
# PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

# PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

# ENGLAND & WALES - ONLINE CONFERENCE

***Discovery***

**January 20222**

**PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION**

ENGLAND & WALES "ONLINE" CONFERENCE

*"Discovery"*

**January 2022**

**39 mins** **Anneliese Day QC – Fountain Court Chambers**
*– "Chairman's Keynote Address"*
https://www.fountaincourt.co.uk/people/anneliese-day/

**19 mins** **Alexandra Marks CBE – Chief Adjudicator – The Business Banking Resolution Service**
*– "Alternative Dispute Resolution for Business Banking Complaints"*

**28.5 mins** **Howard Elgot – Park Lane Plowden Chambers**
*– "Undersettlement claims – Personal Injury"*
https://www.parklaneplowden.co.uk/our-barristers/howard-elgot/

**28 mins** **Charles Holbech – Radcliffe Chambers**
*– "Professional Negligence and Wills"*
https://radcliffechambers.com/profile/charles-holbech/

**49 mins** **James Hall – Gatehouse Chambers**
*– "Solicitors' liability: rectification and aggregation; two recent sources of aggravation"*
https://gatehouselaw.co.uk/barrister/james-hall/

**21.5 mins** **Alex Laing - Coram Chambers**
*– "Forum shopping – Family Law"*
https://www.coramchambers.co.uk/alex-laing/

**16 mins** **Andrew Foyle – Partner - Shoosmiths**
*– "Covid-19, economic downturns and the market outlook for professional negligence lawyers"*
https://www.shoosmiths.co.uk/people/cvdetails/andrew-foyle

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

**tbc** **Sean Gibbs - Hanscomb Intercontinental**
*– "The role of an Expert Witness"*
https://www.hanscombintercontinental.co.uk

**34 mins** **Pradeep Oliver – Partner - Cripps Pemberton Greenish LLP**
*– "Financial Services Group Litigation"*
https://www.crippspg.co.uk/profile/pradeep-oliver/

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

**Total talk time - 4 hrs 17 mins**

**1 hr - Conference Pack Review**
**1 hr 30 mins - Questions & Answers via WhatsApp Group and Zoom Wrap Party**
**Total CPD – 6 hours 47 mins**

PNLA
Professional Negligence Lawyers Association

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# Experienced, considered and robust expertise

Grant Thornton

Whether you need early-stage advice on the merits or technical aspects of a claim or dispute, or you require an independent testifying expert witness, we can provide you with the right specialists and the right team, giving you the best chance of resolving your dispute effectively.

When faced with a dispute, you will require a team that can bring commercial, regulatory and accounting capability, be able to value assets and sophisticated products, quantify losses and provide recommendations on addressing deficiencies.

## Capability and experience

Our disputes team have been expert witnesses on claims worth a total of over **US$100 billion** and have given evidence over **250 times**.

We have been appointed as experts by individuals, businesses, governments and regulators acting both in an advisory and a testifying capacity.

We have acted as party-appointed experts both by claimants and respondents, as single joint experts, as tribunal-appointed experts and as expert determiners in jurisdictions all over the world, under various procedural rules.

## Types of work and claims

- **Purchase price adjustments**
- **Misrepresentation**
- **Breach of warranty**
- **Contentious valuations**
- **Loss of profits**
- **Professional negligence**
- **Asset tracing and recovery**

## Context

- **Expert determination**
- **Commercial litigation**
- **Arbitration – investor state and commercial**
- **Insurance claims**

## Breadth and depth of coverage

Our sector coverage and geographical reach is substantial. Recent cases include those in the financial services sector, energy, construction and manufacturing.

We have over **140 people** in our Forensic team in the UK and 800 **globally** in **37 countries**.

We can also draw on the expertise of the wider UK firm which comprises over **4500 people**.

Grant Thornton has a presence in **140 countries**.

*"We have worked with Grant Thornton on a number of matters requiring forensic accountancy input, and have found them to be thorough, commercial and pragmatic in providing their views. In two instances in particular, they first provided high-quality advice which enabled the client to make a proper assessment of a claim and to avoid proceedings, and second were able to advise quickly and under pressure on a very urgent matter in a manner which fit in with that client's requirements.*

*We consider Grant Thornton one of our preferred advisors and would be very happy to instruct them again on appropriate matters where forensic accountancy input is required."*

Litigation Lawyer

Ranked for Litigation support servces, Chambers & Partners 2021

TOP RANKED Chambers Litigation Support 2021 Grant Thornton UK LLP

Global Arbitration Review (GAR) 100, 2019, 2020, 2021

GAR 100 2021

Global Investigations Review (GIR) 100, 2018, 2019,2020

GIR 100 2020

Who's Who Legal, Arbitration 2020, 2021, 2022

WWL Arbitration 2022 Expert Witnesses

ACQ5 Asset recovery firm of the year 2019, 2020,2021

Gamechangers 2021 GLOBAL AWARDS UK - ASSET RECOVERY FIRM OF THE YEAR GRANT THORNTON UK LLP

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# 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.

KEC are able to offer costs advance and disbursement funding using the very best commercial terms and are also 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 Legal Costs, funding and other associated assistance might be of use to your firm.

KE Costs Lawyers are delighted to continue to support the PNLA.

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**w:** Our Management Team – KE Costs Lawyers

HANSCOMB
INTERCONTINENTAL

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

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

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

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

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# Discovery

**Professional Negligence & Liability**

January Update 2022


# Anneliese Day QC
# Fountain Court Chambers

# Chair's Keynote Address

# 39 mins

# Anneliese Day QC

Call Date: 1996 | Silk Date: 2012

Anneliese is a "leading lawyer of her generation" and a "standout genius" who is frequently instructed in high-value and complex cases both nationally and internationally. She is ranked both as a Leading Silk in six practice areas in the legal directories (commercial litigation, international arbitration, professional negligence, energy, construction and insurance/reinsurance) and as an Arbitrator.

She was recently described as "an absolute Rockstar at the top of her game", who operates at the highest level in her areas of expertise dealing with courts and tribunals as both Lead Counsel and Arbitrator not only in the UK but also in Asia Pacific, the Middle East and the Caribbean (including the DIFC and the SICC). She also regularly appears at appellate level. She is known for being a "charming, intelligent and ruthlessly brilliant advocate", "stupendously talented" and a "good leader for the 21st century".

In 2020, Anneliese was named 'International Arbitration Silk of the Year' at the Chambers Bar Awards where she was also shortlisted as 'Professional Negligence Silk of the Year'. She has previously been named 'Construction and Energy Silk of the Year' three times, 'Barrister of the Year' in 2014 by *The Lawyer* and one of the 500 most influential people in the UK by *Debretts*. She is a fellow of the Chartered Institute of Arbitrators.

Her recent highlights include:

- **$350 million arbitration in Trinidad concerning a road contract and security issues in English Court of Appeal:** Acting as lead counsel in connection with the termination of a $350 million road contract in Trinidad having successfully had a call on the project security confirmed by the Court of Appeal in London.
- **DIFC audit claim against Deloitte:** Acting on behalf of Deloitte & Touche in respect of a claim for $128 million by minority shareholders of the former Lebanese Canadian Bank.
- **Mining arbitration in Singapore:** Acting as lead co-counsel in one of the largest arbitrations in the world arising out of the Roy Hill Iron Ore project in Western Australia where over $1 billion was in dispute.
- **Fiduciary duties of attorneys in Cayman Islands:** Successfully obtaining summary judgment in proceedings against Walkers solicitors in a case considering the fiduciary duties of attorneys, conflicts of interest and the defence of illegality.
- **ICSID Arbitration in Washington DC and London:** Acting for Canadian mining company in an ICSID claim against the Republic of Kazakhstan heard in Washington DC and London.

## AREAS OF EXPERTISE

- Commercial dispute resolution
- Construction and Engineering
- Energy & natural resources
- Fraud: civil
- Insurance and reinsurance
- International arbitration
- Offshore
- Product liability
- Professional discipline
- Professional negligence

## OTHER NOTABLE CASES

### INTERNATIONAL ARBITRATION

- Leading an arbitration concerning Trinidad's road network following the termination of a $350 million FIDIC contract.
- Acting as lead co-counsel in one of the largest SIAC arbitrations heard in 2018 between Samsung and Duro arising out of the Roy Hill Iron Ore project in Western Australia where over $1 billion is in dispute.
- Acting for Canadian mining company in an ICSID claim against the Republic of Kazakhstan which was heard in Washington DC and London.
- Acting in an ICC arbitration on behalf of Middle Eastern employer in relation to the design and construction of a cement plant pursuant to a FIDIC contract.
- Advised on a dredging dispute in Hong Kong.
- Acting on behalf of both employers and contractors in relation to joint venture projects concerning nuclear installations both in the UK and abroad. Anneliese's extensive experience encompasses both military and civil nuclear implicated design and construction projects, including nuclear power stations and submarines. She has acted in numerous ICC and LCIA arbitrations in this context.
- Acting as an arbitrator in relation to a dispute concerning a gas fired power station.
- Acting as counsel on behalf of a Port Authority in dispute with a wind turbine manufacturer.
- Acting as arbitrator in a shipbuilding dispute concerning delayed delivery and alleged defects.
- Acting as arbitrator in a dispute concerning alleged wrongful termination of a sub-contract relating to the construction of an underground station.
- Advising and acting for employer in relation to design and construction of luxury hotels in Europe.
- Acting as arbitrator in a FIDIC dispute concerning the construction of two multi use towers in Dubai on reclaimed land.
- Acting as counsel in an arbitration concerning the construction of the Crescent Development Project in Baku, Azerbaijan.
- Acting for an airline in respect of a dispute arising out of the faulty construction of aircraft engines.
- Acting for a US multinational in an LCIA arbitration arising out of an explosion at a chemical plant in the US.
- Acting for an employer under a FIDIC contract in relation to the construction of apartment blocks in the Middle East.
- Acting on behalf of a French telecommunications company in respect of an ICC arbitration.
- Acting on behalf of the respondent to a commercial dispute between employer and former employee concerning oil contracts in the Middle East.
- Advising on ICC rules and whether a party appointed arbitrator should recuse himself as a result of potential conflicts of interest.
- Acting in the first ever case to be brought before the Dubai Financial Markets Tribunal.
- Acting as arbitrator in a dispute concerning restraint of trade.

Anneliese was appointed as a member of the LCIA Court with effect from May 2019 and to the SIAC panel of arbitrators September 2019.

**COMMERCIAL DISPUTES**

- *Gwynt y Môr OFTO Plc v Gywnt y Môr Offshore Wind Farm Limited and ors* [2020] EWHC 850 (Comm): Acting for the operating company of the second largest offshore wind farm in defence of a claim by the purchaser in the Commercial Court. The case involved complex issues relating to the contractual construction of the Sale and Purchase Agreement.
- Successfully acting for BTI in resisting a strike out/summary judgment application made by PWC in respect of a claim against PwC, relating to their audit of 2007 and 2008 accounts of Windward Prospects Limited.
- Acting on behalf of Deloitte & Touche in respect of a claim for $128 million by minority shareholders of the former Lebanese Canadian Bank. Money laundering and funnelling of funds are alleged.
- Acting in a high-profile claim brought by a Welsh Government body against its advisers for breach of contract and negligence. Losses of £50 million are being claimed.
- Acting in a £50 million claim for over 100 investors who invested in a film finance scheme against a prominent tax silk.
- Acting for Brazilian claimants in a high-profile claim against a leading law firm in the Cayman Islands (Walkers) in relation to a conflict of interest where allegations of fraud made during trial.
- Acting for the Saudi defendants in a high-profile dispute between various overseas parties involved in the ownership and management of an English telecommunications company, featuring allegations of unfair prejudice, breach of contract and breach of fiduciary duty.
- Acting for a Hong Kong company pursuing an Austrian party in respect of a joint venture concerning IP rights in relation to agrochemicals.
- Recovering very significant monies due under a letter of credit in relation a Trinidadian road dispute, including successfully defending the bank's attempt to challenge enforcement in the Court of Appeal.
- Bringing a £60 million claim against surveyors arising out of the valuation of a number of extremely large commercial properties in the UK involving securitisation issues.
- Obtaining an injunction on behalf of Bentley Motor Cars so as to enable production to continue.
- Acting for a pathological gambler suing William Hill bookmakers.
- Advising and appearing in High Court and related arbitration proceedings in a complex commercial dispute arising out of the breakup of an insolvency practice.
- Acting on behalf of Vision Express in respect of a commercial dispute with a franchisee in Jersey.

- Claim by bank against a guarantor arising out of the collapse of commercial loan portfolio.
- Acting on behalf of DSG in relation to commercial dispute arising out of the supply of televisions.
- Acting for the park managers in a multi-party £80 million dispute arising out of a fire at Magna Park warehouse.
- Acting on behalf of the defendant to a commercial dispute between employer and former employee concerning oil contracts in the Middle East.
- Acting in a high-profile dispute between various overseas parties involved in the ownership and management of an English telecommunications company, featuring allegations of unfair prejudice, breach of contract, breach of fiduciary duty and fraud.
- Resisting injunctive relief being obtained against Middle Eastern client in the UK in a case involving jurisdictional issues and allegations of fraud.
- Advising on claims against investment funds and investment advisers following the Madoff scandal.
- Acting in family dispute involving high net worth individuals in the UK arising out of contentious probate proceedings and related allegations of breach of trust and professional negligence.
- Acting for investors following the collapse of the Ritz Carlton deckhouses development in the Cayman Islands.
- Advising and acting on behalf of claimants suing financial advisers in light of collapse of Icelandic banks.
- Acting on a multi-million claim relating to a fraud on an investment management company allegedly perpetrated by one of its directors, involving freezing and proprietary injunctions.

**CONSTRUCTION, ENERGY & INFRASTRUCTURE**

- *Gwynt y Môr OFTO Plc v Gywnt y Môr Offshore Wind Farm Limited and ors* [2020] EWHC 850 (Comm): Acting for the operating company of the second largest offshore wind farm in defence of a claim by the purchaser in the Commercial Court. The case involved complex issues relating to the contractual construction of the Sale and Purchase Agreement.
- Acting in an arbitration concerning a significant termination dispute relating to the construction of a large data centre for an American technology company.
- Instructed to advise on an issue of contractual interpretation in relation to a wind farm in Scotland, specifically relating to breach of contract which led to multi-million-pound losses.
- Acting as lead co-counsel in one of the largest SIAC arbitrations heard in 2018 between Samsung and Duro arising out of the Roy Hill Iron Ore project in Western Australia where over $1 billion is in dispute.
- Acting on behalf of Capita in respect of a claim brought against it by Morgan Sindall arising out of the refurbishment works at Lancashire County Cricket Club.
- Acting in one of the highest value construction disputes in the UK arising out of the construction of a jetty for berthing nuclear submarines at Faslane in Scotland.
- Acting on behalf of the developer of an extremely high-profile development in Azerbaijan in an arbitration where our client is being pursued by its construction manager for sums in excess of $60 million.
- Acting in a high-profile arbitration in Trinidad concerning Trinidad's road network following the termination of a $350 million contract with a Brazilian contractor.
- Instructed in a complex technical UNCITRAL arbitration arising out of the decommissioning of nuclear facilities in Lithuania.
- Acting on behalf of the winning party (both at first instance and on appeal) in the landmark case of *Walter Lilly v Mackay*, giving her particular expertise in relation to delay and global claim issues at both a theoretical and practical level. Following *Walter Lilly*, she has been asked to give seminars in a number of jurisdictions, including advising on how the decision can be used in a FIDIC and NEC context.
- Acting for Beck Interiors in relation to a dispute concerning the refurbishment of the Lanesborough Hotel in London.
- Acting for the successful claimant in a case concerning the former London Stock Exchange. The court ordered a contractor to pay £14.7 million in damages following the failure of toughened glass used to clad a central London office block. The breakages were found to have been caused by the contractor's breach of its contractual obligations to heat soak all of the glass in accordance with European Standard EN 14179 2005.
- Acting on a number of high-profile road related PFI disputes in the UK, including successfully taking all the way to the Court of Appeal a dispute concerning the entirety of Birmingham's Road network, the largest PFI project in the UK. She also recently appeared in a series of expert determinations and related court proceedings concerning the M25 road network.
- Acting on behalf of a UK Port Authority in a significant dispute with a wind turbine manufacturer which was successfully resolved in her client's favour following the commencement of an arbitration.
- Acting on a series of high-profile and complex adjudications for a contractor in relation to the construction of a large wind farm in Scotland which led to the resolution of a five-year dispute, including flying to Scotland at short notice and directing a large number of witnesses and experts in preparation for the adjudications.
- Advising an employer on the proposed termination of a large wind farm project.
- Acting on behalf of Amec and Morgan Sindall as one of two lead counsel in a claim against the Ministry of Defence relating to Faslane nuclear submarine facility in Scotland in a dispute worth £300 million, one of the biggest disputes in the UK in recent times.
- Acting on behalf of a large civil engineering contractor in Northern Ireland in relation to a number of infrastructure disputes, including acting as counsel in the *Belfast Harbour Commissioners v McLaughlin* & *Harvey v Doran*, a huge £20 million professional negligence claim pertaining to the plan for the construction of Belfast Harbour.
- Acting for the Irish Government in a large road dispute, including successfully defeating a large value adjudication claim.

- Acting on behalf of the UK government in relation to an arbitration concerning the termination of a PFI contract with a private contractor concerning military dogs.
- Acting for a number of waste contractors in relation to complex PFI disputes involving both joint venture and employer contractor disputes. Her experience in this area includes leading a number of adjudications and advising on related court proceedings in Northern Ireland.
- Acting on behalf of a US record company in £40 million dispute against project managers in respect of the construction of an automated distribution warehouse.
- Acting for the UK government in a dispute concerning the construction of the M56 and M6 motorway, including successfully pursuing claims against both consultants and contractors.
- Acting on behalf of AMEC in a dispute with EDF arising out of the construction of a gas fired power station.
- Acting for an airline in respect of a dispute arising out of the faulty construction of aircraft engines.
- Acting on behalf of Multiplex in relation to disputes arising out of the construction of Wembley Stadium.
- Acting for a contractor in relation to disputes arising out of hotel installations at Heathrow Terminal 5.
- Acting on behalf of park managers in respect of a fire at a warehouse asserting to have caused £80 million worth of damage to goods owned by an international clothing retailer.
- Successfully overturning an adjudicator's decision on natural justice grounds. Thereafter instructed in the subsequent £40 million dispute concerning cabling in relation to London Underground.
- Acting on behalf of Barnsley College in a four-party dispute with consultants and contractors relating to overheating issues arising out of a new build project.
- Successfully defending engineers in relation to an allegedly negligent failure to report on compression failure, including obtaining indemnity costs.
- Acting on behalf of Carillion in a five-week trial in Manchester TCC in a final account dispute arising out of a project at Warrington College. After a three-month hearing, Anneliese's clients were the net receivers of money together with a significant costs award in their favour.
- Acting on behalf of a Joint Venture Company in respect of issues arising out of motorway construction in a case involving both English and Scottish law.

**PROFESSIONAL NEGLIGENCE**

- Successfully acting for BTI in resisting a strike out/summary judgment application made by PWC in respect of a claim against PwC, relating to their audit of 2007 and 2008 accounts of Windward Prospects Limited.
- Acting on behalf of Deloitte & Touche in respect of a claim for $128 million by minority shareholders of the former Lebanese Canadian Bank. Money laundering and funnelling of funds are alleged.
- Acting in a high-profile claim brought by a Welsh Government body against its advisers for breach of contract and negligence. Losses of £50 million are being claimed.
- Acting in a £50 million claim for over 100 investors who invested in a film finance scheme against a prominent tax silk.
- Acting on behalf of Ernst & Young in relation to first ever proceedings before the Dubai Financial Markets Tribunal.
- Acting for Ernst & Young in complex claim in UAE involving alleged breach of directors' duties and issues relating to limitation of liability and duty of care/Galoo issues, with conspiracy and fraud also being alleged.
- Acting for BDO in respect of claims arising out of alleged fraud in Cayman involving proceedings in Cayman, BVI and England.
- Acting on behalf of various of the Big 4 in respect of numerous allegedly fraudulent tax scheme cases.
- Acting on behalf of a charity in respect of a proposed claim against one of the Big 4 firms arising out of fraud within the management team.
- Succeeding in having claim against BDO relating to allegedly negligent audit struck out.
- Advising in relation to a proposed claim by a major food retailer against large firm of accountants in relation to an outsourcing credit control agreement.
- Acting on behalf of well-known football chairman in relation to claim against his former accountants.
- Defending a claim brought against accountants for allegedly negligent advice concerning CT G rollover relief.
- Acting on behalf of the former accountants of Neil Hannon (former lead singer of Divine Comedy) in respect of a claim brought against them.
- Advising one of the Big 4 in respect of proposed claim against them arising out of allegedly negligent tax advice.

*Accountants, Auditors & Actuaries*

- Acting on behalf of BDO in respect of a claim against them arising out of their instruction as a joint expert. Successful in having claim struck out.
- Advising Paul Oakenfold in respect of claim against accountants in relation to tax relief issues.
- Dealing with various claims against accountants and auditors concerning solicitors' accounts.
- Successful striking out of claim by shareholders against auditors on existence of duty of care point.

- Advising in relation to a claim concerning alleged fraud by accountants in preparation of charity's accounts.
- Defending a claim against accountants concerning the adequacy of business advice given and *Galoo* type causation issues.

*Financial Services Professionals*

- Acting on behalf of claimants pursuing claims arising out of collapse of world financial markets.
- Advising and acting on behalf of financial advisers being sued in light of collapse of Icelandic banks.
- Acting on behalf of claimants pursuing administrators of a pension scheme for failing to implement amendments to the scheme.
- Acting on behalf of financial advisers being sued by numerous premiership footballers in relation to investments made in Spanish property.
- Acting for both claimants and defendants in relation to numerous claims concerning alleged mis-selling of pensions.

*Insurance Brokers & Agents*

Alongside her strong insurance and reinsurance practice, Anneliese is regularly instructed in claims against insurance brokers and managing agents. Her work includes:

- Advising Marsh/HSBC insurance brokers in respect of claim arising out of alleged failure to give adequate advice on limitation periods.
- Acting for a Jersey company in relation to the broking of a commercial insurance policy of a café subsequently destroyed by fire.
- Acting for insurance brokers in relation to alleged breach of duty in placing a contractors' all risks policy.
- Acting for various claimants bringing proceedings against an insurance broker following repudiation of life insurance cover following alleged non-disclosure.
- Regularly acting for both lenders and insurers in relation to alleged mortgage fraud and negligent conveyancing transactions, including advice in relation to breach of undertaking, breach of fiduciary duty and breach of trust claims.

*Lawyers*

- Acting for Brazilian claimants in a high-profile claim against a leading law firm in the Cayman Islands in relation to a conflict of interest where allegations of fraud made during trial.
- Acting on behalf of Morrison & Foerster in respect of claim brought against them by Petrocapital in relation to advice given in relation to shareholder claims.
- Acting on behalf of the Department of Transport in relation to claim against Magic Circle firm arising out of advice given in relation to rail franchising contracts.
- Acting for Eversheds in a claim brought by Nationwide alleging failure to react appropriately to material suggestive of mortgage fraud and thereafter on behalf of Eversheds in related claims.
- Acting on behalf of a claimant pursuing Mace & Jones for £40 million as a result of allegedly negligent planning advice in relation to a quarry.
- Acting on behalf of Pannone in multi-million pound litigation brought against it by the administrators of Lexi Holdings arising out of the fraudulent activities of Shaid Luqman. The case raises issues of illegality, actual/apparent authority and scope of duty in relation to solicitors acting for clients who commit fraud on third parties.
- Acting for innocent partners of fraudster solicitor who absconded to India with millions of pounds.
- Advising on whether duty of care owed by Law Society and/or Barclays Bank in respect of monies alleged to have been misappropriated by solicitor and various partnership issues.
- Acting on behalf of insurers in relation to liability of innocent partner for alleged fraud in Zambia by another partner, including considering whether any partnership arose at all.
- Acting on behalf of Newcastle Airport in respect of a claim against Eversheds arising out of an asserted failure to advise Newcastle Airport of the breaches of fiduciary duty being committed by two executive directors whilst renegotiating their contracts of employment.
- Successfully running abuse of process and causation arguments in relation to claim against a barrister following criminal conviction of claimant.

*Patent Agents*

- Acting for claimant suing solicitors in relation to negligently conducted high court patent litigation.
- Defending a claim for allegedly negligent advice by patent agents.

*Surveyors & Valuers*

- Bringing £60 million claim against surveyors arising out of valuation of a number of extremely large commercial properties in the UK involving securitisation issues.
- Acting on behalf of claimant bank in successfully suing valuer for a series of negligent commercial valuations followed by claims having to be made under the Third Party Rights against Insurers Act.
- Acting on behalf of valuers in negligence claim by a bank against valuers and solicitors in relation to commercial property (including

compulsory purchase and planning issues).

- Acting on behalf of commercial valuers seeking to strike claim out on limitation, duty of care and reliance issues, including issues relating to duties of care, if any, owed to third parties.
- Acting on behalf of valuers in relation to claim brought by new liquidator against former liquidator and valuers in relation to alleged hope value of commercial property.
- Acting both for and against surveyors in relation to both commercial and residential property valuations.
- Acting for surveyors in relation to structural survey cases (e.g. alleged failure to spot dry rot, alleged failure to spot subsidence).
- Regularly acting for both lenders and insurers in relation to alleged mortgage fraud and negligent conveyancing transactions, including advice in relation to breach of undertaking, breach of fiduciary duty and breach of trust claims.

**INSURANCE**

Anneliese has a strong insurance and reinsurance practice covering most classes of risk, including professional indemnity; property; D&O, general commercial liability (EL/PL/products); motor; and financial risk. She regularly advises both insurers and insureds on coverage disputes involving interpretation of policy wordings, dishonesty, non-disclosure and avoidance issues, and breach of warranty and condition claims. As well as acting as counsel, Anneliese regularly sits as an arbitrator resolving coverage disputes (both between insured and insurer, and between insurers).

Her experience includes:

- Regularly acting in claims concerning Contractors All Risks insurers.
- Representing insurers in a claim for an indemnity on a reinstatement basis in respect of fire damage to an historic house in Northern Ireland.
- Acting on behalf of insurers in relation to a series of claims arising out of jewellers' block policies.
- Dealing with reinsurance issues arising out of an explosion in a chemical factory in the USA.
- Advising insurer in relation to a potential coverage dispute in respect of an Employment Practices Liability Policy issued to Skype.
- Advising on and acting in relation to numerous professional indemnity insurance issues, including notification, dishonesty and condonation. Acting both as Counsel and as an arbitrator.
- Acting for the insured surveyors in a claim concerning innocent non-disclosure.
- Acting for insurers in various disputes concerning alleged sham partnerships and dishonesty issues.
- Advising insurers, attending various indemnity conferences and acting in an arbitration in relation to allegations of dishonesty and condonation against a two partner firm in Essex who became involved in mortgage fraud allegations totalling approximately £40 million in relation to Thamesmead properties.
- Advising insurers in relation to whether allegations of dishonesty and/or condonation could be made against 'innocent' partners in a firm of solicitors whose fellow partner had absconded with £15 million.
- Advising insurers on issues of privilege arising out of claims made against solicitors.
- Advising partner on settlement terms where coverage issues in play (instructed by the solicitor concerned directly).
- Acting for insolvency practitioners seeking to establish cover in respect of a professional indemnity policy, successfully resisting allegations of dishonesty and condonation.
- Following criminal allegations and involving issues such as formation and construction of the policy and non-disclosure.
- Acting as an arbitrator in relation to notification issues and advising as to which insurer should provide cover in relation to the claims in issue.
- Acting on behalf of insurers seeking rectification of an insurance policy following a substantial flood at a commercial premise in Germany.
- Acting for distributors against insurers disputing coverage following a fire at warehouse of well-known retailer.
- Advising insurers on coverage and exclusion issues in respect of residential and commercial property policies.
- Advising extensively on claims under the Third-Party Rights Against Insurers Act.
- Acting for insurers in relation to jewellers' block insurance policies. Advising on whether coverage could be provided considering alleged breaches of conditions precedents relating to notification and record keeping.
- Advising insurers on whether coverage should be provided following allegations of arson.

**PRODUCT LIABILITY**

Anneliese undertakes product liability work in a commercial context. Her work includes:

- Acting for Bayer CropScience in respect of alleged claim for alleged damage to potato crops.
- Acting for insurers in relation to claim for damage to commercial business following supply of allegedly defective vehicles.
- Advising in relation to disputes as to quality of electrical products supplied to supermarket chain.

- Representing the Department of Health in quantum cases arising out of the CJD growth hormone litigation and the BSE/variant CJD litigation.
- Anneliese has a significant offshore practice and has been instructed in cases in Cayman and the BVI in cases involving issues of professional liability, duties of directors and trustees, construction and property disputes, investment related work and duties of auditors.

**OFFSHORE**

- Acting for a Brazilian claimants in a high-profile claim against a leading law firm in Cayman in relation to a conflict of interest claim.
- Acting for professional advisers following the collapse of the Ritz Carlton deckhouses development in Cayman.
- Advising on claims against investment funds and investment advisers following the Madoff scandal.
- Acting for defendant auditors in claim arising out of an alleged failure to detect fraudulent activity by directors.
- Acting for a property developer in a family dispute concerning a construction business.

## DIRECTORY RANKINGS

**Chambers & Partners**

- Commercial Dispute Resolution
- Construction – 'Star at the Bar'
- Energy & Natural Resources
- Insurance
- International Arbitration: Construction/Engineering – Band 1
- Professional Negligence
- Professional Negligence: Technology & Construction
- Construction – UK (Global) – 'Star' ranking
- Dispute Resolution: Commercial – UK (Global)
- Energy & Natural Resources – UK (Global)

**The Legal 500**

- Professional Negligence – Tier 1
- Commercial Litigation
- Construction – Tier 1
- Energy
- Insurance & Reinsurance
- International Arbitration: Counsel
- International Arbitration: Arbitrators
- Middle East: The English Bar: Commercial
- Asia Pacific: The English Bar: Construction, Energy and Infrastructure
- Asia Pacific: The English Bar: Commercial

## DIRECTORY QUOTATIONS

'She has laid waste to a number of witnesses and it's been money well spent – there's no limit to the amount of effort she'll put in, an absolute Rockstar at the top of her game. '
**The Legal 500: International Arbitration**

"She is an absolute genius and an assassin in court. She has fantastic people skills and massive technical ability too."
**Chambers & Partners: Insurance**

"She is at the top of the Bar and fated to be one of the best silks and advocates of a generation." "She is technically astute and has a fantastic eye for detail."
**Chambers & Partners: Construction**

'A standout genius. She is stupendously talented. Very experienced in heavy cases and unflappable on her feet.'
**The Legal 500: Professional Negligence**

"Like an iron fist in a velvet glove, she cross-examines witnesses very well and gets to the heart of the case very quickly." "She acts directly

and quickly on the key issues."
**Chambers & Partners: Commercial Dispute Resolution**

"Anneliese is without doubt in a league of her own – she has a unique combination of the sharpest of intellects and insightful and perfectly calibrated judgement – she is the ultimate trial lawyer. Very well prepared, tactically sophisticated and intellectually agile, while never losing sight of the ball."
**The Legal 500: Insurance & Reinsurance**

'A top advocate – really gets people listening to what is important, and filters out all the rubbish, also just a pleasure to work with.'
**The Legal 500: Commercial Litigation**

"Instructing her is like sending your opponent a battering ram with a first-class stamp. She is frighteningly bright, superb on her feet, completely unflappable, has an exceptional work ethic and is blessed with an incredible memory for detail." "A formidable and very able advocate."
**Chambers & Partners: Commercial Dispute Resolution**

'Piercing intellect, good manner with clients and hard-working. Identifies and grapples with the central issues quickly and succinctly.'
**The Legal 500: Energy and Construction**

"First class, she is on the ball and has good judgment. She is hard working and bright, and careful and open with parties."
**The Legal 500: International Arbitration – Arbitrators**

## INTERNATIONAL BAR / COURT APPOINTMENTS

- Ad hoc admission to the Cayman Islands Bar.
- Called to the Bar of Northern Ireland.
- Full registration as a Foreign Lawyer with the Singapore International Commercial Court (SICC).
- Called to the Bar of the Dubai International Financial Centre (DIFC).

## EDUCATION

M.A. (Cantab.) (First Class), Harvard University

## APPOINTMENTS, MEMBERSHIPS AND PRIZES

- Fellow of the Chartered Institute of Arbitrators
- Chair of the Design Committee of the Delos London Hearing Centre (LONDAP)
- Appointed member of the LCIA Court with effect from May 2019
- Appointed to the SIAC Panel of Arbitrators from September 2019
- Named as 'International Arbitration Silk of the Year' by *Chambers & Partners* in 2020
- Shortlisted as 'Professional Negligence Silk of the Year' by *Chambers & Partners* in 2020
- Shortlisted as 'International Arbitration Silk of the Year' by *The Legal 500* in 2020
- Named as 'Construction Silk of the Year' by *Chambers & Partners* in 2018
- Named as 'Construction and Energy Silk of the Year' 2018 at the *The Legal 500* UK Awards
- Named as 'Barrister of the Year' 2014 by *The Lawyer*
- Selected as one of the 500 most influential people in the UK by *Debretts* in 2015

## PUBLICATIONS

Editor of *Jackson and Powell on Professional Liability* until 2014 (Sweet & Maxwell, 7th ed., 2012)

## LANGUAGES

French and Spanish

## LINKEDIN

Anneliese's LinkedIn profile can be found here.

BSB Barristers' Register

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Fax: +44 (0)20 7353 0329
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PNLA
Professional Negligence
Lawyers Association

# Notes: -


**Alexandra Marks CBE**
**Chief Adjudicator**
**The Business Banking Resolution Service**

# *Alternative Dispute Resolution for Business Banking Complaints*

**19 mins**

BBRS. Business Banking Resolution Service™

# Alexandra Marks CBE

## Chief Adjudicator

Alexandra Marks has been a solicitor for over 35 years. She was an equity partner in one of the world's leading law firms, Linklaters, before stepping down to build a portfolio of public, judicial and third sector roles.

For the past 15 years, she has sat as a part-time judge in the Crown Court, High Court and First-tier Tribunal and for several years was an Adjudicator for the Solicitors Regulation Authority.

Alexandra has served terms as a Commissioner at the Judicial Appointments Commission and the Criminal Cases Review Commission. She is currently Statutory Reviewer of Access and Participation Plans for the Office for Students. An accredited mediator, she was also Chair of CEDR (the Centre for Effective Dispute Resolution) before taking on the role of Chief Adjudicator for the Business Banking Resolution Service.

She continues to be actively involved in human rights and social justice organisations. She was Chair of Amnesty International Charity Limited for 10 years, and has been a Council Member of JUSTICE since the 1980s.

Alexandra was awarded the Law Society's Lifetime Achievement Award 2016, was made a CBE in The Queen's Birthday Honours list in June 2017 and is an Honorary Fellow of Brasenose College, Oxford.

BBRS. Business Banking Resolution Service

# Business Banking Resolution Service

## Alternative Dispute Resolution For Business Banking Complaints

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## Overview: About the BBRS

BBRS. Business Banking Resolution Service

**Who we are**

- The BBRS is an independent, non-profit organisation set up to resolve disputes between eligible small and medium-sized (SME) businesses and their banks
- Banks participating in our voluntary, contractual scheme are:
  - Barclays Bank PLC and Barclays Bank UK PLC
  - Danske Bank
  - HSBC UK Bank plc
  - Lloyds Banking Group (Lloyds Bank plc and Bank of Scotland plc)
  - NatWest Group (including The Royal Bank of Scotland Plc, National Westminster Bank plc, Coutts & Company and Ulster Bank Limited (Northern Ireland))
  - Santander UK plc
  - Virgin Money (including Clydesdale Bank PLC and Yorkshire Bank)

**Why we were set up**

- We have been established in response to the commitments made by the banking and finance industry following the Simon Walker Review in 2018. This identified the need for an independent service to resolve eligible historical and current complaints for SME businesses that had, or have not previously had access to independent review.

**Our mission**

- To deliver an accessible and transparent service, giving eligible businesses the opportunity to have their complaint heard and independently reviewed.
- To make decisions based on what is fair and reasonable in the circumstances and seek to inspire confidence through the consistency of our approach.



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## Who can use the service?

BBRS. Business Banking Resolution Service

BBRS considers historical and contemporary complaints which meet the eligibility criteria which differ slightly for the Historical Scheme and Contemporary Scheme.

Broadly speaking, we are able to assist with claims:

- From UK registered businesses, trusts, charities, friendly societies and co-operative societies
- Relating to an unresolved complaint against one of the banks participating in the BBRS
- Where that complaint has not been the subject of a third-party review e.g. by the Financial Ombudsman Service; another redress scheme; or the courts
- For historical cases (from 1 December 2001 to 31 March 2019), businesses must have a maximum turnover up to £6.5m per annum; and a balance sheet of no more than £5m
- For contemporary cases (from 1 April 2019 onwards), businesses must have a turnover/income up to £10m per annum; and a balance sheet of no more than £7.5m
- The complaint must also not be - or have been - eligible for the Financial Ombudsman Service

## Historical Scheme

BBRS. Business Banking Resolution Service

Our Historical Scheme is for complaints relating to incidents (acts or omissions on the part of the bank) that took place between 1 December 2001 and 31 March 2019. Different financial criteria apply depending on the date that the complaint was made to the bank, and the nature of the enterprise:

| Date | UK Businesses | | Charities | Trusts |
|---|---|---|---|---|
| **Complaint made between 1 December 2001 and 31 October 2009** | Annual turnover: At least £1 million but less than £6.5 million | Balance Sheet: Less than £5 million | Annual income of at least £1 million but less than £6.5 million | Net asset value of at least £1 million but less than £5 million |
| **Complaint made between 1 November 2009 and 31 March 2019** | Annual turnover: More than €2 million* but less than £6.5 million (* unless 10 or more employees) | Balance Sheet: More than €2 million* but less than £5 million (* unless 10 or more employees) | | |



BBRS. Business Banking Resolution Service

## Case Study 1 – Historical complaint

| Annual turnover | Balance sheet | Staff |
|---|---|---|
| £2.2m | £3.4m | 6 full-time |

- In June 2010, an Edinburgh-based tour company is sold a long-term fixed rate loan product by their business bank
- In May 2015, they ask the bank about repaying the loan early
- The business owner is told that the loan has large break costs associated with repaying the loan early. The business owner believes that they were mis-sold the product and immediately complains to their bank The bank's internal investigation of the complaint concludes that the loan was not mis-sold. The business owner is dissatisfied with the bank's response to their complaint
- Based on the turnover and balance sheet of this organisation, they could be eligible for the BBRS

Until 1 November 2009, the Financial Ombudsman Service could consider cases from SMEs with an annual turnover of up to £1m.

From 1 November 2009, this threshold increased so provided they had fewer than ten employees, if either the turnover **or** balance sheet were below €2m, the business would be eligible for the Financial Ombudsman Service.



## Contemporary Scheme

BBRS. Business Banking Resolution Service

Our Contemporary Scheme is for complaints relating to incidents (acts or omissions on the part of the bank) that took place on or after 1 April 2019.

We can consider complaints from businesses registered in the UK which meet the following financial criteria:

- Turnover of less than **£10m**
- Balance sheet of less than **£7.5m**
- Charities must have an annual income of less than **£10m**
- Trusts must have a Net Asset Value of less than **£7.5m**

BBRS. Business Banking Resolution Service

## Case Study 2 – Contemporary complaint

| Annual turnover | Balance sheet | Staff |
|---|---|---|
| £7.2m | £5.1m | 40 full-time<br>20 part-time |

- In March 2021, a boutique hotel chain based in the UK paid various cheques into its account
- A bank statement a fortnight later showed that the value of these cheques had not been credited to its account
- The business immediately complained to its bank
- The business manager is dissatisfied with the bank's response and is informed he can take the business' complaint within 6 months to the BBRS
- Based on the turnover and balance sheet of this business, they could be eligible for the BBRS

From 1 April 2019, the Financial Ombudsman Service has been able to consider unresolved complaints from SMEs with:
• an annual turnover of up to £6.5 million and
• a balance sheet total of up to £5 million or employs fewer than 50 people

## Concessionary cases

BBRS. Business Banking Resolution Service

We encourage everyone who may be eligible to apply because even where a case is falls outside the BBRS' eligibility criteria, the BBRS may still be able to consider it if we, the customer and the bank all agree.

Broadly speaking there are two categories of cases where this can occur:

**1. Cases falling outside our eligibility conditions**

For example, if the business has a turnover slightly above our financial thresholds, BBRS can ask the bank if we can still consider the complaint. If the bank says no to the BBRS' request, it will provide an explanation both to us and the SME customer so we can discuss it with them if they wish. These provisions apply only if the case is *ineligible* for the service: the BBRS will *always* be able to review a case which meets the Scheme's eligibility conditions.

**2. Excluded Schemes**
If a complaint relates to, or was eligible for, an Excluded Scheme, it is not eligible for the BBRS' service.
However, the BBRS may still be able to assist where:

- the complaint meets all our other eligibility conditions apart from the fact it relates to an Excluded Scheme; and
- either the SME customer believes they have new evidence which was not previously considered in the Excluded Scheme, and had it been considered, it would have made a material difference to the outcome; or
- the SME customer did not have, nor could reasonably be expected to have had, notice of the Excluded Scheme.

More information on this can be found on our website. Our key message to SMEs is don't self-exclude – and we're always happy to talk to SME customers who are uncertain about their eligibility for our Scheme.

## What to expect when using our service

BBRS. Business Banking Resolution Service

1. Businesses register their case with the BBRS by giving their details and information about the complaint they made to their bank
2. The BBRS will perform a high-level eligibility check and keep this under review as their case progresses
3. Businesses will then be assigned a "Customer Champion" to be their point of contact throughout the BBRS process – they will explain the process to them and provide practical support such as helping customers to identify relevant documents relating to their complaint
4. Customers will be given access to the BBRS' online system which will allow them to work efficiently with the Customer Champion to upload documents and evidence
5. Customers will then be given the chance to see any evidence their bank has submitted and at the same time, the bank will get to see the customers' evidence
6. There is an opportunity for the customer and the bank to respond to each other's evidence
7. The Customer Champion will then explain the options to the customer to resolve their complaint, these may include:
   - Early settlement
   - Entering into mediation
   - Going to adjudication by one of the BBRS' impartial case assessors

## How we will resolve cases

BBRS. Business Banking Resolution Service

While our 'default' technique of investigative adjudication is important, many cases will be more suitable for one of the range of other techniques for alternative dispute resolution (ADR).

Our operating model is based on a core in-house team of lead case assessors, who are supported by additional ADR-trained and experienced people provided by our business partner, the Centre for Effective Dispute Resolution (CEDR).

ADR techniques we can use include:

**Settlement:** At any point during the process, the parties may wish to attempt early settlement of the complaint.

**Informal Mediation (also known as Conciliation)**: The BBRS, where appropriate, will encourage and support a customer and their bank to seek a fair and reasonable outcome without the need for BBRS investigative adjudication but by agreement instead.

**Formal Mediation**: When a bank and customer agree, they have an opportunity to enter direct discussions to try and resolve the dispute. A trained neutral mediator will be appointed to assist and facilitate negotiations for the dispute to be resolved.

**Adjudication**: Adjudication is the method used to investigate a complaint when the SME customer is eligible for the BBRS scheme. A Case Assessor makes a decision (a Determination) on what is 'fair and reasonable in the circumstances', based on the evidence presented.

## Awards and Decisions

BBRS. Business Banking Resolution Service

**Awards**

The BBRS assesses each case on a fair and reasonable basis and can require banks to pay a financial award to successful complainants.

- If the BBRS upholds a complaint, it can make a financial award against a bank up to £350,000 for Historical cases and £600,000 for Contemporary cases.
- The BBRS can recommend an award above these limits, and the relevant bank is required to consider these recommendations reasonably and in good faith.

**Financial loss**

If the BBRS finds that a bank's unfair act or omission has caused financial loss, it will try to put the SME customer back into the position they would have been if the bank had not made that mistake. To do that, the BBRS will look at the situation the customer was in after the bank's unfair act or omission started to impact its finances. Financial loss can include consequential loss as well as direct loss.

**Non-financial loss**

Resolving complaints includes assessing non-financial impacts and the BBRS can award compensation if it concludes that the SME customer has experienced inconvenience and damage to reputation – or even, if it is a sole trader, 'distress'.
The BBRS may make this type of award even if there is no quantifiable financial loss in the case overall.
The BBRS can also make non-financial directions, such as requiring the bank to continue re-directing payments to another account.



## Can I use the BBRS if insolvent?

BBRS. Business Banking Resolution Service

Insolvency does not, of itself, impact eligibility for the BBRS.

However:

- ✓ The complaint must be brought by the insolvency practitioner or an individual who has been authorised by the insolvency practitioner.
- ✓ The individual bringing the complaint must also have (or have had) a role in the business such as director, shareholder, partner, trustee, member or sole trader.

For complaints that are eligible, our investigation and decision-making processes will be the same as that for any other business entering our service.

This can be a complex area, but we are here to help. If someone is considering bringing a complaint on behalf of an insolvent business, please contact us to discuss this before registering a complaint via our website. Then we can help explain whether we would be able to look at the complaint, and what we would need to see to be able to do so.

## Reaching out to clients

PNLA members are in a unique position to:

- Identify past and present clients that might be able to benefit from our services
- Check our 'Can we help you?' tool on behalf of their clients via thebbrs.org/can-we-consider-your-case/
- Call our helpline number **0345 646 8825** and speak to one of our expert advisors on their client's behalf
- Share information on BBRS with colleagues and clients

## Additional information

**Business Banking Resolution Service**

Visit www.thebbrs.org for more information including:

- Contemporary Scheme eligibility criteria
- Historical Scheme eligibility criteria
- Our FAQs

Visit www.thebbrs.org/register to register or use our 'Can we help you?' tool

Contact us by emailing hello@thebbrs.org or calling us on 0345 646 8825. Our lines are open Monday-Friday between 9am and 5pm.


**Howard Elgot**
**Park Lane Plowden Chambers**

*Undersettlement claims – Personal Injury*

**28.5 mins**

# Howard Elgot

**Called:** 1974

**Email:** howard.elgot@parklaneplowden.co.uk

## Introduction

Howard Elgot is one of the very few provincial barristers to have been shortlisted as Barrister of the Year by the Law Society.

He has acted as both leading and junior counsel in many cases of national importance in the High Court, Court of Appeal, House of Lords and the Supreme Court. He practices principally in the fields of clinical and professional negligence, and personal injury litigation. He is accredited as an adjudicator by the Professional Negligence Bar Association. He previously practised at 3 Paper Buildings, Temple, London.

Independent guides refer to Howard as a “well-prepared, fearsome cross-examiner and negotiator", a "marvellously innovative thinker", who is “admired for his client-friendly demeanour and sympathetic attitude."

Howard is a keen cricketer and a long-suffering supporter of Leeds United.

## Recommendations

**Chambers and Partners 2022 - Personal Injury - Band 1** *"He is very good technically."*

**Chambers and Partners 2022 - Clinical Negligence - Band 1** *"His strengths are his determination to succeed for the benefit of his client, his attention to detail, and tactical acumen"*

**Legal 500 2022 - Clinical Negligence - Tier 1** *"A first-class lawyer and advocate who always operates at the highest level. His technical knowledge and case strategy is second to none."*

**Legal 500 2022 - Professional Negligence - Tier 1** *"He spots the key issues early and focuses on the best approach going forward. He establishes very good rapport with lay clients."*

**Legal 500 2022 - Personal Injury - Tier 2** *"A formidable advocate and a clear, concise communicator. Clients trust him."*

**Chambers and Partners 2021 - Personal Injury - Band 1** *"A sound advocate who always returns papers promptly. A pragmatic and commercially-informed approach is his hallmark."*

**Chambers and Partners 2021 - Clinical Negligence - Band 1** *"Very approachable and gets truly involved in cases to get the best result for the client." "He is really very impressive in face-to-face negotiations and argues his cases eloquently but forcefully."*

**Legal 500 2021 - Professional Negligence - Tier 1** *"Go-to barrister."*

**Legal 500 2021 - Personal Injury - Tier 2** *"Tenacious In pursuit of a case. Always willing to examine every angle of the evidence and to come up with new avenues to explore."*

**Chambers and Partners 2020 - Personal Injury - Band 2** Senior junior known for his superb grasp of claims involving serious spinal and brain injuries. He often acts in complex, high-value paralysis cases, representing both claimants and defendants. He is a frequent speaker at national conferences on personal injury law. He is experienced appearing before the House of Lords, the Supreme Court and the Court of Appeal.

**Strengths:** "Clever, determined and sharp." "He's absolutely top drawer; his attention to detail is superb and he has the ability to turn his hand to almost anything."

**Chambers and Partners 2020 - Clinical Negligence - Band 2** Assists with long-running and typically high-value claims on behalf of both claimants and defendants. He has demonstrated expertise in child brain injury including cerebral palsy, as well as failings in psychiatric care and claims against GPs.

**Strengths:** "He thinks outside the box and is not afraid to look into the little details." "He really knows how to argue for his clients."

**Legal 500 2020 - Personal Injury - Tier 2** '*An excellent junior counsel.*'

**Legal 500 2021 - Clinical Negligence - Tier 1** '*Tenacious In pursuit of a case. Always willing to examine every angle of the evidence and to come up with new avenues to explore. Skilled at pinning down experts and getting to the root of their evidence in conference. Excellent in negotiations. Very capable at arguing costs budget issues in these types of cases.*'

**Legal 500 2020 - Clinical Negligence - Tier 1** *'Specialises in claimant work.*'

**Chambers and Partners 2019 - Personal Injury - Band 2** "His attention to detail is second to none and he is incredibly thorough in his preparations. He is very knowledgeable on the most complex of issues."

**Chambers and Partners 2019 - Clinical Negligence - Band 2** "He's relentless in his pursuit of a case and clear in his assessment of its strengths and weaknesses. He handles medical experts and opposing counsel well and is not intimidated by anybody." "My greatest praise for Howard is when he is in court - he is a brilliant advocate."

**Legal 500 2018/2019** "A smooth and determined barrister."

**Chambers and Partners 2018 - Clinical Negligence - Band 2** Assists with long-running and typically high-value claims on behalf of both claimants and defendants. He has recent experience in child brain injury and failed orthopaedic surgery cases, as well as psychiatric claims.

**Strengths:** "He's very, very experienced and he thinks outside the box." "He will fight your client's corner and doesn't back down easily."

**Recent work:** Successfully represented the claimant in a case in which negligent treatment of an infection led to a total knee replacement, while further infections and surgery left the claimant permanently disabled.

**Chambers and Partners 2018 - Personal Injury - Band 2** Senior junior known for his superb grasp of claims involving serious spinal and brain injuries. He often acts in complex, high-value paralysis cases, representing both claimants and defendants. He is a frequent speaker at national conferences on personal injury law.

**Strengths:** "As good as a silk. Able, tenacious and a fighter. Always quick to pick up on relevant points."

**Recent work:** Acted for the defendant in Mills v Bankole, an RTA matter in which the claimant claimed permanent disability and almost £1 million in damages.

**Legal 500 2017** "Experienced in catastrophic injury claims."

**Chambers and Partners 2017 - Clinical Negligence** Assists with long-running and typically high-value claims on behalf of claimants and defendants. Has recent experience in child brain injury and failed orthopaedic surgery cases.

**Strengths:** "He is excellent at dealing with liability in difficult clinical negligence claims. He has a thorough knowledge of both medicine and the law." "He is a safe pair of hands and is reliable and academic."

**Recent work:** Represented the Claimant in Carrick v NHS Commissioning Board. The Claim related to negligence after the claimant suffered a stroke in prison.

**Legal 500 2016 (Personal Injury and Clinical Negligence)** "He has a sharp mind- few can match his intellect in the region."

**Chambers & Partners 2016 (Clinical Negligence)** "Acts for claimants and defendants in maximum severity cases, including cerebral palsy and catastrophic brain injury claims."

**Strengths**: "He is an extremely thorough individual who focuses on the main issues in a particular case." "The work that you send him is always returned promptly and he is happy to engage at any time by telephone."

**Chambers & Partners 2016 (Personal Injury)** "Represents claimants and defendants in personal injury cases of the utmost severity involving brain, spinal and orthopaedic injuries. Noted by market observers for his strength in cases involving fatal accidents."

**Strengths**: "He is one of the strongest players." "He has the courage of his convictions."

**Chambers & Partners 2015** "Well versed in catastrophic injury and clinical negligence litigation. Commentators praise him highly for his strong technical skills and knowledge in industrial disease cases, including asbestos and respiratory."

**Expertise**: “He is very capable and a tenacious advocate.” “He has a sharp mind and is one of the best counsels in the region, even a match for a QC.”

**Recent work**: He acted in the fatal incident claim Chapman and Gibbs v Bradley, which involved dependency claims as well.

**Chambers & Partners 2014 "**Frequently handles extremely high-value complex catastrophic work, with particular expertise in industrial disease litigation and brain injury cases relating to infants."

**Expertise**: "He is extremely thorough and very good with clients."

**Recent wor**k: He acted for the claimants in a group action against British Coal by coal miners who suffered VWF as a result of using vibratory tools.

**Chambers & Partners 2013 "**Howard Elgot acts for both defendants and claimants on a broad range of personal injury matters. He handles catastrophic brain and spinal injury cases, as well as disease litigation. His recent matters include the British Coal Vibration White Finger Litigation."

**Chambers & Partners 2012** "Howard Elgot tackles catastrophic brain and spinal injuries, workplace stress and disease litigation."

**Chambers & Partners 2011** "Well-prepared, fearsome cross-examiner and negotiator" who is well known for his handling of catastophic injury, industrial disease and stress claims.

**The Legal 500 2010** "Howard Elgot is an excellent choice for fatal accident actions."

**Chambers and Partners 2010** The "cerebral" Howard Elgot is another well-known figure on the circuit. His great forte is his "expert handling of fatal claims, which few can better."

**Chambers & Partners 2009** Howard Elgot shines in fatality claims thanks to being "a marvellously innovative thinker."

**Chambers & Partners 2008** "a solid, safe pair of hands" who is "admired for his client-friendly demeanour and sympathetic attitude."

**The Legal 500 2007** **"**one of the leading juniors on the North Eastern Circuit in the field of personal injury and clinical negligence work."

# Notable Cases

## Recent Cases

Howard Elgot continues to act in the British Coal VWF Professional Negligence Litigation. He has recently been appointed to act in national multi-party professional negligence litigation against solicitors who acted for purchasers in the new-build leasehold ground rent controversy https://www.gov.uk/government/news/crackdown-on-unfair-leasehold-practices--2 Recently he has successfully obtained compensation for a professional footballer whose career was ruined by a foul tackle during a game. Former Colchester United centre forward Jamie Guy suffered a complex double leg fracture after being fouled by the Eastleigh Town goalkeeper. International referee Dermot Gallagher and football agent Dan Chapman acted for Jamie Guy as expert witnesses.

## Reported Cases

**Liddle v Atha and Co [2018] 1 W.L.R. 4953** QB Underpayment of issue fee. Abuse of Process? Striking out.

**Barton v Wright Hassall LLP [2018] 1 W.L.R. 1119** Supreme Court - Should the courts apply the dispensing provision in CPR 6.15 to allow irregular service of a claim form by a litigant in person?

**DS v North Lincs and Goole NHS Trust [2016] Med. L.R. 339** QB Cerebral Palsy. Breach of Duty and Causation.

**Marshall v Hull & East Yorkshire Hospitals NHS Trust - [2015] All ER (D) 76 (Feb)** - Do the causation rules expounded in the well-known cases of Chester v. Afshar and Wright v. Cambridge Medical Group apply in all cases of clinical negligence?

**Murrills v. Dr Berlanda [2014] EWCA Civ 6** - Appropriate place of service of claim form on an Italian doctor. Residence or place of business?

**Power v. Meloy Whittle Robinson [2014] EWCA Civ 898** - Use of CPR 6.15(2) to validate invalid service of claim form in the British Coal VWF Professional Negligence Litigation. The first judgment of the Court of Appeal in a domestic case on this new provision.

**Swift v Dr Edbrooke. Clinical Risk, 2013 -** Ectopic pregnancy claim against GP. The negligent GP and her senior partner were described by trial judge as the least satisfactory medical witnesses he had ever come across.

**Bryce v Newcastle upon Tyne Hospitals NHS Trust. Clinical Risk 2012** – Failure to diagnose cauda equina syndrome **Middleton v Thompson [2012] EWCA Civ 231** - The court's approach to psychiatric evidence - somatoform disorder.

**Lovell v Leeds City Council [2009] EWHC 1145 (QB)** - Allegation of negligent design and siting of new roundabout causing catastrophic injury.

**Lough v Intruder Detection and Fulton [2008] EWCA Civ 1099** - Occupiers' Liability claim. Apportionment of liability between residential occupier and employer.

**Bailey -v- Warren [2006] EWCA Civ 51 ; The Times, 20 February 2006: [2005] PIQR P15** - The leading case on the

court's discretion to ex post facto validate an agreement with a claimant lacking litigation capacity.

**Halsey -v- Milton Keynes NHS Trust [2004] 1 WLR 3002** - The leading case on the effect of a refusal to mediate.

**Beck -v- Ministry of Defence [2004] PIQR P1** - When will the Court permit change of an expert witness?

**Hatton -v- Sutherland [2002] 2 All ER1** - Stress at work - the leading case.

**D & D -v- Donald [2001] PIQR Q5** - Impact of marital infidelity on the multiplier in a fatal accident claim.

**Burke v Leeds Health Authority [2001] All ER (D) 209 (Jan)** – Parental consent to treatment.

**Cullen v Harman and MIB, Court of Appeal 18th Feb 2000** – MIB liability **Hurd v Stirling Group Plc, Court of Appeal 26th May 1999** - reg.18(1) Workplace (Health, Safety and Welfare) Regulations 1992.

**Clarke -v- Kato [1998] 1 W.L.R. 1647 (H.L.)** - When is a car park a "road" for the purposes of Road Traffic Act liability?

**Dickson v. Barrington Black, Austin, Court of Appeal 13th May 1997** – Solicitors' negligence.

**Liddell -v- Middleton [1996] P.I.Q.R. P36** - Admissibility of expert evidence in motor claims.

**Hill -v- Bruce [1995] P.I.Q.R. P300** - Causation of damage - contributory negligence.

**Roebuck -v- Mungovin [1994] 2 A.C. 224** - Strike out for want of prosecution.

**Dale -v- British Coal [1992] 1 W.L.R. 96 Limitation Act** - whether leave to appeal required.

# Clinical Negligence

Howard has a large high profile clinical negligence practice, including many cerebral palsy and other obstetric claims, brain and spinal injury cases and amputation cases. Although his clinical negligence practice is almost entirely on behalf of claimants. he was successful in the Court of Appeal in 2014 in the important procedural case of Murrills v Berlanda, acting on behalf of an Italian doctor. Other high profile cases include the claim of Gianluca Petrachi, an Italian Serie A footballer, against an English surgeon, and Marshall v Hull and East Yorkshire NHS Foundation Trust, a new and important High Court decision on causation.

Howard has spoken nationally to AvMA on amputation claims and is a regular speaker at regional meetings of AvMA, most recently on the topics of consent to treatment and service of the claim form. This latest talk drew upon Howard's recent successful appeal to the Court of Appeal in Power v Meloy Whittle. Howard recently chaired the AvMA Seminar "Funding & Costs in the Brave New World" and spoke on the expected changes to the discount rate at the recent Clinical Negligence Debate in Manchester. He has also spoken to the regional conference of the Brain Injury Rehabilitation Trust.

# Inquests & Inquiries

# Personal Injury

Howard has acted in many high profile claims on behalf of claimants, insurers and the Motor Insurers' Bureau. He was instructed in the Selby Rail Crash personal injury litigation on behalf of the insurers of Gary Hart and has acted in many other multi-party claims on behalf of claimants. He is one of the lead counsel in the British Coal VWF Professional Negligence claims.

Howard regularly appears in complex personal injury and clinical negligence claims, including brain injury and other catastrophic injury claims and industrial disease litigation, particularly stress-related claims. Howard appeared in the Court of Appeal in the leading stress at work case, Hatton v Sutherland.

Additionally Howard has a substantial professional negligence practice arising out of personal injury and clinical negligence claims.

Howard has twice spoken at the Personal Injury Bar Association national conference on the topic of mental capacity, having appeared in the Court of Appeal in the landmark case of Bailey v Warren. He has also spoken at the national AvMA conference on amputation claims, and has also spoken at a conference of the Brain Injury Rehabilitation Trust.

As well as having been short-listed nationally as Law Society Barrister of the Year, Howard has also been short-listed nationally as Personal Injury Barrister of the Year.

# Professional Negligence

Howard Elgot continues to act in the British Coal VWF Professional Negligence Litigation. He has recently been appointed to act in national multi-party professional negligence litigation against solicitors who acted for purchasers in the new-build leasehold ground rent controversy https://www.gov.uk/government/news/crackdown-on-unfair-leasehold-practices–2

His most recently reported professional negligence cases are Liddle v Atha and Co and Barton v Wright Hassall LLP, both reported in 2018 1WLR. In Barton v Wright Hassall LLP, Howard acted as leasding counsel in the Supreme Court, leading Abigail Telford, also of Parklane Plowden.

Howard has a wealth of experience in commercial, construction and professional negligence work and has appeared regularly in the higher courts including the Queen's Bench and Chancery Divisions as well as the London Court of International Arbitration.

Howard has advised in various group litigation professional negligence claims relating to property development at home and overseas, particularly in Italy, Egypt and Turkey.

He acted successfully in a claim made by the Turkish sole distributors of Johnson and Johnson surgical products against Johnson and Johnson, a case in which he led Richard Copnall, also of Park Lane Plowden.

Howard is developing a habit of acting in commercial litigation involving Manchester United. He acted for the designer and the construction company that constructed the football pitches at their Carrington training ground and previously acted for the Vice-President of Manchester United in a dispute with a former director involving a substantial shareholding in the club.

Howard has acted in many mediations and appeared in the Court of Appeal in the leading group of cases on ADR, reported collectively as Halsey -v- Milton Keynes.

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# "An Otherwise Intractable Situation" -

# The Conundrum of Incapacity in Solicitors' Negligence Claims

**Howard Elgot – Parklane Plowden Chambers**

***"34. It was this dichotomy that led the court to suggest the indemnity that has now been agreed, and the stay that has now been agreed. This approach is, and always was, the obviously pragmatic solution to an otherwise intractable situation—as the judge also effectively recognised."***
***Sir Geoffrey Vos MR in Evans v Betesh Partnership 2022 RTR 1***

## The Facts

1. The facts of Evans v Betesh Partnership could not be much simpler. Hannah Evans was injured in a road traffic accident on 11th July 2009 while a passenger in a car driven by a Mr Clancy. Mr Clancy pleaded guilty to causing death by dangerous driving in respect of his driving at the time of the accident.

2. Ms Evans instructed the Betesh Partnership to act for her in her claim against Mr Clancy. She was further advised by a barrister instructed on her behalf by the Betesh Partnership.

3. Ms Evans subsequently accepted a Part 36 offer of £100,000 made on behalf of Mr Clancy's insurers following a conversation between herself and her solicitors on 8th November 2011. Neither her solicitors nor her barrister had advised her to accept the offer, but she gave instructions to her solicitors to accept the offer and the offer was duly accepted.

4. Some years later Ms Evans consulted new solicitors. The new solicitors sought new medical evidence. The new medical evidence from a consultant neuropsychiatrist and from

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a consultant neuropsychologist was to the effect that Ms Evans had suffered a traumatic brain injury in the accident and probably did not have litigation capacity at any time following the accident. Importantly she probably did not have litigation capacity as at the date of acceptance of the Defendant's Part 36 offer.

5. It was alleged that the claim was very substantially under settled. The new solicitors, acting through a litigation friend, issued proceedings in professional negligence against the Betesh Partnership (the first and third to sixth Defendants) and against the barrister (the seventh Defendant).

The Requirement of Approval

6. If Ms Evans did not have litigation capacity at the time of the acceptance of the Part 36 offer, any purported settlement of Ms Evans' claim, or any acceptance of the Part 36 offer, was void ab initio for want of approval by the court.

7. CPR 21.10 states:-

"(1) Where a claim is made—
(a) by or on behalf of a child or protected party; or
(b) against a child or protected party,
no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court."

CPR Part 36.14 (4) which states:-

" If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given."

No approval had been asked for or given. Ms Evans and her advisors did not want to apply for an approval; Mr Clancy and his insurers would not be able to obtain an ex post facto approval if Ms Evans had been injured so severely in the accident as to lose litigation capacity. (For when an insurer might obtain an ex post facto approval, see the decision of the Court of Appeal in Bailey v Warren 2006 C P Rep 26.)

8. White Book 21.10 .3

**"If a settlement has been approved, an effect of that approval is that no claim can be brought by the child or protected party against the solicitors for negligent under (or over) settlement.** Where a settlement has been reached without approval and where it is alleged the legal advisors were negligent in under or over settling, it may still be possible to bring an action against the legal advisors. The claimant is likely to in any event seek an indemnity against the advisers for any adverse costs in seeking to re-open the original claim (see Evans v Betesh Partnership (A Firm) [2021] EWCA Civ 1194). It is therefore wise, where there is any doubt about capacity, to seek approval."

9. Unfortunately the first sentence of the above White Book commentary (highlighted above) is wrong. Approval by the court emphatically does not have the effect of protecting the legal advisors who seek the approval. This was one of the issues upon the Court of Appeal were unanimous in Bailey v Warren, and for good reason. The court can only approve a settlement on the evidence put before it.

Limitation

10. Furthermore If Ms Evans did not have litigation capacity as at the date of settlement, there is no limitation reason why her claim against Mr Clancy would fail (s. 28 (1) Limitation Act 1980). The new solicitors were therefore at liberty to bring proceedings on behalf of Ms Evans against Mr Clancy and/or his RTA insurers notwithstanding the acceptance of the

Part 36 offer and the effluxion of time.

Standard Practice

11. The Defendants argued that standard practice in these claims is for a claimant to pursue the original tortfeasor first, as was done, for instance, in Bailey v Warren [2006] CP Rep 26 (see para. 98,) and in Dunhill v Burgin [2014] 1 W.L.R. 933 (see the Order of Hickinbottom J).

12. Indeed it was accepted in the Court of Appeal in Evans that there was no previous case, reported or otherwise, known to any of the parties, where a claimant who alleged that he/she did not have litigation capacity as at the date of a settlement had chosen to issue proceedings against his/her legal advisers to the exclusion of the original tortfeasor.

The Pleadings

13. In the High Court Marcus Smith J struck out the Particulars of Claim against the Defendants on the basis that:-

"The essence of Ms Evans' claim – as pleaded in paragraph 33 of the Particulars of Claim – is that she had 'lost the opportunity of recovering an appropriate sum of damages and thereby damages in addition to those already recovered and in respect of which she had a reasonable prospect of recovering" (para. 5)

This was held to be inconsistent with the allegation that Ms Evans did not have litigation capacity. If she did not have litigation capacity she suffered no loss of opportunity.

The Appeal and the Intractable Nature of the Problem

14. The appeal from the decision of Marcus Smith J was heard by the Court of Appeal in July 2021, and was compromised on the second day of the appeal after encouragement from the bench that the Defendants should indemnify the Claimant in relation to her costs of pursuit of Mr Clancy and/or his insurers. Notwithstanding the settlement of the appeal, the Court of Appeal invited the Defendants to complete their submissions and thereafter reserved judgment.

15. Why is the problem "intractable? Sir Geoffrey Vos MR explained:-

"32. It might have suited Ms Evans to argue that she did have capacity in 2011, had it not been for the views expressed by Professor Wood [consultant neuropsychologist] . Had she done so, the judge would not have struck out the claim and the defendants would have accepted that she had pleaded a reasonable claim for substantive loss, even if they might have quarrelled with the allegation that the defendants ought to have investigated whether she had capacity. As it seems to me, however, that allegation by itself would be unlikely to lead to substantial damages.

33. Conversely, as appeared in the course of Mr Elgot's submissions for the firm, it looked likely that the defendants would ultimately argue, if there were a trial of these proceedings before any application to re-open the settlement, that Ms Evans did not have capacity. In that way, it could submit, as it has done before us, that Ms Evans had either suffered no loss because she could have re-opened the settlement or, at best, suffered very little loss for that reason."

16. Sir Geoffrey Vos MR considered that the court below had been wrong to strike out the claims, holding that the approach of Marcus Smith J had been "too binary" (para. 39). He continued that:-

"She has lost, even if she had no capacity, the opportunity of recovering more than £100,000 in damages in 2011 and before entering into a settlement. Instead, as a direct result of the breaches of duty alleged against the firm and the barrister (if proved), she has been party to a settlement that may be difficult and costly to re-open."

17. It is true that Ms Evans would probably have some extra expenses if she wished to resurrect the claim against Mr Clancy, but in fact she had not pleaded the type of extra expenses canvassed in the Dunhill litigation, and never sought permission to amend.

Joinder

18. Unless Ms Evans joined Mr Clancy into the proceedings, any finding by the court in the lawyers' negligence claims would not bind Mr Clancy. Ms Evans refused to join him into the claim against her lawyers as a further defendant, and the defendant lawyers could not bring third party proceedings against him because of the wording of the Civil Liability (Contribution) Act 1978 – see Royal Brompton Hospital v Hammond [2002] 1 W.L.R. 1397.

Quantification of the Claim Absent the Pursuit of Mr Clancy

19. Absent pursuit of Mr Clancy and/or his insurers, how might a court quantify the claim against the solicitor or barrister defendants, if Ms Evans did not have litigation capacity at the date of settlement?

20. It is worth noting that damages in the solicitors'/barristers' negligence claims could not be assessed on the basis of the chance of a court finding that Ms Evans did not have capacity at the relevant time. The issue is truly binary. Ms Evans either had litigation capacity or she did not have it..

21. If Ms Evans did not have litigation capacity in 2011, but had settled her claim at full value and obtained an approval, the value of her entire damages award (on a lump sum basis)

would have been about half the award that she would have been entitled to in 2021/22. This unusual benefit of delay is caused by the changes in discount rate from +2.50% in 2017 to the current discount rate of -0.25%.

22. Ms Evans is now aged about 30. At the current - 0.25% discount rate her lifetime care and case management/OT/aids and appliances/ Court of Protection etc multiplier for future loss is about 63.

23. If her claim had settled say 6 years ago, the discount rate would have been 2.5% and her lifetime care and case management/OT/ aids and appliances/ Court of Protection etc multiplier would have been about 31. Her future loss of earnings multiplier now will also be about double the multiplier of 6 years ago.

24. Please consider two decisions of the Court of Appeal, namely Kennedy v. Van Emden 1996 PNLR 409 and Bacciottini v. Gotelee and Goldsmith 2016 4 WLR 98, where the causes of action against the negligent solicitors had accrued, because there were breaches of duty and compensable losses, but thereafter the causes of action were lost because there were no longer any compensable losses as at the date of trial.

25. And so, if Ms Evans' claims against her lawyers were not stayed, and if Ms Evans did not have litigation capacity when the Part 36 offer was "accepted", how might a court approach the quantification of her professional negligence claims?

26. Is it an "intractable situation"?

HOWARD ELGOT

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**Charles Holbech**
**Radcliffe Chambers**

*Professional Negligence and Wills*

**28 mins**

Radcliffe Chambers

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

### TRUSTS

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

### WILLS AND ESTATES

Charles has considerable experience in relation to wills, probate and administration, and succession. He is experienced in will drafting, and in tax planning through wills. Charles has appeared in the Privy Council in a leading case on the construction of wills: *Sammut v Manzi* [2009] 1 WLR 1834. He also has considerable experience and expertise in claims relating to the estates of deceased persons such as probate claims, proprietary estoppel, and family

provision claims. He appeared in the Court of Appeal in a leading case on proprietary estoppel: *Campbell v Griffin* [2001] EWCA Civ 990; and in the High Court on constructive trusts: *Thomson v Humphrey* [2009] EWHC 3576 (Ch). Charles has a particular interest in claims to set aside wills on the grounds of undue influence, want of knowledge and approval, lack of testamentary capacity, and/or forgery. He appeared in *C v D* [2012] EWHC 3214 (Ch), a case considering whether a spent conviction could be adduced as evidence of propensity for dishonesty. He has given many lectures on these issues, and has advised on and appeared in many cases in this area.

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

Charles represented the Executors of an estate on an interesting point of construction of a will in Jeffreys v Scruton [2020] EWHC 536 (Ch).

## TAX AND ESTATE PLANNING

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

## PROPERTY

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

## PROFESSIONAL LIABILITY

Charles has a particular interest in professional negligence and has lectured extensively upon negligence claims relating to wills. He has addressed the Professional Negligence Lawyers' Association's annual conference on three occasions on professional negligence in the private client context, most recently in 2019.

Charles is the sole contributor of *White v Jones liability for negligent advice* published in Oxford Journals – October 2016, and has recently written another article in Trusts & Trustees entitled *Discretionary objects and the beneficiary principle*.

He also wrote *A hard case to make: Bromley v Breslin [2015*] published in Trusts & Estates Law Journal July/Aug 2016*,* and the chapter on Taxation in *Williams Mortimer & Sunnucks on 'Executors, Administrators & Probate' (*2018) published by Sweet and Maxwell.

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

Charles regularly contributes headnotes to the Wills and Trusts Law Reports.

## RECOGNITION

Recent directory editorial comment has included the following:

- *"He is extremely intelligent but also very approachable and responsive."* (Chancery: Traditional, *Chambers UK Bar 2022*)
- *"Charles is excellent at quickly identifying the issues and advising on the law. He is excellent in his technical knowledge but is also able to explain it in a way which is easily able to be understood by the beneficiaries. He is always approachable and helpful."* (Private Client: Trusts and Probate, *Legal 500 UK Bar 2022)*
- *"I'd follow him to any set, because he's so bright and capable, very clever. I would always go to him with anything complicated."* (Chancery: Traditional, *Chambers HNW London Bar 2021*)
- *"Very, very good and goes the extra mile on difficult cases." "He's absolutely brilliant. He gives the client confidence in the case and really helps them through it."* (Chancery: Traditional, *Chambers UK Bar 2021*)
- "*Very Bright.*" (Private Client: Trusts and Probate, *Legal 500 UK Bar 2021*)
- "*He is very, very good. He goes the extra mile on difficult cases.*" (Chancery: Traditional, *Chambers HNW London Bar 2020*)
- "*He's absolutely brilliant. He gives the client confidence in the case and really helps them through it*." (Chancery: Traditional, *Chambers HNW London Bar 2020*)
- *"He gives clear and practical advice. In addition, he has always made himself available to speak with the client and with their other advisers in order to provide the best advice for them."* (Chancery: Traditional, *Chambers UK Bar 2020*)
- "*Very bright*." (*The Legal 500 UK Bar 2019*)
- *"A real expert on tax and he always knows how to work through even the most complex of problems. His advice is always very helpful and is spot-on. His technical skills are outstanding and he has a very strong grasp of some of the most complex legal concepts."* (Chancery: Traditional, *Chambers UK Bar 2019*)
- *"He's good for the particularly contentious matters and is very quick thinking. He is a committed practitioner and always goes the extra mile for his clients. He is forceful and a go-to person if you have a fraught dispute."* (Chancery: Traditional, *Chambers HNW 2018*)
- *"Excellent on really complex and intricate details." "He really knows his stuff."* (Chancery: Traditional, *Chambers UK Bar 2018*)
- *"Very meticulous and methodical."* (Private Client: trusts and probate, *The Legal 500 UK Bar 2017*)
- *"A pragmatic barrister who gets to the crux of the matter and offers sensible, straight forward advice" which "invariably chimes with the objectives of the clients."* (Chancery: Traditional, *Chambers UK Bar 2017*).
- *"He is academically bright, has great technical skills and can assimilate and deal with a great amount of detail and documentation."* (Chancery: Traditional*, Chambers UK Bar 2016*)
- *"Superb on detail and particularly technical points of law"* (Private Client: trusts and probate, *The Legal 500 UK Bar 2016*)

## PUBLICATIONS

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

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

## QUALIFICATIONS

Christ Church, Oxford – Classics Mods; BA in Law

## MEMBERSHIPS

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

## POLICIES AND OTHER DETAILS

- Read Charles' Privacy Notice, Data Protection Policy and Disposal Policy

**PROFESSIONAL NEGLIGNCE AND WILL DRAFTING**

**SUMMARY**

- Liability of solicitor to intended beneficiary who suffers loss as a result of the solicitor's breach of duty to take care to ensure that effect is given to testator's instructions: *White v Jones* [1995] AC 207.

- Breach of contractual duty to testator a breach of tortious duty to identified or identifiable beneficiary on whom the testator wishes to confer a particular benefit.

- Breach in failing to implement the testator's instructions

    - by drawing up a will for execution promptly; or
    - by failing to ensure that will duly executed (*Marley v Rawlings* [2015] AC 129; *Marley v Rawlings (No 2*) [2015] AC 157*).*

- Is there a duty to advise a testator generally about matters relating to the instructions giving rise to a liability to someone who might have benefited if such advice were given?

- Or a duty to inquire into a relevant matter and/or advise the testator and/or to ascertain the testator's instructions in the light of that advice?

- Distinction between a case where:

    - the testator has **not** expressed any wish to benefit a particular person even though they might have been expected to benefit that person, if fully advised (no liability: *Gibbons v Nelson* [1999] Ch 326); and

    - the testator **has** expressed a wish to benefit a particular person, but failed to give competent advice as to how, or to how best, that benefit should be conferred.

- Duty to advise to sever a joint tenancy so as to give effect to an intended testamentary gift of a half share of joint property

    - part of the will-making process
    - *Carr-Glynn v Frearsons* [1999] Ch 326

- Duty to:
    - advise as to legal effect of joint tenancy and effect of not severing;
    - and to ascertain testator's wishes in light of that advice;
    - *Shah v Forsters* [2017] EWHC 2433 (Ch).

- Probably a duty to investigate
    - whether assets are jointly owned with another; and
    - whether a joint tenancy or tenancy in common.

- Other cases where duty to ascertain correct information and to advise accordingly

- Rectification claim if will does not give effect to testator's instructions due to:
    - clerical error; or
    - failure to understand instructions

- Failure to ascertain instructions outside scope of rectification

- Loss of chance claims
    - causation and damages

- Negligence in drafting a will unclearly
    - costs of construction or rectification claim; and
    - limitation period.


**James Hall**
**Gatehouse Chambers**

# *Solicitors' liability: rectification and aggregation; two recent sources of aggravation*

**49 mins**

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## Practice overview

James specialises in professional negligence, commercial litigation and property disputes. His professional negligence work relates primarily to the financial services and property sectors though he also deals with a wide variety of claims arising from transactions, projects and misconduct of litigation. He deals with a variety of commercial claims with a focus on disputes connected with his professional negligence practice, such as insurance disputes, conspiracy claims and FS sector work including claims against the FSCS. His property work generally relates to title issues, land registration issues, mortgages and trusts issues and often overlaps with his professional negligence practice.

James is instructed in many high-value and complex matters; details of many of his cases are set out in the CVs available in the practice area links on the left.

He understands the need not only for technical excellence but also the commercial imperatives of his clients, which range from large lending institutions and professional indemnity insurers to self-insured businesses, other businesses and high net worth individuals. He focuses on strategy and cost-benefit analysis as well as legal finesse.

Earlier in his career he spent several years as an employed barrister in an international law firm, developing and leading a team of specialist lawyers, giving him invaluable insight and understanding of the workings of solicitors' firms and their clients.

He has regularly contributed to leading texts and had many articles published in industry periodicals and peer-review journals. He has also spoken at the CML Fraud Conference; The Legal Week Banking Litigation and Regulation Forum and the Legal Business Financial Regulation and Disputes Summit as well as having been quoted in the Times and insurance sector magazine Post. He frequently provides seminars and training on a diverse range of topics.




# Professional liability

## Financial professionals, insolvency professionals, directors & officers

James Hall specialises in professional negligence and financial services-related litigation. Apart from his time practising in chambers since 2001, between 2007 and 2011 James spent four years at an international law firm as an employed barrister, developing and leading a specialist team of lawyers. James' time in-house gave him an invaluable understanding of both the commercial realities of practice in a full service law firm and the business of the financial services sector.

James builds on his technical excellence by understanding that strategic overview and costs/benefits analysis are also key to finding the best solutions for commercial disputes.

He is ranked in Chambers UK in the field of Professional Negligence, being described as '*especially strong on claims relating to tax mitigation schemes*' and as having '*an innovative approach to problem solving...the experience he has gained from working in-house gives his advice that commercial and pragmatic edge that the clients love*'.

James is also ranked in the Legal 500 as a leading junior in Professional Negligence and has been described as having '*excellent technical knowledge but is also very commercially savvy*.'

He is also recommended for professional negligence in Who's Who Legal.

James has spoken at the Legal Week Banking Litigation and Regulatory Reform Conference on 'Ticking Timebombs: Tax avoidance scheme claims' and at the Legal Business Financial Regulation and Disputes Summit (where he also chaired a panel discussion) on extensions to the FOS jurisdiction; he has also been quoted in The Times on similar issues and has been quoted in leading insurance sector magazine Post on solicitors' professional indemnity policy issues. He has also spoken on professional indemnity insurance aggregation issues at the Council of Mortgage Lenders' Annual Fraud Conference and has regularly delivered training seminars to law firms.

He is a substantial contributor to Lender Claims (Edited by Tomlinson QC and Grant, Sweet and Maxwell, July 2010) in relation to subjects including equitable securities over land. James is also a contributor to Construction Professional Indemnity Insurance (Sweet and Maxwell, 2018). ). He is also a contributor to Insurance Broking Practice and the Law, Informa.

James' peer-reviewed article 'Breach of Trust- the strongest of all Lender Claims?' was published in both the Journal of Professional Negligence (Vol 28 no. 2) and Trust Law International (Vol 26 no.4)(both 2012). James also co-authored the article 'Breach of trust- commercial lenders beware- but also an opportunity?' in the Mortgage Finance Gazette (2013).

**Recent *Reported Cases***

- *Commercial First Business Limited v Munday* [2014] EWCA Civ 1296 (issues over 'all monies' charges, estoppel, collateral contracts);
- *Freemont (Denbigh) Ltd v Knight Frank LLP* [2014] EWHC 3347 (Ch) (claim against commercial valuer worth £8 -10million);
- *Carr v Formation Group Plc* [2018] EWHC 3575 (Ch) (claim arising out of alleged secret commissions on selling of tax mitigation schemes).

**Financial Services /Tax Advice/Accountancy-related claims**

- *Bache v AFH* – claim for negligence against financial advisors relating to pension transfer arrangements.
- *Harland v St James Place Wealth Management plc & Anor* – misselling of/negligent advice on investments linked to carbon-trading/tax mitigation schemes, quantum in excess of £400,000.
- *Mr and Mrs Carpenter v St James Place Wealth Management plc & Anor* – relating to the misselling of/negligent advice on investments linked to new technology/tax mitigation schemes, quantum in excess of £750,000.
- *Various investors v St James Place Wealth Management plc & Others* – relating to the misselling of/negligent advice on investments linked to new technology/tax mitigation

schemes (including Epocket, VIP and Vismail), quantum in £millions.

- *Various investors v Openwork Limited & Others* – relating to the misselling of/negligent advice on investments linked to new technology/tax mitigation schemes (Including Icebreaker, Betex and Prefect Software), quantum in £millions.
- *Individuals v Accountants* – relating to alleged negligent investment advice on a qualifying registered overseas pension scheme (QROPS), quantum £8,000,000.
- *Various investors v Valuation consultancy subsidiary of major lender* – negligent valuation of business/rights underlying new technology/supporting tax mitigation schemes, quantum in £millions (being led at some stages by Patrick Lawrence QC, 4 New Square- dozens of high net worth individual clients and 4 schemes involved).
- *Nahal & Gill v Crosby Insurance* – Claim against insurance brokers in relation to material non-disclosure/ misrepresentation in relation to commercial property insurance, quantum in excess of £150,000.
- *Jarvis v Royal Skandia Life Assurance & Others* – Claim against insurer and financial adviser re: tax liability on encashment of policy, quantum circa £25,000, jurisdiction and duty of care issues.
- *Various investors v HSBC Private Bank (UK) Limited* – relating to the alleged misselling of/negligent advice on film partnership/tax mitigation schemes, quantum in the £millions.
- *Three investors v IFA firm in the North-West* – relating to alleged misselling of/negligent advice on UCISs with real property, often abroad, as the underlying assets, quantum circa £2million.
- (And on a related issue: *Various investors in the 'Icebreaker' scheme v Enterprise Insurance Co Plc* – enforceability of insurance policy/material non-disclosure/misrepresentation).
- *Individual v Accountants with in-house financial advisors* – relating to alleged misselling of/negligent advice on Scottish commercial property syndicate/tax mitigation schemes.
- *Individual v Wealth Management PLC* – relating to alleged negligent advice in relation to pension funds invested in property syndicates and structured products.
- *Cullum v Towergate Financial* – alleged misselling of/negligence advice on medical drug-related tax mitigation scheme, quantum in excess of £1,300,000.
- *Large farming company v Insurance Brokers* – claims for over £200,000 against insurer and insurance brokers in relation to fire at farm premises caused either by arson or self-heating of hay; issues as to exclusion and coverage and whether failure by brokers to advise on those issues.
- *Individual v Root 2* – claim relating to negligent advice on spread-betting/income tax avoidance scheme.
- *HNW Individuals v Accountants in the North-East* – claim worth circa £10million in relation to alleged advice on investment in a QROPS.

- *Individual and company specialising in optical supplies v Accountants in the South-East* – relating to failure to implement instructions regarding shareholdings and failure to advise on director's loan/s455 tax issues.
- *London estate agency v Large accountancy practice* – relating to advice on amortisation of goodwill/tax relief.
- *South Wales/South West based accountants v Music industry and promotions company* – counterclaim for in excess of £500,000 relating to alleged negligent preparation of accounts and bookkeeping and failure to advise.
- *HNW individuals* (former shareholders in music and events promotion business) *v South Wales/South West based accountants* – claim for around £18million for underlying alleged negligence in preparation of accounts and bookkeeping and failure to produce proper management accounts and modelling/forecasting for high value share sale.

**Other work relating to alleged misselling of financial products**

- *LLP and Ltd Co. clients v HSBC Bank plc* – breach of statutory duty, misrepresentation and/or breach of duty of care re: swap IRHPs – basic loss in excess of £1.3million, possible consequential loss claim of £4.35million.
- *Ltd co. client v Barclays Bank plc* – breach of statutory duty, misrepresentation and/or breach of duty of care re: structured collar/swap IRHP – basic loss in excess of £300,000, plus consequential losses.
- *2 x Ltd co. clients v HSBC Bank plc* – breach of statutory duty, misrepresentation and/or breach of duty of care re: swap and cap IRHPs- basic loss over £160,000, plus consequential losses.
- *Partnership client v Lloyds Bank plc* – misrepresentation/breach of duty of care re: alteration from variable to fixed rate tailored business loan- basic loss over £165,000, plus substantial consequential losses estimated at around £600,000.
- *2 x Ltd co. clients and 1 individual v Multi Units France, Societe D'Investment a Capital Variable S.A. & Lyxor International Asset Management S.A.S* – misrepresentation/breach of contract/breach of duty of care relating to stock market volatility tracking/index-linked investments – primary loss circa £500,000 plus consequential losses, jurisdiction and applicable law issues.
- *Clarke v Virgin Money plc* – representing and advising defendant lender (assignee of original lender) in relation to claim for alleged breaches of statutory duty and/or negligence regarding substantial residential, self-cert interest-only mortgage loan.
- *Various Investors v FSCS* – advice on claims against the FSCS relating to UCIS.

- *Investors in Icebreaker scheme v FSCS* – relating to insolvent Gibraltarian insurer and whether policies relating to tax mitigation scheme are enforceable (and whether FSCS should compensate given the insurer's insolvency)
- *Carr & Ors v Formation Group plc & Ors* – representing first defendant in relation to claim for knowing receipt, alleged bribery, dishonest assistance and unlawful means conspiracy arising out of alleged secret commissions on selling of tax mitigation schemes.
- *HNW foreign national v UK plc and insurer* – in relation to misselling of corporate bond and/or of bond offering insurance policy.

## Legal professionals

James handles a wide variety of claims against legal professionals, often related to his expertise in commercial litigation and property transactions as well as banking and finance disputes and corporate transactions.

He is ranked in Chambers UK in the field of Professional Negligence, being described as "*especially strong on claims relating to tax mitigation schemes*" and as having "*an innovative approach to problem solving...the experience he has gained from working in-house gives his advice that commercial and pragmatic edge that the clients love*".

James is also ranked in the Legal 500 as a leading junior in Professional Negligence and has been described as having "*excellent technical knowledge but is also very commercially savvy*".

He is also recommended for professional negligence in Who's Who Legal.

**Recent cases**

- Lender claims including breach of trust and breach of fiduciary duty; and including e.g. a multi-million pound claim, on behalf of Wave Lending, against solicitors and arising out of seven linked transactions; and another multi-million pound claim, on behalf of Mortgage Express, against solicitors and arising out of twenty-six linked transactions, re: both commercial and residential lending, mainly claimant (for high street banks and intermediary-led lenders, in securitised and non-securitised lending); claims against solicitors (and valuers) for peer-to-peer lending business; but also some defendant work.
- Claims by lenders relating to accidental discharges of mortgages at the Land Registry.
- Acting for claimants or defendants in claims made by large and SME companies and private clients in relation to:
  - Corporate transactions (e.g. restructures, SPAs and transfers of shareholdings).
  - Commercial and residential conveyancing, e.g.:

    - failure to protect business tenancy renewal rights- complex and substantial losses resulting;
    - failure to protect option agreements relating to business premises;
    - errors in drafting of commercial leases;
    - conveying areas of agricultural land not intended to be conveyed;
    - alleged failure to advise on restrictive covenants;
    - failure to advise on effect of overage clauses;
    - failure to advise on Listed Buildings Consent issues;
    - failure to advise on accessway maintenance and site layout issues on development site;
    - failure to advise on various risks in off-plan flats purchase;
    - failure to progress commercial conveyancing leading to loss of finance and delayed development;
- Conduct of litigation (including e.g. defending a reputable West End firm in relation to alleged negligence in freehold enfranchisement proceedings; and negligent conduct of matrimonial proceedings in relation to insurance policy asset).
- Administration of deceased's estate, relating to failure to realise investment prior to investment fund becoming insolvent.
- Tax planning including inheritance tax and capital gains tax advice, planning and mitigation schemes.

## Property Professionals

James' practice has always involved him in a wide variety of property disputes and this has led him into handling the professional negligence claims associated with property transactions as well. His experience of claims against solicitors is dealt with at the Professional Liability – Legal Professionals part of his profile. His recent work involving other property professionals is listed below.

He is ranked in Chambers UK in the field of Professional Negligence, being described as "*especially strong on claims relating to tax mitigation schemes*" and as having "*an innovative approach to problem solving...the experience he has gained from working in-house gives his advice that commercial and pragmatic edge that the clients love*".

James is also ranked in the Legal 500 as a leading junior in Professional Negligence and has been described as having "*excellent technical knowledge but is also very commercially savvy*".

He is also recommended for professional negligence in Who's Who Legal.

**Recent cases**

- Numerous lender claims against surveyors and valuers (re: both commercial and residential lending), mainly claimant (including e.g. development sites, hotels and farms as well as residential property).
- Private client claims against surveyors and valuers (including in relation to the valuation of businesses and sale value of real property) ranging in value from tens of thousands to several millions of pounds.
- Claim against an architect for negligent design in a barn and cellar conversion.
- Claims against an estate agency with in-house architect and project manager and against separate architects relating to design of barn conversion and boundary encroachment.
- Claim against architects, project managers, drainage engineers (and solicitors) by car dealership in relation to various issues on a development site.
- Claim by a major household insurer against its loss adjusters, for loss of the chance to bring various subrogated recovery actions.
- Claim for negligence against professional well-drilling contractor re: borehole drilling operation.

# Commercial dispute resolution

## Banking & finance

James has particular expertise in loans, mortgages and guarantees as well as equitable securities. He has extensive knowledge of both commercial and residential secured lending and of related issues e.g. securitisation, title insurance and land registration.

He is ranked in Chambers UK in the field of Professional Negligence, being described as *"especially strong on claims relating to tax mitigation schemes"* and as having *"an innovative approach to problem solving...the experience he has gained from working in-house gives his advice that commercial and pragmatic edge that the clients love"*.

James is also ranked in the Legal 500 as a leading junior in Professional Negligence and has been described as having *"excellent technical knowledge but is also very commercially savvy"*.

He is also recommended for professional negligence in Who's Who Legal.

He has spoken at the Legal Week Banking Litigation and Regulation Forum on 'Ticking Timebombs: Tax avoidance scheme claims'; at the Legal Business Financial Regulation and Disputes Summit (where he also chaired a panel discussion) on extensions to the FOS jurisdiction;

and on professional indemnity insurance aggregation issues at the Council of Mortgage Lenders' Annual Fraud Conference.

He is a substantial contributor to Lender Claims (Edited by Tomlinson QC and Grant, Sweet and Maxwell, July 2010) in relation to subjects including equitable securities over land. James is also a contributor to Construction Professional Indemnity Insurance (Sweet and Maxwell, 2018).

James' peer-reviewed article 'Breach of Trust- the strongest of all Lender Claims?' was published in both the Journal of Professional Negligence (Vol 28 no. 2) and Trust Law International (Vol 26 no.4)(both 2012). James also co-authored the article 'Breach of trust- commercial lenders beware- but also an opportunity?' in the Mortgage Finance Gazette (2013).

See James' professional negligence page for details of the wide variety of financial services-related professional negligence and alleged misselling claims that he has dealt with.

**Recent *Reported Cases***

- *Commercial First Business Limited v Munday* [2014] EWCA Civ 1296 (issues over 'all monies' charges, estoppel, collateral contracts);
- *Carr v Formation Group Plc* [2018] EWHC 3575 (Ch) (claim arising out of alleged secret commissions on selling of tax mitigation schemes).

**Related work**

- Complex mortgage litigation
- "Title rectification" – the use of various property and commercial law doctrines to perfect or achieve best possible security
- Fraud and undue influence in the creation of loans, securities and guarantees
- Cross-collateralisation – consolidation and "all monies" charges
- Breach of trust in relation to mortgage advances
- Proceedings to establish and/or enforce equitable securities e.g. by way of subrogation
- Professional negligence in relation to secured lending and commercial lending generally
- Secret commissions/breach of fiduciary duty
- Land registry adjudication and indemnity claims
- Freezing injunctions and similar relief

**Related cases**

- Numerous lender claims against solicitors for negligence, breach of trust and breach of fiduciary duty and against valuers for negligence, for high street banks ad intermediary-led

lenders, securitised and non-securitised accounts, ranging up to claims involving twenty-six linked transactions and multi-million pound losses.

- *Commercial first Business Limited v Munday* [2014] EWCA Civ 1296- issues over 'all monies' charges, estoppel, collateral contracts.
- *Southern Pacific Mortgage Limited v Mahmood* – acting for the lender claimant seeking rescission of an erroneous e-DS1, so as to restore its charge; issue over onward transfer and s29 Land Registration Act 2002.
- *Nationwide Building Society v Onadeko & others* – acting for the lender claimant seeking rescission of an erroneous e-DS1.
- *Wave Lending Limited v Rahman & PBG* – advising the lender claimant on title rectification where security and borrower's proprietorship registered in respect of the wrong title, and interconnection with adjoining flat; advising on linked professional negligence claim against solicitors.
- *Virgin Money v Clarke* – acting for lender claimant in mortgage possession claim with counterclaim (and purported defence) by defendant for 'misselling' of self-cert, interest only loan.
- *Forensic Recovery Limited v West Bromwich Building Society* – advising trustee in bankruptcy on claim re: appropriation to debts and unjust enrichment.
- *McCaul v Newcastle Building Society* – acting for lender in mortgage possession claim involving landlocked property, borrower contesting validity of exercise of power of attorney to secure charges over neighbouring titles, s58 LRA 2002 issues, attempted appeal by borrower and difficulties in sale in possession.
- *Carr & Ors v Formation Group plc & Ors* – representing first defendant in relation to claim for knowing receipt, alleged bribery, dishonest assistance and unlawful means conspiracy arising out of alleged secret commissions on selling of tax mitigation schemes.
- *HNW foreign national v UK plc and insurer* – in relation to misselling of corporate bond and/or of bond offering insurance policy.

## Commercial litigation

James Hall specialises in commercial litigation, professional negligence and financial services-related litigation. Apart from his time practising in chambers since 2001, between 2007 and 2011 James spent four years at an international law firm as an employed Barrister, developing and leading a specialist team of lawyers. James' time at Eversheds gave him an invaluable understanding of both the commercial realities of practice in a full service law firm and the business of the financial services sector.

James builds on his technical excellence by understanding that strategic overview and costs/benefits analysis are also key to finding the best solutions for commercial disputes.

He is ranked in Chambers UK in the field of Professional Negligence, being described as "*especially strong on claims relating to tax mitigation schemes*" and as having "*an innovative approach to problem solving...the experience he has gained from working in-house gives his advice that commercial and pragmatic edge that the clients love*".

James is also ranked in the Legal 500 as a leading junior in Professional Negligence and has been described as having "*excellent technical knowledge but is also very commercially savvy*".

He is also recommended for professional negligence in Who's Who Legal.

He has spoken at the Legal Week Banking Litigation and Regulation Forum on 'Ticking Timebombs: Tax avoidance scheme claims'; at the Legal Business Financial Regulation and Disputes Summit (where he also chaired a panel discussion) on extensions to the FOS jurisdiction; and on professional indemnity insurance aggregation issues at the Council of Mortgage Lenders' Annual Fraud Conference.

He is a substantial contributor to Lender Claims (Edited by Tomlinson QC and Grant, Sweet and Maxwell, July 2010) in relation to subjects including equitable securities over land. James is also a contributor to Construction Professional Indemnity Insurance (Sweet and Maxwell, 2018). He is also a contributor to Insurance Broking Practice and the Law, Informa.

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*Commercial First Business Limited v Munday* [2014] EWCA Civ 1296 (issues over 'all monies' charges, estoppel, collateral contracts);

*Freemont (Denbigh) Ltd v Knight Frank LLP* [2014] EWHC 3347 (Ch) (claim against commercial valuer worth £8-10million);

*Carr v Formation Group Plc* [2018] EWHC 3575 (Ch) (claim arising out of alleged secret commissions on selling of tax mitigation schemes).

**Commercial Litigation Work**

Including (anonymised where appropriate):

- *Agents' Mutual Limited v Moginie James Limited* (with Tom Grant QC)- high profile claim for breach of contract, misrepresentation and breach of competition law regarding the On The Market online property portal.
- *Carr & Ors v Formation Group plc & Ors* – representing first defendant in relation to claim for knowing receipt, alleged bribery, dishonest assistance and unlawful means conspiracy arising out of alleged secret commissions on selling of tax mitigation schemes.
- *CK-CK Limited v NFU Mutual Insurance* – advising on policy avoidance/material non-disclosure issues.
- *SIG v NDM; & NDM v SIG* – linked claims concerning supply of timber, terms of agreement, alleged fraud and breach of fiduciary duty as agent.
- *AB Agri v (1) Riddell (2) Dodd* – circa £800,000 claim on guarantee, allegations of misrepresentation, duress, non est factum, interpretation issues.
- *Cartrefi Fforsaron Homes v Wright* – claims for debt for construction of timber-framed housing, dispute as to terms.
- *Registered charity domiciliary care provider v Welsh unitary local authority* – claim for inducement of breach of contract between main contractor and claimant subcontractor.
- *Macron v Ginn* – advising Italian sportswear manufacturer on enforceability of guarantee.
- *Multequip v various guarantors* – claims on guarantees- issues of interpretation and whether guarantee or indemnity.
- *WH Leach v HD Drilling* – claim for negligence re: borehole drilling operation.
- *Black Clawson Limited v AbbFab Engineering Limited* – claim for deceit and other causes of action- re: sub-contract for machine for export, worth circa £750,000-£1m.
- Advising re: dispute over terms of credit insurance.
- Advising Attorney General of the Falkland Islands re: conversion claim regarding illegally caught Patagonian Toothfish.
- Professional negligence work involving solicitors, surveyors, financial advisors and other professionals (see separate CV).
- Insurance issues – interpretation, material non-disclosure and misrepresentation, fraudulent claims (see also Insurance section).
- Freezing orders and other urgent interim relief in circumstances of fraud.
- *LLP v Substantial solicitors' practice in the South-West* – multi-million pound claim against solicitors for conspiracy to use unlawful means to assist debtors in defrauding creditors.

- *Carr & Ors v Formation Group plc & Ors* – representing first defendant in relation to claim for knowing receipt, alleged bribery, dishonest assistance and unlawful means conspiracy arising out of alleged secret commissions on selling of tax mitigation schemes.
- *HNW foreign national v UK plc and insurer* – in relation to misselling of corporate bond and/or of bond offering insurance policy.

# Insurance

## Professional indemnity insurance

James' specialist practice in professional liability work frequently requires him to advise on aspects of professional indemnity policies, both for insurers and insureds, for example in relation to:

- Extent of cover, interpretation of policy clauses and exclusions
- Declinature for fraud, material non-disclosure, misrepresentation, breach of warranty or lack of fair presentation
- Aggregation issues
- The Third Parties (Rights Against Insurers) Acts

**Related work**

James has advised in substantial professional indemnity insurance disputes including, by way of examples:

- Dispute between substantial accountancy practice and insurer, as to exclusions, material non-disclosure, misrepresentation, breach of warranty.
- Dispute between former solicitor and insurer, as to alleged fraud in over 100 conveyancing transactions.
- Claim by lender against conveyancing solicitors where insurers had purported to aggregate many claims leading to potential shortfall in the millions of pounds.

He is ranked in Chambers UK, Legal 500 and Who's Who Legal in the field of Professional Negligence.

James is a contributor to Construction Professional Indemnity Insurance, Sweet and Maxwell, 2018. He is also a contributor to Insurance Broking Practice and the Law, Informa. He has previously spoken on professional indemnity insurance aggregation issues at the Council of

Mortgage Lenders' Annual Fraud Conference. He has also been quoted in leading insurance sector magazine Post on solicitors' professional indemnity policy issues.

## Insurance coverage

James regularly advises on aspects of insurance policies, both for insurers and insureds, for example in relation to:

- Extent of cover, interpretation of policy clauses and exclusions
- Declinature for fraud, material non-disclosure, misrepresentation, breach of warranty or lack of fair presentation
- Aggregation issues
- The Third Parties (Rights Against Insurers) Acts

He is ranked in Chambers UK, Legal 500 and Who's Who Legal in the field of Professional Negligence.

James is a contributor to *Construction Professional Indemnity Insurance*, Sweet and Maxwell, 2018. He is also a contributor to Insurance Broking Practice and the Law, Informa. He has previously spoken on professional indemnity insurance aggregation issues at the Council of Mortgage Lenders' Annual Fraud Conference. He has also been quoted in leading insurance sector magazine Post on solicitors' professional indemnity policy issues.

**Related work**

James has advised in substantial professional indemnity insurance disputes including, by way of examples:

- Dispute between substantial accountancy practice and insurer, as to exclusions, material non-disclosure, misrepresentation, breach of warranty.
- Dispute between former solicitor and insurer, as to alleged fraud in over 100 conveyancing transactions.
- Claim by lender against conveyancing solicitors where insurers had purported to aggregate many claims leading to potential shortfall in the millions of pounds.
- Dispute with bond offering insurer as to remit of policy, reliance on Third Parties (Rights Against Insurers) Act 2010.

James has also advised on insurance issues in relation to other types of policy, for example advising on a business combined policy in relation to theft of and damage to property and goods where material non-disclosure was alleged.

## Insurance funded disputes

James regularly appears in and advises on claims where either or both parties are insured, including professional negligence/indemnity cases and also has substantial experience acting for household insurers in subrogated recoveries claims.

Many of his cases also involve BTE or ATE insurance funding.

For further details of James' experience, see the other practice areas on his profile, most of which include cases where insurers have been involved.

# Real property & mortgages

James has throughout his career advised on and appeared in a large number of property disputes for a variety of client types.

**Related work**

- Enforceability of contracts for sale
- Boundary disputes
- Easements
- Proprietary estoppel and trusts
- Rectification of deeds and documents and other equitable relief
- Undue influence and co-owner/occupier disputes
- Landlord and tenant- relief from forfeiture
- Reconstruction of conveyancing transactions
- Equitable subrogation
- Land registration issues, priority of mortgages and other interests in land
- Title insurance
- Fraudulent transactions
- Land Registry adjudications and Land Registry indemnity claims.
- Freezing injunctions and similar relief

**Recent cases**

- *Commercial First Business Limited v Munday* [2014] EWCA Civ 1296 – issues over 'all monies' charges, estoppel, collateral contracts.

- *Natwest Bank plc v Fox-Davies & 2 others* – acting for the claimant seeking, as executor of a will, to register title in the face of attempted adverse possession by defendants.
- *Southern Pacific Mortgage Limited v Mahmood* – acting for the lender claimant seeking rescission of an erroneous e-DS1, so as to restore its charge; issue over onward transfer and s29 Land Registration Act 2002.
- *Nationwide Building Society v Onadeko & others* – acting for the lender claimant seeking rescission of an erroneous e-DS1.
- *Wave Lending Limited v Rahman* – advising the lender claimant on title rectification where security and borrower's proprietorship registered in respect of the wrong title, and interconnection with adjoining flat.
- *Virgin Money v Clarke* – acting for lender claimant in mortgage possession claim with counterclaim (and purported defence) by defendant for 'misselling' of self-cert, interest only loan.
- *Timegold Limited v Kaur* – claim for declaratory relief as to constructive trust and/or proprietary estoppel in order to enforce defective contract for sale of property.
- *Hanmer v Vale of Glamorgan* – advising local authority on long running boundary dispute.
- *McCaul v Newcastle Building Society* – acting for lender in mortgage possession claim involving landlocked property, borrower contesting validity of exercise of power of attorney to secure charges over neighbouring titles, s58 LRA 2002 issues, attempted appeal by borrower and difficulties in sale in possession.
- *Garden centre v Landlord's successor in title* – re: rectification of commercial lease as to rent review machinery
- *Commercial landlord v tenants* – re: rectification of commercial leases as to rent review machinery

## Professional associations

- Professional Negligence Bar Association
- Professional Negligence Lawyers Association
- London Common Law and Commercial Bar Association
- Association of London Welsh Lawyers
- British Insurance Law Association

## Qualifications

LLB Hons (Cardiff)

## Recommendations

James is ranked as a leading junior for Professional Negligence in both Chambers UK and Legal 500. He is also recommended for professional negligence in Who's Who Legal.

- *"His greatest strength is his ability to see the bigger commercial picture and not get lost in the legal merits. This is what is important to clients. In real terms that means getting results early on in the litigation."* (Legal 500)
- *"Very pragmatic and excellent in discussions with clients."* (Chambers UK)
- *"He is a very personable lawyer – almost like an outsourced member of our team. Because of his law firm background, he understands exactly how clients like his advice to look. He's very adept at striking a balance between detail and practicality."* (Chambers UK)
- *"He is very thorough, articulate and great with clients. He challenges the clients in a sympathetic way to draw out necessary information. His advice is clear and very detailed."* (Chambers UK)
- *"He is a rare breed in terms of being able to distil document-heavy material into detailed advice. Very practical."* (Chambers UK)
- *"He provides excellent advice and is an extremely successful advocate. His previous in-house experience is valued for its commerciality. He is extremely thorough and bright while being very easy to work with and client-friendly"* (Chambers UK)
- *'He is commercially astute and technically very gifted.'* (Legal 500)
- *'He is able to take in immense amounts of detail, distil that knowledge and then summarise it in a way which is easily accessible.'* (Legal 500)
- *"Technically excellent, responsive, client-friendly and commercially minded"* (Legal 500)
- *"Especially strong on claims relating to tax mitigation schemes"* (Chambers UK)

## Publications

- *Construction Professional Indemnity Insurance* (Sweet and Maxwell, 2018): chapter on ascertainment of liability.
- *Lender Claims* (Edited by Tomlinson QC and Grant, Sweet and Maxwell, July 2010) – Contributions in relation to subjects including equitable securities over land.
- *Breach of Trust – the strongest of all Lender Claims*? has been published in both the Journal of Professional Negligence (2012- Vol 28 no. 2) and *Trust Law International* (2012- Vol 26 no.4).
- *Insurance Broking Practice and the Law, Informa* – Contributor

## Insights

**19/11/2021** International Men's Day: parental leave – is the approach of men in barristers' chambers changing?
**26/10/2021** Black History Month: #ProudToBe an Ally
**14/09/2021** Common mistake, rectification and the danger of box-ticking
**09/09/2021** Aggregation – solicitors' professional indemnity insurance: an update on Baines v Dixon Coles & Gill
**12/07/2021** James Hall, Tom Bell and William Golightly's article on SAAMCO and MBS v Grant Thornton picked by CIArb North West

## Past events

**24/09/2021** Professional Liability Online Seminar Series – Solicitors' and barristers' negligence
**22/04/2021** James Hall speaking at Legal Cheek's new Living Room Law
**18/02/2021** #HardwickeBrew – Property – Overage & Options
**13/11/2020** #HardwickeBrew – Construction Professionals, Covid and the Third Parties (Rights Against Insurers) Act 2010
**30/06/2020** #HardwickeBrew – Professional Negligence – Surveyors Negligence
**14/05/2020** #HardwickeBrew – Property – Mortgage Issues
**07/05/2020** #HardwickeBrew – Property – Remote hearings in property disputes
**05/12/2019** Professional Indemnity Insurance: Recent Developments
**12/02/2019** A changing landscape: the impact of changes in the FOS jurisdiction on FS and professional negligence claims
**07/02/2019** James Hall speaking at Financial Services Regulation & Disputes Summit 2019

## Related newsletters

**16/03/2021** Focus On...Professional Liability
**08/10/2018** Property Newsletter: October 2018

## Recognition

> *"He is very thorough, articulate and great with clients. He challenges the clients in a sympathetic way to draw out necessary information. His advice is clear and very detailed."*
> **— Chambers UK**

> *"He is able to take in immense amounts of detail, distil that knowledge and then summarise it in a way which is easily accessible."*
> **— Legal 500**

> *"He is a rare breed in terms of being able to distil document-heavy material into detailed advice. Very practical."*
> **— Chambers UK**

> *"Technically excellent, responsive, client-friendly and commercially minded"*
> **— Legal 500**

> *"His greatest strength is his ability to see the bigger commercial picture and not get lost in the legal merits. This is what is important to clients. In real terms that means getting results early on in the litigation"*
> **— Legal 500**

> *"Very pragmatic and excellent in discussions with clients."*
> **— Chambers UK**

## Practice managers


### Patrick Sarson

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# Solicitors' liability: rectification and aggregation; two recent sources of aggravation

Notes accompanying talk by James Hall for the PNLA conference in December 2021

## Introduction

In this talk I discuss two recent sources of aggravation for solicitors and their insurers, namely rectification and aggregation. There's no particular link between those two subjects other than they have both recently arisen in the context of solicitors and their potential liability in negligence; and there have been two interesting cases in the last six months on these subjects, so I thought they would make a nice pairing!

The cases in question are, in relation to rectification, *Ralph v Ralph* [2021] EWCA Civ 1106 (a decision in July 2021); and in relation to aggregation, *Baines v Dixon Coles and Gill* [2021] EWCA Civ 1211 (a decision in August 2021).

## Rectification

### Introduction

1. Rectification is an equitable remedy whereby the Court can order that a document's wording be altered, and treated as if it had been altered from the time of its creation, to reflect the intentions of the parties *if* the document as originally written does not reflect those intentions.

2. Rectification can be ordered where there is a common or mutual mistake (a mistake by both parties to a document – usually a contract or conveyance); and can sometimes, but less commonly, be ordered where there is a unilateral mistake by one party and unconscionable conduct by the other. It can relate to unilateral documents and dispositions as well as bilateral documents such as contracts.

3. *Ralph v Ralph* was a common mistake case relating to a transfer of real property. It was not itself a professional negligence claim, but it has some interesting facets that could well be relevant to conveyancing solicitors (and licensed conveyancers)' potential liability in transactions involving the purchase of property by joint purchasers. The decision of the Court of Appeal in the case (on a *second* appeal) was handed down

on 22nd July 2021.

## The facts, the first instance decision and the first appeal

4. A father and son, David and Dean Ralph respectively, contracted to purchase a property. David was unable to obtain mortgage finance alone and Dean, being 19 at the time of the purchase in 2000 and also having an income, was able to assist his father by joining in both the purchase and the mortgage loan. The Land Registry form TR1 used to effect the transfer had box 11 (of the standard form at the time: the equivalent option is now contained in box 10 on the current version of form TR1) ticked, thereby (purportedly ) making a declaration of trust that the transferees are to hold the property on trust for themselves as tenants in common in equal shares i.e. a defined and separate 50% equitable share each ("the Ticked Box").

5. It should be noted that the Court of Appeal expressed concern about whether the TR1 in question, not being executed by David and Dean as transferees as well as by the transferor, complied with s53(1)(b) Law of Property Act 1925, and whether the decision in *Taylor v Taylor* [2017] EWHC 1080 (Ch) that such a TR1 was unimpeachable was correct, but the point was not argued by the parties in the case and so the Court assumed that the TR1 amounted to a validly executed declaration of trust.

6. Dean brought a claim for a declaration that he was a 50% beneficial owner of the property, and for an order for sale under TOLATA 1996. The trial judge, HHJ Monty QC, found that David and Dean had simply not reached any agreement on beneficial ownership at all, that there was a mistake in the TR1 by way of the Ticked Box that could be rectified by deletion, and that the property was held beneficially for David alone (i.e. Dean was a mere legal owner and trustee for David). It appears there was no discussion as to beneficial ownership between David and Dean or between either or both of them and their conveyancing solicitor (who acted for them both) prior to the transfer, and the TR1 was executed only by the seller/transferor. Privately, David intended the property to be for the benefit of his family, but his intention thereby was rather nebulous (and note that Dean had other, younger siblings).

7. On the first appeal (neutral citation [2020] EWHC 3348 (QB)), before Mr Justice Morris, the court also found for David: agreeing that there could be rectification to delete the 'X' in the Ticked Box and confirming, the trial judge having found that there was no common intention of sole ownership by David nevertheless, that on the principles set out in *Stack*

*v Dowden* [2007]UKHL 17 and *Jones v Kernott* [2011] UKSC 53[1] David was the sole beneficial owner (informed by the fact that Dean had neither contributed directly to the purchase price nor made any mortgage instalment payments).

## The second appeal

8. On the second appeal Sir Geoffrey Vos, the Master of the Rolls, delivered the only substantive judgment. The key features of that judgment were:

    a. On the assumption that (but see point (e) below) the principles in *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2020] Ch 365 applied:
        i. For rectification, the starting point (but see (iii) below) is that there needed to be "*some outward expression of accord*" between the parties having the common intention that was not reflected in the contract (see also *Joscelyne v Nissen* [1970] 2 QB 86), subject only to an exception in pension scheme cases;
        ii. The exception in pension scheme cases is that it is sufficient for the employer's and the pension trustees' intentions to coincide, without need to show the outward expression of accord because the pension scheme is a 'different animal' to a contract (*AMP (UK) plc v Barker* [2001] Pens LR 77; *IBM United Kingdom Pensions Trust Ltd v IBM United Kingdom Holdings Ltd* [2012] Pens LR 469);
        iii. The communication necessary to establish an outwardly expressed accord or common intention, which each party understands the other to share, need not involve declaring that agreement or intention in express terms; such an accord could include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words. Depending on the circumstances and the context, the fact that an intention or understanding is shared may be apparent from the fact that nothing is said;
        iv. The basis for rectification is entirely concerned with the parties' subjective states of mind, because the justification for rectifying a contractual document to conform to a continuing common intention was found in the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed;

[1] Morris J noted [72], [73], [80] that it was not easy to identify the trial judge's precise reasoning in this respect but that the trial judge must have reached the same conclusion on *Stack v Dowden* principles.

b. The case of David and Dean could be distinguished from *FSHC* itself, as in *FSHC* additional obligations in an agreement went beyond those agreed by the parties, and the parties in question had positively agreed that the agreement would only provide security, and no more i.e. it was impliedly agreed (and known to the parties that each shared the same intention) that no additional obligations would feature in the agreement; whereas, in the case of David and Dean, there was no accord as to how the beneficial interest in the property would be divided (and, therefore, there was no agreement (express or implied) that the Ticked Box would not be ticked);
c. Accordingly, the trial judge's findings did not admit of the conclusion that Dean and David actually agreed anything, nor that they had the same intention. If there was no continuing common intention, the question of whether an outward expression of accord was required in a case of this kind did not need to be decided. Morris J's conclusion that "*the agreement between the parties contained effectively no agreement as to beneficial interests. The best way then to reflect what they did actually agree (i.e. joint legal title only) is to remove the cross in box 11*" could also not stand because, in Vos MR's judgment, "*it was impossible to find a sufficient, or any, continuing common intention that there should be no declaration of trust in the TR1*" (my emphasis in bold). This was not "*a "goes without saying case". Had the matter been raised, David would have said "this is for my family (perhaps including Dean)", and Dean would have said: "I want a share" – what share is not clear, but there was no finding that he was happy to have the same share as his siblings*";
d. Aside from the pension scheme type of case referred to at a (ii) above, Vos MR noted that there is authority for a power to order rectification notwithstanding the absence of proof of any mistake by the trustees appointed under a settlement, in some circumstances: in ***Re Butlin's Settlement Trusts*** [1976] Ch 251 there was no mistake proven on the part of four out of five trustees (only the other trustee and the settlor were proved to have been mistaken), and Brightman J in that case held that there would even be power to rectify where only the settlor can be shown to have been mistaken, provided there was no bargain as such between settlor and trustees: i.e. where the trustees were party to the settlement only as trustees (though the court retained a discretion to decline rectification against a protesting trustee);
e. Vos MR devoted a significant portion of his judgment at paragraphs [26] to [32] to raise (but, because it had not been argued by the parties, not answer) the question of whether the principles in *FSHC* should apply, in unmodified form, outside of a commercial contract and in the context of a declaration of trust, noting the special rules for voluntary settlements outlined in *Re*

***Butlin's*** (see point (d) above).

9. The appeal was therefore successful, rectification of the TR1 to delete the tick in the Ticked Box was not permitted and the effect was that David and Dean were each tenants in common and each had a defined 50% beneficial share in the property.

## Commentary and points to take away from a professional liability perspective

10. There is an old saying - 'hard cases make bad law'. Did this hard case make bad law?

11. The decision of the Court of Appeal certainly seems quite harsh on David. It is clear that neither David nor Dean positively intended Dean to have a 50% share in the property at the time of purchase, and yet that is what Dean ended up with, and the only thing he did for that share was be technically liable for the mortgage loan, though in fact he had not made any payment towards that loan. However, it is hard to find fault with the reasoning on a very strict analysis of the authorities. There needs to be some evidence from which a genuine, actual common intention that each party appreciates the other has, which is not reflected in the document in question, can be ascertained: here there was no such positive agreement, rather the absence of any positive agreement/common intention and simply no thought as to the Ticked Box at all.

12. However, as both the trial judge and the first appeal judge found, it was common to both David and Dean that neither had in fact intended the Ticked Box to be ticked. Could it not be said that in such a situation, it is implied that there was an agreement or a common intention, which would have been obvious to both of them (and 'went without saying'), that neither of them intended the Ticked Box to be ticked, and that they intended the beneficial interests in the property to be resolved by some other means? The Court of Appeal thought not.

13. Although expressly stating that the 'expression of accord' point did not need to be dealt with, the Court of Appeal has, in this case, in some ways shown that a line has to be drawn somewhere when dealing with 'goes without saying'-type rectification: i.e. that in a situation where no thought is really given *at all* to the contractual feature in question, where there were different options that could legitimately have been agreed (joint tenants; tenants in common in 50/50 shares; tenants in common in some other defined shares) but none of which *were* agreed, then, even if coincidentally neither party had wanted the feature in question (such as the ticked box), that is insufficient shared intention so as to give rise to rectification.

14. As Vos MR notes in his judgment, there is already some difference of treatment in terms of different types of transaction/disposition and in different contexts (see numbered points (a)(ii) and (d) above). Thus, it may not be necessary in the case of a voluntary settlement, i.e. one not based on any bargain or agreement between the settlor and trustees, to prove common or mutual mistake by the trustees; whereas in the case of a disposition based on agreement between the parties to it, the common or mutual mistake (and, conversely, their common intention that the agreement should not be what was recorded) does need to be shown. Vos MR appears to have been of the view that the principles ought to be slightly different again where the document concerned is a declaration of trust in a family context.

15. However, is there not a danger that, if the categories of transaction or document where the default principles set out in *FSHC* do not apply are widened, then in each case where a particular category of transaction or document, or its context, is novel and arguably 'non-commercial' in some way, the parties will seek to make an exception to the established principles? A level of flexibility in the law is necessary (and perhaps inherent in an equitable doctrine), but too much flexibility makes the outcome of cases hard to predict and to advise on.

16. *Ralph v Ralph* once again highlights the conceptual difficulties thrown up by the doctrine of rectification for mistake and the nuances which mean that in some scenarios rectification will be available but in other, very similar, scenarios, it will not, unless an argument can be made that the context and nature of the transaction renders it a 'special case' justifying a departure from the normal rules set out in *FSHC*.

17. From a professional liability perspective:

    a. Too much flexibility also makes it harder for transactional lawyers, or the litigators who may ultimately be dealing with the fallout from transactions (including professional negligence claims against conveyancers), to predict with confidence how a court might treat a particular document. Of course, it helps if the transactional documents are clear and explicit about what the intentions of the parties actually are.
    b. To put it more crudely, even if only the basic TR1 is going to be completed (and one can imagine other proforma documents where this point may apply), the lessons for conveyancers are:
        i. Make sure the right boxes are ticked and the wrong ones are not!
        ii. Make sure that the clients' intentions and instructions have been properly ascertained, and recorded in writing. Adopting that process could even reveal a conflict between the clients which is, of course, highly problematic for the conveyancer if it is not identified at the outset (and it seems

there probably was such a conflict in David and Dean Ralph's case).

c. The other issue this decision particularly feeds into is mitigation of loss:
    i. If a transaction turns out not to represent the intentions of at least one party then, in any resultant professional negligence claim against the solicitors or conveyancers, as ever, the claimant will be under a duty to take reasonable steps to mitigate their loss.
    ii. We all know the famous case of *Pilkington v Wood* [1953] Ch 770 which suggests that claimants are not under a duty to embark on complex or costly litigation. The corollary of that principle is that whilst expenses incurred in reasonable attempts to mitigate loss are claimable as damages, if a claimant does embark on risky litigation they may not be able to recover as damages the costs of doing so (*Protea Property Holdings Ltd v 119 Molyneux Road Ltd* [2020] EWHC 1322 (Ch).
    iii. The trickier and more complex the law on rectification becomes, the harder it is to advise professional negligence claimants as to whether they ought to pursue rectification of the document giving rise to the loss, instead of or at least prior to pursuing the professional negligence claim against the solicitor who acted for them. The claimant may be damned if they do or damned if they don't. Defendants and their insurers will usually have more ammunition if no effort is made by the claimant to seek rectification.
    iv. Just look at the course of *Ralph v Ralph* itself – David won at first instance, won on the first appeal but then lost on the second appeal – if he had brought a claim against his conveyancers for the cost of all of that litigation, as damages, would he be considered to have acted reasonably in pursuing it? A difficult question to answer.

## Aggregation

### Introduction

18. Aggregation is where under the terms of an insurance policy what may appear to be multiple claims on the policy are treated as all one claim. That can be either to the insurer's advantage or the insured's advantage, depending on the circumstances. If multiple apparent claims are treated as only one claim then there is only one excess; but there is also only one limit of indemnity.

19. So, aggregation works in favour of the insured where there are lots of small claims the total of which does not exceed, or perhaps does not

greatly exceed, the limit of indemnity for one claim; but, more often, it works in favour of insurers where multiple apparent claims each fall within the limit of indemnity but taken together greatly exceed the limit of indemnity for any one claim.

20. The first instance decision in *Baines v Dixon Coles and Gill* [2020] EWHC 2809 (Ch) (aka *Guide Dogs for the Blind v Box*) was handed down in October 2020. It was a decision of His Honour Judge Saffman sitting as a High Court judge, dealing with summary judgment applications made by the parties, including for declaratory relief relating to whether the defendant solicitors' insurers were entitled to aggregate the claims of the various claimants under the PII policy (in an earlier decision ([2020] EWHC 1948 (Ch); July 2020) the judge had found that despite the fact that these would be claims under the TP(RAI) Act 1930 against the insurer and that the claimants did not yet have a cause of action against the insurer, the court had jurisdiction to make the declarations under the principles outlined in *Rolls Royce v Unite* [2009] EWCA Civ 387).

21. It was one of the few reported cases to deal with aggregation in solicitors' professional indemnity policies and which followed the important Supreme Court decision in *AIG Europe Ltd v Woodman* [2017] USKC 18 which concerned investment and property development schemes in Turkey and Morocco.

22. In summary, the decision confirmed the need for something more than mere similarity between a number of wrongs committed by the same solicitors for the SRA Minimum Terms and Conditions ("MTC") aggregation clause to bite.

23. On 6th August 2021 the Court of Appeal handed down its judgment in the insurers' appeal against the High Court decision. The Court of Appeal upheld that decision, for reasons set out below.

24. Apparently the insurers are seeking leave to appeal to the Supreme Court, though whether they will get it remains to be seen and there is currently (as at the end of November 2021) no reference to the case on the Supreme Court website.

## The facts

25. *Baines* concerned separate claims brought by several clients of a solicitors' firm. The claims arose from the misappropriation of various funds totalling around £4million by a partner (Linda Box, former Diocesan Registrar for the Diocese of Wakefield)("B") in the three-partner firm of Dixon Coles and Gill, which had PII cover with a limit of indemnity of the minimum level (for an ordinary partnership) being £2million per claim. The other two partners were Mr Gill and Mrs Wilding, who maintained they were entirely innocent of the dishonesty

perpetrated by Mrs Box.

26. In the first set of proceedings, church representatives (C1) brought a claim for the recovery of funds misappropriated by Mrs Box. In the second set of proceedings, four charities (C2) claimed sums due to them from an estate administered by the firm. B's equity partners (G and W) discovered that B had dishonestly misappropriated over £4 million of client money. Evidence included a ledger (the red ledger) entitled "The Bishop of Wakefield Fund" in which B had recorded transactions apparently for C1's benefit, but which they did not recognise. There was also another client account ledger entitled "The Bishop's Trust" which was said to contain spurious entries, and details of conveyancing transactions apparently made on C1's behalf but with no record of what had happened to the money. B had engaged in 'teeming and lading' by moving money between accounts to hide the fraud.

27. G and W denied liability for B's misappropriations other than those connected to the conveyancing transactions. C1 sought summary judgment for an account from G and W by virtue of their positions as equity partners. They also applied for an interim payment.

28. C2 were charities and beneficiaries under a will of which B and G were executors. B had administered the estate and misappropriated legacies payable to C2.

29. G and W claimed under the firm's professional indemnity insurance, which provided for cover of £2 million per claim. If the misappropriations were classed as one claim, any excess over that amount would have to be met by G and W personally to the extent that they were liable for B's wrongs. If the two sets of claims were separate, each would attract its own £2 million indemnity limit.

## The MTC aggregation clause

30. Paragraph 2. 1 of the MTC provides that the minimum limit for "*Any one claim*" (exclusive of defence costs) must be at least £3million for any solicitors' firm which is a limited corporate body i.e. a company or LLP or £2 million for a solicitors' firm which is an unlimited company, ordinary partnership (not LLP) or sole practitioner.

31. Paragraph 2. 5 of the MTC provides:

> "*One claim*
> *The insurance may provide that, when considering what may be regarded as one claim for the purposes of the limits contemplated by clauses 2.1:*
> *(a) all claims against any one or more insured arising from:*
> *(i) one act or omission;*
> *(ii) one series of related acts or omissions;*

*(iii) the same act or omission in a series of related matters or transactions;*
*(iv) similar acts or omissions in a series of related matters or transactions*
*and*
*(b) all claims against one or more insured arising from one matter or transaction will be regarded as one claim*."

## First instance decision in *Baines*

32. HHJ Saffman found that the claims could not be aggregated for the purposes of a professional indemnity insurance claim. They did not arise from one act or omission ('Limb 1'), nor was there sufficient interconnection between the thefts perpetrated by Mrs Box to bring them within the term "*series of related acts or omissions*" for the purposes of paragraph 2.5(a)(ii) of the MTC ('Limb 2')[2].

33. Re: Limb 1, HHJ Saffman found (perhaps unsurprisingly) that the claims did not arise from 'one act or omission' under paragraph 2.5(a)(i) MTC (as had been argued by the insurers). The separate acts of theft giving rise to the claims took place over a period of years, even though they all had the same objective of stealing money. Although there was a common dishonest motive, dishonesty was a state of mind not an act or omission. Also, each misappropriation was a separate breach of the SRA Accounts Rules r.7. The reference in r.7.2 to "*breaches*" indicated that multiple misappropriations constituted multiple breaches. The way in which Box concealed her activities, by teeming and lading, was not a unifying factor sufficient to make them 'one act'.

34. Re: Limb 2, whether there was a sufficient connection between acts for them to be classed as one 'series of related acts or omissions' was a fact-sensitive matter, *AIG* followed. The thefts from the claimants did not have a sufficient interconnection or unifying factor with any other claims to bring them within the term "*related series of acts or omissions*" in Limb 2, *AIG* followed. The financial losses suffered by C1 and C2 were caused by separate thefts from each of them and there was no basis on which to aggregate the claims.

35. The court also referred to the claimants' argument that, when determining whether different matters form a series of related matters for the purpose of aggregation, the 'acid' test was whether any one client could plead a complete claim against the firm without referring to another act, matter or transaction from which a different claim arises. In HHJ Saffman's view, this test had much to commend it and was

[2] In *AIG v Woodman* the Court of Appeal was concerned not with Limb 2 but with "*a series of related matters or transactions*" under paragraph 2.5(a)(iv) of the MTC ('Limb 4'). As explained below, the decision of the Court of Appeal in *Baines* deals with both Limb 2 and Limb 4.

clearly consistent with *AIG* and fitted comfortably with the seminal decision in *Lloyds TSB General insurance v Lloyds Bank Group Insurance Co* [2003] UKHL 48 (the seminal House of Lords decision which had prompted the current wording of the MTC and which was also followed in *AIG v Woodman*).

## The appeal in *Baines* in relation to aggregation[3]

36. No appeal was pursued in relation to HHJ Saffman's decision on the insurers' Limb 1 argument, though the Court of Appeal's decision confirms (see paragraph [49]) that the claims did not arise from one act or omission for the purposes of the MTC aggregation clause. The church's claim arose from theft from a particular fund and had nothing to do with the separate theft from the deceased's estate in the charities' claim. B's dishonesty was not an 'act' as such, in any event.

37. As to Limb 2, the question, which was a fact-sensitive one, was whether the thefts were a series of acts which were 'related' because they formed part of an extended course of dishonest conduct on multiple occasions over many years. There was nothing to suggest that there had been any break in B's conduct and the thefts were underpinned by the dishonest way in which she had treated the client account. However, she also stole in other ways, including diverting proceeds from the sale of an investment to herself. While the acts were related to her continuing dishonesty, that was not enough. The unifying factor requirement would only be satisfied if each of the church's claim and the charities' claims arose from a combination of both thefts. Neither claim arose from a related series of acts. As noted above, B's dishonesty was not itself an act. The acts were her individual thefts. It could not be said that each of the claims arose from a series of B's thefts. It was not sufficient that the thefts had the same underlying origin or cause in her dishonest treatment of clients' money.

38. In reaching this decision, the Court followed both the *Lloyds* case and the *AIG v Woodman* case, noting that in the *Lloyds* case the rationale was that the insurers had chosen (by the policy wording) a narrow unifying factor on which to base aggregation (an act or omission constituting the cause of action, rather than say an underlying cause) and that the position was analogous in the present case: B had committed separate thefts constituting separate causes of action, and her dishonesty insofar as it was a common underlying cause lay 'upstream' of the matters which could be caught by Limb 2. For a series of acts or omissions to be 'related', "*it is* [not] *enough that one act should have resulted in one claim and another act in another claim…. It can only mean that the acts or events form a related series if they*

[3] There was a separate policy interpretation point which the insurers sought to appeal but which they did not succeed in, and which does not affect the analysis in relation to aggregation so I do not deal with it in this talk/these notes.

*together resulted in each of the claims*" (paragraph [53], quoting from Lord Hoffmann at paragraph [27] in *Lloyds*). The distinction between Limb 2 and the clause in *Lloyds*, that the words 'related series of acts or omissions' were in parenthesis in the *Lloyds* clause but not in the MTC, did not matter; the principle would be the same either way. Nor did the difference between the nature of the insuring clauses between that in the MTC and that in the *Lloyds* policy matter to the principle.

39. There was also discussion of the slightly different judgment of Lord Hobhouse in *Lloyds*, in which he had given an example which he considered (but Lord Hoffmann doubted) would have been within the clause, namely that of a pension sales consultant providing the copies of the same document to multiple people, where the document contains misrepresentations about the merits of the pension scheme. Although that would involve discrete acts or omissions/causes of action that could be brought separately, Lord Hobhouse thought the connection of the underlying document sufficient. However, in *Baines* the Court of Appeal noted that no final view was reached by either Lord Hobhouse or Lord Hoffmann on that example, and in any event considered that it was not analogous to B's thefts in the present case as the thefts whilst similar were not the 'same act' repeated many times.

40. The Court of Appeal noted (see particularly [63], [66] and [76]) that in *AIG v Woodman* the same conclusion had been reached in relation to the materially identical wording of Limb 4 ("series" and "related", albeit Limb 4 is clearly intended to be *wider* than Limb 2 as it refers to "similar acts or omissions" in a series of "matters or transactions" not just "one series of related acts or omissions").

41. There was also discussion in the Court of Appeal's decision (at [78] to [83]) of the possibility of an aggregation argument based on the fact that thefts from a solicitors' client account are from a mixed fund, and that the clients' claims could, on one conceptual analysis, be said to arise from a combination of the thefts, as their claims would strictly be for an account against the solicitors as trustees and payment of compensation when the overall deficiency (resulting from the thefts) in the single account was established. However, as that was not the basis on which the insurers had argued the case either at first instance or on appeal, the Court of Appeal decided it would not be appropriate to allow the appeal on that basis (which would have had the effect of overturning the summary judgment decision against the insurers, and allowing those arguments to be fully ventilated at trial).

## Commentary and points to take away

42. The Court of Appeal's decision is unsurprising. It would have been highly unattractive to allow B's pervasive general dishonesty to permit aggregation, and would have opened the door to aggregation under the MTC on the basis of any underlying common factor being present, even

if it is not directly a component of the cause of action or not a common and direct causal factor in each and every claimant's claim.

43. However, the Court of Appeal's judgment does have two facets which might give some hope to insurers wishing to aggregate:

    a. Firstly, regarding the discussion of Lord Hobhouse's example of the pension sales consultant in *Lloyds*; and the apparent view that repeating exactly the same act might be enough to fall within Limb 2 where e.g. it is based on repeated use of the same misrepresentative document. But: what amounts to 'repeating the same act'? The salesman might very well have provided the document in different ways at different stages of the sales process. The document might have altered very subtly over time but still be in large part the same. Furthermore, why does using the same document again and again make the claims related? They are just coincidental, surely, but not related *to each other* in any causal sense. The use of the document to misrepresent the position to one victim is not a necessary precursor to the misleading of another victim with the same document. Lord Hobhouse's example was, with respect, not a helpful one;
    b. Secondly, regarding the client account point regarding claimants all ultimately having a claim relating to one account with an overall deficit, the esoteric analysis undertaken by the Court of Appeal seems conceptually attractive but could also result in injustice and inconsistency. So, if a trustee of multiple trusts with separate accounts commits multiple thefts, there will not be aggregation as between the beneficiaries' claims but if a solicitor trustee operating the usual mixed fund client account commits multiple thefts, there could be? The possible flaw, I would respectfully suggest, with that conceptual analysis is that the claims of the multiple claimants against a solicitor client account trustee are not in reality causally linked at the level which the aggregation clause contemplates – it is not the acts or omissions which are linked to one another – the link flows simply from the operation of the law in relation to mixed funds and remedies of accounts and compensation.

44. Overall, it continues to be challenging for insurers to rely on the MTC aggregation clauses save in the scenario (such as partly occurred in *AIG v Woodman*) where the very mechanics of the underlying transaction or matter are such as to make the claimants' claims causally related to one another. However, given the importance to insurers of limiting liability in what continues to be a precarious professional lines market, insurers may try and seize on the above two facets (or other novel arguments) to try and aggregate in MTC cases (and in relation to analogous clauses in other insurance policies).

45. The other point to take away is that *Baines* is, of course, only directly applicable to the MTC or to other aggregation clauses with materially identical wording.

46. For example, an aggregation clause in an accountant's professional indemnity policy that I recently had cause to consider was entirely different in its terms to the aggregation clause in the MTC. It read "*All claims which arise from the same original cause, a single source or a repeated or continuing shortcoming in your work will be regarded as one claim*." The key phrases there are '*same original cause*' and '*repeated or continuing shortcoming*'.

47. In relation to that form of clause, the discussions in *AIG* and in *Baines* about 'related', 'series' and 'similar' are of no real relevance; though there is plenty of case law about the meaning of 'original cause' for example, which one could do another whole talk on. But one must be careful not to extrapolate, too readily, from analysis of one form of clause to the treatment of another form of clause. There are many other variants of clauses out there too, of course.

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### ABOUT ME

Alex specialises in children and finance law, particularly cases with an international element.

Described in the current Legal 500 as "one of the best young or junior barristers" and "A Queen's Counsel in the making" and by Chambers and Partners as "diligent, unflappable, precise, clear and effective", Alex was the Family Law Awards: Junior Barrister of the Year (2020), which is the top category under QC, having been the only member of the Family Bar ever twice to have won the Family Law Awards: Young Barrister of the Year (2018 and 2016).

He is the only lawyer to appear in the four UK Supreme Court cases about family law over the past two years, including the Family Law Awards: Case of the Year (2020).

Alex is co-author of the leading book, Hershman and McFarlane: Children Law and Practice (https://www.bloomsburyprofessional.com/uk/hershman-and-mcfarlane-children-law-and-practice-9781526511546/). He is also co-author of three further books on family law: Laing and Jackson: Public Children Law: Contemporary Issues (1st edn., 2018); Child Protection and the Family Court: What You Need to Know (3rd edn., 2019); and Family Law Precedents Service (46th edn., 2020).

Alex speaks and writes fluent Spanish. He holds a DELE Diploma C2 (equivalent to doctorate level: certifies "mastery").

### EXPERIENCE

Alex studied history and modern languages at Trinity College Dublin for which he was awarded a First, an honorary distinction and the Gold Medal for receiving a First in each and every paper, essay and dissertation (famous recipients include Samuel Beckett, Nobel laureate). As part of that, Alex spent a year at the Universidad de Salamanca in Spain; subsequently, he completed a masters-level programme at the Universidad para la Paz in Costa Rica (distinction: 1st in year).

He completed the GDL (distinction) and the BPTC (outstanding) at the City Law School, London, where he won the Everard Van Heyden prize.

Before coming to the Bar, Alex worked for the United Nations in El Salvador. At that time, El Salvador suffered from the highest murder rate of any country not in open war. His primary tasks were to help investigate corruption in the justice system and introduce electoral reform; he also worked with charities assisting ex "maras" (or gang members) to reintegrate into society.

Alex was the top barrister of his Call to the Bar by Lincoln's Inn across all areas of law. Shortly after, Sir James Munby P described Alex's work in complex areas as "very impressive" ([2015] EWCA Civ 1112) and "illuminating" ([2016] EWHC 2271). He was then awarded the Outstanding Newcomer in the Field of Children Law: ALC (2017) and the Family Law Awards: Pro Bono Lawyer of the Year (2017).

By appointment of Sir Andrew McFarlane P Alex is currently on two working groups on the future of family justice (public children law; and adoption).

**PRACTICE AREAS**

Children

Family Finance

Human Rights

International

**EDUCATION**

Called to the Bar by Lincoln's Inn (top barrister)

The City Law School, BPTC (Outstanding)

Universidad para la Paz, Costa Rica, M.A.-level certificate, Transitions to Democracy (Distinction)

The City Law School, GDL (Distinction)

Trinity College Dublin, B.A. (Mod.) European Studies (Gold Medal; First Class Honours, with Distinction)

**LANGUAGES**

Spanish

Italian (basic)

**PROFESSIONAL MEMBERSHIPS**

The Honourable Society of Lincoln's Inn

Family Law Bar Association

Resolution

coram
CHAMBERS

## PUBLICATIONS

### Books

*Family Law Precedents Service* (46th edn., 2020), with Sir Michael Keehan et al.

*Child Protection and the Family Court: What You Need to Know* (3rd edn., 2019), with Sir Andrew McFarlane P and HHJ Reardon.

*Laing and Jackson: Public Children Law: Contemporary Issues* (1st edn., 2018), with Dr Bianca Jackson.

### Articles

*No Exceptions to the Ongoing Involvement of the Judge Who Hears the FDR,* Lexis PSL online, 9 August 2019

*Outta Time, But Not Outta Luck* (co-author, Greg Williams), The Review, July 2019

*Family: Update,* Legal Action (December 2018 / January 2019)

*A Short Note on Habitual Residence: AB v CD [2018] EWHC 1021 (Fam)*, Family Law Week, 22 May 2018 (read https://www.familylawweek.co.uk/site.aspx?i=ed190031)

*Daedalus, Ariadne and the Minotaur: Where are we now?* Family Law Week, 15 May 2018 (read https://www.familylawweek.co.uk/site.aspx?i=ed189940)

*Villiers v Villiers: The Hammer of the Scots?: Part I* (co-author, Michael Horton) The Review, May 2018

*Why pro bono?* [2018] Fam Law 361

*Villiers v Villiers: An Update* (co-author, Michael Horton) Family Law Week, 22 March 2018 (read **http://www.familylawweek.co.uk/site.aspx?i=ed188904**)

*I Can't Get No (Just) Satisfaction: Human Rights Act Claims in Family Law* (co-author, Rachel Cooper), The Review, December 2017

*Guidance on the Use of Professional Time to Benefit Children,* The Review, September 2017

*Children Giving Evidence in Family Proceedings:* A Pocket Guide to the Law, Bloomsbury Law Online, 26 October 2016 (read **http://www.bloomsburylawonline.com/children-giving-evidence-in-family-proceedings/**)

*Secure, Secure, Secure, Absconding*, Bloomsbury Law Online, 5 October 2016 (read **http://www.bloomsburylawonline.com/secure-secure-secure-absconding/**)

*Children Case Update: Public law: Part 3: Special guardianship orders; female genital mutilation protection orders; BIIa and other international care cases; inherent jurisdiction and wardship; decisions of the Supreme Court* [2016] Fam Law 643

*Children Case Update: Public law: Part 2: Fact finding; medical treatment; adoption and placement orders* [2016] Fam Law 931

*Children Case Update: Public law: Part 1: Care Proceedings,* [2016] Fam Law 643

*And There Lurks the Minotaur: The Interrelationship Between the Inherent Jurisdiction and Section 25, CA 1989: Part II*, Family Law Week, 8 July 2016 (read **http://www.familylawweek.co.uk/site.aspx?i=ed161670**)

*And There Lurks the Minotaur: The Interrelationship Between the Inherent Jurisdiction and Section 25, CA 1989: Part I*, Family Law Week, 22 June 2016 (read **http://www.familylawweek.co.uk/site.aspx?i=ed161398**)

*A Very Legal Playground: In the Matter of B (A Child) and the Habitual Residence Seesaw,* Family Law (online), 22 February 2016

*Saleem, Shivering and English Winters: Jurisdiction under Article 11 of the 1996 Hague Convention* and is published on Family Law (online), 4 January 2015. (**read here**)

*'Calderback to the Future: A Debate on the Motion: This House Believes the Calderbank Regime Should be Restored in Family Cases'* [2015] Fam Law 1537

*'"… this can no longer be tolerated": a short guide to the correct use of section 20, Children Act 1989'* Family Law Week, 11 November 2015 (read here)

*'Limping Infants and Article 15 BIIA: the "magisterial" judgment in In the Matter of N (Children) (Adoption: Jurisdiction)',* Family Law Week, 10 November 2015 (**read here**)

*'Magna Carta 800 Years On: Faded Lustre and Family Law.'* Family Law (online), 17 July 2015 (**read here**)

*Genes or Jeans? The Importance of the Genetic Relationship when Evaluating a Child's Best Interests,* Family Law (online), 3 June 2015 (**read here**)

*Adopting Foreign Children: Part II: A Counter-Argument; Choice of Laws* [2015] Fam Law 703

*Adopting Foreign Children: Part I: Jurisdiction* [2015] Fam Law 565 (**read here**)

*Re J: A Lesson on Threshold and Logic*, Family Law Week, 23 April 2015 (**read here**)

*Daedalus's Twist? Secure Accommodation after a Child's 16th Birthday*, Family Law Week, 9 April 2015 (**read here**)

*Ariadne's Golden Thread: Placing Children in Secure Accommodation*, Family Law Week, 9 April 2015 (**read here**)

**Podcast and Case Summaries**

Secure Accommodation Orders and Deprivation of Liberty of Children and Young Persons, 29 July 2017 (listen here http://www.familylawweek.co.uk/site.aspx?i=ed178924)

Alex writes weekly case summaries for Family Law Week. These are available to read http://www.familylawweek.co.uk/site.aspx?i=se0&s=Laing

**CASES**

**2021**

*In the matter of T (A Child)* [2021] UKSC 35

*Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request)* [2021] EWHC 1970 (Fam)

*Re E (Care Proceedings: Welfare Determination)* [2021] EWFC 52

*AX v BX & Ors (Revocation of Adoption Order) (Rev 1)* [2021] EWHC 1121 (Fam)

*G v G* [2021] UKSC 9

*Villiers v Villiers* [2021] EWFC 23

**2020**

*Villiers v Villiers* [2020] UKSC 30

*Re T (Jurisdiction: BIIR: Cyprus)* [2020] EWFC 37

*Re E (Care Proceedings: Fact Finding)* [2020] EWFC 24

*M v F* [2020] EWHC 576 (Fam)

**2019**

*Re E (A Child: Questioning of Vulnerable Witness)* [2019] EWHC 3808 (Fam)

*In the matter of NY (A Child)* [2019] UKSC 49

*Re NY (A Child) (1980 Hague Abduction Convention) (Inherent Jurisdiction)* [2019] EWCA Civ 1065

*TY and HY* [2019] EWHC 1310 (Fam)

**2018**

*T (A Child)* [2018] EWCA Civ 2136

*X and Y (Appeal against Care Order)* [2018] EWFC B55

*Williams and another v London Borough of Hackney* [2018] UKSC 37

*Letts v Letts* [2018] EWHC 1639 (Fam)

*Villiers v Villiers* [2018] EWCA Civ 1120

*A Local Authority v A's Father, Mr F & Ors* [2018] EWHC 1121 (Fam)

*AB v CD* [2018] EWHC 1021 (Fam)

*A Local Authority v T (No. 2)* [2018] EWHC 816 (Fam)

*A Local Authority v T (No. 1)* [2018] EWHC 576 (Fam)

**2017**

*F v H & Anor* [2017] EWHC 3358 (Fam)

*A London Borough v M, F and B* [2017] EWFC B93

*J (A Child) (Finland) (Habitual Residence)* [2017] EWCA Civ 80

**2016**

*Magiera v Magiera* [2016] EWCA Civ 1292

*P (A Child)* [2016] EWCA Civ 1127


# Timing: simple examples

- 1. There is a dispute in England about jurisdiction in respect of an application issued on 20 December 2020
- 2. There is a court battle in England about the enforcement of a Portuguese order, whose proceedings were instituted in 2017
- 3. There is a preliminary issue about jurisdiction and lis pendens between a French application issued in November 2020 and an English application from April 2021

## Timing: changes at 11pm

- Brussels IIa (to be replaced by Brussels IIa Recast, from August 2022)
- EU Maintenance Regulation
- Lugano Convention (previously a member through the EU) (not permitted to re-join)
- Brussels I Recast / Recast Judgments Regulation

## Timing: legal basis

- Article 67 of the Withdrawal Agreement
- Given effect by the European Union (Withdrawal Agreement) Act 2020

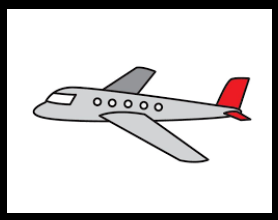

## Children law: the headlines

## Jurisdiction

- Domestic jurisdiction: ss 1 – 3, Family Law Act 1986
- International jurisdiction: BIIa and 1996 Hague Convention
- Previously: BIIa (arts 61 – 62); or 1996 Hague Convention; or residual domestic jurisdiction
- Now: either 1996 Hague Convention, or residual domestic jurisdiction

## Jurisdiction in practice

- Transition period case: BIIa still applies and, for reason of arts 61 - 62, predominates
- Post-Brexit case: starting point is 1996 Hague Convention:
  - Art 5 – habitual residence (but no perpetuatio fori; however, see art 13 (1) protection)
  - No 3-month BIIa art 9 continuing jurisdiction re access rights
  - No free-standing BIIa art 12 (3) prorogation
  - Different scheme for provisional measures

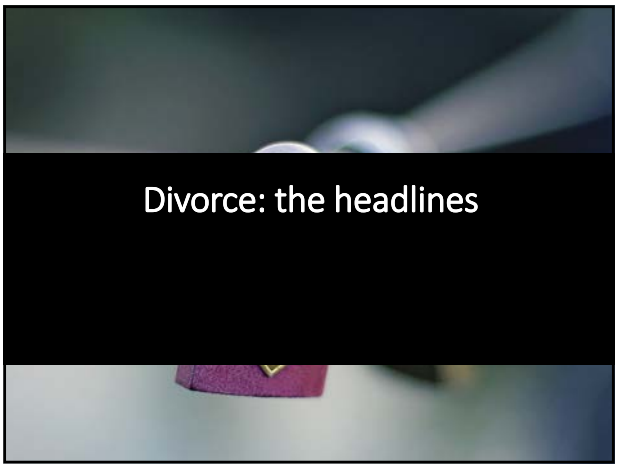


## Transfers in practice

- Transition period case: art 15, BIIa
- Post-Brexit case: arts 8 – 9, 1996 Hague Convention

## Recognition and enforcement in practice

- Reminder: date is when proceedings instituted (not the date the order was made)
- Transition period case: Chapter III, BIIa
- Post-Brexit case: Chapter IV, 1996 Hague Convention
- Differences include (i) removal of Annex II, III and IV certificates; and (ii) no direct enforceability of access rights and 'second bite of cherry' returns



# Divorce: the headlines

## Jurisdiction in practice

- Focus on art 3, BIIa indents replaced with the amended section 5, DMPA 1973:
- (a) *both parties to the marriage are habitually resident in England and Wales;*
- *(b) both parties to the marriage were last habitually resident in England and Wales and one of them continues to reside there;*
- *(c) the respondent is habitually resident in England and Wales;*

## [cont]

- *(d) the applicant is habitually resident in England and Wales and has resided there for at least one year immediately before the application was made;*
- *(e) the applicant is domiciled and habitually resident in England and Wales and has resided there for at least 6 months immediately before the application was made;*
- *(f) both parties to the marriage are domiciled in England and Wales; or*
- *(g) either of the parties to the marriage is domiciled in England and Wales.*

# Forum in practice

- Transition period case: art 19.1, BIIa – 'race to court'
- Post-Brexit case: the re-application of *forum non conveniens* (as previously between UK and all non-EU countries) – 'closest connection'; exercised according to *Spiliada* principles. BUT what will EU countries do?

# Recognition in practice

- Transition period cases: recognition under BIIa
- Post-Brexit cases:
  - 1970 Hague Divorce Recognition Convention
  - Domestic law (including potential issues with same-sex divorces)

# Financial relief: the headlines

## Financial jurisdiction

- Transition period cases (including, for example, a joint lives order whose proceedings were commenced pre-31 Dec 2020 which will run for many years): EU Maintenance Regulation. Fiddly!
- Post-Brexit cases:
  - If 'ancillary relief', tied to divorce jurisdiction
  - If sch 1, para 14 of sch 1
  - S 27, MCA 1973 has own jurisdiction
  - Part III, MFPA 1984: s 15
  - 2007 Hague Maintenance Convention, art 18
  - Issues re sole domicile and enforcement under 2007 Hague Maintenance Convention (and 2007 Lugano Convention)

## Maintenance recognition and enforcement

- Transition period cases: EU Maintenance Regulation (two-tier system, depending on 2007 Hague Protocol)
- Post-Brexit cases: 2007 Hague Maintenance Convention (all EU countries signatories, plus UK)


**Andrew Foyle**
**Partner**
**SShoosmiths**

# *Covid-19, economic downturns and the market outlook for professional negligence lawyers*

**16 mins**


# Andrew Foyle

Partner / Solicitor Advocate
Dispute resolution & litigation
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Andrew is a Partner and joint head of the dispute resolution and litigation team based in Edinburgh. His clients are primarily financial institutions for whom he acts in a range of litigation matters, including contractual disputes, general banking litigation, recoveries and the pursuit of professional negligence actions. Andrew also acts for a range of commercial clients and insolvency practitioners. Recent examples of his work include successfully defending a lender in a multi-million pound claim for damages raised against them by a former customer where it was claimed that they had acted negligently in their approach to realisation of securities, strategic advice to a lender in relation to a major remediation project, and a reported case which further clarified the law relating to pre-action requirements under the Home Owner & Debtor Protection (Scotland) Act 2010.

Andrew joined Shoosmiths as a partner in 2013 following more than a decade at an Edinburgh firm where he latterly managed their banking litigation team. Prior to that, Andrew was a researcher at the Scottish Law Commission where his projects included the Report on Poindings and Warrant Sales, and the Report on Diligence.

Andrew is a solicitor advocate with rights of audience in the Supreme Courts in Scotland and is a ranked lawyer for Banking Litigation in the Chambers UK Guide, where he is described as being "steady, sensible and pragmatic" as well as having "a breadth of knowledge on litigious matters". Commentators described him as "very approachable, dedicated to his client and provides very clear and concise legal advice". Andrew is regularly called upon to speak at external events and conferences on his areas of expertise, and is a regular contributor to publications such as the Journal of the Law Society of Scotland on topics including insolvency and commercial litigation.

## Accreditations

Band 3 2022, Chambers and Partners
Leading individual 2022, Legal 500

# Covid-19, economic downturns and the market outlook for professional negligence lawyers

**A talk for the Professional Negligence Lawyers Association**

**December 2021**

**Andrew Foyle**
**Solicitor Advocate, Partner & Joint Head of Litigation for Scotland**
**Shoosmiths LLP**

## WHAT THE PAST CAN TEACH US

- Previous economic downturns and recessions
- The rise of professional negligence claims in the lending sector, and the subsequent decline

## WHY IS THERE A SPIKE DURING A RECESSION?

- Reasons why negligence is more apparent in a recession
- Professional negligence claims as an alternative to debt recovery

## WHAT DOES THIS MEAN AS WE EMERGE FROM COVID?

- Will there be a downturn?
- The effect of Brexit
- Government and regulatory pressures

## WHAT CAN PROFESSIONAL NEGLIGENCE LAWYERS DO TO PREPARE?

- Client engagement
- Gearing up
- Be ready!

## CONTACT

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andrew.foyle@shoosmiths.co.uk


**Philippa Hill**
**Partner**
**Grant Thornton**

*The Accountant's Perspective*

**16 mins**

Grant Thornton

# Auditing in the digital information age

**Philippa Hill, Forensic Partner in Grant Thornton leading the Accounting Integrity and Conduct (AIC) special interest group**

## Speaker profile

Philippa is a Partner in Grant Thornton's Forensic and Investigations team and is a Fellow of the Institute of Chartered Accountants in England and Wales (ICAEW). She has specialised in accounting and commercial disputes for 20 years and leads the cross-disciplinary AIC group, comprising audit technical, financial reporting and forensic specialists, focused on matters involving suspected accounting irregularities, misstatements and associated enquiries, particularly into the role of auditors and accountants, typically in the context of a company collapse. She supports subject matter experts on liability aspects and provides expert advice on financial and accounting issues affecting causation and loss.

Prior to specialising in disputes and investigations she was an auditor. Philippa is regularly engaged by professional firms, claimant entities or the FRC to provide independent expert advice and opinion, often working closely with audit partners and other specialists.

In addition, Philippa acts as expert determiner, expert witness or party adviser in matters involving suspected breaches of accounting and financial warranties and post transaction price adjustment disputes. She has given evidence on accounting and financial matters in High Court, arbitration, criminal courts and professional disciplinary matters.

Her entry in 'Who's Who Legal' 2021 for expert witnesses notes: "*Philippa is very thorough and possesses an impressive depth of expertise in professional negligence matters*" "*She is able to summarise complicated points and make them understandable to her audience*".

## Presentation to the PNLA – January 2022

I am going to briefly cover two fairly expansive topics:

- First - is accounting dead and is audit, therefore, also dead?
- Fundamental changes taking place in the way audits are carried out

For each topic I highlight factors I consider likely to feature in claims against auditors in the future.

## Is accounting dead?

To start with financial statements - apart from the terminology, financial statements haven't really changed in many many years. They still essentially comprise a balance sheet, profit and loss account, cash flow and some notes. The fact that they have remained fundamentally the same may be a fundamental problem and was the subject of a book called "*The End of Accounting*", which more or less came to the conclusion that accountancy was dead, or at least largely irrelevant for investors thinking about the value of their investment.

For background, accountancy seeks to describe economic reality as faithfully and as neutrally as possible which is the stated objective of the International Accounting Standards Board (IASB).

It is said that, if financial information is to be useful, it must affect its users' decisions i.e. investors' decisions.

You might expect that the key financial information contained within accounts: sales, earnings, asset values and so on would be correlated with stock prices, such that higher earnings should equate to higher market capitalization.

Statistical correlation of financial results with stock prices has been deteriorating since the 1980s, which was the dawn of the information age affecting business models, operations and the values of companies. Entire industries were born - software, biotech, internet services, (which have come to dominate stock markets) but 20 years on we

continue to use an essentially historical cost-based accounting model designed more for the asset-intensive businesses of the industrial age (rather than the information-intensive intangibles-based businesses of many modern companies). The consequence is intangible assets that have become increasingly important value-drivers, still largely escape the balance sheet.

Standard setters have tried to account for these assets – to bridge the gap between balance sheets and the market value of businesses, but the problem is, recognising intangibles and measuring them at "fair value" leads to increased subjectivity, chiefly in the form of management forecasts which are vulnerable to bias, diminishing the integrity and reliability of financial information.

An alleged failure to exercise sufficient professional scepticism about management's over-optimistic forecasts is so often at the heart of a professional negligence claim or enforcement action against auditors.

Past performance has generally in the past been seen as a reliable predictor of future performance, but with the speed of technological innovation, assumptions underpinning future cash flows that rely heavily on an extrapolation of past performance may simply not hold true.

Another way of looking at it is that shareholders are acting primarily on new information, whether that is forward or backward looking. It's the newness of that information that makes it relevant. Financial statements (which are typically signed off 6 months or more after the end of the period to which they relate) are competing with a proliferation of more timely and readily available information sources such as on-line investor services providing tailored economic and industry data in and investment analysis in internet chat rooms. With fractionalised share trading, many more investors – with a touch of the button on their mobile phone – are acting on this information in real time, months before it appears (or not) in financial statements.

It's questionable whether all this new information is reliable – the way audited financial statements are required to be. When it comes to the usefulness of information, newness seems to trump reliability.

As an example of this phenomenon: you might recall that in November 2021, Tesla (which had net assets of $23 billion on its balance sheet) first hit a market capitalization of $1 trillion. The shares were up by 14.6% in one day, not because it published audited financial information, but because of a positive research note from a Morgan Stanley analyst (who raised his target for the price for their shares after Hertz announced it would purchase 100,000 Tesla cars).

Shareholders did not wait for audited accounts to act on this news.

So if accountancy is indeed dead, does the auditor die also?

Accountancy is probably not actually dead – it's just that historical financial statements are struggling for relevance amongst other sources of information available to the user, i.e. the market. The standard setters acknowledge that the rules around intangibles are too restrictive. Addressing this issue is steadily moving up the IASB's agenda.

Are auditors dead? Well, hopefully not. The independent audit of financial statements at least has the benefit of validating periodically the more up to date information such as analyst forecasts. It is this retrospective vindication that gives those forecasts their relevance.

Even though there is a growing disassociation between the information that investors use and that which is audited, the audit would still seem to be relevant for testing management's judgments as regards the values that are represented.

As a note of caution to practitioners, if you are trying to mount a claim where the chain of causation is founded on the decisions of an investor in reliance on audited financial statements, such arguments may have less credibility or potency now than perhaps they have done in the past when there was a greater correlation between past results and future value.

## Fundamental changes to the way audits are carried out – the digital age

When I started out as an audit junior just over 20 years ago I was working on paper audit files. To a trainee, moving to electronic files seemed like an obvious development, but for people who had been in the profession for many years at the time, it was a big change to how they carried out and documented their audit work. Certainly

I have been involved in cases where the transition to electronic audit files meant a certain amount of evidence fell through the cracks and was not properly captured

The current period of change we're going through in the digital age is a seismic shift in comparison to that change, as technological functions challenge to the core some of the traditional ways of working that auditors have been using for decades.

Take the process of trying to find a potential fraud or error in a large population of transactions – we're currently entering a third age of how auditors would approach that task. The first age, occupying the first half of the 20th Century, were the days of bookkeeping audits, where the auditor would obtain assurance from ticking and bashing every single transaction.

The latter part of the 20th Century ushered in the age of sampling, due largely to the increased number of transactions making 100% coverage impractical. Sampling is still a cornerstone of how an auditor obtains assurance today and as you are aware is a crucial limitation on scope.

But we are now well into the digital age of data analytics, which offers increasingly powerful solutions.

If you consider an auditor trying to detect fraud as like looking for a needle in a haystack. In the first age, we searched every bit of straw. In the second age, we split the haystack into bales, plunged our hand somewhere into each bale, and hoped any needles would turn up. The auditor in the third age doesn't even touch the haystack – they grab a metal detector and a GPS and pinpoint exactly where the needle is.

This sounds great in theory, and is potentially a big step forward for audit quality, but as with all technology it comes with a fresh set of challenges. One such challenge, stretching the metaphor even further, is that the size of the haystack is growing exponentially.

There are lots of articles about the phenomenal amount of data we generate every single day - the numbers of 'bytes' created are also too big for most people contemplate. One 2018 article in Forbes magazine said that 90% of the data in the world was generated in the last two years - the rate is accelerating so that statistic will now be a significant underestimate of the rate of production.

Another challenge we face is that data can vary greatly in structure and quality, across a plethora of different accounting systems used by businesses. In order to ensure the more complex analytics routines work properly, you need good quality structured data to input, otherwise you run the risk of "garbage in garbage out". So not only does the auditor have to hone the traditional skills they have always needed like professional skepticism and sound judgement, they are having to develop expertise in newer areas like the completeness and accuracy of data capture from clients and giving the right structure to unstructured data.

Data structure issues are also being addressed by technology, such as Application Programming Interfaces (APIs) – for example, we can now plug a desktop or cloud connector into certain accounting systems to automatically go in and get the data we need. Powerful algorithms and scripts are performing tasks that used to take hours can now be done in minutes. Data analytics programs can identify outliers automatically that don't follow the 'normal' pattern, so audit work can be targeted on the higher risk items.

What are the problems with using data analytics as an audit tool, which could be at the root of claims and regulatory investigations into audit failures in due course?

The first is people not having the right skills. It's little use having fantastic technological solutions to deploy if audit partners, managers and trainees don't have the know-how or confidence to put them into action effectively. At the risk of stereotyping, junior staff may be more techno savvy but have not yet developed the judgment needed to apply within their analysis, and more senior experienced auditors may not have sufficient expertise on the data science aspects to enable them to provide effective supervision as they may have good judgment but less of an understanding of the processes in which they being used.

The second challenge is understanding the extent to which an auditor should deploy digital solutions and what would reasonably be expected within an audit done in this way. If for example your program ingests a million transactions and results in 1,000 outliers, how do you decide on which outliers to conduct substantive testing, or do you keep recalibrating the data analytics process until the sample of outliers is sufficiently small that you can test all exceptions?

The FRC issued guidance on this in August 2021[1] that it described as "*non-authoritative*", which essentially tells auditors to only test the "truly exceptional" items – that's easy to say but changing the parameters to narrow down the results could be a critical judgment requiring detailed understanding not only of the business and its transactions but how that translates into expected data flows as well any nuances within the data set. The FRC warns that data cleansing techniques are necessary to make the data usable but should not be carried out so exhaustively as to undermine the whole objective of identifying non-conforming items. Expertise such as this may take time to build up within an audit practice and people are learning on the job.

What about the choice of tools? In Forensics we use an artificial intelligence (AI) tool that is different from the data analytics tool of choice of our audit practice. What if one tool spots something that the other one wouldn't – does it count as sufficient and appropriate audit evidence if a more powerful tool was available that could have identified an incident of fraud but you didn't use it?

There is wide range of approaches between firms in terms of investment in and the use of data analytics as part of the audit process but no clear guidelines or standards as regards which approach should be deployed.

The third key area of challenge is around data management and cyber security. The traditional audit involved the sharing of information between a client and their auditor, subject to confidentiality arrangements. Now that auditors are relying on third parties to provide tech solutions, that may involve handing over client data to third parties for processing – and the nature of these third parties means some are start-ups that potentially do not have the governance or infrastructure appropriate for the services as they have not kept up their own investment with the scale and pace of demand and there is a real risk of data breach by a third party that could cause significant harm to the audited company as well as major reputational damage and potential liability for the audit firm.

And lastly, there is an issue with accounting standard setting keeping apace. It takes literally years for a new or revised accounting standard to be developed, drafted, exposed and consulted on, issued and then to come into force. At present there is no catch-all auditing standard around data analytics, nor is there a statement of principles about the digital audit – auditors are having to adapt and interpret a framework created for the early stages of the electronic age to an environment that is very different in the 2020s and is evolving all the time. Interpretation of the standards may vary considerably between individual firms and by regulators.

## Audit and corporate governance reforms

I'll mention very briefly the long-running audit and corporate governance reforms the final details of which are yet to be signed off by the Business Secretary Kwasi Kwarteng, following a period of consultation that goes back to 2018 following the collapse of Carillion and the subsequent launch of several major enquiries into the audit market and regime.

One of the main legislative reforms proposed would require company directors to report on their internal controls, likened to the Sarbanes-Oxley Act of 2002 in the US – that proposal is reportedly being dropped after intensive lobbying by business in favour of a change to the corporate governance code, which applies only to listed entities. The code operates on a 'comply or explain' basis, hence this is a much watered down proposal.

So there's little comfort for audit firms who were hoping the playing field would finally be levelled up a bit such that company directors would take on more of the burden of responsibility, instead of the first question following a company collapse always being – where were the auditors? Poor internal controls can significantly increase the risk of fraud and error and it is primarily the directors who are responsibility for these.

The head of one Big Four auditor said: "*It feels like you're the goalkeeper and they've not invested in the defence. It leaves you exposed.*"

I hope this presentation has been of interest – please do get in touch if you would like to discuss any of the topics.

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[1] Addressing Exceptions in the use of Audit Data Analytics 2021 (frc.org.uk)

# Experienced, considered and robust expertise

Whether you need early-stage advice on the merits or technical aspects of a claim or dispute, or you require an independent testifying expert witness, we can provide you with the right specialists and the right team, giving you the best chance of resolving your dispute effectively.

When faced with a dispute, you will require a team that can bring commercial, regulatory and accounting capability, be able to value assets and sophisticated products, quantify losses and provide recommendations on addressing deficiencies.

## Capability and experience

Our disputes team have been expert witnesses on claims worth a total of over **US$100 billion** and have given evidence over **250 times**.

We have been appointed as experts by individuals, businesses, governments and regulators acting both in an advisory and a testifying capacity.

We have acted as party-appointed experts both by claimants and respondents, as single joint experts, as tribunal-appointed experts and as expert determiners in jurisdictions all over the world, under various procedural rules.

## Types of work and claims

- **Purchase price adjustments**
- **Misrepresentation**
- **Breach of warranty**
- **Contentious valuations**
- **Loss of profits**
- **Professional negligence**
- **Asset tracing and recovery**

## Context

- **Expert determination**
- **Commercial litigation**
- **Arbitration – investor state and commercial**
- **Insurance claims**

## Breadth and depth of coverage

Our sector coverage and geographical reach is substantial. Recent cases include those in the financial services sector, energy, construction and manufacturing.

We have over **140 people** in our Forensic team in the UK and 800 **globally** in **37 countries**.

We can also draw on the expertise of the wider UK firm which comprises over **4500 people**.

Grant Thornton has a presence in **140 countries**.

*"We have worked with Grant Thornton on a number of matters requiring forensic accountancy input, and have found them to be thorough, commercial and pragmatic in providing their views. In two instances in particular, they first provided high-quality advice which enabled the client to make a proper assessment of a claim and to avoid proceedings, and second were able to advise quickly and under pressure on a very urgent matter in a manner which fit in with that client's requirements.*

*We consider Grant Thornton one of our preferred advisors and would be very happy to instruct them again on appropriate matters where forensic accountancy input is required."*

Litigation Lawyer

Ranked for Litigation support servces, Chambers & Partners 2021

Global Arbitration Review (GAR) 100, 2019, 2020, 2021

Global Investigations Review (GIR) 100, 2018, 2019,2020

Who's Who Legal, Arbitration 2020, 2021, 2022

ACQ5 Asset recovery firm of the year 2019, 2020,2021

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

**Hanscomb Intercontinental**

# *The role of an Expert Witness*

**tbc**

# Sean Sullivan Gibbs

ARBITRATOR-ADJUDICATOR-EXPERT DETERMINER-DAB MEMBER

**POSITION**

Director

**DISCIPLINE**

Quantum

Contracts

**QUALIFICATIONS**

BSc Construction Management

LLB (Hons)

Post Graduate Diploma Arbitration

Post Graduate Diploma Bar Studies

LLM

Barrister

Direct members exam (QS) SCS

Member ICE

Assoc Fellow ICHEME

Fellow RICS

Fellow CIARB

Fellow Assoc Arb

Fellow CIOB

Fellow CICES

Fellow BIARB

Bond Solon Accredited Expert Witness

**Specialisms/skills**

Expert Advisory / Witness

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

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

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

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

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

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

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

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PNLA
Professional Negligence
Lawyers Association

# Notes: -


**Pradeep Oliver**
**Partner**
**Cripps Pemberton Greenish LLP**

*Financial Services Group Litigation*

**34 mins**

Pradeep Oliver
**Partner**
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pradeep.oliver@crippspg.co.uk

Pradeep works as professional negligence lawyer, he has particular expertise in financial services negligence involving the mis-selling or mismanagement of a financial product or service leading to financial loss.

*"a careful litigator who goes to great lengths to assess the genuine strengths and weaknesses of the case."*
Chambers UK Guide 2020

*"Pradeep Oliver is a very bright, astute and robust litigator with a great deal of professional negligence experience and expertise. He takes no prisoners"*
Leading individual in Legal 500 '2022

The LEGAL 500 UNITED KINGDOM LEADING INDIVIDUAL 2022

RANKED IN Chambers UK 2020 Pradeep Oliver

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# Investment fraud

## Looking forward to 2022

January 2022

Pradeep Oliver

# Introduction

**Pradeep Oliver**
Partner, Specialist disputes
**Cripps Pemberton Greenish**

- Leading individual: Legal 500 (The South)
- Band 2 ranking: Chambers and Partners (South East)
- Our Professional Negligence team are ranked Band 1 in Chambers and Partners and Tier 1 for Legal 500 2022.

# Agenda





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# 1. Pensions: Self-invested Personal Pension (SIPPs)

Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474

- Section 27 of Financial Services and Markets Act 2000 ("FSMA") provides that an agreement made between an FCA-authorised person carrying out a regulated activity and another person, is unenforceable by the FCA-authorised person if:
- it is made in consequence of something said or done by a third party; and
- the third party was carrying out a regulated activity in breach of the "general prohibition" on unauthorised persons carrying out regulated activities.
- If an agreement is unenforceable under section 27, the non-FCA authorised party is entitled to recover money paid under the agreement and compensation for loss.
- Section 28 of FSMA gives the court discretion to allow an agreement that would otherwise be unenforceable under section 27 to be enforced if the court considers this would be "just and equitable in the circumstances of the case.



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# 2. Pensions: Occupation Schemes

- Section 94 of the Pension Schemes Act 1993 ("PSA") provides that a member of an occupational or personal pension scheme has a right to a "cash equivalent transfer value" of any benefits which have accrued under the transferring arrangement.
- Section 99 of PSA requires the trustees or managers to carry out the member's requirements within a specified period – basically within six months of application, or, in the case of salary related occupational pension schemes, six months of the date of guarantee of the amount of the cash equivalent.





# 3. Pensions: Liberation Schemes

- A payment by a registered pension scheme that is not permitted by rules contained in the Finance Act 2004 is an "unauthorised payment".
- There is an automatic tax charge on unauthorised payments of 40% known as the unauthorised payments charge, and possibly an additional surcharge of 15% (total 55%).

# 4. Mini Bonds

- Non-transferable debt securities commonly referred to as 'mini bonds', are unlisted bonds.
- Companies offer mini bonds to retail investors in order to raise finance.
- Hotel Chocolat, Naked Wines and John Lewis have issued mini-bonds to as a way of securing debt-based finance.
- As non-transferable securities, investors cannot sell their investment, which normally must be held until maturity.





# 4. Mini Bonds (cont.)

- London Capital & Finance PLC ("LCF") 11,000 investors with a total value of more than £230m. LCF was authorised by the Financial Conduct Authority ("FCA") to undertake a number of regulated activities, however the majority (if not all) 3 of LCF's revenue was generated from its unregulated activities
- Compensation (London Capital & Finance plc and Fraud Compensation Fund) Act 2021

# 5. Property Investment Schemes

- "Too good to be true" guaranteed rental returns being promised on hotel room, care home, student accommodation.
- Collective Investment Schemes? If so, illegal scheme under FSMA.
- FCA/SFO are investigating





# 6. Acting for victims of investment fraud

- Who can I make a recovery against?
- Go after the fraudster?
- Fraud – do the costs justify a civil claim? Private prosecution?
- Is there a professional involved? IFA, pension provider, solicitor failed to protect the client?

# 7. Which route?

- Financial Ombudsman Service? – limit increased to £350,000.
- FSCS - if was regulated and insolvent could be only option but limit is ££5,000
- Court? Proportionality issues
- Group actions



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# Any questions?

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**Katy Manley**
**President – PNLA/Manley Turnbull Solicitors**

*Conference Closing Remarks*
**4 mins**

**Total talk times - 4 hrs 17 mins**

**Very many thanks to our excellent Chair Anneliese Day QC and all our wonderful Speakers**

**Questions and discussion via PNLA WhatsApp +44 7930251578**

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