside a broker following avoidance of a policy.

Sian's experience in this area includes the following cases:

- Advised and acted for insurer in 'QC clause' arbitration over scope of architect's professional indemnity policy
- Advised professional indemnity insurers on a successful claim for reimbursement under a Minimum Terms policy from an insured for material non-disclosure and late notification.
- Acted for excess layer insurers who successfully avoided cover and a claim under the Third Party (Rights Against Insurers) Act 1930 in a multi-million point multi-party insurance dispute arising from the construction of a supermarket
- Advised on proposed wording of policies for public liability in public houses and nightclubs, advising on vicarious liability claims.
- Advised and acted for insurers of domestic and commercial properties on claims raised, accepting and declining cover, policy repudiation in public liability, fire explosion and domestic insurance situations, including subsidence and tree root claims.
- Claims concerning legal expenses insurance, conditional fee agreements and success fee uplifts, pursuit policies and premiums and material non-disclosures to insurers leading to insurers accepting cover in respect of undisclosed liabilities.
- Acted in a variety of multi-party disputes concerning film finance insurance (contingent expenses insurance and time

variable contingent policies).

- Acted in claim for payment under health cover plan concerning reference to the Insurance Ombudsman.
- Advised insurers on a 'spread of fire' claim.
- Advised & acted for insured on pursuit of a claim for under settlement and errors in loss adjustment following a flood claim.
- Advised professional liability insurers on wholesale declinature of cover due to dishonesty by a firm of solicitors over a number of years.

Chancery

Siân has experience of a variety of chancery matters. Siân's experience in this area includes the following cases:

- Acting on claim under The Trusts of Land and Appointment of Trustees Act 1996 (ToLATA) concerning numerous property developments and alleged frauds relating to proceeds of sale of units.
- Advised and acted for the Trustees of the Independent Living Funds (1993 and the Extension Fund), in matters concerning the interpretation of the founding trust deeds, drafting of new trust deed, claims against local authorities and clients for recovery of overpayments.
- Pursued an extended Grepe v Loam order – Pursuing an extended *Grepre v Loam* order *(Ebert v Venvil)* to restrain a persistent litigant-in-person from issuing further proceedings out of High Court, County Court, Bankruptcy Court, including defending defamation claims.
- Acted for mortgagees on enforcement of mortgages.
- Acted on an application for committal to prison for contempt.
- Acted in landlord and tenant claims of all types (both residential and commerical).

International Arbitration

Siân Mirchandani is a barrister practicing in England and Wales, based in London chambers at Four New Square – London's premier set for Professional Negligence. Siân has practiced at the English Bar since 1997 and was appointed Queen's Counsel in 2019.

Sian specializes in commercial cases, technology & construction litigation, arbitration and adjudication. A significant proportion of her practice comprises complex construction cases, of all types, often involving professional negligence claims, insurance coverage issues, insolvency and contribution claims. Siân also has a specialist practice in regulatory & drug product testing claims and feed claims, both stemming from her previous career and qualification as a veterinary surgeon (Cambridge).

Sian is a qualified Technology & Construction Bar (TECBAR) adjudicator. Siân has recently undertaken the Chartered Institute of Arbitrators' (CIArb) Advanced Fellowship programme and is now building a practice as an arbitrator.

What the Directories say about Sian Mirchandani QC (Chambers, Legal 500, Who's Who Legal)

"utterly tenacious in fighting for her client"

"If you want someone to get the best for a client backed into a corner she would be a marvellous choice of advocate"

"Great analytical skills – excellent drafting and advocacy skills".

"an excellent advocate – tenacious and extremely detailed, identifying potential problems and arguments even before they arise"

"tremendously bright, has a tenacious eye for detail, and brings a new level of strategic thinking to the table".

"She's fantastic: just brilliant to work with and very easy-going and responsive. Very hard-working and diligent."

"Very bright and incredibly determined and tenacious."

"She's incredibly bright, good on the detail and clear and concise with her advice."

"She's a great advocate – very considered and measured."

"Tenacious, with a sharp and incisive legal mind."

Commercial Dispute Resolution

Examples of work as Counsel in court and arbitration proceedings include:

- Acted on an arbitration between insurer and insured, over whether the scope of cover in a policy year included combustible cladding claims
- Advising Counsel retained to draft submissions and appear at oral hearing(s) in domestic arbitrations concerning Government advertisement for IT contract(s)
- Advising Counsel for paper arbitrations between insurance companies as to liability for claim(s)
- Informal arbitration between two separate arms of the same multi-national insurance company as to the meaning and operation of design and operator error exclusions following damage of a food waste digester due to process 'run away' leading to over pressurisation damage.
- Defending a UK software developer and two companies against claims of alleged overcharging, fraudulent misrepresentation and deceit, procuring or inducing a breach of contract and conspiracy to injure by unlawful means.
- Claims arising out of UK and EU securitisation transactions known as 'commercial mortgage backed securities' (CMBS) against major firms of valuers following their valuation of commercial properties packaged as 'tax efficient' investments in Germany, Denmark and the UK: *K/S Lincoln et al v CBRE Richard Ellis* – hotels*; Capita Alternative Fund Services & Matrix Securities v Drivers Jonas* – factory outlet centre; *Titan Europe 2006-3 Plc v Colliers International UK Plc* – a large multi-use warehouse and department store in Germany; *Whitetower 2006-3 Plc v Colliers International UK Plc* – a group of commercial buildings in London; *LRC Holdings v BNP Paribas* – a group of four substantial office buildings near the Tower of London.
- A claim for damage to business following disruption of telecommunications' cables.
- Advising on claim for alleged breach of contract and negligence in conduct of laboratory testing as part of a pharmaceutical product licence application; pursuit of lost opportunity to obtain pharmaceutical product license; loss of market lead.
- Defending farm foot supplier in claim for alleged contamination of animal feed leading to herd deaths and loss of profit.
- Defending farm nutrition adviser in claim for allegedly negligent advice about feeding to a pedigree closed herd.
- A claim for recovery of payments made to a Dutch company for waste recycling plant, following the Dutch company's insolvency.
- A claim against US events lighting company for recovery of fees due to a consultant engaged to assist in acquiring contracts for the Olympic Games.
- A fraud claim against property development company arising out of avoidance of sale on contracts for apartments, Manchester, UK.
- Advised Scottish Power plc in respect of injunctive proceedings brought by new occupier

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Construction & Engineering

Examples of work as Counsel in court and arbitration proceedings include:

Cladding, fire, flood nuisance, subsidence

- Advising employer's agent & insurers facing claims brought by social housing associations concerning cladding, render & fire safety defects
- Defending architect in cladding detachment claim brought by contractor, arising out of landmark refurbishment project, City of London
- Sole leading counsel in '*Premier Inn*' cladding & fire safety litigation (claims relating to 4 hotels) for architects (*Premier Inn v McAleer & Rushe and Others)*
- Sole leading counsel in '*New Capital Quay'* cladding & fire safety litigation (claims brought by 81 leaseholders against developer & contractor (*Elaine Naylor & Ors v (1) Galliard Homes Ltd (2) Roamquest Ltd (3) Galliard Construction Ltd*
- Advising (another) hotel chain in relation to its liability as developer following discovery of cladding & fire safety defects
- Advising leasehold tower block management companies in relation to claims options against developers/contractors

following discovery of cladding & fire safety defects
- Advising local authority on liability following discovery of defects in external cladding (Expanded Polystyrene System, EPS) installation to private owners' properties
- Advising insurers on routes of recovery following failure to install fire stopping and cavity barriers in a newly refurbished aparthotel development
- Advising insurers on routes for recovery following failure of cavity barriers to contain fire in newly built and refurbished building
- Advising insurers on investigations and routes for recovery following catastrophic gas boiler explosion in block of flats in Kensington
- Advising insurers on claims arising from spread of fire following pipework soldering by metalwork sub-contractor
- Advising and pursuing claims by insurer under Contractors' All Works policy following fire during refurbishment of a nightclub
- Advising insurers on routes of recovering following fire in fast food restaurant
- Advising insurers on routes of recovery following fire in wooden building housing a restaurant
- Advising and pursuing claims following Buncefield explosion
- Acting for designing mechanical engineer defending a claim by M&E contractor following fire in back up power system installed during commercial property refurbishment
- Advising insurers on claims following explosion of a food waste digester
- Numerous subrogated tree root subsidence claims brought by household contents' insurers, including Tree Preservation Orders, planning permission application and appeal from decision.
- Numerous subrogated claims by residential household insurers against contractors:
    - Following poor installation of sanitary ware leading to leak claims.
    - Of adjoining construction of housing estate where re-profiling led to water run-off and inundation of adjoining houses.

Commercial construction

- Advising contractor and insurers in respect of proposed action against project manager and building services engineer where apartments in tower blocks overheat
- Advising road building contractor on pursuit of claims against designer, under indemnity clauses following adjudication of employer's claim against contractor
- Advising employer on early termination of long term maintenance contracts
- Defending contractor's claim against specialist screed flooring sub-contractor relating to design responsibility issues for floor installed in a care home.
- Defending Employer's claim against contractor for design defects relating to glass façade and M&E installation at a tertiary education college.
- Contractor's claim against sub-contractor installing flooring to a building constructed for the London Olympics: NEC3 contract, issue over whether the adjudication clause was effective.
- Claims arising from detachment of cladding panels from university buildings where installation design had been amended on site
- Contractor's claims against employer for non-payment and repudiation following internal offices fit out contract
- Contractors' claims against employers in large scale construction and re-furbishment contracts concerning government department and educational buildings.
- Contractor's claims against project manager following discovery of defects in demountable buildings in various schools.
- Acting for a housebuilder in respect of a group action pursued by home owners arising from defective piling on a large housing estate.
- Employer's claims for early termination of multi-year NEC3 Term Service Contracts
- Employer's claim against project manager and main contractor in construction of process plant including design, management and delay issues.
- Employer's claim against designer, project manager and contractor for negligent design and construction of a commercial showroom.
- Employer's claim against specialist contractor for excessive noise resulting from plant installation for a swimming pool complex.
- Developer's consequential claims against a series of architects for planning breaches in construction of new care home

- Developer's claims against consulting engineers arising out of the heating installation for a multi-unit residential development
- Defending warranty and other claims brought against architect – designer of a multi-use commercial City centre development
- Defending counterclaim against architect brought by housing development company alleging oversized properties were designed

Residential construction

- Considerable experience of residential construction disputes advising and acting for employers, architects, contractors and sub-contractors involving:
    - Failures to advise on obtaining guarantees and certificates on a recently refurbished building
    - Failures to comply with design brief
    - Planning breaches resulting in enforcement action
    - Overrun on costs
    - Disciplinary actions following complaints
    - Disputes arising in construction of new replacement building following fire destruction of original listed building

Adjudications

- Considerable experience with adjudications including:
    - Pursued a claim arising out of defects in a major UK dual carriageway, following entire replacement
    - Defending civil engineers facing claim for failure to detect a live drain across a housing estate construction site in Northern Ireland.
    - Claims brought by M&E main contractor against sub-contractors and consulting engineers
    - Acting for large contractor against subcontractor concerning final account following the installation of a flue gas desalination plant at a power station.
    - Defending architect in claim concerning design and project management of extension to Grade II listed building
    - Defended a claim by a developer against the employer's agent for calculation errors in certificates
    - Delay and claims for expense and loss of profit arising from alleged loss of contracts for construction and refurbishment for tertiary education buildings
    - Claims brought by liquidator following contractor's insolvency
    - Multiple connected disputes referred to single adjudicator.
    - Passing claims down chains of adjudications following total destruction of a bespoke wooden building on South Coast by fire
    - Claims brought by steelwork contractors against consulting engineer/designers for underscale design in a supermarket building
    - Claim by interior fitting out sub-contractor against contractor based overseas

Insolvency context

- Advising insurers of insolvent main contractor on joinder to the construction dispute to pursue an active defence whilst reserving insurers' defences under the insurance policy.
- Advising insurers of architect on pursuit of Part 20 contribution proceedings against sub-contractor via assignment of cause of action from contractor (in liquidation)
- Advising international building contractor on pursuit of claims under the Third Party (Rights Against Insurers) Act 1930, against a concrete subcontractor (for defective slipform design, delay and expense) following sub-contractor's insolvency (Landmark building in City of London)
- Acting for insurers facing claim under Third Party (Rights Against Insurers) Act 1930 following explosion and fire at steel fabrication plant
- Advising and acting for insurers seeking to join action brought against insured following insolvency
- Advising and acting for excess layer insurers in defending claim under Third Party (Rights Against Insurers) Act 1930, arising from construction of a supermarket

Specialist & unusual buildings

- Led strike out of claim against approved inspector by developer & purchaser of refurbished coach house (after ***Herons Court v Heronslea***)
- Defending project manager against employer's claims (delay & expense) arising out of refurbishment of educational and performing arts premises in **Liverpool, UK**
- Defending architect in multi-party dispute following catastrophic collapse of granite table in school playground, London
- Advising insurers on a claim due to knotweed contamination of a construction site in **Wales** by a ground clearance contractor
- Employer's claim against planning and design architect for failure to advise adequately on budget for a 'Grand Design' type conversion of a dis-used water tower, **England**.
- Employer's claim against design architect following delays and budget overrun on **UK premier league** football training facility
- Acting for a waste recycling company in a claim concerning **recovery of payments made to a Dutch company** for construction of a **waste recycling plant** following its insolvency.
- Advising **Japanese plant engineering company** in respect of claims proposed against the project manager and contractors for an **engineering project based in Eire**.
- Employer's claim against contractor and architect for negligent design and construction of a **swimming pool complex** (arbitration and adjudication), **UK**
- A claim by a farmer against a local authority landlord concerning the **negligent farm design** by a farm designer engaged by the local authority, **UK**
- Acting for design and build contractor (and insurer) in a claim concerning deficient **installation of cow cubicles** resulting in injury, lameness and loss of production, **UK**
- Defending developer's claim against architect arising from window design for high-end **beachside property, UK**
- Acting for sub-contractor (M&E) in defence of claim for indemnity arising out of alleged flue fire in a **completely wooden residential building**, South Coast, **UK**

Insurance

Examples of work as Counsel in court and arbitration proceedings include:

- Advised and acted for insurer in 'QC clause' arbitration over scope of architect's professional indemnity policy
- Advised for professional indemnity insurers on a successful claim for reimbursement under a Minimum Terms policy from an insured for material non-disclosure and late notification.
- Acted for excess layer insurers who successfully avoided cover and a claim under the Third Party (Rights Against Insurers) Act 1930 in a multi-million pound multi-party insurance dispute arising from the construction of a supermarket
- Advised on proposed wording of policies for public liability in public houses and nightclubs, advising on vicarious liability claims.
- Advised and acted for insurers of domest6ic and commercial properties on claims raised, accepting and declining cover, policy repudiation in the public liability, fire, explosion and domestic insurance situations, including subsidence and tree root claims.
- Claims concerning legal expenses insurance, conditional fee agreements and success fee uplifts, pursuit policies and premiums and material non-disclosures to insurers leading to insurers accepting cover in respect of undisclosed liabilities.
- Acted in a variety of multi-party disputes concerning film finance insurance (contingent expenses insurance and time variable contingent policies).
- Acted in claim for payment under health cover plan concerning reference to the Insurance Ombudsman.
- Advised insurers on a 'spread of fire' claim.
- Advised & acted for insured on pursuit of a claim for under settlement and errors in loss adjustment following a flood claim.
- Advised professional liability insurers on wholesale declinature of cover due to dishonesty by a firm of solicitors over a number of years.

Professional negligence

Examples of work as Counsel in court and arbitration proceedings include:

Lawyers

- *X v Y* – Defending solicitor appointed as arbitrator from challenges under sections 24, 33 and 68 Arbitration Act 1996 & allegations of partiality.
- *Naqvi v Harris Cartier Ltd & Others* [2019] EWHC 3042 (QB) – Acting for a barrister sued following unsuccessful claim in Employment Tribunal. Pursued strike out for collateral attack on Tribunal Decision
- *Ahmad v Wood* [2018] PNLR 28 – striking out certain allegations for abusive collateral attack, which resulted in the claim value being dramatically reduced
- *Right to Buy* 'lead cases' litigation – large scale judge-managed litigation involving numerous firms of solicitors. Siân acted for one of the major defendants, facing thousands of claims arising from their role as conveyancing solicitors acting for council tenants exercising their 'Right to Buy' their rented property. The litigation ended in discontinuance by the Claimants at the start of trial.
- *AIB Group (UK) Limited v Mark Redler & Co Solicitors* [2014] UKSC 58 – Supreme Court decision which confirmed that causation of loss must still be proved in a claim for equitable compensation for breach of trust, and the recoverable loss is confined to the loss actually caused by the breach of trust.
- *Arthur J.S. Hall v. Simons* [2002] 1 AC 615 – House of Lords' decision which considered the question of when an attack on a previous court's decision was an impermissible 'collateral attack'. This led to the abrogation of barristers' immunity from suit in England & Wales, a victory for Siân's clients (the defendant solicitors), who following this decision, if sued by a former client are now able to pursue a contribution from the barristers they had instructed.
- *re. Sambala* Multi-claimant litigation arising out of a failed development scheme in Cape Verde – defending the conveyancing solicitors from claims by purchasers of holiday homes 'off plan'
- Multi-claimant litigation arising out of a failed development scheme for a care home with assisted living apartments in Northamptonshire – defending the conveyancing solicitors.

Accountants

- Acted in a lost litigation case against accountants for negligent advice on payment of VAT for EU cross border business activities, resulting in company insolvency
- Acted against accountants alleged to have failed to advise correctly about 'research & development' tax relief for a waste management company
- Acted for accountants alleged to have mis-handled tax returns for a property owning professional over a number of years
- Acted for accountants alleged to have negligently prepared accounts for a dissolving partnership
- Acted for accountants alleged to have negligently prepared accounts in the context of a farming partnership dissolution.
- Acted against accountants who advised a 'Lloyds name' negligently about tax mitigation advice
- Acting on the disclosure exercise for the *Chase Manhatten Bank v HIH Insurance*.
- Acted on professional disciplinary proceedings arising out of allegedly negligent advice on tax planning
- Acted for various accountants on negligent tax advice allegations.

Financial advisers

- Acted for defendant financial advisers in a secure capital bond mis-selling claim.
- Acted on various claims involving tax avoidance schemes involving film finance
- Acted on pension mis-selling claims.
- Acted on investment mis-selling and client mis-classification claims
- Acted on insurance mis-selling claims – involving claims against insurance brokers & agents
- Acting on an appointed representatives' claim brought under the Commercial Agents (Council Directive) Regulations 1993 against the represented insurers.

Insurance brokers & agents

- Acted for a ship owner against insurance broker for misplacement of risk via an introducing broker and failure to advise of a premium warranty clause.

- Acted in a trial concerning the insurance broker's role as agent for passing on information relating to a claim and advising client as to whether an "event" within the policy had occurred.
- Advised a leading insurance brokerage on a potential claim arising from a dispute over premium refund on a hotels' package commercial combined insurance policy.
- A claim involving insurers' avoidance due to breach of 'deep fat frying' warranty where breach was due to nature of construction of the building housing the restaurant business.
- A dispute amongst brokers in the broking chain over obligations to review incorrect policy documentation for a property portfolio.

Surveyors & Valuers

- *LRC Holdings v BNP Paribas* – a claim brought by an investment & litigation vehicle that had taken an assignment of the cause of action against the valuers arising from the valuation of a linked group of four substantial office buildings located near the Tower of London. The Claimant's case was withdrawn shortly before trial.
- *Whitetower 2006-3 Plc v Colliers International UK Plc* – a high value claim concerning the valuation of a portfolio of central London commercial properties valued at c. £1.5b. The Claimant's case collapsed at trial before final submissions.
- *Titan (Europe) 2006-3 plc v Colliers* – The Court of Appeal overturned the decision of Blair J (reported at [2014] EWHC 3106, (Comm)), that the defendant valuer had negligently overvalued a large commercial property in Germany, for the purpose of inclusion in a portfolio of loans to be securitised by Credit Suisse. For a more detailed note on this case, written by instructed counsel, please click here.
- *Capita Alternative Fund Services & Matrix Securities v Drivers Jonas* – A claim concerning valuation of a factory outlet centre in Kent.
- *K/S Lincoln; K/S Chesterfield; K/S Wellingborough v CB Richard Ellis Hotels Ltd* – Coulson J, in the successful defence of claims concerning hotel valuations brought by Danish property owning vehicles.
- Claims brought by lenders
- Claims concerning overvaluation of properties including farms and commercial valuations based on rental income and yield.
- Structural survey claims, e.g. failure to detect defects; failure to detect and advise on additional parts; failure to advise of need for additional specialist surveys; failure to advise property based on red shale foundations; property development overvaluations.
- Claims relating to new build properties involving NHBC and other 'structural' guarantee policies of insurance

Qualifications & Memberships

Siân is a member of the Professional Negligence Bar Association, the Society of Construction Law, COMBAR, TECBAR, the Chancery Bar Association and the London Common Law & Commercial Bar Association. She is a Committee Member of the Technology and Construction Court Bar Association (TECBAR), and a TECBAR accredited adjudicator, a Member of Chartered Institute of Arbitrators – qualification as Fellow (pending). Member of the Ethical Conduct Body, Society of Antiquities.

Education

M.A. Vet M.B. Emmanuel College, Cambridge University

Diploma in Law, City University

BTC, Inns of Court School of Law, London

Member of Chartered Institute of Arbitrators – qualification as Fellow (pending)

Insights

Surveyors and Valuers chapter of Professional Negligence and Liability

1 March 2017

Multiplex Construction v Bathgate [2021] EWHC 590 :All roads lead to Rome

Presented by Siân Mirchandani QC

100 Bishopsgate, London

Facts

- 100 Bishopsgate – very substantial construction project in London
- Multiplex - the main contractor for the project with design and build responsibilities
- Bathgate - previously known as Dunne, was the sub-contractor for concrete package of works
- BRM – designed the slipform rig **[See Slide 4]**
- RNP - an independent design checker engaged by Dunne. Argo is the insurer of RNP, after RNP entered liquidation
- Trial of preliminary issues regarding the legal relationship between RNP and Multiplex
- No contract between Multiplex and RNP
- Claim brought alleging duty of care and warranties
- **RNP's fee £3,978 - claim value £12 million (indemnity limit £5m) !**

Slipform rig – moving upwards, concrete constructed below

Multiplex's claim

- Dunne owed obligations to Multiplex in contract.
- One such obligation required an independent third party check.
- Also required by the British Standard.
- Multiplex asserted it was entitled to proceed directly against Argo, under Third Parties (Rights against Insurers) Act 2010, as it claimed that the rights RNP had to be indemnified by Argo were transferred to Multiplex because RNP owed it duties of care and warranties (which it asserted had been breached).
- Preliminary issue to determine whether RNP did owe such duties or did provide such warranties

Why the claim arose

- Dunne went into administration
- Event of Default under Multiplex/Dunne subcontract.
- Multiplex terminated the sub-contract. Engaged alternative specialist sub-contractor, Byrne Brothers to complete the final works
- Byrne investigated the works carried out by Dunne and the slipform right - Byrne concluded both were **defective**
- Multiplex had the rig replaced in order to continue with the project.
- Losses caused over £12 million (remedial works, delay, disruption and consequential losses)
- Default judgments were obtained against Dunne and BRM
- Basis of the claim: that RNP owed it a duty of care arising out of an assumption of responsibility and/or that the certificates issued by RNP contained negligent mis-statements / warranties to Multiplex
- Real point: did RNP owe a duty to hold Multiplex harmless from economic loss?

Context and gaps

"It can therefore be seen that, were Dunne and BRM still solvent and/or insured, the main thrust of Multiplex's case would be against them. Certainly, as a matter of law, Multiplex has a cause of action against Dunne for the same matters advanced against RNP (or its pleading proceeds as though it does). The case against RNP would be an add-on to that main case. **As it is, RNP (or more accurately, Argo, RNP's insurer) may be the only party from whom Multiplex might realistically expect any recovery**."

"It is correct that a party is free to proceed against any one of a number of other parties against whom it has a good claim. The reason this point is potentially important here is in respect of the matters that must be considered when considering assumption of responsibility and a potential duty of care. The phrase used in some of the authorities is "**gap filling**", by which is meant whether there is a gap in terms of a claimant's contractual relations, which the law of tort might fill. Here, the "artificial claim" point is a more refined, and subsidiary, point which arises under consideration of any gaps. **It is not a strict requirement that there be a gap, but here, in my judgment, there is no gap."**

The Preliminary Issues

- Due to a dispute over incorporation of RNP's terms – the Court concluded that RNP was simply engaged to perform the Category 3 check, for fee £3,978, to provide the relevant certificate, an implied term that RNP would use reasonable skill and care

- The issues:

1. Did RNP owe Multiplex a duty of care?
2. Had RNP provided warranties to Multiplex?

- [Concerned with Issue 1 only in this talk.]

Preliminary Issue 1:

Is there a duty of care?

Analysis of the cases - 1

1. The existence of a duty of care cannot be dealt with in the abstract. The finding of a duty of care is to be made with reference to whether RNP had a duty of care related to the kind of loss suffered, i.e. economic loss as a result of underperformance/failure of the rig. Per Akenhead J in ***Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd [2008] EWHC 1570 (TCC) ; Per Lord Hoffman in SAAMCO [1997] AC 191 and Caparo Industries v Dickman [1990] 2 AC 605.***

2. Three different tests for the finding of a duty of care, three different routes of analysis though may not lead to substantially different results, or only do so in the rarest of cases: the assumption of responsibility test, the three-part test and the incremental test.

3. ***Hedley Byrne*** distinguished as a basis for the duty contended for. Unlike the company's bankers asked for a reference, who had 3 choices (silent, decline, answer) RNP had no "choice".

Analysis of the cases - 2

4. Generally no assumption of responsibility where the parties have consciously so structured their relationships (in contract), that to find such an assumption would be inconsistent with those arrangements. Would it be inconsistent to find RNP liable, given that it would be "*short circuiting the contractual structure so put in place by the parties".* Is the contractual structure, "*so strong, so complex*"? ***Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 ; White v Jones [1995] 2 AC 207.***

5. Objectively viewed exchanges: do any statements cross the line? (RNP/Multiplex) Are the certificates such statements? Or simply provided to Dunne to show design had been checked. ***Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830***

6. Is the safety aspect of the Category 3 check a determinative factor? A classification society did not owe a duty of care to cargo owners for the statements made by its surveyor regarding the seaworthiness of a vessel: ***Marc Rich & Co AG v Bishop Rock Marine Co Ltd ("The Nicholas H") [1996] 1 AC 211.***

Analysis of the cases - 3 (modern)

7. What if RNP knew the identity of Multiplex? Not relevant as assumption of responsibility is an objective test.

8. Assumption of responsibility is a sufficient condition of liability – if that test is passed, then no further enquiry is needed. If not passed, then enquire further. Look at detailed circumstances and the particular relationship as a whole. ***Customs and Excise Commissioners v Barclays Bank Plc [2006] UKHL 28:*** "*the tests used in considering whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined."*

9. No place for tort in a purely commercial context, where parties have consciously and voluntarily arranged their affairs; tortious duty should not be invoked where there is no "liability gap". A "gap" is not essential, but relevant to consider. ***Riyad Bank v Ahli United Bank UK plc*** **[2006] EWCA Civ 780.**

Analysis of the Cases - 4 (modern)

10. Context of and circumstances in which statements are made need to be considered to determine if there is a duty and, if so, its scope. ***Galliford Try Infrastructure Ltd (Formerly Morrison Construction Ltd and Morrison Construction Services Ltd) v Mott MacDonald Ltd [2008] EWHC 1570 (TCC)***

11. Knowledge of and consent to advice being passed on to a known third party, who will rely on it for a specific purpose, may be sufficient to demonstrate sufficient foreseeability and proximity, and that the context may also show that it is fair, just and reasonable in such circumstances to impose a duty of care owed by the defendant to that third party. More likely for a third party consumer. ***Arrowhead Capital Finance Ltd (In Liquidation) v KPMG LLP [2012] PNLR 30.***

Reliance

Christopher Clarke LJ in ***Hunt v Optima (Cambridge Ltd) [2014] EWCA Civ 714 at [54]*** :

"In order to recover in the tort of negligent misstatement the claimant must show that he relied on the statement in question: James McNaughton Paper Group Ld v Hicks Anderson & Co [1991] 2 QB 113,126. It must operate upon his mind in such a way that he suffers loss on account of his reliance e.g. by buying at too high, or selling at too low, a price, or making an agreement or doing something which he would not otherwise have made or done".

Multiplex did not allow the certificate issue to "operate on its mind" in such a way that the economic loss was suffered by it on account of that reliance.

RNP did not assume responsibility to Multiplex for the statements in the Category 3 check certificates.

NEW SQUARE

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Ben Lynch QC
Fountain Court Chambers

Business Interruption Insurance

32 mins

Ben Lynch QC

Call Date: 2001 | Silk Date: 2020

Ben is a highly regarded commercial silk, who has been described in the directories as "a barrister with a frighteningly astute mind, who doesn't leave any stone unturned". Ben has a specialist practice in insurance and reinsurance, professional negligence and commercial dispute resolution, acting in various landmark cases. Ben is also an editor of *MacGillivray on Insurance Law*.

Ben's practice encompasses all aspects of commercial dispute resolution; over the years he has developed a strong reputation in the fields of professional negligence, telecommunications disputes, competition law, cyber, fraud, injunctions, international commercial arbitration, regulatory law, professional discipline, group actions and shareholder disputes.

Ben is commended for his "great work ethic, who has a fantastic eye for detail, excellent technical ability and superior client-handling skills", won the *Chambers & Partners* 'Insurance Junior of the Year' award in 2017 and is ranked in the legal directories across a number of practice areas.

His recent highlights include:

- ***Financial Conduct Authority v Arch Insurance (UK) Limited & ors*** **[2020] Lloyd's Rep. I.R. 527 ; [2021] 2 W.L.R. 123:** Acting at first instance and in the Supreme Court appeal, in the leading authority on business interruption insurance.
- ***Axis Corporate Capital UK II Ltd v Absa Group Ltd*** **[2021] EWHC 861 (Comm):** Acting in an anti-suit injunction addressing differing law and jurisdiction clauses.
- ***Rockliffe Hall Ltd v Travelers Insurance Co Ltd*** **[2021] EWHC 412 (Comm):** Acting in the leading authority on "closed list" disease clauses in business interruption insurance.
- ***Travelers Insurance Company Ltd v XYZ*** **[2019] 1 WLR 6075:** Acting for the successful insurers in the Supreme Court, in a precedent-setting case which is now the leading authority on s.51 cost orders against insurers, arising from the PIP breast implant litigation.
- ***AIG Europe Limited v OC320301 LLP*** **[2017] 1 W.L.R. 1168:** Acting for successful insurers in the Supreme Court, in the leading case on aggregation of claims in solicitors' professional indemnity insurance.

AREAS OF EXPERTISE

- Commercial and chancery litigation
- Commercial dispute resolution
- Competition
- Company
- Fraud: civil
- Insurance and reinsurance
- International arbitration
- Professional discipline
- Professional negligence
- Restructuring/insolvency
- Technology
- Telecommunications

RECOMMENDATIONS

"An excellent lawyer, who is thorough, clever and analytical, with good knowledge of the insurance market. Judges know that his submissions are always soundly researched and reliable. "
The Legal 500

"He is unfailingly diligent and charming."
The Legal 500

"His written work is excellent and his knowledge of the law and civil procedure is second to none."
The Legal 500

"He has an amazing capacity to interrogate and remember a vast amount of information in very complicated cases. He is also unfailingly polite and level headed."
The Legal 500

"He's going great guns and building up an impressive insurance practice. He rewrote the textbook we all reach for." "He's incredibly responsive and intelligent. He provides very user-friendly advice and is a pleasure to work with." "He's just an absolute expert on insurance issues."
Chambers & Partners

"He is just fantastic with clients. He has a very strong attention to detail." "He has excellent procedural knowledge and his written work is of an extremely high quality."
Chambers & Partners

"A rising superstar who is extremely bright, user-friendly and knowledgeable about all aspects of insurance."
Chambers & Partners

"Extremely bright, very client-friendly and very strong technically, you can rely on him to turn things around under pressure." "He has an excellent eye for detail and is very approachable."
Chambers & Partners

Ben is ranked in the legal directories for:

Chambers & Partners

- Insurance (New Silks)
- Commercial Dispute Resolution (New Silks)
- Professional Negligence (New Silks)
- Dispute Resolution: Commercial – UK (Global guide)

The Legal 500

- Commercial Litigation
- Insurance and Reinsurance
- Professional Negligence

REPORTED CASES

Insurance & Reinsurance

- *Financial Conduct Authority v Arch Insurance (UK) Limited & ors* [2020] Lloyd's Rep. I.R. 527; [2021] 2 W.L.R. 123: first instance and Supreme Court, leading authority on business interruption insurance.
- *Axis Corporate Capital UK II Ltd v Absa Group Ltd* [2021] EWHC 861 (Comm): anti-suit injunction addressing differing law and jurisdiction clauses.
- *Rockliffe Hall Ltd v Travelers Insurance Co Ltd* [2021] EWHC 412 (Comm): leading authority on "closed list" disease clauses in business interruption insurance.
- *Travelers Insurance Company Ltd v XYZ* [2019] 1 WLR 6075: Supreme Court, acting for the successful insurers in a precedent-setting case which is now the leading authority on s.51 cost orders against insurers, arising from the PIP breast implant litigation.
- *AIG Europe Limited v OC320301 LLP* [2017] 1 W.L.R. 1168: Supreme Court, acting for successful insurers in leading case on aggregation of claims in solicitors' professional indemnity insurance.
- *Redman v Zurich Insurance Plc* [2017] EWHC 1919 (QB); [2018] 1 W.L.R. 280: Leading authority on Third Parties (Rights Against Insurers) Act 2010. Acting in a successful strike out application in this market-defining case which was the first on the Third Parties (Rights Against Insurers) Act 2010 which decided when the 2010 Act applies and when the 1930 Act applies. The decision was very important

for the market and has been widely reported and discussed.

- *Maccaferri Ltd v Zurich Insurance PLC* [2016] EWCA Civ 1302; [2017] Lloyd's Rep. I.R. 200: Court of Appeal, leading insurance notification case (led by Colin Edelman QC).
- *Cape Distribution Ltd v Cape Intermediate Holdings Plc* [2016] EWHC 1786 (QBD): A trial of issues relating to insurers' liability to indemnify mesothelioma claims in a co-insurance context and limitation, led by Justin Fenwick QC and Leigh-Ann Mulcahy QC.
- *Flexsys America L.P. v. XL Insurance Company Limited* [2010] Lloyd's Rep. IR 132.
- *ERC Frankona v. American National* [2006] Lloyd Rep IR 157.

Commercial Dispute Resolution

- *Joint Administrators of Transform Medical Group (CS) Limited* [2020] EWHC 2064 (Ch): joint privilege and "successor in title" principle.
- *Axis Corporate Capital UK II Ltd v Absa Group Ltd* [2021] EWHC 861 (Comm): anti-suit injunction addressing differing law and jurisdiction clauses.
- *A v B* [2020]: £500 million+ political risk expropriation reinsurance.
- *Blanche v EasyJet* [2019] EWCA Civ 69; [2019] 1 Lloyd's Rep. 286: Acting in this important appeal against a decision that they delay of a flight as a consequence of an air traffic management decision amounted to "extraordinary circumstances" which allowed the respondent air carrier to rely on the defence contained in Regulation 261/2004 art.5(3).
- *Wetherley v Wetherley* [2018] EWHC 3201 (Ch): Unfair prejudice petition, full trial, acting alone, successful at trial.
- *Akcine Bendrove Bankas Snoras v Antonov* [2018] EWHC 887 (Comm): Led by Leigh-Ann Mulcahy QC; Bankruptcy; Banks; Breach of undertaking; Directors' powers and duties; Enforcement; Foreign judgments; Freezing injunctions; Interim relief; Misappropriation.
- *Puharic v Sabir* [2018] EWHC 1099 (QB): Acting for claimant in injunction applications; application for expedited trial; leading Nicolas Damnjanovic.
- *Angel Group v Davey* [2018 WL 01040329]: Change of circumstances; Freezing injunctions; Legal advice and funding; Proprietary rights.
- *Teva v AstraZeneca* [2017] EWHC 1852 (Comm) (Leggatt J).
- *AIG Europe Limited v OC320301 LLP (formerly The International Law Partnership LLP)* [2017] UKSC 18; [2017] 1 W.L.R. 1168: Supreme Court – leading decision on solicitors' professional indemnity insurance aggregation (led by Colin Edelman QC).
- *Maccaferri Ltd v Zurich Insurance PLC* [2016] EWCA Civ 1302; [2017] Lloyd's Rep. I.R. 200: Court of Appeal, leading insurance notification case (led by Colin Edelman QC).
- *Cape Distribution Ltd v Cape Intermediate Holdings Plc* [2016] EWHC 1786 (QBD): A trial of issues relating to insurers' liability to indemnify mesothelioma claims in a co-insurance context and limitation.
- *Lyons v Fox Williams LLP* [2016] EWHC 2427 (QB): Very high-value professional negligence claim brought by injured ex-E&Y employee against a high-profile firm of solicitors, seeking benefits (amongst other things) under Long Term Disability insurance policies and in relation to a high-value agreement reached in Russia. Complicated case, acting for defendant.
- *John Raymond Transport Ltd v Rockwool Ltd* [2015] EWHC 1069 (QB) (led by Ian Mill QC).

Professional Negligence

- *A v B v C* [2021]: very high value solicitors' professional negligence claim, acting for defendant solicitors.
- *McDonald v Allium Law* [2021]: solicitors' professional negligence claim, acting for claimant.
- *Av B* [2021]: high value, confidential solicitors' professional negligence claim.
- *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347: Acting for the defendant in this very high-profile professional negligence claim brought by an injured ex-EY employee, seeking benefits (amongst other things) under Long Term Disability insurance policies and in relation to a high-value agreement reached in Russia. This is now one of the leading authorities on the difficult and important issue of "the duty to warn".
- *A v B [2017]:* Professional negligence claim against IFA / tax adviser involving *Titan Steel Wheels Ltd v RBS* [2010] EWHC 211 (Comm) issue.
- *Lyons v Fox Williams LLP* [2016] EWHC 2427 (QB): Very high-value professional negligence claim brought by injured ex-E&Y employee against a high-profile firm of solicitors, seeking benefits (amongst other things) under Long Term Disability insurance policies and in relation to a high-value agreement reached in Russia. Complicated case, acting for defendant.
- *Nouri v.Marvi & Others* [2010] 50 EG 64

Competition

- *Av B* [2020]: high value competition arbitration, confidential.
- *A v B* [2018]: £300 million+ arbitration involving competition law issues, working with Sir Francis Jacobs QC.
- *Ethernet* [2014] CAT 14: Major regulatory case (ex ante cost orientation obligations and Ofcom's dispute resolution powers; involving in excess of £250 million) led by Rhodri Thompson QC, Graham Read QC and Sarah Lee.
- *BT v Ofcom "PPC" case* [2012] EWCA Civ 1051: Led by Christopher Vajda QC, Andrew Burrows QC (Hon) in the Court of Appeal and

previously by Graham Read QC before the CAT: [2011] CAT 5 (Marcus Smith QC sitting as Chairman)

Company, Restructuring & Insolvency

- *Joint Administrators of Transform Medical Group (CS) Limited* [2020] EWHC 2064 (Ch): joint privilege and "successor in title" principle.
- *Akcine Bendrove Bankas Snoras v Antonov* [2018] EWHC 887 (Comm): Led by Leigh-Ann Mulcahy QC; Bankruptcy; Banks; Breach of undertaking; Directors' powers and duties; Enforcement; Foreign judgments; Freezing injunctions; Interim relief; Misappropriation.
- *Wetherley v Wetherley* [2018] EWHC 3201 (Ch): Unfair prejudice petition, full trial, acting alone, successful at trial.
- *Angel Group v Davey* [2018 WL 01040329]: Change of circumstances; Freezing injunctions; Legal advice and funding; Proprietary rights.

Technology

- *Ethernet* [2014] CAT 14: Major regulatory case (ex ante cost orientation obligations and Ofcom's dispute resolution powers; involving in excess of £250 million) led by Rhodri Thompson QC, Graham Read QC and Sarah Lee.
- *BT v Ofcom "PPC" case* [2012] EWCA Civ 1051: Led by Christopher Vajda QC, Andrew Burrows QC (Hon) in the Court of Appeal and previously by Graham Read QC before the CAT: [2011] CAT 5 (Marcus Smith QC sitting as Chairman).

OTHER NOTABLE CASES

Insurance & Reinsurance

- Credit risk insurance cases [2021]: variety of high-value, confidential cases and various COVID-19 cases.
- Business interruption insurance cases [2021]: COVID-19 cases.
- Data breach / cyber insurance case [2021]: Very high-value.
- Guarantee insurance case [2021]: Very high-value.
- Bank crime policy case [2021].
- Group litigation arising from very high profile disaster [2020].
- $1bn+ political risk insurance case [2020].
- *A v B* [2020]: £500 million+ political risk expropriation reinsurance dispute.
- Political risk insurance case [2019-2020].
- Year of attachment cases [2020]: Solicitors' PI, high-value year of attachment issues.
- Very high value solicitors' professional indemnity insurance aggregation dispute [2017-2020], led by Nigel Tozzi QC.
- *A v B* [2018]: Advising on complicated, high-value claims for indemnity in respect to costs arising out of high-profile public event; acting for insurer.
- Advising on various cyber-related disputes [2018].
- *A v B* [2018]: Very high-value avoidance dispute, led by John Lockey QC.
- *A v B*: High value, complicated, international D&O insurance dispute, acting for claimant insured [2018].
- *A v B:* Double insurance dispute, acting for claimant insurer [2018].
- *A v B:* Very high-value reinsurance recovery action, acting for claimant [2018].
- *A v B:* High-value avoidance / coverage dispute acting for claimant government department [2018].
- *A v B v C and others* [2018]: Surveyors' insurance aggregation dispute, acting alone.
- *A v B* [2017]: Complicated D&O insurance dispute involving various issues, including the definition of "claim".
- *A v B v C* [2017]: Complicated D&O insurance dispute involving various issues, including notification issues, dishonesty and attribution of knowledge.
- *A v B and C v D* [2017]: EL insurance cases concerning Third Parties (Rights Against Insurers) Act 2010.
- Long-tail EL insurance avoidance trial [2016-17].
- High-value marine insurance case involving arrest of a vessel [2016-17], led by Stephen Moriarty QC.
- *A v B* [2016]: Insurance coverage dispute involving accountant / tax adviser: concerned, amongst other things, the extent to which a court can review the exercise of an insurer's discretion, under the terms of the policy, to accept or reject a claim.
- Port Authority claim [2016]: Concerning insurance for fines arising from a breach of health and safety legislation and questions about the scope and application of the doctrine of *ex turpi causa*.
- Advising on Solvency II issues [2016].
- *A v B:* Year of attachment insurance arbitration involving regulatory investigation by SRA in relation to solicitor's involvement in tax avoidance schemes [2016].
- *A v B*: Advising insurers on coverage issues arising out of a fall from height at a worksite [2016].

- *A v B*: Advising insurers on coverage issues arising out of a crush injury – involved difficult questions about the scope of the duty of good faith [2016].
- *A v B*: Year of attachment arbitration in respect of solicitors' professional indemnity claims. Issue as to number of claims. Issue as to breadth of notification of Circumstances [2016].
- *A v B:* Acting for defendant insurer in high-value claim arising out of fires at a business premises. Case involved defence of, amongst others, fraudulent devices (led by Graham Eklund QC) [2015-2016].
- £20 million+ solicitor's professional indemnity year of attachment arbitration (acting alone).
- High-value D&O insurance case arising out of alleged high value property fraud.
- *Godiva v Travelers* [2014]: Major solicitor's professional indemnity insurance aggregation dispute – one of *The Lawyer*'s Top 20 Cases of 2014 (led by Colin Edelman QC and Derrick Dale QC).

Commercial Dispute Resolution

- Disputes relating to / arising from COVID-19 issues [2020] – multiple.
- Force majeure / frustration cases [2021] – multiple, high-value.
- Advising on various cyber-related disputes [2021].
- Group litigation arising from very high profile disaster [2020].
- $1bn+ political risk insurance case [2020].
- *A v B* [2020]: £500 million+ political risk expropriation reinsurance dispute.
- Multiple recent injunction applications, acting for claimants and respondents [2019].
- *A v B* [2018]: Involved in £300 million+ arbitration involving competition law issues.
- Multiple hearings in company / shareholder dispute, acting alone [2018].
- Committal proceeding [2018]: Led by Paul Gott QC, acting for defendant.
- *Norwich Pharmacal* application in the Isle of Man [2017].
- Advising on rectification case arising out of high-value sale of business [2017].
- Injunction involving a coal mine.
- High-value commercial education contract dispute acting for a government (acting alone).

Professional Negligence

- *A v B v C* [2021]: very high value solicitors' professional negligence claim, acting for defendant solicitors.
- *McDonald v Allium Law* [2021]: solicitors' professional negligence claim, acting for claimant.
- *Av B* [2021]: high value, confidential solicitors' professional negligence claim.
- A v B [2020]: Acting for well-known QC defending claim arising out of insurance dispute.
- A v B [2019]: High value, factually complicated solicitors' professional negligence claim, acting for defendant solicitors.
- *A v B* [2018]: Complicated claim against tax adviser, acting for claimant, involving limitation and alleged unjust enrichment issues.
- *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347: Acting for the defendant in this very high-profile professional negligence claim brought by an injured ex-EY employee, seeking benefits (amongst other things) under Long Term Disability insurance policies and in relation to a high-value agreement reached in Russia. This is now one of the leading authorities on the difficult and important issue of "the duty to warn".
- *A v B* [2016-17]: High-value professional negligence claim against a Project Monitor, arising out of a series of loans made by a lending bank to a property developer, acting without a leader. Various complicated questions arise in relation to limitation and alleged loss, along with contribution claims against third parties.
- *A v B v C* [2016]: Acting alone for the defendant / Part 20 claimant in this high-value IFA professional negligence claim involving Inheritance Tax advice and a Part 20 claim against a well-known provider of IHT solutions.
- *Lyons v Fox Williams LLP* [2016] EWHC 2427 (QB): Very high-value professional negligence claim brought by injured ex-E&Y employee against a high-profile firm of solicitors, seeking benefits (amongst other things) under Long Term Disability insurance policies and in relation to a high-value agreement reached in Russia. Complicated case, acting for defendant.

Competition

- *Av B* [2020]: competition arbitration, confidential.
- *A v B* [2018]: Involved in £300 million+ arbitration involving competition law issues, working with Sir Francis Jacobs QC.
- Extensive experience in competition law cases in the Competition Appeal Tribunal and Court of Appeal.
- Advisory work of various kinds.

- Seminars, lectures and talks on competition law.
- Telecoms competition law cases.
- Insurance competition law cases.
- *Ethernet dispute*[2014] CAT 14: Major regulatory case (ex ante cost orientation obligations and Ofcom's dispute resolution powers; involving in excess of £250 million) led by Rhodri Thompson QC, Graham Read QC and Sarah Lee.
- *BT v Ofcom "PPC" case* [2012] EWCA Civ 1051: Led by Christopher Vajda QC, Andrew Burrows QC (Hon) in the Court of Appeal and previously by Graham Read QC before the CAT: [2011] CAT 5 (Marcus Smith QC sitting as Chairman).

International Arbitration

- Multiple domestic, international, LCIA, HKIAC, UNCITRAL, PIA, ad hoc and other arbitrations acting as sole advocate, in person and remotely.
- A v B [2021]: very high value, high profile, urgent arbitration recently heard on expedited basis; lengthy hearing; leading team of juniors – confidential.
- A v B [2021]: High value HKIAC arbitration – confidential.
- A v B [2020]: $1bn+ political risk insurance arbitration case – confidential.
- *A v B* [2020]: £500 million+ political risk expropriation reinsurance arbitration arising out of events in Latin America – confidential.
- *A v B* [2018]: £300 million+ arbitration in Switzerland involving competition law issues arising out of Eastern countries – confidential.
- *A v B* [2019]: £100m+ domestic insurer v foreign insurer: year of attachment arbitration dispute – confidential.
- *A v B* [2018]: Domestic insurer v foreign insurer: aggregation arbitration dispute – confidential.
- *A v B* [2017]: High-value arbitration dispute arising out of alleged property fraud in India – confidential.
- *A v B* [2017]: Very high-value matter arising out of BIT dispute – confidential.
- *A v B* [2016]: £20 million+ solicitor's professional indemnity year of attachment arbitration – confidential.

Professional Discipline and Regulatory & Investigations

- *A v B*: A year of attachment insurance arbitration involving regulatory investigation by SRA in relation to solicitor's involvement in tax avoidance schemes [2016].
- Advising on Solvency II issues [2016].
- *A v B*: Insurance aggregation dispute involving extensive SRA investigation into a firm's involvement in overseas property development business [2016].
- *A v B*: Insurance coverage dispute involving regulatory investigation in to accountant's involvement in giving various kinds of tax advice [2015-2016].
- *A v B*: Insurance aggregation dispute involving large SRA investigation into a firm's involvement in mortgage fraud [2014].
- Extensive regulatory experience in relation to solicitors in particular, but also in relation to accountants, surveyors and other professionals.
- Leading expert in the field of professional indemnity insurance, which often involves regulatory issues.
- Appeared (acting alone) in hearings before the SRA and other regulatory bodies and has significant experience in advising on matters involving regulatory investigations, disciplinary tribunal matters and insurance issues involving regulatory disputes.
- Appeared in the Court of Appeal in the recent *AIG* aggregation case (above) and was junior counsel in the long-running *Godiva* litigation.
- Advised on regulatory structures of various kinds, including in relation to insurers, wording of insurance policies, litigation funders, solicitors, other professionals and banking matters.

Company, Restructuring & Insolvency

- *Joint Administrators of Transform Medical Group (CS) Limited* [2020] EWHC 2064 (Ch): joint privilege and "successor in title" principle.
- *Akcine Bendrove Bankas Snoras v Antonov* [2018] EWHC 887 (Comm): Led by Leigh-Ann Mulcahy QC; Bankruptcy; Banks; Breach of undertaking; Directors' powers and duties; Enforcement; Foreign judgments; Freezing injunctions; Interim relief; Misappropriation.
- *Wetherley v Wetherley* [2018] EWHC 3201 (Ch): Unfair prejudice petition, full trial, acting alone, successful at trial.
- *Angel Group v Davey* [2018 WL 01040329]: Change of circumstances; Freezing injunctions; Legal advice and funding; Proprietary rights.
- Unfair prejudice petition [2018].
- Multiple hearings in company / shareholder dispute, acting alone [2018].
- Company / minority shareholder dispute, acting alone [2017].
- Advising on various shareholder dispute issues [2017].

Civil Fraud

- Cyber fraud claims (involving insurance issues).
- Direct insurance fraud claims acting for insurers, including "death" claims, both domestic and international.
- Insurance aggregation claims arising out of fraud.
- Professional negligence claims arising out frauds, fraudulent tax schemes and domestic and international fraudulent transactions: acting for and against barristers, solicitors, architects and other professionals in circumstances involving these and other kinds of frauds.
- Very significant experience dealing with solicitors' PI claims arising out of mortgage frauds.

Technology

- Telecommunications & IT: Competition Appeal Tribunal ("CAT") cases, High Court cases, Mediations, Court of Appeal.
- Large number of complicated Artificial Inflation of Traffic cases [2016].
- Complicated Dial Through Fraud cases [2014].
- *Ethernet dispute* [2014] CAT 14: Major regulatory case (ex ante cost orientation obligations and Ofcom's dispute resolution powers; involving in excess of £250 million) led by Rhodri Thompson QC, Graham Read QC and Sarah Lee.
- *BT v Ofcom "PPC" case* [2012] EWCA Civ 1051: Led by Christopher Vajda QC, Andrew Burrows QC (Hon) in the Court of Appeal and previously by Graham Read QC before the CAT: [2011] CAT 5 (Marcus Smith QC sitting as Chairman).

APPOINTMENTS, MEMBERSHIPS AND PRIZES

- Balliol College, Oxford: Paton Scholar
- Middle Temple: Astbury Scholar
- Columbia Law School: Stone Scholar
- COMBAR
- PNBA (previously a committee member)
- LCLCBA (committee member)
- Bar Pro Bono Unit
- Lawyers Fishing Club (membership secretary)

PUBLICATIONS

Macgillivray on Insurance Law, 11th Edition, Second Supplement to 11th Edition, 12th Edition, First and Second Supplements to 12th Edition, 13th Edition, First and Second Supplements to 13th Edition, 14th Edition, First and Second Supplements to 14th Edition. Authors: Professor John Birds, Ben Lynch QC, Simon Paul.

EDUCATION

- Balliol College, Oxford, BA (Hons) Law (top First in college, Paton Scholar)
- Columbia Law School, LLM (Stone Scholar)
- Inns of Court School of Law (Very Competent)

LINKEDIN

Ben's LinkedIn profile can be found here.

BSB Barristers' Register

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Fountain Court
CHAMBERS

Business interruption: *The FCA Test Case*

Ben Lynch QC

Financial Conduct Authority v Arch Insurance (UK) Limited & ors
[2021] UKSC 1

Chronology of the Test Case:

- **1 May 2020** – FCA announces intention to bring a test case to achieve market certainty over policy response of non-damage BI insurance policies to COVID-19 losses
- **9 Jun 2020** – FCA issues High Court claim against 8 insurers under the Financial Markets Test Case Scheme testing representative sample of 21 policies (affecting 370,000 policyholders & 700 types of policies issued by 60 insurers)
- **26 June 2020** – interveners join
- **15 Sep 2020** – High Court Judgment
- **16-19 Nov 2020** – 'Leapfrog' appeal hearing in Supreme Court
- **15 January 2021** – SC Judgment
- **18 May 2021** – Declarations ordered

The Key Issues

- Broadly, the issues were ones of construction and of principle.
- The Court had to determine whether on a set of assumed facts (and agreed facts) certain business interruption policies, which did not require physical damage, provided cover in principle for BI losses arising in the context of the COVID-19 pandemic and the government's response to it.
- So far as cover was concerned, the issues of construction concerned three types of clause – (1) disease clauses, (2) prevention of access / public authority clauses and (3) hybrid clauses.
- The other key issues concerned causation (namely, what is stripped out in a 'but for' counterfactual) and trends clauses.
- Briefly consider the 3 types of clauses.

(1) Disease clauses

- Variety of wordings
- RSA 3 – first example
- QBE 1 – second example, compare with QBE 2
- QBE 2 – third example, important on appeal
- RSA 4 – no appeal

QBE 1: relevant clause:

"[loss resulting from] interruption of or interference with the business arising from:

(a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it;

(b) actual or suspected murder, suicide or sexual assault at the premises;

(c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the premises;

(d) vermin or pests in the premises;

(e) the closing of the whole or part of the premises by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the premises."

QBE 2 clause 3.2.4: "Infectious disease, murder or suicide, food or drink or poisoning"

"***Loss resulting from interruption of or interference with the business in consequence of any of the following events:***

a) ***any occurrence of a notifiable disease at the premises*** or attributable to food or drink supplied from the premises;

b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

c) ***any occurrence of a notifiable disease within a radius of 25 miles of the premises***;

d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;

e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order of or advice of the competent local authority;

(2) Prevention of Access clauses: Arch

"We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this section resulting from …

…

Government or Local Authority Action

Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property …"

(3) Hybrid clauses: Hiscox

"***What is covered*** ***We*** *will insure* ***you*** *for* ***your*** *financial losses and other items specified in the schedule, resulting solely and directly from an interruption to* ***your activities*** *caused by:*

…

Public authority 13. ***your*** *inability to use the* ***insured premises*** *due to restrictions imposed by a public authority during the* ***period of insurance*** *following:*

a. a murder or suicide;

b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;

c. injury or illness of any person traceable to food or drink consumed on the ***insured premises****;*

d. defects in the drains or other sanitary arrangements;

e. vermin or pests at the ***insured premises****."*

Causation - introduction

With particular thanks to:

- Leigh-Ann Mulcahy QC
- Max Evans
- Professor Jane Stapleton

Causation – issue and general approach

- Key issue: insurers argued that it was necessary to show as a minimum requirement that the loss would not have been sustained but for the occurrence of the insured peril. Relied on general law of causation, 'but for' wording in trends clauses & *Orient Express Hotels v Generali* [2010] EWHC 1186 (Comm)
- On High Ct's construction of insured peril, causation largely answered itself. Not so with SC construction e.g. disease clauses cover only effects of cases of C-19 within the specified radius of the premises.
- The causal connection had to take account of the nature of the cover provided in particular policies. Issue is legal effect of insurance contract applied to particular factual situation.
- On proper construction of the policies, proximate cause test satisfied.
- SC agreed with High Ct's alternative construction that each case of C-19 was a broadly equal concurrent proximate cause of the national Government measures in March 2020 [207].

Causation – multiple causes and 'but for'

- Here: multiple concurrent cause situation.
  - *The Miss Jay Jay* [1987] 1 Lloyd's Rep 31 (two concurrent causes – adverse sea conditions and defective yacht design - neither excluded, only one of which is covered – insurers liable)
  - *Wayne Tank v Employers Liability Ass Corp* [1974] QB 57 (two concurrent causes – employee negligence in leaving equipment switching on/unattended and defective equipment – one insured, one excluded – insurers not liable (NB: *"it is always a question of interpretation"* [174]).
- However, in both cases – each cause was necessary, albeit not sufficient in itself, to cause the loss. So 'but for' test satisfied. Not the case with C-19. Each case, taken alone, is not necessary or sufficient to cause the loss.
- Key to decision [183-185, 191] Prof. Stapleton & "over-determined" causes – where insured peril, in combination with many other similar uninsured events, brings about a loss with a sufficient degree of inevitability, even if the occurrence of the insured peril is neither necessary nor sufficient to cause the loss by itself, it is reasonably capable of being regarded as cause of the harm that occurs.

Causation – application

- Concluded 'but for' causation is not necessarily determinative in deciding questions of proximate causation – it will not be applied if its application is contrary to intention of parties as to what is covered, based on interpretation of policy as a whole [190-191].
- Application to disease clauses[194-198]:
  - Notifiable disease contemplates may be cases outside radius and action taken by public authority in response to outbreak as a whole.
  - Contrary to commercial intent to treat them as depriving insured of cover for interruption also caused by cases of disease which policy is expressed to cover.
  - Wordings do not confine cover to a situation where interruption has resulted only from cases of disease occurring within the radius. To apply a 'but for' test would be to treat loss caused by cases outside the radius as excluded from cover when there was no such exclusion. Not necessary to show that 'but for' the disease within a particular area the losses would not have been suffered.

Causation - application

- Weighing approach also rejected: whilst not an indivisible disease, indivisible effect, via Govt measures. As loss is indivisible, question whether caused by insured peril is all or nothing [201]. Also unworkable [202] and whimsical in effect [202-203].
- Result: only effects of any case occurring within the radius covered but those effects include the effects on the business of restrictions imposed in response to multiple cases of disease any one or more of which occurs within the radius [207].
- Application to POA/hybrid clauses: if losses result from all elements of the risk covered by the clause operating in the required causal sequence, the fact that such losses were also caused by other uninsured (but not excluded) effects of C-19 which are inherently likely to arise/are the source event does not exclude them from cover [243; 249]. Although not themselves covered, such effects are matters arising from the same fortuity which parties would naturally expect to occur concurrently with the insured peril. They are not a "separate and distinct risk" [237].

Trends clauses

- Part of machinery for quantifying loss. Do not address scope of indemnity. [260]
- Should be construed consistently with insuring clauses [261] & should not be construed so as to take away cover provided by insuring clauses (i.e. exclusion) [262]
- Absent clear wording, they are intended to arrive at results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause (here, the effect of the pandemic). Generally to be construed to mean trends or circumstances unrelated to insured peril [268]
- *Orient Express* wrongly decided and overruled [308]
- Pre-trigger losses caused by C-19 not taken into account in indemnity period once cover is triggered [296]

Other issues not part of the Test Case

- Aggregation – for purpose of application of sub-limits of liability and deductibles, how many 'occurrences', 'events' or 'losses' suffered?
- Deductions of government assistance (see FCA Dear CEO letter 18 Sep 2020 – re: government grants)
- Damages for late payment of insurance claims – s.13A Insurance Act 2015
- Measure of indemnity & proof of loss
- Property damage BI clauses
- Exhaustive disease clauses – now see *Rockliffe v Travelers*

Questions

Paul Marshall
Cornerstone Chambers

The Post Office Scandal - A Study in Judicial Failure

53 mins

Paul Marshall

Called - 1991

Telephone - 0207 242 4986

Clerk - Sam Collins

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

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

Profile

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

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

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

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

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

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

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

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

Directory Quotes

Commercial Dispute Resolution - London (Bar) "He is very thoughtful, highly imaginative and a real fighter." *Chambers and Partners 2021*

"Extremely personable and a joy to work with." *Legal 500 2021*

"Paul Marshall is a fighter who thinks outside the box." "Paul Marshall is diligent and approachable, and he has a wealth of knowledge about financial services law." *Chambers and Partners 2020*

"Extremely personable and a joy to work with." *The Legal 500 2020*

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

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

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

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

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

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

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

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

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

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

Practice areas

Commercial and Regulatory

Overview

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

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

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

Publications

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

1st September 2019

Paul Marshall has published a new article in the Butterworths Journal of International Banking and Financial Law (https://store.lexisnexis.co.uk/products/butterworths-journal-of-international-banking-and-financial-law-skuuksku02692694JIBL72080/details?gclid=Cj0KCQjwiILsBRCGARIsAHKQWLMlXTVxldopwFJJHHxb2xSlNtQokrVXM9rx613gtmdYwzf6hNv7mKMa/ *judges prefer bankers to nuns: changing ethics and the Plover bird* (paywall).

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

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

10th May 2018

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

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

Atkin's Encyclopaedia Of Court Forms in Civil Proceedings

1st April 2018

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

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

1st October 2017

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

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

Trust and Estates Law & Tax Journal - Consequences of non-compliance

16th November 2016

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

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

Butterworths Corporate Law Service

1st September 2016

Member of the Editorial Board

Butterworths Atkin's Court Forms - Equitable Remedies

1st September 2016

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

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

Butterworths Journal of International Banking and Financial Law

1st September 2016

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

• Fault Lines in English Financial Law, Thornbridge Limited v Barclays Bank plc [2015] EWHC 3430, [2016] 5 JIBFL 266.
• 'Humpty Dumpty is broken: unsuitable and inappropriate swaps transactions' [2014] 11 JIBFL 679 (Crestsign v Natwest and RBS [2014] EWHC (Ch) 3043).
• 'Novating mis-sold swaps: the poverty of narrowly contractual analysis' [2015] 1 JIBFL 11 (Bailey and Anr. v Barclays Bank plc [2014] EWHC 2882).
• Interest rate swaps and the sale of the unknown (Green and Rowley v RBS [2013] EWCA Civ 1197).

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

4th December 2015

(Sweet & Maxwell 3rd Ed 2015)
(Editor Ben Kingsley, Slaughter and May) Paul contributed the chapters on Civil Liability and the Application of AML Legislation to International Transactions.

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

1st May 2010

(2010)
Volume 35, Editor.

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

Services

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

Associations

• Commercial Bar Association (COMBAR)
• Chancery Bar Association (ChBA)
• International Bar Association (IBA)
• Member of the Chartered Institute of Arbitrators (MCIArb.)

THE PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

THE POST OFFICE SCANDAL - A STUDY IN JUDICIAL FAILURE

"first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother's eye."
St Matthew 7, 5.

"The history of the Government's relationship with the Horizon project is a sorry tale"
Hansard 15 July 1999

"*Post Office Limited (POL) has accepted that it got things wrong in the past in its dealings with a number of postmasters*"
Government answer (USS for Justice) to Parliamentary question by Chi Onwurah MP 13 July 2020

PAUL MARSHALL

June 2021

PART I - INTRODUCTION

I am talking to you today about the most serious series of miscarriages of justice in recent English history. To put it in tabloid terms, for 20 years the Post Office hijacked the English criminal justice system and used it, essentially as part of the Post Office for its own purposes.

The scandal, on one analysis, represents a spectacular failure to manage both legal and commercial risk.

It is a scandal that has resulted in the insolvency of one of the most famous retail networks in the UK. (The Post Office has stated it cannot pay, without government support, the claims under its Historic Shortfall compensation scheme. The government has said it will underwrite this.) It has rendered a once admired brand seriously toxic. It has metaphorically, and also literally, destroyed the lives of hundreds of people.

It has taken a legal fiasco and human tragedy of epic proportions to place the issue of the presumption of the reliability of evidence given to the court produced by computers on the public and legal agenda, having been absent since 1997 (see 10 March 2021 Westminster Hall debate moved by Darren Jones MP, Chair BEIS Select Committee: https://hansard.parliament.uk/commons/2021-03-10/debates/B735CCE6-164E-42E1-98A1-1D3DDDEEF4CF/AutomaticComputer-BasedDecisionsLegalStatus). It is quite rare that a presumption of law can be linked with avoidable loss of life.

That this is a matter of public concern is reflected by the BBC considering the contingently disastrous effects of the presumption to have merited a 10-part BBC series, broadcast on Radio 4 from 25 May 2020. A supplemental 11th broadcast entitled "The Reckoning" was broadcast on Radio 4 on 2 June.

On 23 April 2021 the Court of Appeal Criminal Division handed-down judgment in 42 appeals. 39 appellants had their convictions for theft and false accounting quashed.

All the appeals were exceptional within the meaning of the Criminal Appeal Act 1995, the founding document for the Criminal Cases Review Commission. Ordinarily a reference by the CCRC requires a previous unsuccessful appeal. In only one case did that apply in the Post Office Appeals.

The Court of Appeal judgment of April 2021, *Hamilton and ors. v Post Office Ltd* [2021] EWCA Crim 577 https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html, while intellectually and jurisprudentially unremarkable, nonetheless is without precedent, not only in the number of convictions quashed, but because the Court of Appeal found what is called "second category" abuse of the process of the court by the Post Office. First category abuse of process, in essence, is the denial of a fair trial to a defendant by some procedural failure or error. In all but three cases the Post Office conceded that the appellants had been denied a fair trial because of the Post Office's failure to give proper disclosure of 'Horizon' computer system's known error records. Second category abuse of process is conduct that has the effect of subverting the integrity of the criminal justice system or undermining public confidence in it. It is profoundly serious and engages with the court's supervision of the prosecutor as a state agency. The Court of Appeal made that finding in 39 appeals.

I claim some credit for the Court of Appeal's finding on second category abuse because, until the end of December 2020, every other lawyer in the case, on both the Crown's and the appellants' sides, other than my solicitors Aria Grace Law and my junior, Flora Page, was steadfastly opposed to advancing that ground of appeal. My three clients, whom I will introduce in moment, had received a certain amount of flak for persisting in it. All the other appellants' legal teams believed it would fail, even if the Court of Appeal was willing to entertain it, which others thought it well might not.

The importance of this finding for the appellants was enormous. The effect of the Court of Appeal's finding, given effect in slightly anachronistic Victorian language, that the Post Office's conduct "offended the conscience of the court", is that the appellant should not only not have been convicted, but should not have been prosecuted. That is to say, complete exoneration. My pursuit of that issue, and my perception that the Post Office's conduct was much worse than merely failing to give proper disclosure of problems with Horizon, that it conceded in October 2020, is what eventually enabled me, with Aria Grace and my junior Flora Page, to elicit from the Post Office the "Clarke Advice", to which I will refer later. The finding prospectively offers the prospect of complete exoneration to many others.

There are thought to be as many as 736 possible miscarriages of justice that are now subject to review.

The Monday after the Court of Appeal's judgment delivered on 23 April, a Friday, Mrs Paula Vennells, the Post Office's former CEO, who after leaving the Post Office had received a CBE for her services and had previously been appointed to the board of the Cabinet Office, resigned from all her corporate directorial appointments and also gave-up her part-time ecclesiastical appointment.

The finding against a wholly state-owned enterprise, that it sought to subvert the criminal justice system, is of course of immense significance. It is also apt to be a fig-leaf to systemic judicial failure. General Christopher Elliot recently wrote a book that might usefully be read by lawyers and judges. It is entitled "*High Command*". He addresses the distressing question, in connection with British military operations in Iraq and Afghanistan: why did so many senior officers, individuals of high ability, personal integrity and goodwill, so disastrously fail? Elliot's question ought to be asked of the judiciary in the Post Office scandal. How is it that, repeatedly, over the period of 14 years, judges up and down the country sentenced innocent people to prison on the basis of evidence now known to have been both fundamentally unreliable and seriously incomplete?

I became involved in the Post Office scandal as a result of my having been diagnosed in 2017 with quite advanced metastatic cancer, which was both personally and professionally inconvenient. Medical treatment meant I was able to pursue other interests. Amongst these has been an interest in how large institutions are seemingly able to easily manipulate the legal system to their own advantage.

Initially, I was interested in Lloyds Bank and the HBOS Reading branch Impaired Assets Unit fraud. This resulted in losses estimated to have been as great as £1 billion. Lloyds Bank for years denied knowing anything about it, despite having received a detailed report by a highly skilled investigative accountant employed by Lloyds, Ms Sally Masterton. Ms Masterton had explained in a detailed report to Lloyds what was happening and the systemic risk that it presented for the bank. Lloyds sacked Ms Masterton and disparaged her to the FCA. Lloyds later paid undisclosed sums to her in settlement of her claims. (She is understood to be subject to extensive NDAs.) That led me to the circumstances concerning the Post Office's grand defence in massive group litigation brought by 550 former postmasters and employees. For 20 years the Post Office had asserted that its Horizon computer system was both robust and reliable. Those contentions, in 2019, were derisively dismissed by Mr Justice Peter Fraser as the 21st century equivalent to the contention that the earth is flat. But for twenty years judges had accepted the Post Office's contention, persuasively advanced by suitably expensive lawyers on the Post Office's behalf. This might be thought to suggest a systemic failure. I would be interested to hear an alternative view.

I wrote about this in a paper entitled "*Denialism, the latest entrants, Lloyds Bank, the Post Office, Clausewitz and the tinkling teacups of the English judiciary*". (It was privately published in February 2020 and is available on the Parliamentary APPG on Fair Banking website https://www.appgbanking.org.uk/wp-content/uploads/2020/02/Denialism-Lloyds-and-the-Post-OfficeFF-10-2-20.pdf) Denialism is not a neologism but a recognised psychological condition. Wikipedia explains it: *"In the psychology of human behaviour, denialism is a person's choice to deny reality as a way to avoid a psychologically uncomfortable truth. Denialism is an essentially irrational action that withholds the validation of a historical experience or event, when a person refuses to accept an empirically verifiable reality."* It fits nicely.

The Post Office is an important national institution that provides a crucial service to society. The entire share capital in Post Office Limited is held by UK Government Investments Ltd on behalf of the Department for Business, Energy and Industrial Strategy. A government minister is responsible for oversight of the Post Office. The Post Office has public status of long-standing. In his *English History 1914-1945* the great historian AJP Taylor wrote that "until

1914 a sensible, law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman". Even now, in some rural communities, the Post Office is the only way that some individuals and businesses can obtain access to cash, banking services and financial services. Branch Post Offices are operated by postmasters and postmistresses who operate these within retail premises as sole traders.

While the Post Office is a private company limited by shares, it is in truth a creature of the government. There is a government appointed representative on the Board. The accounting officer for the Post Office reports to the accounting officer of the Department for Business Energy & Industrial Strategy.

Enterprises such as the Post Office are private enterprises through which the government delivers services. Sometimes these are called "*Arm's Length Bodies*" or more voguishly "*Partner Organisations*" of government. In 2012 the Post Office was separated from the Royal Mail. A key government objective for the Post Office was to make it profitable, because for a long time its activities had been loss-making.

Twenty-two years ago, in 1999, the then labour government had brought to an end a PPI procurement project. That project had been to run the state benefits system through the Benefits Agency in collaboration with the Post Office. It was proposed to run the benefits scheme on a grand computer system called Horizon. The project did not go happily and incurred wasted cost to the taxpayer of about £700 million. It was a fairly conventional failed government IT project. At a Parliamentary Select Committee hearing on 15 July 1999 several government ministers, including the future Chancellor of the Exchequer Alistair Darling, explained to Members of Parliament that the Horizon computer system was insufficiently tested. It was said that it exposed the government to the prospect of a *catastrophe*.

The government decided that a whizzo way of dealing with the problem was to offload Horizon on to the Post Office. This was in the name of modernisation, and to salvage something from the failed procurement project. Fujitsu, the Japanese technology company, that earns billions from government contracts, took over the Horizon computer system and supplied it under a service contract to the Post Office.

At the time of its introduction in 1999 the Horizon computer system was the largest networked non-military IT system in Europe. Horizon was rolled-out from 1999 in branch Post Offices that originally numbered almost 17,000. (There are around 11,000 now.) As a computer platform, Horizon was more complicated than, say, a standard bank system because a branch sub-Post Office provides a great many more services to Post Office customers than an ordinary retail bank branch provides to its customers.

The system was designed so that a dispute about a transactional balancing error in a branch Post Office was not capable of being identified, disputed or resolved on the Horizon system itself, but only through a human interface antiphrastically called the 'Horizon Helpline'. If a balancing shortfall occurred, the operation of the Horizon system was such that the postmaster in question was required to make it up immediately out of their own money, or else the issue would be, in Orwellian language, 'settled centrally' even where a postmaster disputed the error. In order that the next trading account could be opened, the account required to be

closed and any balancing errors resolved. In practice, this merely meant that a postmaster could ask for time to pay.

Shortly after its introduction, many postmasters experienced balancing errors that were inexplicable, even on meticulous examination of the transaction, the payments received and made, and the inputs on the Horizon system. This resulted in postmasters being required to make-up shortfalls from their own funds, ranging from small amounts to tens of thousands of pounds.

Sometimes postmasters could not, and in some cases would not, make up the shortfalls. The latter included circumstances where postmaster was wholly confident that the shortfall was not due to any error, mistake or fault on their part. Postmasters who were steadfast in their refusal, or simply had not the resources to make the payment, were made the subject of criminal or civil proceedings brought by the Post Office. In some cases, postmasters attended court in the hopelessly naive expectation and belief that once they were before a judge or jury their innocence of any criminal or civil wrongdoing would be easily established.

Between 2000 and 2018 the Post Office pursued over a thousand Postmasters in both criminal and civil proceedings for sums allegedly owed in connection with the operation of their branch sub-post offices. The sums claimed as debts were alleged to arise out of accounting shortfalls.

Some problems with computers

There is a widely held perception that computers are fundamentally reliable. It is also commonly assumed that most computer errors are readily detectable or the result of user 'input' error. That perception and those assumptions have received a warmly enthusiastic embrace by a judiciary that sometimes struggles in correctly evaluating evidence, especially technical evidence. The book to read is Sir Richard Eggleston, *Evidence Proof and Probability*.

In earlier times, before computers became pervasive, the Police and Criminal Evidence Act 1984 (PACE) required that evidence from computers, that is technically hearsay, should be subject to proof of the reliability of its source. A change took place from 2000 as the use of computers became more widespread and more people, including some judges, became more familiar with their operation and the fear of unreliability and inaccurate documents diminished. The Law Commission papers to Parliament in 1993 and 1997 recommended the repeal of statutory formalities seen increasingly as cumbersome and difficult to comply with. Those recommendations were carried into effect by the Civil Evidence 1995 and the Youth and Criminal Evidence Act 1999 which removed safeguards under the PACE Act 1984.

In the absence of formal statutory requirements, as the Law Commission suggested, the courts have since then applied the presumption of the proper functioning of *machines* (*Castle v Cross.* [1984] 1 WLR 1372) to computers. But computers are not machines, or at least they are not *only* machines. The practical effect is that, when a party adduces evidence of a computer-based or derived document, that party may rely upon the presumption that the computer was operating reliably at the material time.

The many hundreds of miscarriages of justice, now estimated to be around 736 or so, came within a hair's breadth of not being discovered. It cost upwards of £150 million for the civil litigation to get close to the truth of only a part of what happened.

The Post Office and its management were willing to expend vast sums of money, and to instruct the most expensive lawyers that money can buy, to prevent the truth coming out. The Post Office easily might have succeeded.

Although I am not a criminal lawyer, I know a bit of law and in late spring of 2020 I offered to help some poor broken people who had been afflicted by the Post Office and imprisoned. That was the consequence of being prosecuted by the Post Office as a private prosecutor. Given the terms of Mr Justice Fraser's judgment of 2019, I believed their appeals should be straightforward. I had no apprehension of the scale of mendacity and subterfuge that I would uncover in my researches. (I estimate that by the time I felt constrained to withdraw from acting for my clients I had spent more than 1200 hours on Post Office issues, for none of which have I sought payment.)

The term "miscarriage of justice" is a bit abstract, so let me introduce you to my former clients.

Tracy Felstead

In 2001 Tracy Felstead was a recent school-leaver proud to have secured employment with the Post Office, still then a highly respected national institution. A shortfall at her Horizon terminal was identified of about £11,500.

Under caution, interviewed by Post Office investigators, who appear to me to have generally been rather intellectually challenged bullies, she was asked: "*can you demonstrate how you did not steal the money?*" I should add here, that a report to the Post Office undertaken by a company called Detica Net Reveal, which is a consulting division of BAE systems, in 2013 advised the Post Office that it might not be a good thing that its security department was incentivised on the basis of *how many failed audits* it achieved. "Audit" was Post Office in-house expression for a cash-balance check.

Tracy was prosecuted by the Post Office and in 2002 convicted of theft. She was 19. She refused to apologise when invited to do so by the trial judge and given an immediate custodial sentence. Her family had raised and paid the Post Office the £11,500 she was alleged to have taken. The Post Office and Fujitsu had complained about the cost of electronic evidence requested by her expert. I have spoken with him. He is very skilled. In the event, none was provided and the expert was not called.

Her conviction was quashed on 23 April 2021, the Court of Appeal finding that the Post Office denied her a fair trial and in prosecuting her had abused the process of the court in a way calculated to undermine the integrity of the criminal justice system and public confidence in it. Prior to an interlocutory hearing in the Court of Appeal in November 2020 she had suffered a nervous collapse because of the continuing strain.

For half her life she has had to declare in every job application that she made that she was a convicted thief.

She is wholly exonerated by the court's conclusion that no prosecution should have been brought and that it was an affront to the conscience and sense of propriety of the court that it was.

Janet Skinner

Denying any wrongdoing, Janet Skinner, in 2007 was encouraged and advised to plead guilty to false accounting in order to avoid a conviction for theft and a custodial sentence. She pleaded guilty as she was advised to, and was anyway sentenced to 9 months' imprisonment.

She left behind her small children. Upon release from prison she was met with a written demand from the Post Office for repayment of further sums and sums due under Proceeds of Crime orders. She suffered a medical collapse and temporary paralysis from which she has never fully recovered. She spent more than three months in hospital. Her harrowing tale is published on two *Guardian* podcasts that I have provided as further suggested reading or listening. If you are not moved to tears of rage and indignation in listening to them there is something fundamentally wrong with you, both as a human being and as a lawyer. You can experience what for Janet was the kind of despair only the imaginations of Dostoyevsky, Kafka and Zola approach.

On 23 April 2021, despite Janet's guilty plea, the Court of Appeal quashed her conviction concluding that the Post Office, in prosecuting her, had abused the process of the court in a way calculated to undermine the integrity of the criminal justice system and public confidence in it. She is wholly exonerated by the court's conclusion that no prosecution should have been brought and that it was an affront to the conscience and sense of propriety of the court.

Seema Misra

In November 2010 Mrs Seema Misra was convicted of theft and imprisoned on her son's tenth birthday. She was prosecuted for an alleged shortfall shown at her Horizon terminal of £75,000.

Mrs Misra had repeatedly called the Horizon 'helpline' and complained to the police of suspected theft by her staff. Upon conviction she collapsed with shock and was admitted to hospital. Upon leaving hospital, she asked the policeman to cover her hands so that it would not be apparent she was handcuffed.

Seema was 8 weeks' pregnant and had experienced fertility problems. The judge said she had brought her predicament upon herself. That was untrue. The Post Office had inflicted her misfortune upon her, deliberately withholding from the court material that would have undermined the prosecution case. The Post Office and its expert and some of its lawyers in 2010 were willing to see Mrs Misra imprisoned, in a word, to protect the Post Office brand and the Horizon system itself. It persisted in this until the doors fell off in December 2019. It emerged this year on 22 March 2021 in the Court of Appeal hearing that the Post Office in 2013 had a protocol in place for shredding inconvenient documents. Remember *Enron*? The Post Office, reassuringly, told the Court of Appeal that not many documents had in fact received this treatment.

On 23 April 2021, the Court of Appeal quashed Seema Misra's conviction concluding that the Post Office, in prosecuting her, had abused the process of the court in a way calculated to undermine the integrity of the criminal justice system and public confidence in it. She is wholly exonerated by the court's conclusion that no prosecution should have been brought and that it had been was an affront to the conscience and sense of propriety of the court.

Tracy Felstead, Janet Skinner and Seema Misra had to wait a combined total of 44 years to have their wrongful convictions quashed. The Post Office, from 2013, was alive to facts that would have provided grounds for appeal in many cases.

To give you a flavour of the true awfulness of this story – if you don't get it already - the Post Office civil litigation incurred costs on both sides of upwards of £150 million including funding and insurance costs. The Post Office paid £57 million in settlement of the group claim. In spring 2020 I asked Tracy how much compensation she had received for her time in prison. She told me, with some reluctance, £17,000. For a minute or two I could not speak, I was so shocked. So this is what civil justice, at its no-expense-spared best, delivers? That around £40 million went on funding costs provides an explanation, but no excuse; it stands as a reproach to the administration of justice.

There are many who bear responsibility for Tracy's prosecution. Others bear responsibility for it taking 20 years for Tracy, and others like her, to appeal. The Post Office, including its Chairman, its Chief Executives, its Chief Accounting Officers, its Board, and its Audit Risk and Compliance Committee share responsibility for this catastrophe. So do a significant number of lawyers and judges who failed to understand and properly evaluate the evidence.

One of the features of these miscarriages of justice is that, in almost all cases, the *only* evidence against the defendant in question was a shortfall shown in the Horizon computer system. I occasionally wonder where some judges and some lawyers filed their critical faculties.

The simplest explanation for the Post Office scandal is that documents generated by the Horizon computer system were routinely treated by lawyers and judges as though statements of fact that were true, without bothering to consider whether their truth should be

evaluated rather than assumed. It was taken as given that what a computer record showed was correct. The shallowness of this approach is reprehensible. Much of the responsibility in my view lies at the feet of the Law Commission. Safeguards were removed for *convenience*. People went to prison because of this. Martin Griffiths in 2015, unable to bear the strain of the Post Office's allegations, walked under a bus. Paula Vennells was able to tell the government that the courts invariably sided with the Post Office. She was absolutely right.

PART II – TWO STREAMS OF FAILURE

The Post Office scandal defies simple analysis because it resulted from two separate streams of failure that each augmented the other.

FIRST STREAM OF FAILURE - MISUNDERSTANDING HOW COMPUTERS FAIL

The first problem that the Post Office litigation painfully exposes is that judges and lawyers commonly do not understand the propensity of computers to fail. Innocent people went to prison because judges were insufficiently critical of the evidence adduced on Post Office prosecutions and in civil proceedings – to which I shall return. They were also institutionally deferential.

If you think that's harsh, in 1997 Lord Hoffmann, who most accept was a clever judge, in *DPP v McKeown and Jones* [1997] 1 WLR 295 301C-D, loftily declared that no one needs a degree in electronics to know whether a computer is working or not. The *Bates* group civil litigation incurred colossal cost in exposing the fallacy of Lord Hoffmann's observation. The law treats computers like machines. But computers are not machines – or at least they are not only machines. Part of the present problem is that technology advances so rapidly that our means of dealing with it cannot keep pace. There is more regulation covering the design of a toaster than there is of someone who writes and sells computer software. There is a lot of enthusiasm at present for Deep Learning Neural Networks, commonly referred to as A.I.. The problem here is that the output from machine learning systems is not even predictable. At present there are no systems in place for testing or evaluating reliability. Testing reliability of existing computer systems is in its comparative infancy – with the exception of safety critical systems, typically in aircraft or some, but by no means all, some medical systems.

Professors Ladkin, Littlewood, Thimbleby and Thomas in a paper entitled '*The Law Commission presumption concerning the dependability of computer evidence*', published in 2020, wrote as follows, of someone who undertook extensive evaluation of software errors:

> "Humphrey considered data derived from more than 8,000 programs written by industrial software developers. He wrote, "We now know how many defects experienced software developers inject. On average, they inject a defect about every ten lines of code." The average number of defects per kLOC[1] was about 120. The best 20% of programmers managed 62 defects per kLOC; the best 10%, 29 defects per kLOC. Even the top 1% still injected 11 defects per kLOC. Typical Operating Technology and IT software have many kLOCs,

[1] kLOC – thousand lines of code – a very small program.

> even thousands of kLOCs, and hence very many defects. The evidence implies that *all software* can be considered to have multiple faults."

The authors continued:

> "McDermid and Kelly reported on the defect densities in safety-critical industrial software:[2] "There is a general consensus in some areas of the safety critical systems community that a fault density of about 1 per kLoC is world class. Some software … is rather better but fault densities of lower than 0.1 per kLoC are exceptional. The UK Ministry of Defence funded the retrospective static analysis of the *Hercules* C130J transport aircraft software, previously developed to civilian aerospace software standard, and determined that it contained about 1.4 safety-critical faults per kLoC (the overall flaw density was around 23 per kLoC…. whilst a fault density of 1 per kLoC may seem high it is worth noting that commercial software is around 30 faults per kLoC, with initial fault injection rates of over 100 per kLoC."

Soberingly, "safety-critical faults" means faults whose possible consequences include system failures causing damage, including injury or death and/or damage to the environment.

Ladkin *et al.* express their view that "… a court should start with the presumption that *any software system contains or is influenced by errors that make it fallible*." You will see that that is the diametric opposite to the existing presumption in law.

They continue:

> "It will therefore fail from time to time when a combination of circumstances lead to an erroneous path of execution through the software – and such failures may not be obvious, and may even be perverse. In assessing the weight to be placed on specific computer evidence, it follows from this that the trier of fact should ask 'how likely is it that this particular evidence has been affected in a material way by computer error? Providing an answer to this question involves, first, reviewing any available evidence for *the number, frequency and nature of errors that have been reported in the particular system previously*."

That last phrase ought in my view to find its way into judicial bench books as soon as possible. For 20 years the Post Office withheld logs of error records from defendants until the Fujitsu Known Error Log was disclosed in the Horizon group litigation in 2019. It included records of tens of thousands of errors and failures and fixes.

At a more concrete level, as I have noted above, in 2010 at Mrs Seema Misra's trial, prosecuting counsel opened and closed the case for the Crown by telling the jury that, were there to have been a problem with the Horizon computer system, *any* such problem would have

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[2] John McDermid and Tim Kelly, *Software in Safety-Critical Systems: Achievement and Prediction*, Nuclear Future 02(03), 2006, 3.1.

been manifest and obvious to a Horizon computer terminal operator. That's, in effect, Lord Hoffmann's point. It's wrong.

The Law Commission had expressed similar views to Lord Hoffmann's in two reports to Parliament in 1993 and 1997. In recommending that safeguards for evidence derived from computers in legal proceedings be removed the Law Commission were significantly influenced by comments made by Professor Colin Tapper. As you will know, he is an expert on the law of evidence, not on computer technology. Until 2000, a person relying on computer evidence at a criminal trial was required to prove that the computer was working properly. The Post Office Horizon scandal, perhaps shockingly, tracks exactly the period since the removal of protections previously provided by the Police and Criminal Evidence Act 1984.

The mischief of the prosecution's contention at Mrs Misra's trial was that, by sleight of hand, it put the *onus* on Mrs Misra to explain to the jury the problems she encountered with Horizon. This was a recurring problem identified in the Court of Appeal's April 2021 judgment. My junior Flora Page gave a presentation on this issue, and the comparative indifference with which it was treated by her colleagues at the criminal Bar, in a lecture to UCL on corporate ethics on Tuesday 7 June.

All Mrs Misra could *actually* do at her trial was point to shortfalls she had experienced at her Horizon branch terminal – that is, all she could show was that the cash that she had received didn't match the balancing figure on the Horizon computer screen. In leaps it had escalated to £75,000. She called the police and suspected her colleagues of theft. The transcript of her trial shows that she was close to taunted by the prosecution for her being unable to point to identifiable problems: '*Mrs Misra says that there must be a fault with Horizon, but she can't point to any problem she actually had*'.

The jury was invited to infer that the only cause of the discrepancy must be theft. That should never have happened. Had her trial been conducted properly, the Post Office should have been required to prove that the Horizon system was working at the time she experienced shortfalls. As we now know from Mr Justice Fraser's 2019 '*Horizon Issues*' judgment (*Bates and ors. v Post Office Ltd ('Horizon Issues') Rev 1* [2019] EWHC 3408 QB, the Post Office could not have done so. Mrs Misra went to prison.

The importance of computer disclosure

The problem with the Post Office's litigation and prosecution of its postmasters is that, for 20 years, the Post Office gave wholly inadequate disclosure of known problems with its computer system.

The most astonishing aspect of this to anyone technically half-literate is that, until 2019, the Post Office declined to disclose the Fujitsu Horizon Known Error Log. In the massive group litigation, reported as *Bates and Ors. v Post Office Ltd (Horizon Issues)* [2019] EWHC 3408, it had three lines of objection to disclosing the Known Error Log (KEL) – a central log maintained to record, as its name suggests, errors in a computer system, their impact, and fixes undertaken to correct them.

To start with, the Post Office's solicitors, Womble Bond Dickinson, in correspondence questioned whether the Known Error Log existed at all; Mr Justice Fraser concluded that it did.

Once the existence of the Known Error Log was established, the Post Office's leading counsel submitted to the court that the KEL was irrelevant and the claimants' demand for its disclosure was "a red-herring"; Mr Justice Fraser concluded that the KEL was likely relevant to the claimants' claims.

Once established as existing and likely to be of relevance, the Post Office's final contention was that, however relevant it might be, very regrettably it could not disclose it because it was not the Post Office's Known Error Log, but rather Fujitsu's.

Mr Justice Fraser's response to this, was to point out that, in fact, as a matter of contract between the Post Office and Fujitsu, the Post Office was entitled to the Known Error Log.

The importance of the KEL is impossible to overstate. The judge found it not to be a red-herring, but, on the contrary, fundamental in revealing the true and full extent of Horizon's unreliability over time, the bugs identified in the system, their effects on branch Horizon accounts, and the fixes that were implemented.

In case you are not already disconcerted, Mrs Misra, on no less than *four* separate occasions in the course of her prosecution, requested that the court order disclosure by the Post Office of Horizon error records.

Three different judges dismissed each of Mrs Misra's applications. In the last application, at the end of her trial, her defence counsel submitted that she couldn't have a fair trial without further disclosure. The trial judge disagreed and said (in terms) that she could have a fair trial without it. 10 years' later the Criminal Cases Review Commission concluded that Mrs Misra didn't receive a fair trial. Why? Because she was not given proper disclosure by the Post Office.

This ought to be a matter of acute concern to the judiciary, to the legal profession and also to the public. One of the problems is that the judge at Mrs Misra's trial appears to have been able to recognise that her trial was unfair. The problem is that it appears that he did not know, nor did counsel, what to look for. Mr Justice Fraser's judgment provides a good steer on this. By invitation of the Committee, I gave my own account to the Justice Select Committee in written evidence in July 2020.

In November 2020, at the personal invitation of the Under Secretary of State, I submitted a paper to the Ministry of Justice on evidential issues relating to computer evidence. That paper was contributed to or endorsed by 8 experts, six of whom are, or have been, university professors. I understand that our recommendations have been submitted for consideration by the Attorney General and by the Chair of the Criminal Procedure Rule Committee, the Lord Chief Justice.

Second stream of failure - Post Office mendacity

What I have called the second complicating stream is Post Office mendacity – institutional ethical failure, if you will. I will give three examples.

Knowing about the 'Receipts and Payments Mismatch' bug

It may come as a surprise to you to know that in September 2010, a month before Mrs Misra's trial, a significant number of senior employees of Fujitsu and senior employees of the Post Office held a high level meeting at which a bug was discussed called the "Receipts and Payments mismatch" bug. This bug, it was acknowledged, would cause a postmaster's receipts and payments to appear to balance at the terminal but not do so on the Post Office's main servers. In short, an error caused by this bug would *not be apparent or obvious* to an operator.

It was recorded in writing that this might present a problem for the Post Office in its "ongoing legal cases". A senior Fujitsu employee and computer engineer who was present at that meeting gave evidence a few weeks later at Mrs Misra's trial. He said nothing about it. I hope that you are deeply shocked. Mr Justice Fraser described the bug as having been kept "secret". If you have been following me, disclosure of that bug would have undermined statements made by the prosecution, both in opening and closing its case against Seema Misra.

Lee Castleton

I want to tell you briefly about Lee Castleton. Lee Castleton invested his life savings in acquiring a branch Post Office in in Yorkshire in 2003. As explained, Fujitsu acquired the Horizon system and provided it to the Post Office. It was known to have problems with its reliability.

Recognising the systemic risk that it was shouldering, the Post Office with its lawyers devised an extremely adverse contract that shifted the risk in the system to postmasters. This was achieved by a contractual term that provided that a Horizon account balance stated by a postmaster to the Post Office was an "account" in law. An "account" is analogous to acknowledgement of a debt due. The legal effect is that, once stated, the burden is on the paying party, if they want to dispute the account for any reason, to show why the account is wrong. If a postmaster's account was wrong, not by any fault of theirs but because the system had failed, as a matter of *contract* it was down to the postmaster concerned to show and explain why.

That presented the hapless postmaster with an insuperable evidential and legal problem.

The first occasion on which the Post Office was required to positively prove that the Horizon system worked properly was in 2019. It then failed dismally.

In 2006 Lee Castleton was sued for a shortfall shown at his Horizon terminal of about £26,000. He was careful and knew he had not made mistakes.

Mr Castleton was unrepresented by lawyers at his 6-day trial in 2006. He had run out of money to pay for legal representation. He had called the Horizon helpline many, many times, complaining that he had problems balancing his accounts. That cut no ice with either the Post Office or with the judge. Mr Castleton was persuaded to accept that the balance that he had provided to the Post Office was in law "an account". He accepted that at the outset of the trial. He was doomed from the outset.

In law, as you will know, the essential feature of an account is that it is the result of *agreement*. It took 13 years for Mr Castleton's concession to be shown by Mr Justice Fraser in 2019 to have been wrongly made. That is because there was no agreement of the account. There was no contractual mechanism for *disputing* the Horizon computer figure. The contractual term was, in effect 'agree the Horizon figure or stop operating your Post Office'. Neat, but utterly unreasonable and oppressive. I have no doubt that the drafting of the term was intended in its pernicious effect. The Post Office was engaged in transferring commercial risk.

The contractual provision had the purported legal effect of transferring the risk of Horizon failure to hapless postmasters. It is unsatisfactory that for 20 years it went unexamined. Most postmasters could never have afforded to instruct a barrister of sufficient experience to challenge the Post Office. Lee went like a lamb to the slaughter.

The trial judge, without hearing any expert evidence, rejected Mr Castleton's defence that the Horizon system might not have been working properly. The judge concluded that it *was* working properly. You may ask yourself how he arrived at that conclusion. You will remain mystified if you take the trouble to read the judge's judgment: *Post Office Ltd v Castleton* [2007] EWHC 5 QB https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html.

The Post Office obtained a costs order against Mr Castleton for £321,000. Counsel for the Post Office until last year crowed on his chambers website about his success and triumph over Mr Castleton, whose life and whose family's life was blighted by the Post Office and the Horizon computer system 13 years' ago.

The costs order made against him caused Lee Castleton to become bankrupt. For several years he and his family were rendered almost destitute. They lived in accommodation without a hot water boiler because he could not afford one. Ask yourself how many postmasters the Post Office's solicitors will have shown that hopelessly flawed reported High Court judgment to, to make them think twice before taking on the Post Office. It happened as a matter of fact.

His Honour Judge Havery Q.C.'s judgment in Mr Castleton's case is now shown to be wrong in virtually every respect, both as to the law and as to its facts. I have written about that decision in an article entitled '*The harm that judges do – misunderstanding computer evidence: Mr Castleton's story* https://journals.sas.ac.uk/deeslr/article/view/5172/5037.

The cover-up

The third aspect of ethical failure by the Post Office is what can be called, "the cover-up".

In October 2020, in one document amongst the many thousands I had looked at, I noticed a remarkable couple of lines that referred to the Post Office main Board, in August 2013, having been told by external solicitors, about concerns about the Fujitsu computer engineer who had given evidence at Mrs Misra's trial. I could not for the life of me understand why the Board of the Post Office was receiving notice about one of its expert witnesses.

My solicitors Aria Grace Law asked a large number of questions about this. These elicited from the Post Office in November 2020 the now famous "Clarke Advice". That document revealed that, as long ago as *in 2013,* the Post Office knew that its principal expert witness had repeatedly given incomplete and misleading evidence to the court. He had thereby put the Post Office in breach of its obligations to the court as prosecutor. It was suggested he should not be used as a witness again. It is the single most explosive document I have encountered in 30 years' practice at the Bar.

One of the extraordinary aspects of the Clarke Advice is that it revealed a curious difference. If you read the judgments of Mr Justice Fraser, you will see that he devotes a good deal of space in his Horizon Issues judgment to the remarkable fact that a Fujitsu expert computer engineer, Mr Jenkins, was the source of much of the Post Office's evidence in 2019. But he was not called as a witness. In their written submissions at the close of the *Horizon Issues* trial the Post Office gave an explanation for Mr Jenkins not being called as a witness. The remarkable thing is, that the reason given to Mr Justice Fraser in 2019 by the Post Office does not sit easily with an alternative explanation, suggested by the Clarke Advice. That is that Mr Jenkins' credibility as a witness was so shredded that he should never be let near a court again. If you are interested you can pursue this by considering the Court of Appeal's judgment of April 2021 against the judgment of Mr Justice Fraser of December 2019.

I occasionally ruminate upon what would have been the impact on the group litigation had Mr Jenkins's known unreliability, and his knowledge of bugs, and the Post Office's knowledge of his knowledge of bugs, been known to the claimants in the group litigation.

The main point, however, is that in my view, any reasonably competent and conscientious lawyer in 2013, in possession of that information – that is to say the *known incompleteness* of evidence given to the court by the Post Office's expert - would immediately have grasped that it could potentially render the conviction of a person, convicted on the basis of evidence given by that Fujitsu employee, unsafe. A prosecutor in the possession of such information has an unqualified duty in law to disclose it to a convicted defendant.

I had been puzzled, until November 2020, as to why, from 2014, the Post Office had not undertaken any prosecutions of postmasters, when in 2012 it had undertaken more than 40. The Clarke Advice provided my answer. The Post Office in 2013-2014 undertook a major change in its policy. But it was keeping quiet about the reason.

A QUESTION TO WHET YOUR APPETITE

I will leave you with a question. It is I believe very topical. The key is timing.

On 17 December 2014 there was an adjournment debate in Westminster Hall moved by Mr James Arbuthnot MP, now Lord Arbuthnot. (An adjournment debate is a debate without a vote. Such debates are usually on subjects of general public importance.) Second Sight Ltd, a specialist firm of forensic accountants, in response to pressure from Members of Parliament, had two years previously been appointed by the Post Office to look into the Post Office's treatment of its postmasters. Sir Anthony Hooper, had been appointed to oversee a mediation process.

At the December 2014 debate, Jo Swinson MP, then the government minister for Postal Services, having heard from MPs a series of shocking stories of the treatment by the Post Office of its postmasters, said this to Parliament:

> Jo Swinson MP: *"…in such a situation what I would normally propose doing is to get a team of forensic accountants to go through every scenario and to have the report looked at by someone independent, such as a former Court of Appeal judge. We have a system in place to look at cases … If any information comes to light during the course of the mediation or the investigations, that suggests that any of the convictions that have taken place are unsafe, there is a legal duty for that information to be disclosed…. I fail to see how action can be taken without properly looking in detail at every single one of the cases through exactly the kind of scheme that we have set up... . We have to look at the details and the facts, and that has to be done forensically. That is why Second Sight, the team of forensic accountants, has been employed and why we have someone of the calibre of Sir Anthony Hooper to oversee the process."*

In 2015, the Post Office told Parliament that it had received no evidence that the conviction of any applicant to the mediation scheme was unsafe. Lord Arbuthnot is on record in 2020 as stating that the Post Office lied to Parliament. To my knowledge he has not been contradicted.

Be that as it may, less than 6 weeks' after the minister's statement to Parliament, on 3 February 2015, Ian Henderson of Second Sight gave this evidence to the Business Innovation and Skills Parliamentary Select Committee:

> Ian Henderson: "*we have seen no evidence that the Post Office's own investigators were ever trained or prepared to consider that Horizon was at fault. That was never a factor that was taken into account in any of the investigations by Post Office that we have looked at."*
>
> *"That is a matter of huge concern, and that is why we are determined to get to the bottom of this matter, because we think that there have been prosecutions brought by the Post Office where there has been inadequate investigation and inadequate evidence to support some of the charges brought against defendants … this … is why we need to see the full prosecution files."*

"When we have looked at the evidence made available to us… I have not been satisfied that there is sufficient evidence to support a charge for theft. You can imagine the consequences that flow from that. That is why we, Second Sight, are determined to get to the bottom of this matter, which we regard as extremely serious."

So Ian Henderson in February 2015 said to the Select Committee that Second Sight wanted to do exactly what Jo Swinson MP, the government minister, in December 2014 had said the government saw to be *necessary*.

Within a month of Mr Henderson's evidence to the Select Committee, in March 2015, the Post Office summarily terminated the engagement of Second Sight and abruptly withdrew from the mediation process.

I raise this question for you to reflect upon. Given what the minister had told Parliament on 17 December 2014, is it plausible that the Post Office sacked Second Sight without briefing the government, as its owner, on the reason for it doing so? I think it inconceivable that it did not.

Assuming the Post Office *did* brief the government on those reasons, the Post Office either gave a truthful account of the reason for sacking Second Sight and withdrawing from mediation, or else it gave an incomplete and misleading explanation.

If the Post Office gave a truthful explanation to the government, that would make the government complicit in a 6 year cover-up. On the other hand, if the Post Office gave a misleading explanation to government, why has there not been the slightest suggestion of this from the government, given the seismic shocks represented by Mr Justice Fraser's judgment of December 2019 and, even more so, the Court of Appeal's devastating judgment of 23 April 2021?

These are very big and important questions. They remain to be addressed. As you will apprehend, the prospect of the government being implicated for possibly having been complicit in the Post Office's denial of justice to postmasters, over many years, is very troubling. Given the close connection between BEIS, formerly BIS, and the Post Office this is not fanciful. Lord Arbuthnot is on record for stating that the Post Office lied in its evidence to Parliament in 2015. To my knowledge that has nowhere been contradicted. Given that the Post Office is the wholly owned creature of government, that in itself is surprising.

In 2015 the Post Office had publicly announced that remote access to postmaster branch accounts was not possible. In 2019 that was revealed to be untrue. In fact, Fujitsu routinely practised accessing branch data from the outset, and manipulated data in branch accounts. No records were kept. The Court of Appeal devote one line in its April judgment to this extraordinary circumstance.

These issues are not academic. The Post Office's behaviour has destroyed peoples' lives. I have provided links to two podcasts by *The Guardian* newspaper on my former client Janet Skinner's experience. That her story reduced the journalist interviewing her to tears says enough. It has been said repeatedly by the government and the Post Office that *'it is accepted*

that mistakes were made'. That is to adopt the language of the pigs in *Animal Farm*, so inadequate is it to the facts.

Some Post Office lawyers knew of information that would have provided a defence to defendants. Other lawyers knew of information that would have enabled convicted defendants to launch appeals to the Court of Appeal long, long before March 2021. I hope that some of them may end up in prison for perverting the course of justice. If, this does not happen, there will be two consequences, the first is that the reputation of the criminal justice system in this country will be irreparably harmed; the second is that legal and commercial ethics in this country will decline yet further. The question too often asked is, "what can we get away with?" The Post Office almost got away with it. It had done so for 20 years.

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Suggested further reading:

Hamilton and ors. v Post Office Ltd [2021] EWCA Crim 577.
https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html

Bates and ors. v Post Office Ltd ('Horizon Issues') Rev 1 [2019] EWHC 3408 QB.
https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html

Bates and ors. v Post Office Ltd ('Common Issues') [2019] EWHC 606 QB.
https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html

Post Office Ltd v Castleton [2007] EWHC 5 QB.
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Recommendations for the probity of computer evidence, Marshall, Christie, Ladkin, Littlewood, Mason, Newby, Rogers, Thimbleby, Thomas, *Digital Evidence and Electronic Signature Law Review* 18 (2021) 18 https://journals.sas.ac.uk/deeslr/article/view/5240/5083 (The published version of a paper submitted to the Under Secretary of State for Justice in November 2020.)

Stephen Mason and Daniel Seng (Eds.) *Electronic Evidence* 4th Edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study University of London 2017, https://humanities-digital-library.org/index.php/hdl/catalog/book/electronicevidence (5th edition forthcoming 2021).

The Law Commission presumption concerning the dependability of computer evidence, Ladkin, Littlewood, Thimbleby, Thomas, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 1. https://journals.sas.ac.uk/deeslr/article/view/5143

'*Robustness of software*', Peter Ladkin, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 15. https://journals.sas.ac.uk/deeslr/article/view/5171/5036

English law's presumption that computer systems are reliable: time for a rethink? Paul Marshall, *Butterworths Journal of International Banking and Financial Law*, 7 (2020) 433.

https://cornerstonebarristers.com/cmsAdmin/uploads/jibfl-marshall-english-law-s-evidential-presumption-that-computer-systems-are-reliable-time-for-a-rethink-jul-2020-1-(1).pdf

BBC Radio 4, 11-part Podcast by Nick Wallis, *The Great Post Office trial* https://www.bbc.co.uk/programmes/m000jf7j/episodes/downloads

The Guardian Podcasts on Janet Skinner's experience, by Anushka Asthana and Richard Brooks

https://www.theguardian.com/news/audio/2021/may/10/exposing-the-great-post-office-scandal-part-1

https://www.theguardian.com/news/audio/2021/may/11/the-post-office-scandal-part-2

The harm that judges do – misunderstanding computer evidence: Mr Castleton's story, Paul Marshall, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 25.

https://journals.sas.ac.uk/deeslr/article/view/5172/5037

English judges prefer bankers to nuns: changing ethics and the Plover bird Paul Marshall Butterworths Journal of International Banking and Financial Law (2019) 8 JIBFL 505 https://www.appgbanking.org.uk/wp-content/uploads/2020/02/English_judges_prefer_bankers_to_nuns_chang.pdf

The Hearsay Rule in Civil Proceedings 1993 Law Com. No. 245.

Evidence in Criminal Proceedings Hearsay and Related Topics 1997 Law Com. No. 216.

Nicholas Ellor
Senior Underwriter
Temple Legal Protection

Litigation Funding Update

12 mins

Nicholas Ellor
Senior Underwriter

temple
legal protection

Nicholas is a Senior Underwriter within the commercial underwriting team.

Prior to joining Temple, Nicholas had over twenty years' experience working as a solicitor in London 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 and brings that expertise insights to the table and provides a fast, highly professional service.

His experience and knowledge enhance our teams' abilities to quickly and expertly assess claims and to provide intelligent and timely support throughout the legal process.

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PNLA
Professional Negligence
Lawyers Association

Notes: -

Adam Grant
Costs Lawyer
KE Costs Lawyers

Costs Budgeting: Pitfalls to Avoid

28 mins

Adam Grant

Costs Lawyer

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KE COSTS LAWYERS

Adam is a Costs Lawyer and member of the senior management team at KE Costs Lawyers. He has over ten years of experience in Legal Costs acting for a wide variety of clients. He specialises in catastrophic personal injury and clinical negligence actions but also has a growing commercial practice, ranging from dispute resolution to insolvency proceedings.

A qualified Costs Lawyer with merit, Adam is an active member of the Association of Costs Lawyers (ACL). He is an elected member of the Association's governing Council and has served as their Policy Officer since 2018. He works extensively with regulators and other public bodies representing the Costs Lawyers' profession. He is also a regular contributor to several legal publications.

Having served on ACL's electronic bill committee Adam is adept at drafting complex 'electronic' bills of costs for detailed assessment and is an enthusiastic proponent of costs budgeting (when done right!). Adam has developed a loyal client base over the past ten years and prides himself on going 'the extra mile' for them, with no job being too big or too small.

Costs Budgeting:
Pitfalls to Avoid

Adam Grant, Costs Lawyer
KE Costs Lawyers

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Why Costs Budgeting?

- Here to stay,
- Single biggest influence on the recoverability of costs between the parties;
- Need to avoid working for no costs or leaving your client with a shortfall at settlement.

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The where and when of Costs Budgeting

3.12 (1) This section and Practice Direction 3E apply to all Part 7 multi-track cases, except:

(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or

(b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or

(c) where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders); or

(d) where the proceeding are the subject of fixed costs or scale costs; or

(e) the court otherwise orders.

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The where and when of Costs Budgeting

3.13 (1) Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets –

a. Where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or

b. In any other case, not later than 21 days before the first case management conference

3.14 Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

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Budget Preparation

- Instruct a Costs Lawyer (he would say that wouldn't he).
- If preparing Precedent H yourself Practice Direction 3E has guidance.
- Need for accurate anticipated costs of paramount importance.

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Budget Preparation

CPR r3.18 *In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*

(a) Have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) Not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so

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Accurate Assumptions

- Need to be detailed enough to give your opponent and the court a clear idea of what work is covered by each phase.
- Avoid generic or opaque assumptions.

Accurate Assumptions

Issue/Statement of Case

Proceedings to remain at the County Court at X, with liability firmly disputed by the parties. No Reply to the Defence is anticipated and no amendment to the value included within the Claim Form is anticipated. The Defendant will pose Part 18 Requests for Further Information and the Claimant will submit responses following advice from Counsel. The Schedule of Loss will not require any amendments.

Witness Statements:

The Claimant will rely upon the witness evidence of herself, her husband and her business partner. Witness statements to be taken via the telephone. The Defendant to rely upon x2 witness statements, one of them being from their in-house accountant. Given the importance of this statement to the issue of liability it is anticipated that the Claimant will obtain advice from Counsel and the expert Forensic Accountant in respect of the Defendant's witness evidence.

Client Approval

- Engage with your client about their Costs Budget.
- Obtain their Approval of anticipated costs.
- Gain that protection for any potential solicitor/client assessment in future.

Agreed/Approved Budgets

- Can be a difficult process, especially if directions are not agreed.
- But important, rules have 'shifted' a large part of the de facto assessment process to the CCMC stage of litigation
- One bite of the cherry!

Agreed/Approved Budgets

CPR r3.13(2) *In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.*

- Double check the Precedent R spreadsheet if completing it yourself!
- Fees and expenses relating to Costs Budget preparation or wider Costs Management recoverable between the parties, subject to 1% and 2% caps respectively.

'Budgeting' doesn't stop at the CCMC!

Reminder:

CPR r3.18 *In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*

(a) Have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) Not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so

PRECEDENT Q

Phase	Pre-Budget Incurred Costs	Post-Budget Budgeted costs	Last Approved/ Agreed Budget	Departure from Last Approved/ Agreed Budget
Pre-Action	£3,568.00	£0.00	£0.00	
Issue/ Statement of Case	£7,896.00	£2,896.00	£3,000.00	-£104.00
CMC	£5,281.00	£0.00	£0.00	-£0.00
Disclosure	£3,185.00	£4,586.00	£4,300.00	+£286.00
Witness Statements	£328.00	£6,865.00	£6,000.00	+£865.00
Expert Reports	£7,586.00	£19,856.00	£12,000.00	+£7,856.00
Pre-Trial Review	£0.00	£4,986.00	£5,000.00	-£14.00
Trial Preparation	£0.00	£1,258.00	£20,000.00	-£18,742.00
Trial	£0.00	£0.00	£15,000.00	-£15,000.00
ADR/ Settlement	£86.00	£17,896.00	£8,000.00	+£9,896.00

‘Budgeting’ doesn’t stop at the CCMC!

- Spending within budget should provide for a full recovery of budgeted costs
- Spending outside the budget will consequently not prove recoverable between the parties unless ‘good reason’ exists to depart from the budget.
- ‘Good reasons’ a few and far between.

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Monitor your Post-Budget Spending

“Parties who want to maximise their recoverable costs need to keep their costs budgets under review” Master Kaye – Persimmon Homes Ltd & Anor -v- Osborne Clark LLP & Anor [2021] EWHC 831 (Ch)

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Varying a Costs Budget

CPR r3.15A

*(1) A party ("the revising party") **must** revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.*

*(2) Any budgets revised in accordance with paragraph (1) **must be submitted promptly** by the revising party to other parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5).*

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Varying a Costs Budget

CPR r3.15A

(3) The revising party must –

a. Serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3E;

b. Confine the particulars to the additional costs occasioned by the significant development; and

c. Certify, in the form prescribed by Practice Direction 3E, that the additional costs are not included in any previous budgeted costs or variation.

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Varying a Costs Budget

CPR r3.15A

*(4) The revising party must submit the particulars of variation **promptly** to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed.*

*(5) The court **may** approve, vary or disallow the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing.*

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Varying a Costs Budget

CPR r3.15A

*(6) Where the court makes an order for variation, **it may vary the budget for costs related to that variation which have been incurred prior to the order** for variation but after the costs management order.*

Significant Development

Churchill –v- Boot [2016] EWHC 1322 (QB)

- Approved Budget in a PI matter of £114,492.57.
- Following CCMC value of claim doubles to c.£2,000,000.00
- Further disclosure ordered, with additional comments from experts and trial adjourned by 6-9 months

Significant Development?

NO!

- Master *refuses* to vary the Approved Costs Budget
- "a doubling of the size of the claim does not necessarily mean or justify an increase in costs"
- "The so called developments relied upon by the Claimant would have been capable of being envisaged at the time that the original costs budget was set".

Need to be able to explain to the court *why* the developments will require further costs. Assumptions are thus very important in the initial budget.

Significant Development

Sharp –v- Blank & Ors [2017] EWHC 3390 (Ch)

- Some 5,800 Claimants pursuing former directors of Lloyds TSB
- Trial length increased by 48 days, the Claimants served an export report which was not anticipated at the time of the initial budget and some 948 additional documents were disclosed

These *were* significant developments and warranted the revision of the parties' budgets

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Significant Development

Whether developments are 'significant' -

"must be understood in light of the claim, its size, complexity and the manner in which the litigation has unfolded – and also from the likely additional costs that have been, or are expended to be, incurred. The amount of the additional expense is not determinative, but it is difficult to conceive that a development leading to modest additional level of expenditure, that is modest in proportion to the amount in the relevant budget phase or phases, is likely to be significant development".

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Significant Development

Cannot be used to rectify a 'mistake':

"It is obvious, however, that a mistake in the preparation of a budget, or a failure to appreciate what the litigation actually entailed, will not usually permit a party to claim later that there was a development because the word 'development' connotes a change to the status quo that has happened since the budget was prepared".

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Be Prompt!

Persimmon Homes Ltd & Anor -v- Osborne Clark LLP & Anor [2021] EWHC 831 (Ch).

"The applicant must therefore first satisfy the court that there has been a significant development in the litigation since the last approved or agreed budget which warrants a revision (upwards or downwards) to the last approved or agreed budget; and second that the particulars of the variation have been submitted promptly both to the other parties and the court in accordance with CPR r.15A(2) to (4).

Promptness is thus one half of the first stage in the revision of a Costs Budget, if the development isn't 'significant' or the revising party is not 'prompt' then the quantum of the variations will not be considered.

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Leave it for Detailed Assessment to sort out?

- Certainly not recommended!
- Hurdles to be overcome 'Why did you revise your approved budget?'
- Argument that the *Denton* Principles then apply
- Uphill struggle!

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SUMMARY

- Give costs budgeting real consideration, the problems arising out of getting it wrong are significant;
- Liaise with a Costs Lawyer in respect of your assumptions;
- Keep your costs under supervision after the CCMC if possible;
- Know how to identify a 'significant development'
- Once you are happy one has occurred, inform your Costs Lawyer asap and get the revisions sorted out promptly.

KE COSTS LAWYERS

Thank you!

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Sean Gibbs **BSc LLB (Hons) PG Dip Arb LLM MICE FCIOB FRICS FCIARB**

Hanscomb Intercontinental

The role of an Expert Witness

15 mins

Sean Sullivan Gibbs

ARBITRATOR-ADJUDICATOR-EXPERT DETERMINER-DAB MEMBER

POSITION

Director

DISCIPLINE

Quantum

Contracts

QUALIFICATIONS

BSc Construction Management

LLB (Hons)

Post Graduate Diploma Arbitration

Post Graduate Diploma Bar Studies

LLM

Barrister

Direct members exam (QS) SCS

Member ICE

Assoc Fellow ICHEME

Fellow RICS

Fellow CIARB

Fellow Assoc Arb

Fellow CIOB

Fellow CICES

Fellow BIARB

Bond Solon Accredited Expert Witness

Specialisms/skills

Expert Advisory / Witness

Sean has held directorships and senior commercial positions with contracting and consultancy firms in the United Kingdom and Internationally. With over 30 years' experience in the global onshore and offshore construction and engineering industries Sean has worked across the continents of Europe, Asia, Middle East, Africa and the Americas.

He has acted as quantum expert before various dispute resolution tribunals including adjudication, dispute board, expert determination and arbitration.

Sean holds a current Cardiff University Bond Solon accreditation and is a practising member of the Academy of Experts.

Project experience includes major airport developments, industrial process plants, commercial developments, military and police installations, heavy engineering in respect of onshore and offshore oil & gas facilities and pipelines, highway interchanges, tunnels, leisure resorts, nuclear, water treatment and desalination plants, waste to energy, biomass, onshore and offshore windfarms, renewables, mines, ports, hospitals and rail/metro projects.

Projects have been based on numerous standard and be-spoke Conditions of Contract, including the NEC/ECC Suite of Contracts, JCT Suite of Contracts, ICE Suite of Contract, FIDIC Suite of Contracts, I Chem E Suite of Contracts, ICC Suite of contracts and other EPC / Split EPC / EPIC / FEED / EPCM /LSTK forms.

He is actively involved with construction law institutes and organizations including The Adjudication Society, Society of Construction Law (UK), The International Bar Association, The Dispute Resolution Board Foundation, Construction Industry Council ADR Board, UK Adjudicators and HK Adjudicators. Sean also sits as an arbitrator and adjudicator and through this experience better understands what the tribunal expects from those giving evidence.

Sean is a Liveryman of the Worshipful Company of Arbitrators and a Freeman of the City of London.

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PNLA ONLINE CONFERENCE

"Getting inside the case"

SEAN SULIVAN GIBBS
BSc, LLB (Hons) PG Dip Arb, Dip Adj, LLM, MICE, FRICS, FCIARB, FCIOB, FCICES

CEO - HANSCOMB INTERCONTINENTAL LTD

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MULTI-DISCIPLINARY EXPERTS

- **ARCHITECTS**
- **SURVEYORS**
- **ENGINEERS**
- **PROJECT MANAGERS**
- **CONSTRUCTION MANAGERS**
- **ACCOUNTANTS**

EXPERTS APPEAR IN

- **LITIGATION**
- **ARBITRATION**
- **ADJUDICATION**
- **DISPUTE BOARD HEARINGS**
- **MEDIATION / CONCILIATION**
- **EXPERT DETERMINATION**

- CPR PART 35
- PRACTICE DIRECTION 35 – EXPERTS AND ASSESSORS
- Guidance for the Instruction of Experts in Civil Claims 2014

HI HANSCOMB INTERCONTINENTAL

Most claims for professional negligence will be supported by expert evidence on the question of whether the conduct of the professional met the relevant standard of care.

Expert evidence is not required in all cases of professional negligence, however, the risk of not adducing expert evidence when it might assist the court must be balanced with the risk of being criticised for wasting costs.

HANSCOMB INTERCONTINENTAL

Central to the decision as to whether or not to call expert evidence at all should be consideration of what will assist the court. The court is unlikely to be assisted by expert evidence where the judge is likely already to have the necessary expertise (eg cases of solicitors' negligence).

HANSCOMB INTERCONTINENTAL

Similarly, the court is unlikely to be assisted where the alleged error is so obvious that an expert witness is not necessary, or where an expert is really only expressing his/her personal opinion as to what (s)he would have done in the position of the defendant.

HANSCOMB INTERCONTINENTAL

Factual allegations do not require expert evidence!

In *Darby Properties Limited v Lloyds Bank*, the claimant was not permitted to present expert evidence in support of an allegation that the bank had failed to provide the necessary information about the risks associated certain products, which required factual evidence instead of an expert's opinion.

HANSCOMB INTERCONTINENTAL

The courts do not permit expert evidence on issues that the court should decide itself!

In *Change Red Limited v Barclays Bank*, expert evidence regarding the definition of "turnover" in a contract was held not admissible, because this was a matter for the judge to determine.

HANSCOMB INTERCONTINENTAL

DUTY TO TRIBUNAL NOT CLIENT !

The primary duty of an expert witness is to the court; this overrides any obligation to the instructing and paying party or parties.

HANSCOMB INTERCONTINENTAL

DUTY TO TRIBUNAL NOT CLIENT !

Expert evidence should be independent, objective and unbiased. In particular, an expert witness must not be biased towards the party responsible for paying his fee. In providing a written report and oral evidence the expert should be truthful as to fact, thorough in technical reasoning, provide his honest opinion and ensure that the report is complete in its coverage of relevant matters.

HANSCOMB INTERCONTINENTAL

DUTY TO TRIBUNAL NOT CLIENT !

The duties an expert witness owes to the court may sometimes conflict with those he owes to the client. The most obvious example is when the expert's conclusions contradict the client's case. If the client seeks to put pressure on the expert to alter his report or suppress the damaging opinion the expert witness must resist such pressure, and if necessary should terminate his appointment.

HANSCOMB INTERCONTINENTAL

The principle duties and responsibilities of an expert witness have been summarised by Mr. Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Company Limited* (also known as the "*Ikarian Reefer*" case)

HANSCOMB INTERCONTINENTAL

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).

HANSCOMB INTERCONTINENTAL

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

HANSCOMB INTERCONTINENTAL

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).

HANSCOMB INTERCONTINENTAL

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

HANSCOMB INTERCONTINENTAL

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co. Ltd. and Others v. Weldon and Others*, The Times, Nov. 9, 1990 per Lord Justice Staughton).

HANSCOMB INTERCONTINENTAL

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

HANSCOMB INTERCONTINENTAL

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

The problems of an expert witness who does not understand the duties and responsibilities arising from that position are illustrated by the recent case of

***Dana UK AXLE Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC)**

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

This was a claim arising out of the alleged premature failure of pinion seals manufactured by FST and supplied to Dana during a period between about September 2013 to February 2016. The seals were fitted by Dana, a manufacturer and supplier of automotive parts, onto vehicle rear axles which Dana then supplied to Jaguar Land Rover for installation onto nine different vehicle models. On Day 7 of the trial, Dana applied to exclude FST's technical expert evidence.

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

At the Pre-Trial Review (PTR), Dana had pointed out a number of defects in FST's technical expert reports, including that:

(i) Contrary to paragraph 55 of the Guidance for the Instruction of Experts in Civil Claims 2014, none of the three technical expert reports FST identified the documents on which the expert had relied. There was reference to academic texts, but no list of the documents provided by FST or its solicitors. There was concern that material containing technical information had been made available to FST's experts long before it had been provided to Dana's experts.

(ii) It was apparent from the reports that two experts visited FST factories, without notice to Dana, thereby not giving Dana's experts a similar opportunity to inspect FST's operations.

(iii) When referring to data or other information, the reports of FST's experts did not always reference the document or source of data relied upon, thereby causing prejudice to Dana's legal team in trying to read and understand those reports.

At the PTR, an order was made permitting FST to rely upon the reports provided that they complied fully with the CPR

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

At the trial, the Judge decided to exclude the evidence of the FST experts. First, FST had failed, in breach of the PTR order, to provide full details of all the materials provided to the experts, whether by FST or its lawyers. There was no detail of any factual information provided orally by FST and no list of all the documents which had been provided to the experts. Further: "*the experts had unfettered and unsupervised access to the Defendant's personnel*" and were provided with information by FST during calls and virtual meetings. However, there was no record of any of these calls or meetings.

This always matters, and here it mattered because it appeared that the FST experts were seeking (and receiving) guidance and approval from FST's in-house technical team on the content of their reports, which went beyond contact limited to providing logistical assistance by locating documents or technical information

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

The Judge noted that:
"It is essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field. Experts should be focussed on the need to ensure that information received by them has also been made available to their opposite numbers."

Where experts liaise directly with their clients to obtain information which is not recorded: "there can be no transparency around the information to which they have been privy and no equality of arms with their opposing experts of like discipline."

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

The Judge also said that it was: "entirely unacceptable for Dana and the Court to discover, during the course of the trial, that FST's experts had not only engaged in site visits about which they did not inform Dana's experts at the time and, in respect of which, they have apparently kept no records, but also that there were, in fact, more site visits than had previously been disclosed in their reports."

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

This led the Judge to comment that it was: "difficult to come to any conclusion other than that the guidance in the TCC Guide at 13.3.2 as to the need for experts to 'co-operate fully' with one another, including in particular 'where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed' has been ignored." The Judge went on to comment on further conduct on the part of FST and the experts beyond the failure to comply with the PTR Order, identifying the breaches.

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

(i) There was a "free flow exchange" of information between the experts and FST's employees, through email exchanges, telephone and video conferences and at site visits, apparently with no, or very little, oversight from the legal team. This went beyond "logistics" and it was inevitable that the experts were privy to information that was not shared with Dana's experts.
(ii) This flow of information continued during the period between the joint expert meetings and the signing of the experts' joint statement and the FST experts ultimately relied on information provided by FST at this time in the joint statement and in their reports. Paragraph 13.6.3 of the TCC Guide makes it clear that legal advisers should not be involved in the negotiating or drafting of joint statements, and the Judge said that it must follow that the same prohibition applies to the parties.
(iii) The experts' analyses and opinions appeared to have been directly influenced by FST. The Judge said that: "Truly independent experts paying proper attention to their duties would not have attended site visits without first informing their opposite number … and would not have felt comfortable receiving extensive information from their clients to which their opposite numbers were not privy."

HANSCOMB INTERCONTINENTAL

EXPERT EVIDENCE THAT DOES NOT COMPLY WITH THE EXPERT'S DUTIES CAN BE EXCLUDED !

The Judge concluded that:

"The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts; all the more so in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in this jurisdiction. For reasons which have not been explained, there has been no such oversight or control over the experts in this case.

The provision of expert evidence is a matter of permission from the Court, not an absolute right (see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules … the use of experts only works when everyone plays by the same rules. If those rules are flouted, the level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk."

HANSCOMB INTERCONTINENTAL

In EXP -v- Barker [2017] EWCA Civ 63 the Court of Appeal upheld the trial judge's rejection of the evidence of an expert witness.

"the starting point is to identify what the judge decided. He considered that the witness had so compromised his approach that the decision to admit his evidence was finely balanced, and that the weight to be accorded to his views must be considerably diminished. In my view he was fully entitled to take that view. Indeed, had he decided to exclude Dr Molyneux's evidence entirely, it would in my view have been a proper decision. Our adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the Court over any other loyalty or obligation, and on the rigour with which experts make known any associations or loyalties which might give rise to a conflict. Dr Molyneux failed to do so here, despite an express direction to that effect. Indeed, the omission of mention of papers co-authored with Dr Barker points in the other direction."

HANSCOMB INTERCONTINENTAL

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd (2) [2021] EWHC 1116 (TCC)

One of the issues Mr Justice Fraser had to consider here, was the nature of the expert evidence. In doing so, he provided a helpful analysis of the reasons why he preferred the evidence of one of the structural engineering experts to the other. Those reasons included the following, that the expert:

- *Constantly embellished his criticisms of Canham, and, I regret to say, exaggerated."*
- *Constantly introduced new concepts or issues, which were not identified in his report." The result was that "he appeared to be seeking to bolster the Claimants' case".*
- *Relied on material that had no relevance to the issues under consideration in this trial.*

HANSCOMB INTERCONTINENTAL

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd (2) [2021] EWHC 1116 (TCC)

- "*Changed his agreement with, and reliance upon, the work of his associate.*" The Judge suggested that because the point did not assist the claimant's case, he disavowed it.
- Went beyond his own expertise, giving geotechnical engineering evidence not structural engineering evidence. The Judge agreed that this demonstrated a lack of objectivity.
- Did not, as his opposite number had, sensibly agree with points put to him, whether they advanced his client's case or not. As his cross-examination demonstrated, he failed to approach his expert exercise applying a completely objective approach to the expert issues.

HANSCOMB INTERCONTINENTAL

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd (2) [2021] EWHC 1116 (TCC)

- Did not, unlike his opposite number, give the Judge the impression that his evidence would have been exactly the same had he been instructed by the other side.
- Introduced concepts into his cross-examination which were not issues for the court.
- Took positions on contested issues of fact. This was a point the Judge said had "*been made in many cases*" and was "so obvious as to go without saying". Further, if a witness of fact makes a telling concession, then this was something that experts ought to take into account when they come to give their own oral evidence. The expert here did not change or alter his position. In the words of the Judge: "*He effectively ignored it, again (probably) because it was not helpful to the claimants' case.*"

HANSCOMB INTERCONTINENTAL

Law Society of Scotland

LAW SOCIETY SCOTLAND DIRECTORY OF EXPERT WITNESS
https://www.lawscot.org.uk/members/business-support/expert-witness/

- Checking process
- Code of Conduct

HANSCOMB INTERCONTINENTAL

THE ACADEMY OF EXPERTS

ACADMEY OF EXPERTS ACCREDITED EXPERT WITNESS
https://academyofexperts.org/search-register/expert/Checking process

- All TAE Experts have been through a vetting process
- Code of Conduct

HANSCOMB INTERCONTINENTAL

ACCREDITED EXPERTS

CARDIFF UNIVERSITY BOND SOLON CIVIL Expert Certificate

THE ACADEMY OF EXPERTS

Expert Witness Law Society of Scotland 2021

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WWL Who's Who Legal

https://whoswholegal.com/john-cock

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Ian Mackie FRICS
Managing Director
Berkeley Research Group

Valuation services for real estate & fixed-asset investments

27 mins

Curriculum Vitae

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SUMMARY

Ian Mackie is a Managing Director in BRG's Asset Valuation practice. He has over twenty-five years of experience of providing valuation services for real estate and fixed asset investments for reporting, taxation and in contentious and non-contentious matters. His experience includes advising on sale and purchase transaction allocations, corporate reorganisations and fulfilling reporting requirements for tax authorities.

Mr. Mackie is both a Fellow of the Royal Institution of Chartered Surveyors and a Fellow of the Association of Taxation Technicians. He has advised upon the valuation of significant assets in the United Kingdom, Europe and the United States ranging from commercial property investments, large hotel and leisure portfolios, retail, healthcare and oil and gas assets. He has advised The Chartered Institute of Taxation, The Royal Institution of Chartered Surveyors and HM Treasury on real estate taxation and valuation matters.

Before joining BRG, Mr. Mackie was a founding partner of the award winning specialist taxation and real estate consulting practice, Bourne Business Consulting, and became a partner/senior managing director at a global consulting firm subsequent to the sale of the Bourne business to that firm.

EDUCATION

BSc (Hons) First Class, Quantity Surveying — University of Reading

PRESENT EMPLOYMENT

Managing Director, Berkeley Research Group

PREVIOUS POSITIONS

FTI Consulting
Senior managing director
2011 - 2019

LECG
Director

2010 - 2011

Bourne Business Consulting
Partner
2002 – 2010

Arthur Andersen
Senior Manager
1994-2002

Schal International Limited
Project Cost Manager
1919-1994

PROFESSIONAL AWARDS, RECOGNITION, AND PRIZES

University of Reading, Building Magazine Prize for top performing student in Faculty of Urban and Regional Studies, 1991

PROFESSIONAL AFFILIATIONS

Chartered Institute of Taxation (CIOT)- Property Taxes Technical Committee 2009-2016
United Kingdom Offshore Industry Tax Committee (UKOITC) – Change of Use of North Sea Assets Research Group 2006-2008
HM Treasury, Office of Tax Simplification – Tangible Fixed Assets, Consultative Committee Member 2016-2018

BUSINESS AND NOT-FOR-PROFIT AFFILIATIONS

Trustee and Board Member, LHA London Limited 2015-2017
Chairman, LHA London Limited, 2017–2019

ARTICLES

1. Real Estate Taxation - iSurv Online Guidance Module - RICS Publications 2010 onwards
2. Property Tax Voice, Tax Adviser Magazine, 2015
3. Finance Bill 2012 Commentary - Tax Journal, 2012

RECENT EXPERIENCE

A recognised industry leader within all aspects of Fixed Asset Valuation and Taxation, key recent lead partner client success include:

- Completion of a pan-European purchase price allocation and cost segregation study for a US Private Equity Investor. Total investment was approximately $3.5 billion and included office, hotel and industrial commercial properties across a number of countries including UK, France, Germany, Sweden, Poland and Spain

- Successful agreement of major retrospective tax depreciation study and fixed asset process improvement for FTSE 100 hospitality and leisure company with tax savings of over £40m agreed with HMRC. In addition, ongoing maintenance and reporting of fixed assets function.

- Full technical case and valuation opinion of purchase price allocation of a commercial property investment for determination by First Tier Tribunal in contention with HM Valuation Office.

- Implementation of fixed asset reporting process for FTSE 100 financial services company including analysis and breakdown of historic fixed asset additions prior to separation of banking group into new business units.

INTELLIGENCE THAT WORKS

Professional Negligence in Commercial Property Valuation

July 2021

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1 | *The Current Climate*

INTELLIGENCE THAT WORKS

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The Regulatory Framework during COVID-19

- The first UK lockdown on March 2020 caused the **RICS to take the unprecedented** step of issuing a valuation notification in response to the COVID-19 (Coronovirus) pandemic which identified the need for valuers to add 'material valuation uncertainty' declarations in their reporting and advice.

- RICS **established the RICS Material Valuation Uncertainty Leaders Forum** to consider the unique events relating to the global COVID-19 pandemic and its impact on valuation assignments, with a focus on financial reporting and measures for the accurate and consistent reporting of material uncertainty.

- The final RICS Material Valuation Uncertainty Leaders Forum Final recommendation was released on 11 May 2021 and stated that **material valuation uncertainty declarations are no longer required**, subject to valuer discretion for individual cases.

Non COVID Valuation challenges

- For several years now, in light of pressure from online shopping and the dwindling of the high street market, **retailers have been lobbying landlords for alternative ways of leasing** as a way to reduce fixed costs.

- The potential outcomes include:
  - An increase in rental payment defaults by tenants.
  - Lower rents accepted by landlords.
  - Alternative Lease Structures e.g. Profit Sharing Leases, Turnover Based Leases.

- These changes will all have differing valuation impacts.

2 | *Valuations*

INTELLIGENCE THAT WORKS

Commercial Valuation Regulatory Framework

- Technical guidance and performance specifications are contained in the RICS Red Book.
- The guidance is struggling to keep pace with the changing business environment, in particular with respect to retail and flexible workspace properties.
- There are a number of bases of value including, but not limited to:
  - Market Value
  - Market Rent
  - Investment Value
  - Equitable or Fair Value
- The valuer must ensure that the basis of value adopted is appropriate for, and consistent with, the purpose of the valuation.
- There are three main categories of valuation approach:
  - Market Approach
  - Income Approach
  - Cost Approach
- Valuers are responsible for adopting, and as necessary justifying, the valuation approach(es) and the valuation methods used to fulfil individual valuation assignments.

Determining valuations

- Value is all about **determining future returns**, and reasonable valuers (and investors) can have different views about future outcomes; therefore, a range of values is not unreasonable.
- There isn't such a thing as one "correct" valuation. However, there is such a thing as a "wrong" valuation where technical errors have been made and the subjective nature of valuation analysis is perhaps one reason why such disputes occur.
- In **assessing whether a valuation has been performed negligently**, a critical part of the assessment is in relation to the valuation process that has been carried out, as much as the answer.
  - Firstly, has the process been conducted in accordance with the instructions provided to them?
  - Has the valuer considered all of the relevant issues and reached a reasoned judgement in relation to them?
  - For rent reviews, has the valuer been even-handed between the parties and made sure each side has been able to participate in the process in a fair way?
  - Has the valuer subjected the information provided to them to sufficient scrutiny – not an audit of information, but at least reviewed to make sure it appears reasonable?
  - Have the process, the analysis and the conclusions been documented to properly record what has been done and why?

INTELLIGENCE THAT WORKS

Impact on valuations

- This is where the claims for professional negligence may open up as the demarcation between auditor and valuer is unclear.
- RICS review of valuation practice launched with a focus on valuation for financial reporting with the aim of ensuring the services provided by RICS regulated professionals remain relevant and trusted in the context of:
  - Rapidly evolving investor and occupier demand in relation to environmental sustainability
  - Increasing involvement of AI in valuation assessment
  - Changing occupational trends (and their impact on investment worth)
  - Changing public expectations over the independence of professionals, especially statutory auditors

Carlo Taczalski & Nicola Atkins
Crown Office Chambers

Practice and procedure in PN claims 2021

40 mins

Carlo Taczalski

Call 2010

"Wise beyond his call."
(Legal 500, 2017)

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Carlo specialises in commercial, construction, insurance, and professional negligence matters. He has been recommended in the Legal 500 as a leading individual in a number of his core practice areas for a number of years.

He is regularly in court as sole counsel and in both leading and led capacities. He has appeared before a wide range of tribunals including in the Privy Council, the Court of Appeal, High Court, arbitral tribunals and in adjudications.

The regularity of his court work means that he is very good on his feet, and is praised for his meticulous and forceful cross examination and preparation.

Carlo also accepts instructions as an adjudicator and arbitrator, and is a TECBAR and PNBA accredited adjudicator.

His present and recent case-load includes:

- Defending one of the lead intermediaries in the Ingenious Litigation (one of The Lawyer's Top 10 cases of 2018); he (leading Frederick Simpson) successfully appealed to the Court of Appeal, overturning an Order that his client provide a cross-undertaking as the price for obtaining security for costs which would have had significant ramifications for his client's total exposure.
- Sole counsel for the successful applicants in *AIG Europe v McCormick* [2020] EWHC 943 (TCC) which has re-stated the correct approach to substituting parties after the expiry of a limitation period.
- Sole counsel for the claimant insurance company in a broker's negligence claim arising out of the fraudulent 'placement' of a (non-existent) reinsurance policy by a sub-broker. Damages are in the region of £15M.
- Defending an adhesive manufacturer in wide-ranging claims that its product, which was incorporated into another product and distributed internationally, was defective causing hundreds of instances of damage across Europe (leading Michael Harper; damages circa £3M).
- Defending a recruitment consultant in relation to the placement of a large number of workers at a Belgian construction site (sole counsel against a silk and junior, damages said to be £3M).
- Defending the ex-CEO of an asset-backed financing company against allegations of dishonesty and mismanagement prior to his departure from the business, and its eventual administration (led by

Daniel Shapiro QC).

- Defending a UK asset management firm in long-running litigation for conspiracy/fraud relating to the alleged asset stripping of a Polish company (led by Ben Quiney QC).
- Engaged on a dispute concerning rival branches of the Kuwaiti ruling family, where a wide-ranging conspiracy to cause loss by unlawful means is alleged.
- Defending (as sole counsel against a silk and junior) a liquidator in a section 212 application put at in excess of £2m.
- Defending a firm of architects in a dispute said to be worth £9M, brought by an Oxbridge College.
- A case put at £20 million+ in the Mercantile Court concerning the design and sale of a prototype electric vehicle.
- Defending an allegedly valuable professional negligence claim against accountants relating to the conduct of a COP9 / fraud enquiry by HMRC (Carlo acts for the accountants).
- Sole counsel for two of the Defendants in a $26 million claim in the (English) High Court concerning alleged professional negligence of Spanish and English lawyers said to have been conducting an arbitration in the US and then resisting the enforcement of its award in England.

Carlo read law at Downing College, Cambridge. Before coming to the Bar, he spent a year working for PricewaterhouseCoopers, and later developing business and service monitoring systems for a charity (of which he is now a trustee). His experience gives him the ability to communicate effectively with a wide range of people, work well either as part of a team or individually, and bring an acute commercial perspective to the issues at hand.

Carlo accepts appropriate public access clients.

Commercial

Carlo is regularly instructed as sole counsel, junior counsel, and increasingly in a leading capacity, in commercial matters involving for example: civil fraud, conspiracy, shareholder disputes, directors' duties, breaches of trust, freezing injunctions, the sale of goods, the supply of goods and services, bailment, franchise agreements, hire agreements and defective products.

He has experience of cases with international elements including issues of jurisdiction and choice of law, and can often make himself available at short notice where the case requires it for example where an interim injunction is to be applied for or resisted.

Carlo is also engaged to advise on contracts as they are being negotiated, and is happy to do so on a public access basis where appropriate.

Selected Cases

- **Ingenious Litigation** – Carlo is instructed, with Ben Quiney QC, and Frederick Simpson for one of the lead Defendants in the Ingenious Litigation. The litigation concerns the alleged fraudulent and negligent mis-selling of investments in a series of film and game finance schemes. The Claimants total over 500 and bring claims for in excess of £100m. The case was recently named as one of The Lawyer's Top 20 cases of 2018. Carlo and Ben have recently been successful in applying for security for costs from a commercial litigation funder funding a number of the Claimants' claims.

- **Wilson James v MSL Recruitment –** Carlo is instructed as sole counsel (against leading and junior counsel) on a claim put at in excess of £2-3m arising out of the supply of temporary workers to a construction site in Belgium.
- **Sanglier v Apollo** – Carlo is counsel for Apollo (leading Michael Harper) against leading and junior counsel in a claim put at in excess of £3m, in relation to allegedly defective adhesive which was supplied to Sanglier, incorporated into Sanglier's product and sold in England and mainland Europe.
- **Borro v Aitken** – Carlo is instructed (with Daniel Shapiro QC) to defend Borro Group's ex-CEO against allegations of dishonesty and mis-management, including questions of compliance with relevant regulatory obligations, during his tenure as Borro Group CEO.
- **St Vincent v Picton Jones** – Carlo, with Ben Quiney QC, successfully resisted the joinder of their client (a UK asset management company) to a long-running claim based upon a conspiracy to sell land in Poland at undervalue, and thereby strip a Polish company of its main asset. The case involved questions of Cypriot and Polish law and limitation periods, reflective loss, and conspiracy to cause loss by unlawful means.
- **Property development arbitration** – Carlo is instructed as sole counsel in an arbitration concerning the amount payable under a joint venture agreement for the development of houses in London; the amount at stake is approximately £2m.
- **Water treatment arbitration** – Instructed as sole counsel in arbitral proceedings concerning a water treatment plant in Eastern Europe, which is said to have been defectively constructed and / or designed (the claim is put at circa Euro 2m).
- **Salt s.r.l. v Frazer-Nash Research Limited** – A Mercantile Court claim in respect of the development of a prototype luxury electric vehicle. Carlo acted with Muhammed Haque QC for the developers who were suing for fees due under the development agreement, and are defending a counterclaim said to be worth in excess of £20 million for various allegedly lost opportunities and development costs.
- **Landmark Limited & Woods Development Limited v American International Bank (In receivership)** – This was a Privy Council appeal from the Eastern Caribbean Court of Appeal; it concerned the basis on which the Appellants were entitled to charge and claim for electricity which they had provided following the inability of the Antiguan statutory provider to meet the Respondent's needs. Carlo was instructed with Kim Franklin QC for the successful Appellants.
- **Antigua Power Company Limited v The Attorney General of Antigua & Barbuda & Others** – This is a claim for approximately £100m in the Eastern Caribbean Supreme Court. It arises out of a breach by the Antiguan Government of a Joint Venture Agreement to build a power-plant in Antigua. The Privy Council upheld APCL's claim for breach of contract in 2013 (the report is at [2013] UKPC 23), and remitted the assessment of damages to the Antiguan High Court. Carlo is presently instructed on the assessment of damages trial with Kim Franklin QC and Dane Hamilton QC.
- **Antigua Power Company Limited v The Attorney General of Antigua & Barbuda & Others –** Carlo was also instructed (with Geoffrey Robertson QC and Kim Franklin QC) on a further claim on behalf of APCL claiming substantial damages as a result of a conspiracy to cause loss by unlawful means in Antigua.
- **Papa John's v Doyley** – Junior counsel for Ms Doyley, the successful defendant franchisee, at the liability trial of her counterclaim for well over £1/2 m in damages for negligent misstatement and misrepresentation; led by Jason Evans-Tovey, they were successful on virtually all issues argued at trial including a number of technical arguments relating to the incorporation and construction of various non-reliance, exclusion and guarantee clauses. The nine day liability trial included an application by Papa John's to adduce further witness evidence midway through the trial. Jason and Carlo successfully resisted the application; the judgment is at [2011] EWHC 2621 (QB).
- **Catapult & Lowe v Ariadne** – Sole counsel for Catapult & Lowe in a dispute over a consultancy

contract. Carlo successfully had the allegedly substantial counterclaim struck out, and was successful on virtually all issues fought at trial with the result that Ms Lowe was awarded (a little) in excess of her Part 36 offer made about 2 years before trial, and was awarded indemnity costs for the entire period of the claim.

Construction & Engineering

Carlo has been recognised as a Leading Individual in this area by the Legal 500 since 2018.

Many of Carlo's commercial instructions are in the context of construction, engineering and energy disputes. Carlo's expertise in construction, insurance and professional negligence makes an excellent choice where the issues involved in the case straddle those different traditional specialisms; a number of Carlo's instructions are therefore in cases where issues of negligence and / or breach of contract overlap with questions of insurance coverage, including in a construction context.

In addition to appearing in Court, Carlo is adept at dealing with disputes in arbitration, adjudication or mediation. He has recently been instructed by a well-known contractor in a series of adjudications, where the difference in the parties' valuations of the work undertaken on the subcontract is in the region of £3m; by a main MEP contractor on an adjudication with the difference between the parties in excess of £1.5m arising out of the building of a tower block near Canary Wharf; and by a well-known groundworks contractor on a series of disputes with a well-known contractor in connection with various housing developments in the North, as well as in many other disputes.

As well as appearing in adjudications, Carlo is a TECBAR accredited Adjudicator

Carlo is the author of the chapter about the NHBC in Emden's Construction Law.

Selected Cases

- **Architect's dispute with Oxbridge College –** Together with Ben Quiney QC, Carlo successfully defended an architect's practice in a £9M adjudication brought by an Oxbridge College in relation to the renovation of one of its main listed courts.
- Sole counsel for the successful applicants in AIG Europe v McCormick [2020] EWHC 943 (TCC) which has re-stated the correct approach to substituting parties after the expiry of a limitation period.
- **Electrical works at London Bridge Station** – Carlo was instructed for one of the parties in relation to aspects of electrical work carried out on the redevelopment of London Bridge Station. The dispute settled confidentially.
- **Property development arbitration** – Carlo successfully represented a developer as sole counsel in an arbitration concerning the amount payable under a joint venture agreement for the development of houses in London. The dispute was put at about £2m.
- **Water treatment arbitration** – Instructed as sole counsel in arbitral proceedings concerning a water treatment plant in Eastern Europe, which is said to have been defectively constructed and / or designed (the claim is put at circa Euro 2m).
- **Landmark Limited & Woods Development Limited v American International Bank (In receivership)** – This was a Privy Council appeal from the Eastern Caribbean Court of Appeal; it concerned the basis on which the Appellants were entitled to charge and claim for electricity which

they had provided following the inability of the Antiguan statutory provider to meet the Respondent's needs. Carlo was instructed with Kim Franklin QC for the successful Appellants.

- **Antigua Power Company Limited v The Attorney General of Antigua & Barbuda & Others** – This is a claim for approximately £100m in the Eastern Caribbean Supreme Court. It arises out of a breach by the Antiguan Government of a Joint Venture Agreement to build a power-plant in Antigua. The Privy Council upheld APCL's claim for breach of contract in 2013 (the report is at [2013] UKPC 23), and remitted the assessment of damages to the Antiguan High Court. Carlo is presently instructed on the assessment of damages trial with Kim Franklin QC and Dane Hamilton QC.
- **Antigua Power Company Limited v The Attorney General of Antigua & Barbuda & Others** – Carlo is also instructed (with Geoffrey Robertson QC and Kim Franklin QC) on a further claim on behalf of APCL claiming substantial damages as a result of a conspiracy to cause loss by unlawful means in Antigua.

Insurance & Reinsurance

Carlo has significant experience of advising on and appearing in proceedings concerning policy interpretation, avoidance of cover for nondisclosure, misrepresentation and breach of notification and other clauses.

Examples of work in this area includes:

- Advising a leading insurance broker in a claim where it is alleged that the broker bound an insurer outside the scope of its actual authority. The case overlaps questions of rectification, construction of the policy, and (in a separate aspect of the case) fraud.
- Sole counsel for the claimant insurance company in a broker's negligence claim arising out of the fraudulent 'placement' of a (non-existent) reinsurance policy by a sub-broker. Damages are in the region of £15M. The case also involves questions of the broker's warranty of authority. Currently pre-action.
- Advised on a claim (settled confidentially at mediation) arising out of the design of a new insurance product, which was found not to operate effectively immediately prior to launch.
- Instructed (with Andrew Bartlett QC and James Medd) in relation to coverage provided by a £5m excess layer professional indemnity insurance policy, following alleged defective design of an office block overseas.
- Junior to Andrew Bartlett QC in a London arbitration relating to coverage under a product liability policy, potentially determinative of claims and various layers of insurance worth up to £300m.

Product Liability

Carlo's product liability practice overlaps with his commercial, construction, property damage and professional negligence practice, with those cases often involving an element of product liability, for example:

- **Allcopy v Vision** – Carlo is currently defending a counterclaim in the TCC which is put in the region of £1m, in which it is alleged that photocopier toner provided to the Defendant and Counterclaimant over a period of 6 years was defective, and caused damage to reprographics machines and significant economic losses.

- **Sanglier v Apollo** – Carlo is instructed for Apollo (leading Michael Harper) in a claim in the TCC which is put at in excess of £3m, in relation to allegedly defective adhesive which was supplied to Sanglier, and which Sanglier incorporated into its own product and sold-on. Particular factors of the case include the long cross-border contractual chain of supplies, and technical arguments as to the alleged deficiency of the adhesive. Carlo acts against leading and junior counsel.
- Instructed as sole counsel in arbitral proceedings concerning a water treatment plant in Eastern Europe, which is said to have been defectively constructed and / or designed (the claim is put at circa Euro 2m).
- Various fire claims involving the failure of electrical components, including being for a leading high-street chain seeking to recover damages including for business interruption following a fire started by a defective component within a freezer in one of their shops.
- Junior to Andrew Bartlett QC in a London arbitration relating to coverage under a product liability policy in a pharmaceutical context potentially determinative of claims and various layers of insurance worth up to £300m.

Professional Liability

Carlo has been recommended as a Leading Individual in the Legal 500 in this area since 2017 and is frequently instructed in professional negligence claims involving the full spectrum of professionals, including lawyers, liquidators, accountants, architects / engineers / design consultants, valuers and brokers. He is regularly instructed on his own or as a leading junior against QCs, and likewise as a part of a larger counsel team.

He has recently conducted a (resoundingly successful) adjudication under the pilot professional negligence adjudication scheme.

Carlo is also a PNBA accredited adjudicator.

Selected Cases

- **Ingenious Litigation** – Carlo is instructed, with Ben Quiney QC, and Frederick Simpson for one of the lead Defendants in the Ingenious Litigation. The litigation concerns the alleged fraudulent and negligent mis-selling of investments in a series of film and game finance schemes. The Claimants total over 500 and bring claims for in excess of £100m. The case was named as one of The Lawyer's Top 20 cases of 2018. Carlo and Ben have recently been successful in applying for security for costs from a commercial litigation funder funding a number of the Claimants' claims.
- **Broker's negligence** – Sole counsel for the claimant insurance company in a broker's negligence claim arising out of the fraudulent 'placement' of a (non-existent) reinsurance policy by a sub-broker. Damages are in the region of £15M. Currently pre-action.
- **Broker's negligence** – Sole counsel defending a broker in relation to allegations of fraud and breach of fiduciary duty in the context of amending policy documents without the insured's consent, and allegedly falsifying documents to induce a renewal.
- **Saunders & Craig v Hunt** – Carlo is instructed as sole counsel (against a QC and senior junior) for a liquidator, Stephen Hunt, to defend a section 212 application brought against him by the successful opposing parties from previous litigation.
- **Surveyor's negligence** – leading Matthew Turner in a claim against a surveyor who failed to identify

relevant asbestos in a full pre-purchase survey of a substantial property causing significant loss (pre-action).

- **Architect's dispute with Oxbridge College –** Together with Ben Quiney QC, Carlo successfully defended an architect's practice in a £9M adjudication brought by an Oxbridge College in relation to the renovation of one of its main listed courts.
- **Loss adjuster's negligence** – Carlo is instructed as sole counsel by a leading loss adjuster who is accused of having negligently caused insurers loss in the region of £5m in the course of adjusting a complex loss arising out of a hurricane.
- **Kinde & Knight v Dellapina & Diaz** – Instructed for a Spanish lawyer said to have negligently advised on and conducted an arbitration in the US, in a claim in the English Courts pleaded at $26 million. In addition to the more usual issues concerning scope and breach of duty, and causation of damage, the case raises questions involving the illegality and public policy defence, recently re-cast by the Supreme Court in Patel v Mirza [2016] UKSC 42.
- **Harris & Trotter v Bazargan** – Instructed, with Ben Quiney QC, for accountants who (when suing for their fees) have been met with an allegedly significant claim for damages relating to a series of HMRC enquiries / COP9 / fraud investigations which they managed for their clients.
- **A v B** – instructed for a broker against a leading law firm in a matter recently settled on confidential terms. The brokers had designed a new insurance product, the structure of which had been the subject of negligent advice from the law firm in question.
- **Birdi & Senna v McAndrew** – allegedly valuable claim against a valuer and auctioneer by two parties, one of whom was bankrupt and one of whom was alleged to have some interest in property apparently forming part of the other's bankruptcy estate. Carlo succeeded in having the claim by both claimants against his client struck out by Newey J at the conclusion of pleadings (it continues between one of the claimants and another defendant).
- **Jones v Kaney [2011] UKSC 13; [2011] 2 WLR 823** – During pupillage, Carlo assisted Roger ter Haar QC and Daniel Shapiro in the preparation and research for the landmark appeal to the Supreme Court.

Civil Fraud

Carlo has a significant practice in specialising in claims which are the result of alleged or actual fraud and dishonesty and can be available at short notice to respond to or make applications for interlocutory relief.

He has particular experience in cases which have a cross-border element, with cases involving Europe, the middle east and the Caribbean.

His experience includes:

- Sole counsel for a major insurance broker accused by a policyholder of fraudulently conspiring with a leading insurer, and of making various fraudulent representations to secure the renewal of a insurance policies covering a £1 billion property portfolio (against a silk and junior).
- Sole counsel for a European insurer, whose reinsurance broker placed a reinsurance policy with a fraudulent sub-broker, such that the policy turned out not to exist.
- Junior counsel (instructed alongside Daniel Shapiro QC) defending a company director against allegations he supressed certain documents from the company's board and other decision makers in the course of managing a group of companies, and then deliberately concealed his conduct.
- The Ingenious Litigation – Carlo is instructed (with Ben Quiney QC and Frederick Simpson) for SRLV,

accountants, who it is said should have provided different advice when advising on allegedly tax-efficient schemes set up by Ingenious Media. The schemes are said by the Claimants to have been fraudulently misrepresented, and some of them are said to be the product of a conspiracy between the Ingenious Defendants and HSBC. Carlo appeared (unled) in the Court of Appeal in December 2020. He was successful, and the decision has overruled every previous case where a cross-undertaking has been required of a defendant for security-for-costs. He led Frederick Simpson.
- Instructed for Antigua Power Company in a claim alleging a fraudulent conspiracy between members of the Government of Antigua, and Chinese state-owned entities.
- Counsel for a prominent family, advising on the ramifications of and remedies following a group of people obtaining an arbitration award by fraud.

Qualifications

- Queen Mother Scholarship, Middle Temple (2010)
- Harmsworth Entrance Exhibition, Middle Temple (2010)
- Lovells Examination Prize, Downing College (2006)
- PricewaterhouseCoopers Scholarship (2005 – 2007)

Memberships

- CLCBAR
- COMBAR
- TECBAR
- PNBA

Recommendations

"A great blend of being exceptionally bright, hardworking and responsive together with a charming personality. Engenders confidence of clients both in conference and courtroom. More than a match for experienced counsel both in mainstream professional indemnity work and more specialist."
Legal 500, 2021

"Carlo is incredibly forensic in his approach to work, he deals with large quantities of information in a methodical manner and is an excellent communicator."
Legal 500, 2021

"Handles a diverse range of construction disputes."
Legal 500, 2020

"He is very bright and thorough when it comes to considering all the possible issues."
Legal 500, 2020

Nicola Atkins

Call 2012

"Brilliant with clients and has real expert knowledge of the issues. She stands out for her attention to detail, and she has a 360-degree understanding of the case, so she can anticipate issues before they arise."
(Chambers & Partners, 2021)

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Nicola Atkins joined Crown Office Chambers in 2019 having established a successful civil and commercial practice at a leading common law chambers. Nicola practises across all of Chambers' core areas of work, with a particular specialism in professional liability, property/property damage and public authority liability.

Nicola is an experienced advocate and regularly appears in the County Court, High Court and in arbitrations and has been led in the Court of Appeal.

Professional Liability

Nicola is instructed in a wide range of professional liability matters, particularly in claims involving construction professionals, solicitors and surveyors and those linked to property damage. She frequently acts and advises in high value cases and is experienced in the cross examination of expert witnesses.

In the latest edition of Legal 500 Nicola is recommended as a leading junior for Professional Negligence and is described as "exceptional".

Selected Cases

Construction professionals

- Acting as junior counsel for the defendant contractor/Pt 20 claimant in a multi-million pound claim concerning the design and installation of allegedly defective cladding at four hotel sites across the UK.
- Acting as sole counsel against leading counsel in a claim valued at £1.5 million brought by a pharmaceutical storage company against an HVAC contractor for the allegedly defective design of an

air ventilation system.
- Acting for a firm of architects in arbitration proceedings to determine a fee claim in respect of a restaurant refurbishment in Covent Garden.
- Acting for a firm of architects in a claim brought for negligent design and exercise of contract administration duties during the course of a home refurbishment.
- Acting as junior counsel (with Ivor Collett) for a firm of structural engineers in a claim valued at £2.5 million concerning the development of a listed farmhouse property in Guernsey.

Solicitors

- Acting for a firm of solicitors in a claim brought in the High Court arising out of an 'Identity Fraud' conveyancing transaction. The firm had previously acted as solicitors for the purported vendors.
- Acting for a firm of solicitors in a claim alleging a failure to advise as to relevant planning restrictions during the course of a conveyancing transaction.
- Acting for a firm of solicitors in a claim brought in the High Court for negligent conduct of underlying clinical negligence proceedings which were served out of time under s14A Limitation Act 1980.
- Acting for a firm of solicitors in ongoing proceedings brought by a former client, a freehold owner of a residential terrace, for the negligent conduct of a claim for the recovery of rent and service charge arrears from a leasehold tenant.
- Acting in a fee claim brought by solicitors against a former client which were defended on the basis that the claimant firm had failed to enforce a costs order obtained in underlying proceedings.

Surveyors/estate agents

- Acting in a claim brought against a firm of surveyors for the failure to identify widespread damp issues during the course of a Building Survey.
- Acting in claims brought against a number of surveyors for the failure to identify Japanese knotweed.

- Acting for a firm of estate agents in a claim involving the alleged failure to convey the existence of an increased offer to the vendors and a failure to comply with The Property Ombudsman Code of Practice.

Property Damage

Nicola is instructed by insurers, individuals and Local Authorities in property damage claims brought in contract, nuisance, negligence, and pursuant to statute. Nicola's property damage practice is often closely connected to and is complemented by her work in professional negligence claims involving construction professionals.

Selected Cases

- Acting as sole counsel at trial and then as junior counsel in the Court of Appeal (with Stephen

Tromans QC and Justine Thornton QC) in Williams(1) Waistell(2) v Network Rail Infrastructure Ltd [2018] EWCA Civ 1514. The case raised a novel point of law concerning the recoverability of damages in nuisance following the encroachment of Japanese knotweed.

- Acting as sole counsel against leading counsel in a multi-million pound claim brought by a commercial retailer for business interruption arising out of a flood.
- Acting in a claim for business interruption caused by a flood at a number of holiday cottages in Wales.
- Acting in a claim involving water ingress from a neighbouring property resulting from a failure to adequately maintain drainage facilities.
- Acting in a claim for alleged damage to neighbouring property in the form of subsidence caused by a defective boundary wall. Successfully appeared at trial and subsequently at the hearing of the claimants' appeal to the High Court.
- Acting and advising in a number of claims involving the encroachment of tree roots and invasive weeds.
- Acting in a number of subrogated claims arising out of the escape of water in residential and commercial premises.

Construction & Engineering

Nicola is experienced in a wide range of construction disputes involving defective works, fee disputes and allegations of negligence by professionals. She regularly appears in the TCC and in arbitral proceedings both as sole counsel and with a leader.

Selected Cases

- TCC: Nicola is instructed as junior counsel for the Defendant, a large building contractor, in a multi-million pound claim concerning allegedly defective cladding installed at a hotel in Gatwick. The Defendant was employed as design and build contractor and has sought to pass on the claim to its various subcontractors and specialist consultants (who are named as additional parties). The trial is listed for 3 weeks.
- TCC: Nicola is acting as sole counsel for specialist contractor in a large claim for loss of profits (£700,000) in relation to the design and construction of an Anaerobic Digestion Facility and a counterclaim for fees. The trial was heard for 4 days in February 2020 with oral evidence from mechanical and engineering and forensic accountancy experts. Judgment is awaited.
- TCC: Nicola is acting for a firm of architects in a claim pleaded at £1.4million involving allegedly defective work carried out on a residential development in Wimbledon. The case involves an extensive schedule of structural defects and the parties have permission to rely on expert evidence in the areas of building services, fire safety, architecture and quantity surveying. The trial is listed for 6 days.
- TCC: Nicola is acting for a specialist glazing company in a claim brought for breach of contract/negligence in relation to the construction of a £2 million property in Sussex. The Claimant (who project managed the works) alleges that as a result of the Defendant's breach of duty the property is affected by water ingress and damp throughout.
- GPS v Contractors: Nicola is instructed by the proposed claimants at the pre-action stage in respect of negligent groundworks carried out during the course of a large residential development. The claim for remedial works and residual diminution in value is currently put at £400,000.

- Arbitration: Nicola acted for a firm of architects in arbitral proceedings for unpaid fees relating to the refurbishment of a restaurant in the West End. Nicola drafted the pleadings, appeared at various interim hearings and at settlement meetings. On the provisional award the firm obtained favourable findings on all but one of its 6 claims.
- TCC: Nicola was instructed on behalf of the defendant contractor in relation to the supply and installation of air conditioning units at a pharmaceutical storage company. The claim for remedial works and business interruption was put at £1.2 million, but settled confidentially.
- Arbitration: Nicola acted for the Respondents in arbitral proceedings concerning a claim for professional surveying fees. The Referring Party was engaged by the Respondents to advise on a large residential building project, particularly in relation to the design and construction of basement areas.
- Nicola was instructed by a company specialising in damp proofing to defend a claim brought in respect of works carried out to a number of holiday cottages in Wales. The Claimants allege that the re-pointing and damp-proofing works caused cracking and moisture ingress to the properties. Their claim comprises the cost of further remediation and a claim for loss of revenue.
- Nicola is instructed in a claim concerning the re-development of commercial premises in Cavendish Square. The claim is brought by a neighbouring property owner who allege that the Defendants (various contractors, sub-contractors and specialist consultants) carried out the redevelopment works, including works to the adjacent footpath maintained by the local highway authority, negligently.
- Nicola acted for a firm of architects in a fee claim brought in respect of a residential building project. The firm alleged that the owners of the property had failed to pay their fees for architectural and contract administration services during a 2 year period. The claim settled confidentially.
- Nicola has acted on a number of claims concerning allegedly defective works, including in respect of cavity wall insulation, plumbing, mechanical and electrical engineering and damp proofing.

Personal Injury

Nicola is instructed by individuals, local authorities and insurers in claims involving personal injury including those under the Equality Act 2010 and the Human Rights Act 1998.

She has significant experience of personal injury trials, procedural applications and drafting pleadings at High Court and County Court level both as sole counsel and as part of a larger team.

Selected Cases

- Acting for three defendants (a local authority, a police force and CAFCASS) in a claim brought under the Equality Act 2010 for discrimination, harassment and victimisation. Successfully appeared at the strike out hearing at which indemnity costs were ordered against the claimant.
- Acting for a school in a claim brought by a former pupil under the Protection from Harassment Act 1997, Data Protection Act 1998 and in negligence.
- Acting for a local authority in a stress at work claim brought by a former employee, a social worker, who alleged that she suffered psychiatric damage and distress as a result of her treatment at work.
- Acting for a local authority in a claim brought under the Equality Act 2010 in respect of alleged

disability discrimination whilst providing the claimant with school transport.

- Acting for a local authority in a claim brought by a former employee for negligent misstatement, breach of the Data Protection Act 1998 and defamation following the provision of an allegedly inaccurate employment reference.
- Acting for a school in a claim brought for breach of the Data Protection Act 1998 and misuse of private data following covert filming of teachers and staff at a school by an employee.
- Acting for numerous NHS Trusts, local authorities and police forces in claims brought under the Occupier's Liability Act 1957 and in negligence for accidents sustained by visitors and employees.
- Acting for Highways Authorities in claims brought under the Highways Act 1980 by injured pedestrians, motorists and cyclists.
- Acting for numerous insurers in RTA claims involving allegations of LVI and fundamental dishonesty, including pleading allegations of fraud.
- Acting for a local authority in a claim brought under Articles 3 and 8 ECHR for the failure by social services to remove children suffering from abuse.
- Acting for a local authority in a claim brought in negligence and under Articles 3 and 8 ECHR for the failure to perform its statutory functions under the Housing Act 1996.
- Acting as junior counsel for the Metropolitan Police in a claim brought under Articles 2 and 8 ECHR by the relatives of a man who was shot and killed whilst holding his girlfriend hostage at knife point. The claim was dismissed after a two week trial in July 2018.
- Acting as junior counsel (with Ivor Collett) for a local authority in a six week inquest involving the death of a child as a result of carbon monoxide poisoning.
- Acting in a jury inquest involving the death of a delivery driver following a dog bite.
- Acting for a number of local authorities in inquests involving deaths at care homes.
- Acting in inquests involving the death of prisoners and patients detained under the Mental Health Act 1983.

Rankings

Professional Negligence: Technology & Construction in London (Bar) – Up and Coming

Professional Negligence: Leading Juniors – Tier 6 – 'Very impressive.'

Qualifications

- BPTC, City Law School (2011-2012)
- Jules Thorne Scholarship, Middle Temple (2011)
- Graduate Diploma in Law, City University (2010-2011)
- Astbury Scholarship, Middle Temple (2010)
- MA, Legal and Political Theory, UCL (2009-2010)
- Academic Scholarships, St Catherine's College, Oxford University (2006-2008)
- BA (Hons), Modern History, Oxford University (2005-2008)

Memberships

PNBA

PIBA

SCL

LCLCBA (Secretary of the Association)

BILA

Recommendations

"Brilliant with clients and has real expert knowledge of the issues. She stands out for her attention to detail, and she has a 360-degree understanding of the case, so she can anticipate issues before they arise."
Chambers & Partners, 2021

"She is exceptional. Nicola is very easy to communicate with and very approachable."
Legal 500, 2021

"She is exceptional."
Legal 500, 2020

“She has a phenomenal amount of energy and is a very switched-on junior.”
Chambers & Partners, 2020

Practice and Procedure in Professional Negligence Claims

Carlo Taczalski and
Nicola Atkins
11 June 2021

Introduction

Recent developments in practice and procedure, including

(1) The Disclosure Pilot
(2) Trial Witness Statements
(3) Shorter Trials Scheme

The Disclosure Pilot – overview

Scope

Commenced 1 Jan 2019. Now extended to the end of 2021. Many of the changes are likely to stick around longer than that.

The aim

The Pilot, which is governed by the provisions of PD 51U, is

> "*intended to effect a culture change. The Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality*"
> *UTB LLC v Sheffield United Ltd* [2019] EWHC 914 (Ch) [75] (per Sir Geoffrey Vos, Chancellor of the High Court).

Rt. Hon. Dame Elizabeth Golster DBE and and Knowles J from the Disclosure Pilot Working Group said this in October 2018 of the intended aims and what the Pilot included:

- Includes express Disclosure Duties on clients and their advisers
- Requires a greater focus on the key Issues for Disclosure, rather than every issue pleaded
- Requires parties to cooperate and engage in relation to disclosure
- Encourages greater use of technology
- Greater oversight and case management by the judiciary, ensuring the court has the information it needs at the CMC so it can make informed and bespoke orders on disclosure

Overview II

Structure

- Two Sections to PD 51U.
  - Section I New rules.
  - Section II Retained rules (CPR 31.16, 31.17, 31.18, 31.19 and 31.22).

The general process

- Pre-action → Initial Disclosure → LOID (S.1A) → Models (S.1A and B) → Section 2 of DRD → CMC → Extended Disclosure

Key Principles and definitions

Para 2 of PD 51U

"**Document**":

> "**2.2** *For the purpose of disclosure, the term "document" includes* ***any record of any description containing information****. The term is further defined below."*
>
> "**2.5** *A "document" may take* ***any form*** *including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings."*
>
> "**2.6** *In addition to information that is readily accessible from computer systems and other electronic devices and media, the term "document" extends to information that is stored on servers and back-up systems and electronic information that has been 'deleted'.* ***It also extends to metadata, and other embedded data*** *which is not typically visible on screen or a print out."*

"**Adverse document**"

> "**2.7** *Disclosure extends to "adverse" documents. A document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute."*

"**Known Adverse Document**"

> "**2.8** *"Known adverse documents" are* ***documents (other than privileged documents) that a party is actually aware*** *(without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a)* ***are or were previously within its control and (b) are adverse****.*
>
> **2.9** *For this purpose a company or organisation is "aware" if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.*

Known Adverse Documents

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

10. The question then arises what the obligation of a party may be to discover whether it has any "known adverse" documents that must be disclosed. Paragraph 2.9 states that "for this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation." …**However, it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has "known adverse documents" will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others**.

11. There is a clear **distinction between carrying out checks and carrying out searches**. A known adverse document is one of which a party is aware without undertaking any further search for documents: see paragraph 2.8. **However**, **the requirement to disclose known adverse documents would be emasculated if there was no obligation at all to look for adverse documents of which the party is aware.** Paragraph 3.4 states that "where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make." To take an example cited by counsel during argument, it would be absurd if a party were able to say "I know I have an adverse document, but I don't know whether it is in the left-hand drawer or the right. I have therefore not located it."

12. …I would hold that **a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them. Any other conclusion seems to me to be a rogue's charter**…

Initial Disclosure

General rule: Need to provide it with statements of case

*"(1) the **key documents** on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and*

*(2) the **key documents** that are necessary to enable the other parties to understand the claim or defence they have to meet."*

(para 5.1)

Exceptions

- Part 7 CF without POC or Part 8 CF – para 5.1.
- Para 5.3:

"**5.3** Initial Disclosure is not required where—

(1) the parties have agreed to dispense with it (see paragraph 5.8 below);

(2) the court has ordered that it is not required (see paragraph 5.10 below); or

(3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and excluding documents referred to at paragraph 5.4(3)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case.

Documents comprising media not in page form are not included in the calculation of the page or document limit at (3) but, where provided pursuant to a requirement to give Initial Disclosure, should be confined strictly to what is necessary to comply with paragraph 5.1 above."

Initial Disclosure II

As per previous slide…

5.10 If a party is requested but does not agree to dispense with Initial Disclosure, the requesting party may apply to the court with notice to the other party for directions limiting or abrogating the obligation to provide Initial Disclosure if it considers compliance with the obligation will incur **disproportionate cost or be unduly complex**. Such an application must be made by application notice, supported by evidence where necessary, and, save in exceptional cases, will be dealt with without a hearing or at a short telephone hearing.

Known Adverse Documents? Position is unclear on the wording: contrast the wording of 3.1(2), with fact that Model A is KADs. But clear from guidance from the Disclosure Working Group (such as the introduction talk in October 2018) that you do NOT need to disclose KADs with ID.

When you issue your signed Disclosure Certificate (following Extended Disclosure) you need to sign to confirm that KADs have been disclosed at that point.

Complaints about ID

Generally deal with them at CMC: para 5.12.

Failures can have costs consequences, and affect Extended Disclosure orders: para 5.13. (Agreements can also affect Extended Disclosure: para 5.9.)

Complying in practice

- No additional search necessary (para 5.4(1))
- Do need to described searches made (para 5.4(2))
- Do not provide unless requested, docs which have already been provided post-intimation of proceedings, or known to be in other side's possession (para 5.4(3)). *(Two schedules? Confirmation statement?)*
- Generally electronic copies, and file the list but note the docs (para 5.5). You do NOT need to have anything translated (para 5.7).

Initial Disclosure III

What are "Key" documents?

Breitenbach v Canaccord Genuity Financial Planning [2020] EWHC 1355 (Ch)

*"14. In our view, therefore, the documents sought do not come within the scope of initial disclosure. Documents "relating to" a pleaded defence – that may or may not support the defence pleaded – may well be within the scope of extended disclosure, **but key documents necessary to understand the pleaded case is a quite different criterion** and concept under the Practice Direction."*

In summary, Initial Disclosure is to be "very *tightly focussed*" – for example documents which potentially evidence the contract or a representation relied upon. See Cockerill J in *Quatar v Banque Havilland* SA [2020] EWHC 1248 (Comm)

LOID – the Disclosure Issues

McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch)

"43. There are a number of areas in which the parties in this case have misunderstood how the Disclosure Pilot is intended to work. I do not say that by way of criticism, since I believe that the solicitors have tried on each side to comply with the pilot. ***It will hopefully help parties in other cases if I explain the misunderstandings that have arisen here. They are in three categories as follows: (1) The identification of issues for disclosure; (2) The approach to choosing between disclosure models; and (3) Co-operation between the parties.***

The identification of issues for disclosure

44. ***The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination.*** *Rather it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the issues for disclosure."*

45. I can give an example from this case. Issue 13 was agreed as being "The date on which [Mr Whitehead's] employment with [MPL] and his engagement with [FFML] terminated". The parties both accept that Mr Whitehead wrote to MPL terminating his employment on 16 March 2016. They also agree that, under clause 22.1 of the service agreement, six months' notice of termination was required (terminating on 15 September 2016). They disagree about whether the revocation of Mr Whitehead's FCA permissions by FFML in July 2016 amounted to an immediate termination of both the service agreement and the adviser contract. ***The issue raised by these pleadings is, therefore: when did (a) the service agreement, and (b) the adviser contract, terminate? But, had the parties thought the point through, they would have realised that that issue is one of law or construction of agreed actions, and not one to which any documents, beyond those already produced on initial disclosure (i e the contracts themselves and the pleaded letters and e-mails), will be relevant. Accordingly, whilst the issue would properly appear in the list of issues for trial, there was no reason in this case for it to appear in the list of issues for disclosure.*** *The parties effectively acknowledged that to be the case by choosing Model A for issue 13. In fact, as I say, it was not an issue that needed to appear on the list of issues for disclosure at all. Further examples of this include all those issues for which the parties eventually agreed Model B, namely issues 1, 3–4, 6–9, and 12."*

LOID II

46. It can be seen, therefore, that issues for disclosure are very different from issues for trial. Issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim. *That is why paragraph 7.3 of PD51U provides that issues for disclosure are " only those key issues in dispute , which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings" (emphasis added). Paragraph 7.3 goes on to explain, as I just have, that issues for disclosure do "not extend to every issue which is disputed in the statements of case by denial or non-admission"."*

See too Nugee J in *The Ingenious Litigation* [2020] EWHC 1731 (Ch), applying the guidance.

Do the issues have to be pleaded?

Lonestar Communications Corp LLC v Kaye [2020] EWHC 1890 (Comm) – Peter Macdonald Eggers QC at [32] yes, they must be "crystallised" in the pleadings

Revenue and Customs Commissioners v IGE USA Investments Ltd [2020] EWHC 1716 (Ch) – James Pickering QC at [58] – expressly "no".

LOID III

For my part, I would:

- Start by identifying the list of issues for trial.
- Consider what documents I am going to need to prove my case at trial, and what documents the other side may have.
- From that formulate the issues, which will allow me to get hold of those documents. Maybe there are also areas of weakness on your side you want to try and insulate against.
- Keep in mind the distinction between factual and legal issues – for example statements and representations.
- Keep in mind the supposed purpose:

  "*Under the Disclosure Pilot a reviewer has defined issues against which documents can be considered. The review should be a far more clinical exercise [than standard disclosure].*" Sir Geoffrey Vos in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) at para 49.

  The list should be capable of being read by a reviewer, and that reviewer identifying whether or not a document falls within a given issue.

LOID IV

Form of the DRD

As per Appendix 2. But it can be varied (para 10.2).

Models

No Model, unless approved by the Court, and no presumptions (para 8.2).

Model A: Disclosure confined to known adverse documents

Model B: Limited Disclosure

Basically ID plus KAD, where ID has not taken place. No obligation to undertake any further search. But note the KAD requirements.

Model C: Request-led search-based disclosure

Searching for particular documents or narrow classes of documents in relation to certain issues for disclosure. Section 1B. Note interplay with definition of issues.

LOID V

Model D: Narrow search-based disclosure, with or without Narrative Documents

"*Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.*" NDs are relevant only to background and context. *Bouygues (UK) Limited v Sharpfibre Limited* [2020] EWHC 1309 (TCC)

Model E: Wide search-based disclosure

Exceptional. Model D. Plus NDs. Plus documents "*which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure).*"

Can you have something else entirely? See para 8.1: "*Extended Disclosure **may** take the form of one or more of the Disclosure Models set out below.*"

Deciding between the models - what issues go to the nub of the case?

Although no presumptions, the correct Model for issues going to the "*nub*" of the case will often by Model D: see Vos C in *McParland* at [51]. It could also be appropriate where there is a lack of trust between the parties.

But *Lonestar* picks up the wording of paragraph 6.5 of the PD, that D and E should only really be ordered if C is not appropriate. Query how many judges approach it like this.

How well is the Disclosure Pilot working?

Third Interim Report (Prof Rachael Mulheron, 25 Feb 2020):

85% say the pilot has not saved costs overall (4% say it has, 10% can't say/too early)
42% say it has made disclosure less accurate (16% say more accurate, 42% can't say/too early)
71% say it has increased burdens on the courts (2% say decreased burdens, 27% can't say/too early)
78% say it has not brought about a culture change (6% say it has, 16% can't say/too early)

PD 57AC: Trial witness statements

Scope

WS for use at trial in Business & Property courts that are signed on or after 6 April 2021. Trial defined as a final hearing of all or some of the issues under CPR Pt 7 or Pt 8

Does not apply to:

- Affidavit evidence
- Witness evidence other than for use at trial (e.g. in support of an application)

Key aims

Report of the Witness Evidence Working Group for the Business and Property Courts (July 2019):

- CPR should include an authoritative statement of best practice in relation to the preparation of WS
- CPR should include a developed statement of truth to be added to WS and a "certificate of compliance"
- Sanctions for failing to comply with rules/practice directions in respect of WS should be more strictly enforced.

Statement of best practice/Appendix A

Based on the *Gestmin principles* (*Gestmin SGPS S.A. v Credit Suisse (UK) Limited and others* [2013] EWHC 3560 (Comm)) per Mr Justice Leggatt:

> *"22. …the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence"*

Appendix A states that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

Contents of a trial WS

WS must contain only (PD 3.1):

- Evidence as to facts that need to be proved at trial in relation to issues of fact to be decided at trial
- Matters of fact of which the witness has personal knowledge that are relevant to facts and issues at trial (including recollection of matters that they witnessed personally)

> *"Often many matters of fact do not require witness evidence because the witness testimony adds nothing of substance to the disclosed documents. The fact that there is or may be an issue concerning what the disclosed documents mean or show does not, without more, mean that witness evidence is required."* (Appendix A to PD 57AC)

WS should not:

- Contain legal argument (should not "argue the case")
- Provide narrative of documents/documentary evidence in the case

Contents of a trial WS

Must include (PD 4.1) a statement that:

> *" I understand that the purpose of this witness statement is to set out matters of f act of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case. This witness statement sets out only my personal knowledge and recollection, in my own words. On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when. I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge. "*

Under PD 5.2 the court may strike out (on an application or of its own motion) a WS that does not conform to the requirements of PD 57AB

Documents

PD 3.2: WS must include a list of documents that the witness has referred to or been referred to. The list must be limited to documents that the witness saw or created while the relevant facts were clear in their mind. *NB* the PD suggests that documents are listed according to their disclosure reference

Appendix A 3.4 requires that, other than the list of documents under PD 3.2, documents are only referred to where the witness evidence is required to:

- Prove or disprove the content, date or authenticity of the document
- Explain why the witness understood the document in a certain way when initially encountering or producing it
- Confirm that the witness did or did not see the document at the relevant time

Appendix A 3.6 states that trial WS should not:

- Exhibit documents unless not previously disclosed in the proceedings
- Quote from documents at length
- Take the court through the documents in the case (or set out a narrative derived from the documents)
- Include commentary on documents or any other evidence

Practical points

Step 1
Identify list of issues that are (a) relevant and (b) within personal knowledge or recollection of the witness

Step 2
Identify list of documents that witness will be referred to by disclosure reference

Step 3
The draft WS should be based on a record or notes made by the legal representative (Appendix A p 3.10). If an interview is carried out the interview should:

- Avoid leading questions and closed questions
- Be recorded by contemporaneous note (*NB* PD 32 18.1(5) trial witness statement should state the process by which it has been prepared)

Step 4
Ensure the WS has a certificate of compliance

PD 57AB: Shorter Trials Scheme

Scope

Permanent in the Business & Property Courts from 1 October 2018 (applies to claims issued on or after 1 October 2015).

PD 2.2, STS not normally suitable for:

- Cases which require extensive disclosure and/or reliance on extensive witness or expert evidence.
- Cases that involve multiple issues and multiple parties.
- Cases involving an allegation of fraud or dishonesty.

PD 2.3: the length of trials in the STS will not normally be more than 4 days including judicial reading time.

PD 57AB: features

Advantages of the Scheme:

- Accelerated pre-action timetable (LOR 14 days after LOC)
- POC accompanied by core documents (issued "promptly" after LOR)
- Pleadings limited to 20 pages
- No PD51U. Parties seek disclosure 14 days before CMC and absent agreement raise requests at CMC. Timetable is usually disclosure by list 4 weeks after CMC (also serving copies of all documents on the list). List to include documents that support the parties' case and documents requested by other parties
- No costs budgets
- All applications (save for the CMC/PTR) dealt with on the papers
- Trial within 8 months of CMC

Transfer out

Judicial Guidance issued at the inception of the Pilot Scheme in October 2015 provided the following guidance in respect of an application by a defendant to transfer out of the STS:

> *"Transfer out: The defendant has a right promptly to apply to transfer the case out of the scheme on the grounds of suitability. In this regard, the court is alive to the risk that a well-prepared claimant may attempt to use the scheme to "ambush" a defendant during the pre-CMC period. The court may sanction such behaviour in costs if a claimant has acted in an oppressive or unfairly prejudicial manner."*

Transfer out

An application by a defendant for an order transferring proceedings out of the STS should be made promptly and normally not later than the first CMC (PD 2.9). C must indicate intention to issue in STS in the Letter of Claim

DBE v Biogas [2020] EWHC 1232 (TCC), construction negligence claim was not appropriate for STS. D made an application to transfer out at the first CMC which was refused. By time of trial C accepted that should not have been issued in STS. Parties should have made a further application once expert/factual evidence received and by the PTR at the latest

PD 2.14: in deciding whether to transfer a case into or out of the STS, without prejudice to the overriding objective, the court will have regard to the type of case the Scheme is for, the suitability of the case to be part of the Scheme and the wishes of the Parties

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Overview

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

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

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

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

Professional Negligence

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

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

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

Regulatory and Disciplinary

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

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

Insurance

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

Commercial Law

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

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

Costs Litigation

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

Notable cases

Various Claimants in the Angelgate, Baltic House and NPPM Developments v Various firms of solicitors: Led by Michael Pooles QC, acting (2020-2021) for solicitors sued by large numbers of claimants in multiple actions arising from the failure of buyer-funded developments in Liverpool and Manchester, in which the court has held [2020] EWHC 3643 (Ch) that the schemes were not collective investment schemes.

Hart v Large [2020] EWHC 985 TCC, *Large v Hart* [2021] EWCA Civ 24. Representing a surveyor in a multi-party case arising from the purchase of a coastal property riddled with almost entirely latent defects. Extensive consideration at first instance and on appeal of the proper measure of loss, involving a departure from the orthodox *Watts v Morrow* measure.

Acting for a public figure in a substantial negligence claim arising out of allegedly mishandled underlying litigation (2019-2020).

Trainer v Cramer Pelmont (2019) EWHC 2501 (QB), [2020] PNLR 3, reasonable arguability of section 14A limitation arguments in solicitors' negligence claim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What others say

"Amazing ability to retain knowledge of the huge number of documents in professional negligence cases and apply them when needed. Excellent cross examiner, really drills down to the issues." *Legal 500, 2021*

"Incredibly experienced in claims against solicitors and surveyors." "Very intellectual where you have obscure and difficult issues." *Chambers UK, 2021*

"He was a very impressive performer as sole counsel. He is a very good speaker who is very articulate, bright and quick-witted." *Chambers UK, 2020*

"His advice is really good across the board: his knowledge of case law is fantastic and he's very pragmatic." *Chambers UK, 2020*

"He is very professional and calm, but persuasive" *Legal 500, 2020*

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

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

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

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

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

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

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

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

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

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

Further information

Education

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

Memberships

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

Lectures

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

ICO Data protection registration number: **Z9162795.** Simon Wilton is a barrister regulated by the Bar Standards Board. Click here to view **Simon Wilton's Privacy Notice**

ADR/Adjudication Update

Accompanying notes to an online talk to the PNLA

by Simon Wilton of Hailsham Chambers.

I have been asked to update you about developments in relation to the PNBA Adjudication Scheme.

The Scheme

You will all know something about the PNBA Adjudication Scheme.

Just to remind you, the PNBA has introduced an adjudication scheme allowing parties to professional negligence claims to have their dispute adjudicated upon by a specialist professional negligence barrister.

Full details of the Scheme, its rules, accompanying guidance notes, and template documentation are available on the PNBA website.

But in outline…

- The Scheme is entirely voluntary but, where the parties choose to use it, it is designed to produce a swift determination by a written judgment given by an independent adjudicator within 56 days.

- The parties can elect for a final and permanently binding adjudication or a temporarily binding adjudication which either party (most obviously the loser) can revisit in court proceedings.

- The decision is, if need be, enforceable by an application for summary judgment to recover the amount due as a debt.

- There are very limited grounds on which any decision can be challenged. It can't be challenged on the basis of an error of fact or law, but a party can argue that an adjudicator exceeded his or her jurisdiction or that there was procedural unfairness.

- The process is confidential, save that the parties can agree that the decision can be made public, and where the decision is only temporarily binding, documents and statement and the decision itself may be disclosed in any subsequent litigation or arbitration.

- Adjudication can take place either before or after issue, with any proceedings being stayed pending the outcome of adjudication.

- The scheme is very flexible. Adjudication can be used to try the whole dispute or just one or more particular issues. The parties can confine the ambit of the dispute as they wish, subject to putting an agreed definition before the adjudicator at the outset.

- The parties can choose their own adjudicator, or ask the Chair of the PNBA to nominate someone from an approved list.

- Adjudicators have to ensure they are not conflicted and there are rules to make sure they declare any interest and disclose information sufficient to enable parties to judge whether they are truly independent.

- The procedure is flexible. Depending on the nature of the dispute, the adjudication may be a paper determination using an agreed bundle at one end of the spectrum, or it can have directions providing for the exchange of documentation, witness and expert evidence, and even live witness testimony at a 'trial' at the other.

- At the end you get a reasoned decision from the adjudicator. In other words, you know who the winner is, and why, unlike in a mediation or early neutral evaluation.

- What about costs? The parties always have to pay the adjudicator, but they can agree whatever they like as to party-and-party costs: full-costs shifting, costs-shifting capped at a fixed sum, or no costs-shifting at all.

Does it have judicial support?

The judges are very much behind the Scheme.

The Pilot Scheme was launched under Ramsey J. in February 2015, and re-launched in May 2016 with the backing of Carr J. and Fraser J.

After the demise of the Pilot the PNBA produced a revised version of the Scheme with supporting documentation in October 2018, an exercise in which I was involved. The Scheme proper was then launched with the support of Coulson LJ in 2019.

The Protocol

The Protocol has swung into position behind the Scheme too. From May 2018, the Professional Negligence Pre-Action Protocol has provided that claimants must give:

> "*An indication of whether the claimant wishes to refer the dispute to adjudication. If they do, they should propose three adjudicators or seek a nomination from the nominating body. If they do not wish to refer the dispute to adjudication, they should give reasons.*" (paragraph 6.2(i))

Paragraph 12 of the Protocol emphasises that parties should use court proceedings as a last resort and should consider whether some form of ADR might enable them to settle their dispute and if so endeavour to agree what form of ADR (including adjudication) to adopt.

Paragraph 12.3 of the Protocol then says:

> "*If court proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's refusal to engage or silence in response to an invitation to participate in ADR might be considered unreasonable by the Court and could lead to the court ordering that party to pay additional costs*."

All this means that you need to know what adjudication is and whether to propose its use, you need a good reason if you are not going to engage in ADR such as adjudication, and you need to be alive to the dangers of unreasonably failing to propose or engage in ADR.

The latest word: *Beattie Passive Norse Limited v Canham Consulting Limited* [2021] EWHC 1116 (TCC)

What is new in all this?

Well, since the Practice Direction came out and the Scheme proper was implemented by the PNBA those interested in adjudication have been waiting for a court decision drawing the litigating public's attention to the merits of the adjudication scheme.

This has now come in the form of *Beattie Passive Norse Limited v Canham Consulting Limited* [2021] EWHC 1116 (TCC), a very recent decision of Mr Justice Fraser.

This was a professional negligence claim against consulting engineers tried in the TCC. It concerned the design of foundations for two blocks of terrace housing. Canham, the defendant engineer, admitted that its design for the foundations was negligent in certain respects. The essential issue was whether the design defects were the reason why the claimants had had to demolish and rebuild both blocks of the terrace housing, at a cost of approximately £3.7 million.

The details of the case don't matter for present purposes, save that the dispute gave rise to a lengthy trial in which issues of the extent of the negligence, causation, and loss were inquired into in great detail, with extensive cross-examination of lay and expert witnesses.

In the result, the claim was an almost complete failure. The claimants were entitled to only £2,000 in damages reflecting the cost of some discrete and very limited remedial works. The judge rejected the contention that the claimants' decision to demolish and rebuild was caused by the engineers' negligence, as opposed to by unrelated construction defects which were not the engineers' responsibility.

At the end of his judgment – paragraph 152 – Fraser J. lamented that the parties had not chosen to make use of the adjudication scheme. He suggested that would have involved a QC as adjudicator giving a non-binding decision although in fact adjudicators don't have to be QCs and the decision can be binding or non-binding. But he correctly pointed out that adjudication would have been:

> "*…far quicker, and much more economical, than conducting a High Court trial which lasted over three TCC weeks, with all the costs to the parties that such a trial entails*".

As he also said:

> "*Even though there were contested issues of fact, adjudications can in suitable cases proceed with oral evidence and cross-examination of witnesses. Using the scheme to which I have referred, to resolve a dispute such as this one, would have been a far better way for the parties to have proceeded*".

Key lessons

What lessons can we take from all this? I suggest the following:

- It looks like adjudication is here to stay, as a form of ADR specifically designed for professional negligence claims;

- It is an economical way by which the parties can agree to resolve all or part of their disputes quickly and cheaply, on a finally-binding or temporarily binding basis;

- It is a flexible procedure founded on party autonomy which enables the parties, with the input of the adjudicator, to tailor a dispute resolution procedure which fits the characteristics of the individual case or issue requiring resolution;

- It has the merit of leading to a decision: you get an answer and know why you have won or lost;

- Whilst one may expect it to be used most frequently in cases which do not involve witness evidence and cross-examination, there is no reason why it should not be used in such a case;

- It has the support of the judiciary, and one can anticipate criticism in the future and potentially costs penalties where a party fails without good reason to engage in adjudication when the other party puts adjudication forward as a suitable means of ADR.

SIMON WILTON

5 July 2021

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Burges Salmon LLP

Pensions Professional Negligence Claims

18 mins

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Justin is a partner in the firm's disputes and litigation team, specialising in pensions disputes and litigation; private and commercial trust disputes; and professional negligence relating to pensions, trusts and tax.

Justin has specialised in pensions and trusts disputes since 1997 and professional negligence since 1995.

Justin is a member of the Association of Pensions Lawyers (APL) and the Association of Contentious Trusts and Probate Practitioners (ACTAPS). He holds the Bristol University Certificate in Pensions Law and is recognised as an expert in pensions litigation in both the Legal 500 and Chambers legal directories.

- Advising on the validity of pension scheme/trust amendments.
- Advising on the interpretation of pension scheme/trust documentation.
- Advising on pensions related negligence claims.
- Advising on private trust related negligence claims.
- Advising on tax related negligence claims.
- Advising on applications to court for directions, variation of trusts, approval of compromises etc.
- Advising on representative claims.
- Advising trustee services.

What others say...

"has his eye constantly on what is best for the client" - Legal 500 2019

Credentials

- Qualifications: BSc (Hons) Law and Economics, PG Dip Pensions Law
- Admitted as a solicitor: England & Wales (1995); Northern Ireland (2015)

Expertise

- Pensions Disputes
- Trustees and Trust Companies
- Professional Negligence
- Trust Disputes

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Kelly is an associate in our dispute resolution team and acts for commercial clients and financial institutes in complex multi-party disputes concerning:

- professional negligence, particularly on behalf of claimants against solicitors, surveyors/valuers, and actuaries contractual and commercial disputes company and shareholder disputes
- banking disputes
- insolvency
- procurement

Kelly's experience includes High Court, Court of Appeal and Supreme Court proceedings as well as advising clients on alternative forms of dispute resolution, including arbitration and mediation.

Experience

- Advising **employer and trustee claimants** on a high value professional negligence claim against their former actuarial and legal advisors.
- Acting for a **non-departmental government body** in defence of a multi-million pound procurement challenge.
- Providing debt recovery and insolvency advice to **major UK banks** in relation to business customer disputes.
- Advising **shareholders** on an unfair prejudice claim brought in ICC arbitration.

- Admitted as a solicitor: 2016
- Expertise - Dispute Resolution

Pensions Professional Negligence Claims

Justin Briggs and Kelly Whittaker

Introduction - Topics

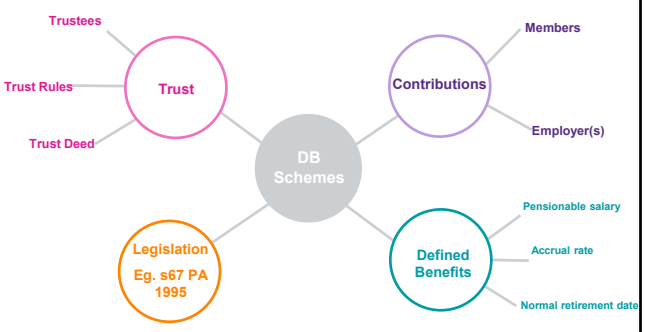
What we will be covering:

- Claims relating to DB occupational schemes
- Causes and themes of those claims
- The Part 7 / Part 8 dynamic
- Quantum complications

Not covering claims relating to:

- DC occupational schemes
- Personal pensions (eg SIPPs)

Key Features of a DB occupational Scheme



Where do negligence claims arise?

- **The What:**
  - An opportunity for error resulting in additional unintended liabilities
- **The How:**
  - Documentation issues
  - Failure to validly amend scheme
  - Because of breach of Rules or governing legislation

Getting going - whose claim is it?

- **To whom is the duty owed?**
  - Engagement terms
  - Assumption of responsibility?
- **Who has suffered the loss?**
  - Employer?
  - Trustee?
  - Members?
  - Combination?

Employer
- Responsible for funding liabilities
- Statutory vs non-statutory

Trustee
- Responsible for scheme's assets
- Depletion of assets?

Members??
- Ultimate beneficiary

Mitigation

The significance of mitigation:

- Before bringing a claim, claimants must consider all avenues via which the unintended benefits might be said not to be payable.
- Requires consideration of:
  - Other scheme rules
  - Estoppel arguments
  - Extrinsic contract
  - Part 8 applications

Mitigation

Role of the Part 8 Claim:

- Exception to the Pilkington v Wood[1] principle:
  - Part 8 proceedings should be brought if good prospects of eradicating/substantially reducing the value of the unintended benefits
- Traditional approach:
  - Employer, Trustees and Members

[1]Pilkington v Wood [1953] Ch 770

Pensions Professional Negligence Claim – PNLA conference June 2021

Mitigation

Role of the Part 8 Claim:

- The Gleeds litigation (Gleeds (Head Office) & Ors v Briggs & Ors [2014] EWHC 1178 (Ch) and Briggs & Ors v Clay & Ors [2019] EWHC 102 (Ch))

Pensions Professional Negligence Claim – PNLA conference June 2021

Quantum

Requirement to identify "*that sum of money which will put the party who has been injured, or who has suffered in the same position as [they] would have been in if [they] had not sustained the wrong*"

(Per Lord Blackburn in Livingstone v Raywards Coal Co (1880) 5 app Cas. 25 at p39)

How are the Unintended Liabilities valued in a pensions context?

- **Who:** Actuarial expert
- **When:** Pre-action? Once proceedings have commenced?
- **How:** buy-out, self sufficiency, technical provision, best estimate, other?

Concluding remarks…

Further questions, please do contact us:

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Katy Manley
President – PNLA/Manley Turnbull Solicitors

Conference Closing Remarks
6 mins

Total talk times - 5 hrs 50 mins

Questions and discussion via
PNLA WhatsApp +44 7930251578

To complete your feedback form please go to

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