PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

ANNUAL - ONLINE CONFERENCE
"Getting into the Groove"

November 2020

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION
ANNUAL "ONLINE" CONFERENCE – "Getting into the Groove"
November 2020

8 mins **PNLA Introduction – Katy Manley – President**
https://www.pnla.org.uk/management-team/

12 mins **Honoured Guest Speaker - The Right Honourable Andrew Mitchell MP**
https://www.andrew-mitchell-mp.co.uk/

44 mins **Chairman's Keynote Address – David Halpern QC – 4 New Square Chambers**
– "Fiduciaries and Good Faith"
https://www.4newsquare.com/barristers/david-halpern-qc

34 mins **Patrick Lawrence QC – 4 New Square**
– "Professional Negligence and Liability Update"
https://www.4newsquare.com/barristers/patrick-lawrence-qc/

15 mins **Michael Pooles QC – Hailsham Chambers**
– "Limitation"
https://www.hailshamchambers.com/barrister/michael-pooles-qc/

24 mins **William Flenley QC – Hailsham Chambers**
– "Brokers' Negligence"
https://www.hailshamchambers.com/barrister/william-flenley-qc/

26 mins **Luka Krsljanin – 2 Temple Gardens Chambers**
– "The Future of Disclosure? The Pilot Regime in the Business & Property Courts"
http://www.2tg.co.uk/people/luka-krsljanin/

17 mins **Imran Benson – Hailsham Chambers**
– "The FCA Test Case"
https://www.hailshamchambers.com/barrister/imran-benson/

17 mins **Pippa Manby – 4 New Square Chambers**
– "Negligence: Costs and the demise of the Arkin Cap"
https://www.4newsquare.com/barristers/pippa-manby/

20 mins **Matthew Pascall – Barrister – Temple Legal Protection**
– "ATE – a beginner's guide"
https://www.temple-legal.co.uk/about-us/our-people/

19 mins **Philippa Hill – Partner – Grant Thornton**
– "The Accountant's Perspective"
https://www.grantthornton.co.uk/people/philippa-hill/

23 mins **Arun Chauhan – Tenet Compliance & Litigation Limited**
– "Professional negligence and Fraud"
https://tenetlaw.co.uk/team/arun-chauhan/

24 mins **Mark Lomas QC – Independent Mediators**
– "Latest trends in Mediations"
https://www.independentmediators.co.uk/our-mediators/mark-lomas-qc/

29 mins **Joe Bryant – Partner – Beale & Co**
– "The Risks Of Claims Against Solicitors Regarding Expert Evidence"
https://beale-law.com/people.php?person=181

Questions and discussion – PNLA WhatsApp +44 7930251578

PNLA
Professional Negligence Lawyers Association

With thanks to our sponsors

KE COSTS LAWYERS

Independent Mediators

temple legal protection

NEW SQUARE

Grant Thornton

Dispute Resolution, Professional Negligence & Commercial Litigation Experts.

KE Costs Lawyers are an experienced specialist Legal Costs agency with offices in London and Liverpool.

Professional Negligence; privacy; construction and property disputes; contentious probate - we work successfully with the PNLA and its members, providing a first-class service, ensuring our attention to detail and a flexible attitude towards your clients' costs needs are met - on time - every time.

We work with you in the important planning stage, during and after legal proceedings, providing first class advocacy services and expert costs advice.

We appreciate that these cases are often complex in nature and therefore provide full and informative narratives with the Bills of Costs to assist in maximising costs recovery.

KE Costs Lawyers can act in respect of all bill drafting, security for costs, costs budgeting, spend management and funding solutions. We are able to offer costs advance funding at no cost to you or your clients, this is an interest free facility and are able to consider a write off facility for those budgets we prepare where the case subsequently fails.

We would be delighted to demonstrate how our attention to detail, excellent communication and expertise in costs, funding and other associated assistance might be of use to your firm.

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

e: colin.carr@kevinedward-costs.co.uk

m: 07540987211

w: https://kecosts.co.uk/services/professional-negligence/

The experts in Litigation Insurance and Disbursement Funding

temple legal protection

Temple Legal Protection and Temple Funding are market-leading providers of litigation insurance and disbursement funding designed to break down the financial barriers to litigation, mitigate risk and reduce liability.

We support your client relationships

In a rapidly evolving legal services sector, our aim is to help you retain and attract clients by enhancing the access to justice solutions you are able to offer.

- **Our litigation insurance** - also known as After-the-Event insurance - is proven in a wide variety of commercial disputes. The cover, which works with all kinds of client retainer, is 'A' Rated and provided in partnership with Royal & Sun Alliance (RSA), one of the largest and strongest insurers in the UK.
- **Our disbursement funding removes the financial barriers** that may prevent your client running a case to its full potential. Easy to administer and affordable, it gives your clients peace of mind and keeps the financial liability off your balance sheet.

Temple Legal Protection and Temple Funding are fully accredited and regulated by the Financial Conduct Authority (FCA), providing transparency and security for both your firm and your clients.

An unrivalled level of service and expertise

The products and services we provide add value, not cost, to your core legal advice services. Through innovation, agility and attention to detail, we seek to ensure our partner law firms always have 'best in class' options to support their business and their clients.

Why work with us?

- Our litigation insurance, which works seamlessly with Temple Funding, enables your client to afford to proceed with their claim to its full conclusion without having to settle or abandon because of costs.
- We insure a wide range of cases both for claimants and defendants - including general commercial litigation, professional negligence claims, property litigation and claims brought by insolvency practitioners.
- Our knowledge of the complexities of commercial litigation is unequalled - we partner with many of the leading commercial litigation law practices.
- We offer regulated, transparent and responsible lending - disbursement funding is now available for your commercial clients at 10% interest per annum.
- The Temple Online Policy System – it provides quick and easy online access to incept insurance policies and manage disbursement funding without the need for multiple application forms, meetings or calls.
- Peace of mind - the insurance premium is paid by your client at the conclusion of the case and only if their claim is successful. If the case loses, they will not have to pay the premium.

In partnership with RSA

Meet the Commercial Underwriting team

temple legal protection

Specialist underwriting expertise backs Temple's litigation insurance

When you partner with Temple, you have the advantages that come with working alongside one of the original and most respected litigation insurance providers in the industry.

Our Underwriters are responsible for all aspects of the insurance process, from creating policy wordings, calculating premium rates, underwriting non-standard risks to dealing with claims. They are directly accessible should you require a second opinion or reassurance on a particular matter – helping you offer an even better service to your clients.

Working with us – you have a choice

- **A Delegated Authority scheme** – where we pass the initial underwriting process to you; your clients benefit from a discounted price on the insurance premium.
- **Premier Facility** - this is used by commercial litigation firms who have a lower volume of cases that need to be assessed on an individual basis.
- **One-off enquiries** - send us a case for us to review without obligation and at no charge; we guarantee a response within 10 working days.

Here's what one of our client law firms had to say

"ATE was vital to the firm and our clients as it was the only way we could bring these hacking claims without catastrophic risk. Although each claim was valuable (as history has shown) the cost of failure after a complex trial would have wiped them out. Having insurance support, both initially and especially when topped up as we faced 6 weeks of trial, meant we could fight on an equal basis with a very rich defendant and achieve an appropriate negotiated settlement."
Duncan Lamont - Charles Russell Speechlys

You can find further testimonials from leading law firms - plus case studies, FAQ's and lots more - please visit https://www.temple-legal.co.uk/solicitors/commercial-ate

Next steps:

To discuss a case you'd like reviewing or arrange a visit to find out how litigation insurance can help your commercial clients, please call our Commercial team on 01483 577877. Don't forget our case assessment service is FREE of charge and without obligation.

Contacts:

Matthew Pascall

Senior Underwriting Manager

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

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

David Chase

Deputy Underwriting Manager

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

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

Nicholas Ellor

Senior Underwriter

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

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

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.

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

Temple Legal Protection Ltd
Portsmouth House, 1 Portsmouth Road, Guildford, Surrey, GU2 4BL
Tel. 01483 577877 DX. 83188 Guildford
www.temple-legal.co.uk

In partnership with RSA

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Katy Manley
PNLA President

8mins - INTRODUCTION

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Honoured Guest Speaker

The Rt Hon Andrew Mitchell MP

12 mins

The Rt Hon Andrew Mitchell MP

Andrew was born in 1956 and is married with two daughters. He was educated at Rugby School and Cambridge University, where he studied history and was elected as President of the Cambridge Union in 1978. Andrew served in the Army (Royal Tank Regiment) before joining Lazard where he worked with British companies seeking large-scale overseas contracts.

He was the Member of Parliament for Gedling from 1987 to 1997. During this period he held office as a Government Whip and as Minister for Social Security. He also served as a Vice-Chairman of the Conservative Party from 1992 to 1993.

In 2001 he was re-elected to Parliament as MP for Sutton Coldfield. In November 2003, he was appointed Shadow Minister for Economic Affairs. From September 2004 until the end of the Parliamentary term, he was Shadow Minister for Home Affairs. Following the General Election in May 2005 Andrew joined the Shadow Cabinet and was appointed Shadow Secretary of State for International Development. Andrew Mitchell was Secretary of State for International Development from May 2010 until September 2012 and Government Chief Whip from September –October 2012.

He speaks widely on international affairs, is the Co-chair of the All Party Group on Syria, a Fellow at Cambridge University and a Visiting Fellow at Harvard University and Honorary Professor at Birmingham University.

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

David Halpern QC
4 New Square
Chair and Keynote Speaker

"Fiduciaries and Good Faith"
44 mins

David Halpern QC

Call: 1978 Silk: 2006

+442078222126 (direct line) d.halpern@4newsquare.com

Clerk: Dennis Peck

d.peck@4newsquare.com

+442078222040 +447912405149

He's a first-rate analyst of the facts, and an impressive authority in chancery law. He provides excellent, clear delivery to clients.

- Chambers & Partners

David Halpern QC has been rated for many years in the legal directories as a leader in the fields of property litigation and professional liability claims.

Since taking Silk in 2006, his practice has broadened to include a wide range of Chancery and commercial work.

He enjoys working as part of a team with other lawyers and experts in a broad range of disciplines, in relation to both litigation and advisory work. He relishes cases involving difficult questions of law but is also very alive to the client's requirement for clear advice and commercial solutions. He accepts appointments as an arbitrator and is regularly instructed to participate in mediations. He also sits part-time as a deputy High Court judge in the Chancery Division.

"Immensely knowledgeable and always gets on well with clients." "He has particular expertise in solicitors' negligence, and is very hands-on and extremely approachable." "He's an imaginative advocate." (Chambers & Partners, 2021)

"He is a walking fountain of knowledge with case law references to match. He is commercially aware and focuses on achieving the outcome the clients are seeking." "A charming man with an agile and creative mind, a great person to have on your team. There is nothing which fazes him." (Legal 500, 2021)

"He has fantastic insight, is immensely knowledgeable and is brilliant with clients." "He has an impressive knowledge of property and professional negligence law, and his drafting is quick, excellent and concise." "He is charming in his advocacy, but it's also underpinned by a real intellectual strength." (Chambers & Partners, 2019)

"His advocacy is strong and to the point, and he is quick to raise relevant points in cross-examination." "He can find and sustain a cause of action where lesser barristers would fail." (Legal 500, 2019)

"David is amazing; he is a fount of legal knowledge and his ability to pinpoint issues and form an early view is invaluable." "Very intelligent, pragmatic and commercial." "Very personable and extremely knowledgeable with great technical skills and a great turnaround. He pays very close attention to detail." (Chambers & Partners, 2018)

'His knowledge is encyclopaedic, and he attacks even the most intractable legal problems with zeal and gusto." (Legal 500, 2017)

"A highly experienced silk whose broad commercial chancery experience feeds into his sophisticated professional negligence practice. He handles a broad range of claims arising from business and property disputes, and also takes on cases involving insurance elements. He's a first-rate analyst of the facts, and an impressive authority in chancery law. He provides excellent, clear

delivery to clients." (Chambers & Partners, 2017).

"He adopts a client-friendly and very practical approach, and is a terrific strategic thinker." "Never more at home than when dealing with tricky cases" (Legal 500, 2016).

"A very sound and meticulous advocate who is very good at what he does." "He is extremely intelligent with excellent client-handling skills" (Chambers & Partners, 2016). "A very bright guy, who gets all the angles of a case. He's diligent and conscientious." "He is very thorough, as well as good-humoured and approachable" (Chambers & Partners, 2015). "Unbelievably brilliant. He is the advocate for all seasons, and fantastically easy to deal with. He's incredibly direct in terms of identifying the problem, fantastic on his feet and a huge amount of fun." "A master tactician," "fantastic on complex areas of law and extremely collaborative in his approach. The lawyer's lawyer." (Chambers & Partners, 2014).

Privacy Policy

Click here for a **Privacy Policy** for David Halpern QC.

Areas of Expertise

Civil Fraud

David's core areas of practice require him to make or defend allegations of fraud and to seek or resist freezing orders and other interim relief. His specialised knowledge of equity and trusts is of particular value when dealing with constructive trusts and tracing claims.

He is regularly instructed by professional indemnity insurers to conduct indemnity conferences in order to examine the insured for possible dishonesty.

Cases

- Acting for a sovereign wealth fund suing a joint venture partner for fraud

- Acting for Barclays Bank in pursuing a £10m claim against a valuer in relation to mortgage fraud

- Thames Valley Housing Association v. Elegant Homes Ltd [2011] NPC 54
  David acted in a claim against a shadow director who was found liable for conspiracy and inducing a Guernsey company to commit breaches of contract. Following David's cross-examination of the defendant, he sought, and obtained from Lewison J, a freezing order, which was granted before closing submissions.

Commercial

David undertakes a wide range of commercial work, especially in relation to the construction of contracts and other documents. His work includes disputes relating to the sale of goods, agreements for intellectual property rights and share sale warranties. A more detailed breakdown is provided under following headings:

- Civil Fraud; and
- Company, Insolvency and Partnership.

Commercial Chancery

David spent 20 years as a junior in Chancery chambers before moving to 4 New Square and then taking Silk. As Chambers &

Partners (2017) says, he has “broad commercial chancery experience”. A detailed breakdown of his commercial Chancery work is provided under the following headings:

- Civil Fraud;
- Contentious Trusts and Probate;
- Company, Insolvency and Partnership; and
- Property.

Company and Insolvency

Company

David’s work in this field is principally concerned with:

- Litigation between shareholders involving s.994 petitions; and derivative claims
- Claims against directors under the Companies Act 2006;
- Claims relating to company securities; and
- Claims for breach of warranty arising out of share sale agreements.

He is also regularly instructed in relation to partnerships, joint ventures and LLPs.

Insolvency

David began his professional life in Chancery chambers, where he gained considerable experience during the recession of the 1990s in insolvency work, both individual and corporate. During the latest recession he has been involved in a number of domestic and international insolvencies, acting variously for liquidators, secured and unsecured creditors, directors, auditors and shareholders. He has also acted in disqualification proceedings.

Cases

• Acting for family member claiming her share of a property empire held through a network of companies and partnerships

• Insight Group Ltd v. Kingston Smith [2014] 1 WLR 1448
David acted for the controlling shareholder in a claim arising out of the dissolution of companies in Nevis and the Isle of Man, which led to the intellectual property of the company becoming bona vacantia. The case is reported in relation to his successful appeal against a refusal of permission to amend.

• Advising a South Korean company in relation to a share sale agreement in Hong Kong

• Acting in Gibraltar for a Nevis Foundation claiming an interest in a Russian fund worth $1bn
The parties had arranged their affairs through a complicated web of trusts and companies in England, Russia, the BVI and Gibraltar, which led to some interesting issues of trust and company law, as well as international law.

• Acting for insolvency solicitors defending negligence claims arising out of their handling of bankruptcies and liquidations

• Defending a claim against an auditor for fraudulent trading under section 213 of the Insolvency Act 1986

• Raja v. Rubin [2000] Ch 274

This remains one of the most significant decisions on Individual Voluntary Arrangements. David successfully argued in the Court of Appeal that the debtor was entitled to alter the arrangement with some of his creditors, provided that a creditor who did not consent was not prejudiced.

- Re Portbase Clothing Ltd [1993] Ch 388
  This is one of the very few reported cases on priorities where a fixed chargeholder had agreed to give priority to a subsequent floating chargeholder.

Insurance & Reinsurance

David's insurance work focuses particularly on issues relating to professional indemnity insurance but also extends to general commercial insurance. He has advised a major mutual indemnity insurer on its mutual status.

Indemnity and coverage matters on which he is regularly instructed include:

- Issues relating to the SRA Minimum Terms and Conditions;
- Indemnity Conferences where he is instructed by the insurer to examine the insured for possible dishonesty;
- Aggregation issues; and
- Declinature.

He accepts instructions to act as arbitrator in relation to coverage disputes.

He acted for the successful claimant in *Bishop of Leeds v. Dixon Coles & Gill and HDI Global Specialty* [2020] EWHC 2809(Ch), where the court held that an insurer was not permitted by the SRA Minimum Terms to aggregate losses caused by thefts by one solicitor from multiple clients, despite the fact of "teeming and lading".

Offshore

David's work has a significant international dimension, which is reflected both in work offshore and in conflict of laws issues in England. His offshore work mirrors the breadth of his domestic practice. He is a former chairman of the International Subcommittee of the Chancery Bar Association. He has been called to the Bar in Gibraltar and has given expert evidence in US proceedings.

Cases

- Hamilton v. Hamilton [2016] WTLR 1699
  David successfully defended the trustee of a will in a claim by her brother for maladministration. The brother claimed that a Liechtenstein Stiftung created by their late father had been a sham and that the assets in the Stiftung formed part of the father's estate. The trial took place in London before Henderson J but involved a detailed examination of Liechtenstein law relating to Stiftungen and related issues of conflict of laws.

- Acting for a solicitor-trustee defending a £95m claim in Jersey for negligent investment
  A major issue in these proceedings concerned the meaning of gross negligence. The trust deed exonerating the trustee from liability for negligence, but not gross negligence.

- Acting in Gibraltar for a Nevis Foundation claiming an interest in a Russian fund worth $1bn
  The claim involved joint venture agreements, trusts and company law issues in England, Russia, the BVI and Gibraltar.

- Advising a major professional body in the Isle of Man on the rent review under its lease

- Acting for two Guernsey companies successfully resisting winding-up.

A Guernsey service provider sought to wind up the companies for non-payment of fees. The underlying dispute was for breaches of fiduciary duty by the service providers in relation to the assets, which included a house in Belgravia.

• Advising Jersey trustees on requests for information from the Comptroller of Taxes

• Acting for Nevis fiduciaries caught in the cross-fire between two warring factions of the family which owns a business empire in the USA

• Advising a South Korean company in relation to a share sale agreement in Hong Kong

Professional Liability

David has been rated for in the Directories for professional liability work since the mid-1990s. Before he took Silk he was the highest-rated junior and was shortlisted by Chambers & Partners for Professional Negligence Junior of the Year. He is rated by Chambers & Partners (2021) and the Legal 500 (2021) as a leading Silk.

"He is a walking fountain of knowledge with case law references to match. He is commercially aware and focuses on achieving the outcome the clients are seeking." *– Legal 500, 2021*

"He has particular expertise in solicitors' negligence, and is very hands-on and extremely approachable." "He's an imaginative advocate." *Chambers & Partners, 2021*

"**Exceptionally bright and unflappable**." *– Legal 500, 2020*

"He is extremely knowledgeable and quotes cases from memory in consultation. He's also very easy to deal with." "He has a great deal of experience and his submissions carry a lot of weight; they are painstaking and thorough, and he presents arguments very attractively." *– Chambers & Partners, 2020*

"**He has an impressive knowledge of property and professional negligence law, and his drafting is quick, excellent and concise." "He is charming in his advocacy, but it's also underpinned by a real intellectual strength**." *–Chambers & Partners, 2019.*

"His advocacy is strong and to the point, and he is quick to raise relevant points in cross-examination." *–Legal 500, 2019*

"Very personable and extremely knowledgeable with great technical skills and a great turnaround. He pays very close attention to detail." *–Chambers & Partners, 2018.*

"A highly experienced silk whose broad commercial chancery experience feeds into his sophisticated professional negligence practice. He handles a broad range of claims arising from business and property disputes, and also takes on cases involving insurance elements. He's a first-rate analyst of the facts, and an impressive authority in chancery law. He provides excellent, clear delivery to clients." *–Chambers & Partners, 2017.*

"**Never more at home than when dealing with tricky cases**". *–The Legal 500, 2016*

"**He is a very intelligent and thoughtful barrister, and a good strategic thinker who is well liked by clients**" *–Legal 500, 2015.*

David developed his practice as a junior in Chancery chambers. This made him an obvious choice for professional liability claims in his core areas of expertise. He continues to be especially well known for his work in claims relating to property, business and finance, but as a Silk he has broadened his practice to include claims against professionals in a wide range of disciplines, as well as coverage issues in relation to professional indemnity insurance.

In the best tradition of the Bar, he will act for either claimants or defendants. He believes that this helps him to give objective advice to all his clients and to provide them with the most effective representation in court.

Accountants, Auditors & Actuaries

David has considerable experience of claims against auditors and accountants, including both auditing and advisory work. He has a thorough understanding of accounts and of the audit process. He edited the chapter on Accountants and Auditors in *Jackson & Powell on Professional Liability* between 2002 and 2015 and wrote a new chapter on Actuaries. An article he wrote on auditors' liability was cited by Lord Neuberger in the Supreme Court in *Bilta v. Jetivia* [2016] 1 AC 1 at [21].

Cases

- Claim against a "Big Four" accountant for negligent tax advice to a trust

- Barclays Bank plc v. Grant Thornton UK LLP [2015] 2 BCLC 537
  Claim by Barclays for £50m. Issue as to whether an auditor engaged to perform a non-statutory audit could rely on a disclaimer of liability to third parties.

- Defending accountant against claim for negligent valuation of shares
  The issues concerned the treatment of unlawfully paid dividends and the appropriate discount for minority shareholding.

- Defending accountants in relation to failed film finance schemes

- Insight Group Ltd v. Kingston Smith [2014] 1 WLR 1448
  Claim against accountants for negligently allowing an overseas subsidiary to be struck off, thereby causing the group's valuable intellectual property rights to become bona vacantia. The case is reported on David's successful application to amend outside the limitation period.

- Defending a claim against an auditor for fraudulent trading under section 213 of the Insolvency Act 1986

Financial Services Professionals

Chambers & Partners (2016) says that David "has considerable expertise in claims relating to negligent financial advice" and is "very well equipped to handle commercial disputes". He regularly deals with claims arising out of the investment powers and duties of trustees and other fiduciaries, claims against IFAs for negligent investment advice and claims for the mis-selling of financial products.

Cases

- Defending a claim against an IFA arising out of a failed film finance scheme

- Advising a City firm as to its liability for a Collective Investments Scheme.
  Advice to a City firm of solicitors as to liability for statements in a prospectus which promoted a financial product as a Collective Investments Scheme.

- Acting for a claimant who lost 60% of the value of his portfolio through his IFA's negligent investment policy

Lawyers

A major part of David's practice is acting for or against solicitors and barristers in a wide range of cases, but especially in relation to areas of Chancery and commercial law which are within his particular expertise. He is rated in the Directories for property litigation as well as for professional negligence. He is also able to draw on experience outside the Chancery and commercial fields, for example the understanding of criminal law and procedure which he gained from sitting for several years as a Recorder in crime.

David represented the appellant in the Supreme Court in the recent landmark case of *Hughes-Holland v. BPE*.

He advises on coverage issues (for further details, see under the heading Insurance).

Cases

- Hughes-Holland v. BPE Solicitors [2017] 2 WLR 1029
  David acted for the appellant in this landmark appeal to the Supreme Court which has restated the law on the scope of a professional's duty of care.

- Dreamvar Ltd v. Mishcon de Reya (reported under P&P Ltd v. Owen White & Catlin [2018] 3 WLR 1244)
  The claimant (for whom David acted) was duped into buying a property from an impostor. He successfully sued his own solicitor for breach of trust in paying the purchase price to the impostor's solicitor. The judge held that the solicitor should not be allowed to rely on s. 61 of the Trustee Act 1925, notwithstanding that the firm had acted honestly and reasonably.

- Bacciottini v. Gotelee & Goldsmith [2016] PNLR 22
  Acting for the appellant in the Court of Appeal in a case about the proper approach to mitigation of loss.

- Ridgewood Ltd v. Kilpatrick Stockton [2014] PNLR 31
  Acting for a solicitor in successfully striking out a £54m claim for negligence on the grounds that it had no real prospect of success and was an abuse of process.

- Acting for the claimant in claims against solicitors and counsel arising out of a claim for compensation in the Lands Tribunal following a CPO

- Acting for a solicitor-trustee defending a £95m claim in Jersey for negligent investment

- Thames Valley Housing Association v. Elegant Homes Ltd [2011] NPC 54
  Defending a raft of claims against a firm of solicitors for £40m for breach of trust and breach of undertakings. This included a successful recovery action against the former client's shadow director for conspiracy and inducing breach of contract.

- Acting for insolvency solicitors defending negligence claims arising out of their handling of bankruptcies and liquidations

- Jassi v. Gallagher [2007] PNLR 4
  Most of David's work in relation to claims against barristers settles before trial. This is a comparatively rare example of a case which went to the Court of Appeal. David successfully defended a barrister at trial and on appeal against a claim arising from a failed leasehold enfranchisement.

Surveyors & Valuers

David is ranked as a leading silk for Real Estate Litigation by both Chambers & Partners and Legal 500.

'His knowledge is encyclopaedic, and he attacks even the most intractable legal problems with zeal and gusto.' (Legal 500, 2017).

Chambers & Partners (2018) describes David as someone who "displays excellence in both professional negligence and property

litigation." Chambers & Partners (2017) in recommending David for Real Property litigation as well as Professional Liability litigation, says that he is ""very technically gifted on property matters" and (in 2016), "he is noted for his specialist knowledge in matters concerning valuation principles."

David is regularly instructed in claims involving surveyors and valuers, particularly in relation to valuation and planning issues, and he frequently works with experts in these fields. He has considerable experience in relation to the valuation of development land.

Cases

• Acting for the claimant in claims against valuers and planning advisers arising out of a claim for compensation in the Lands Tribunal following a CPO

• Acting for Barclays Bank in pursuing a £10m claim against a valuer in relation to mortgage fraud

• Acting for valuers sued for negligence in agreeing a formula for the sale of development land

Property

David is rated as a leading Silk in property litigation by The Legal 500 (2021), Chambers & Partners (2021) and Who's Who Legal (2021).

"A charming man with an agile and creative mind, a great person to have on your team. There is nothing which fazes him." *– Legal 500, 2021*

"Immensely knowledgeable and always gets on well with clients." *– Chambers & Partners, 2021*

"He is very impressive on his feet." "He has an excellent manner and is great to work with, pragmatic and commercial." *– Chambers & Partners, 2020*

"He has fantastic insight, is immensely knowledgeable and is brilliant with clients." *–Chambers & Partners, 2019*

"He can find and sustain a cause of action where lesser barristers would fail." *–Legal 500, 2019*

"**David is amazing; he is a fount of legal knowledge and his ability to pinpoint issues and form an early view is invaluable." "Very intelligent, pragmatic and commercial."** *–Chambers & Partners 2018*

"His knowledge is encyclopaedic, and he attacks even the most intractable legal problems with zeal and gusto." *–Legal 500, 2017.*

"**Adopts a client-friendly and very practical approach and is a terrific strategic thinker."** *–The Legal 500 2016*

"**Advises on a mix of real estate and professional negligence cases. He is noted for his specialist knowledge in matters concerning valuation principles. 'He is extremely intelligent with excellent client-handling skills.'"** *–Chambers & Partners 2016*

"An eminent property litigation silk with a wealth of experience, who is highly sought after by solicitors for his work on the intersection between property and professional negligence disputes. 'Unbelievably brilliant. He is the advocate for all seasons, and fantastically easy to deal with. He's incredibly direct in terms of identifying the problem, fantastic on his feet and a huge amount of fun.' 'He's got all the points and is persuasive in writing.'" *–Chambers & Partners 2015*

"A very sound property lawyer with a great reputation. He is often hired by developers due to his strong business acumen.

He also has a property-related professional negligence practice, and is an excellent all-rounder." *–Who's Who Legal 2015*

His real property work regularly includes litigation and advice on:

- Contracts for the sale of land;
- Disputes as to title (including advising on title) and rectification;
- Disputes involving developers, including easements and covenants, ransom strips and overage (his skill in relation to overages was singled out for praise by the Legal 500 in 2014);
- Landlord and tenant disputes, particularly in relation to commercial leases; and
- Mortgages.

Cases

• Acting for a vendor who has agreed to sell four hotels as a going concern where the purchaser claims that the agreement has been frustrated by COVID-19 and Lockdown.

• Acting for the trustees of a mosque who own a 23-acre site (with significant planning potential) adjoining the Olympic Stadium in a dispute with a rival group who claim it is held on trust for them.

• Defending an alleged anchor tenant for breach of a keep-open covenant
David acted for a national leisure company which was sued for breach of a keep-open covenant in a commercial lease. It was alleged that David's client was the anchor tenant of a shopping centre.

• Acting as arbitrator in relation to a lock-out agreement

• Ridgewood Ltd v. Kilpatrick Stockton [2014] PNLR 31
Acting for a solicitor in successfully striking out a £54m claim arising out of the purchase of 11 petrol filling stations conditional upon the grant of planning permission.

• Drafting an overage clause to secure an uplift of £11m for the vendor

• Acting for a developer in a misrepresentation claim arising from an exclusivity agreement for the purchase of a property for £80m

• Acting for a landowner disputing a ransom strip which was preventing the development of 750 houses

• Advising a national housebuilder on ownership of a riverbed and whether a large development site had prescriptive rights of drainage

Wills, Trusts and Probate

Although much of David's work is more commercial in nature, he has a thorough grounding in the traditional Chancery fields of wills, trusts and probate. He is experienced in contentious and non-contentious probate and in the construction and rectification of wills and trusts, and he advises trustees, fiduciaries and personal representatives on all aspects of their functions.

Cases

- Dreamvar Ltd v. Mishcon de Reya (reported under P&P Ltd v. Owen White & Catlin [2018] 3 WLR 1244)
  Acting for successful claimant in claim that a trustee should not be relieved under s. 61 of the Trustee Act 1925, even though the trustee was held to have acted honestly and reasonably.

- Hamilton v. Hamilton [2016] WTLR 1699
  David successfully defended the trustee of a will in a claim by her brother for maladministration. The brother claimed that a Liechtenstein Stiftung created by their late father had been a sham and that the assets in the Stiftung formed part of the father's estate. The case involved a detailed examination of Liechtenstein law.

- Shergill v. Khaira [2015] AC 359
  David acted (with Mark Herbert QC) for the successful appellant in the Supreme Court. The case concerned a power to appoint trustees of a Sikh Temple. Under the Trust Deed, the power was given to the "Holy Saint". The Supreme Court held that the issue as to whether one of the parties was indeed the Holy Saint was justiciable under English law.

- Acting for a beneficiary of a trust of heirlooms seeking to set aside for undue influence a deed of covenant made with the trustees

- Acting for a solicitor-trustee defending a £95m claim in Jersey for negligent investment

- Acting on the rectification of a disability trust which had previously been approved by the Court of Protection

- Cattley v. Pollard [2007] Ch 353
  This was the first reported case on the limitation period for claims against a defendant for assistance in a dishonest breach of trust. David argued that s 21 of the Limitation Act 1980 did not apply. His argument was accepted by the court and was subsequently approved by the Supreme Court in Williams v. Central Bank of Nigeria [2014] AC 1189.

Qualifications & Memberships

David is a member of of the Chancery Bar Association and is a former chairman of its International Subcommittee. He is also a member of the Property Bar Association, the Professional Negligence Bar Association and COMBAR.

Other activities:

- He sits part-time as a deputy High Court judge in the Chancery Division. He previously sat as a Recorder in crime.
- He is a Bencher of Gray's Inn and an advocacy trainer for the Inn.
- He has chaired disciplinary proceedings for the Bar Standards Board.
- He is on the panel of the Bar Pro Bono Unit.

Education

M.A. (Oxon)

Insights

Sevilleja v Marex: Reflective Loss Restated

18 July 2020

David Halpern QC writes on the recent Supreme Court judgment in Sevilleja v Marex restating the doctrine of reflective loss in company law.

COVID-19 and remote trials

14 April 2020

The first judgment has now been reported on the effect of COVID-19 on a forthcoming trial. In Re One Blackfriars Ltd, Hyde v. Nygate [2020] EWHC 845(Ch), John Kimbell QC, sitting as a Deputy High Court judge, refused to adjourn a trial due to start in June but ruled that it should proceed remotely by video-link.

Unfair Prejudice Petitions: what makes prejudice “unfair”?

3 July 2019

Unfairness is an essential ingredient in minority shareholder petitions. Prejudice alone is not enough. This article explores just what it is that a petitioner needs to prove to make prejudice “unfair” in order for a petition to succeed.

Former editor of Jackson & Powell on Professional Liability

1 December 2016

He edited the chapter on Accountants and Auditors in Jackson & Powell on Professional Liability between 2002 and 2015 and wrote a new chapter on Actuaries.

Casenote on Stone & Rolls v. Moore Stephens in Modern Law Review 73 MLR 487 (cited by Lord Neuberger in the Supreme Court in Bilta v. Jetivia [2016] AC 1 at [21]).

Exoneration Clauses for Trustees and Directors and Statutory Relief from Liability (an analysis of the law in Guernsey with reference Spread Trustee v. Hutcheson), 2012 Trust Law International 32.

“Negligent Investment: Claims against Trustees and Agents”: in (2009) 15 Trusts & Trustees 602

PNLA ANNUAL CONFERENCE 2020
KEYNOTE ADDRESS

DAVID HALPERN QC, 4 NEW SQUARE

FIDUCIARY DUTIES, RELATIONAL CONTRACTS AND GOOD FAITH

The traditional approach

- No general duty of good faith.
- Equity treats certain relationships as fiduciary.
- A few common-law relationships give rise to duties of good faith, e.g. insurance and employment contracts.
- Subject to these, there is no remedy for bad faith falling short of fraud. There are merely remedies in the event of fraud or dishonesty, e.g. economic torts such as deceit and conspiracy.

Who is a fiduciary?

The best-known categories:

1. Trustees – the paradigm.
2. Partners – duty of "utmost good faith".
3. Directors – treated as if they were trustees for the company (*Burnden Holdings v. Fielding* [2018] AC 857), but not for the shareholders)
4. Agents in the strict sense, i.e. with power to bind their principal. Other agents are not necessarily fiduciaries or may have modified duties: *Kelly v. Cooper* [1993] AC 205; *CH Offshore v. Internaves* [2020] EHWC 1710 (Comm).
5. Solicitors – broadly fiduciary, but partly commercial, e.g. in respect of fees.

***Sheikh Tahnoon Al-Nehayan v. Kent* [2018] EWCH 333, Leggatt LJ**

"… fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making …)"

Should these 5 categories be extended?

- Professionals other than solicitors? *Bolkiah v. KPMG* [1999] AC 222 applies the same test to forensic accountants. It is likely that most professionals owe fiduciary duties, but there are a few exceptions.
- Joint ventures and LLPs? Not necessarily – it is fact-specific: *F&C v. Barthelemy (No 2)* [2012] Ch 613.
- *Brandeis (Brokers) v. Black* [2002] 1 Lloyds Rep 359: broker on London Metal Exchange were held to owe fiduciary duties.

***Re Goldcorp Exchange Ltd* [1995] 1 AC 74**

Customers bought gold bullion from company in reliance on promise that it would maintain sufficient stock. Held: company not a fiduciary; hence customers were unsecured creditors.

Quoting Frankfurter J: "To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? and what are the consequences of his deviation from duty?"

"It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies."

What is a fiduciary obligation?

Duty of skill and care is derived from equitable rules re fiduciaries but it is not a fiduciary duty. Millett LJ in *B&W v. Mothew* [1998] Ch 1: "A servant who loyally does his incompetent best for his master is not unfaithful and not guilty of a breach of fiduciary duty."

Fiduciary obligations (i.e. restrictions or inhibitions):

- Loyalty (the core principle, underpinned by the no-conflict and no-profit rules);
- Confidentiality (not limited to fiduciaries); and
- Undue influence.

The obligations may be modified by agreement.

Millett LJ's expanded duty of loyalty

- Duty not to make a profit (i.e. an unconvenanted profit).
- Duty to avoid a potential conflict between duty to client A and duty to client B or own interest, save with consent.
- Duty to avoid any actual conflict of interests (any breach is actionable, even if unconscious).
- Duty to act in good faith (this is necessary, but not sufficient, to create a fiduciary relationship).

Remedies for breach of fiduciary duty

Swindle v. Harrison [1997] 4 All ER 705. In theory the primary remedies are:

- Rescission (unless there is a bona fide purchaser);
- Account of profits (useful where the defendant's gain exceeds the claimant's loss);
- Constructive trust (gives proprietary interest which is important in the event of insolvency).

In practice the usual remedy is damages.

Damages for breach of fiduciary duty

Similar to common-law damages save that:

- "But-for" causation is sufficient: *AIB v. Redler* [2015] AC 1503*;*
- Contrib neg is no defence: *Nationwide v. Balmore Radmore* [1999] PNLR 606;
- Damages to put C into same position as if D had performed his duty: *Hilton v. Barker Booth Eastwood* [2005] 1 WLR 567.
- Compound equitable interest: *Watson v. Kea* [2020] WTLR 351.
- In some cases, no limitation period: 1980 Act s. 21 – but see *Coulthard v. Disco Mix* [2000] 1 WLR 708.

Good faith and relational contracts

Walford v. Miles [1992] 2 AC 128 exemplifies the traditional approach: "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party."

Yam Seng v. International Trade Corp [2013] EWHC 333 (Comm), Leggatt J:

- Implied duty to act in good faith? In effect, "fiduciary-lite": but
  - A term will not be implied unless necessary or obvious.
  - Difficult to apply: when does legitimate self-interest become commercial impropriety?
- "Fidelity to the bargain": a more promising tool.
- Relational contracts: JVs, franchises, distributorships.

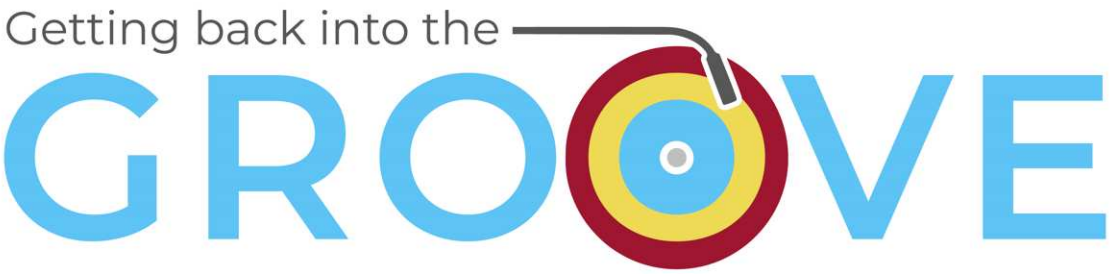
***Braganza v. BP Shipping* [2015] 1 WLR 1661**

"Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision making power is given."

PNLA ANNUAL CONFERENCE 2020
KEYNOTE ADDRESS

DAVID HALPERN QC, 4 NEW SQUARE

FIDUCIARY DUTIES, RELATIONAL CONTRACTS AND GOOD FAITH



Patrick Lawrence QC
4 New Square

"Professional Negligence and Liability Update"
34 mins

Patrick Lawrence QC

Call: 1985 Silk: 2002

+442078222000 p.lawrence@4newsquare.com

Clerk: Andrew Call

a.call@4newsquare.com

+442078222038 +447788443600

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

- Chambers & Partners

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

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

He practises principally in the commercial and company law sectors. This work fits well with his expertise in auditors' negligence and his involvement in claims against pensions advisers, tax advisers, and other financial services professionals. He is numerate (as barristers go). He is retained in cases where effective cross-examination is considered critical. Many of his cases involve allegations of impropriety in the commercial world, and he is prepared to read closely large amounts of material in order to find out what really went on, and then – if necessary – to go to court to prove it. He has acted in many leading cases involving the development of equitable rules concerning fiduciary obligations in a commercial context, and the interplay between trust, contract, and fraud.

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

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

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

Privacy Policy

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

Areas of Expertise

Professional Liability

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

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

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

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

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

Accountants, Auditors & Actuaries

Patrick has extensive experience in high value audit negligence cases. Between 2016 and 2020 he acted in a $200m claim arising out of the collapse of an insurance conglomerate in the Eastern Caribbean. He is currently acting in a claim concerning self-interest conflict and the suppression of evidence of fraud in connection with the auditing of a bullion dealer in Dubai. He has conducted a number of lengthy contested cases (among them Resort Hotels, Wiggins and Mayflower) the FRC or its predecessors. He acted in audit cases arising out of the largest ever fraud on the AIM, Langbar International PLC, and arising out of the Farepak collapse (the Christmas hampers case). He has extensive knowledge of auditing and accounting standards. He has addressed a wide range of audit issues: eg. fraud, and audit response to evidence of fraud; premature or excessive recognition of revenue; allegedly inappropriate capitalisation of expenditure; quality of audit evidence; the going concern basis; the justification for the issuing of qualified and adverse audit opinions; and so on.

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

Financial Services Professionals

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

Insurance Brokers & Agents

He has acted in many claims against insurance brokers. Not many have reached court, but that may partly be because such claims tend to be rather difficult to defend on liability issues. He appeared in *Jones v Environcom* [2011] EWCA 1152. *Kirk v Aviva and*

others settled shortly before trial in 2017; a fire case involving claims against insurers and brokers, and allegations of breaches of fiduciary duty arising out of undisclosed close commercial connections between broker and insurer.

Lawyers

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

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

Cases

- Ward Hadaway v DB UK Bank Limited
- Petrocapital Resources PLC v Morrison & Foerster
- Lexi Holdings v Pannone & Partners
- (1) William James Luke (2) Kingsley Smith & Co (A Firm) v (1) Wansbroughs (A Firm) (2) Caroline Addy
- Bowie v. Southorns
- Martin William Cave v. Robinson Jarvis & Rolf (A Firm)
- Parry v. Edwards Geldard
- Mortgage Corporation Ltd v. Lewis Silkin & Anor : Same v. Marsha Shaire & Others
- Maes Finance Ltd v. Sharp & Partners
- Bristol & West plc v. Bhadresa

• Halifax Mortgage Services Ltd v. S & S

• Parry v. Edwards Geldard

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

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

• Shah v Forsters

Pension Advisors

Patrick has been instructed in many cases involving allegations of negligence against those who advise pension schemes. They have concerned (among other things) failed post-*Barber* equalisations; variations to schemes which have been ineffective as a result of a lack of attention to the provisions governing amendment; issues as to the identity of those to whom the advisers owe duties; black hole damages points; damages issues arising in relation to entry of scheme into PPF. He has acted in a number of cases arising out of the entry (or attempted entry) of a scheme into the PPF, and has defended claims brought by the PPF in its own right. In 2017-2019 he acted in major multi-party litigation arising out of the decision of Newey J. in *Gleeds Retirement Benefits Scheme* [2015] Ch 212. Amending deeds were improperly executed over a period of almost 20 years. Part 8 proceedings intended to validate the deeds and make the amendments effective were largely unsuccessful. The matter was settled on appeal, on terms leaving the employer facing additional liabilities of many millions of pounds. The employer began proceedings against the negligent pension advisers, who responded by alleging that the Part 8 proceedings had been conducted negligently. The outcome was very complex litigation in which issues arose as to (among other things):? the legal principles to be applied where one defendant argued that the subsequent negligence of an adviser 'broke the chain of causation'; the legal principles to be applied where a claim for damages was founded on a liability established by a compromise; title to sue (as between pension trustees and the employer); the operation of s. 14B of the Limitation Act 1980; the quantification of the claim in respect of unintended liabilities ('best estimate' basis; buy-out basis; or something else?); the quantification of claims in respect of expenditure on legal costs; and the important procedural question whether negligent advisers should be joined to Part 8 proceedings designed to remedy the consequences of their negligence.

Surveyors & Lawyers

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

Since the market collapse in 2008-09 he has been retained in a large number of high value claims against valuers, and is very familiar with the issues that arise where claims arise out of aggressive lending practices of 2000-2008. In 2010 he appeared for the successful defendant in *K/S Lincoln v CBRE* [2010] EWHC 1156, a claim concerning the valuation of a £40m portfolio of hotels. The case stands as the most up-to-date authority on the "margin of error defence". Since then, Patrick has been looking to develop the reach of that defence in cases involving residual valuations of commercial developments, where a small and permissible variation in relation to one component of the valuation can lead to the final valuation figure being 'out' by a very significant margin. He has also been considering the issues that arise where an employee of the claimant lender may have acted improperly in relation to the making of the loan in question, and has been exploring the ways in which evidence of an individual's impropriety may provide a valuer with a complete defence. In 2015-19 he acted in claims involving a £1.2bn commercial portfolio valuation; a €300m portfolio of commercial properties in Benelux/Germany; a £250m commercial valuation in the Midlands; a £150m hotel

portfolio valuation; among others.

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

Cases

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

Commercial

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

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

Cases

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

• Rubicon Computer Systems Ltd v. United Paints Ltd

• Brill v. Penn

• Orb ARL v Fiddler

Commercial Chancery

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

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

Cases

• Pennyfeathers Limited v Pennyfeathers Property Co Ltd

• Noel Edmonds v Lawson

• Dore v Leicestershire County Council

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

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

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

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

• Homsy v. Searle

• Shah v Forsters

Costs

Patrick's familiarity with (i) claims arising out of failed litigation and (ii) insurance law has led to the development of a practice in the field of costs law. Costs cases include: *IOMA Insurance v Wake Smith* – failure of multiparty industrial illness litigation supported by CFA/ATE packages; 3 week trial in Mercantile Court of costs/ATE issues arising therefrom; (ii) *Automotive Latch Systems v Honeywell Inc.* – advising on ATE cover following failure of >$100m commercial claim giving rise to >$15m costs liabilities; (iii) *Hunt v Harlock* – successful appeal against a ruling that a clerical error in an ATE policy vitiated the cover and meant that the premium was irrecoverable; (iv) *Astaldi SPA v [a firm of solicitors]* claim by Italian construction company in respect of disbursements relating to litigation in Algeria; (v) *Bamrah v Gempride* – leading case on the power to disallow costs on the ground of misconduct in assessment proceedings; now a landmark judgment on appeal [2018 EWCA 1367; (vi) *Warren v Hill Dickinson [2019] EWHC B1 (Costs)* – a decision of Master Leonard, considering s.70(1) Solicitors Act; and ambiguities and lacunae in CPR provisions concerning interim costs certificates; (vii) *Willers v Joyce* [2019] EWHC 2183 – an important decision by Rose J. on an application for a non-party costs order against the lawyers acting for the unsuccessful claimant, brought on the ground that the lawyers had a direct pecuniary interest in the recovery of the main head of damage, and should accordingly be regarded as "real parties" to the litigation who were within the scope of the court's costs jurisdiction.

Disciplinary and Regulatory

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

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

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

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

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

cross-examine.

In 2018-19 he acted in various matters before the SDT involving allegations of dishonesty and want of integrity.

He is currently retained in a number of cases concerning the position of professionals who provide expert and other evidence while retained on some form of contingent fee agreement.

Cases

- R (on appn of Crookenden) v ICAEW

- Williams v SRA

Insurance & Reinsurance

Patrick's extensive practice in this area has focused on disputes between insurer and insured concerning questions of construction, and the avoidance of policies for non-disclosure, misrepresentation and fraud. He has appeared in a number of contested trials at which the honesty of the insured has been the subject of a direct challenge. He has frequently advised on the relationship between the solicitors' policies now written by the commercial market and the run off insurance administered by SIF; and has acted as in arbitrator in that connection. He has advised on coverage issues relating to claims arising out the Madoff fraud. In the last decade he appeared in numerous (>30) arbitrations in the field of PI cover, raising issues as to the operation and construction of the 'Minimum Terms'; as to 'Successor Practices'; as to the liability of insurers to indemnify in respect of issues arising out of disputes as to costs and fees; and (of course) as to notification and aggregation. He recently acted for the claimants at the trial of multi-party proceedings in the Commercial Court, involving both insurers and brokers, arising out of claims in respect of fire and business interruption cover.

Public Law and Human Rights

Patrick has considerable experience of applications for judicial review arising out of his work in the disciplinary/regulatory context. He has appeared in a number of reported cases concerning the construction of statutes pursuant to s.3 of the Human Rights Act – eg. *Cachia v Faluyi.* In the last few years this grounding has enabled Patrick to develop his public law practice, especially in the field of political activity and the funding of political parties. In 2010 he acted in the Supreme Court for the successful appellant in R (*on application of Electoral Commission*

Cases

- D&G; Cars Ltd v Essex Police Authority

- D&G; Cars Ltd v Essex Police Authority

- Breyer Group Plc v Department of Energy and Climate Change

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

- Cachia v. Faluyi

Sports Law

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

Patrick Lawrence comes from a racing family. He has conducted a number of hearings before the BHA’s Disciplinary Panel, and for a period sat on the Panel as one of its three legally qualified members. He has acted in many cases concerning sports spread betting, and has drafted the standard terms used by the members of the Sports Spread Betting Association. Cases include: (i) *McGarel Groves v Glyn*; action arising out of death of international dressage horse; (ii) *BHA v Warwick Racecourse*; 2day hearing arising out of abandonment of racing at Warwick; (iii) *BHA v Wigham & MacKay*; 2 day hearing into Rule 155/157 complaints.

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

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

In 2017-19 he acted in a number of claims brought against gambling operators by parties who claimed that their money had been used, and lost, by a gambler who should not have been allowed to bet. The claims involved the development of equitable principles to circumvent the obstacles created by the decision in *Calvert v William Hill*.

Cases

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

Offshore

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

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

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

Qualifications & Memberships

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

PATRICK LAWRENCE QC

PNLA Online Conference – November 2020

Professional negligence update – focus on auditors

A discussion of:

Manchester Building Society v Grant Thornton [2019] 1 WLR 40

Assetco v Grant Thornton [2020] EWCA Civ 1151

These cases raise, yet again, issues concerning the application of the so-called *Saamco* principle.

What is that principle? Damages should only be awarded where they fall within the "*scope of the duty*" which has been breached. The principle does not apply where the defendant is to be regarded as having assumed a responsibility to advise on all aspects of the proposed transction.

It is a principle which can be applied without much difficulty, where the defendant is a valuer providing information as to the value of a property which is the subject of a possible transaction being considered by the client. That is the paradigm *Saamco* case: a single discrete piece of information (although the valuation is, obviously, a piece of 'advice'); and a single discrete transaction into which the client enters in reliance on that information/advice.

The case law of the last 25 years shows that the application of the principle (or rule) is much less straightforward in cases involving other types of professional, more complex facts, multi-faceted advice, reliance over a long period of time in relation to many different events and transactions, and so forth.

Take a step back. Deciding whether a defendant should pay damages in respect of a specified loss usually involves 2 enquiries. First: a factual enquiry: did the breach actually cause the loss or would it have happened anyway? Generally, subject to some complications in cases involving concurrent causes, if the loss would have happened anyway, damages should not be awarded. Second: a legal question involving a value judgment: ought the defendant be held liable?

A passage in the speech of Lord Nicholls in *Kuwait Airways v Iraqi Airways (Nos 4&5)* [2002] 2 AC 883 at 1091 (paragraphs 70>75) is cited quite often, but it ought to be as well known as the snail in the ginger beer bottle.

"*The inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability, given the reasons why the law has recognised the cause of action in question"*

The law has to set a limit. Various analytical techniques are used: 'effective' causation (*Galoo*); remoteness & foreseeability; intervening causes, dressed up in Latin ("*novus actus interveniens*"); mitigation; collateral benefits, also dressed up in Latin ("*res inter alios acta*"). See also Lord Sumption in *Hughes-Holland v BPE Solicitors* [2018] AC 599 at paragraph 20.

Saamco scope of duty is another analytical technique, limiting the extent or scope of a defendant's liability to pay.

It serves substantially the same purpose as the techniques mentioned above; it will often lead to the same outcome; it exists because Lord Hoffmann was impatient with judges' purporting to resolve issues by using 'common sense'.

As Lord Nicholls said: "*when the outcome of the second enquiry is not obvious, it is of crucial importance to identify the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances*."

But it is always a value judgment. Should the court compel the defendant to pay, in <u>these</u> circumstances, for <u>this</u> breach of duty?

Manchester Building Society v Grant Thornton

In my view, the less interesting of the 2 cases, although unlike *AssetCo* it has gone to the Supreme Court.

It is a claim against an auditor, but it is not (strictly) about the scope of an auditor's duty. The negligent advice was limited and specific. It concerned the accounting treatment of interest rate swaps. The advice was given by the auditor; it could have been given by any expert in corporate accounting. See: *AssetCo* at paragraph 100.

When it came to light that the recommended accounting treatment was not permissible, the positions had to be closed. The swaps had to be 'broken early'. Substantial losses were realised. The claimant would not have entered into the positions if properly advised about the appropriate accounting treatment.

This case yields to an entirely orthodox *Saamco* analysis.

But for causation was proved. The claimant BS would not have entered into the relevant transactions if properly advised.

However, the claimant had not shown that the losses would <u>not</u> have been sustained, if the advice/information had been correct. There was one possible route to demonstrating that: namely, by proving that the discovery of the correct accounting treatment meant that the positions had to be closed immediately, and that if they had been allowed to go to full term there would have been no or a reduced loss. The claimant could not show that.

It follows, on a conventional *Saamco* analysis, that the loss was not within the scope of the duty. It would have been sustained even if the relevant information had been correct. There was therefore an insufficient connection between the breach of duty and the loss to justify making the defendant pay compensation.

The CofA judgment spends a lot of time considering the distinction between 'advice' and 'information' cases, despite the fact that Lord Sumption was rather dismissive of the utility of that distinction in the *Hughes-Holland* case. I doubt that this distinction deserves the amount of attention that it sometimes receives. True 'advice' cases are very rare. They involve a defendant who is under a duty to consider all possible consequences of a proposed course of action, and to advise thereon. This was clearly not an 'advice' case in that sense.

The closing words of the judgment give defendant accountants some comfort, though, subject to what the SCt may say: "*it would be a striking conclusion to reach that an accountant who advises a client as to the manner in which its business activities may be treated in its accounts has assumed responsibility for the financial consequences of those business activities*".

However, having said that ….

Assetco v Grant Thornton

shows that in certain circumstances an accountant (acting as auditor) may be liable to pay compensation in respect of losses made its client in the course of its business:

This was a case involving fraud on the part of the company's management. Assetco was the holding company of a group containing a number of profit-making companies and 2, Assetco London and Assetco Lincoln, which were anything but. These two subsidiaries provided fire engines to the London and Lincolnshire Fire Brigades pursuant to long term contracts. The contracts appeared from the 2009 and 2010 accounts to be profitable. They were in fact generating heavy losses, which directors deceitfully concealed from the auditors.

Proper auditing would have revealed the deceit and shown that the business activity in question was not sustainable. That was admitted.

The claim was for:

1. Sums lent to the 2 subsidiaries which were irrecoverable (in effect, a claim for trading losses).
2. Fees.
3. A payment made in respect of a fraudulent related party transaction instigated by one of the dishonest directors.
4. Dividends paid by Assetco in 2009-10.

The dividends claim was maintainable, as a matter of law, on the basis of authorities going back to the 19th century. It failed on the facts, the directors' decision to award dividends being treated as a *novus actus*, and was not considered by the CofA.

The central issue was whether damages could be recovered in respect of losses sustained in respect of the London and Lincoln Fire Brigade contracts.

The defendant relied on ***MBS***, unsurprisingly.

The claimant submitted, and the court accepted, that there was a distinction between "single transaction in reliance on discrete advice" cases such as *MBS* and *Hughes-Holland*, on the one hand, and true audit negligence cases such as *AssetCo* on the other.

However, that said, the court held at paragraph 101 that the *Saamco* principle would normally fall to be applied to audit cases. There may be exceptions: the well-established right to compensation for wrongly paid dividends may be one such.

So: the principle was engaged. But it did <u>not</u> bar the claim. There was a sufficient connection between the relevant trading losses and the audit negligence because GT should have uncovered the deceit which was concealing the loss-making nature of the relevant contracts; and should have provided information which would have enabled the company to bring the loss-making activities to an end. Accordingly, the negligence was an effective cause of the loss; not merely an occasion for the losses being sustained: paragraph 109. It will be noted that the court reverted to the language of 'effective' causation while discussing the application of the *Saamco* principle.

The defendant did, though, persuade the court that the loss sustained on the fraudulent related party transaction was outside the scope of the duty that had been breached. This was 'mere' dishonest misappropriation of funds after the point at which the company's activities would have been closed down or substantially modified if the audit had disclosed the prior misconduct, and there was no direct link between the misappropriation and the earlier misconduct.

<u>Loss of a chance?</u>

This was the second main issue. The judgment contains a lengthy and illuminating discussion of the authorities. The court rejected the criticism of the judge's elaborate analysis. In particular, it rejected the argument that a large number of >90% chances should, as a matter of elementary mathematics, be multiplied together to produce (say) an overall probability of c. 70-80%. "*The distinction between certain and almost certain was in this case meaningless*."

<u>Credit for benefits?</u>

This was the third issue.

The benefits in question included substantial sums raised by 2 share issues, one in 2009 and one in 2011; also, monies borrowed on overdraft. The latter was not a true benefit, in that the borrowing obviously gave rise to a debt. The share issues were slightly more promising candidates for benefits which had to be brought into account.

The judge held that neither share issue fell to be taken into account

Again, there is an instructive discussion of the recent SCt authorities in this area.

Rather surprisingly, to my mind, the court allowed GT's appeal in relation to the earlier share issue. It dismissed the appeal in relation to the 2011 issue. That had been made at a time when the company's parlous position was known, and the court held that there was an insufficient connection between that money-raising exercise and GT's earlier negligence for it to be just to take it into account.

The 2009 share issue was made at a time when investors would have been wholly unaware of the true position. The claimant made the point that such investors had no right of action against GT; and that, if credit were given for the share issue, the company (which might be liable to investors for obtaining their money under false pretences) would be deprived of assets which might properly be used to compensate stakeholders, including the relevant investors. There appears to me to be force in this. The court noted that the investors might well have had a claim against the company, but that such a claim was statute-barred, so there was no reason to deprive GT of the credit in respect of the monies raised. This seems to me to treat an adventitious and collateral decision of deceived investors not to bring a claim in time as something that should come to the rescue of a negligent auditor.

A final word on contrib in audit negligence cases

I end by identifying an issue in audit negligence cases which may be ripe for re-examination in the higher courts.

1. The case law in this jurisdiction treats it as routine for a deduction to be made for contributory negligence in audit negligence cases even where the negligence or misconduct of the company's management is the very thing that should have been brought to light by proper auditing.

2. It might be said that this is paradoxical. The paradox can be expressed thus: *the worse the management misconduct, the worse the auditor's negligence (for failing to expose it) ….. but, at the same time, the higher the deduction for contributory negligence*.

3. Other jurisdictions have dealt with this point differently. The issue is touched on in this passage from the first instance judgment of Bryan J. in *Assetco* [2019] EWHC 150:

   "1104. Thus the auditor may be under a duty to prevent the occurrence/event/act in question. This leads onto the question as to whether the defence of contributory negligence should be available at all in cases where it is established that the defendant owed a duty to protect against

the particular loss suffered by the claimant. In *MAN Nutzfahrzeuge AG v Freightliner Ltd* Moore-Bick LJ observed that, *"there may be cases in which the nature of the duty owed by the defendant to the claimant [may] be such as effectively to exclude the possibility of contributory fault."* A Hong Kong authority (*Extramoney Limited v Chan, Lai Pang & Co* [1994] HKCFI 361 at [164]-[165]) goes further, expressing the point – i.e. the unavailability of contributory negligence, essentially as a rule of law, whilst in the Australian case of *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 842 Rogers CJ referred to a respectable body of authority for the proposition that, *"a defence of contributory negligence against a company, based on the alleged negligent conduct of a servant or director, is not available to an auditor whose duty is to check the conduct of such persons".* The Supreme Court of Canada has taken the view that there is no attribution to a company of the fraudulent conduct of its directors for the purpose of contributory fault in claim against the auditors who ought to have detected the fraud (*Livent Inc v Deloitte LLP* [2016] ONCA 11 at [103]).
1105. However on the current state of English law, the dishonesty of management is attributed to the company for the purpose of contributory fault – see *Barings (No.7) [2003] EWHC 1319 (Ch), [2003] Lloyd's Rep. IR 566* at [698]-[720] and *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd [2018] 1 Lloyd's Rep. 472* at [94]."

4. If a claimant is to get anywhere with the argument that has gained some purchase in other jurisdictions, namely that there should be no deduction for contributory negligence where the relevant misconduct/negligence is what the auditor should have detected, then the point would have to be taken in the appellate courts. It would probably have to be taken in the Supreme Court. In my view, there is some force in the argument. It might be developed along these lines:

    a. The reality of cases such as this is that the action is being brought for the benefit of those who are the real stakeholders in a company which is on the brink of insolvency: the creditors[1].

    b. The creditors are betrayed, where auditors fail to detect management misconduct which is detrimental to their interests. They are betrayed both by the defaulting directors, and by the auditor.

    c. When the company sues the auditor, and perhaps also the defaulting directors, it does so (in reality) for the benefit of the creditors.

    d. There would be nothing illogical about treating this situation as being one in which the auditor and the defaulting directors are both liable to the company; in which there are the usual rights of contribution as between the defendants; but in which the company's claims against the auditor should not be reduced by reason of the management misconduct which the auditor has failed to detect.

[1] See the discussion of points arising in this area of the law in the dissenting judgment of Lord Mance in *Stone & Rolls v Moore Stephens* [2009] 1 AC 1391, a case that is now authority for nothing at all, but where the dissenting judgments are still instructive.

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Michael Pooles QC
Hailsham Chambers

"Limitation"
15 mins

hailshamchambers

020 7643 5000
clerks@hailshamchambers.com

Michael Pooles QC

Call: 1978 | Silk: 1999

michael.poolesqc@hailshamchambers.com

Overview

Michael Pooles QC's principal area of practice is that of professional indemnity claims and related coverage issues. He frequently acts for or against lawyers, accountants and surveyors but also acts for or against all manner of professionals including areas such as veterinary science, land management and fish farming. He is frequently instructed in costs matters. His practice also includes general insurance matters of all types and substantial personal injury claims. Michael is consistently ranked as a leading silk in the areas of professional negligence and costs by the leading directories and was *Chambers & Partners'* 2008 and 2016 Silk of the Year for Professional Negligence. Michael was formerly one of editors of the solicitors' chapter of Professional Negligence and Liability.

Professional negligence

Lawyers

Michael is recognised as a leader in the field and has appeared in a number of the highest profile claims against lawyers in recent years.

Accountants & auditors

Michael has acted in a number of claims against accountants and auditors and represented accountants before a variety of disciplinary bodies up to the AADB.

Financial professionals
Michael has represented many financial professionals and has challenged determinations of the FOS before the administrative court.

Insurance brokers
Michael has appeared in many brokers claims and has considerable experience of both professional indemnity and general insurance disputes.

Costs litigation

Michael has experience in costs matters appearing in the Court of Appeal in The Accident Group final costs hearings and in leading cases on costs capping.

Arbitration and Mediation

Michael has frequently been appointed as an arbitrator in respect of insurance coverage and professional indemnity and conduct matters. He has also been retained in this capacity in costs disputes. He deals with matters involving both disputed on paper and full hearings. He is very happy to travel at the convenience of the parties and is highly conscious of the need for speed and economy in arbitration.

Noteworthy cases

Perry v Raleys [2019] UKSC 5. The correct approach to loss of a chance claims in professional negligence.

Cavanagh v Witley Parish Council [2018] EWCA Civ 2232. Owners' obligations in respect of tree inspections.

Edwards v Hugh James [2018] EWCA Civ 1299. Admissibility of after-acquired evidence in professional negligence damages calculations.

Barton v Wright Hassell [2018] UKSC 12. Whether litigants in person are entitled to additional latitude under the Civil Procedure Rules.

Thomas v Hugh James [2017] EWCA Civ 1303. Explanation of limits upon what solicitors might be expected to advise in low value personal injury claims.

Joseph v Farrer [2017] EWHC. (Ch) Solicitors did not owe contractual tortious duties to the claimant beneficiary of an intended inter vivos gift.

Rahim v Arch Insurance [2016] EWHC 2967 (Comm). Solicitor not entitled to an indemnity owing to her fraudulent conduct.

LSREF v Gateley LLP [2016] EWCA Civ 359. Date to be adopted for transactional loss following professional negligence.

CRU v King & Wood Mallesons LLP [2016] EWHC 727 (QB). Solicitors' duties when advising on termination of employment contracts.

Clydesdale Bank v Workman [2016] EWCA Civ 73. Requirements in findings of dishonesty against professional men and women.

Wellesley v Withers LLP [2015] EWCA Civ 1146. Test of remoteness of damage in cases of concurrent professional liability.

Rayner v Wolferstons [2015] EWHC 2957 QB. Date of knowledge under section 11 (4) a of the Limitation Act 1980 and impact upon consequential claim against solicitors.

Wellesley v Withers [2014] EWHC 556 – Test of remoteness of damage where parallel duties owed in contract and tort.

Santander v R A Legal [2014] EWCA Civ 183 – Nature of trusts in conveyancing and relief under s61 Trustee Act 1925.

Harrison v Cluttons [2013] EWCA Civ 1569 – Duty of care of landlords' surveyor to tenant.

Drysdale v Hedges [2012] EWHC 4131 – Landlord's duties under Defective Premises Act 1972.

Davisons v Nationwide [2012] EWCA Civ 1626 – Nature of solicitor's obligations in trust and s61 Trustee Act defence).

Herrmann v Withers LLP [2012] EWHC 1492 Ch, Newey J – Solicitor's conveyancing obligations and measure of damages.

Asiansky v Khazada [2011] EWHC 2831 QB, Andrew Smith J – Summary dismissal of claim against QC.

Kmeicic v Isaacs [2011] EWCA Civ 451 – Duties of householder towards construction workers on site.

Greene & Wood Mclean LLP (in administration) *v Templeton Insurance Ltd* [2010] EWHC 2678 – Defending counsel alleged to have negligently advised the pursuit of a Group Litigation Order, claim dismissed.

Cabvision v Feetham & ors [2009] EWHC 3400 (Ch) Norris J – Costs litigation and breach of duty.

Jones v Attrill (Law Society intervening) [2008] EWCA Civ 1375 – Accident line direct challenges to recoverability.

Taylor Walton v Laing [2008] PNLR 11 – Abuse of process by way of relitigation.

Zurich Professional v Karim [2006] EWHC 3355 – Exclusion of professional indemnity cover due to dishonesty committed or condoned.

Flora v Wakom [2007] 1 WLR 482 – Indexation of periodical payments in injury claims.

The AIDB v (1) PricewaterhouseCoopers and (2) David Donnelly FCCA [2007] – Disciplinary complaints brought about by the AIDB following the collapse of the Mayflower Group.

The Queen on the Application of Rosemary Fogg v The Secretary of State for Defence [2006] EWCA Civ 1270.

Aer Lingus v Gildercroft Ltd [2006] EWCA Civ 4 – Contribution between tort feasors and limitation.

Haward v Fawcetts [2006] UKHL 9 – Accountants / limitation / family business / multiple potential causes of loss / damage / attribution.

Law Society v Sephton [2006] UKHL 22 – Accountants / limitation / solicitor's accounts rules certificates / date of damage.

3M United Kingdom & Anor v Linklaters & Paines (A Firm) [2006] EWCA Civ 530 – Solicitor's negligence / date of knowledge.

Shalson v Russo [2005] Ch 281 – Tracing / offshore trust / test for sham trusts.

Sharratt v London Central Bus [2004] EWCA Civ 575 – Costs / TAG costs group action / referral fees / ATE premiums.

Atack v Lee [2004] EWCA Civ 1712 Costs – CFAs / success rates / cases at trial / judicial discretion.

Manolakaki v Constantinides [2004] EWHC 749 (Ch) – Solicitor / insurance / financial instrument fraud / coverage / non-disclosure.

J.J. Couglan Ltd v Ruparelia Thaker [2004] PNLR 4 – Financial instrument fraud / solicitor / outside ordinary course of business / liability of innocent partner.

Sweetman v Nathan [2004] PNLR 7 – Strike out / fraud on third party / subsequent negligence claim against partners of fraudulent solicitor.

Ezekial v Lehrer [2002] Lloyd's Rep PN 260, C.A. – Limitation S14A knowledge.

Delaware Mansions v Westminster City Council [2002] 1 AC 321 – Nuisance and tree-root damage.

Ingmar GB Ltd v Eaton Leonard Technologies Inc [2001] CMLR 9 – Commercial agents regulations.

Lloyds Bank v Crosse & Crosse [2001] Lloyd's Rep P.N. 452 – Negligent conveyancing / limitation / measure of damages.

Lec (Liverpool) Ltd v Glover [2001] Lloyd's Rep I.R. 315 – Fire insurance policy construction / exclusion cause / blow torch.

Casey v Hugh James Jenkins [1999] Lloyd's Rep P.N. 115 – Solicitor's obligation on loss of legal aid / causation.

Abbey National v Sayer Moore [1999] EGCS 114 – Limitation lenders claim against solicitors.

What others say

"He is phenomenally intelligent yet engages with clients in an approachable and down to earth manner. He is trustworthy and dependable, gets to grips with the detail quickly and has a beautiful drafting style. His expertise is second to none." *Legal 500, 2021*

"He is phenomenally clever and gives you practical and concise advice. He is brilliant at cross-examination and has a calming effect on clients." *Chambers UK, 2021*

"He is quite simply the go-to man for high-profile, high-value, complex professional negligence claims. His submissions were instrumental in winning the case and his gravitas was clear for all to see." *Chambers UK, 2020*

"Very impressive: a true advocate who is quick on his feet and a very good cross-examiner." *Chambers UK, 2020*

"He is very experienced and an extremely popular silk" *Legal 500, 2020*

"A super advocate who has tremendous knowledge of solicitors' negligence and fraud" *Chambers UK, 2019*

"He is a master and has been operating at the top level for a very long time" "Absolutely charming and quick off the mark. Everyone finds him a delight to work with" *Chambers UK, 2019*

"Excellent advocacy and client service" *Legal 500, 2019*

"Top end, especially for solicitors' negligence. He is absolutely excellent" "He provides clear and down-to-earth advice. He spots the key issues immediately and develops a strategy accordingly" *Chambers UK, 2018*

"He has an excellent way of getting to the heart of a case and is a pleasure to work with " *Legal 500, 2017*

“The best professional indemnity barrister there is.” “If we need a case to win, we instruct Michael. What he doesn’t know about professional indemnity isn’t worth knowing.” “Confident, inspiring and reassuring: a superb lawyer with a refined and smooth style.” *Chambers UK, 2017*

“An absolute star” *Legal 500, 2016*

“He is the jewel in the crown of their chambers. He sets everything out in a huge amount of detail and is organised and methodical.” “Very approachable, highly regarded and a very good strategist. He knows the insurance market really well and has a common-sense way of dealing with cases.” *Chambers UK, 2016*

“He has very good instincts and stands by them.” *Legal 500, 2015*

“Confident, inspiring and reassuring, he’s a superb lawyer with a refined and smooth style. ‘He is extremely clever, has very good instincts and stands by them’.” *Chambers UK, 2015*

“Cool headed, steady and extremely experienced.” *Legal 500, 2014*

“A very strong professional indemnity practitioner – there are few people who know the field as well as he does.” *Chambers UK, 2014*

“For any sticky situations he is normally the first one called. ‘Very impressive, he’s great on his feet, and clearly knows his stuff”.” *Chambers UK, 2014*

Further information

Education: The Perse School Cambridge; LLB (London); Scarman Scholar, Inner Temple Jardine Scholar and Treasurer’s prizewinner (1978). Qualified Mediator 2003.

Appointments: Recorder 2000-2012. Master of the Bench of The Inner Temple.

Committees: Former Board Member of the Bar Standards Board; Former member of the Professional Conduct Committee (and the Legal Services Committee) of the Bar Council of England and Wales.

Professional memberships: Professional Negligence Bar Association; COMBAR; South Eastern Circuit; London Common Law and Commercial Bar Association.

Publications & lectures: Former editor of the solicitors' chapter of Professional Negligence and Liability (Informa looseleaf.), Michael Pooles has frequently provided lectures to members of the Professional Negligence Bar Association and others on professional indemnity, policy, conduct, limitation and civil fraud matters.

ICO Data protection registration number: **Z687517X.** Michael Pooles QC is a barrister regulated by the Bar Standards Board. Click here to view **Michael Pooles QC's Privacy Notice**

Limitation – failed litigation and general considerations in 2020

Michael Pooles QC

hailshamchambers
4 Paper Buildings

1. Despite the fact that the Limitation Act has now been in force for 40 years it still provides elephant traps for both the unwary and the wary. In the vast majority of the limitation cases in which I have been involved over the years the parties' files have been endorsed with perceived limitation dates and in many of those cases both parties' dates have proved to be incorrect.

2. The recent decision of the Court of Appeal in *Holt v Holley & Steer* [2020] EWCA Civ 851 provides not only some interesting guidance on limitation issues in the context of the negligent conduct of litigation but also a useful and important discussion on the true ambit of the decision of the House of Lords in *Law Society v Sephton* [2006] 2 AC 543, a case about which I can still feel bitter and twisted 15 years after the event. The judgment in *Holt* also contains a valuable repetition of the court's overarching policy attitude to limitation issues generally.

3. The claim in *Holt* arose out of the negligent conduct of a common or garden matrimonial finance dispute. Mrs Holt's solicitors had allegedly failed to obtain

an appropriate direction for an expert's valuation of certain buy-to-let properties held by herself and her husband and also of her jewellery when the values of both were relevant to the assessment of the overall capital holdings of the couple. Mrs Holt's solicitors had in fact obtained a valuation of the houses shortly prior to the final distribution hearing but had failed to advance an application to rely upon that evidence in the face of opposition from their opponents.

4. A Claim Form in the professional negligence claim was issued more than 6 years after the conclusion of the final matrimonial finance hearing but less than 6 years after the delivery of the District Judge's reserved judgment.

5. In answer to the solicitor's limitation defence Mrs Holt contended that, until the reserved judgment was actually delivered, she had suffered no loss so as to complete her cause of action in tort and to start time running for limitation purposes under section 2 of the Act. Mrs Holt's argument had succeeded in front of the District Judge on a strike out application but that judgment was overturned by the Circuit Judge whose decision was in turn upheld by the Court of Appeal.

6. Mrs Holt's team's primary submission to the Court of Appeal was that matrimonial litigation should be viewed differently to conventional civil litigation because it is far more inquisitorial than a conventional civil law dispute; the family judge has wide discretionary powers to employ in order to achieve a fair distribution of assets and thus can direct the submission of additional evidence

of his own motion. Accordingly, it was argued that, until his judgment was delivered, the District Judge resolving Mrs Holt's financial proceedings could himself have initiated a demand for evidence concerning the value of the properties or of the jewellery.

7. This argument failed. The Court of Appeal considered that there was no fundamental distinction between matrimonial proceedings and other civil litigation and that Mrs Holt had suffered a loss amounting to damage in tort when the chance of producing the necessary additional evidence was lost which occurred, at the latest, at the end of the oral hearing. Indeed, resolving an interesting issue which has been debated for some years, and in respect of which there is a very useful discussion in the latest edition of Flenley & Leech, available at all good bookshops, the Court of Appeal accepted that damage is suffered by a claimant when there is a significant diminution in the ability to obtain an order for the admission of evidence, rather than at the point of total inability to obtain such a direction. This appears to resolve the debate on the time trigger which has been outstanding since the decision of Chadwick LJ in the well-known case of *Khan v Falvey* [2002] Lloyd's Rep PN 369. It means that it is not straightforward to determine the day upon which time started to run and a prudent practitioner must take a "defensive" approach to that issue.

8. The second point of interest in *Holt* is the debate regarding the effect and impact of *Sephton v Law Society.* You will recall that, in that case, the Law Society was seeking to recover from a Solicitors Accounts Rules certifying accountant, sums it had paid out from the Compensation Fund in respect of a dishonest sole

practitioner. The Law Society defeated a limitation defence on the basis that it had not suffered damage, so as to complete the cause of action in tort, until a third party claim had been made against the compensation fund, and accepted, despite the inevitable fact that the removal of funds occasioning that claim, and provision of the negligent Accountant's reports had occurred more than 6 years prior to the issue of the Claim Form (and more than 3 years after the Law Society had knowledge of what had happened). Lord Hoffmann, delivering the leading judgment of the House of Lords, concluded that, until a claim was accepted by the Compensation Fund, any potential loss was entirely contingent and that the cause of action in tort was therefore incomplete.

9. In her case, Mrs Holt sought to suggest that, until final judgment had been delivered in the matrimonial finance proceedings, her loss was just such a contingency. The Court of Appeal set out in some detail the history of the debate on this topic in *Sephton* and rejected this submission. They placed particular weight upon the fact that, in *Sephton*, the Law Society was undertaking a public law obligation and this placed that case in a completely different position. The Court approved and adopted the well-known, and orthodox, statement of the nature of loss in tort delivered by Lord Justice Stephenson in *Forster v Outred* [1982] 1 WLR 86.

10. *Holt* is the latest of a number of efforts over the last 15 years to prey in aid the decision in *Sephton* to postpone a limitation bar. Whilst, so far as I am aware none has yet succeeded, something of a high point was reached last year, prior to the decision in *Holt*, in the case of *Evans v PricewaterhouseCoopers* LLP

[2019] EWHC 1505 (Ch). This was an application for reverse summary judgment in respect of a professional negligence claim arising out of a failed tax avoidance scheme. The defendant accountants contended that the claimants had suffered actionable loss at the time they entered the scheme but the claimants resisted the application on the basis that, until the Inland Revenue rejected the scheme, any loss was contingent. This was held by the deputy judge to be arguable and she therefore rejected the application for reverse summary judgment. Her approach was to categorise the type of claim and she held that this was not a case in which the facts gave rise to a "failed transaction" type of analysis as was seen in classic cases such as *Bell v Peter Brown*. She therefore concluded that it was arguable that the case fell within *Sephton.*

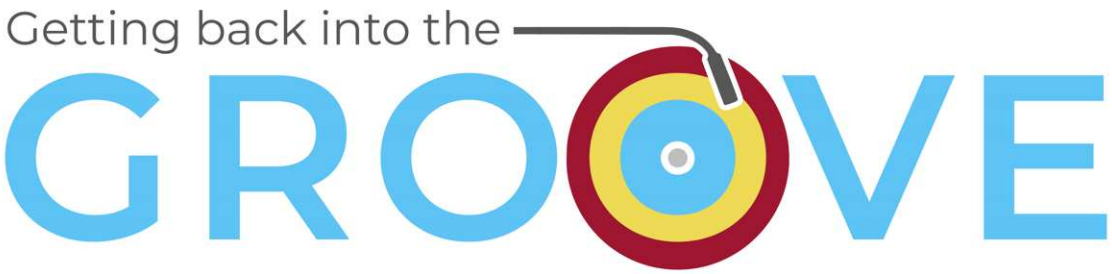
11. In *Holt* the Court of Appeal seems to have adopted a far more restrictive interpretation of contingency and emphasises the public law nature of the claim which the House of Lords was considering in *Sephton* in which the Law Society's obligations were statutory and discretionary and the Compensation Fund rules could have been altered between the earlier events of theft and negligence and the application for a grant. It seems to me that the Court of Appeal has effectively rejected the approach which was adopted by the judge as arguable in *Evans* and this in my view, reinforces the marginal remaining application of the House of Lords decision in *Sephton*. It will no doubt continue to be rolled out where claimants are in extremis but no prudent advisor would rely upon it as a justification for delaying the issue of proceedings.

12. Finally in *Holt*, the Court of Appeal made a number of general statements concerning the application of the law of limitation which are important and which should inform those considering, or fearing, limitation defences. The first is the emphasis which the Court placed upon its conclusion that application of the law of limitation is intensely fact specific. Whilst this is undoubtedly true and the court emphasised the need to focus on the particular facts alleged to give rise to the cause of action in the claimant's statement of case, it expressed no doubt regarding the earlier decision of the Court of Appeal in *Polley v Warner Goodman & Street* [2003] EWCA Crim 1013 in which Clarke LJ famously stated that a claimant "*cannot defeat the statute of limitations by claiming only in respect of damage which occurs within the limitation period if he has suffered damage from the same wrongful act outside that period*". Thus the fact specific concentration is directed to the cause of action rather than elements of the resulting damage.

13. The Court of Appeal in *Holt* also re-emphasised two other highly important general considerations concerning limitation issues. The first is that, whilst the value of a claim in litigation diminished by negligence may have altered from time to time as the litigation progressed, <u>difficulty</u> in calculation at any point of time is not tantamount to <u>impossibility</u> of calculation. The crucial importance of this impact upon the value of the claim was as applicable in *Holt* as in any other civil claim despite the fact that that, in the context of matrimonial finance proceedings, the cause of action cannot not be assigned in any way.

14. The second general consideration addressed by the Court of Appeal is the repetition of the principle that it is a "sensible" public policy to advance rather than retard the accrual of a cause of action in tort with consequent limitation implications, especially when the parallel limitation period in contract has clearly expired at the time of issue of the proceedings (as was recognised by both parties in *Holt*). Out of an abundance of caution I would comment that considerations in the context of the tort of deceit may be different in this regard from those in the tort of negligence.

15. Nevertheless, with the passage of years the Court's disposition to marry up remedies and defences in professional negligence claims, whether they are framed in contract or in tort, seems increasingly evident as appears from this and a number of other cases, such as *Wellesley v Withers* [2015] EWCA Civ 1146 in respect of remoteness of damage. However limitation disputes seem bound to continue.



William Flenley QC
Hailsham Chambers

“Brokers' Negligence”
24 mins

020 7643 5000
clerks@hailshamchambers.com

William Flenley QC

Call: 1988 | Silk: 2010

william.flenleyqc@hailshamchambers.com

Overview

William Flenley QC practises in the fields of professional liability, insurance, regulatory and contract law. He has appeared in a number of leading cases relating to the liability of professionals, including a trio of recent reported cases in the Court of Appeal: *Addlesee v Dentons Europe* [2020] Ch 243 (privilege), *Group Seven v Notable Services* [2020] Ch 129 (dishonest assistance in breach of trust), and *Various Claimants v Giambrone & Law* [2018] PNLR 2 (application of *Saamco*). He is co-author of the best known practitioners' book on claims against solicitors, *Flenley & Leech, The Law of Solicitors' Liabilities*. The first edition was published in 1999 and the fourth edition in August 2020.

William is a former Chairman of the Professional Negligence Bar Association. He has contributed to *Cordery on Legal Services* and *Professional Negligence and Liability,* was deputy editor of *Lloyd's Reports: Professional Negligence*, and has lectured in law at the London School of Economics. He is a Bencher of the Middle Temple. He has been recommended as a leading barrister practising in professional liability by each of the two principal directories for many years and has been shortlisted in the *Chambers Bar Awards 2020* as Professional Negligence Silk of the Year.

William is also a board member of Thames Reach, a homelessness charity.

Professional negligence

Accountants & auditors

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

Insurance brokers

William's work involving insurance brokers includes acting in claims relating to alleged failures concerning business interruption cover, and failures to give proper advice concerning a burglar alarm warranty. In this area, William additionally benefits from his substantial experience of dealing with insurance coverage disputes between insured and insurer.

Financial professionals

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

Lawyers

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

Surveyors & valuers

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

Mediation

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

Insurance coverage

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

Arbitration and Adjudication

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

What others say

'Very willing to listen to the ideas of others and assimilate them as necessary. Very experienced indeed in solicitor negligence and insurance coverage. Gives extremely clear advice. Very good on tactics and thinking through the consequences of strategic decisions.' *Legal 500, 2021*

"His knowledge and ability to get to grips with the evidence is impressive." *Chambers UK, 2021*

"A top QC because he is incredibly intelligent and hard working." *Chambers UK, 2021*

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

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

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

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

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

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

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

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

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

“Technically very strong” *Legal 500, 2016*

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

“‘Extremely tenacious and thorough’”. *Legal 500, 2015*

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

“excellent analytical skills.” *Legal 500 2014*

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

Notable cases

Addlesee v Dentons Europe [2020] Ch 243, Court of Appeal authority on what happens to the legal professional privilege of a company after it has been dissolved.

Group Seven v Notable Services [2020] Ch 129, the most recent Court of Appeal authority on the mental element of dishonest assistance in breach of trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further information

Publications

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

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

A former contributor to *Cordery on Legal Services*.

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

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

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

Education

MA (Oxon) (Jurisprudence) (1985), Open Exhibition

LL M (Cornell Law School, USA), St Andrew's Society of the State of New York Scholar (1986)

BCL (Oxon) (1987), Middle Temple Astbury scholarship (1988)

Mediation training (ADR Chambers)

Appointments

Part-time lecturer in Law, London School of Economics, 1988-89

Bencher of the Middle Temple, 2014

Committees

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

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

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

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

Notes for Talk:

Negligence Claims Against Insurance Brokers in Relation to Losses Suffered Due to Covid 19

William Flenley QC, 17 November 2020.

1. This week, the Supreme Court is hearing argument in the business interruption insurance test case, originally decided in the Commercial Court: *Financial Conduct Authority v Arch*.

2. I'm not going to predict what the outcome will be (other than: probably the decision will be provided reasonably fast). And much of what I say in this talk will have to be reviewed in light of the Supreme Court's decision.

3. I'd like to look at the case from a professional negligence point of view: from the perspective of potential insurance brokers' negligence claims.

4. First: what is business interruption ("BI") insurance? It is insurance cover for businesses. Blair J in *Eurokey v Giles Insurance Brokers* [2014]:

   "the intention of a business interruption policy is to maintain the turnover of the business during the indemnity period following an insured incident [**a 'peril']** so that it can resume trading at its anticipated pre-trading level. The purpose is to put the insured in the same trading position after the interruption as it would have been [in] had the loss not occurred."

5. BI policies can include disease as one of the insured perils, or triggers for cover.

6. Any business which suffers loss due to the covid pandemic should be asking (i) does it have insurance cover? If so (ii) does it have cover which will cover the losses it has suffered due to the pandemic? [This may depend on the Supreme Court's decision.] If not, (iii) if it used insurance brokers to advise it on its insurance cover, can it, in the alternative, claim the loss from the brokers?

7. Structure of such a brokers' negligence claim:

   - Duty of care owed
   - Breach of duty due to negligence/failure to take reasonable care.
   - The breach of duty caused loss: generally that, had there been no negligence, the insured would have had insurance which *did* cover its loss, whereas in fact it has either no cover, or cover which does not cover its loss.
   - Quantum: amount which would have been paid out under the alternative policy which it would have had, absent negligence.

8. Re the third stage: businesses may in some cases have to wait for the Supreme Court's decision. If a business's loss is in fact covered by its policy then there will of course be no claim against brokers, and no need to consider one.

9. A claim against a business's brokers would be relevant if

    - The business does not in fact have cover, but
    - It can be shown that there was available, in the market, insurance cover which *would* have paid out for the type of loss which the business has suffered; but that the business did not in fact have that kind of cover. Again, this depends on the third point at para.7 above. So businesses may have to await Supreme Court's decision. [Eg if the Supreme Court in effect holds that practically none of the policies available in the market would have paid out for losses caused by Covid 19, then it may be very difficult to succeed in brokers' negligence cases re BI.]

10. But: if a business can satisfy the last two points (which go to causation), then it may be worth considering a claim against brokers. The question will be whether, as a result of negligence on the part of the broker, the business ended up without cover which it otherwise would have had, and which would have paid out for the losses it has suffered.

11. Re BI one can think of two issues on duty and negligence:

    (a) Is it a case where the business did not have BI cover *at all*. Or
    (b) Is it a case where the business *did* have BI cover, but not the right kind of cover to pay out for losses caused by Covid 19?

    In (a), the question will be whether the brokers advised the insured to obtain BI cover at all.

    In (b), issue is likely to be whether the brokers advised the insured to obtain, alternatively of the existence of, the right kind of cover which would have paid out.

12. NB That in (b), cases where the insured always had *some* BI cover, it may be hard for a broker to argue that they had no duties in relation to BI cover at all; in this sort of case one would expect that a court might hold that the broker did have *some* duty re BI cover; and the issue may be as to the *extent* of the broker's duty to advise re BI and the different kinds of BI cover. (The *Eurokey* case was a case of that kind.)

13. The extent of duty to advise is likely to depend on the sophistication of the client, and the number of times the broker had visited the client.

14. The general duty of a broker is to take reasonable care to ascertain the kinds of risk to which the insured is exposed and then to recommend cover which will respond to those kinds of risks.

15. For present purposes, one relevant kind of possible BI cover is cover where the insured peril is "infectious or contagious diseases".

16. Re those, NB that *Riley on Business Interruption Insurance* (10th ed., 2016), observes at 11.20 that

    "The risk of business interruption loss arising from [among other contingencies, infectious diseases] is of particular concern to owners of hotels, boarding houses, guest houses, public houses, holiday camps, caravan sites, exhibition halls, private hospitals, nursing homes and … restaurants and catering contractors."

    Comment: that suggests that there may be a particular duty on brokers working for those types of organisations to suggest BI cover for infectious diseases.

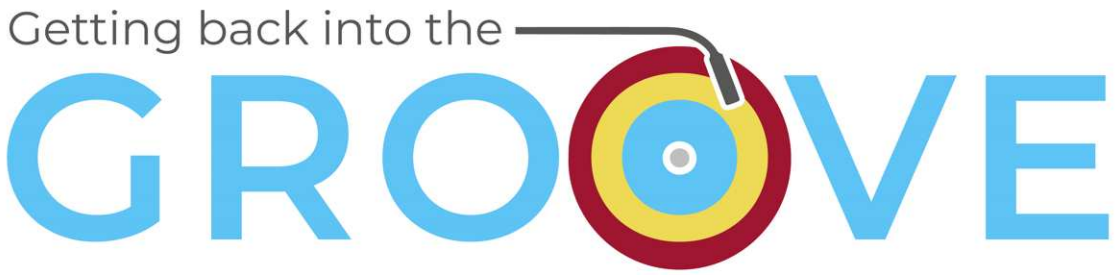
17. The editor of *Riley* goes on to say that in 1989 the Association of British Insurers issued a recommended wording which can be applied to those types of business.

18. Further, note that it appears that BI policies covering infectious diseases tend to be of 2 types:

    (a) Policies covering *specified diseases*. Ie the policy covers loss suffered due to a list of specific diseases set out in the policy. To my mind those are unlikely to cover Covid 19, since until January 2020 no one had heard of it, and after January 2020 insurers would have wished to avoid having to cover it.

    (b) Policies covering *notifiable diseases*. Those are usually diseases which the government makes into a notifiable disease. Covid 19 became a notifiable disease in England on 5 March 2020, under the Health Protection (Notification) Regulations 2010.

19. At the moment, it appears that, based on the High Court's decision, those businesses whose policies cover business interruption due to notifiable diseases may well be able to claim, at least in relation to the period after 5 March 2020. If that remains the position after the Supreme Court's decision, then those have businesses of the kind mentioned above in para.16, which do have BI cover, but where the cover is limited to *specified diseases* and not *notifiable diseases, may* be in a position, depending on the circumstances in which brokers advised them, to claim against the brokers.



Luka Krsljanin
2 Temple Gardens Chambers

"The Future of Disclosure? The Pilot Regime in the Business & Property Courts"

26 mins

LUKA KRSLJANIN

Call 2013

Get in touch

lkrsljanin@2tg.co.uk
+44 (0)20 7822 1200

"Very good technically, very thorough and approachable "
(Chambers UK)

Practice Overview

Luka specialises in commercial disputes, in which he is regularly instructed both as sole counsel and as part of a counsel team. He regularly appears in the Business & Property Courts.

His practice encompasses general contractual disputes, shareholder disputes and cases involving allegations of fraud and conspiracy. Many of his cases arise in the sports context, and he is identified by the Legal 500 as a "***rising star***" in sports disputes, who is "**particularly well known for his work in football – especially contractual claims – he has a wonderful bedside manner that is totally reassuring to clients, together with a clear, deep knowledge and understanding of sports law. Luka will go far in this field.**"

A specialist in the field of disclosure in all civil litigation, he has acted (led and unled) in leading cases before the High Court and Court of Appeal on issues of privilege, pre-action disclosure and obligations under the Disclosure Pilot in the Business & Property Courts.

He also frequently acts in a range of civil and commercial cases with a cross-border element, often engaging complex questions of foreign law. He also has experience in complex professional (including clinical) negligence disputes.

He is ranked in numerous areas of practice in both the Legal 500 and in Chambers & Partners, where he has been praised as "**extremely intelligent and assiduous**", "**unbelievably unflappable**", and "**hard-working and diligent**".

Practice areas

Commercial Dispute Resolution
Sport
Private International Law
Travel & Jurisdiction
Insurance & Reinsurance
Clinical Negligence
Professional Negligence

Memberships

PIBA
Guernsey International Lawyers Association

Qualifications

MA (Cantab)
BVC (Certificate of Honour)

Education

Cambridge University

LUKA KRSLJANIN

Commercial Dispute Resolution

Both led and as sole counsel, Luka regularly advises and acts in cases concerning all manners of commercial disputes, most commonly in the Sports context, but also more generally in the Joint Venture, Partnership and Agency contexts. He has represented high-profile clients in high value claims, including the owners of West Ham United Football Club, Sheffield United Football Club and Stade Rennais Football Club.

He specialises in tackling complex issues of disclosure, and has appeared in two of the leading cases of recent years on disclosure in commercial cases. He also has particular interest and experience in tackling the controversial issue of implied obligations of good faith in English contract law.

Current and Recent Work

***Re R-Squared Holdco Limited* [2020] EWHC 23 (Ch)**:
Luka acts for a number of Respondents to a s.994 Unfair Prejudice Petition, in which the Petitioners allege that other shareholders have attempted unlawfully to secure the Petitioners' shareholding at nominal value including by instituting disciplinary proceedings against the Petitioners to oust them from the company. The case involves complex questions of disclosure – including the question of a shareholder's entitlement to inspect legal advice given in respect of ongoing disciplinary proceedings against that shareholder. The judgment noted above provides valuable guidance on the approach to interim injunctions in the context of an Unfair Prejudice Petition.

***Stade Rennais F.C. v Sports Invest Ltd* [2020-]**:
Luka acts for the French Ligue One Football Club Stade Rennais, owned and controlled by the well-known Pinault family, the owners of such world-famous companies as Gucci, Yves Saint Laurent and Balenciaga. Stade Rennais are alleged to have induced a breach of contract by 'poaching' a high-profile agent/manager from Sports Invest, an English-based football agency, to serve as their Director of Football. Complex disclosure issues are concerned, in particular with regard to the limits of privilege under French Law. The case proceeds to trial in 2020.

DongGuan Limited & Butt v Vantage Aviation Limited & Newton [2020]:
Luka acts (unled) in this multimillion pound dispute concerning a contract by which an English aviation company agreed to provide sophisticated training to helicopter pilots employed by the Chinese Ministry of Transport.

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

In addition to issues of contractual construction, the case involves allegations of undue influence and fraud.

***Sheffield United Ltd v UTB LLC & Ors* [2019] EWHC 2322 (Ch)**:
Luka acts for Sheffield United Ltd in this dispute concerning the ownership of the Club as between two 50% co-owners: Mr Kevin McCabe and Saudi Prince Abdullah. The case led to a landmark judgment on the Disclosure Pilot in the Business & Property Courts from the Chancellor, Sir Geoffrey Vos **([2019] EWHC 914 (Ch))**. The substantive trial of the case, which lasted for 6 weeks, has also led a major judgment from Fancourt J on matters including: implied terms, obligations of good faith, unfair prejudice, and conspiracy **([2019] EWHC 2322 (Ch)).**

***WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652**:
Luka acted on behalf of the successful Appellant in this landmark Court of Appeal case on the limits of litigation privilege. The appeal came in the context of a claim brought by the owners of West Ham Football Club against the leasehold owner of the London Stadium (the former Olympic Stadium). West Ham alleged that E20, the Stadium owners, were unlawfully preventing West Ham from accessing certain seats in the Stadium, and therefore depriving West Ham of substantial ticketing revenue. The claim involved allegations that E20 has failed to act in good faith. The case involved numerous significant judgments including that of the Court of Appeal noted above. In particular, a judgment of Snowden J on the redaction of commercially sensitive documents **([2018] EWHC 2578 (Ch))** and a judgment on applications for third party disclosure **([2018] EWHC 2971 (Ch)).**

Sport

The Legal 500 identifies Luka as one of four "***rising stars***" in the field of Sport, noting in particular his strengths in litigating contractual disputes in the football context (see the bio above). He is junior counsel of choice for West Ham United Football Club, the well-known Premier League Football team, and has represented them in a series of disputes, including in their high-profile dispute with the owners of the former Olympic Stadium; a claim valued at over £100 million.

In addition to his comprehensive commercial experience, Luka also deals with Sports cases involving injury and regulatory matters, and therefore is well-versed in cross-examining experts on complex scientific and medical issues in a sporting context.

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

Current and Recent Work

***Jones v Fulham Football Club* [2020-]:**
Luka acts for the well-known Football Club, Fulham FC, in this claim which relates to an alleged assault on the football pitch. The Claimant alleges that a dangerous tackle was made with the intention to harm and humiliate, whereas the Defendant asserts that the tackle was a legitimate and reasonable tackle made in accordance with reasonable practice.

***Stade Rennais F.C. v Sports Invest Ltd* [2020-]:**
Luka acts for the French Ligue One Football Club Stade Rennais, owned and controlled by the well-known Pinault family, the owners of such world-famous companies as Gucci, Yves Saint Laurent and Balenciaga. Stade Rennais are alleged to have induced a breach of contract by 'poaching' a high-profile agent/manager from Sports Invest, an English-based football agency, to serve as their Director of Football. Complex disclosure issues are concerned, in particular with regard to the limits of privilege under French Law. The case proceeds to trial in 2020.

***X v Y* [20201]:**
Luka acts in a confidential dispute concerning a Football Club, in which it is alleged that the actions of an individual have caused reputational damage to the brand of the Club.

***Sheffield United Ltd v UTB LLC & Ors* [2019-]:**
Luka acts for Sheffield United Ltd in this dispute concerning the ownership of the Club. The dispute arises out of an Investment and Shareholders Agreement, pursuant to which Sheffield United Ltd (a limited company controlled by English businessman Kevin McCabe) and UTB LLC (a limited company controlled by Saudi Prince Abdullah Bin Mossad Bin Abdulaziz Al Saud) held 50% of the shares in the Football Club's holding company. UTB claims it is entitled to obtain Sheffield United Ltd's shares in the company, and the latter counterclaims and also pursues an unfair prejudice petition by which it asks the Court to make a buyout order in its favour. The case involves legally significant questions as to implied obligations of good faith.

***WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652:**
Luka acted for the successful Appellant, (led by Paul Downes QC) in this landmark appeal concerning the scope of litigation privilege. Luka's client succeeded in the appeal, with a unanimous Court of Appeal (Sir Terence Etherton MR, Lewison LJ and Asplin LJ) rejecting the Respondent's argument that it was entitled to redact and conceal evidence of discussions between Board Members regarding a potential settlement of the claim. The Court of Appeal held that such discussions, which were in the context of

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

anticipated litigation but not directed at obtaining advice or evidence for that litigation, were not protected by litigation privilege.

***West Ham v E20 Stadium LLP* [2016-2018]:**
Luka acted on behalf of the owners and operators of West Ham United, in their claim against the leasehold owner of the London Stadium (the former Olympic Stadium). West Ham alleged that E20, the Stadium owners, were unlawfully preventing West Ham from accessing certain seats in the Stadium, and therefore depriving West Ham of substantial ticketing revenue. The claim involved allegations that E20 has failed to act in good faith, and so invokes complex consideration of good faith issues. Prior to its settlement at trial, the case involved numerous complex case management issues, and interim applications which led to valuable High Court Judgments on **the redaction of commercially sensitive documents ([2018] EWHC 2578 (Ch))** and **applications for third party disclosure ([2018] EWHC 2971 (Ch))**.

Private International Law and Travel

Luka is ranked in both the leading legal directories as a leader in the field of private international law/travel. The Legal 500 says he is "***Extremely intelligent and assiduous, and has good experience of travel law and jurisdictional issues. Punches above his weight.***", whilst Chambers UK calls him "***unbelievably unflappable***", "***very astute and confident***" with "***a very impressive knowledge of foreign claims***".

Luka routinely acts in high-level Conflict of Laws disputes before the English Courts. He has worked on landmark cases before the High Court, Court of Appeal and Supreme Court.

Current and Recent Work

***Rasmussen and IQE Plc v Zurich Espana* [2020]:**
Luka acts as sole counsel for the Defendant in this case, valued at over £20 million, which arises out of the death of a man following a cycling accident in Spain. The Deceased was CFO of a cutting-edge technology company, producing materials at the forefront of the Artificial Intelligence revolution, giving rise to substantial disputes concerning the claim for loss of earnings.

In addition to claims brought by the estate and dependants, a legally novel claim was brought by the Deceased's former employer for losses sustained as a result of the death of their CFO and the associated market impact, estimated in the sum of £2.2 million. Luka prepared and drafted the

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

jurisdiction challenge to this claim, and days before the hearing the company discontinued its claim.

***Challenor v Zurich Espana* [2020]**:
Luka acts for the Spanish Defendant in this multimillion pound claim arising out of a serious road traffic accident between a motorcycle and a four-by-four vehicle in Menorca, leaving the Claimant tetraplegic. The Claimant motorcycle driver concedes that the accident was caused solely by his own negligence, but claims that he is nonetheless entitled to recover under the insurance policy. Complex questions of Spanish insurance law are engaged.

***ABC v AXA France* [2020]**:
Luka acts (led by Nina Goolamali QC) in this claim arising out of a serious road traffic accident in France which caused life-altering injuries to a young child. French law applies and accordingly complex questions of French quantum law arise in this multi-expert, multimillion pound claim, estimated to be worth £20 million.

***Vilson v Suravenir Assurances SA* [2018]**:
Luka acted (as sole counsel) for the successful Appellant in this reported case concerning the English Court's powers to stay proceedings where parallel proceedings arising out of the same serious incident are brought in a foreign Court.

***Spring v EvKB* [2017]**:
(led by Charles Dougherty QC), an ongoing High Court case in which the Claimant, a former soldier stationed in Germany in the 1990s, seeks to claim in respect of injuries suffered during training.

***Howe v MIB* [2016]**:
(led by Marie Louise Kinsler), a High Court case on the issue of limitation in the context of a claim brought against the Motor Insurers Bureau relating to an accident abroad. Luka appeared for the successful Defendant. The Claimant is now seeking permission to appeal.

***Brownlie v Four Seasons Ltd* [2015]**:
(led by Howard Palmer QC and Marie Louise Kinsler), a Court of Appeal case concerning jurisdiction and choice of law in contract and tort.

***Bianco v Bennett* [2015]**:
(led by Marie Louise Kinsler), a High Court case in which Luka and Marie Louise succeeded on an important point of law regarding foreign causes of action in the English Courts.

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

Clinical Negligence

One of only two "***Rising Stars***" identified in the Legal 500 (2021), Luka is praised as "***highly intelligent, hard-working and diligent***" and "***punching way above his year of call***". He is also ranked in Chambers UK for his work in the field.

He has acted unled in High Court trials, and acted for the successful Defendant both in the High Court and in the Court of Appeal in ***Manzi v King's College Hospital NHS Foundation Trust*** [2018] EWCA Civ 1882, an important judgment on adverse inferences and fact-finding, as well as for the successful Respondent in the Privy Council in ***Williams v Bermuda Hospitals Board*** [2016] UKPC 4 (led), a leading authority on the law of causation.

Current and Recent Work

Luka frequently appears in trials, and has built up a reputation for his strong cross-examination of medical experts. His recent trial successes include the following:

Austin v Dorset County Hospital NHS Foundation Trust & Others **[2019]**:
Luka represented the First Defendant in this complex case relating to gynaecological treatment. The trial was originally listed for a full week's hearing. On the third day of trial, Luka cross-examined the Claimant's expert, and drew from him vital concessions which were fatal to the Claimant's case. The Claimant discontinued immediately after the cross-examination, and agreed to pay the Defendants' costs.

Hindmarsh v Norwich County Hospitals NHS Trust **[2018]**:
Luka acted for the successful Defendant in this case concerning spinal surgery carried out on the Claimant. A spinal fixation device had failed shortly after complex spinal surgery, and the Claimant alleged that this was the result of wrongful surgical technique. Under Luka's cross-examination, the Claimant's expert conceded that he had fallen into the "Sherlock Holmes fallacy" (the erroneous approach to causation rejected by the House of Lords in the famous case of ***The Popi M***). The Judge found for the Defendant on breach and causation.

Teasdale v Royal Free London NHS Trust **[2017]**:
Luka represented the successful defendant in this ophthalmology case where breach of duty had been admitted. Causation was firmly disputed and HHJ Baucher singled out Luka's cross-examination of the Claimant's

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

expert, a Professor of Opthalmology, as "*exemplary*", as essential in resolving the case in the Defendant's favour

***Sinclair v Colchester Hospital NHS Foundation Trust* [2017]**:
Luka represented the successful defendant in this Fatal Accidents claim arising out of cardiac treatment. The claim was pleaded in the value of several hundreds of thousands of pounds. The Court found for the Defendant on breach of duty and also on causation.

Professional Negligence

Luka frequently acts in professional negligence matters which closely relate to his commercial practice: he has particular experience of dealing with solicitors' negligence cases as well as in complex technology and construction matters.

***Aerospace Resources Ltd v RGV Aviation Ltd* [2020]**:
Luka acts for the Claimant in this case; a sophisticated business providing aerial surveillance solutions to the oil and gas sector, which purchased an Aircraft from the Israeli Armed Forces. The Defendant is a company specialising in providing inspection and surveying services for Aircraft. The Claimant alleges that the Defendant negligently failed to detect structural damage with the Aircraft, resulting in substantial losses.

***A v B* [2018]**:
Luka is instructed in this case concerning an offshore attorney alleged to have negligently mishandled client funds, resulting in losses of tens of millions of pounds.

***Agouman v Leigh Day* [2016] EWHC 1324 (QB)**:
Luka acted in this major professional negligence claim concerning the disbursement of settlement monies to millions of villagers in the Cote d'Ivoire. Luka acted at numerous interlocutory stages, including in a hearing against a QC regarding contested aspects of expert evidence on banking and finance matters.

***Atang v Newatia* [2016]**:
Luka is currently instructed as sole counsel in a professional negligence claim worth $500,000. The claim relates to the provision of negligent investment advice by a senior, experienced financial investment adviser. As such, Luka has valuable experience of dealing with complex allegations of professional negligence, including breach of the COBs rules.

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

Recommendations

Chambers UK 2021
"He's very organised and is a thoughtful advocate." "He's always helpful, really sharp and has incredible attention to detail. He goes above and beyond for his clients." "Excellent on his feet in cross-examinations."

Chambers UK 2021
"Professional, proactive and always available to help. He is excellent both in court and on paper." "A confident and very polished advocate."

Legal 500 2021
“Particularly well known for his work in football - especially contractual claims - he has a wonderful bedside manner that is totally reassuring to clients together with a clear deep knowledge and understanding of sports law. Luka will go far in this field.”

Legal 500 2021
“Extremely intelligent and assiduous, and has good experience of travel law and jurisdictional issues. Punches above his weight.”

Legal 500 2021
“Highly intelligent, hard-working and diligent.”

Chambers UK 2020
"He has a very impressive knowledge of foreign claims"

Chambers UK 2020
"He is very astute and confident"

Chambers UK 2020
"He is unbelievably unflappable"

Chambers UK 2019
“A Confident and Robust Advocate”

Chambers UK 2019
“Very approachable and incredibly helpful”

Chambers UK 2019
“Thinks Outside the Box...legally but also tactically”

Chambers UK 2018
“A Bright and Self-Confident Advocate”

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

LUKA KRSLJANIN

Chambers UK 2018
"Very good technically, and very thorough"

2 Temple Gardens
London EC4Y 9AY
T +44 (0)20 7822 1200
F +44 (0)20 7822 1300

clerks@2tg.co.uk
www.2tg.co.uk

The Future of Disclosure? The Pilot Regime in the Business & Property Courts

Key Cases

Castle Water v Thames Water [2020] EWHC 1374 (TCC): the meaning of "known adverse documents"

McParland v Whitehead [2020] EWHC 298 (Ch): Lists of Issues for Disclosure, Disclosure Guidance Hearings, Models of Extended Disclosure

Lonestar Communications Corporation LLC v Kaye & Ors [2020] EWHC 1890 (Comm): Models of Extended Disclosure (with focus on Model C)

Vannin Capital PCC v RBOS Shareholders Action Group Ltd and others [2019] EWHC 1617 (Ch): further disclosure/varying orders for Extended Disclosure

Ventra Investments Ltd v Bank of Scotland plc [2019] EWHC 2058 (Comm): further disclosure/varying orders for Extended Disclosure

Agents' Mutual v Gascoigne Halman Ltd and another [2019] EWHC 3104 (Ch): further disclosure/varying orders for Extended Disclosure

Brake & Ors v Lowes & Ors [2020] EWHC 538 (Ch): further disclosure/varying orders for Extended Disclosure (evidence in respect of the same)

Maher v Maher and another [2019] EWHC 3613 (Ch): the timing of applications

Further Resources

"Disclosure pilot monitoring in the Business and Property Courts, third interim report" by Professor Rachael Mulheron

The Disclosure Working Group's "*Redline - revised PD51U 15 Sept 2020 (Final)"*

"*The Disclosure Pilot Scheme: Views From The Ground*" by Johnny Shearman and Graham Jackson (first published in PLC Magazine, June 2020)

LUKA KRSLJANIN
2 Temple Gardens
November 2020

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Imran Benson
Hailsham Chambers

"The FCA Test Case"
17 mins

020 7643 5000
clerks@hailshamchambers.com

Imran Benson

Call: 2005

imran.benson@hailshamchambers.com

Overview

Imran is an experienced litigator who is well known for a robust but charming style of advocacy and excellent client service. He specialises in professional liability, commercial litigation, costs, insurance disputes, cyber law and disciplinary and regulatory controversies. He appears in domestic and foreign courts, before various regulators and a range of arbitration tribunals. He gives clear and straightforward advice even in the most complex and nuanced of cases.

He is ranked in the legal directories for both professional negligence and costs and is instructed by national, City and international law firms, as well as institutional clients and HNW individuals.

Imran is willing to consider direct public access instructions in appropriate cases.

Professional liability

A substantial part of Imran's practice involves professional liability work focusing on lawyers, property and financial professionals.

Lawyers

Imran's lawyer's liability practice is extensive. It typically includes: all kinds of property related disputes, breach of trust, warranty of authority, fraud, litigation gone wrong and failed non-contentious transactions such as business sales, tax avoidance, art purchases and wills claims. He is currently acting for a property firm in connection with a £5m claim and acting against a Top 30 Firm in a substantial loss of a chance claim. He is due to spend the whole of November 2019 defending a commercial law firm at trial in connection with an £8m claim arising from a company demerger. He acts for and against other barristers, when necessary.

Property

Imran has a deep knowledge of the property professional sector. He spent 3 years as a member of the RICS Conduct and Appeals Committee, which disciplines RICS members and has first-hand experience of supervising the management of a substantial central London commercial estate.

He has acted in cases involving all the leading London based international firms. This typically involves alleged negligent valuations of development sites with large GDVs (£1m – £120m) or valuations of industrial, retail, residential, office and alternative properties such as casinos, hotels, utilities, student housing and data centres. He deals in related claims involving LPA Receivers and distressed sales.

His practice also includes complaints about advisory services and property management work. He has been instructed in a range of high value and complex claims (£20m – £60m) concerning the valuation of City of London office blocks and the effectiveness of associated debt securitisation.

He also regularly deals with a large array of construction related professionals including architects, quantity surveyors, structural engineers, monitoring surveyors etc.

Finance

Imran's work relating to financial professionals covers auditors, accountants, actuaries, IFAs, tax advisors (including investment scheme promoters), pension professionals and insurance brokers.

Recent cases have involved inappropriate advice and investments, claims involving private equity, inadequate accounts reporting, failed tax avoidance schemes and currency exchange failures. He acts both for and against such professionals and is adept at reading financial statements. Many of these claims involve cross claims against other professionals – in respect of which he has broad and deep experience.

Costs litigation

Imran has a busy contentious and non-contentious costs practice typically involving City firms. Recent instructions have come from firms such as Withers, Macfarlanes, Dechert, Squire Patton Boggs and Morgan Lewis. He is often instructed to help formalise complex fee arrangements at an early stage of a claim, or when a major problem has surfaced. He regularly appears in the SCCO, before regional costs judges and on appeal. He has defended the fees of a number of City firms, including one in dispute with a former hedge fund client and another bringing large-scale group litigation. He also acts in non-party cost order applications.

He has acted and continues to act for High Net Worth individuals, assisting them and their staff with the unravelling of litigation.

Imran also regularly advises on and drafts alternative funding arrangements. Alternative funding is attractive to a range of lawyers and clients but can be unfamiliar territory for some. He has been instructed in such matters by the London office of a well-known US firm negotiating with a corporate client in a proposed follow-on claim, a City boutique firm assisting a client with renegotiation of bank financing and a large debt collection firm looking to enter into a Damages Based Agreement.

Commercial law

Imran has a broad, busy and substantial company and commercial disputes practice. Typically this arises out of fraud, SPA disputes, failed domestic and international investments or general contractual or quasi-contractual disputes. LexisNexis PSL regularly ask him to contribute to their information law materials – he has an excellent knowledge of the law of confidence as it applies to commerce.

As examples of recent work:

- *Cool Seas v Interfish* [2018] EWHC 2038 – 17 day trial before Rose J concerning a s.994 petition and cross-petition with cross allegations of fraud relating to a £multi-million business. Sole counsel against QC and Junior
- acting for a group of claimants in the VW NOx Emissions Scandal Group Litigation
- acting for investors in a failed AIM company bringing claims for deceit worth £several million against the controlling mind of the company
- an $87m claim concerning the sale of oil rigs to Iranian entities in breach of sanctions

Imran regularly obtains and resists a wide range of injunctions: domestic and international freezers, search orders and employee anti-poaching injunctions.

He has a deep interest in the art market and has worked on matters concerning auctioneers, art ownership, theft and damage claims.

Insurance

Imran regularly acts in insurance disputes concerning coverage and brokerage.

Recent work has included advising a number of insureds in relation to BII Covid claims, a successful defence at arbitration of a declinature decision by a Legal Expense Insurer on the basis of (amongst other things) provocation by the insured. He has advised on aggregation rights arising out of innocent misselling of a fraudulent investment scheme. He regularly advises on the solicitor's and ICAEW minimum terms. He is involved in fights about successor practices.

He advises on coverage and recently successfully defended QBE on a declinature decision both at arbitration and on subsequent appeal to the Commercial Court.

However, his insurance expertise is much broader. He has been involved in a number of fire/property damage claims, recovery claims and a full range of D&O disputes – especially involving fraud. He knows the importance of meticulous attention to detail and the need to take swift and robust action.

He has acted on disputes between broker and underwriter about commission, premium, validation and IPR. He has knowledge of (and indeed written a chapter on) Takaful (Islamic insurance). He acts in broker's negligence claims and is very familiar with the difficult tactical decisions to be made in such cases.

Disciplinary and Regulation

Imran appears in front of a range of disciplinary tribunals. As a former member of the RICS Conduct and Appeals Committee he has deep knowledge of the regulatory world. He has provided discrete advice and robust representation to solicitors facing dishonesty charges, accountants/auditors facing charges of incompetence and accepts instructions before the ARB, IFOA, ICAEW, FRC, SDT, ACCA etc as well as truly specialist tribunals such as Lloyds, AIM and others. He is a contributor to ARDL's quarterly briefings.

Arbitration and international

Imran has an arbitration practice involving both ad hoc and the commonly used rules. He has been to, amongst other places, Mauritius, the Middle-East and Channel Islands for professional reasons and is happy to travel where appropriate.

Cyber & information technology

Imran has recently seen a number of instructions involving cyber and technology matters. This relates to cyber fraud, SEO optimisation, alleged failures regarding IT contracts and website development problems. He is familiar with many of the technical and legal concepts which apply in this developing area. His knowledge of costs means he can handle both liability and funding issues in this developing area.

Recent work has included domain name disputes, email interception, website development, fees disputes morphing into negligence claims and digital marketing problems (including social media influencer fraud).

What others say

“An engaging litigator, good client-focus, quick thinking, and erudite.” *Legal 500, 2021*

“Imran is exceptionally bright, attentive and very commercial; ensuring the legal position and the client’s commercial objectives are considered in tandem. A very strong junior who provides forthright and clear advice.” *Legal 500, 2021*

“He is very talented and produces strong pleadings but is also very good to deal with, and is happy to explore alternatives to trial.” *Chambers UK, 2021*

“A good advocate with a nice calm style, who’s highly persuasive.” *Chambers UK, 2021*

“He’s technically very, very good and he offers clear advice.” *Chambers UK, 2021*

“Imran is approachable and provides succinct advice which, whilst offering different options, doesn’t sit on the fence.” *Chambers UK, 2020*

“He is a super barrister, who is articulate, bright and very sociable.” *Chambers UK, 2020*

“He is a skilled advocate who is very good at handling the judge and his opponent.” *Chambers UK, 2020*

“A very commercial barrister who has been growing in stature in recent years.” *Chambers UK, 2020*

“Able to get the gist over to the judge clearly, swiftly and persuasively” *Legal 500, 2020*

“He is strong on professional negligence cases” *Legal 500, 2020*

"He is very bright, tenacious, and he stands by his advice. A go-to junior for solicitor professional negligence claims" "He carefully considers the issues and provides clear, pragmatic advice" *Chambers UK, 2019*

"He has a very good court manner" "He is a good advocate with great technical knowledge" *Chambers UK, 2019*

"Excellent on the law and knows how to convince clients to accept sensible commercial advice" *Legal 500, 2019*

"Brilliant" *Legal 500, 2019*

"Works in a very collaborative way and is happy to pick up the phone and chat" *Chambers UK, 2018*

"A highly regarded up-and-coming junior" "Provides commercial and clear advice" *Legal 500, 2017*

"His advice is very practical and he gives us exactly what we need." "He gave a really good … performance." *Chambers UK, 2017*

"He is very commercial and sees the whole picture." *Legal 500, 2016*

"He is very efficient and good at dealing with slightly tricky personalities. He has skill above his level of call and is someone I'm very happy to bounce ideas off." *Chambers UK, 2016*

"He's an outstanding junior with great communication skills." *Chambers UK, 2016*

"He is extremely thorough and provides well-reasoned advice and guidance." *Legal 500, 2015*

"A great addition to any team facing a significant court battle over costs." *Legal 500, 2015*

Recent cases

De Sena v Notaro [2020] EWHC 1031 – defence at month long trial of a firm of solicitors facing a £5m+ fiduciary duty claim connected with a corporate demerger transaction. Claim dismissed with indemnity costs.

Malmsten v Bohinc [2019] EWHC (1386) (Ch) – first proportionality decision at High Court level. Successfully reduced the opponent's bill from £47,500 to £15,000.

Wimalarathna v Nationwide Building Society (2019) – successful recovery of money taken from customer's bank account, by a claim under the Payment Services Regulations, which claim had previously been denied by the FOS.

Confidential v X – LEI coverage arbitration for insurer relying on, amongst other things, provocation clause.

Hislop v Perde [2018] EWCA Civ 1726, [2019] 1 WLR 201 – leading CA case on how Part 36 applies to fixed costs cases.

Lewis Thermal v Cleveland Cable [2018] EWHC 2654 – security for costs application against impecunious *SPVAI Amoudi v Glenside Holdings* [2018] 2 WLUK 240: costs recovery for pre-action work in the FTT.

Cool Seas v Interfish [2018] EWHC 2038 – 17 day trial before Rose J concerning a s.994 petition and cross-petition with cross allegations of fraud relating to a £multi-million business. Sole counsel against QC and Junior.

Oldham v QBE [2017] EWHC 3045 (Comm) – successful defence on appeal from an arbitration about reimbursement of defence costs paid by an indemnity insurer pending a coverage dispute in which QBE ultimately succeeded.

DB v Jacobs [2016] EWHC 1614 – effect of Part 36 offers on Calderbank offers.

Healey v Shoosmiths LLP [2016] EWHC 1723 – 6 day trial, €2m claim concerning purchase of a super-yacht.

Carey v Healys LLP (April 2016 – Central London CC) – 5 day trial, successful defence in claim brought by property developer concerning advice on title and related funding of development site.

Confidential (Jan 2016) – acted for insolvent bank in claim against leading valuation firm re GDV of new-build Surrey mansion. Settled for £2.85m plus costs.

Heatherville v Knight Frank (2015, HHJ Bird, Manchester Mercantile) – acted for defendant in casino valuation claim. Claim discontinued with costs shortly before opening.

Southern Rock v Brightside (2014-2015) – bitter £multi-million litigation with leaders on both sides in many actions in different Courts concerning insurer/broker dispute about claims handling, brokerage fees, misuse of intellectual property rights etc. Settled on satisfactory terms.

Santander v RA Legal [2014] EWCA Civ 183 – breach of trust and s.61 relief – Imran successfully appeared at first instance unled, then came second at the Court of Appeal (led).

Hallam v Baker Estates [2014] EWCA Civ 661 – Imran successfully established that CPR .3.9 does not apply to in-time applications for more time – this was a significant development in light of the topical litigation around Mitchell.

West Brom BS v Cooke Dugan [Jan 14] – before CLCC HHJ Walden-Smith; successful mitigation & breach of trust claim.

Lucas v Ronaldsons [Jan 14] – HHJ Pelling QC as deputy HCJ in ChD; successful s.14A Limitation Act defence.

Saxton v Bayliss [2013] EWHC 3136 – successful appeal on costs liability.

SRA v Rohrer (In Administration) [July 2013] – before David Richards J ChD; acting for administrator of an intervened law firm regarding return date of ex parte injunction and related matters.

Skillsmart v iProfile [July 2013] – before HHJ Seymour QC, QBD; acting for respondent at injunction application related to allegedly unlawful access to emails and confidential information.

Medacs [Summer 2012] – various freezing injunctions and other claims from mistaken payment.

Nicholson v Knox Ukiwa [2008] EWHC 1222 – successful defence of 4th generation loss of chance claim, alleged under-settlement at mediation, arising out of wrongfully dishonoured.

Further information

Appointments

- Member of RICS Conduct and Appeals Committee
- Bristol University Distinguished Alumni Lecturer
- South Eastern Circuit Access to Justice Sub-Committee

Education

- LLB Bristol University
- Queen Mother Scholar
- Lady Templeman-Indo Goodwill award
- Chancery Bar Lodge Essay Prize

Memberships

- ARDL
- LCLCBA
- PNBA
- SEC

ICO Data protection registration number: **Z9409766.** Imran Benson is a barrister regulated by the Bar Standards Board. Click here to view **Imran Benson's Privacy Notice**

020 7643 5000
clerks@hailshamchambers.com

BII – Where are we?

Massive piece of business

FCA Judgment: https://www.bailii.org/ew/cases/EWHC/Comm/2020/2448.html

Deals with non-damage only

Disease Claims

Specimen Disease Policy Wording:

Insurers shall indemnify against:

RSA: interruption of or interference with the Business during the Indemnity Period following any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises"

QBE: interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it…"

QBE2: *loss resulting from interruption of or interference with the business in consequence of any of the following events:…(c) any occurrence of a notifiable disease with a radius of 25 miles of the premises…provided that that the (h) insurer shall only be liable for loss arising at the premises which are directly subject to the incident"*

Appeal? Supreme Court for Christmas?

Property Damage

TKC London v Allianz - property damage claim
https://www.bailii.org/ew/cases/EWHC/Comm/2020/2710.html

All risks including BI

Needed to show BI caused by an Event

Loss of perishable stock in café when closed by Regs, is not an event, but a consequence of the closure and did not cause interruption since could buy more.

More broadly Loss of Property and BI which follows is covered, but temporary deprivation of use because of closure does not equal "accidental loss" – which was a necessary precondition.

IMRAN BENSON

October 2020

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Pippa Manby
4 New Square

"Negligence: Costs and the demise of the Arkin Cap"

17 mins

Pippa Manby

Call: 2010

+442078222000 p.manby@4newsquare.com

Clerk: Tom Woolsey

t.woolsey@4newsquare.com

+442078222039 +447841344153

A rising star, who achieves good results against more experienced opponents.

- Legal 500

Pippa Manby has a broad commercial practice, encompassing general commercial litigation, professional liability, costs, insurance and sports work.

Pippa is recognised by the directories as a Leading Junior in Professional Liability, Sports Law and Costs where she is described as *"An extremely personable barrister who puts her clients at ease but turns into a rottweiler in court","a rising star, who achieves good results against more experienced opponents", "bright, responsive, down to earth and user-friendly", "efficient at understanding the brief – she has no weaknesses", "a creative thinker with a good analytical mind, she is fast, decisive and insightful", "technically sound with a very commercial approach to legal issues and solutions"* and *"confident on her feet with a strong grasp of detail."* More detail regarding Pippa's experience in particular areas can be found by following the links to the various practice areas.

Before coming to the Bar Pippa read Ancient and Modern History at Worcester College, Oxford where she was a scholar. She then took a year out working in the Gambia for the Institute for Human Rights and Development in Africa. Pippa completed the GDL at City University where she obtained a Distinction and was a finalist in the internal mooting competition judged by Lord Hoffmann. Pippa was graded Outstanding on the BVC winning a Buchanan Prize from Lincoln's Inn. Lincoln's Inn has also awarded her Hardwicke, Lord Denning and Levitt Scholarships.

Privacy Policy

Click here for a **Privacy Policy** for Pippa Manby.

Transparency Statement

Click here for the **Transparency Statement** for Pippa Manby.

Areas of Expertise

Commercial Dispute Resolution

Pippa's commercial practice is broad and includes cases across a range of disputes in the United Kingdom and internationally. She has experience of cases involving the supply of goods and services, banking and finance, breach of warranty SPA claims, company law, guarantees, insurance and insolvency and bankruptcy. She has experience of obtaining injunctions and freezing injunctions.

Recent examples of her work include:

- Acting (led by Graham Chapman QC) for the successful applicant for a worldwide freezing injunction to secure a judgment debt.
- Acting and advising in various cases relating to claims relating to breaches of warranties in SPAs. Pippa has particular experience of cases involving breaches of financial and/or tax warranties.
- Acting in relation to a substantial claim relating to a failed golf resort development. The claim raises issues of choice of law and forum and liability under guarantees.
- Acting in a claim arising from the termination of a contract for wholesale office supplies.
- Advising and acting in various claims relating to enforcement of guarantees.
- Acting for a major online retailer in relation to proceedings brought against it for alleged breaches of its terms of use.
- Various instructions in the Companies Court relating to share capital reductions.

Costs

"Effective communicator – both with client and judge." – *Legal 500, 2021*

"She has a level of expertise that far exceeds her year of call." – *Legal 500, 2020*

"Confident on her feet with a strong grasp of detail." – *Legal 500, 2019*

"A rising star, who achieves good results against more experienced opponents." – *Legal 500, 2018*

Costs forms a substantial part of Pippa's practice. Pippa is regularly instructed in both inter-parties and solicitor-client disputes covering the full range of costs matters. She appears regularly in costs matters in the County Courts, Senior Courts Costs Office and High Court and has appeared before the Supreme Court's costs officers.

Pippa has experience of cases concerning:

- enforceability of CFAs
- reasonableness and recoverability of ATE premiums
- wasted costs applications
- costs budgeting
- costs in the RTA Portal
- default costs certificates
- applications for assessments under section 70 of the Solicitors Act 1974
- appeals against judicial exercise of discretion in respect of costs
- Part 36
- costs orders on discontinuance
- solicitors' liens
- public funding
- disallowance of costs on the grounds of misconduct / delay
- provisional assessments and challenges to the same
- solicitors' failure to provide necessary costs information / inadequate retainer letters
- costs orders for and against non-parties
- litigation funding

Recent examples of her work include:

- Appearing as sole counsel against two QCs in a 14-day appeal relating to a solicitor and/or costs draftsmen's misconduct in costs proceedings. The matter was subsequently been appealed to the Court of Appeal where it is the leading case on misconduct in costs proceedings: *Gempride v Bamrah* [2018] EWCA Civ 1367.

- Acting (led by Dan Saoul) in a detailed assessment of a £16m bill of costs arising from a large intellectual property dispute. The assessment was listed for 6 weeks but settled shortly before commencement.
- *Woodburn v Thomas* [2017] EWHC B16 (Costs) – a case in which Master McCloud gave guidance on the relationship of costs budgeting in Precedent H and the subsequent Bill of Costs.
- Regular instructions to act in multi-day substantial detailed assessments often following from well-known reported decisions.

Insurance

Pippa is regularly instructed to provide advice on and to act in insurance matters. She has experience of claims involving:

- material non-disclosure and misrepresentation;
- incorporation and construction of terms;
- notification;
- waiver;
- aggregation;
- allocation of liability between insurers;
- fraudulent claims;
- minimum terms for indemnity insurance for various professional bodies;
- assignment of policies and prohibitions on assignment.

Recent examples of her work include:

- Acting on behalf of an insurer in defending a claim brought under a motor policy. The claim was successfully defended following a two-day trial.
- Advising an insurer in relation to recovery of its outlay against directors of an insured.
- Advising a client in relation to a sickness policy.

International Arbitration

Pippa accepts instructions in disputes proceeding by way of arbitration.

Pippa has been instructed as part of a large team in an LCIA arbitration concerning a £800m contract for the design, development, testing and support of a complex IT system.

She has also been instructed in a commercial dispute relating to media rights in the European Court of Arbitration.

Professional Liability

“She is hard working, leaves no stone unturned and is excellent technically. One to watch.” – *Legal 500, 2021*

“Bright, responsive, down to earth, and user-friendly.” – *Legal 500, 2020*

“An extremely personable barrister who puts her clients at ease but turns into a rottweiler in court.” “She is very effective in her presentation to the judge and has a professional way of dealing with discussions between parties.” – *Chambers & Partners, 2020*

“She is technically sound with a very commercial approach to legal issues and solutions.” – *Legal 500, 2019*

“Gaining a strong reputation in the professional negligence sphere” – *Chambers & Partners, 2019*

Professional liability forms a substantial part of Pippa’s practice and she is recognised by both Chambers & Partners and Legal 500

as a leading junior in this area. Pippa has advised and acted for claimants and defendants in professional liability actions involving solicitors, barristers, accountants / auditors, IFAs, surveyors, insurance brokers, construction professionals and other professionals.

During pupillage Pippa assisted with the preparation of the Respondent's case for the appeal to the Supreme Court in *Jones v Kaney* [2011] UKSC 13 (the case which abolished expert witness immunity from suit).

Accountants, Auditors & Tax Advisers

Pippa has substantial experience of claims for and against accountants, auditors and tax advisers. Recent examples of her work include:

- Acting (led by Ben Hubble QC) in a substantial claim against company accountants for negligent advice in relation to a failed offshore investment.
- Acting (led by Graham Chapman QC) in a large claim relating to negligent tax advice in relation to a round-the-world tax scheme: *Evans v PricewaterhouseCoopers LLP* [2019] EWHC 2350 and [2019] EWHC 1505.
- Acting for a Hong Kong based auditor facing a substantial claim for negligence for failing to detect management fraud.
- Advising a large accountancy firm in relation to limitation issues in respect of historic claims.
- Acting in a claim in relation to negligent advice on the appropriate tax treatment of and legally effective route to effect a share repurchase by the company of a director's shares.
- Advising and acting for Singaporean auditors in relation to their potential liability in a substantial claim relating to allegations of failing to detect employee fraud in a large Singaporean company.
- Acting for accountants in a case relating to tax treatment of partnership property.
- Acting for accountants in a case relating VAT registration.
- Acting for claimants in claims relating to a SDLT mitigation scheme which was retrospectively outlawed.
- Various claims relating to failed tax mitigation schemes (including film finance schemes).

Construction Professionals

Pippa is experienced at acting for and against construction professionals. Her practice in this area is complemented by her "pure" construction practice. Recent examples of her work include:

- Acting on behalf of a defendant architect in relation to a claim for failing to obtain planning permission and/or advise of the risks of proceeding without planning permission in relation to a high-value residential property development in London.
- Representing a project manager involved in the re-building of a traditional Cornish farmhouse.

Lawyers

Pippa has acted in cases involving solicitors, barristers, costs draftsmen / lawyers and notaries.

She has experience of cases involving conveyancing, lost litigation, privilege, underlying family and criminal proceedings, probate and (wasted) costs. She has advised on the tracing of assets and in various claims brought by the estate and/or beneficiaries. Pippa's experience in professional liability is complemented by her costs practice.

Recent examples of her work include:

- Acting (led by Ben Hubble QC) for the defendant solicitors in a substantial case relating to matrimonial proceedings and security for payments.
- Acting (led by Roger Stewart QC and Graham Chapman QC) on behalf of a hedge fund suing the French office of an

international law firm for breaches of duty relating to the enforcement of a Eur 20m loan. The case *(Fortelus Special Situations Master Fund Ltd v Fried Frank Harris Shriver & Jacobson*) *was* selected as one of the Lawyer's Top 20 cases for 2016.

- Acting (led by Ben Hubble QC and Graham Chapman QC) for defendant solicitors alleged to have been negligent in performing the due diligence and verification of a company seeking public listing on the Alternative Investment Market. The claim for $65m settled shortly before trial.
- Appearing as sole counsel against two QCs in a 14-day appeal relating to a solicitor and/or costs draftsmen's misconduct in costs proceedings. The matter was subsequently been appealed to the Court of Appeal where it is the leading case on misconduct in costs proceedings: *Gempride v Bamrah* [2018] EWCA Civ 1367.
- Acting (as junior Counsel) in a very high-value claim relating to allegedly negligent advice provided by solicitors and Counsel in the context of Court of Protection proceedings.
- Various successful strike out applications on behalf of barristers sued by former clients in criminal and civil proceedings.
- Successfully defending various wasted costs applications against lawyers.
- Advising in various lost litigation claims where opportunities for settlement and/or costs savings were missed during the course of the underlying claim.

Various instructions arising from claims by mortgage lenders against professionals where unpaid mortgage loans have resulted in a shortfall on the sale of the security.

Financial Services Professionals

Pippa has varied experience of claims against IFAs and other financial services professionals. She has experience of claims relating to tax mitigation schemes, pensions, failures to implement client instructions and failures in relation to assessment of client risk appetite.

Insurance Brokers & Agents

Pippa has experience of bringing and defending claims against insurance brokers. This is complemented by her practice in insurance law. Her experience of such claims includes experience in relation to disclosure, notification of circumstances to insurers and negligent placing of insurance.

Recent examples of her work include:

- Acting for a claimant firm of IFAs in a Commercial Court claim against their former professional indemnity insurance brokers. The claim alleges failures in relation to advice on disclosure.
- Acting for a defendant insurance broker in a claim relating to fire damage to a hotel for which the insurer has purported to avoid the policy on grounds of deliberate or reckless non-disclosure.
- Acting for a defendant insurance broker in a claim relating to a motor policy and alleged non-disclosure of criminal convictions of one of the drivers.

Surveyors & Valuers

Pippa has significant experience of bringing and defending claims against surveyors and valuers.

Recent examples of her work include:

- Defending a surveyor alleged to have failed to identify Japanese knotweed during a residential mortgage valuation. The case was dismissed and costs awarded to the defendant following a three-day trial.
- Defending a surveyor jointly instructed by the parties to perform a rent review valuation.
- Acting for a property owner suing surveyors for failing to identify damp and/or other serious defects in a high-value home during a building survey.
- Various claims by banks relating to valuation of mortgage securities.

Property Damage

Pippa has varied experience of property damage claims both in terms of recovery actions and in actions against letting agents said to be responsible for permitting such damage. She has experience of private and public nuisance and *Rylands v Fletcher* claims. Recent examples of her work include:

- various claims relating to Japanese knotweed;
- acting for a manufacturer of large oil tanks in a claim relating to a defective product alleged to have caused severe damage to a residential care home;
- acting for a landlord in a claim relating to fire damage caused by a neighbouring property;
- acting for a landlord in a claim relating to negligent servicing of a boiler which caused an oil leak;
- acting for homeowners in a nuisance / negligence claim relating to subsidence allegedly caused by an oak tree in their garden;
- acting for a homeowner in a claim against a major utilities company relating to a flood caused by negligent repairs carried out by their emergency team;
- acting for a homeowner and her insurer in relation to a flood claim brought against both a building company and vendor of bathroom goods which settled shortly prior to trial;
- acting in a claim for damage and business interruption losses on behalf of a business whose showroom was burned to the ground by an escape of hot embers from a garden fire;
- acting for a homeowner and their insurer in a claim relating to the negligent installation of a new water pump which caused a major flood in the property. The claim included losses relating to lost rent from prospective tenants;
- acting for a farmer and his insurer claiming for significant damage to their farm as a result of a fire caused by an incinerator located on a neighbouring property;
- defending a letting agent alleged to have negligently vetted tenants who converted a commercial property into a marijuana factory;
- defending a letting agent alleged by the home-owners to have wrongly permitted tenants to keep pets in a property resulting in considerable animal damage to the property. The matter proceeded to a two-day trial, with more than 10 witnesses for the claimant home-owners where it was successfully defended.

Sports Law

“She is technically excellent and strong in anti-doping work.” – *Legal 500, 2021*

“An excellent junior civil barrister.” – *Legal 500, 2020*

“A creative thinker with a good analytical mind, she is fast, decisive and insightful.” – *Legal 500, 2019*

“Efficient at understanding the brief – she has no weaknesses.” – *Legal 500, 2018*

Recognised as a Leading Sports Junior by Legal 500, Pippa has a sizeable sports law practice which includes acting for athletes, coaches and governing bodies. She has experience of cases across the sports law spectrum, including matters involving selection, doping, funding, disciplinary, governance and contracts. Her experience includes advising on and representing parties in contentious matters that proceed to hearings. In addition, she has experience of advising on non-contentious issues and of drafting in a sports law context.

Recent examples of her work include:

- Acting for a former Olympian charged with evading, refusing or failing to provide a sample. Following a two-day hearing, the charges were dismissed and the athlete exonerated.
- Acting for an athlete appealing a sanction for a positive test for furosemide to the Court of Arbitration for Sport.
- Advising in relation to a footballer’s challenge to his conviction for evading provision of a sample.
- Representing a Premiership Footballer charged with a Rule E1 offence before an FA Disciplinary Panel.
- Representing a junior football charged with using racially abusive language before an FA Disciplinary Panel.
- Acting (led by Dan Saoul) for the RFU in prosecuting a rugby union player for possession and use of a prohibited substance.
- Acting and appearing successfully for a manager in a dispute both before the British Boxing Board of Control and the

Appeal Stewards of the BBBofC.

- Acting (led by Dan Saoul) in *UKAD v Buttifant*, a case which raised issues regarding intention and contamination and which is now a leading case on intention.
- Acting for a tennis player charged by the ITF with refusing or failing to provide a sample: *ITF v Mak*.
- Acting in an FA Rule K arbitration for a respondent football club.
- Various instructions on behalf of the British Horseracing Authority which have included issues of betting, regulation of trainers and animal welfare.
- Acting in a claim arising from breaches of a host and promoter agreement relating to an international motor racing event.
- Acting in a claim relating to the funding of a series of friendly matches involving a national football team.
- Advising England Boxing on various legal issues, including challenges by boxers to bout results, selection disputes, trade mark infringement and membership. Pippa recently represented England Boxing at a full-day disciplinary tribunal hearing.
- Advising the British Wrestling Association on various legal matters, including selection policies, its constitution and various governance issues, its Betting and Wagering Policy and on disputes regarding funding and rental relief.

Pippa is willing to consider instructions on a pro bono basis where appropriate.

Qualifications & Memberships

Memberships – COMBAR, PNBA, BASL

Education – B.A. (Oxon), Dip. Law (City)

Insights

Professional liability round up of 2019

7 January 2020

Helen Evans, Pippa Manby, Anthony Jones and Seohyung Kim of 4 New Square Chambers explain what the 2019 cases tell us, how the various strands of development interact, and what trends are evident as we go into 2020.

Aldred v Cham

29 October 2019

In Aldred v Cham [2019] EWCA Civ 1780 the Court of Appeal considered whether the cost of counsel's advice relating to the proposed settlement of an RTA claim was a claim for a disbursement which should be allowed in addition to the fixed recoverable costs ("FRC") provided for under CPR 45.29C and Table 6B because it was "reasonably incurred due to a particular feature of the dispute". This case has provided welcome clarity in a previously much disputed area. Roger Mallalieu appeared for the successful Appellant. Pippa Manby explains the facts, the court's rulings and the implications of the decision.

2018 – A year in Costs

21 January 2019

Costs law update by 4 New Square - the most significant costs cases of 2018.

The Supreme Court abolishes expert witnesses' immunity from suit: Jones v Kaney [2011] UKSC 13

30 March 2011

On 30 March 2011 the Supreme Court delivered its judgment in Jones v Kaney [2011] UKSC 13 abolishing the long-standing principle of English law that expert witnesses are immune from suit in respect of negligence actions brought by clients. This short article seeks: (i) to provide an overview of the case; and (ii) to identify some of its potential implications, not least on insurers and expert witnesses.

The Court of Appeal clarifies the law on Part 36 offers of settlement: C v D [2011] EWCA Civ 646

31 May 2011

In C v D [2011] EWCA Civ 646 the Court of Appeal (composed of Rix, Rimer and Stanley Burnton LJJ) held that a Part 36 offer was not capable of being time limited and that, against that background, a reasonable interpretation of an offer expressed to be a Part 36 offer and to be “open for 21 days” was that the offer would not be withdrawn during such a period, not that it would automatically lapse thereafter.

The Atomic Veterans Litigation

21 November 2011

Legal Update: the Supreme Court hears the appeal of the veterans from Ministry of Defence v AB and others [2010] EWCA Civ 1317 and reserves judgment.

Costs Newsletter: Six Months In

27 November 2013

We are now six months into the Jackson reforms. Most would agree that it is really too early to tell what impact the reforms have had; with many of the reforms being subject to transitional arrangements which necessarily means that it will be towards the beginning of 2014 before we start seeing measurable impacts of the Jackson reforms. That having been said, the reforms have already injected a good deal of challenging questions into civil procedure generally.

Greenwich Millennium Village Limited v Essex Services Group PLC (& ors) [2014] EWHC 1099 (TCC)

6 May 2014

Mr Justice Coulson has handed down his lengthy judgment on the costs matters arising from the claim made by Greenwich Millennium Village Limited ("GMVL"). His judgment may prove of particular interest for his consideration of costs issues which arise when, as so often in the TCC, parties seek to pass on liabilities along a contractual chain.

Funders in the firing line? Davey v Money and Hall v Saunders

In this talk I consider two recent decisions involving litigation funders **Davey v Money and Hall v Saunders**. Spoiler alert, both of these cases don't go the funders' way.

Introduction

In this talk I consider two recent decisions involving litigation funders. Spoiler alert, both of these cases don't go the funders' way. As I will come on to address, the former case, *Davey v Money,* is likely to be of wider impact than the latter case, *Hall v Saunders*. I do not think that either of these cases will turn the tide of increasing third party funding of higher value claims in the English courts. However, they may impact on the ways in which that funding is provided and, specifically, the contractual terms on which it is provided.

Turning to the first case… the Court of Appeal's decision in Davey v Money / Chapelgate Credit Opportunity Master Fund v Money [2020] EWCA Civ 246

Facts of the claim

- The underlying claim was brought in July 2014 by Mrs Davey for breach of fiduciary duty against the administrators of Angel House Developments Limited and against the bank, Dunbar Assets plc, for (1) vicarious liability for the administrators' breaches of duty, (2) procuring breaches of duty by the administrators and (3) conspiracy by unlawful means.
- The administrators and bank were (of necessity) separately represented in the proceedings brought by Mrs Davey.
- In September 2015 Mrs Davey's QC advised her that she had a 75% chance of success against the administrators and a range of prospects from 55-70% as against the bank depending on the causes of action alleged
- 23.12.15 Mrs Davey entered into a funding agreement with ChapelGate Credit Opportunity Master Fund which is the litigation funding arm of a hedge fund. Salient features were:
    - Commitment amount total of £2.5m
    - A "Waterfall" arrangement for the application for any monies recovered:
        (1) Repay funding incl ATE premium
        (2) Chapelgate's profit share
        (3) Outstanding legal costs / disbursements within budget
        (4) Outstanding legal costs / disbursements without budget
        (5) (Anything that remained would go to) Mrs Davey herself
    - Pursuant to the terms of that agreement Mrs Davey was required to provide information to CG regarding the litigation but it was acknowledged that she would have complete control over the litigation.

- CFAs entered into with sols and counsel.
- In the event no ATE obtained → amendment to funding agreement in Feb 2016:
    - Waived requirement for ATE to be obtained
    - Reduced overall financial commitment to £1.25m
    - But, by virtue of some amendments to the terms of the funding agreement, Chapelgate retained the same profit entitlement
- The matter proceeded to trial in 2016 and by a judgment dated 11.4.18 Snowden J dismissed Mrs Davey's claim and ordered her to pay costs on the indemnity basis.

<u>Non-party costs order - Snowden</u>

- Administrators and bank applied for a NPC order against Chapelgate.
- This was granted in April 2019. The NPC order was only to be limited to costs after the date of the funding agreement.
- However, it was not capped at the level of the funding provided by Chapelgate. Snowden held that the CA's approach in *Arkin v Borchard Lines* where it had limited the costs recoverable against the third party to the level of funding provided, was an approach to be considered for application, rather than a rule to be applied automatically to all cases.
- Snowden J held that in the present case the balance between the competing factors of ensuring that the successful party should have its costs and enabling commercial funders to continue to provide access to justice should be struck differently.

<u>CA decision</u>

- Chapelgate appealed to the CA on various bases but focussed on the failure of Snowden J to limit the costs recoverable against the funder to the level of funding required by reference to Arkin or otherwise..
- Newey LJ with whom Patten and Moylan LJJ agreed.
- Noted the framework for NPC orders:
    - S.51 Senior Courts Act 1981
    - Considered the case law around NPC orders including Arkin – nothing that it was well established that a professional funder can be liable for a NPCO.
    - Noted that the limitation in the Arking cap had been *"commended"* by CA as *"an approach"*.
    - Arkin had been criticised in the Jackson review and Jackson recommended abolishing it
    - Had been the subject of further criticism and doubt (see e.g. *Bailey v GSK* [2018] 4 WLR 7 and *Excalibur Ventures llc v Texas Keystone Inc (No 2)* [2017] 1 WLR 2221).
- Held that:
    - The *Arkin* Cap is not a binding rule.

- Judges retain a discretion to do what is just.
- They may well see the extent of the funder's potential return as more significant than the level of funding provided.
- Essentially, the Cap is one possible weapon in the judge's armoury.
- Snowden J had been entitled to weigh up the factors and decline to apply the Arkin cap in circumstances where:
    - Funder had funded all of Mrs Davey's costs from the date of the funding agreement.
    - The Funder had stood to receive in return a profit amounting to a multiple of its commitment.
    - It had been inevitable that the defendants would incur costs greatly in excess of the funding which the funder had provided

Implications?

- Progress of the appeal was closely followed by the market. Would this be the end of Arkin?
- It is not the end of *Arkin* completely but it has been confirmed that it is "an approach" only.
- CA's approach has been recently followed by Sir Alaistair Norris in *Sharp v Blank* [2020] EWHC 1870 (Ch):

    - Group action against directors of Lloyds TSB.
    - Unsuccessful Cs were to be severally liable for directors costs along with their commercial funder against whom a NPC order was made
    - Funder to be jointly and severally liable with Cs.
    - Noted decision in *Davey v Money* – in essence Arkin cap is not a binding rule but simply guidance to individual judges who retain a complete discretion in relation to third party costs orders; whilst the extent of a third party's investment may be a factor to be weighed, so also might be the potential return due to the funder.
    - Noted limited information before the court about the funding arrangements
    - But the exposure for the interim payment would be below the cap – so could order interim payment now and adjourn the extent of funder's liability overall for later consideration.
    - So will have to see if the Court decides to apply the Arkin cap or not in due course.

- Overall implications:
    - Funder needs to be careful – what risk of costs is it causing? This will depend on when it provides the funding; what the funding is for; what is the extent of the funding? Would the litigation be able to proceed otherwise?

        - Difference between funding e.g. expert input and providing 100% of funding from a certain date onwards.
    - Funder needs to consider - Is the likely return reasonable by reference to the investment?
        - Something they will be doing anyway in order to see if they want to fund the litigation but need to bear this in mind in terms of exposure for adverse costs in excess of the extent of the funding provided.
        - A question then arises how to evidence this reasonableness for the purposes of responding to a NPC order?
        - I can't lay down any definitive guidance here but I would suggest avoid obvious internal discrepancies - the defendants in Chapelgate made reference to the amendment of the funding agreement to submit that the fact that this enabled the funder to halve its funding commitment whilst depriving the defendants of the costs protection provided by ATE, but retaining the same profit share as a factor in favour of disapplying the Arkin cap. Not something that the CA expressly ruled upon but clearly this did not look like a sensible, measured risk v reward analysis by the funder.
    - Notable that CA did not take the chance entirely to overrule Arkin – so it is there in the appropriate case.
    - One can imagine how on different facts, a judge might find it a useful tool to award something as against the funder but not too much
    - Likely to see more battles between successful defendants and funders about whether or not the cap applies.

The Second case that I'm going to address is that of

Hall v Saunders [2020] EWHC 404 (Comm) – Richard Salter QC

Facts

The claim was brought by John Hall as assignee of the 1st Class Legal, a funder which was now in liquidation.

The underlying claim was a claim by Malicorp which had entered into a contract with the government of Egypt to design, build and operate a new airport. Egypt 'purported to cancel' the contract, triggering arbitration proceedings in Cairo which resulted in an award of more than US$14m in favour of Malicorp. Malicorp sought to enforce the award in England with the High Court giving permission in 2012 for it to do so subject to the right of Egypt to apply to set aside that order.

1st Class Legal agreed with Malicorp and its then solicitors Balsara, that it would fund the proposed action and a funding agreement was entered into between Malicorp, Balsara and 1st Class Legal in November 2011. The funder issued an ATE policy to Malicorp on behalf of a separate insurer which contained its own separate terms and conditions. The claim and funding arrangements were then transferred from Balsara to Saunders with a separate tripartite agreement entered into.

At various stages in 2013 and 2014 Counsel gave negative advice as to the prospects of success of the enforcement proceedings. The original arbitration award was declared a nullity by the Cairo Court of Appeal. Ultimately the enforcement proceedings failed when 1st Class Legal did not provide funding and Malicorp failed to contest Egypt's application to set aside the order giving permission to enforce the arbitration award. Counsel's negative advice had not been passed on to 1st Class Legal.

An indemnity was refused by the ATE provider on the basis that there had been breaches by the solicitor and/or client of the policy by ignoring or withholding Counsel's negative views from the funder.

Mr Hall brought a claim against Saunders alleging that it had breached contractual, tortious and fiduciary duties owed to 1st Class Legal. The breach alleged was that Saunders had not communicated the increasingly pessimistic views expressed by counsel as to the prospects of success of the enforcement proceedings. He argued that this was a breach of their duties under the tripartite funding agreement between it, Malicorp and 1st Class Legal.

Saunders applied to strike out the claim and/or for summary judgment on the basis that Mr. Hall's claim for breach of contract was bound to fail; on the correct construction of the terms of the Funding Agreement, Saunders was under no duty to pass on the views of counsel as to the prospects of success of Enforcement Proceedings as any such duty was only owed by their client, Malicorp. Accordingly, in the absence of any contractual duty, the Defendants owed no duty of care and/or fiduciary duty to the Funder either.

Decision of Richard Salter QC (sitting as a deputy judge of the High Court)

Granted Saunders' application for summary judgment. Held that this was a short series of points of law which could be determined at this early stage and did not need to await the factual investigation of a full trial.

He carried out a careful review of the contractual provisions in the case which were said to support the imposition of such a duty. He rejected the submission that, as the ATE Policy and Funding Agreement were a suite of documents intended to work together, terms could be read across between them and/or the ATE policy could influence construction of the Funding Agreement - neither the Funder nor Saunders were parties to the ATE Policy.

He held that the Funding Agreement did not impose express obligations on Saunders to report to the Funder and he would not imply such obligations. He noted that it might have been a better bargain if the Funder had imposed reporting obligations on Saunders but that was not sufficient to imply such a term. It was thereafter conceded on behalf of the Funder that if there was no contractual duty there could be no tortious or fiduciary duty to do so. The Funding Agreement did impose wide-ranging reporting obligations on Malicorp but there were no equivalent obligations on Saunders.

Implications?

The case raised the question as to whether it was suitable for summary judgment because "*…the nature of the relationship between litigation funders and the solicitors retained by those whom they fund is a modern one on which there is little authority. This is a developing issue of considerable relevance in the new landscape conduct of litigation.*" However, the judge rejected Mr. Hall's attempts to avoid summary judgment on the basis that the matter should go to a full hearing because of its novelty and importance.

Instead, he reached his conclusions applying well established legal principles on interpretation of the particular contractual wording. This case turns on the particular wording in question. Other funders, solicitors and/or clients will have entered into different wording so in each instance it will be necessary to interpret the particular contracts to see whether there are obligations imposed on the solicitors to report to the funder.

Some funders who do not presently have express reporting obligations imposed on the solicitors may seek to impose such obligations. It would be sensible from their perspective to have such obligations imposed both on the solicitor and the client if possible to ensure the best prospect of information being reported back. There is a clearly a balancing act to be struck between securing access to information so as to understand the prospects of the litigation and retaining the usual distance between funders and that underlying litigation.

From a professional liability perspective, solicitors who sign up to any wider ranging reporting obligations will need to be careful to know what they are signing up to and

to ensure that their obligations to the funder and their client are complementary and not contradictory such that they can both be fulfilled.

Concluding thoughts?

Despite these two decisions, litigation funding is here to stay – funders have the experience and expertise to evolve to react to both these decisions. There may be an increase to the cost of litigation funding in terms of the proceeds share taken to take account of the confirmation that Arkin is just guidance which judges don't have to follow if they do not consider it appropriate to do so. There may be a change to the documentation between funders, clients, solicitors and/or ATE insurers to seek to impose direct reporting obligations on to solicitors in light of Hall decision.

On the issue of redrafting the agreements used by funders, funders may also be reacting to the decision in another case involving Chapelgate, Singularis Holdings Limited v Chapelgate Credit Opportunity Master Fund Limited

- Chapelgate backed claimant in claim for negligence against a firm of stockbrokers
- Claim was successful subject to 25% discount for contributory negligence
- C had agreed that Chapelgate would receive 30% of proceeds of the case if it went to trial and damages were recovered
- Issue was: was Chapelgate's share to be calculated on the gross damages or the damages net of the contributory negligence deduction?
- Andrew Lenon QC – sitting as deputy judge of chancery division held that this came down to consideration of the specific terms of the funding agreement. On a proper construction of detailed definition of "proceeds" in the funding agreement, he held that any reduction for contributory negligence should be taken into account in calculating the share to be received by the funder.
- Was known at time that FA entered into that CN was being run as a defence.
- Funders to redraft agreements to make it clear that they receive their proceeds from the damages awarded prior to any contributory negligence deduction?

Things to watch out for in the future: in the Russian oligarch divorce proceedings of *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam). 2016 – Tatiana Akhmedova was granted 41.5% share of her ex-husband's £1bn fortune she is seeking to enforce this award. Burford are funding the enforcement litigation. She is now seeking to enforce against her son who has alleged that the funding agreement is champertous and unlawful in family proceedings. Something to watch out for next year as another case putting funders in the spotlight.

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Matthew Pascall Barrister
Temple Legal Protection

"ATE – a beginner's guide"
20 mins

Matthew Pascall
Senior Underwriting Manager

temple legal protection

Barrister Matthew Pascall is the latest addition to the expanding commercial team at Temple Legal Protection, joining as Senior Underwriting Manager from November 2017.

Matthew was called to the Bar in 1984 and joined Guildford Chambers two years later. Spending more than 30 years in practice there, he has comprehensive knowledge and experience of the commercial legal sector and he is listed in the current Legal 500 as a Tier 1 barrister.

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

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

A Beginner's Guide to ATE

Matthew Pascall
Senior Underwriting
Manager
Commercial Team

Introduction

- Why a Beginner's Guide?
- Has it been some time since you last insured a case?
- Some may be unfamiliar, some a bit rusty?
- Our experience is some fee earners in the same firm are familiar with ATE and others much less so.
- Everyone needs to understand ATE, even if they refer cases to brokers.

What's it Do?

- Insures against your client's liability to pay the other side's costs – if you lose, we pay them
- Also insures your own disbursements – if you lose, we pay them.

How do I get it?

- Just ask!
- Ask us for a Proposal form, fill it in and tell us all about the case.
- We may ask you questions, be wary of any insurer who doesn't.
- We'll give you an early, non-binding, indication of the premium so you can discuss it with your client.
- Premiums for cases presented to us by PNLA members are discounted.

What does it cost and when does the client pay?

- The premium is fully deferred and contingent, so…
- It is only paid at the conclusion of the case and only if the insured wins.
- The premium available to PNLA members is discounted.
- It is based on a percentage of damages and is staged.
- The amount of the premium increases in stages as the case nears trial.
- If a claimant is able to insure early, he or she will pay less.

What does it cost?

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

How do we decide which cases to insure?

- We have to be satisfied that the chances of success are at least 60%.
- There has to be realistic chance of recovering damages in the case of a win.
- We asses each case on the basis of the information given to us in the proposal form, on any accompanying documents including any pre-action correspondence.
- We do not insist on seeing counsel's opinion but it helps to see one if it's available.

What sort of cases do we insure?

- Any professional negligence claim where the chances of success are 60% or better.
- We have no particular "no go" areas.
- We can provide cover for up to £1m and for the right case, can go much higher.
- We are experienced in insuring group litigation.

Will I lose control of the case?

- You do need our consent to accept, make or reject offers of settlement and to issue or discontinue proceedings.
- We aim to work ***with*** solicitors and our mutual clients.
- We take care at the outset to make the right underwriting decision.
- When the unexpected happens in the life of a case we have to respond but will do so working with you to try and get the best outcome for the client.

Settlements

- Most insured cases settle.
- We will always work with solicitors to get the best possible outcome.
- We will not let a premium get in the way of a sensible settlement.
- We will be pragmatic and are prepared to “share the pain” and agree reduced premiums – other insurers do not do this.

Delegated Authority – What?

- We can give your firm the power to assess your cases and issue ATE policies on our behalf without the need to refer them to us.
- You can issue proceedings, accept, make and reject offers without reference to us.
- If a case takes a turn for the worse, we ask that you keep us in the loop.
- In most cases, all we hear about is the arrival of the premium or the occasional claim.

Claims

- The whole point of ATE is to have protection against a liability to pay costs.
- We have met over 95% of claims arising out of commercial cases (including prof neg claims) over the last few years.
- The process is reasonably quick.
- We’ve paid a £1.1m claim within 28 days of judgment.

Disbursement Funding

- All disbursements excluding counsel's fees.
- 10% rate of interest.
- https://www.temple-legal.co.uk/solicitors/funding/litigation-funding-calculator/
- Only available for cases we have insured.

Questions?

Getting back into the GROOVE

PNLA
Professional Negligence Lawyers Association

Philippa Hill
Partner
Grant Thornton

"The Accountant's Perspective"

Philippa Hill fca

Partner

London

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

I am a partner in our disputes advisory team within the wider forensics and investigations group. As a chartered accountant and fellow of the ICAEW, I have specialised in accounting and commercial disputes since 2001, acting as expert witness or adviser. Prior to this, I was an auditor.

I lead the firm's cross-disciplinary accounting integrity and conduct practice, advising on:

- accounting irregularities, misstatements and fraud
- professional negligence and associated professional indemnity claims
- disciplinary matters relating to accountants and auditors.

I support subject matter experts (e.g. a responsible individual) to act as expert witness on liability issues where required. I have experience in professional disciplinary enquiries led by the Financial Reporting Council, which investigates matters affecting the public interest.

I am a specialist in SPA disputes and other post-transaction disputes, acting as expert determiner, expert witness or party adviser in price adjustment negotiations and other post-deal commercial disputes, including:

- Completion accounts
- Earn outs/deferred consideration
- Breach of warranty claims

As a leading member of the firm's SPA advisory practice I also advise parties and their advisers pre-deal on the terms of the SPA, helping them to mitigate the risk of disputes arising, and guarding again value leakage for parties.

I act as independent expert accounting witness or expert adviser in litigation/arbitration on matters such as quantum of economic loss arising from breach of contract, breach of duty, and fraudulent misrepresentation. I have given evidence and been cross-examined in a number of cases, including commercial, criminal and regulatory matters. My 2019 Who's Who Legal - Expert Witness in Arbitration profile says, "an excellent team player" who stands out for her "ability to respond calmly in questioning and withstand hostile cross-examination". One source comments, "She is able to assimilate information and present coherent and strong arguments and analyses."

In a personal capacity I am a trustee, director and treasurer of a national charity called 'Pause – creating space for change', which provides intensive support to women at risk of having children removed from their care.

Bear traps for auditors in 2020 and beyond

Philippa Hill, Partner in Grant Thornton specialising in accounting disputes including negligence and regulatory claims relating to auditors

In this talk I consider how the challenges of 2020 have compounded the turmoil in the auditing profession in recent years, which may also give an indication as to the likely problems arising in audits and the potential areas that liability claims may touch on over the next few years.

Given the various claims against auditors in the limelight this year (including, dare I say it, two claims against Grant Thornton that have been appealed this year), this talk is from the perspective of auditors and the bear traps they face in this increasingly hostile and volatile climate.

Within this session, I will provide a brief update on developments facing the audit profession. The key areas I will cover are:

- Update on audit reforms
- Recent proposed revisions to the auditor's duty in relation to fraud risk
- Challenges of completing audit under Covid-19 restrictions; and
- Key themes from alleged financial misstatements where auditors have been criticised

Audit reform

An annual audit has been a statutory requirement in the UK for companies over a certain size since 1900[1]. Apart from concerns raised whenever there was a significant company collapse, not much happened for almost 120 years until the collapse of Carillion in January 2018. This precipitated seven inquiries being launched, including by the Secretary of State for Business and other bodies concerned with the role of audit generally, the audit market, and auditors' responsibilities. These led to many recommendations for reform being issued.

Just before the end of 2019 the report of Sir Donald Brydon into the nature and scope of an audit was published[2]. Prior to that, in April 2019, there was the CMA's report into the statutory audit market[3] and in December 2018, the report of Sir John Kingman on audit regulation[4], namely the Financial Reporting Council or 'FRC'. These three government-commissioned reports alone made 155 recommendations in total.

Progress on implementing these recommendations to improve audit

Covid-19 and Brexit understandably seem to have had a disruptive effect on the timetable for legislative change. Recently, on 27 October this year, the FRC published its submission to the Department for Business, Energy and Industrial Strategy (BEIS) Select Committee's inquiry into

---

[1] https://assets.publishing.service.gov.uk/media/5329db4140f0b60a76000016/development_of_the_statutory_financial_audit.pdf

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852960/brydon-review-final-report.pdf

[3] https://www.gov.uk/cma-cases/statutory-audit-market-study#final-report

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf

Delivering Audit Reform[5]. This submission provides a helpful summary (and comprehensive list in an Appendix) of the various recommendations of Kingman, Brydon and the CMA and their status from the perspective of the audit regulator. Since recording the video I see there are references in the recent press to BEIS publishing its recommendations and timetable for reform early in the new year.

What has changed so far

New Ethical standard 2019

The FRC revised the ethical standard for auditors and imposed stronger independence requirements, including for auditors of the largest private companies in the UK. It says it introduced the more stringent requirements for large private company auditors in response to the independence failings it identified in its inquiry into the audits of British Home Stores (BHS) before its collapse.

Going concern

The FRC has also revised the requirements for auditing the basis of preparation of a company's accounts as a 'going concern' to enhance the focus on risk assessment, provide a stronger framework for challenging company management, and give greater transparency through reporting on the work of the auditor to satisfy itself that the going concern assumption is appropriate. This is a particularly relevant issue in the current market conditions which I will come back to.

Points not yet implemented

A substantial number of the recommendations of Sir John Kingman and Sir Donald Brydon require legislation that has yet to be drafted or enacted, including for:

- The replacement of the FRC with a new Audit, Reporting and Governance Authority (ARGA) with statutory powers and objectives
- Introduction of Sarbanes-Oxley-style internal controls reviews and reporting (Kingman 51, Brydon 13.1.8)
- A duty of alert for auditors if they have viability or other serious concerns (Kingman 45)
- A duty of directors to report on actions taken to prevent and detect material fraud (Brydon 14.2.2); and for auditors to report on the directors' reports (Brydon 14.2.5)
- Bringing in a resilience statement within the financial statements (Brydon 18.1.2); and
- A clearer and better definition of what constitute "*adequate accounting records*" (Brydon 12.4)

I comment below on some of the public policy recommendations not yet taken forward:

Sarbanes-Oxley style regime

One of Sir John Kingman's recommendations was introducing a version of US Sarbanes-Oxley Act of 2002 (SOX) relating to Corporate Responsibility, a proposal that was supported by many audit committee chairs during his consultation, and is supported by the FRC. The SOX was introduced in response mainly to the high profile accounting frauds at Enron and Worldcom in the US, resulting in public company bankruptcies, the former being widely accepted as leading to the end of Arthur Andresen, then a top 5 accounting firm. Sir John Kingman made the case for a strengthened framework around internal controls over financial reporting in the UK, which company directors would have to report on, improving director and Board accountability.

---

[5] https://www.frc.org.uk/getattachment/edc8731b-4dc3-4963-9bef-5553ee99143b/FRC-select-committee-submission-2020.pdf

A key feature of the SOX that auditors would welcome is clarification that the primary responsibility for internal financial controls and the accuracy of financial reporting rests with the board and management of a company. Auditors are often the first in line when it comes to a claim but assurance frameworks commonly list external audit as the fourth line of defence, after several layers of internal controls, compliance and governance functions. The FRC's statutory successor is expected to have more power to bring action against company directors, which is currently limited to individual directors who are members of a regulated accounting body. Directors have always had primary responsibility for financial statements, but this kind of reform could potentially tip the balance towards more civil or regulatory actions against directors and more robust defences for auditors following a corporate collapse.

Operational separation of audit from advisory practices

One of the key recommendations of the Competition and Markets Authority was operational separation of audit practices from the rest of their firm's practices, and is a recommendation that the FRC have pursued in spite of a lack of legislative change. This recommendation is about improving the independence and hence quality of audit and increasing the level of professional scepticism, by avoiding any risk or perceived risk of auditors' judgment being influenced by their firm trying to win what have traditionally been more lucrative consultancy services from audit clients. By forcing audit practices to be self-sustaining and commercially viable, without-cross-subsidisation, the idea is to reduce price pressure which itself has been seen as a factor driving down audit quality in the past.

The Big Four firms had to respond with their plans for implementation by 23 October this year with implementation to be completed by 30 June 2024. A side effect of the reforms is that one can also see the Big Four looking at divestment from certain services lines such as KPMG looking to sell their restructuring practice, citing independence constraints as a factor and pwc announcing the sale of their contracts review software business noting that they cannot sell such services to audit clients.

Interestingly the Securities and Exchange Commission in the US (SEC) has recently reduced its very stringent independence requirements, which previously prevented certain consultancy services from being provided by any member firm in an auditor's global network to any affiliate of an SEC-registered audit client of the firm. Last month they moved away from this blanket rule to a more principles-based approach involving case by case judgments about materiality and the extent to which independence may be compromised depending on the relationships between the parties and nature of services being proposed. This has been one of the more welcome developments from the perspective of global accounting firms this year and has been lauded as a victory for common sense.

Lack of independence is mostly of interest to regulators of audit, being an ethical consideration, but we do often see it cited in civil claims against auditors as part of the backdrop of evidence presented to try and demonstrate that auditors have not exercised sufficient professional scepticism or challenge of management in carrying out their work. Audit firms have made changes to avoid the impression of relationships being too 'cosy' and some firms have even ceased to refer to 'audit clients' at all and now refer to 'audited companies' instead.

Resilience Statement

Another of the key changes (where Sir Donald Brydon is particularly exercised about the impact of delays in reform, given the current market pressures) is the introduction of a resilience statement by company management in financial statements, that the auditor will need to consider and report upon. This is expected to build upon (and ultimately replace) the going concern and viability statements. He considers there should be a move from reporting on liquidity to consideration of solvency. Solvency risks are longer term and may be more qualitative and judgmental in nature, posing challenges for both company management and auditors.

Shared audits

The final public policy issue I'll refer to in this talk, which could potentially cause problems for firms, is shared audits, which is a proposed solution to break up the oligopoly of the Big Four audit firms when it comes to public interest audits. One consequence of stricter independence requirements is that the choice of auditor is reduced, and the planned structural reforms are aimed at getting more 'challenger' firms involved in the audit of public interest entities (PIEs), a market that many firms outside the Big Four have had neither the experience nor the significant resources required to break into. Challenger firms will be in higher risk territory if such reforms are implemented, not only due to their reduced global audit experience but also the fact that shared audit is a fairly alien concept in the UK (unlike on the continent, particularly in France where it is more commonplace) and how responsibilities and indeed liability are shared as between two firms on the audit of one global audit client are as yet unclear.

Proposed revisions to the scope of auditor's duty in relation to fraud risk

Sir Donald Brydon can now be regularly seen in various forums "banging the drum" for the changes he proposed to audit, particularly in the current climate. One of the major themes of his report was to revise the way in which auditors perform their work in addressing the risk of fraud, an issue which is a common feature of auditor negligence cases.

In response to his report, the FRC recently published a revised version of International Standard on Auditing (ISA) 240 "*The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements*" The draft standard is out for consultation until the end of January 2021 and is proposed to be effective for audits of periods commencing in mid-December next year with early adoption permitted.

Brydon's report proposed that there was a need for auditors to perform their work under the concept of 'suspicion', potentially a step up from the existing requirement of 'professional scepticism' and he promoted a more 'forensic' approach to audit. Whilst the term 'suspicion' does not appear in the FRC's revised draft auditing standard, it is fair to say that the changes proposed by the FRC place a clear burden on an auditor in respect of fraud both at the initial assessment stage and throughout the course of their work.

New requirements include clauses around assessment of the authenticity of documents (something which is likely to be harder to do remotely) and investigating inconsistent responses provided to the auditor that appear implausible[6].

Challenges arising from Covid-19

The managing partner of PwC UK told the Financial Times last month: "*With so much uncertainty, the role of auditors has never been more important or more difficult. Judgment calls this year will be harder than ever.*"

That is probably an understatement. There are few areas of an audit that have not been impacted by Covid-19 given the forward-looking nature of many accounting judgements and the uncertainties facing both individual businesses and the wider economic outlook. Particular challenges include testing management projections and forecasts supporting their views on impairment of goodwill and other assets, and forecasts underpinning their assumptions that the business is a going concern. The

[6] Source for summary of changes: https://www.icas.com/professional-resources/audit-and-assurance/information-and-support/frc-proposes-revisions-to-auditing-standard-on-fraud

unprecedented nature of the situation makes evaluating the accuracy of forecasts all the more difficult.

As mentioned, the FRC issued a revised version of auditing standard ISA 570 "Going Concern" applicable to all audits for periods commencing on or after 15 December 2019, including requirements on the auditor to:

1) perform greater work to robustly challenge management on forecasts,
2) test the adequacy of supporting evidence, and
3) introducing a specific audit opinion to report a clear positive conclusion on the application of the going concern basis.

This updated standard coincides with Covid-19 impacted audits, so auditors have been faced with what is arguably a raised bar on auditing standards when it comes to assessing going concern at the same time as an increased inherent risk of business failure and significant uncertainties surrounding future business performance, particular in certain affected sectors.

Other areas of audit where the impact Covid-19 has been felt include:

- getting comfort on information presented by management when working remotely, particularly determining whether data has been manipulated or altered in some way, when the auditor is not able to observe the process of information being extracted from its native system and provided to the auditor, who may therefore struggle to verify the provenance and integrity of the information;
- developing audit plans and performing testing to address the increased risks of fraud arising from the pandemic, taking into account for example an enhanced incentive for management to engage in fraudulent financial reporting or a heightened risk of override of systems and controls with companies moving at short notice to remote working;
- testing and forming of a view on the value of inventory when auditors cannot physically attend stock takes at the year end and property valuations where sites are inaccessible.

Areas of accounting and audit that have gone wrong – themes from recent claims and enforcement cases

There are a number of key areas where auditors have been pursued in respect of the quality of their work based on published findings in regulatory and civil cases.

The FRC publishes an Annual Enforcement Review (AER) and from its review published in July this year[7] of cases over the past six years it noted that the overwhelming majority involved a failure to obtain sufficient appropriate audit evidence (ISA 500) and a failure to exercise professional scepticism when assessing the decisions and judgements made by management (ISA 200). The "*key underlying reasons for recurring audit failures*" noted by the FRC were:

- **Insufficient involvement of the audit partner and senior team members**
  There was lack of partner and senior team member monitoring and review and over-delegation to junior members of the team who may not have the experience to judge and challenge given those with experience are best placed to exercise scepticism. Without partner and senior team members providing sufficent direction, supervision and review of

[7] https://www.frc.org.uk/getattachment/d299042a-f14f-40eb-8889-7b44818cf53b/Annual-Enforcement-Review.pdf

junior members of the team, failures in audit quality arise.
Similarly issues identified by more junior team members overlooked or not suitably escalated

- **Disorganised audit work**
  Disorganisation leads to lines of inquiry not being pursued to their conclusion, and parts of the financial statements being signed off without the testing being done properly. Increasing use of specialists/experts is often the cause. Documenting the interaction between auditors and others has been a challenge, as has how auditors have considered and concluded on the work of others
    - Examples include: requests for support from other teams, with no follow-up and the audit being signed off without the work having been finished; overly complicated instructions and division of work within the wider audit team, resulting in the teams being unclear about what they were supposed to do, and relevant audit testing being missed; poor communication with and oversight of component auditors

- **Failure to step back from the detail and look at the overall financial picture**
  Failures in this area are as a result of one or more of the following and compounded by/contributed to by inadequate ECQR (see below):
    - Siloed working practices
    - A tick-box culture

- **Auditors being too close to management leading to lack of sufficient scepticism**
  Close auditor/management relationship has led to a lack of sufficient scepticism by the audit team - there are higher risks in this area where the audit client is very significant to an office and/or partner/audit team

- **Failure to involve appropriately an effective the audit quality assurance partner (ECQR)**
  Issues arising in this area include:
    - The ECQR is involved in work too late in the day
    - The ECQR review inadequate, which is characterised by a failure to conduct and document an effective review or to question key judgements
    - Sometimes, issues picked up by the ECQR process were not suitably followed up and cleared by the engagement team

- **Auditors accepting the views of experts and specialists on which they then rely too readily**

Other themes we have observed from cases and press reports are as follows:

- **Auditing revenue recognition and disclosure:**
  One of the biggest published decisions this year against an audit firm was the FRC's record fine of £15m for the auditors of Autonomy[8]. Hewlett Packard bought Autonomy for $11 billion in 2011, the majority of which was subsequently written off, and there continues to be a number of civil and regulatory actions in the UK and in the US against management and advisers of Autonomy. From an audit perspective, the matters under consideration were the approach to auditing revenue recognition and related disclosures including the accounting

[8] https://www.frc.org.uk/news/september-2020-(1)/sanctions-against-deloitte-and-two-audit-partners

for value added reseller transactions and the accounting for and (lack of) disclosure of hardware sales that were said to be loss-making. The tribunal ruled the auditors failed to exercise adequate professional scepticism and failed to obtain sufficient appropriate audit evidence and in doing so commented on a lack of objectivity of the partner.

- **Related party transactions** is another top issue and one that often at the heart of an accounting fraud and relates to the presentation of what are really transactions with parties controlled by the entity and its management disguised as third party arm's length transactions and balances of a different nature. Wirecard, the former fintech star of the German stock exchange has been the subject of well publicised allegations of accounting misstatements involving 'round tripping' of cash around fictitious or related entities to give the appearance of increased turnover.

All these factors have been a recurrent feature of auditing claims and regulatory action over recent years. The impact of Covid-19 and the advent of further reform is potentially going to add significant obstacles and hence risk to an already difficult path for auditors, and could lead to increased claims, whether meritorious or simply a desperate search for recoveries by businesses fighting for survival.

Post Script: Additional note of interest on FRC enforcement developments:

There are a number of headlines arising from the FRC's enforcement activities impacting the audit profession as reported in their Annual Enforcement Review for 2019-20 including:

- The increased use of non-financial sanctions by the FRC which require firms to implement improvements to reduce the likelihood of a future similar deficiency in their work. From nil requirements in enforcement year 2017-18, nine such requirements were placed on firms in 2019-20.
- The increasing use of 'constructive engagement' in relation to AEP cases. For the year 2019-20, there were 31 cases resolved this way compared with 16 cases in the previous year.
- For cases where the FRC considers that where audit work is judged as "breach of a relevant requirement" but reporting an individual's name would be "disproportionate" then the name of the entity and the audit partner will not be released as part of the FRC's sanctions reporting.
- A 14% growth in the size of the enforcement team at the FRC for 2019-20. Furthermore the 2020/21 FRC budget provides for an increase of 22 people in the division to 72 in total, a 44% increase.

Thanks for your kind attention and I hope to see you in person next year!

November 2020

Grant Thornton

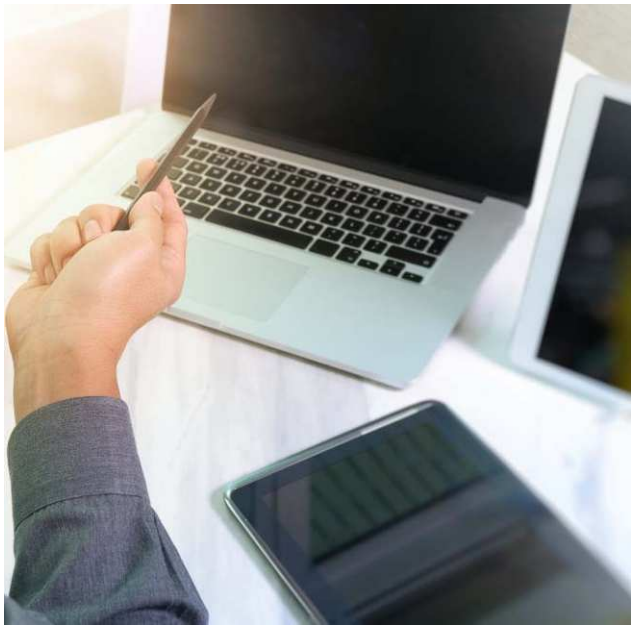
Bear traps for auditors in 2020 and beyond

18 November 2020

Philippa Hill

Audit reform

- Ethical standard and independence
- Going concern and resilience statement
- Sarb-Ox style regime
- Operational separation
- Shared audits
- Proposed revisions to auditor responsibilities in relation to fraud



Grant Thornton

Challenges arising from Covid-19

Going concern

Obtaining comfort on information provided to the auditor

Increasing risk of fraud

Audits of areas where on-site access is important

- Stock takes
- Asset valuations

Grant Thornton

Areas of auditing gone wrong

Grant Thornton

Areas of reporting and auditing gone wrong

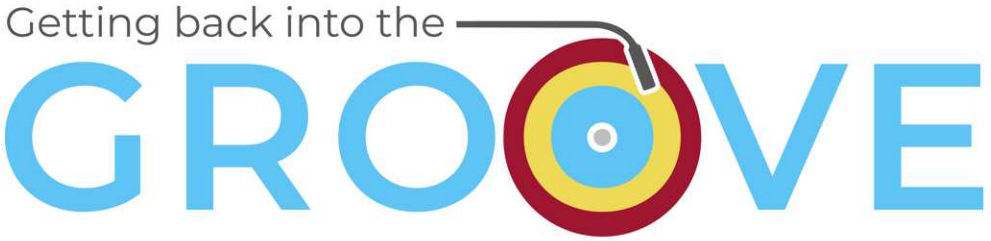
Other themes observed from cases and press reports

Auditing revenue recognition and disclosure

Related party transactions

Grant Thornton

grantthornton.co.uk



Arun Chauhan
Tenet Compliance & Litigation

"Professional negligence and Fraud"
23 mins

Arun Chauhan

Solicitor

arun.chauhan@tenetlaw.co.uk
+44 (0)7392 311733

tenet
compliance & litigation

Arun is the reason Tenet is here. He founded Tenet early in 2016, himself having previously held the role of partner heading up a top 20 national law firm's commercial fraud team.

Arun is a solicitor specialising in financial crime compliance, investigations and litigation arising from fraud. Arun further qualified as a compliance professional through the International Compliance Association.

Arun's aim when he established Tenet was to provide national law firm expertise on dealing with fraud and financial crime issues in a more accessible format to clients. This objective has helped Tenet grow rapidly in three years and be recognised in 2019 when shortlisted by Legal Week in their Innovative Mid-size Practice category. As Tenet has evolved, it has resulted in Tenet acting for a range of clients from multi-billion pound turnover corporations to individuals both domestically and internationally. Arun typically represents claimants who have suffered loss to dishonest actions.

When advising companies or not-for profit organisations, Arun principally advises Board members, in-house legal, finance and compliance teams.

Immersed in the counter fraud world, Arun is a solicitor and certified compliance professional specialising in financial crime compliance. He was the first private practice solicitor to obtain the post-graduate diploma qualification in financial crime compliance with the International Compliance Association (their leading qualification on the subject).

Arun regularly speaks on counter-fraud, financial crime compliance and fraud matters having featured on BBC television from 2016 onwards and quoted in the national press (for example, the Telegraph). Arun often presents on webinars and at conferences, including for the International Compliance Association, RICS, for various accounting bodies and the National Housing Federation. He is also the Deputy Chair and Trustee Director for the Fraud Advisory Panel, a board member of Today Advisory and is a member of the Commercial Fraud Lawyers Association.

Fraud and professional negligence

Arun Chauhan
18 November 2020

Overview

- Covid – the impact on fraud and cybercrime in 2020
- Types of negligence claims arising out of fraud events
- Focus on conveyancing and cybercrime - two case examples
- The key issues and expectations upon solicitors
- Contributory negligence
- Conclusions

Covid – the impact on fraud and cybercrime in 2020

- 2020 it is said that fraud cost $42bn / cybercrime will reach $6trn
- Cybercrime has cost UK businesses £87bn since 2015
- Fraud is on the increase especially cybercrime. Why?
- The pandemic will lead to uncovering of more historic fraud
- Home working is driving change of behaviours
- Volume of emails and pace people operate contributing to the increase in cybercrime
- Ease to spoof email address, mobile numbers and breach confidentiality

Fraud – Types of negligence claims

- Loss of chance claims relating to the conduct of civil fraud litigation
- Advice on claims relating to conflicts of interest
- Accountancy claims – failure to identify internal fraud
- Failure to identify fraud event / advise on risk of fraud in conveyancing transaction - authorised push payment (APP)

Case 1

- *Email interception – caused loss of c.£500k*
- C was purchasing their first home using savings
- In the course of the transaction, a fraudster had hacked the computer systems of C's conveyancing solicitors (D) impersonated the D.
- The Fraudster persuaded C to pay the balance purchase monies of c. £500k to the fraudster in Hong Kong
- In the course of the litigation it was disclosed that other clients of D had raised concerns 5 weeks apart of the email interception prior to C transferring completion monies
- D incorrectly relied on an external IT support advice

Case 2

- Residential conveyancing case – loss alleged of c.£100k
- Email interception - similar case
- Allegation of failure to advise of no changes to bank account details – moving money from the US to the UK
- Nature of how bank account information would be updated
- Failure to use cybercrime footer warning
- Failure to follow best practice updates from the SRA and the Law Society
- Allegation by C – would have acted differently if warnings had been provided

Key issues

- Argued for a scope of duty including an expectation on the part of the solicitors to be alert for this common type of fraud
- Identified the issue that Ds had the opportunity to identify from emails impersonating C that there was a compromise of emails, for example, no communication by phone the brevity of email content and spelling errors.
- Argued for scope of duty to positively warn and advise on risks associated with a conveyancing transaction including to provide oral and written warnings of cybercrime risk
- Defective IT systems – DPA issues . D's systems were not adequate to minimise the risk of wrongful access to its clients' personal data

Contributory negligence

- In case 1, C worked for an FCA regulated firm and it was alleged they ought to have had a heightened understanding of the risk of cybercrime despite C being a first time purchaser.
- In case 2, C was a seasoned property investor.
- Cs argue it was wrong on the part of Ds to assume Cs would have understood how APP fraud works in the context of conveyancing – awareness of 'cybercrime' was not enough.
- Guidance is helpful for Cs - . *"Contributory negligence is rarely an issue between an unsophisticated lay client and his solicitor, and it will be unusual for there to be such a finding" - Jackson & Powell on Professional Liability at 11-341*

Example of authorities relied upon

- Cases 1 and 2 both were compromised
- Natural concern is the floodgates as there are many of these conveyancing fraud cybercrime issues – but each do turn on their own facts
- *Lawton LJ accepted in Boyce v Rendells [1983] 2 EGLR 146 at 149H: "… if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks."*

Conclusions

- Professionals and wider sectors are seeing that fraud risk is part of day to day governance and risk management.
- The expectation of clients is that advisers will understand these risks and protect clients
- The expectation is of a duty of care to extend to assisting in identifying risks and in the case of litigation, being aware of all types of civil fraud remedies if a commercial litigator accepts instructions on such a case.
- The message to insurers is to ensure your insured is educated on issues of fraud relevant to their role
- More claims are likely to arise

Contact details

- Arun Chauhan
- e: arun.chauhan@tenetlaw.co.uk
- t: 0121 796 4020
- m: 07392 311733
- w: www.tenetlaw.co.uk

Getting back into the GROOVE

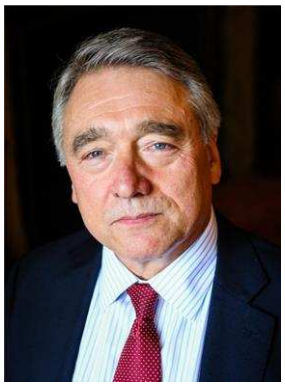
PNLA
Professional Negligence Lawyers Association

Mark Lomas QC
Independent Mediators

“Latest trends in Mediations”
24 mins

Independent Mediators

Mark Lomas QC
Commercial Mediator



Mark is one of the UK's leading mediators with a wide-ranging commercial practice and a recognised expertise in high-value professional negligence and insurance disputes. He is ranked in Band 1 of both Legal 500 (who describe him as "highly effective") and Chambers & Partners (who commend him for his "strong technical and commercial analysis and diplomatic style").

Mediation experience

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

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

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

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

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

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

Directories

Legal 500 2019

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

Chambers & Partners 2019

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

Who's Who Legal: Mediation 2018

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

Who's Who Legal: Thought Leaders - Mediation 2018

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

Who's Who Legal: UK Bar: Mediation 2017

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

Areas of practice

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

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

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

Clients comments

Comments relating to performance as a mediator include:

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

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

"Conducted in a very professional and amicable manner."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Excellent – achieved the impossible!"

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

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

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

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

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

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

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

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

Professional memberships

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

Professional background

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

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

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

Training/talks/books/articles

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

Contact details

Independent Mediators

Nicky Doble –
Chief Executive

Phone:
+44 (0)20 7127 9223

Email:
imoffice@independentmediators.co.uk

Website:
www.independentmediators.co.uk

PROFESSIONAL INDEMNITY INSURERS – DEVELOPMENTS IN THEIR APPROACH TO SETTLEMENT

A MEDIATOR'S PERSPECTIVE

MARK LOMAS QC

INDEPENDENT MEDIATORS

A. INTRODUCTION

B. WHEN INSURERS ARE PREPARED TO SETTLE

(1) The drive towards early settlement

(2) The importance of the Limit of Authority

(3) The problem of shifting quantum

C. WHEN INSURERS DECIDE TO FIGHT

(1) Generic issues they want determined

(2) Allegations of conduct

(3) Cases deemed to be without merit

D. IMPACT OF INSURANCE-RELATED ISSUES ON SETTLEMENT

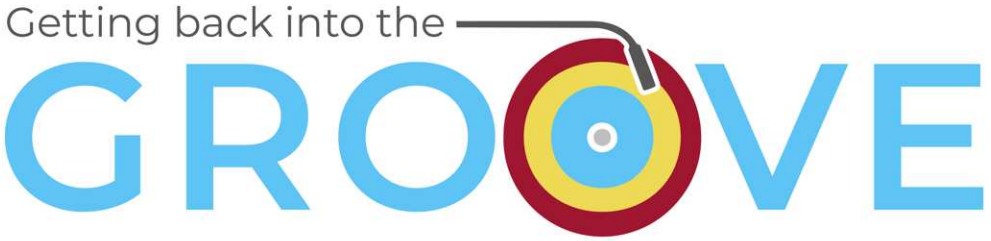
(1) Coverage issues

(2) Aggregation issues

(3) Contribution between co-defendants

E. MEDIATING ONLINE

(1) Plague or Brave New World?



Joe Bryant
Partner
Beale & Co

"The Risks Of Claims Against Solicitors Regarding Expert Evidence"

29 mins

BEALE&CO

Joe Bryant

Partner

E: J.Bryant@beale-law.com
T: +44 (0) 117 428 9333

Joe specialises in defending lawyers and insurance brokers (and their London market insurers) against claims for professional negligence, and has an established client base including some of the largest legal and insurance firms both in the UK and internationally. He advises on the full spectrum of issues facing the legal and broking professions, from M&A lawyers facing complex corporate and tax litigation on the one hand, through to Lloyds brokers having to deal with disputed declinatures and Insurance Act interpretation on the other. He is routinely instructed by the insurance market to act for its policyholders in resolving their disputes, as well as providing coverage advice on policy interpretation. Away from brokers and lawyers, Joe also acts (again predominantly through the UK insurance market) for construction professionals, having been involved in a wide range of claims both nationally and internationally over his 20 year career to date.

Joe's experience includes:

Resolving a £55m claim against a midlands firm arising from an alleged failure to advise on the most appropriate structure for earn-out following a corporate sale. Succeeding at trial in defending a firm against allegations that they had failed to advise their client appropriately on the availability in divorce proceedings of a pension sharing order.

Advising on claims arising from Bath Spa, the Olympic Stadium and the partial collapse of the M4 Brynglas Tunnels, as well as several claims under the Defective Premises Act.

Joe is ranked in the legal directories as a leading lawyer in the field of professional indemnity, being ranked as Band 1 in Chambers 2020.

He regularly delivers risk management training to firms throughout the UK and speaks and writes widely on professional indemnity issues in the insurance market. Joe also co-wrote leading textbook "Insurance Broking Practice and the Law".

"Very astute and pleasant to work with," with clients lauding his "wealth of experience" Chambers UK 2020

"He is an excellent lawyer and I have never been disappointed in his work" Chambers UK 2019

BEALE&CO

LITIGATION

Instructing experts – traps for the unwary solicitor

BEALE&CO

Overview

- 2020 Cases
- Anecdotal examples
- Risks for instructing solicitors
- Practical guidance

BEALE&CO

Scene-setting…

- Why experts?
  - Causation
  - Quantum
  - Liability (*Sansom v Metcalfe Hambleton & Co (1998)*)
- Duties
  - CPR 35.3
- Characteristics of a good expert…

BEALE&CO

2020 Cases

- *A Company v X, Y and Z*
- *De Sena v Notaro*
- *Essex County Council v UBB Waste*

BEALE&CO

There but for the grace of God…

- "Quantum expert offered views on liability"
- "Expert gave so many scenarios as to what might have happened that the Court struggled to take on board the one he said DID happen"
- "Expert was put into a room with the opponent's expert at mediation and told to sort it out"
- "It turns out the opponent's expert was given his arguments by his instructing solicitor"
- "Expert confessed that he had actually been the project supervisor on another project identical to the one whose design he was now being asked to criticise"

BEALE&CO

Risks to Instructing Solicitors

- Case oversight; you are responsible for the team
  - Reasonable skill and care?
- Reflected criticism / loss of credibility across whole case
- Solicitor is arguably a better target?
  - Easy to highlight solicitor's error
  - Expert immunity until comparatively recently
  - Solicitors PII cover is very robust and predictable

BEALE&CO

Practical Guidance - Selection

- Check background for relationships / prior use / conflict
- Avoid friends / contacts
- Don't select on cost / panel arrangement
- Be wary of expert experts
- Check task is within experience / expertise
- Who will actually do the work?
- 'Hired Gun' test
- Check reputation for tolerance for alternative views

BEALE&CO

Practical Guidance - Instruction

- Bring expert on board early
- Supply all information – don't be selective
- Stress test the report for objectivity

BEALE&CO

Q&A

Joe Bryant
Partner
T: +44 (0) 117 428 9333
E: j.bryant@beale-law.com

Questions and discussion via
PNLA WhatsApp +44 7930251578

To complete your feedback form please go to https://www.pnla.org.uk/event/pnla-online-conference-getting-back-into-the-groove/