PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

ENGLAND & WALES - ONLINE CONFERENCE

"The New Normal"

May 2022

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

ENGLAND & WALES "ONLINE" CONFERENCE

"The New Normal"

May 2022

4.14 mins **Jayna Patel (Chair) – Partner – Dutton Gregory LLP**
PNLA South of England Representative
– "Chair's Introduction"
https://www.duttongregory.co.uk/site/people/profile/jayna.patel

15.28 mins **Richard Hitchcock QC – Outer Temple Chambers**
– "Some thoughts on Limitation: Knowledge and Concealment - s14A and s32 of the Limitation Act 1980"
https://www.outertemple.com/barrister/richard-hitchcock-qc/

30.33 mins **Tiffany Scott QC – Wilberforce Chambers**
– "Litigation Roundup"
https://www.wilberforce.co.uk/people/tiffany-scott-qc/

28.24 mins **Helen Swaffield – Contract Law Chambers**
– "The top 5 factors for a winnable professional negligence claim"
https://www.contractlawchambers.co.uk/our-people

32.59 mins **Simon Wilton – Hailsham Chambers**
– "Surveyors Negligence – Hart v Large"
https://www.hailshamchambers.com/barrister/simon-wilton/

13.15 mins **Nick Curling – TLT**
– "Impact of Manchester Building Society v Grant Thornton on negligence claims by lenders"
https://www.tltsolicitors.com/find-a-lawyer/nick-curling/

17.18 mins **Robert Strang – 3 Hare Court**
– "The loss recoverable by a lender consequent on a valuer's negligent valuation - Charles B Lawrence & Associates v Intercommercial Bank Ltd [2021] UKPC 30"
https://www.3harecourt.com/barrister/robert-strang/

26.50 mins **Nicholas Hill – Outer Temple Chambers**
– "Pensions and Financial Services update."
https://www.outertemple.com/barrister/nicholas-hill/

34.30 mins **Jonathan Sachs – Partner – BDP Pitmans**
– "Claimant Group Claims"
https://www.bdbpitmans.com/our-people/jonathan-sachs/

27.39 mins **Helen Pugh – Outer Temple Chambers**
– "Insolvency Practitioner Negligence"
https://www.outertemple.com/barrister/helen-pugh/

35.05 mins **Jason Karas – Mishcon Karas & Mark Davis – Mishcon De Reya**
– "Audit Negligence"
https://www.mishconkaras.com.hk/people/jason-karas
https://www.mishcon.com/people/mark-davis

26.35 mins **Moira Hindson – Moore Kingston Smith**
– "The selection and use of Experts – top tips."
https://mooreks.co.uk/people/moira-hindson/

45.17 mins **Roger Flaxman ACII MAE – Flaxman's Partners**
– "Changing roles and responsibilities of brokers"
https://www.flaxmanpartners.co.uk/team/roger-flaxman/

24.25 mins **Rachel Auld – Indemnity Legal**
– "Third party rights against insurers'."
https://www.indemnitylegal.co.uk/people/rachel-auld

31.54 mins **Rocco Pirozzolo – Harbour Underwriting**
– "Improving your chances of obtaining funding and ATE."
https://harbourunderwriting.com/team/rocco-pirozzolo/

25.34 mins **Kevin Wonnacott – Wonnacott Consulting Ltd**
– "Costs – A practical guide"
kevin@wonnacott.co.uk
https://wonnacott.co.uk/

1.45 mins **Jayna Patel (Chair) – PNLA South of England Representative**
– "Chair's Closing Remarks"
https://www.wilsonsllp.com/our-people/jayna-patel

7 hours – Total talk time
1 hour - Conference Pack Review
2 hours - Questions & Answers @ live closing event held @ Outer Temple Chambers (1st November)

Total CPD – 10 hours

PNLA
Professional Negligence
Lawyers Association

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We provide expert witness, advisory and investigation services and have given evidence in the High Court, Family Court, Crown Court and the Upper Tribunal (Lands Chamber), as well as in arbitral and disciplinary tribunals. We also have extensive experience of acting in alternative dispute resolution forums, such as mediations and expert determinations. Feedback from our clients is that we write clear and comprehensive reports, which are measured and credible.

CASE STUDY: investigation on behalf of insurers

We were instructed on behalf of the insurers of a firm of accountants facing allegations of negligence in the preparation of the accounts of a company that sold power tools and other equipment. The claimants contended that, as a consequence of the defendant firm's negligence, the accounts contained errors, the correction of which caused the company's financiers to lose confidence in the company's ability to repay its liabilities. The withdrawal of support by the company's bankers allegedly caused the company to enter into liquidation. Our work involved reviewing the claimant's letter before action and preparing an expert advisory report to assist the defendants' advisers with their response.

Our services include

- Professional negligence
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- Forensic investigations
- Fraud investigations
- Matrimonial disputes
- Compulsory purchase orders
- Expert determinations
- Disciplinary proceedings
- Fraud and white-collar crime
- eDiscovery

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Managing Director, Kevin Wonnacott, with more than 30-years" experience has led, managed and advised on many difficult costs matters for a wide breadth of clients and case types, often involving international and cross-jurisdictional elements, where the issue of costs has become contentious, complex and which requires concentrated and high skilled input from experienced costs lawyers.

Striving to deliver the best outcomes for clients whether it be by way of negotiated compromise at the budgeting stage or advice and advocacy within the resultant detailed assessment proceedings – WCL's philosophy is to ensure the client receives robust, effective and efficient advice and representation at all times.

Having built strong professional connections with the key firms and practitioners operating in the dispute resolution and costs litigation sectors, WCL is very well placed to advise and represent a party which is in need of an experienced costs lawyer.

SERVICES

* Advice on retainers, funding arrangements
* Legal spend audits, analysis
* Preparation of and advice on costs budgets
* Preparation of and advice on bills of costs
* Preparation of and advice on costs pleadings
* Representation at Detailed Assessment Hearings
* Strategic advice on settlement, effective disposal

CONTACT

email: kevin@wonnacott.co.uk
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Jayna Patel
Partner
Dutton Gregory

"Chair's Introduction"

4.14mins

Jayna Patel

Partner

Contact information

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Jayna has a particular technical expertise in professional negligence claims against solicitors, valuers, construction professionals and accountants and is the South England Representative for the Professional Negligence Lawyers' Association.

Jayna also provides general commercial litigation advice to businesses including the recovery of debts.
Educated at Cardiff University, Jayna qualified as a solicitor in 2007.

Jayna has worked in Cardiff, Salisbury and London and has experience of project managing high value complex claims.

Jayna believes that it is important for her clients to be aware of the commercial implications of her legal advice so that they can weigh up the risks/benefits/costs of litigation. She is a trusted advisor to her clients, and they rely on her expertise to achieve the best outcome.

Jayna has extensive experience of alternative funding for litigation and can assist her clients with securing the right package for them.

Jayna has embraced hybrid working and splits her time between London and Winchester.

Recent cases

- Miah v. Hoque & Ors , Lawtel, 24/05/2018. A former member of a mosque sought an injunction in the High Court to be readmitted to worship during Ramadan. Jayna acted for the mosque in successfully resisting the application and recovering 80% of the incurred costs.
- Acting for a milk wholesaler in a contractual dispute against Muller.
- Successfully settling a variety of professional negligence claims brought by an international business and individuals against solicitors, surveyors and accountants.
- Representing a medical regulatory body in relation to a regulatory appeal.
- Acting for shareholders and directors e.g. minority shareholder claims, business loans.
- Bringing and defending claims arising from employment restrictive covenants.
- Acting for landowners/estates in relation to property damage caused by utility businesses or third parties.

Jayna lives in Winchester and likes to keep active exploring the local surroundings with her husband and young daughters. She also regularly travels to Cardiff and London to visit family and friends.

"Jayna's determination, rigour and attention to detail ensured our successful outcome against a giant of a company. We are grateful that she was on our side and were particularly impressed with her communication and negotiating skills." Former client

"The other step forward was with Jayna Patel who was equally amazing. Always took the time to discuss each step of the case." Legal 500, 2022

Richard Hitchcock QC
Outer Temple Chambers

"Some thoughts on Limitation: Knowledge and Concealment -s14A and s32 of the Limitation Act 1980"

15.28mins

Richard Hitchcock QC

Year of Call: 1990
Year of Silk: 2014
Direct Access: No

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Richard Hitchcock QC has broad experience of acting as adviser and advocate in the commercial sphere.

In recent years his practice has become principally focused in five complimentary areas: Trusts and Occupational Pension Schemes; Commercial Chancery; Civil Fraud; Banking and Financial Services and Professional Negligence.

In addition, he has developed and maintains niche practices in commercial law more generally, construing commercial contracts in particular ISDA Agreements.

Richard is recommended in Chambers & Partners and Legal 500 for his pensions expertise.

Areas of Expertise

Pensions

Expertise in all areas of the law relating to trusts occupational pension schemes, acting for trustees, employers, beneficiaries / members, trade unions and third parties to the trust (principally actuaries, auditors, accountants, brokers, scheme consultants and solicitors).

Issues raised in current cases include:

Trusts: construction of trust powers and duties; rectification and variation of trusts issues; administration of trusts; defending and litigating hostile claims by beneficiaries; pre-emptive costs applications prior to trust litigation.

Pensions: investment management and breach of duties in relation to investments; scope of actuaries and auditors duties; statutory construction in particular in relation to winding up and open/frozen scheme issues; construction of scheme documents and in particular trust powers; equalisation including GMPs; rectification and rescission and the scope of the powers of the Pensions Regulator.

He has exceptional experience of Regulatory cases involving U.S. targets, and in negotiating and litigating UK pensions

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issues against a backdrop of US debt restructuring / Chapter 11 proceedings having been involved in the Sea Containers, Nortel, Visteon, MF Global, Lehman Brothers and Desmond matters. He has conducted successful applications for judicial review of decisions of the Pensions Regulator.

He has acted as both arbitrator in pensions cases and as an expert witness in claims in the United States of America and Grand Cayman.

Notable Pensions cases

Avon plc v. Pinnock and ors; Avon plc v Baker McKenzie and DLA

Motor Insurers Pension Scheme

Newell v Putland

Re Robert Horne

James Cropper PLC and Entrust Limited v (1) Aviva and (2) Womble Bond Dickinson

Commercial & Chancery

A litigation based company practice, which incorporates all manner of general commercial disputes, in particular those involving shareholders and directors' duties.

He is currently acting for administrators resisting commercial claims under guarantees and contracts arising through implication from conduct.

He has acknowledged expertise in acting in company disputes incorporating other areas of law, in particular banking, pensions, finance and insolvency.

Richard's work in this area typically involves disputes involving company directors, joint venturers and LLP members. His broad commercial experience and particular expertise with regard to breach of fiduciary duty provide the ideal qualification for this area of work.

Notable Commercial & Chancery cases

Defending a claim alleging fraudulent investment and investment advice

Acting for hedge fund managers in a claim against a subsidiary company arising out of employee fraud

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Acting for an LLP in a claim alleging fraud in the drafting and implementation of a contract.

Financial Services

Wide experience in all aspects of the current regime for carrying out investment business, acting both for the FCA and for regulated firms and individuals.

Recent and current cases have raised the following issues: mis-selling of derivative products including LIBOR linked products; broad ranging compliance issues (instructed by both solicitors and in-house counsel); statutory construction (FSMA 2000 and European legislation); sale of investments (common law and statutory breach issues and scope of duties); unauthorised business / perimeter issues; applicability of conduct of business rules; collective investment schemes; availability of remedies under the Financial Services Compensation Scheme; MiFID II and the European Market Infrastructure Regulations.

He has exceptional experience of Regulatory cases involving U.S. targets, and in negotiating and litigating UK banking issues against a backdrop of US debt restructuring / Chapter 11 proceedings having been involved in the Sea Containers, Nortel, Visteon, MF Global and Lehman Brothers matters.

Professional Negligence

Wide experience as adviser and advocate in cases relating to actuaries, accountants, auditors, benefit consultants, financial services professionals insurance brokers and solicitors.

He has particular experience of claims in the regulatory context, whether pensions, financial services or banking and claims for allegedly negligent tax and business advice.

Current cases raise issues including: scope of duty; extent of implied terms in retainer; relevance of professional guidance to contents of duty of care; date of knowledge; construction of contractual terms and loss of chance.

Richard also has wide experience of representing clients in mediations and other forms of ADR. He is available to accept instructions directly from professionals and lay clients.

Memberships

- Association of Pension Lawyers
- Chancery Bar Association
- Chartered Institute of Arbitrators
- Commercial Bar Association
- Financial Services Lawyers Association

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Awards

- Recommended in Legal 500 for Pensions
- Recommended in Chambers & Partners for Pensions

Recommendations

RANKED IN Chambers UK Bar 2021 Outer Temple Chambers

The Legal 500 United Kingdom Leading Silk 2022

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Some thoughts on Limitation: Knowledge and Concealment - s14A and s32 of the Limitation Act 1980

PNLA ANNUAL CONFERENCE

Richard Hitchcock QC

Outer Temple

Section 14A

- Section 14A of the *Limitation Act 1980* operates to postpone the running of time where a claimant did not know (and could not with reasonable diligence have discovered) the material facts relevant to the cause of action.
- An interests of justice provision

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A quick reminder of *Howard v Fawcetts*

- The question for the purposes of s14A LA80 is whether the Claimants had sufficient knowledge for it to be reasonable to begin to investigate further: see *Howard v Fawcetts* [2006] UKHL 9, [2006] 1 W.L.R. 682.
- No discretion
- Remember the burden & carefully consider the relevant time frame
- Recent reiteration in ***Nobu Su v Clarksons Platou Futures Ltd*** [2018] EWCA Civ 1115

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Imputed knowledge

- ***Graham v Entec Europe Ltd*** [2003] EWCA Civ 1177
- The Court of Appeal considered the question of imputation of knowledge in a case where the insurer brought a subrogated action in the insured's name.
- Argued on behalf of the insured that the insurer's knowledge—including the knowledge of its loss adjuster – could not be imputed to the insured.

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- The Court of Appeal disagreed:
- *"…the spirit and purpose of the Act is to concentrate upon the knowledge of the person who has the right and interest in pursuing the claim."*
- *"S.14A(5) treats the starting date for reckoning the period of limitation under subsection (4)(b) as the earliest date on which the plaintiff "or any person in whom the cause of action was vested before him" first had the requisite knowledge. That provision would appear to have particularly in mind the situation where a plaintiff sues as the assignee of another. However, it plainly contemplates that, at any given time, it is the knowledge of the person in whom the cause of action is vested which is relevant."* (emphases added)

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Section 32

- Section 32(1)(b) of the ***Limitation Act 1980*** provides that:

"…where in the case of any action for which a period of limitation is prescribed by this Act…any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant…the period of limitation shall not begin to run until the plaintiff has discovered the…concealment…or could with reasonable diligence have discovered it."

- Section 32(2) provides that:

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

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- In the case of subsequent concealment, time does not begin to run until the concealment was or should have been discovered: ***Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*** [1996] AC 102

- Lord Nicholls:

"In the case of subsequent concealment the clock is turned back to zero. It is turned back to zero even if the defendant had already acquired a limitation defence before the concealment took place."

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Canada Square Operations Ltd v Potter [2021] EWCA Civ 339

- What constitutes concealment?

Rose LJ at [75]: *"...Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it...For the purposes of the Act that obligation need only be one arising from a combination of utility and morality to adopt Rix LJ's phrase* [in *The Kriti Palm*]"

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- Deliberate?

Applying ***R v G*** [2003] UKHL 50 the test has both subjective and objective elements:

"[87] … the correct test was that a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk …"

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- ***OT Computers Ltd (In Liquidation) v Infineon Technologies AG*** [2021] EWCA Civ 501

- Reasonable diligence?

"[T]he question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered…the concealment." [47]

Outer Temple

Thank you for listening

Richard Hitchcock QC

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Tiffany Scott QC
Wilberforce Chambers

"Litigation Roundup"

30.33 mins

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Qualifications and Appointments

- Degree in Classics, Oriel College, Oxford
- Oriel College Exhibitioner
- Distinction in Postgraduate Diploma in Law
- College of Law prize for best paper in Tort
- Laurence Kingsley Prize for Excellence in Drafting and Pleading, Inns Court School of Law

"Impressive, pragmatic and very commercial."

Chambers & Partners, 2022

Memberships

- Chancery Bar Association
- Vice-Chair of Property Bar Association
- Professional Negligence Bar Association
- Combar
- Society of Trust and Estate Practitioners (STEP)
- Bar Pro Bono Panel

Publications

- Sequent Nominees Ltd v Hautford Ltd (2019) Property Law Journal
- Rotrust Nominees Ltd v Hautford Ltd (2018) *Property Law Journal*
- Unreasonable refusal of consent to change of use (2017) *Wilberforce Property Update* (Issue 3)
- Trusts and estates cases: recent developments (2016) *Trusts & Trustees* 22 (9): 982-990

Practice Overview

Tiffany is an experienced advocate with a broad chancery/commercial practice with particular technical expertise in trusts and estates disputes, property litigation and professional liability claims. She has experience in 'business' litigation of all kinds, often with an international element, including civil fraud and asset recovery, fund and partnership disputes, shareholder disputes, claims against fiduciaries, and claims arising out of insolvency.

She is one of the leading names at the Bar in her fields of practice. She is well-known for being ***"just brilliant in Court"*** (Chambers & Partners) ***"a great advocate"***, and ***"excellent when cross-examining"*** (Legal 500), and for being ***"extremely good at handling appeals"***. The legal directories further comment that she is ***"fierce when you need her to be fierce… her legal mind is incredible"***, ***"a tough and tenacious advocate"***, ***"a ferocious litigator cross-examiner"***, that ***"her style is effective as she is ruthless, yet never over the top, when exposing the limitations of her opponent's case"***, and that she ***"knows how to give the other side a good kicking"***.

She has appeared before Courts and Tribunals at all levels, including the Privy Council. She appeared in the Supreme Court in May 2019 in *Sequent Nominees Ltd (formerly Rotrust Nominees Ltd) v Hautford Limited* [2020] A.C. 28, a case concerning the exercise of contractual discretions, and the reasonableness of withholding consent.

She enjoys working as part of a litigation team and is recognised for being ***"a very able chancery practitioner, a good advocate and an excellent team member"*** (Chambers & Partners), as well as for her meticulous preparation of cases, attention to detail and first-rate drafting skills. Her ***"attention to detail is second to none"*** (Legal 500) and she ***"offers comprehensive advice and always handles cases and clients with care and efficiency"*** (Chambers & Partners).

She takes care to explore issues with her clients and find creative ways to approach the various problems that arise in practice. She is ***"brilliant at condensing complex points with clients – always calm and reliable"*** (Chambers & Partners). Her clients range from major infrastructure providers, investment banks and high net worth individuals to charities and those who need representation on a pro bono basis.

Publications continued

- Where different legal systems collide: the decision in Labrouche v Frey & Ors (2016) *Trusts & Trustees* 22 (7): 741-752
- *Wilberforce Legal Digest* (Issue 2) Trust, Tax, Probate and Estates (2015) (Editor)
- In the post-Pitt world (2014) *Trusts & Trustees* 20 (9): 871-881
- *Hill and Redman's Law of Landlord and Tenant* (Editor)
- Failed joint ventures: the search for the 'Pallant v Morgan equity' (2008) Development Disputes: Current issues for property litigators

Practice Overview continued

Tiffany is recommended by the directories as follows:

- by The Legal 500 in the fields of private client – trusts and probate and property litigation;
- by Chambers & Partners in the fields of chancery traditional, chancery commercial and real estate litigation;
- by Chambers Global in the field of dispute resolution: commercial chancery;
- by HNW Guide in the field of chancery: traditional;
- by Who's Who Legal as a Real Estate Silk with *"considerable experience before various courts and tribunals, including the Supreme Court"*.

Chambers & Partners 2022 describes Tiffany as *"impressive, pragmatic and very commercial". "She gives really succinct, direct, practical advice, and is obviously extremely intelligent and very good legally. What really impresses is how she rolls her sleeves up and dives into the case." "She has a knack for cutting through the wider noise and getting straight to the nub of the issue to come up with a strategic way forward."* Furthermore, she *"stands out as being really, really reassuring to clients - she is really hands-on with clients, and that is superbly helpful".*

Legal 500 2022 says that she is *"incredibly thorough, always happy to pick up the phone to chat something through and excellent when cross-examining", "highly skilled in extracting information from witnesses in a sensitive but determined manner".*

Commercial

Tiffany has been recommended in this field by Chambers & Partners and Chambers Global for many years as a silk with a depth of experience in commercial chancery matters. The 2021/2022 directories state that she is noted for her calm and confident client management and practical approach to advisory matters. *"She is really strategic and has an eye for the detail. Her communication skills are great and she puts clients at ease. She is very knowledgeable and a pleasure to deal with."* She is *"Impressive, pragmatic and very commercial"* who *"gives really succinct, direct, practical advice and is obviously extremely intelligent and very good legally. What really impresses is how she rolls her sleeves up and dives into the case". "Her ability to tap into the details of a case at a moment's thought is what sets her apart from other counsel in this area."*

Earlier editions describe her as *"fierce when you need her to be fierce, she is just brilliant in Court and her legal mind is incredible. She is very direct and matter of fact and has a good presence in the Court room"*, is *"very assured, highly realistic and someone who can manage client expectations in difficult circumstances"* (2019); she *"has an impressive intellect, and is approachable and client-friendly. Sensible, pragmatic and efficient, she is calm and collected when on her feet"* but is also well capable of being *"a ferocious litigator cross-examiner"* (2018); *"extremely good at handling appeals and a good draftswoman"* (2017); a *"seasoned commercial chancery litigator"* who is *"very calm and methodical … her manner inspires confidence even in adverse circumstances. She is a brilliant, self-assured advocate who is a real asset to any team".*

She has experience in 'business' litigation of all kinds, often with an international element, including civil fraud and asset recovery, fund and partnership disputes, shareholder disputes, including s994 petitions, claims against fiduciaries, and claims arising out of insolvency.

She undertakes a variety of cases with a financial services element including claims arising out of poor investment advice or mis-selling, professional negligence claims in the financial services field and other related actions (such as actions by trustees or against pension providers) requiring analysis of the performance of investments for the purpose of assessing damages.

She has experience dealing with claims requiring consideration of the Financial Services and Markets Act 2000 and the Conduct of Business Rules and she has also, over the years, dealt with claims involving previous regulatory regimes including the rules of FIMBRA, the Personal Investment Authority, and LAUTRO.

Commercial continued

2021 cases include:

- *Invest Bank PSC v El-Husseini & Ors* (2021) – acting for Swiss trustees of a family trust in ongoing proceedings brought by a UAE bank seeking freezing and disclosure orders to enforce judgments obtained in the UAE and in support of Canadian proceedings pursuant to s.25 Civil Jurisdiction and Judgments Act 1982 and under the Chabra jurisdiction; and seeking to challenge transfers of assets worth £19 million on the grounds of retention of beneficial ownership and as transactions defrauding creditors under s.423 of the Insolvency Act 1986. A jurisdiction challenge is to be heard in February 2022.
- *Settle Safe Ltd v Eurofunding Ltd & Anr* (2021) – acting for a Canadian online payment services provider in ongoing claim against a payment processor for fraudulently disposing of €3.8 million of merchant funds, involving dishonest assistance in a breach of trust, procuring breach of contract and unlawful means conspiracy. Obtained interim and final proprietary and freezing injunctions and disclosure orders. Contempt application to be heard in March 2022.
- *Foglia v The Family Officer Ltd & Ors* [2021] EWHC 650 (Comm) – acting for defendants in proceedings for knowing receipt, dishonest assistance and unjust enrichment following misappropriation of €15 million from Cayman bank account held by an Italian fiduciary nominee company. Interim proprietary and freezing injunctions and disclosure orders under CPR 25.1(1)(g) and Norwich Pharmacal jurisdiction obtained by claimant, followed by summary judgment and post-judgment freezing orders.
- *Latchworth Ltd v HSBC Bank PLC* (2021) – acting for HSBC in ongoing proceedings alleging dishonest assistance in a breach of trust and negligence following misappropriation of €11.5 million of trust assets by a customer of the bank.
- Advising a lender as to liability for procuring a breach of contract and unlawful means conspiracy arising from implementation of a proposal to remove valuable assets from an operational company upon the disposal of a well-known London hotel.
- Acting for a partner in a farming partnership in proceedings seeking declarations as to the existence of a partnership at will and its dissolution and the winding up of the partnership with taking of necessary accounts, and an interim payment.
- Advising as to the interpretation of a joint venture agreement relating to the exploitation of a site in Kent and as to termination of the venture.

Earlier cases include:

- *Amarenco Solar Ltd v Sustainable Development Capital* – providing an opinion to the Irish Court in proceedings for an injunction to restrain a winding up petition, including whether the defendant had substantial grounds to dispute a debt arising under an agreement for the provision of corporate finance services in connection with a renewable energy development project
- Advising various LLPs in connection with the operation of film finance agreements and as to obtaining an injunction against various banks to prevent payment out of monies that would trigger catastrophic multi-million pound tax liabilities.
- Advising as to the proposed sale of a major London hotel chain and pre-sale restructuring of its substantial property portfolio.
- Advising and representing minority shareholders in a dispute in relation to the management of two well-known London restaurants.
- *Ahmad v Owadally* – acting for parties to a joint venture in appeal against decisions reached on the taking of an account of profits, including issues of whether money found to have been the proceeds of crime should be brought into account.
- *Andusia Recovered Fuels Ltd v GBN Services Ltd* – claim for damages for non-delivery of recovered fuels, arising out of the closure of a European processing plant alleged to engage force majeure provisions in the contract.

Commercial continued

- *Michel v Michel* – acting for the majority shareholders in an unfair prejudice petition relating to a family- run cosmetics manufacturing company and its Chinese operations.
- Acting for the majority shareholders in an unfair prejudice petition relating to a well-known restaurant-owning company combined with proceedings seeking specific performance of buy-out provisions in a shareholders' agreement, alleging breach of a good faith provision.
- *Luitpold Immobilienverwaltung v Huber & Grothe* –acting for claimant in proceedings against judgment debtors to provide information about their assets, successfully seeking committal.
- Advising a major insurance company as to issues relating to its equity release portfolio.
- Acting in an arbitration for a property developer in a joint venture dispute with a landowner relating to the development of an estate of houses involving complex questions of agency and authority.
- *Axle Holdings v Letter* – a claim for fraudulent misrepresentation and breach of warranty against the vendors of shares in a luxury vehicle company with a sale price of $52 million.
- *Investec Bank (Channel Islands) Ltd v Kamyab* – acting for the bank in a claim to recover millions of pounds secured against various properties, where the defendant alleged that the properties had been put into trust.
- *Vocational Health Services v BMI Healthcare* – a claim by a consortium of doctors against a major healthcare provider in relation to a failed joint venture, alleging conspiracy.
- *Garrard v Salter* – a dispute arising out of a joint venture/partnership establishing a venture capital business.
- *Taylor v Peacock Financial Management* – representing a financial services provider in negligence proceedings in relation to trust investments.
- Advising a former director/shareholder as to the negligent drafting of an agreement for his exit from the company.
- Advising in relation to the breakdown of a joint venture to establish a company providing procurement solutions for the construction industry.
- Advising in a multi-jurisdictional dispute between high net worth individuals as to joint venture and loan agreements relating to the purchase, refurbishment and subsequent operation of a floating oil storage off-loading vessel in Thailand.
- Acting for Flavio Briatore in claim brought by Italian fashion designer regarding alleged joint venture to establish a worldwide fashion couture business under the 'Billionaire' trademark.
- Acting for Vivian Imerman in a high-profile dispute with Robert Tchenguiz regarding the breakdown of a joint venture for purchasing and operating Whyte & Mackay, involving allegations of breach of fiduciary duty, breach of directors' duties, dishonesty, taking of secret profits and unjust enrichment.

Civil Fraud

Tiffany's practice encompasses a range of complex civil fraud proceedings and asset recovery litigation, often with an international element, in which she can bring to bear her considerable technical experience and expertise in relation to attacking and defending trust structures and in dealing with proprietary and equitable interests. She has advised and represented clients in various dishonest assistance, deceit, breach of fiduciary duty and unjust enrichment claims over the years, involving restitutionary remedies and change of position defences, including acting for Credit Agricole Indosuez in the *Niru Battery Manufacturing v Milestone Trading & Ors* litigation, both at first instance and in the Court

Civil Fraud continued

of Appeal, acting for Vivian Imerman in a high-profile dispute with Robert Tchenguiz regarding the breakdown of a joint venture for purchasing and operating Whyte & Mackay, and acting for the Duke of Norfolk in *Fitzalan-Howard v Hibbert*, a dishonest assistance claim arising out of the demise of Erinaceous Group.

Her work in this field frequently involves interim applications for freezing and proprietary injunctions, disclosure orders, orders for service out of the jurisdiction and jurisdiction challenges and contempt proceedings. In November 2021 Tiffany spoke at Thought Leaders 4 FIRE – QC Surgery: Fraud on the subject of freezing and proprietary injunctions.

2021 and ongoing casework includes:

- *Invest Bank PSC v El-Husseini & Ors* (2021) – acting for Swiss trustees of a family trust in ongoing proceedings brought by a UAE bank seeking freezing and disclosure orders to enforce judgments obtained in the UAE and in support of Canadian proceedings pursuant to s.25 Civil Jurisdiction and Judgments Act 1982 and under the Chabra jurisdiction; and seeking to challenge transfers of assets worth £19 million on the grounds of retention of beneficial ownership and as transactions defrauding creditors under s.423 of the Insolvency Act 1986. A jurisdiction challenge is to be heard in February 2022.
- *Settle Safe Ltd v Eurofunding Ltd & Anr* (2021) – acting for a Canadian online payment services provider in ongoing claim against a payment processor for fraudulently disposing of €3.8 million of merchant funds, involving dishonest assistance in a breach of trust, procuring breach of contract and unlawful means conspiracy; obtained interim and final proprietary and freezing injunctions and disclosure orders. Contempt application to be heard in March 2022.
- *Foglia v The Family Officer Ltd & Ors* [2021] EWHC 650 (Comm) – acting for defendants in proceedings for knowing receipt, dishonest assistance and unjust enrichment following misappropriation of €15 million from Cayman bank account held by an Italian fiduciary nominee company; interim proprietary and freezing injunctions and disclosure orders under CPR 25.1(1)(g) and Norwich Pharmacal jurisdiction obtained by claimant, followed by summary judgment and post-judgment freezing orders and enforcement issues.
- *Latchworth Ltd v HSBC Bank PLC* (2021) – acting for HSBC in ongoing proceedings alleging dishonest assistance in a breach of trust and negligence following misappropriation of €11.5 million of trust assets by a customer of the bank.
- *Ahmad v Owadally* (2020) – acting for parties to a joint venture found guilty of money laundering offences, on appeal against decisions reached on the taking of an account of profits of the joint venture including issues of whether money found to have been the proceeds of crime should be brought into account.
- Advising a lender as to liability for procuring a breach of contract and unlawful means conspiracy arising from implementation of a proposal to remove valuable assets from an operational company upon the disposal of a well-known London hotel.
- Representing a barrister in a claim relating to alleged negligent advice regarding compliance with local authority enforcement notices, and alleged negligent conduct of criminal litigation under POCA.

Earlier cases include:

- *Luitpold Immobilienverwaltung v Huber & Grothe* – acting for claimant in proceedings against judgment debtors to provide information about their assets and in contested committal proceedings.
- *Axle Holdings Ltd v Letter* – acting for claimant in claim for fraudulent misrepresentation and breach of warranty against vendors of shares in luxury vehicle company with a sale price of $52 million.
- *Vocational Health Services v BMI Healthcare* – acting for BMI in claim by a consortium of doctors in relation to a failed joint venture alleging conspiracy.

Professional Liability

Tiffany has an established reputation in the area of professional liability having been recommended in this field by The Legal 500 for many years which described her as ***"an incisive and bright silk"***, ***"superb"***, ***"excellent"***, ***"a first-rate advocate"***, and ***"very persuasive and adaptable on her feet"***.

She undertakes a wide variety of professional negligence work, whether acting for claimants or for the insured, in claims against solicitors, barristers, accountants, trustees, surveyors, construction professionals, finance practitioners (including pension advisers) and insurance brokers.

Much of her work in this area is property or trust related but she also undertakes a variety of cases with a financial services element including claims arising out of poor investment advice or mis-selling and other related actions requiring analysis of the performance of investments for the purpose of assessing damages.

She has experience dealing with claims requiring consideration of the Financial Services and Markets Act 2000 and the Conduct of Business Rules and she has also, over the years, dealt with claims involving previous regulatory regimes including the rules of FIMBRA, the Personal Investment Authority, and LAUTRO.

2021 and ongoing casework includes:

- Representing a barrister in ongoing claim relating to the alleged negligent conduct of litigation in which the underlying claim in unjust enrichment failed.
- Representing a barrister in ongoing claim relating to alleged negligent advice regarding compliance with local authority enforcement notices, and alleged negligent conduct of criminal litigation under POCA.
- *Latchworth Ltd v HSBC Bank PLC* – acting for HSBC in ongoing proceedings alleging dishonest assistance in a breach of trust and negligence following misappropriation of €11.5 million of trust assets by a customer of the bank.
- Advising and representing claimants in various different claims regarding solicitors' negligence in conveyancing transactions including failure to report onerous lease terms, failure properly to report on terms of a guarantee, failure properly to advise as to terms of sale contracts and rent review clauses, failure to register an option to purchase; and advising and representing clients in associated rectification proceedings.
- Acting for potential claimant in anticipated proceedings against tax advisors for negligent advice in relation to the establishment of LLPs and changes in capital profit-sharing ratios resulting in a tax liability of over £2.5 million.
- Acting for potential defendant solicitors in anticipated group litigation arising out of the release of deposits held as stakeholder on real estate transactions.
- Acting for solicitors in an ongoing claim brought by landlord of a leisure park alleging negligent drafting of a lease by failing to include in the calculation of rent the income of subsidiaries and licensees who also operate from the park.

Recent cases include:

- Acting for Cayman Islands attorneys in a claim arising out of alleged negligent handling of complex trust litigation.
- Representing a firm of investment advisers in proceedings brought by a beneficiary of a trust alleging that negligent financial advice had been provided to the trustees.
- *Creative Horizon v Scott Fowler* – acting in group litigation for a group of 60 overseas investors who paid deposits for the purchase of flats yet to be built in England, seeking damages from the solicitors who advised and alleging a failure to warn about the risks of the transactions.
- *Orientfield Holdings Ltd v Bird & Bird* [2017] EWCA Civ 348, and [2015] PNLR 33 (first instance decision) – acting for solicitors in a claim alleging negligence in the course of the purchase of a residential property worth £25 million by failing properly to advise the client as to the contents of a "Plansearch". The case at first instance was listed by The Lawyer as one of the top 20 cases of 2015.

Professional Liability continued

- *Pannikou v Taylor Williams Daley & Mishcon de Reya* – acting for claimants against building surveyors and real estate transaction lawyers in a claim arising out of alleged negligent advice and drafting in relation to the purchase of a redeveloped property.
- *HBB v John M Lewis* – acting for claimant property-owning company against solicitors in claim for alleged negligent conveyancing.
- Advising a former director/shareholder in relation to the negligent drafting of an agreement for his exit from the company.
- Acting for the owner of a retail development in a claim against its solicitors for failing to advise it properly as to service of a notice under an agreement for lease.
- Advising solicitor defendants in lost litigation claim involving complex questions of loss of a chance.
- Advising a major institutional investor as to potential solicitors' negligence proceedings arising out of its investment in a large well-known shopping centre.
- Advising and representing insured clients in various disputes arising out of allegedly negligent conveyancing and drafting of leases, including rectification claims, and negligent property surveys and valuations.

Property

Tiffany is a well-known property litigator and deals with all aspects of property litigation and advisory work including:

- Commercial and residential landlord and tenant disputes (such as lease renewals, consents to assignment, unauthorised alterations and dilapidations claims)
- Claims for rectification of leases and other agreements
- Real property matters such as rights of way, rights to light and restrictive covenants (including modification under section 84 LPA 1925)
- Interference with land such as trespass, nuisance and adverse possession claims
- Enforcement of legal charges, including mortgage possession proceedings and the appointment and removal of receivers and the exercise of their powers and duties
- Insolvency issues in the real estate and landlord and tenant context
- Disputes arising out of development agreements (including incomplete joint ventures, *Pallant v Morgan* type constructive trusts, proprietary estoppel; construction of agreements and the duties of joint venture partners, including good faith and best and reasonable endeavours clauses)
- Disputes arising out of failure to complete or alleged rescission of contracts for sale

She appeared in the Supreme Court in May 2019 in *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47 [2020] A.C. 28, the latest word on reasonableness of withholding consent.

She is Vice-Chair of the Property Bar Association and co-edits the chapter of Hill and Redman's Law of Landlord and Tenant dealing with maintenance of the fabric of the premises.

She has been ranked in this field for many years by The Legal 500 and by Chambers & Partners which comment in the 2021/2022 editions that *"she has a knack for cutting through the wider noise and getting straight to the nub of the issue to come up with a strategic way forward", "her attention to detail is second to none. She is incredibly thorough, always happy to pick up the phone to chat something through and excellent when cross-examining"*, she is *"highly skilled in extracting information from witnesses in a sensitive but determined manner", "very client friendly an unlike many barristers acknowledges that her involvement is part of a bigger picture". "Sharper than a scalpel when dissecting witnesses". "Presents complicated advice in a simple and client-friendly way".*

Property continued

Earlier editions state that she *"offers comprehensive advice and always handles cases and clients with care and efficiency"*, is *"excellent on her feet"* (2020), *"a tough and tenacious advocate"*, who *"provides clients with excellent commercial legal solutions and is quick to get to the heart of a problem"*, is *"approachable, very friendly and has a keen eye for detail"* (2019), *"a great advocate who is very good at dealing with complex legal issues"* (2018), *"technically very sharp and engaging with clients"* (2017); *"bright and considered"* (2017); *"willing to explore issues and find creative solutions"*. She is also said to have *"an excellent grasp of complex valuation matters"* and be *"excellent at handling appeals"*.

Casework during 2021 and ongoing includes:

- Acting for major national infrastructure provider in arbitration proceedings relating to the disposal of land consequent on the expiry of a concession agreement with a railway operator.
- *Rustington Investments Ltd v Esporta Health & Fitness Ltd* – acting for defendant guarantor in action for arrears of rent, alleging no liability pending participation in the UK Government's binding arbitration scheme.
- *Smoke Club Ltd v Network Rail Infrastructure Ltd* – acting for tenant in proceedings seeking compensation following compulsory purchase of the demised premises, alleging existence of a tenancy on grounds of proprietary estoppel alternatively a periodic tenancy; successful in 4 day trial of preliminary issue in Upper Tribunal January 2021.
- *Cotter v Warren* – acting for defendant in claim alleging acquisition of rights of way over two plots of land by prescription; 4 day County Court trial in October 2020, permission to appeal to High Court, appeal settled June 2021.
- *Lesis Ltd v Aziz* – acting for defendant in proceedings seeking specific performance of a contract for sale of development land, defended on the basis that the claimant was not itself ready willing and able to complete alternatively on basis of misrepresentation; 5 day High Court trial in 2021, settled on first day.
- *Bvlgari (UK) Ltd v British Grolux Investments Ltd* – acting for Bvlgari in contested lease renewal proceedings under ground (f) of section 30(1) of the 1954 Act relating to flagship store on New Bond Street.
- *Dustyhall Ltd v Gower Furniture Ltd* (2019) – acting for defendant tenant in claim alleging breach of the lease by parting with possession of the property to a group company for whom the tenant was acting as agent; settled 2021.
- Advising major national infrastructure providers and government departments as to various matters arising out of agreements to develop railways, to develop major London landmark sites, to operate break clauses of prestigious London headquarters, and as to dilapidations and the giving of vacant possession.
- Advising tenant of a national department store as to modification of leasehold covenants under s.84 LPA 1925.
- Advising a London Borough Council as to issues arising under a long lease of the town shopping centre including consent to assignment, the operation of user and alteration covenants, and as to modification of leasehold covenants under s.84 LPA 1925.
- Advising major national hotel chain as to issues that arise under a hotel management operating agreement.
- Advising lender as to issues arising on pre-pack administration including disposal of a well-known London hotel, including issues as to liability for procuring a breach of contract and unlawful means conspiracy.

Earlier cases include:

- *Morrisons v L&Q* (2020) – acting for landlord in lease renewal proceedings, seeking possession on ground (f) of section 30(1) of the 1954 Act. Settled 2021.
- *Milburngate Durham Ltd v Turtle Bay Restaurants* (2020) – acting for landlord in proceedings seeking specific performance of an agreement for lease, allegation that certificate of practical completion invalid and access date not achieved.

Property continued

- *Re All Saints Retail Ltd* (2020) – acting for landlord of flagship retail unit on Regent Street seeking an order to revoke a CVA on the grounds that its guarantor contended the CVA had extinguished its liability under an Authorised Guarantee Agreement
- Advising a tenant in relation to the proposed development of airspace above a hotel.
- Advising a landlord as to the validity of a break notice served by the wrong party and at the wrong premises.
- Acting for potential claimants in anticipated proceedings for an injunction restraining interference with a right of way and trespass.
- *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47 [2020] A.C. 28 – acting for the tenant in the Supreme Court (and in courts below) in what is now the leading case dealing with unreasonable withholding of consent.
- *John v Shelvex* (2019) – acting for successful claimants in proceedings alleging that a Pallant v Morgan equity had arisen, 4 day trial in June 2019.
- *GE CIF Trustees v EE Limited* (2019) – acting for landlord in claim where tenant alleged breach of covenant for quiet enjoyment, derogation from grant and repudiatory breach of the lease arising from construction works to adjacent premises.
- *Mir v Mir* (FTT, 2018) –acting for the successful defendant in a 2 day trial to determine beneficial ownership of the family home.
- *Kilburn v London Borough of Barnet* (2018) – acting for the tenant in 3 day trial under ground (f) of the 1954 Act, contesting that the landlord Council had shown a sufficiently clear and settled intention to redevelop where the relevant committee had not met to take a final decision.
- *Anglia Leisure Ltd v Burlinson* (2018) – 5 day trial of a right of way dispute relating to ancillary rights to load and unload.
- *Acredart & Car Giant v London Borough of Hammersmith & Fulham* [2017] EWHC 197 (TCC) and [2017] EWHC 464 (TCC) (Costs) – acting for the successful Council in a dilapidations claim, an important decision regarding the correct approach to valuations under section 18(1) LTA 1927.
- *Canary Riverside Estate Management Ltd v Circus Apartments Ltd* (2017) – acting for landlord of a block of flats in Canary Wharf worth £35 million in proceedings brought as a preliminary to forfeiture and defending a counterclaim for unreasonable withholding of consent to assignment and subletting.
- Acting in an arbitration of a joint venture dispute between property developer and landowner over the development of an estate of houses, involving complex questions of agency and authority.
- Acting for a trustee in bankruptcy attempting to resolve long-running issues in dealing with numerous properties which the bankrupt purchased with money obtained from banks by fraud, raising complicated issues of trusts of property interests and land registration.
- *Leslie (Ashford) Ltd v Merlion Housing Association* (FTT) [2016] – acting for a developer turning an office block into flats and seeking to terminate an agreement for sale.
- *Benjamin UK Ltd v Residents of Redwood Glade* (UT) [2016] – acting for a company using a residential property in a cul-de-sac as a home providing residential care for looked- after children in proceedings to modify a restrictive covenant.
- *Marston's Property Development v Payne* [2015] – acting for Marston's in proceedings to enforce an agreement for sale, purchase and development of land; successful application for an expedited trial.
- *Peel Land and Property v TS Sheerness Steel Limited* [2014] EWCA Civ 100 – successful appeal as to the removability of tenant's fixtures.

Property continued

- *Peel Land and Property v TS Sheerness Steel Limited* [2013] EWHC 2689 – refusal of interim injunction to prevent removal of tenant's fixtures pending appeal. Advising a major national institutional investor in relation to its investment in a large well known shopping centre.
- Representing major national asset managers in an adjudication to determine whether breaches of a service partner agreement had taken place in relation to the management of a portfolio of over 250 properties across the UK.
- Representing Lincolnshire Co-Operative as landlord in 1954 Act lease renewal proceedings contested on ground (g) – defended by the Spar tenant on the basis that the 1954 Act is incompatible with the Human Rights Act 1998 in failing to provide adequate compensation.
- Advising and acting for a major international oil and gas company in relation to threatened trespass and protests at key London sites during the Olympics.

Trusts, Tax, Probate and Estates

Tiffany is a member of STEP and she deals with all aspects of trusts and probate work – contentious and non-contentious, offshore, onshore and multi-jurisdictional. She has been recommended as a leading name in this field by The Legal 500 and Chambers & Partners for many years. The 2021/2022 editions say that she is ***"noted for her involvement in offshore work"*** and is ***"immensely clever, very intelligent, very user-friendly and very responsive"***, ***"approachable and quick to understand and address the needs of clients"*** and that she ***"provides insightful and comprehensive advice on very complex trust matters"***. She is ***"an excellent practitioner who stands out as being really, really reassuring to clients – she is really hand-on and that is superbly helpful".***

Earlier editions describe her as ***"extremely diligent, with a good strategic focus. She comes from a broad practice background, so she's comfortable with all different types of matters and robust in court". "She is confident and inspires confidence, respectful and inspires respect", "brilliant at condensing complex points with clients – always calm and reliable", "her advice is always very detailed and thorough, she demonstrates impeccable judgment", "she is very smart, very responsive and very bright"*** and she ***"has excellent attention to detail and a good calming way with clients"***.

She is also recommended in the HNW Guide in this field as being ***"technically excellent and a very pleasant person to deal with", "very assured and realistic, she can manage client expectations in difficult circumstances"***, ***"exceptionally bright and hardworking … she makes the advice very easy to understand in subjects that are very, very difficult. She breaks it down for the client in a way that is easily digestible"***. ***"She is very easy to work with. She takes a look at the bigger picture, rather than getting bogged down in the minutiae. I have seen her on her feet: she's very good at cross-examination, and is very persuasive."***

Her general areas of practice include:

- contentious trust litigation between beneficiaries and trustees
- disputes involving attacking or defending trusts and trust assets
- disputes involving trusts in divorce proceedings including consideration of when a nuptial settlement has arisen and of when trust assets might be a financial resource
- disputes involving construction of wills and contentious probate
- claims for the appointment and removal of trustees and executors
- claims for provision under the Inheritance etc. Act 1975
- rectification of wills and trusts
- applications under the Variation of Trusts Act 1958
- applications under the Trustee Act 1925 for enlargement of trustees' administrative powers

Trusts, Tax, Probate and Estates continued

- approval of compromises on behalf of minor children
- Re Beddoe applications

2021 and ongoing casework includes:

- Acting for trustees of a €40 million Guernsey trust in ongoing proceedings concerning their purported removal by the Monegasque-appointed guardian of the settlor in favour of Monegasque trustees, including a challenge to the validity of the trust on grounds of undue influence and lack of capacity, forced heirship, freezing of trust assets in Switzerland and consideration of the Guernsey firewall legislation and conflicts of laws.
- Acting for beneficiaries of various BVI trusts worth £200 million established by a renowned figure in the sporting world in ongoing dispute involving questions of validity of removal of trustees and application by trustees to Court for blessing as to division of the trust assets on winding up, and threatened (late) application under the 1975 Act.
- Acting for trustee of multi-million pound trust in High Court proceedings arising out of a divorce, brought by a beneficiary for disclosure of trust documents and information and for an account of dealings with the trust fund, and ongoing advice as to terms of various indemnities to be provided by the parties.
- Acting for minor and unborn beneficiaries of three dynastic English settlements established by landed gentry ancestors worth £400 million in proceedings under the Variation of Trusts Act 1958 seeking an extension of the perpetuity period and modernisation of the trust instruments, in which an anonymity order was granted on an interim and on a final basis.
- Acting for Isle of Man beneficiary of a Jersey trust in ongoing Jersey proceedings brought by settlor/beneficiary seeking to have trustee removed for maladministration including questions of the weight to be given to wishes where settlor is not the economic settlor.
- Advising as to the provisions and operation of a family trust established under the law of the Abu Dhabi Global Market.
- Acting for recipient of a gift of shares in a Guernsey company in ongoing proceedings by the donor to set aside the gift on grounds of undue influence alternatively alleging the existence of a trust.
- Advising as to enforceability of a cohabitation agreement on the breakdown of a relationship, including questions of proprietary estoppel and constructive trusts.
- Advising as to enforceability of a cohabitation agreement and return of valuable artwork and an engagement ring.
- Acting for and against potential claimants in various anticipated contentious probate proceedings seeking to set aside wills on grounds of testamentary incapacity, undue influence and want of knowledge and approval.
- Acting for beneficiaries under an English will in a dispute as to the proper implementation of an option to purchase land in the testator's estate.
- Acting in various complex and high value 1975 Act proceedings.

Recent casework includes:

- Acting for the executor of a settlor/trustee in ongoing claim brought by beneficiaries of a substantial trust for an account against the estate and the current trustee and a trustee de son tort, alleging misappropriation of assets.
- Acting for Cayman Islands attorneys in a claim arising out of alleged negligent handling of complex trust litigation.
- Advising trustees of a family trust of valuable land as to how to impose a "clawback" provision on beneficiaries to whom they have made distributions in order to share in the profits of future development.

Trusts, Tax, Probate and Estates continued

- Representing minor and unborn beneficiaries in various different and ongoing applications to vary trusts to introduce a power to accumulate income and to extend the perpetuity period.
- Acting for the trustee of an overseas retirement benefit scheme with only one member, holding assets of around £60 million, as to issues that arise on the divorce of the member where his wife is challenging the exercise of the trustees' powers and seeking information about the scheme.
- Advising on proceedings in Jersey to set aside a trust on grounds of undue influence and invalidity of the trust instrument.
- *TP v PRBP* [2018] EWHC 2433 (Fam) – acting for trustees of a £400 million trust in divorce proceedings where the wife claimed that assets to which the husband is entitled under the trust should be brought into account on the divorce.
- *Labrouche v Frey (Re Olga Martin Montis)* [2016] EWHC 268 (Ch) – acting for Marquesa Soledad Cabeza de Vaca in long-running litigation brought by her son culminating in 6 week trial alleging wrongful distribution of £20 million of trust assets and excessive fee-taking by the trustees, arising out of the conversion of a Liechtenstein establishment to a foundation.
- *Skillings v Kibby* [2016] EWHC 3165 – acting for successful beneficiaries under a will in a 5 day taking of an account; an account was obtained on the footing of wilful default following misapplication of estate assets; included cross-examination on the questions whether an Old Masters painting was sold at an undervalue and whether excessive fees were paid to non-professional agents. Permission to appeal was refused after a 2 day hearing.
- Acting for the Hayward family in long-running litigation in the Bahamas in relation to the family trusts of the late Sir Jack Hayward which own half the Grand Bahama Port Authority – involving injunctions to restrain distribution of trust assets and the exercise of powers of appointment; setting aside trustee resolutions removing the family as beneficiaries; seeking the appointment of a judicial trustee; and an inquiry as to whether a trustee procured the removal of its co-trustees in breach of duty.
- Advising invalidly appointed trustees how to retire and obtain payment of their fees and expenses from the trust fund; applying to court to authorise payment of fees and to ratify the actions the trustees had taken while invalidly appointed.
- Appearing before the Court of Protection on contested applications for the appointment of a deputy and appointment of a litigation friend.
- Acting for a professional interim receiver appointed under the Mental Health Act 1983 on a claim by a disappointed beneficiary for allegedly negligent failure to procure a statutory will.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Helen Swaffield
Contract Law Chambers

"The top 5 factors for a winnable professional negligence claim"

28.24mins

Contract Law CHAMBERS

Helen Swaffield

Head of Chambers

clerks@contractlawchambers.co.uk

Helen Swaffield is a practising Barrister with over 25 years' experience in Commercial and Public Law including commercial contracts and regulation, EU Law, international outsourcing and procurement, competition, franchising, supply and distribution and IPR. Helen appears in the High Court, Commercial Court and Technology and Construction Court as well as commercial arbitrations and adjudications. Helen has a French Law accreditation and has a diploma in EU Law from the University of Strasbourg. Having worked at both the EU Commission and the EU Court, she speaks French and reads Spanish.

Helen has drafted commercial, public and health sector contracts and has developed precedents and templates for industry use. She is regularly consulted to mitigate business risks and resolve claims and other disputes before litigation. Publications: Helen is the editor of and contributor to the Commercial Litigation Journal and the Procurement and Outsourcing Journal.

Helen operates her practice with a tight-knit group of legal associates and other professionals to ensure that our clients receive the best possible service from a strong and multifaceted legal team.

Some of Helen's most recent work includes:

- Advising multi-national mining company in contractual restructuring.
- Successfully representing some 200 Defendants in a seven-day trial relating to contractual interpretation in front of the County Court and High Court on appeal in *Terracorp Limited v Rajesh Mistry and others* [2020] EWHC 2623 (Ch). - Also see The Times article on the case: https://www.thetimes.co.uk/article/victory-for-owners-of-worthless-land-lk6bss2lnshareToken=fd9d0f405f73510a2117c681e4503c9f
- Achieving a multi-million pound settlement on behalf of over 200 Claimants in a claim for a failed property development.
- Advising top-tier law firms on the performance of lease covenants.
- Advising global IT development company on R&D/supply contracts and negotiating with UK/US law firms to a successful conclusion.

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5 FACTORS TO WIN PROFESSIONAL NEGLIGENCE CLAIM

Helen Swaffield
Contract Law Chambers
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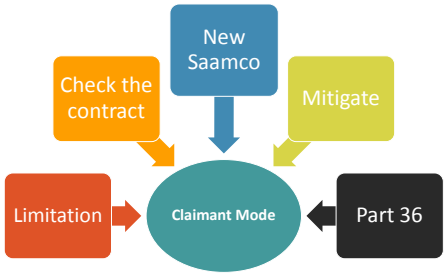
The Session



Limitation Defence

1

In contract the date of the breach

6 years

2

In tort the date of the loss (primary)

6 years

(NB. the cause of action accrues only when some damage occurs)

3

In tort the date of the constructive knowledge (secondary) 3 years

3 years

15 year long stop

Tort 1: when is loss suffered?

- A contingent liability is not sufficient to start time running. It is well established that a cause of action in negligence arises when "actual damage" is suffered as a result of the negligence. The classic formulation of actual damage is "any detriment, liability or loss capable of assessment in money terms" including "liabilities which may arise on a contingency". ***Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1997] 1 WLR 1627*).**
- ***Berney v Saul [2013] EWCA Civ 640***
  - The key issue was the date on which the claimant suffered a quantifiable or ascertainable loss.
  - In a claim based on the conduct of litigation that has been settled, a cause of action may accrue before any settlement, if it is shown that the value of the litigation was diminished. "Off the rails"

Tort 1 does not require awareness

- ***Nouri v Marvi and others [2010] EWCA Civ 1107,***
  - The court rejected N's argument that he was ignorant of the fraud at completion and so it was wrong to assume that a potential purchaser would have been made aware of the difficulties caused by the forged transfer.
  - The court held that the correct analysis was to assume awareness of any breach at that date.
  - It was well established that a cause of action in tort could accrue for the purposes of the Act without the claimant being aware of it.

Constructive Knowledge S 14 A

- The claimant only needs to have had sufficient information to make it reasonable to commence investigations into the potential claim against the defendant.
- **Chinnock v Veale Wasbrough and another [2015] EWCA 441** "negligence" meant the negligence of the defendants (and not of the NHS trust against whom the Claimant had sought to sue for clinical negligence). He found that the Claimant had had constructive knowledge under section 14A(10) of the LA 1980 since, being "deeply unhappy" with the defendants' advice when she received it in 2001, it would have been reasonable for her to seek alternative legal advice.
- Expertise?

Capita ATL Pension Trustees Ltd and others v Sedgwick Financial Services Ltd and others [2016] EWHC 214

it was reasonable to take a second opinion from a specialist pensions solicitor in this case so that the trustees were fixed with constructive knowledge of the advice they would have obtained had they done so. Proceedings against the second defendant were dismissed

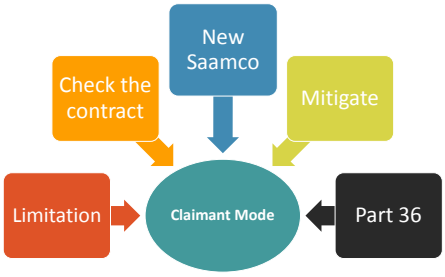
Put Simply

- Section 14A
- Three years from the date when the claimant knows or ought to have known:
  - the material facts about the loss suffered;
  - the identity of the defendant;
  - his cause of action (that is, that the loss was attributable in whole or in part to the act or omission that is alleged to constitute negligence).
- ***Jacobs v Sesame Ltd [2014] EWCA Civ 1410***
  - No heed to the frail characteristics of C

Time runs from?

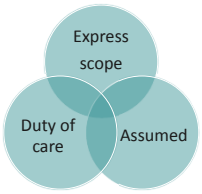
- **Holt v Holley & Steer Solicitors (A Firm) [2020] EWCA Civ 851**
  - D had failed to obtain expert evidence on the value of certain matrimonial assets (a number of buy to let properties and jewellery) and failed to secure permission to rely on that evidence during the course of the proceedings.
  - Drive-by valuation was obtained
  - The Court of Appeal dismissed C's appeal and found the claim in negligence to be time barred. In doing so they reiterated that the relevant date for assessing limitation in negligence claims was the date at which C was financially worse off/had suffered measurable damage as a result of the negligence.

The Session



Start with the Retainer

- What is within the scope of the duty?



Contractual basis

- Advantages
  - Textual contextual interpretation of the Contract
  - 51% causation
  - Avoids the roulette of contributory negligence
  - Calculation of loss
    - Reasonable contemplation
    - Reasonably foreseeable
    - Pure economic loss

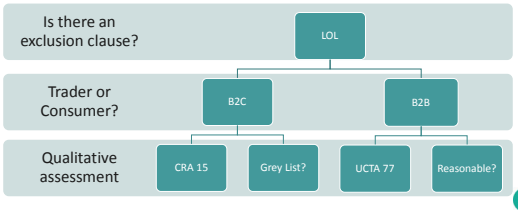
The Extent of the Retainer

- The interplay between contract and tort
  - Scope of obligations and duties
    - In the light of the terms of the retainer has the professional assumed wider non-contractual obligations?
    - Does the contract inform the levels of service expected of the professional in the performance of the obligations?
    - What was the result that the professional was engaged to achieve, whether by obtaining a benefit or avoiding /minimising a risk or loss?
- There are also implied duties that are derived from section 13 of the **Supply of Goods and Services Act 1982**:
  - reasonable care and skill

Damages Limited by the retainer

- The contract is a defence to the tort
  - **Denning v Greenhalgh Financial Services Ltd [2017] EWHC 143 (QB)**
    - an extended duty to advise will only arise in "obvious cases"
    - Green J distinguished the case from **Credit Lyonnais SA v Russell Jones & Walker [2002] EWHC 1310 (Ch)** which establishes that a professional's duty may extend beyond the scope of the retainer if, whilst performing the retainer, the professional comes across information which would lead any competent professional to advise upon a legal risk
    - the extent of a professional's duty will be determined by the terms and limits of the retainer
  - ***Mehjoo v Harben Barker (a firm) and another [2014] EWCA Civ 358***
    - *Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors – or upon professional men in other spheres-duties which go beyond the scope of what they are requested and undertake to do.*

The Exclusion Clause- Will It Operate?



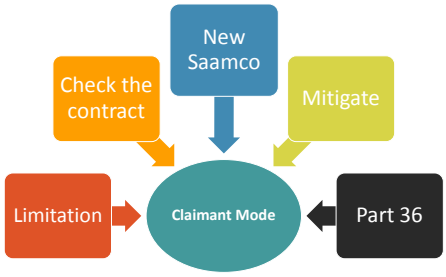
Is it an Exclusion Clause?

- Liability or shared or defined obligation?
  - You accept the risk…..
  - We are not instructed …….
  - No liability for loss of profit, loss of data, loss of business [etc]
- *All financial loss is limited to £100,000.00*
- *All contractual liability is limited to £100,000.00*
- Is it reasonable? B2B
- Consumer Rights Act 2015- grey listed?

Recent Cases

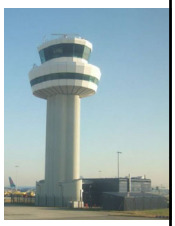
B2B	B2C
Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371	Section 63 and Schedule 2 Consumer Rights Act 2015 Part 1

The Session



"information" and "advice"

- **BPE Solicitors v Hughes-Holland [2017] UKSC 21**.
  - drafting errors and failure to inform client
  - CA: the loss was attributable to Mr. Gabriel's misjudgements and so reduced the damages to nil.
  - *the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client*
  - If the professional sets the agenda, decides what factors are relevant and advises in relation to those factors, then they can be liable for the full losses caused by the transaction.



The SC "Overhaul"

- **Manchester Building Society v Grant Thornton [2021] UKSC 20**
- https://www.supremecourt.uk/cases/docs/uksc-2019-0040-judgment.pdf
- medical negligence case of **Khan v Meadows [2021] UKSC 21**
- decisive ruling on the "scope of duty" principle in English law, the boundaries and application of which have caused significant uncertainty ever since *SAAMCO* was decided. The resulting decisions contain a fundamental restatement and realignment of the legal principles
- The Court unanimously allowed the Society's appeal. A majority (Lords Hodge, Sales, Reed, Kitchin and Lady Black)

Court of Appeal

- The Court of Appeal dismissed the Society's appeal; agreeing with Teare J that the c.£32m cost incurred by the Society in terminating the swaps was irrecoverable pursuant to SAAMCO.
- The basis relied upon by Hamblen LJ, however, was that the scope of Grant Thornton's duty was to provide *'information'* only, not *'advice'*, and that the Society had failed to satisfy the burden of proof in relation to the counterfactual test as required by SAAMCO

Supreme Court

in line with the judgment of Lord Sumption in Hughes-Holland at paras 39-44, the distinction between "advice" cases and "information" cases drawn by Lord Hoffmann in his speech in SAAMCO should not be treated as a rigid straitjacket. The focus is to be on the identification of the purpose of the professional's duty.

counterfactual analysis of the kind proposed by Lord Hoffmann in SAAMCO should be regarded only as a tool to cross-check the result given pursuant to analysis of the purpose of the duty at (ii), but one which is subordinate to that analysis and which should not supplant or subsume it.

6 Questions

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

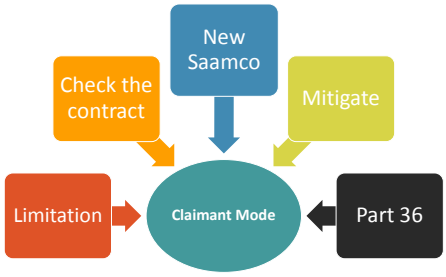
(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it, or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could have been expected to avoid? (the legal responsibility question)

Contract Law CHAMBERS

The Session

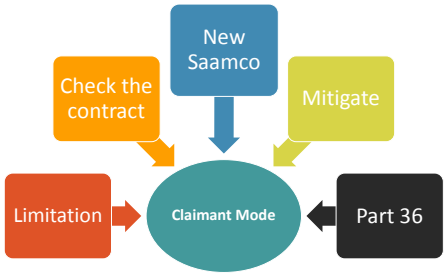


Contract Law CHAMBERS

Mitigation

- ***Michele Raffaello Bacciottini & Rosemary Anne Cook v Gotelee & Goldsmith (A Firm) [2016] EWCA Civ 170***
  - Application for correct planning permission £250
  - Cost of planning permission or difference in value?
  - on the ordinary principles of mitigation, the homeowners were under a duty to take steps to seek to remove the restriction and applying to lift the restriction was a simple step.
  - What is reasonable?

The Session



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Service by email?

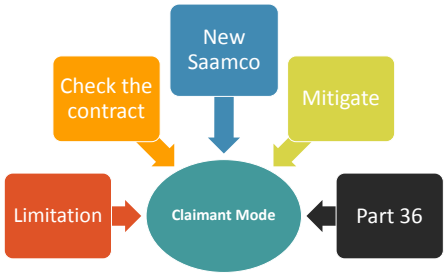
London Trocadero (2015) LLP v Picturehouses Cinemas Ltd and others [2021] EWHC 3103 (Comm)

- CPR 36.7(2) provides that a Part 36 offer is made "when it is served on the offeree".
- The Offer was not properly served, as it was emailed to the defendants' solicitors without checking in advance whether they had instructions to accept service by email and was therefore invalid. there had been a failure to comply with the service rules under CPR 6.20 and PD6A as the claimant had not obtained confirmation from the defendants' solicitors that they were willing to accept email service of the Offer.

Remedy the defect under 3.10 & 6.28

- Whether CPR 3.10, to remedy a procedural error. Having reviewed the authorities, including Integral Petroleum SA v SCU- Finanz AG [2014] EWHC 702 in which the court applied CPR 3.10 where particulars of claim had been served by email without prior authorisation, the defendants' solicitors had not complained about the defective service until shortly before the present hearing and had not suggested that any prejudice had been suffered as a result.
- It would be "a triumph of form over substance" if the court were to make an order invalidating the Offer. He therefore made alternative orders under CPR 3.10(b) to remedy the defect in service and under CPR 6.28 dispensing with service.

The Session



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Helen Swaffield
Barrister at Law

Head of Contract Law Chambers

Contract Law Chambers
www.contractlawchambers.co.uk
E-mail: office@helenswaffield.co.uk

Current Situation

- She is the Head of Contract Law Chambers, London, a BSB Entity.
- providing specialist advocacy and advice services to clients in professional negligence, commercial, contracts, company, property disputes and consumer rights.
- She has recently completed a series of cases involving land banking and property scams protecting the rights of consumers against professionals.
- In Professional negligence, Helen has completed cases against valuers, solicitors and other professionals
- Many of her clients are based internationally and she collaborates with international lawyers from Africa, the United States and Europe.
- She is often instructed by solicitors in high value commercial contract disputes in pharma engineering, automotive, aeronautical, oil & gas, public outsourcing, health, financial, IT, bio-chemical and agriculture.

Professional Experience

- Helen was called to the Bar in England and Wales in 1987
- She has a Masters in French Law from the University of Strasbourg
- Helen has a long career in advising businesses, international PLCs and public bodies in Contract, Company, Negligence and EU Law through a BSB Entity.
- She has worked in house for the EU Commission and the Court of First Instance in Luxembourg and leading international companies
- Helen regularly appears in the High Court for interim applications and trials as well as adjudication and arbitration .
- Helen drafts and advises upon a range of contracts including, commercial and consumer contracts shareholders agreements, joint ventures and vertical agreements.
- Helen is regularly asked to train lawyers from the UK and internationally including leading city lawyers.

Simon Wilton
Hailsham Chambers

"Surveyors Negligence – Hart v Large"

32.59mins

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Simon Wilton

Call: 1993

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Overview

Simon is a highly experienced junior barrister specialising in professional negligence, professional regulation, and commercial disputes – particularly in the insurance field. He has wide experience of interlocutory, trial and appellate advocacy, arbitration work, and all kinds of alternative dispute resolution including acting as an adjudicator under the PNBA adjudication scheme (which he was partly responsible for developing).

Simon was short-listed (one of three) by Chambers & Partners as professional negligence junior of the year in 2014, 2016 and 2021 (he is a relentless optimist).

Simon was head of the Professional Negligence Group at Hailsham Chambers from 2016-2021.

“He’s a heavyweight barrister: exceptionally intelligent, incredibly good on his feet, and has the judge on his side. I tend to give him the big, complex cases.” “He has all the qualities of a leading silk. One of the nicest and most user-friendly barristers you can ever come across.” “He’s really invested in the underlying client, and he goes above and beyond in every way, particularly impressive in his knowledge of the minutiae in complex cases.” *Chambers UK, 2022*

“Simon is incredibly good on his feet. He has an exceptional courtroom manner and an effortless ability to get the judge on side. Outstanding depth of knowledge in all aspects of professional negligence. He is more than ready to be in silk.” *Legal 500, 2022*

“Amazing ability to retain knowledge of the huge number of documents in professional negligence cases and apply them when needed. Excellent cross examiner, really drills down to the issues.” *Legal 500, 2021*

Professional Negligence

Simon has advised and appeared in cases involving all kinds of professionals including solicitors, barristers, surveyors, valuers, accountants, professionals acting as expert witnesses, financial advisers, construction professionals (including specialist sub-contractors), insurance brokers, and professional trustees. Typical cases include lenders' claims against solicitors or valuers or mortgage brokers, and indeed property finance litigation of all kinds, claims against lawyers arising from mishandled litigation or transactional work or private client work including wills and probate, claims arising from poor financial advice or dubious investment or tax avoidance schemes promoted by financial advisers or accountants, claims referable to the acts and omissions of solicitors or accountants acting as professional trustees, claims against professionals (usually surveyors) acting as LPA receivers, and litigation against specialist sub-contractors arising out of failed construction projects.

Simon undertakes work for claimants although the staple of his practice is work for the leading professional indemnity insurers and specialist solicitors active in these fields.

Simon particularly relishes document-heavy cases, cases involving contractual construction points, cases with a specialist Chancery or commercial bent or cases involving allegations of fraud, including those requiring applications for freezing injunctions or other urgent interlocutory work.

Regulatory and Disciplinary

Simon has wide experience advising and representing professionals such as accountants, solicitors, architects, nurses and estate agents involved in regulatory disputes or disciplinary inquiries. He represents individuals and firms before their professional regulatory bodies or, should it be necessary, on appeal to the High Court or by way of a judicial review challenge.

His recent experience also extends to representing a GP expert facing allegations of contempt of court, believed to be the first case of its kind, representing an account to a national icon before his professional body, and successfully defending a surveyor against a charge of dishonesty before his professional body in circumstances where the Court of Appeal had previously said he was dishonest.

Insurance

Simon has extensive experience of disputes between insureds and insurers, including claims against insurers and insurance brokers following avoidance for misrepresentation or non-disclosure, and policy disputes turning on points of construction, coverage issues, excess layer issues, and double insurance problems. He is also instructed in disputes between insurers, whether primary or excess layer insurers or reinsurers. In conjunction with his professional negligence work he has developed particular experience of cases involving professional indemnity insurance, especially PI insurance for solicitors (and he is unafraid of grappling with the intricacies of successor practice disputes). His advisory work includes joint instructions from insurers wishing to resolve disputes between themselves. He also has extensive experience of contested arbitrations and litigation, including litigation in the Commercial Court, the former Mercantile Court, and the Technology and Construction Court.

Commercial Law

Simon has extensive experience of commercial litigation, both by way of advisory work in respect of contractual disputes and by way of court appearances in the Chancery Division, the Commercial Court and the Mercantile Courts. Recent work has included:

- advising in a £10m litigated dispute between an insured and his insurers and brokers arising out of a devastating fire at a logistics warehouse
- acting for a UK company in respect of a claim against a German manufacturer and featuring an exposure to liabilities consequent upon exports to Thailand of defective chemical products
- advising on and appearing in a wide-ranging and high-value contractual dispute between online motor insurers and their broker counterparties which led to high-profile litigation mentioned in the Financial Times, comprising 3 linked actions which featured allegations of various economic torts
- advising on a technically complicated contractual dispute between an insurer and its information technology partner
- advising on limitation of liability and exemption clauses in connection with a series of disputed food supply contracts

Costs Litigation

Simon's costs practice focuses upon contractual disputes between solicitors and clients and cases involving applications for wasted costs or third party costs orders or disputes about BTE or ATE cover. He successfully defended a solicitor against a wasted costs and non-party costs order in *Tinseltime Limited v Roberts* [2012] EWHC 2628 (TCC); [2013] PNLR 4; [2012] 6 Costs LR 1094.

Notable cases

Witcomb v J Keith Park Solicitors [2021] EWHC 2038 (QB), [2021] PNLR 24: preliminary issue as to when time ran under section 14A when a claimant alleged his solicitors and counsel had negligently failed to ensure he received a provisional damages award in an underlying personal injury claim.

Sukul v Bar Standards Board and Others (June 2021): striking out of claim against QC alleged to have misconducted disciplinary proceedings against a barrister on grounds no duty of care owed in the circumstances and abuse of process/collateral attack.

Various Claimants in the Angelgate, Baltic House and NPPM Developments v Various firms of solicitors: Led by Michael Pooles QC, acting (2020-2021) for solicitors sued by large numbers of claimants in multiple actions arising from the failure of buyer-funded developments in Liverpool and Manchester, in which the court has held [2020] EWHC 3643 (Ch) [2021] PNLR 15, that the schemes were not collective investment schemes.

Hart v Large [2020] EWHC 985 TCC, *Large v Hart* [2021] EWCA Civ 24 [2021] PNLR 13. Representing a surveyor in a multi-party case arising from the purchase of a coastal property riddled with almost entirely latent defects. Extensive consideration at first instance and on appeal of the proper measure of loss, involving a departure from the orthodox *Watts v Morrow* measure.

Acting for a public figure in a substantial negligence claim arising out of allegedly mishandled underlying litigation (2019-2020).

Trainer v Cramer Pelmont (2019) EWHC 2501 (QB), [2020] PNLR 3, reasonable arguability of section 14A limitation arguments in solicitors' negligence claim

Dr Mahdavi v (1) Sterling Avram; (2) Healys (2018) – acting for a solicitors' practice accused of breach of trust, of breaching an undertaking, and of being vicariously responsible for deceit following a £7m fraud perpetrated by consultant engaged by the firm.

Acting for accountant to national icon accused of professional wrongdoing by his professional body (2018).

Kirk v Aviva & Ors (2017): junior counsel led by Patrick Lawrence QC in a £10m dispute between a commercial property owner and his commercial property insurers and insurance brokers following a devastating fire at a logistics warehouse.

Kashourides v Allsop LLP (2017): defending LPA receivers against a Commercial Court case valued at £10 million by the claimant, and involving multiple allegations of underselling in relation to two investment property portfolios.

Liverpool Victoria Insurance Company Limited v Khan & Ors. (2017): defending a GP expert accused of contempt of court in relation to expert evidence given in a road traffic claim.

Bridging Loans Ltd v Toombs [2017] EWCA Civ 205 Court of Appeal: successful defence of appeal to the Court of Appeal seeking to overturn an order giving summary judgment to the defendant valuer in a claim brought by a bridging lender.

DB UK Bank Ltd v Jacobs Solicitors [2016] EWHC 1614 [2016] 4 WLR 184: a successful determination of the issue of whether a cross-offer rendered an earlier non-part 36 offer incapable of acceptance, such that a supposed compromise had not been effected when that non-part 36 offer was purportedly accepted shortly prior to trial.

Ahmad v Bank of Scotland [2016] EWCA Civ 602: striking out of a multi-million pound claim against various defendants including LPA receivers: the result at first instance was upheld in the Court of Appeal.

Venus Asset Management Ltd v Matthews & Goodman (2014-2016). Defending a surveyor accused of negligence leading to what are alleged to be very large losses referable to the compulsory purchase of premises for the London Olympics.

Southern Rock v Brightside Group Limited (2014-2016). Led by **Michael Pooles QC** in a high value commercial dispute between insurers and brokers involving 3 concurrent actions.

Various insurance arbitrations (2009-2016) before well-known arbitrators including Colin Edelman QC, Stephen Hofmeyr QC and **William Flenley QC.**

Acting (2014-2015) in an asset-recovery action (featuring freezing injunctions and asset tracing in the UK and Pakistan) for a City of London solicitors' practice defrauded (initially) of almost £7m.

Acting (2014) for excess layer insurers, RSA and SIMIA, led by Justin Fenwick QC in Commercial Court case where the issue was whether notification of a potential multi-million pound claim to the excess layer was required under the terms of the excess layer policy.

Johnson v Hibberts (2014): Chancery Division, John Jarvis QC, solicitors' negligence trial: nature of duty owed by solicitor concerning rule that marriage revokes a will.

Valentine Rainer Ltd v Henderson (2013), Chancery Division, HHJ Hodge QC, acting for receivers, defeated claim for damages for acting after funds in hand to pay off appointing creditor.

Hotel Installations (Project Support) Limited v Plummer Parsons (2013): acting for defendant accountant: striking-out of £1m claim on scope of duty/causation grounds.

Tinseltime Limited v Roberts [2012] EWHC 2628 (TCC); [2013] PNLR 4; [2012] 6 Costs LR 1094: successfully defended wasted costs/non-party costs application against claimant's solicitor who bore the cost of disbursements under a CFA.

Led by Michael Pooles QC, successfully defending City firm in arbitrated professional negligence claim before a panel of arbitrators (2011).

Acting (2010) for financial adviser sued in part 20 proceedings as part of the Innovator and Gentech Technology Scheme litigation.

Coomber v Alan Bloom (& Ors) (2010): Acting for LPA receivers in multi-party action arising out of the collapse of 'The Icelandic Bank'. Claim struck out after 3-day hearing before Lewison J.

Nationwide BS v Barnes Kirkwood Woolf v Hiscox (2010): Led by Christopher Symons QC, acting for insurer defending declinature on grounds of dishonesty of valuer's claim for indemnity for £2.5m lender's claim. Claim withdrawn on the eve of trial with indemnity costs payable.

Bonham v (1) Fishwick; (2) Fenner [2008] Pens LR 289 and [2008] 2 P&CR DG6. Acted for accountant trustee sued for breach of trust. Case struck out by Evans-Lombe J in 2007 [2007-8] 10 ITELR 329. Appeal dismissed by Court of Appeal.

Leonard v Byrt & Ors [2008] EWCA Civ 20. Acting for solicitors. Court of Appeal upholds summary judgment in a 'lost litigation' claim.

CHRE v (1) NMC; (2) Kingdom (2007). Administrative Court. Beatson J. Acting for nurse defending statutory appeal brought by the CHRE. The case establishes there is a judicial discretion whether or not to remit a case 'under-prosecuted' by the NMC.

Jessup v Wetherell [2007] 98 BMLR 60, [2007] ACD 79. PNLR 10. High Court. Silber J. Successful application for summary determination of solicitors' negligence claim on limitation grounds.

Sinclair v Woods of Winchester Ltd & Anor (2005) 102 Con LR 127. TCC. HHJ Coulson QC. Appeal from construction arbitration. Successful defence of application to remove the arbitrator.

Sangster v Biddulphs [2005] PNLR 33. High Court. Etherton J. Solicitors' negligence. Preliminary issue whether claimant relied on solicitor held out as partner.

Kesslar v Moore & Tibbits [2005] PNLR 17. Court of Appeal. Solicitors' negligence. Claimant suing successor practice. Issue was whether the correct defendant could be substituted after limitation had expired.

Aldi, B&Q, Grantchester v Holmes Building Ltd & Ors (2004). TCC. HHJ Seymour QC. Multi-party construction litigation. Led by Patrick Lawrence QC. Acting for specialist sub-contractor in one of the largest construction cases to come to court in 2004. Arising out of the subsidence of 2 supermarkets on reclaimed land.

Taylor v Anderson and Another, The Times 22 November 2002, (2003) RTR 21. Court of Appeal. Whether a fair trial possible in an apparently stale claim brought by a claimant under a disability.

Griffiths v Last Cawthra Feather [2002] PNLR 27. High Court. Solicitors' negligence. Issue was the date and method the court should adopt in assessing loss in a case arising out of the acquisition of property with an onerous repairing obligation.

Delaware Mansions Ltd v Westminster City Council [2002] 1 AC 321. Led by **Michael Pooles QC**. Successful appeal to the House of Lords. The leading case on nuisance by tree roots.

What others say

"Simon is incredibly good on his feet. He has an exceptional courtroom manner and an effortless ability to get the judge on side. Outstanding depth of knowledge in all aspects of professional negligence. He is more than ready to be in silk." *Legal 500, 2022*

"Amazing ability to retain knowledge of the huge number of documents in professional negligence cases and apply them when needed. Excellent cross examiner, really drills down to the issues." *Legal 500, 2021*

"Incredibly experienced in claims against solicitors and surveyors." "Very intellectual where you have obscure and difficult issues." *Chambers UK, 2021*

"He was a very impressive performer as sole counsel. He is a very good speaker who is very articulate, bright and quick-witted." *Chambers UK, 2020*

"His advice is really good across the board: his knowledge of case law is fantastic and he's very pragmatic." *Chambers UK, 2020*

"He is very professional and calm, but persuasive" *Legal 500, 2020*

"He is astute, concise and strategic he has gravitas in court, an exceptional knowledge of the law and is very commercial in his approach" *Legal 500, 2019*

"He offers a technically brilliant, commercial approach and he's excellent with clients, as well as robust in court" "A very solid performer. He really understands his cases and he's very thorough and effective" *Chambers UK, 2018*

"Very bright, responsive, and has an easy manner but is tough when required" *Legal 500, 2017*

"He has excellent technical knowledge, a great grasp of the law and a very commercial approach." *Chambers UK, 2017*

"Very thorough, experienced and good with clients." *Legal 500, 2016*

"He is personable, enthusiastic and his advocacy skills are second to none. His manner in conference is impeccable and his pleadings are thorough and robust. He gets to the heart of a case very quickly, is extremely intelligent and makes even the most dry of cases fun. It is always a pleasure to work with him." *Chambers UK, 2016*

"He is very good on paper and his advice is very clear and concise.'" *Legal 500, 2015*

"is concise, clear, practical and commercial. He's intellectually very able and 'a very good, confident speaker who doesn't talk nonsense'." *Chambers UK, 2015*

"able to grapple with complex issues very quickly. He provides pragmatic advice in a way which is easy to understand." *Legal 500, 2014*

"a clear, practical and commercial barrister, he has an extremely strong reputation amongst his peers. 'An impressive advocate who is good at thinking on his feet. He's a skilled draftsman, and provides very thorough analysis of a case'." *Chambers UK, 2014*

Further information

Education

Simon was educated at the University of Sussex and the Université de Montpellier, where he took a 1st class degree in English with French. He acquired a Diploma in Law from City University, followed by the Bar Vocational Course at the Inns of Court School of Law where he was graded very competent. He was a Karmel scholar at Gray's Inn.

Memberships

Simon is on the executive committee of the Professional Negligence Bar Association and is a member of the London Common Law, Commercial Bar Association and the Chancery Bar Association.

Lectures

He lectures widely to solicitors' firms and insurers, and to professional bodies including the Professional Negligence Lawyers' Association and the Professional Negligence Bar Association. He was formerly an editor of the much lamented Lloyd's Reports (Professional Negligence) series of law reports. He continues to edit the 'Damages' chapter in Professional Negligence and Liability.

ICO Data protection registration number: **Z9162795.** Simon Wilton is a barrister regulated by the Bar Standards Board. Click here to view **Simon Wilton's Privacy Notice**

Hart v Large: All that is solid melts into air

[2020] EWC 985 (TCC); [2021] EWCA Civ 24

A talk for the PNBA by Simon Wilton of Hailsham Chambers

Critical advice given by the surveyor in relation to newly rebuilt and extended property where few if any defects apparent: "*It is not necessarily essential that a[n architect's] certificate is provided, but with a project of this size, stated as having been managed by an architectural firm, it would not be unreasonable to ask for this. If such a certificate is not available, there may be little practical recourse if it were found that unseen deficiencies exist. You should seek advice on this from your legal adviser*".

The judge's view on the nature of the duty: where a buyer was buying a new or newly converted property where any defects would be unlikely to have had time to become apparent and where modern construction techniques had been used which might hide indications, for instance, of whether effective damp-proofing was installed, the surveyor's role dovetailed with that of the solicitor "*to ensure the purchaser has the total package of advice and protection that that purchaser needs*".

In practice, that meant "*the only ways that the surveyor can protect the prospective purchaser are (1) to spell out the limitation on the advice given; (2) to be particularly alert to any signs of inadequate design or faulty workmanship; and, (3) to draw attention in appropriate terms to protections available to the purchaser, including (on the facts of this case) the Professional Consultant's Certificate*."

Breaches of duty found: (1) a failure to identify a few, generally relatively minor, defects; (2) a failure to warn that no worthwhile assurance could be given about the adequacy of damp-protection and water ingress measures; (3) a failure to recommend sufficiently emphatically the need to get an architect's certificate (a PCC)

So far as the measure of loss was concerned the fundamental question was: '*Who is to bear the risk of unidentified defects?*'

Having considered *SAAMCo* and *Hughes-Holland v BPE* the judge said the answer was it should be Mr Large, and he should pay damages reflecting the difference between (1) the price paid and (2) the value of the Property with all the defects that existed, and not the difference between (1) and (3) its value with those defects which should have been identified ie the value of the Property in the condition in which it should have been reported upon.

This was because the nature of Mr Large's negligence was a failure to warn that no worthwhile assurance could be given about damp-protection measures and it was essential to investigate further and to have a PCC to protect against latent defects. "*Here what was needed by the Harts was clear and unequivocal advice that there were risks which simply could not be assessed and against which the Harts needed protection if they wished to proceed. Whilst this is not going so far as to say that Mr Large had "a duty to protect his client (so far as he could do it) against the full range of risks associated with the purchase of the Property, what they needed was advice which was so fundamental to whether the transaction should go ahead that Mr Large should be held to bear the consequences of such advice not having been given*"

Then came the appeal to the Court of Appeal, permission to appeal having been denied for all grounds except in respect of the measure of loss. On appeal the thrust of the appeal was that the judge had wrongly departed from authority, and that the measure of loss should be the 'diminution in value' comparing (1) the value of the Property as reported; and, (2) the value it would have had in the light of a competent report, having regard to everything the judge had found Mr Large should have said.

The Court of Appeal decision: in SAAMCo terms the CA thought this was a hybrid case: Mr Large was providing a mixture of information/advice, and, the nature of his breaches of duty (the failure to warn that no assurance could be given about the adequacy of damp-proofing and that a PCC was essential) was such that he had failed to protect the Harts against the risk of latent defects. Those defects were therefore within the scope of his duty and it was just for him to bear the consequences of not alerting the Harts to them. All the defects that subsequently emerged could therefore be taken account of when assessing the 'diminution in value'.

Lesson No.1: You can be a jolly good surveyor and still lose: Mr Large was, in the judge's words, "*a conspicuously honest witness*" who "*made genuine attempts to assist the Harts both before and after they bought the Property*", but, in the Judge's view, this was an occasion when he had departed from "*his usual high standards*".

Lesson 2: Surveyors need to have some understanding of the legal protection which architect's certificates and the like can give. They may need to advise on the importance of obtaining such certification and thus will need to be able to advise upon the kind of certificate which should be sought, and should not just leave such matters to solicitors.

Lesson 3: Language matters; Mr Large had said it was "*not necessarily essential*" to get a PCC which perhaps underplayed what he clearly thought (and arguably did in fact make clear), that it was of the greatest importance to do so; unfortunately for Mr Large the judges thought he did not express himself in sufficiently emphatic terms.

Lesson 4: If you are a surveyor, please do get adequate insurance. Mr Large had a policy which offered £250,000 worth of cover inclusive of claimants' costs. Although not out of line with RICS requirements, that is a precarious level of cover when you are surveying properties worth over £1m and when you find yourself a defendant to a £1m claim.

Lesson 5: It is no longer a universal rule in surveyors' negligence cases that the measure of loss is the difference between the value of the property as reported upon and the value it would have had if reported upon correctly. Where there are 'known unknowns' which the surveyor should have highlighted or where the surveyor should have recommended further investigation or protection via third party certification the 'diminution in value' award may encompass latent defects not ascertainable at the time of the survey. This could generate a significantly more generous measure of loss than otherwise.

Lesson 6: 'All that is solid melts into air' as per Karl Marx and Friedrich Engels in *The Communist Manifesto*: in *Hart v Large* a well-known and hitherto unquestioned line of authority was departed from, the rationale for doing so being, yet again, the SAAMCo principle, which on this occasion at least worked in the claimants' favour to produce an enhanced measure of loss.

Nick Curling
TLT

"Impact of Manchester Building Society v Grant Thornton on negligence claims by lenders"

13.15mins

Nick Curling

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Nick specialises in acting for financial institutions in a wide variety of banking litigation matters including high value recovery actions and in defending claims brought by customers and third parties.

He has particular experience in acting for international banks in cross-border enforcement work and in disputes involving syndicated loans and trade finance instruments.

He also has over 15 years' experience in acting for lenders in professional negligence claims against property valuers, solicitors, project monitoring surveyors, accountants and auditors. He regularly provides training to clients on how to spot and then manage professional negligence claims.
Nick spent 18 months on secondment within the restructuring and recoveries division of a major UK bank gaining an invaluable insight into the commercial and regulatory pressures faced on a daily basis.
Jurisdiction: England & Wales

Experience

- Acting for a consortium of 13 Indian banks (led by State Bank of India) against high profile businessman Vijay Mallya in relation to the registration in England of an Indian judgment for £1Bn and its subsequent enforcement via bankruptcy proceedings.
- Advising a UK clearing bank in relation to a potential £10M claim against a property valuer in respect of lending on a new hotel.
- Obtaining judgment for US$240M for IDBI Bank against a Cypriot corporate guarantor in relation to lending to construct two off-shore oil rigs.
- Acting for a syndicate of 4 banks against a borrower, corporate guarantor and personal guarantor in a US$45M recovery action in relation to lending on an energy project in Nigeria
- Investigating a potential £1M professional negligence claim for an asset-based lender in respect of a classic sports car

PNLA TALK

MBS v GT - LENDER CLAIMS

Everyone is no doubt already very familiar with last years' Supreme Court decision in the case of *Manchester Building Society v Grant Thorton* so you'll be pleased to know that I won't go over the facts or what was decided in great detail. Instead, I'll be focusing on what the decision is likely to mean for lenders pursuing claims against negligent professionals, specifically solicitors, property valuers and project monitoring surveyors – what has changed and what will stay the same. Your next speaker, Robert Strang, will taking you through the Privy Council's decision in *Charles B Lawrence & Associates v Intercommercial Bank Ltd* which illustrates how the courts may now approach such lender claims. Although I am focusing on lender claims, what I discuss will hopefully get you thinking of how the principles in Manchester BS might be applied in other types of professional negligence claims.

Before I do set out my views, a very brief recap on the Manchester BS case.

As we all know, in Manchester BS the Supreme Court refocused the test for how damages are to be assessed against a negligent professional. This refocused test involves:

- Consideration of why the professional was instructed, and the scope of their retainer, especially by reference to any written instructions.
- An analysis of the extent and types of loss suffered and to then link these back to the purpose of the professional's instruction.
- Central to this is to look at why the loss really happened. If the true cause of the loss was not linked to the risk that the professional's advice was meant to guard against then there will be insufficient nexus between the loss and the negligent advice and the claim will fail.

These above principles mean that lenders should be reviewing their precedent instructions to professionals to ensure that the purpose behind the instruction being given is

properly explained to maximise the chances of a higher recovery. Otherwise, there could be an issue to be determined at trial as to what the client intended the instructions to protect them against and what the professional believed was intended.

Of course, Mancehster BS did not necessarily sweep away all previous methods for assessing damages. If established rules and conventions for dealing with certain types of case remain consistent with the principles involved in the refocused test then it is likely that the courts will be keen to retain these for reasons of certainty (for instance, the tried and trusted SAAMCO cap in valuer negligence cases).

Let's now look to the professionals that a lender will instruct when it is considering making a loan and how Manchester BS might affect how claims are framed.

First, solicitors. Broadly speaking, there are 4 categories of claim against negligent solicitors.

1. Failure to register security or discharge previous security. Here, there is no change, with damages calculated as the value of the security that the lender should have had.
2. Failure to report a title defect, such as lack of right of way or breach of planning. Here, a solicitor is instructed to ensure the security is marketable and worth what the lender has been advised. Again, likely there is no change and damages will still be assessed as the difference in value of the property with and without the title defect.
3. Failure to correctly report the terms of a lease, such as ground rent, user clauses, forfeiture provisions. Here, the purpose of the solicitor's instruction is to ensure the lease has been valued by reference to the correct terms, that the borrower's intended use is permissible and the lender has adequate enforcement rights. This is where the Manchester BS case is likely to improve the lender's prospects in any claim. Where the unreported provision goes to value, then damages assessment will remain the same, much like in a title defects scenario.

But where the unreported provision relates to the overall use of the property, it may now be possible for a lender to argue that damages extend to missed loan repayments as a result of lower than expected income from the borrower's use of the property and, possibly, the whole of the lenders loss.

4. Failure to identify or report issues with the borrower's bona fides or indications of mortgage fraud, such as gifted deposits, back to back sales, unexplained uplifts in the purchase price. In these scenarios, the solicitor is instructed to ensure that the loan transaction is as represented to the lender and to highlight any potential issues with the borrower's covenant to pay that might affect the decision to lend. The refocused test should again see a lender in an improved position. Where a transaction is fundamentally fraudulent, the lender should be able to recover its entire losses. In cases where there is a gifted deposit, the position is less clear, although depending on the size of the deposit and whether the borrower's contribution is part of a

lender's overall assessment of credit-worthiness then it could be possible to argue for the full loss suffered.

What about the other main professional when it comes to lending, the property valuer. In the most common scenario where the valuer is putting a value on a property, the classic SAAMCO cap should remain relevant in assessing damages from a negligent valuation. It is readily understood by and applied by lenders and insurers and, dare I say it, feels "fair".

But what if the loan relates to the development of a site, or where the rationale for the loan is that it will be serviced from rental income derived from a property or from the trading business carried out (i.e. a pub, hotel or care home). This is where the Manchester BS case is likely to be of greatest assistance to a lender wanting to pursue a claim.

In relation to development loans, a valuer will be instructed to not only provide a gross development value for the completed development but also to comment on the feasibility of the development itself in terms of planning, nature of construction, build time and construction costs. A lender wants to know that the development can be

completed and the GDV realised as expected by the lender in terms of costs and time, because ultimately the lender expects to be repaid from the sale proceeds of the completed development. So if a lender can link any losses suffered to the negligent advice, for instance under-estimated construction costs, as opposed to some other unrelated event, for instance an unforeseen issue with the development site such as land contamination, then it should be easier for a lender to bring a successful claim.

Where the loan is predicated on expected rental or trading income, the purpose of a valuer's instruction is to ensure that the rental or trading income is sufficient to service the loan. Where a borrower struggles to make loan repayments because of lower than expected rental or trading income, it should now be possible for a lender to pursue a claim against a valuer for any losses suffered as a result of missed repayments. A lender would still need to prove that the reason for the lower income is that the rental or trading income advised by the valuer could simply never have been achieved, as opposed, for instance, to the trading income not

reaching the advised levels due to the borrower's own mismanagement.

Finally, in relation to development loans, a lender will usually instruct a project monitoring surveyor to, first, provide a development appraisal report prior to any lending and, secondly, to provide monthly interim reports to track the development's progress for the purposes of paying construction costs out of the development loan. Again, the Manchester BS case is likely to see greater scope for lenders to pursue successful claims.

In relation to the initial appraisal report, a lender wants to assess whether the borrower has sufficient funding in place to complete the development and that it can be completed on time and to the expected standard of finish. Where the construction costs are underestimated, it is likely that a lender will now be able to argue that its full losses falls within the project monitoring surveyor's duty. It should also be possible to argue for its full loss if anything else has not been reported correctly that effects the completion of the development as expected.

With interim reports during the development, the purpose of the PMS's instruction is to guard against excessive drawdowns being made where the development has not actually progressed to the appropriate stage, to ensure the building works have been carried out adequately and that remedial works will not be needed, and to ensure that there is sufficient funds still available to the borrower to be able to complete the development. Providing that causation can be established (i.e. if the lender had been advised that there was a funding shortfall it would have stopped further funds being drawn), then the refocused test from Manchester BS should mean that a lender can claim for all losses suffered from the point that the negligence advice was provided.

I should end by saying that these are just my views on how the refocused test will play out in common types of lender claims. As ever, much will depend on the particular facts of any given case. What is clear, however, is that lawyers will need to place a much greater focus as to the purpose behind a professional's instruction to understand how damages could come to be assessed.

Nick Curling TLT LLP

March 2022

Robert Strang
3 Hare Court

"The loss recoverable by a lender consequent on a valuer's negligent valuation - Charles B Lawrence & Associates v Intercommercial Bank Ltd [2021] UKPC 30"

17.18mins

Robert Strang

Call Date: 2003

Robert is an experienced and effective advocate with an international practice, specialising in commercial and public law. He has appeared as an advocate many times at the highest level, having acted in several appeals to the Privy Council.

His domestic practice covers a broad range of commercial and business disputes. He is experienced in substantial and fact-heavy disputes involving civil fraud. He has a special interest in financial services, having worked in the City for many years before he came to the Bar, and has represented clients in many claims against financial service providers and advisors.

Robert has acted in both litigation and advisory work in many Caribbean jurisdictions, in public law and regulatory matters and in private, commercial disputes and arbitrations.

Legal Services

Administrative, Public and Constitutional law

Robert has appeared in many landmark constitutional and public law cases in the Privy Council on appeal from Caribbean and other jurisdictions. He is acting in a number of outstanding administrative law appeals in the Privy Council. And he is presently advising the Insurance Commission of the Bahamas in relation to litigation arising from recent regulatory action.

Notable Administrative, Public and Constitutional law cases

Maharaj v Minister of Energy and Energy Affairs [2020] UKPC 13

a successful appeal establishing that the Minister had no power to eject the appellants from their petrol stations and suspend their licences to sell petroleum, resulting in an award of damages.

Attorney General v Ayers-Caesar [2019] UKPC 44

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resisting procedural appeals by the Attorney General and Judicial and Legal Services Commission in this ongoing judicial review brought by a former High Court judge who claims she was unlawfully forced to resign.

Attorney General v Dumas [2017] UKPC 12

confirming that a citizen had the right in the public interest to bring a claim for interpretation of the constitution alleging failure by a public body to observe the constitutional limits on its powers

Sam Maharaj v Prime Minister [2016] UKPC 37

Robert appeared as sole counsel in this successful appeal in which the Privy Council confirmed that failure by a public body to observe the rules of natural justice entailed a breach of the appellant's constitutional right to the protection of the law and led to a claim in damages in judicial review.

Civil Fraud

Robert has long experience of acting in substantial and difficult cases of civil fraud, in all areas of commercial activity. He has acted for businesses and individuals in disputes over investment scams, fraudulent misrepresentations in sales of businesses and shares, and complex conspiracy claims.

Notable Civil Fraud cases

A&V Oil v Petrotrin

In A&V Oil v Petrotrin he is presently acting for an oil exploration company in Trinidad in a dispute with the state-owned oil company, in an arbitration over a disputed claim of fraudulent overstatement of oil production.

International

Robert is presently involved in litigation in a number of Caribbean jurisdictions, in both public and private law. With Simon Davenport QC and Matthew Happold he is representing a large group of investors from countries in the Eastern Caribbean in a claim in the Caribbean Court of Justice against the Republic of Trinidad and Tobago.

He is acting with Peter Knox QC in a high-value arbitration in Trinidad, concerning allegations of fraud against an oil exploration company.

He is acting in a large number of appeals outstanding in the Privy Council, including an appeal from the

Bahamas brought by an investment fund against the regulator; a high-profile contractual dispute from Trinidad and Tobago; and a land law appeal from St Vincent and the Grenadines.

In the English High Court, he is instructed in a cross-border dispute between French, Italian and English businesses over a share sale and joint venture gone sour, involving the determination of questions of French law.

Notable International cases

Super Industrial Services v National Gas Company [2018] UKPC 17

a case in which Robert and Peter Knox QC advised and represented a large contractor in a dispute with a state-owned gas company, including a procedural appeal to the Privy Council.

Professional Negligence

Robert has acted in many claims against financial advisors and financial services providers. With Aidan Casey QC, he represented a large number of investors bringing claims against their SIPP providers for losses incurred in the Harlequin investment fiasco. He had previously acted in a successful claim brought against the promoters of the Harlequin investments. He is presently advising investors on claims arising from the collapse of the Woodford funds.

He is instructed in an ongoing appeal to the Privy Council concerning the SAAMCO principle.

Public Access

Robert is able to accept instructions directly from members of the public, companies and other entities through the public access scheme (also known as direct access). He has acted, advised and drafted pleadings and documents for a number of individuals and small and medium sized businesses on a direct access basis. He is happy to accept instructions on a direct basis in appropriate cases. If you wish to instruct Robert on a direct basis, please speak to the clerks.

For more information on public access, please see the Bar Council website.

Publications

- JIBFL – The scope of English law claims against primary dealers

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Memberships

- London Common Law & Commercial Bar Association (LCLCBA)
- ALBA
- Commonwealth Lawyers Association

Languages

- Greek, Spanish

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Charles B Lawrence v Intercommercial Bank [2021] UKPC 20

Notes of online presentation delivered to the PNLA, by

Robert Strang, 3 Hare Court

1. This was an appeal to the Privy Council from Trinidad and Tobago, which posed the question described at paragraph 17 of the Supreme Court's judgment in Manchester Building Society v Grant Thornton [2021] UKSC 20:

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

2. And it offered a neat answer to the question, because, in the Board's analysis, the loss suffered by the claimant bank was made up of two distinct elements: one element of the loss fell within one adviser's scope of duty, and was caused by his negligence; and the other element was covered by another adviser's scope of duty, and was caused by their negligence.

3. So, as appears from the judgment of Lord Burrows, the application of the scope of duty principle gave a ready answer to the issue in the appeal.

4. The answer did not appear so readily to the High Court and Court of Appeal in Trinidad and Tobago, who struggled to apply the principles articulated in the judgment of the House of Lords in the SAAMCO case [1997] AC 191 and its companion judgment, the Nykredit Mortgage Bank case [1997] 1 WLR 1627.

5. The history of this case perhaps demonstrates the truth of what Lord Nicholls said in Nykredit Mortgage Bank at 1631H: the principle was easier to formulate than apply. And it shows how welcome was the clarification and explanation given by the Supreme Court in Manchester Building Society and Khan v Meadows [2021] UKSC 21.

Facts of the case

6. The appellant, Charles B Lawrence, is a valuer. He was instructed by the guarantor in a proposed loan transaction to provide a valuation, for mortgage purposes, of a plot of undeveloped land in San Fernando, Trinidad. He produced a report valuing the land at $15 million (which was about one and a half million pounds). That was on the basis that he expected the land to be developed for commercial use.

7. In light of the report, in December 2008 the bank, Intercommercial Limited, agreed to lend $3 million, secured by a guarantee, in turn secured by a charge over the land. Very soon after the loan was advanced, the borrower and the guarantor defaulted, and the bank tried to realise its security.

8. It encountered 2 problems. The first was that when it put the land up for sale in July 2009, it received only one bid, of $2 million. In fact, according to the expert evidence accepted by the courts below, the land was worth only $2,375,000 at the time of the loan and less than $2 million in July 2009.

9. The second problem was that the bank didn't get a chance to realise even that lesser value, because it also discovered that it did not have good title to the land. The bank's conveyancing lawyers, who had not properly checked the root of title. In Trinidad and Tobago, although there has been a land registration system in place for many decades, about ¾ of the land remains unregistered. Establishing title to unregistered land involves checking that there is good root of title by tracing back through the deeds of conveyance in the register of deeds. And in this case, it appears that someone had slipped in a false deed of conveyance, and the lawyers had not spotted the inconsistencies in the deeds.

10. So, the bank, having thought it was lending $3m secured on land worth $12m, found that the land was only worth $2m or so, and then found that it held no security at all. It suffered a total loss of the $3m loan. And it sued both Mr Lawrence and the lawyers.

11. In March 2014, shortly before Mr Lawrence's trial, the bank settled with the lawyers for the sum of $2.4m. That was said to represent the land valued at $1.9m, plus interest over the 5 years or so since the loss.

The judgment against Mr Lawrence

12. Mr Lawrence proceeded to trial and defended his valuation, saying that he had properly valued the land with the assumption of commercial development. The judge disagreed and found that Mr Lawrence had negligently overvalued the land. She accepted the evidence of the bank's expert valuer who said the land should have been conservatively valued, on the basis that it would only be approved for residential development. On that basis the land would only have been worth $2,375,000 at the time of the loan.

13. So Mr Lawrence was liable to the bank in negligence. As for the measure of damages, he submitted that he was only liable for the difference between the amount of the loan and the actual value of the land and argued that it was necessary for the bank to establish the actual value of the land.

14. The judge rejected that argument. She held that it was a simple 'but for' case. But for the valuation, the bank would not have lent. Mr Lawrence's valuation caused the bank's total loss of $3m. She referred to the judgment of Lord Nicholls in Nykredit Mortgage Bank for what he called the "basic comparison", between the bank's position under the transaction and its position had it not entered the transaction. And she said that on the facts of this case there was no need to move beyond the basic comparison.

15. She therefore held Mr Lawrence liable for the whole sum of $3m plus interest for 5 years or so, up until the payment in 2014 by the conveyancing lawyers of $2.4m, for which she gave credit.

Appeal to the Court of Appeal

16. The Court of Appeal took the same approach. It said that had Mr Lawrence not provided a negligent valuation, the bank would not have lent and would not have lost

$3m. And on that basis it found that the entire loss was therefore attributable to the inaccuracy of Mr Lawrence's information.

17. That was a reference to Lord Hoffman's distinction between advice and information in his judgment in SAAMCO. The Court of Appeal asked Lord Hoffman's information question – how much of the loss was attributable to the information being wrong – but still came up with the answer to the 'but for' question.

18. So the Court of Appeal measured the damage as the whole loss of $3m plus interest to trial, giving credit against that total sum for the $2.4m recovered from the conveyancers.

19. The Court did also go on to consider Mr Lawrence's arguments on the SAAMCO principle. It accepted that Mr Lawrence should not be liable for the fact that the security in the bank's hands was found to be worth nothing because of the defective title. But it found that didn't make any practical difference to the measure of damages, because the bank had received $2.4m from the conveyancers, for which credit was given, which was close to the value of the land as it found it, $2,375,000.

20. In fact the Court of Appeal was wrong about there being no practical difference, because it did not consider the effect of interest, at 12%, over the 5 years and more from loan to judgment. It held Mr Lawrence liable for the whole loss of $3m, and so also held him liable for interest on that whole sum until judgment in 2014. But if it had agreed that he could not be liable for the loss attributable to the defect in title, that is, the loss of the actual value of the land, then he would only be liable for the difference between the actual value of the land and the bank's loan – which was $625,000. The difference between interest at 12% on $625,000 for 5 years or so and interest on $3m over the same period was more than $1m.

Appeal to the Privy Council

21. And that difference was why Mr Lawrence appealed, on the quantification point, to the Privy Council. He was fortunate in that by the time his appeal was heard, the judgments in Manchester Building Society and Khan had been delivered.

22. He argued, applying the scope of duty principle, that the bank's loss should properly be split into two distinct losses: the first was the loss caused because he had overvalued the land; the second was the loss caused because the title to the land was defective.

23. The second loss was outside the scope of his duty of care, because it was no part of his job to investigate title. If that was right, he could not be liable for the loss of the actual value of the land, $2,375,000. He could only be liable therefore for the remainder of the bank's loss: the difference between the loan amount and the actual value of the land. $675,000.

24. The Board agreed, repeating what was said in Manchester Building Society and in Khan. To establish the scope of an adviser's duty, it is necessary to consider the purpose for which the advice was sought; one looks to see what risk the adviser's duty was supposed to guard against.

25. The Board found that it was clear that the purpose of Mr Lawrence's report was to value the property on the assumption that there was good title to the land. It was not his purpose to advise on the title to the land. The bank was not looking to him for that advice, which was a matter for the lawyers, not a valuer.

26. Having made that finding, the Board agreed with Mr Lawrence's logic on the measure of loss. It accepted as correct that on the 'but for' test, the whole $3m loss could be said to have been factually caused by Mr Lawrence. But it was necessary to exclude from the total loss *"that element of the loss which was outside the scope of Mr Lawrence's duty because it was attributable to the defect in title rather than the overvaluation"* (paragraph [15]).

27. On the facts, that was achieved by deducting the actual residential value of the land - $2,375,000 - from the total loan of $3m. (The Board noted that the Court of Appeal found that the bank's loss was incurred at the time of the loan. This had been common ground. That finding made the question of the amount of the bank's total loss a simple one: it was the $3m loan.)

28. In coming to these conclusions, Lord Burrows said (paragraph [16]) that it was helpful to compare this case with Khan. In Khan, the purpose of the doctor's advice was to advise on the risks of haemophilia. The loss caused by giving birth to a son with haemophilia was covered by the doctor's scope of duty; the loss caused by giving birth to a son with autism was not. In Khan and in the present case, the conclusion on what loss fell within the scope of duty followed from the purpose of the advice given by the professional, and hence the risk that was being guarded against.

29. Lord Burrows went on to point out that this was a case where asking what he called the SAAMCO counterfactual would not have given the right answer, The SAAMCO counterfactual asks would the claimant still have suffered the same loss if the advice had been true? If yes, the scope of duty does not extend to the loss, if, no, it does extend. In this case if Mr Lawrence's valuation of $15m had been correct, the bank would have suffered no loss, assuming that is, no defect in title. (And conversely, I would add, assuming no good title to the land, the bank would still have lost the entire loan.) So the counterfactual did not give the correct answer.

30. This, said Lord Burrows, served to reinforce the point made by the Supreme Court in Manchester Building Society and in Khan that the counterfactual is of second order importance. It is a useful cross-check in most but not all cases. It is no substitute for the application of the scope of duty principles.

31. Lord Burrows also dealt with the question of the settlement recovered by the bank from its conveyancers (paragraph [20]). Once one applied the scope of duty principle, he said, one could see that it was irrelevant. The loss attributable to the defective title was outside the scope of Mr Lawrence's duty of care and so it was excluded as irrecoverable from him. The fact that the Bank had obtained recovery from its lawyers in relation to that loss was therefore irrelevant.

Nicholas Hill
Outer Temple Chambers

"Pensions and Financial Services update."

26.50mins

Nicholas Hill

Year of Call: 2008
Direct Access: Yes

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Nick practises in commercial and chancery law with a focus on pensions, financial services and professional negligence. He is much in demand for his expertise in cross-over work involving regulatory issues and commercial law. The directories recommend Nick for his client care, for his advocacy, for developing new arguments, and for finding solutions; he is described as being "second to none".

Nick's ongoing work includes professional negligence matters (for solicitors, benefits consultants and investment advisers), company disputes (including various insolvency matters), indexation work, and regulatory work both for and against the Financial Conduct Authority and The Pensions Regulator.

Areas of Expertise

Commercial & Chancery

Notable Commercial & Chancery cases

A multi-party, multi-jurisdictional high value shareholder dispute concerning various alleged frauds, breaches of fiduciary duties and numerous other claims in respect of an investment fund in the Cayman Islands and its investment manager in the BVI. Nick was led by Andrew Spink QC for the directors of the corporate entities central to the dispute.

Advising and acting (alone) for the subsidiary of a well known PLC to obtain a freezing injunction and search order arising from a fraud committed by a fiduciary of the company. Nick appeared (alone) at the original ex-parte hearing, on the return date and on the successful application for summary judgment in respect of the substantive proceedings.

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Acting (led by Richard Lissack QC) in a case concerning the procedure for the transfer of shares in an oil company following a successful claim for breach of contract and an order for specific performance.

Advising a public authority (alone) on a complex claim for deceit and breach of contract.

Acting (with Richard Lissack QC) in an LCIA Arbitration representing a Belize company (with subsidiaries in Cyprus and Russia) in respect of a multi-million pound breach of contract by a Russian company.

Pensions

Nick is a leading pensions junior; he is "right on top of the subject", "finds solutions to problems", "thinks of new arguments" and is "excellent with clients".

In the last year, in addition to the matters set out above, Nick was instructed by tPR in confidential proceedings, in three major professional negligence actions involving pension schemes, was appointed to the Litigation Committee of the Association of Pension Lawyers, and has given talks on indexation, professional negligence issues, and equalising for the effect of unequal GMPs.

Recent case highlights include:

(1) **Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank Plc [2020] EWHC 3135 (Ch)**. This 2020 Judgment addressed the obligation to equalise for the effect of unequal GMPs on transfers out. Nick also acted for the Representative Beneficiaries in the major 2018 Judgment **([2018] EWHC 2839 (Ch)** and **[2018] EWHC 3343 (Ch)].**

(2) **Gleeds v Aon and ors,** acting for the defendant solicitors in a significant professional negligence matter.

(3) **Ove Arup & Partners International Ltd v Trustees of the Arup UK Pension Scheme [2020] EWHC 1064 (Ch).** A case concerning the "functional replacement" of the RPI.

(4) **ColArt International Holdings Limited v (a) ColArt Pension Trustees Limited (2) Mark Coulson [2019] EWHC 3081 (Ch).** Rectification proceedings representing the claimant company.

Notable Pensions cases

A massive interpretation/rectification claim listed for two days in February 2021 (acting for the trustees);

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On-going professional negligence claims for solicitors and benefit consultants;

Advice to the MOD as a member of the Attorney General's Panel of Junior Counsel to the Crown in respect of inter alia the various armed forces pension schemes;

Advice to public and private sector clients on the various Police Pension Schemes, Firefighter Schemes, and the Teachers' Pension Scheme;

Cross-over advisory work in Pensions and Financial Services (see Pensions Misselling: cracks in the system (New Law Journal, May 2018)); and various rectification claims

Financial Services

Nick's practice crosses the regulatory and civil aspects of financial services and is built on invaluable experience gained in 2010/11 on secondment to (what was then) the General Counsel's Division at the Financial Services Authority. At the FSA Nick advised on a broad range of matters, including the first ever use of the SRR and BIP under the Banking Act 2009 (Re Southsea Mortgage and Investment Company). He had regular engagement with FSA Enforcement and SFO investigatory work.

Nick continues to be instructed by the FCA. Work over the last few months for the FCA has included advice on perimeter matters, information gateways, and work on ISAs and Child Trust Funds.

His work for private clients over the last 12 months or so has included:

- regulator perimeter queries
- advising an American PE fund on sanctions issues arising from contracts concluded in London
- advice on regulatory risks for a major insurance corporation (involved in pension scheme buy-ins and buy-outs)
- advice on collective investment schemes
- a successful appearance in front of the RDC for a mid-level manager at a well-known Building Society

Nick's Financial Services practice often leads to instruction in commercial litigation (including professional negligence matters). He has acted in a wide range of mis-selling claims (often in respect of derivative products, including LIBOR linked products and pension matters (see his article Pensions Misselling: cracks in the system (New Law Journal, May 2018)) and in major litigation concerning involving (allegedly) negligent advice to a fund in 2007 to invest £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets (Philips Pension Trustees Limited & Philips Electronics UK Limited).

Nick is the author of chapter 3 of "The Bribery Act 2010" in the Second Edition of Lissack and Horlick on Bribery

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(LexisNexis) and writes for Lexis PSL (including on Corporate Transactions and Bribery, January 2016).

Employment & Discrimination

In Employment and Discrimination law Nick has extensive experience appearing in the tribunal (across the country) for Claimants and Respondents (25:75). His practice includes unfair dismissal, TUPE and discrimination claims across the range of protected grounds.

Nick is conscious of the significance of employment claims to Claimants and Respondents (irrespective of the value of the claim and/or the range of issues before the tribunal or court) and is always pleased to be involved in the litigation process at an early stage through written advice and/or conferences as appropriate.

He has a particular interest and experience in cross-over work between Employment and Pensions and Employment cases with a FS element.

Nick is a member of the Employment Lawyers Association and the Industrial Law Society.

Notable Employment & Discrimination cases

Successfully appearing (at trial) for a well-known charity resisting a disability discrimination claim (London South).

Acting for an international fashion brand (at trial) successfully defeating a claim for race discrimination (London Central).

Obtaining a protective award of 90-days for 104 Claimants following the closure of a factory (Ashford).

Representing a not-for-profit organisation dedicated to supporting vulnerable adults with disabilities in defeating 51 separate allegations at trial (Reading).

Acting for the subsidiary of a well known PLC in the High Court in obtaining a freezing injunction arising from a fraud committed by company employee. Nick appeared (alone) at the original ex-parte hearing, on the return date and on the successful application for summary judgment in respect of the substantive proceedings (in respect of both breach of fiduciary duty and breach of contract).

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Professional Negligence

In the field of professional negligence Nick is described as a "fantastic advocate", who is "excellent with clients" and as having "a great eye for detail".

Frequent clients are solicitors, actuaries, and pension consultants. As is so often the way in this field much of Nick's work is confidential but his cases include:

- Complex limitation arguments (on both s14A and s14B of the Limitation Act 1980), deployed in a summary judgment application by Nick's defendant client. The claim was discontinued by the claimants upon receipt of the application.
- Fiercely fought claims for damages for professional negligence by the employer and trustees of a large UK pension scheme against the scheme's former investment strategy consultants and one of its fund managers, arising out of the scheme's investment in 2007 of £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets.
- The Gleeds v Aon and ors litigation, acting for defendant solicitors.
- Acting for solicitor defendants in a case where the claimants were persuaded to pursue Part 8 rectification proceedings instead of continuing with the (issued) Part 7 claim.

Memberships

- Association of Pension Lawyers
- Financial Services Lawyers Association
- Young International Arbitration Group
- Commercial Bar Association

Recommendations

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Financial Services and Pensions Professional Negligence Update *Adams v Options*

PNLA ONLINE CONFERENCE

Nicholas Hill

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Pensions background

- 2014 Budget: "*People's pensions are hard-earned over years of work. It is only right they have the freedom to choose how and when they access them during retirement.*"
- ***Taxation of Pensions Act 2014***
- Possible Parties: (1) the original Scheme and its Trustees, Administrator, or Scheme Manager; (2) financial advisers; (3) introducers; and (4) SIPP providers (Operators).

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- Introducers - unregulated (Under the RAO, Art 33, introducers have specific exemption from FCA regulatory action provided they restrict their activities to referring the client to an FCA-authorised provider of independent financial advice).
- SIPP operators – regulated (2013 FCA comment"*[a]lthough the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers*".

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Adams v Options – a reminder of the facts

- Carey Pensions accepted retail clients procured by an unregulated introducer – CLP Brokers.
- CLP Brokers allegedly "*recommended that Mr Adams should transfer…to a SPP to be provided by CPUK and that the entire fund* [of £52,626.91) *should be invested in storepods"* (PoC ¶5).
- CLP Brokers then provided a half completed application form to open a SIPP with Carey Pensions.

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Basis of Claim

(a) S.27 *FSMA 2000* Argument
- Agreement with Carey unenforceable pursuant to s.27 *FSMA 2000*.
- Transfer of pension to Carey SIPP flowed from advice given by CLP in contravention of s.19 *FSMA 2000* general prohibition.

(b) COBS Argument
- Carey acted in breach of the FCA's Conduct of Business Sourcebook COBS 2.1.1R obligation to act "*honestly, fairly and professionally in accordance with the best interests of its client.*"

(c) Joint Tortfeasor Argument
- Carey was a joint tortfeasor with CLP and so shared responsibility for negligent advice given by CLP.

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Focus on the s27 Argument

- A very quick reminder of s27 and s28.
- The claimant argued that CLP had 'advised' (Art 53, RAO) him, and 'arranged' (Art 25, RAO) the SIPP and/or the investment in Store First, in breach of the general prohibition.
- There are, of course, exclusions from Article 25 including "*arrangements which do not or would not bring about the transaction to which the arrangements relate"* (Article 26).

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High Court Judgment: [2020] EWHC 1229 (Ch) (HHJ Dight)

- All claims dismissed.
- On s27 argument: The relevant words in Article 26 were "*bring about*" and the arrangements had "*to be a positive or effective cause, not merely a set of circumstances which may be no more than the context of the transaction which eventuates.*"

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Court of Appeal [2021] EWCA Civ 474

(Newey LJ, Rose LJ and Andrews LJ)

- Whether CLP was carrying out a regulated activity and did or said something which led to the pension transfer (thereby triggering the availability of relief under s.27); and
- If it was, whether the Court should exercise its discretion under s.28 to (notwithstanding the breach) allow Carey to enforce its agreement with Mr Adams and retain the funds transferred to it.

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Court of Appeal analysis

- The advice on the ultimate investments was not a regulated activity but that advice was not limited to the ultimate investment. It included advice on moving (disposing of rights) from one pension scheme (with Friends Life) and acquiring rights under the new scheme with Carey.
- Para 68 – *if a person praises an unregulated investment which would need to be acquired by means of a particular vehicle, it may very well, depending on the particular facts, be right to see him as advising that the vehicle be adopted…*

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- Article 25(1) of the RAO provides for "*[m]aking arrangements for another person … to buy, sell, subscribe for or underwrite a particular investment which is*", among other things, "*a security*", but article 26 excludes from article 25(1) "*arrangements which do not or would not bring about the transaction to which the arrangements relate*".
- Para 97 *…For arrangements to "bring about" a transaction for the purposes of article 26, they must play a role of significance.*

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Section 28 – para 115 – a policy decision

i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly…

ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;

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Five observations

(1) Clarification of the wrapper

(2) The rejection of "but for" causation

(3) The approach to advice
- CA applied *Rubenstein v HSBC*
- Context specific? Regulatory regime?

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(4) Section 28 very unlikely to assist

(5) Pensions, Financial Services and Professional Negligence – the regulatory overlay is complex and may be determinative…

Nicholas Hill
Outer Temple Chambers
March 2022

Jonathan Sachs
Partner
BDP Pitmans

"Claimant Group Claims"

34.30mins

BDB PITMANS

Jonathan Sachs

Partner

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Jonathan has over 30 years' experience as a specialist claimant professional negligence lawyer dealing with both individual and group claims. He has won cases at the Supreme Court, the Court of Appeal and High Court and has also gained many settlements for his clients through mediation.

Jonathan has a calm approach to litigation and because of his experience he will often know and have a good relationship with his opponents.

He also conducts fraud claims often with an international element and has experience of all injunctive and enforcement applications.

In addition, Jonathan has a general corporate commercial practice.

Career Highlights:

- Acting successfully on the seminal notice period case of Newcastle v Haywood (2018) UKSC 22 at the Supreme Court, the important committal decision of Newson-Smith v Al Zawawi (2017) EWHC 1876 (QB), the tax professional negligence case of Shepherd v Byrne and Partners LLP (2017) EWHC 758 (ch) , the case of Frederick v Positive Solutions Ltd which settled shortly before the Supreme Court Appeal and the then leading professional negligence conveyancing case of Santander v RA Legal (2014) EWCA Clv 183
- Successfully concluded after a contested trial a group claim against a solicitor arising from an Unauthorised Collective Investment scheme relating to the purchase of rooms in a hotel
- Acted for an airline in freezing applications in cross border jurisdictions arising from a fraud
- Defended a pensions company on a claim for £138 million by the Pensions Regulator

Expertise in:

- Banking and Finance
- Commercial Contracts
- Commercial Litigation
- Joint Ventures
- Professional Negligence Claims
- Group Claims
- Shareholder Disputes

PROFESSIONAL NEGLIGENCE GROUP CLAIMS AGAINST SOLICITORS

1 Who are the Defendants?

1.1 The legal entity which provided the advice. This is often not the same legal entity which now exists. Indeed there may be no legal entity at all which exists if the company has dissolved.

1.2 There is sometimes a shift from solicitors to licensed conveyancers even back again to solicitors. This may have an effect on insurance as there is no automatic run off insurance cover for licensed conveyancers and the level of cover is often only £2million.

1.3 Often the defendant in a group action will have ceased to trade and had become insolvent or even dissolved.

1.4 The Law Society will provide insurance details of the defendant with their insurance disclosure form having been completed. Administrators often do not hold the insurance of their company.

1.5 There will normally be run off insurance cover for 6 years for solicitor's firms after they cease to trade. If there is a claim after the 6 years has expired there can still potentially be a claim against the Solicitors Indemnity Fund under Section 14a or Section 32 of the Limitation Act 1980.

1.6 Schedule 1 of the Third Party Rights against Insurers Act 2010 gives the Claimants all the rights that they need and in particular to find out in circumstances that aggregation applies as to how much money has been paid out to any prior firm who has made a group claim.

1.7 Contrast the position with solvent Defendants and the inability to find details of insurance other than primary level insurance – Travelers Insurance v XYZ (2019) UKSC 48 .

1.8 With insolvent firms there is unlikely to be any more than the minimum £3million minimum terms cover for an LLP or Limited Company or £2million for a partnership or sole trader.

2 Is the insurance likely to be avoided for fraud and dishonesty?

2.1 Is the firm in fact a sole practitioner. There are firms where there are listed a number of partners but if those partners are salaried partners it is unlikely that there will be insurance cover for the firm in respect of a fraudulent sole equity partner . There will be no reliance on the holding out unlike a lender who may be able to do so if it had a panel of firms which required two partners. There may be the sham partner who is not really in receipt of profits.

2.2 In Zurich v Karim & Others [2006] EWHC 3355 QBD the partnership consisted of a mother, daughter and son and the mother perpetrated dishonest and fraudulent conveyancing acts. The daughter and son were found to have turned a Nelsonian blind eye to their mother's conduct. Therefore there was no cover.

2.3 However do not get too concerned about insurance issues. The two partners in Maxwell Alves, Dr Alan Ma and Mr Daniel Cheung have been found liable twice by the Solicitors Disciplinary

Tribunal, once for getting involved in conveyancing transactions concerning the purchase of student apartments and once in unsupervised litigation being conducted by an unregulated fee earner but still there is insurance cover for claims against this partnership.

3 Aggregation

3.1 In Various Claimants v Giambrone [2017] EWCA CIV 1193 there was a Trial, an Appeal to the Court of Appeal, a cost order against the insurers which was appealed to the Court of Appeal and then there was a further appeal by the insurers against the cost ordered to the Supreme Court.

3.2 This was a claim by various claimants relating to the purchase through the Italian LLP office of Giambrone concerning villas in Sicily. The first instance judgment which was upheld at the Court of Appeal was that the solicitors were negligent as they failed to inform the purchasers that the properties in Sicily were riddled with mafia corruption and there was further a breach of trust in respect of the release of client funds. . However, the main problem in respect of these cases was that despite the fact that they were being run by two very competent London law firms, a little known northern Irish law firm had got in first, and taken a very substantial sum off the £3million pounds which was available on an aggregate basis. Despite the fact that the Claimant's were likely to obtain little by way of compensation if aggregation applied, there was still an appeal to the Court of Appeal by the Defendants which was criticized as being unfair by the Court of Appeal. An order for costs was obtained at first instance and on an appeal against the insurers but unfortunately once the insurers had appealed to the Supreme Court there was a discontinuation following the XYZ v Travelers decision.

3.3 The main case on aggregation concerning group claims against solicitors is that of AIG Europe Limited versus Woodman & Others [2017] UKSC18.

3.4 In this case, there were various purchases of apartments in Morocco and Turkey which were sold by the same developer. The court found that the purchasers in Morocco aggregated together, and that purchasers in Turkey aggregated together, but luckily for the Claimant despite the insurers argument the two did not aggregate together. The effect of this decision is that it is likely that in circumstance of aggregation where there are similar purchases, as long as the purchases are a different development in different towns, there will not be aggregation across developments.

4 The Claimants

4.1 The most difficult part of running a Claimant group negligent claim is to ensure that the onboarding is dealt with as quickly and as cheaply as possible, and also the production of data which will be required is not carried out by paralegals at £100 to £150 per hour with spreadsheets but by IT systems. Without such technology the onboarding and paralegal costs will be disproportionate to the amounts in issue and further more third party funders will not fund the same.

4.2 Advertising costs are not a recoverable item against a Defendant on success. Please see Weaver v British Airways Plc [2021] EWHC217(QB). £1m of advertising costs was not allowed to be recovered on an interpartes basis

4.3 Cold calling is not allowed and predominantly Claimants do not want to pay.

4.4 Third party funding is therefore invariably a requirement with ATE insurance. An important consideration then is whether to take ATE insurance at the beginning or when proceedings are issued. If there are test Claimants, which is likely then you may only want to insure the test Claimants rather than the whole group. Furthermore, in some jurisdictions and particularly in Asia it will not be possible to provide ATE insurance for some of the Claimants.

4.5 If third party funding is in place cost orders and security for costs and disclosure orders against third party funders are available under CPR25.14. An order for disclosure is obtainable pursuant to Wall v RBS (2016) EWHC2460. It is therefore important to ensure that the third party funder is able to defend any application for security for costs by showing it has sufficient assets within the jurisdiction. Bonds may be required in respect of the ATE insurance policy and again it might be sensible to ensure that the ATE insurers are credit rated insurers I within the jurisdiction.

4.6 Cost sharing agreements will be required even with Third Party Funding to ensure that all Claimants share the costs and any adverse costs. Committees should be formed so that delegated powers of instructions can be provided.

4.7 Several cost orders should be obtained at the first Case Management Conference as otherwise the Defendants can choose from which Defendants to pluck off in the event of there being insufficient ATE insurance or ATE insurance failing.

4.8 Finally, in any ATE insurance and third party funding agreement there should be careful consideration of the clauses relating to offers and dispute resolution if the third party funder or ATE insurer required or wished an offer to be accepted and the Claimants do not wish such an offer to be accepted.

5 Failure to settle in pre-action protocol

5.1 The normal process will be that generic Particulars of Claim are drafted and a GLO order is not obtained but directions similar to a GLO order are made. This will normally require that there be test Claimants with legal issues in relation to those test Claimants being binding on the group and there be further binding on factual issues. The unsuccessful case of David Maclean & Others v Andrew Thornhill QC is an example of how these test Claimants are organized with half the test Claimants being chosen by the Claimants and half the test Claimants by the Defendants.

5.2 Witness familiarization is important in respect of group claims as there will be test Claimants who will be in effect the backbone of what may be a multimillion pound litigation.

<u>The Trial</u>

Often the main difficulties at a professional negligence trial are not issues of liability but issues of causation and quantum. The Claimants will have to go in the witness box and prove that if they had been given competent advice that they would not have proceeded with their purchase. It may very well be that on disclosure or cross examination it can be shown that some of the Claimants have purchased other investments and have received competent advice on those investments but still proceeded at considerable risk. . Furthermore it may be that some of the purchasers are more sophisticated than others, and that they perhaps understood the risks of such investments being lost and in particular, if their assets and income are high.

Finally, paying out the damages .

It is important that care is taken in not only obtaining proper AML for the Claimants , in particular, Claimants with similar sounding names in foreign jurisdiction but that the damages are carefully and properly paid out to the Claimants bank accounts. An example of where matters can go terribly wrong is the case of Sylvie Aga Agouman v Leigh Day (a firm) [2016] EWHG1324(QB) where unfortunately £32million pounds of money recovered by Leigh Day was paid to the wrong payee.

This case in itself was quite famous for the fact that Leigh Day had managed to claim in the preceding action against Trafigura more than £100million pounds in legal costs because of the 100% uplift on the conditional fee agreement prior to the 2013 reforms .

BDB Pitmans LLP

5th May 2022

Helen Pugh
Outer Temple Chambers

"Insolvency Practitioner Negligence"

27.39mins

Helen Pugh

Year of Call: 2008
Direct Access: Yes

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☎	0207 353 6381

Helen specialises in general commercial litigation, civil fraud, contentious insolvency and company law issues, and professional negligence.

Her practice has a strong international element with an expertise in jurisdictional disputes and conflict of law issues, including as they arise at an interim stage in applications for worldwide freezing orders and service out applications or on the substantive claim, and in the cross-border insolvency context.

Areas of Expertise

Commercial & Civil Fraud

Helen has a busy commercial and civil fraud practice with an increasing amount of work with a cross-border element. She has particular knowledge of cryptocurrency disputes and the particular issues arising in connection with these disputes over digital assets.

She is ranked in Commercial Litigation in Legal 500. "A tenacious, confident advocate who is incredibly switched on. Clients appreciate Helen's determination, and her commitment to their case."

Notable Commercial & Civil Fraud cases

Ellis v Babushkin & ors; Ellis v Digit Europe Ltd

A multi-million pound bitcoin fraud against foreign-domiciled parties identified as potential recipients of the misappropriated bitcoin followed a disputed tracing exercise by blockchain analysis experts (sole counsel).

Sayn-Wittgenstein-Sayn v Sayn-Wittgenstein-Sayn

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A claim for repayment of a series of loans made to the defendant raising a variety of issues including the meaning of delivery of a deed, the scope of a purported settlement and limitation (sole counsel).

A £5m claim by a US company against an English company with high profile and high value IP rights concerning breach of warranty, breach of fiduciary duty and the fraudulent dissipation of monies (led by Aidan Casey QC)

A multi-party fraud action said to arise out of the misappropriation of luxury cars worth c£1.5m at a prominent London hotel and their unauthorised transfer to Switzerland (sole counsel).

Advising upon force majeure construction issues in light of Covid-19 in the context of a substantial long-lease of equipment in the Bahamas.

Baxendale-Walker v APL Management Ltd

A summary judgment matter involving a high-net worth individual concerning a £3.7m loan and issues of mistake, illegality, misrepresentation, res judicata and abuse of process. (led by Jonathan Seitler QC)

An arbitration concerning the supply of commodities in South America (led by Richard Samuel)

A claim by a Jordanian company against the supplier of nanotechnology for fraudulent misrepresentation (led by James Guthrie QC)

Company & Insolvency

Helen has substantial experience of all aspects of company and contentious insolvency matters, including shareholder disputes, derivate actions, directors' disqualification proceedings, misfeasance/breach of fiduciary duty claims, unlawful distribution claims, antecedent transaction challenges, beneficial ownership disputes and other proceedings under the Insolvency Act such as petitions, annulment applications, and applications for examinations.

Helen is ranked as a leading junior in the Legal 500 (2022 edition) and described as having "an enviable ability to grasp large amounts of information quickly and draft claims logically, thoroughly and with precision."

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Notable Company & Insolvency cases

A successful application to serve a winding up petition out of the jurisdiction on an overseas company in respect of debts owed to another overseas company and on the just and equitable ground.

Holland v Revenue and Customers Commissioners (Re. Paycheck Services 3 Ltd)

The leading Supreme Court case on de facto directors (led by Peter Knox QC).

Instructed in a double derivative claim for which permission is sought for members of a large pension scheme to bring an action against the directors of a corporate trustee of a pension scheme.

A complex unlawful dividend and misfeasance claim against a former director of an insolvent company raising issues which include directorial responsibility where a company falls victim to a fraud.

Advising in conjunction with local lawyers on winding up proceedings in the Isle of Man on the grounds of a petition debt based on an Indian arbitration award undergoing challenge in the Delhi Supreme Court.

An unfair prejudice petition arising out of an acrimonious breakdown of trust at a construction company.

Advising on restrictive covenants in the context of a shareholder-employee relationship.

Banking & Finance

Helen undertakes a range of financial services and banking work as part of her broad commercial practice. In addition to guarantee disputes and other contractual claims, Helen's expertise in insolvency and civil fraud is a considerable asset in this area. She has also been instructed in a number of professional negligence cases against financial and insurance intermediaries.

Helen is regularly invited to speak on topics related to banking and finance, including Quincecare claims and

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cryptocurrency. She has been published on a range of topics in the Journal of International Banking and Financial Law and other leading publications. Helen is a member of Chancery Bar Association, Commercial Law Bar Association, the Professional Negligence Bar Association, Thought Leaders 4 Fraud, Insolvency, Recovery and Enforcement and the Female Fraud Forum.

Notable Banking & Finance cases

Advising a finance company upon the enforceability of its loan agreement and associated guarantees against husband and wife co-directors. The case raises a number of issues not atypical in cases where the debtor company is a family-run business, including questions of authority and forgery.

Zu Sayn-Wittgenstein-Sayn v Zu Sayn-Wittgenstein-Sayn [2021]

Acting for a high profile, high net worth individual in an action to recover a significant loan raising issues including the validity of a deed, promissory estoppel and limitation.

Advising a high net worth foreign national in connection with a claim against his former solicitors arising out of multi-million losses due to issues relating to deeds of priority and the registration of charges between competing lenders, and a claim against another lenders.

Advising the former spouse of a company director upon the validity and enforceability of an all-monies guarantee provided to an institutional lender to secure her former spouse's failing business.

Acting for a client in an action for breach of MCOB rules in a typical 'interest-only' mortgage mis-selling case.

Professional Negligence

Helen has extensive experience across the breadth of professional negligence actions including firms of solicitors, surveyors and valuers, insurance and other brokers or intermediaries, and accountants. Helen is regularly named in the Professional Negligence category of Chambers & Partners and Legal 500, and is currently ranked in the Legal 500 [2022] edition as a leading junior in this area "Helen has a fantastic grasp of the intricacies of professional negligence, and an approachable and understanding demeanour which helps to build a quick rapport with clients."

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Notable Professional Negligence cases

Symrise AG v Baker & McKenzie

A commercial court trial against a city law firm arising out of negligent Mexican tax advice (led by William Godwin QC).

A claim against an accountant for various breaches of duty, including a failure to implement a tax efficient members' voluntary liquidation in advance of an adverse change in entrepreneur's relief.

A claim against a firm of solicitors for a failure to register a lender's charge and a failure to advise on the meaning and effect of an inter-lender deed of priority.

A claim against a mortgage broker for misselling an interest only mortgage in breach of the then applicable MCOB rules.

A claim against conveyancing solicitors arising out of a planning permission defect.

Memberships

- COMBAR (Commercial Bar Association)
- ChBA (Chancery Bar Association)
- PNBA (Professional Negligence Bar Association)
- Female Fraud Forum
- R3 (the Association of Business Recovery Professionals)
- Thought4Leaders FIRE Community Member

Languages

- Basic – conversational German and French

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Publications

In addition to writing for chambers' own publications, Helen regularly contributes to a range of external journals and periodicals including the Journal of International Banking and Finance Law, the Journal of Corporate Rescue and Insolvency, the New Law Journal and others.

Helen has published various articles. Recent articles include:

- Knowing receipt and the proprietary base (JIBFL 2021)
- Reflective Loss and the Applicable Law Conundrum, Journal of Banking and Finance Law (JIBFL 2020)
- Breathing Space: The Impact of a More Consensual Approach, Journal of Corporate Rescue and Insolvency (CRI 2020)
- 'A New Tool for Minority Shareholders?', an article on the decision in In re Core VCT plc (in liquidation) in the Journal of Corporate Rescue and Insolvency (CRI 2019)
- Unexplained Wealth Orders – Whose cash is it anyway?,the New Law Journal (NLJ 2019)
- Russian Litigation in London: a two-part series of articles the New Law Journal (NLJ 2019)
- Restoring a company to members' voluntary liquidation with the appointment of new liquidators, Journal of Corporate Rescue and Insolvency (CRI 2019)
- A Collective Sigh of Relief: Global Corporate Ltd v Hale on Appeal, Journal of Corporate Rescue and Insolvency (CRI 2019)
- No ifs, no buts Cost pressures & solicitors' negligence are no excuse for cutting corners, the New Law Journal (NLJ 2015)

Recommendations

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Insolvency Practitioner Negligence

Helen Pugh *of* Outer Temple Chambers

About Helen

Helen is a barrister at Outer Temple Chambers in London and is one of the rare individuals to be ranked in both professional negligence and insolvency in the Legal 500 [2022]. Helen has extensive experience across the breadth of professional negligence actions including firms of solicitors, surveyors and valuers, insurance and other brokers or intermediaries, and accountants. Her cross-over expertise in insolvency makes her a go-to individual for professional negligence claims in an insolvency context.

The Basics: The Insolvency Practitioner

1. Insolvency practitioner is in fact not a term of art and there are individuals who style themselves as insolvency practitioners without sanction.

2. BUT there is a distinction to be drawn between pre- and post-appointment roles.

3. To act as an office-holder of a company or an **appointment-taker**, an individual *has* to be licensed by one of five recognised professional bodies ("RPBs").

4. In relation to a company, 'acting as an insolvency practitioner' within the meaning of the IA covers liquidators, provisional liquidators, administrators, administrative receivers, monitors, or its nominee or supervisor in a CVA.

5. In relation to an individual debtor, it covers acting as a trustee in bankruptcy, interim receiver, nominee or supervisor of an IVA.

6. The RPBs also offer a licence for non-appointment takers who nonetheless wish to hold themselves out as competently certified in insolvency matters. This can be attractive to solicitors working in the insolvency profession. So if you have a solicitors negligence case which arises in the insolvency context, check whether

they held themselves out as a qualified IP and if so then you can test their conduct against the IP RPB as well as the SRA.

Recognised Professional Bodies

7. To date the profession has been regulated by a number of different regulators, largely reflecting the fact that many IPs are dual qualified as accountants.

8. The current regulators are:

   Association of Chartered Certified Accountants (ACCA)

   Institute of Chartered Accountants in England and Wales (ICAEW)

   Chartered Accountants in Ireland (CAI)

   Institute of Chartered Accountants of Scotland (ICAS)

   Insolvency Practitioners Association (IPA)

9. Complaints against an IP should in the first instance be referred to his or her firm, and then to the Insolvency Service's Complaints Gateway which acts as a triage to review complaints and decide whether or not it is of sufficient severity to warrant passing on to the relevant RPB. A RPB has a number of options available to it if it upholds a complaint including a fine up to £7500 but it does not compensate victims.

10. The government is presently considering a number of reforms including:

    - Replacing the 5 RPBs with one to ensure consistency; and

    - Filling the gap in regulation by expanding regulation to firms and not just individuals.

11. The RPBs are of course not just background but will be central to any professional negligence claims you wish to bring. As with accountancy and audit

claims or claims against solicitors, the codes and guidance published by the RPBs will be the best source of content for any duty of care.

Material distinctions between pre- and post-appointment roles

12. From a professional negligence point of view this is a critical distinction.

- Pre-appointment roles cover a wide spectrum of roles but are typically advisory and governed by the common law – your claim will be in contract or tort for breach of the duty to exercise reasonable care and skill. Whilst that standard will be informed by RPB rules and codes, the process for analysing these cases will be very familiar to anyone who has acted in accountancy cases. Post-appointment roles are largely governed by a statutory framework found in the Insolvency Act 1986. That statutory framework will cover the duties owed by the office-holder and the means of enforcing them.

- There is often a change in defendant pre- and post-appointment. Appointment-taking is an individual responsibility. Once an insolvency practitioner is in office, he or she is personally responsibility: he or she will enforce their powers through court action in their own name and conversely, will be sued in their personal capacity for any breach of their duties under the statutory framework. In contrast, in their pre-appointment role they are often simply acting as employees or individuals for whom their firm is ultimately responsibility either because the retainer will be with the firm or under vicarious liability principles.

- The distinction between pre-and post-appointment services may also affect the claimant. In a pre-appointment advisory role, the insolvency practitioner or more commonly his or her firm, will usually be undertaking a contractual duty to the company or its directors or an individual creditor as the case may be, and there will be a like assumption of responsibility in

tort to that individual. Once an insolvency procedure is invoked and an office-holder is in place, the IP will almost always owe its duty to the company's creditors as a class and any claim against the IP for breach of his duty will be a class remedy on behalf of the creditors. Any compensation will be for the benefit of the class to be distributed in accordance with the *pari passu* insolvency framework and will not be for the benefit of the individual claimant only.

Pre-Appointment Professional Negligence Cases

13. These cases will often bear similarities to cases brought against accountants acting in an advisory role pursuant to a contract. The contractual relationship will usually give rise to a special relationship owed to the other contracting party. Typically the cases will involve advice given on the options available to a company director or an individual facing financial difficulties.

14. See:

- *Pitt v Mond* [2001] BPIR 624. P sought advice from M having run into difficulties with his nursing home business. Based on property values provided by P, M drew up IVA proposals which set out a schedule for payments. Subsequently property prices crashed and the IVA was disastrous for P. P sued M for professional negligence in failing to cater for the possibility of a property crash, for failing to bind the unsecured element of the debts of secured creditors and for failing to provide for full and final settlement of the debts. The claim was dismissed on the facts.

- In *A&J Fabrications Ltd v Grant Thornton* major creditors of a company agreed with GT that it would support the appointment of GT's employee as liquidator and pay GT £5,000. In return GT agreed to keep the creditors informed of the results of its investigations with a view to the creditors being able to sue the directors. A dispute arose and the creditors claimed

that in breach of agreement and breach of the duty of care, GT had failed to pass on information to the creditors. GT argued that post-appointment it owed no duties to the creditors because the duties were owed exclusively by their employee to the company. GT's strike out application failed. There could be coterminous duties. They were complementary as the duty to the creditors was merely a duty to act properly as a liquidator, namely to get in the assets and investigation recoveries.

Post-Appointment Cases

The Statutory Scheme and Class Remedies

15. Here the courts tend to protect the sanctity of the pari passu principle and to severely limit the availability of individual claims.

16. See Privy Council case of *Hague v Nam Tai Electronics Inc* [2008] UKPC 13. H lived and worked in Hong Kong and was the liquidator of a BVI company (T). N was an unsecured creditor of T. N obtained permission to serve out of the jurisdiction against H in relation to a claim alleging breaches of duty by H in failing to collect or take control of T's assets so that they could be applied to discharge T's liabilities. The Privy Council held that the claim by the creditor was misconceived – the duty was owed to T and not to the individual creditors. Absent a special relationship between H and N, the remedy was a class remedy for misfeasance under the statutory framework. N had no cause of action and permission to serve out ought not to have been granted.

The Forgotten Creditor Cases

17. This is currently the main exception to the class remedy approach. This line of cases stems from an early C20th decision called *Pulsford v Devenish* [1903] 2 Ch 625. In this case a liquidator sold the assets of the company and distributed the proceeds to the shareholders notwithstanding he was aware there were

unsecured creditors who would therefore go unpaid. The company was dissolved. Subsequently a creditor brought a claim against the liquidator for breach of duty. Farwell J observed "*A more gross dereliction of duty by a liquidator I have seldom heard of…It certainly would be somewhat shocking if there were no remedy in such a case as this, and I am glad to have been able to persuade myself that there is a cause of action against the liquidator.*"

18. So where a creditor has suffered particular loss because they have been overlooked or kept out of the distribution, an action is likely to lie against the liquidator for breach of statutory duty and/or breach of a common law duty of care.

The Special Relationship

19. There is scope for the development of other categories in the so-called 'special relationship' cases.

20. In *Kyrris v Oldham* [2003] EWCA Civ 1506 franchisees of several Burger King restaurants got into difficulties and an administrator was appointed over the partnership. One of the creditors claimed, amongst other things, alleging breach of the administrators' duties in the conduct of the partnership in the course of the administration. Jonathan Parker LJ gave the unanimous judgment of the Court of Appeal. At paragraph 141 he held:

"In my judgment it matters not whether one adopts the approach of the House of Lords in Caparo Industries plc v Dickman , or the 'assumption of responsibility' approach which it adopted in Henderson v Merrett Syndicates : on either approach the result is the same, namely that, absent some special relationship, an administrator appointed under the 1986 Act owes no general common law duty of care to unsecured creditors in relation to his conduct of the administration."

21. *Hague v Nam Tai Electronics Inc* obiter referred to the 'special relationship' exception in *Kyrris v Oldham* but then went on to hold that no special relationship had even been pleaded in *Nam Tai* itself.

22. In the bankruptcy context, it is likely that similar principles apply. In *Oraki v Bramston* [2018] Ch 469 former bankrupts were successful in applying to have their bankruptcies annulled because of serious irregularities leading to the costs order on which they had been made bankrupt. The former bankrupts brought a professional negligence claim against their former trustee for unnecessarily prolonging the bankruptcies but this failed on the facts. However, the court considered obiter the argument the trustee's argument that the claim was in any event bound to fail because his duties were governed exclusively by section 304 of the Insolvency Act 1986 (the misfeasance provision) which ousted any common law liability. This sweeping argument was rejected by the Court. It considered that section 304 did <u>not</u> exclude all other forms of liability of a trustee in bankruptcy.

23. So at the highest level there is support for the existence of professional negligence claims against appointment-takers. But when might a special relationship be found?

24. In *Prosser v Castle Sanderson Solicitors (a firm)* [2002] EWCA Civ 1140 an individual property developer sued his former solicitors and an insolvency practitioner who had acted as nominee and then supervisor for his IVA. For present purposes I will focus on the insolvency practitioner. An IVA proposal was put forward which were substantially modified in the course of the creditors' meeting to involve the immediate liquidation of one of the debtor's companies. The meeting was adjourned and the claimant asked the IP if there was any alternative to liquidation of one of the claimant's companies if he wanted the IVA to pass. The claimant was told there were no alternatives and accordingly he agreed to the IVA with the modifications.

25. The IVA was disastrous and he issued a claim arguing that the IP had owed him a duty of care which was breached during the adjournment when the IP failed to tell him that one alternative was to adjourn the IVA for 14 days. The claimant was unsuccessful in proving that would have made any difference and so he lost on causation. However, the issue whether the IP owed a duty of care at all was discussed by the Court of Appeal obiter. The IP had argued that he was acting in his capacity as nominee under the statutory scheme, was an officer of the court and thus did not owe a duty to any one individual. Instead any aggrieved person was limited to the statutory remedy pursuant to which they could apply to the court to challenge the IVA.

26. The Court of Appeal disagreed that it was as black and white as this. Although that was true when the IP was acting in his capacity as nominee, that was not the capacity in which he was acting during the adjournment. In the course of the adjournment he was acting in his capacity as advisor to the claimant akin to the capacity he had acted prior to accepting the position as nominee. He thus owed a duty of care to the claimant albeit on the facts that duty was not breached.

27. But in other cases claimants have generally had little success in arguing that there was a special relationship.

28. In *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWH 1743 (Ch) the claimant asserted there was a special relationship between it and the administrators of a mining company. The claimant had provided services to the company in return for royalties on sales of the ore. A dispute arose between the claimant and the company which was settled by deed providing for the company to make regular payments to the claimant. The company went into administration and the administrators sold the mine without transferring the liability to continue paying the royalties to the claimant. The Court rejected the argument of a special relationship. There were no undertakings or specific assurances or representations provided by the defendants that they would ensure a purchaser

took on the obligation to pay royalties. It was not enough that the administrators had been made aware by the claimant that there was a royalty obligation and that they had not disagreed with the claimant's assertion.

29. What you will be looking for is an express representation or express conduct justifying the claimant in believing their interests are going to be looked after by the liquidator or administrator.

30. The courts will be reluctant to find such a special relationship where acting in the interests of the individual creditor would be adverse to the interests of the company or general body of creditors as a whole as the primary duty of a liquidator and administrator is to act in those interests.

Statutory Remedies

31. As should be clear by now, there will be occasions when a professional negligence action will lie against an office-holder but in practice this is going to be rare. However, it is worth bearing in mind what the statutory causes of action are. In the right case, such as where your clients are the sole or majority creditors, it may be worth exploring the class remedies. And in many cases the statutory claim will carry many of the hallmarks of a professional negligence claim. So misfeasance actions include actions against an office-holder for breach of their duty to exercise reasonable care and skill in performing their duties.

Challenging a liquidator or administrator for misfeasance

32. A liquidator can be sued under section 212 of the Insolvency Act. Section 212 applies where a liquidator (or officers or others concerned in the management of the company):

"has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company."

33. An administrator can be sued for misfeasance pursuant to paragraph 75 of Schedule B1 of the Insolvency Act 1986.

34. Misfeasance covers a much wider variety of breach of duty than a breach of the duty of reasonable care and skill, but it undoubtedly does encompass that duty as well.

35. Examples include:

- In *Centralcrest Engineering Ltd* [2000] BCC 727 a liquidator was misfeasant in a negligent sense for continuing to trade a company in liquidation notwithstanding it should have been clear that course of action would lead to greater losses.

- In *Re Windsor Steam Coal Co* [1929] 1 Ch 151 a liquidator made a negligent payment to third parties in respect of a claim to which the company had a defence.

- In *Re Home & Colonial Insurance Co* [1930] 1 Ch 102 a liquidator was negligent and thus misfeasant in settling a claim without investigating whether or not it was meritorious (which is wasn't).

36. Whilst the Insolvency Act 1986 might prescribe many of the duties on liquidators and administrators, much of the day to day conduct of the liquidation or administration will be governed by the duty of reasonable care and skill albeit that the only route for enforcing that duty is through the statutory framework of misfeasance.

37. In the recent High Court case of *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) successor administrators brought a claim against the company's former administrators alleging that they had sold the company's asset, a high rise tower on the south bank, at an undervalue. John Kimbell QC sitting as a Deputy High Court Judge held:

"206(4) The FAs [former administrators] owed the Company a duty to exercise reasonable care and skill in the performance of their functions to the standard of an ordinary, reasonably skilled and careful insolvency practitioner."

38. The takeaway from this review of the misfeasance provisions in the Insolvency Act is that provided you have a legal team which can ensure no additional insolvency points are missed, a professional negligence-type claim can be brought under the label of a misfeasance claim albeit with one crucial difference – remedy. Any remedy will go to compensate the company and thus the class of unsecured creditors, and not to any individual client you may have.

The Standard of Care of a Liquidator or Administrator

39. An office holder is a professional and is expected to act in accordance with the standard of a reasonably careful office-holder. So in *Re One Blackfriars* the learned judge held:

"I accept the FAs' submission that they were not to be judged by the standard of "the most meticulous and conscientious member of the profession" – per Millett J in Re Charnley Davies Ltd (No. 2) [1990] B.C.C. 605 . To succeed with their claim for breach of this duty, the JLs must establish that the FAs "made an error which a reasonably skilled and careful insolvency practitioner would not have made" – see Re Charnley Davies Ltd (No. 2) [1990] B.C.C. 605 at p.618D-E. Many of the particular allegations of breach in this case, such as the failure to obtain a valuation, failure to appoint an independent marketing agent, and failure to investigate planning potential properly, fall into this category of duty."

40. So the test is not as high as proving that no insolvency practitioner would have made the error. The standard is that of the reasonably skilled and careful IP.

Conclusions

41. Professional negligence claims against insolvency practitioners have, to my mind, been much neglected by the commentators. Thus there is no separate chapter dealing with insolvency practitioners in Jackson & Powell. Yet claims against IPs should often be considered as part of a portfolio of services offered by professional negligence solicitors.

42. Claims relating to advice on insolvency options will have a commonality with claims against accountants, and with the appropriate evidence of the standard of a reasonably careful IP, should be considered as an appropriate extension to your professional negligence practices.

43. Claims relating to conduct of a liquidator or administrator or other appointee require a bit more thought. It might be that you are limited to a 'derivative' type claim on behalf of the company or all creditors. It might be that the complaint of negligence has to be labelled as misfeasance to bring it within one of the statutory causes of action. And in other claims it might be possible to identify an advisory claim owed to your specific claim which gives rise to a more traditional professional negligence claim like in *Prosser v Castle*.

44. Finally, a thank you for me for reading this far and for watching the webinar. Please do get in touch if you have any questions on this topic: Helen.Pugh@outertemple.com or contact my clerks Matt.Sale@outertemple.com and Peter.Foad@outertemple.com.

HELEN PUGH

OUTER TEMPLE CHAMBERS

Jason Karas
Mishcon Karas
&
Mark Davis
Mishcon De Reya

"Audit Negligence"

35.05mins

Karas LLP

in Association with Mishcon de Reya

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Jason Karas is the Managing Partner of Karas LLP. He specialises in the investigation, litigation and resolution of complex commercial, financial and insolvency disputes, involving some of the most sophisticated global corporations.

Jason practices principally in professional negligence in financial and commercial matters, company law and cross-border insolvency throughout the Asia Pacific region and internationally. A leading international corporate litigator and advocate, he is renowned for his tenacity, commercial acumen and stamina.

He has particular expertise litigating large-scale claims involving professional advisers (including directors, auditors and bankers duties), shareholder remedies, governance and regulatory disputes and the identification and tracing of stolen assets.

Over the last two decades, Jason has managed multi-jurisdictional investigations and litigation arising from some of the largest and most complex corporate collapses around the world, including Bond Corporation, Bell Group, HIH Insurance, Akai Holdings, Moulin Global, Carlyle Capital, the Kingate (Madoff feeder) Funds, Memory Tech, 3D Gold, Ocean Grand, Orient Power, China Medical Technologies, Bank Century, China Forestry, Platinum Funds and 1MDB.

Jason is also a trusted adviser to corporate clients, general counsel, investment and hedge funds and family offices. Jason has also been at the forefront of the development of the dispute financing industry.

In 2013, Jason was one of the first lawyers in Hong Kong to be granted Higher Rights of Audience for civil proceedings and is frequently in the High Court, Companies Court and Court of Appeal, conducting hearings as Solicitor Advocate.

A more detailed CV is available upon request.

Mishcon de Reya

Mark Davis

Partner

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Mark Davis is a Partner in the firm's Dispute Resolution department. He has a broad commercial contentious and non-contentious practice across a wide range of industry sectors, and particular experience in the shipping, shipbuilding, offshore, aviation and financial & professional services sectors.

He has conducted litigation cases before all divisions of the High Court, the Court of Appeal and the Privy Council, and has represented clients involved in arbitrations under the rules of the ICC, LCIA, LMAA, and UNCITRAL. He has conducted or overseen proceedings in many foreign jurisdictions including Brazil, Canada, China, Gibraltar, Hong Kong, India, Japan, Korea, Russia, Singapore, Taiwan and the USA.

Mark acted for AssetCo Plc in its successful auditors' negligence claim against Grant Thornton UK LLP and is one of the leading lawyers practising in this area.

He has also acted for clients in share and asset sale and purchase transactions ranging in value from £100K to €500 million, and advises on diverse contractual issues.

He is the author of the first and second editions of *Bareboat Charters and Refund Guarantees*, both of which are the first published English law text books dedicated to these subjects.

Mark is recognised as a leading expert in Legal Business' Legal Experts publications and acknowledged as one of the World's leading litigation lawyers in Euromoney's guide to "The World's Leading Litigation Lawyers".
He is also a CEDR accredited mediator and is a fluent German speaker.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Moira Hindson
Moore Kingston Smith

"The selection and use of Experts – top tips."

26.35mins

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Moira has earned an excellent reputation in the legal and business community as a forensic accountant and expert witness in professional negligence and fraud cases, business and partnership valuation assignments, and in cases that require the quantification of loss of profits. She is well known for writing clear, well-structured and comprehensive reports, which are always delivered to deadline.

Moira's 25-year career has seen her act as an expert accounting witness in many cases and she has given evidence in the High Court and other courts on numerous occasions. Her cases have involved allegations of negligence against auditors and accountants and in high-profile civil and criminal fraud cases, in which she was instructed by solicitors acting for company directors facing allegations of fraud, misrepresentation or false accounting. She has also been involved in a number of forensic investigations on behalf of companies in which fraud or wrongdoing by employees or directors has been suspected.

Moira has lectured to auditors and accountants on the ICAEW's disciplinary process and the lessons to be learned from the professional negligence cases in which she has been involved. She heads the Forensic Accounting Services department and is a member of the firm's Technical Committee. Moira is also a member of Moore Kingston Smith's Governance Board and is the firm's designated ethics partner.

Moira has written a number of articles and is the co-author of a casebook of professional negligence claims against auditors and accountants, *Audit and Accountancy Pitfalls: A Casebook for Practising Accountants, Lawyers and Insurers,* which was published in 2010.
Moira is a member of Expert Witness and Academy Experts.

Tips for selecting and using an Expert Accountant

Hello everyone and thank you for joining this session. I am Moira Hindson and I have been a forensic accounting partner at Moore Kingston Smith, a Top 20 firm of Chartered Accountants, for the past 20 years. During this time I have been involved in the audit function within the firm as a member of the Technical Committee and as the firm's Ethics Partner. I regularly act as Expert Advisor and/or Expert Witness in claims or disciplinary proceedings involving allegations of negligence against auditors and accountants.

I am going to talk today about some of my top tips when selecting and using Experts. As you know, it is not the job of the Expert to win the case for their client and the last thing you want is one that thinks otherwise. But whilst it is not the Expert's job to win an unwinnable case, selecting the wrong Expert could result in your client losing what might otherwise have been a successful claim or Defence. A winning Expert in this context is one that provides the legal team with the information and assistance they need to be able to give the best possible advice to the client.

For obvious reasons my Top 10 tips relate primarily to the selection and use of Experts in audit or accountancy negligence claims. However I believe that most if not all of them are of general application in any negligence case against a professional firm.

Tip 1: Decide how to select your Expert

So where do you start with the selection of an Expert? My first tip is that before you delve in to any Expert Registers or Google 'Expert Accountant', think very carefully about exactly what kind of Expert you are looking for. Let's say you have an audit negligence case. What kind of an Expert do you want? Obviously an Expert in auditing, but that's a bit like saying you want an Expert in medicine. What sort of medical Expert: a GP, a consultant, a pharmacist, a medical researcher? They are all involved in different aspects of medicine and that's before we even think about the different parts of the body in which they could specialise.

If what you are looking for is someone whose current job involves doing actual audits then you need to start by going to a firm of accountants that undertakes audits. This may seem patently obvious unless you appreciate that not all Experts within accountancy firms are in accountancy firms that provide auditing services. Not all accountancy firms are registered to undertake audits. And of course there are numerous forensic accounting boutiques that only do forensic accounting and Expert Witness work. They may have people with past experience of audit work, but is that what you are looking for? If not, the focus of your search needs to be on the word 'audit', rather than 'accountancy' or 'Expert'.

If you conclude that what you are looking for is someone who knows about auditing today, you need to be contacting someone in an accountancy firm that is registered to undertake audits. There are not as many of these as there used to be, partly because many of the smaller firms have consolidated into larger ones but also because many smaller firms have allowed their audit registration to lapse due to the weight of regulation that has been imposed on auditors in recent years. Your search will probably narrow down to a large to mid-size accountancy firm that provides auditing services.

Tip 2: Consider who the Defendant is

An audit negligence case will obviously involve a firm of auditors as Defendants. Who are they? Where do they sit in the league table of accountancy firms? How many partners do they have? Is auditing a key service area or are they best known for other areas of accountancy work? The

answers to these questions will help to guide you towards an accountancy firm that may be reasonably comparable in size and culture to the one involved in the claim. If the Defendant firm is one of the Big 4 you are probably going to struggle to persuade any of the other 3 to act against them but one of the firms just outside the Big 4 might be a sensible starting point.

Tip 3: Consider who the Claimant is

Next you need to think about who the Claimant company is and how it prepares its financial statements. If it's a large global company whose shares are listed, or a specialist financial institution such as a Bank, then you clearly need to be focusing your search on the larger audit firms. Global corporations prepare their financial statements using a different accounting framework to smaller UK based companies and, depending on the subject matter of the claim, it could be vital that your Expert is familiar with the relevant accounting framework so that he or she can opine properly on the appropriateness of the audit methodology. If the subject matter of the claim requires, for example, specialist banking knowledge then your Expert will ideally come from a firm that audits banks. Good luck with that one. The larger accountancy firms work extensively with all the banks and finding an auditor from within one of those firms who is prepared to act against any Bank may be like looking for a needle in a haystack. You may find that you are forced in these circumstances to look for someone with previous experience of auditing banks, which you may find within one of the boutique forensic accounting firms, or a retired Big 4 auditor.

Tip 4: Match the Expert to the issues in the claim

Let's say that you have identified that the Claimant company is a UK based entity that prepares its financial statements using UK GAAP. The Defendant audit firm is a Top 30 general practice firm. You have decided that you do not want an Expert from a Big 4 firm on the basis that the culture and audit methodology in those firms will be very different. You therefore select some mid-tier firms that offer both auditing and Expert Witness services. Who should you contact within those firms?

Let's think about how audit departments in larger and medium-sized firms are structured. As you may know, the people who are ultimately responsible for an audit are called Responsible Individuals, or RIs. They are the senior people on each audit team and they sign the audit reports, using their own name. If something goes wrong with an audit it will be the RI who is in the line of fire. Poor Peter Meehan, the RI on KPMG's Carillion audit, is not exactly a household name, but he has had a much bigger taste of the spotlight than he would ever have imagined or desired. So you definitely want your Expert to be an RI? Well maybe, it depends on what the key issues in the claim are.

If the key issues in the claim revolve around what a competent auditor would have said or done at a particular moment in time having had sight of a particular document or having been provided with a particular piece of information then yes, an RI is probably your best bet for an Expert. After all, they are the people at the coalface. But finding one willing to do the job won't be easy. The work of an audit department revolves around a job plan; a piece of often quite complex software that keeps a record of all the audit jobs undertaken by the firm, the start and finish dates of the audits (which are often designed to meet accounts filing deadlines) and the names of all the audit staff at each level who are available to do the work. An RI's portfolio of audit clients is structured such that time is set aside in his or her diary (which may be days or weeks) to enable them to review audit files as each one is completed so that filing deadlines or other important dates can be met. Superimposing an unpredictable timetable of Expert report deadlines, consultations, Expert meetings and Court

hearings over an already onerous job plan schedule is simply too daunting a prospect for most RIs to contemplate.

In addition RIs, who may or may not be partners in the firm, are tasked with winning new audit clients that will bring in recurring fees to grow the practice. A one-off fee for Expert Witness work is unlikely to make a sufficient contribution towards their targets to tempt them into this line of work.

Even if an RI can be persuaded to take on an Expert assignment, you may need to proceed with caution, as you would with any inexperienced Expert. Unless they have somehow managed to combine their audit work with doing Expert Witness assignments on a regular basis (a difficult trick to pull off) they may have little if any knowledge of the legal framework, the scope of the opinions they are being asked to express or the nature of the advice being sought by the legal advisers. Bear in mind also, that accountants, including auditors, are not renowned for their extrovert personalities. The witness box, or even consultations with Counsel, can be a dauting prospect for someone not used to the limelight.

So if an RI is not always the best answer, what is the alternative? I refer back to the nature of the issues in dispute. The RIs are the men and women on the ground and arguably there will be certain questions only they can answer. But of course they do not operate in a vacuum, particularly in firms of any substance. These firms will have technical and compliance teams, including technical and Ethics partners, that decide and enforce the audit methodology and processes to be adopted by the audit teams, including the RIs, and provide training on a range of issues relevant to the work of the auditors. Many of them will be used to explaining difficult accounting or auditing concepts to an audience.

Members of the technical and compliance teams may or may not be RIs. They do not need to be – their job does not include signing audit reports – but they may have drifted into a compliance role having previously acted in the RI position. They will generally be of a more technical or academic mindset than the RIs, who are more commonly ‘general practitioners’. If the issues that are the subject matter of the claim relate to complex technical accounting regulations, audit methodology or the ethical conduct of the firm, you may be better off going to the relevant specialist within the compliance team, rather than the RI, who would be consulting the technical or compliance partners in any event. Why not go straight to the horses mouth?

Of course many of the larger accounting firms, and some of the smaller ones, have specialist forensic accounting teams whose members are used to providing Expert evidence in a wide range of legal cases, including those involving allegations of professional negligence. To do this successfully in an audit negligence case I suggest that they either need to have recent experience of acting as an RI or be involved in the audit function in a technical or compliance capacity as I described a moment ago. If your potential Expert has neither recent experience of acting as an RI nor ongoing involvement in his or her firm’s audit department you may want to question whether they are really the right person for the case.

Shows that whilst an RI’s expertise may be the most relevant to the case, depending on the issues being dealt with, they are not necessarily ‘at the top of the tree’ in terms of determining how a particular firm may interpret the regulatory framework or carry out its audits.

Firmwide governance: responsible for all aspects of the firms professional work

Technical committee: responsible for interpreting and commenting on the regulations, deciding how they will be implemented within the firm, monitoring compliance, feeding back to firmwide governance on issues of concern.

Ethics partner: feeds into firmwide governance and technical committee. Responsible for the interpretation and implementation of the terms of the Ethical Standard for auditors, for determining the firm's ethical policies in relation to all work carried out for audit clients, monitoring compliance with those policies and highlighting an areas of concern

RI's responsible for individual audits.

I suggest that it is at least helpful, if not essential, to have a basic understanding of how professional firms, in whatever area they operate, are structured in order to ensure that you are selecting Experts with exactly the right expertise to address the issues in your case.

Tip 5: Seek advice early

If there is one plea that will be echoed by pretty much every expert it would be, please don't leave it to the last minute before consulting us. We understand that litigation can be unpredictable at times, and you don't want to incur unnecessary costs on behalf of your client but presenting us with deadlines that are wholly unrealistic could lead to work being rushed, errors creeping into our reports or important documents or information being overlooked. An Expert from a firm of any size will have mandatory quality control procedures that must be adhered to before a report can be released, so they cannot be working on amendments or additional information disclosed only hours before the deadline for the exchange of reports.

Worse still, you could be damaging your client's case by failing to take Expert advice at the outset. Not long ago I was instructed by solicitors acting for a Defendant audit firm to provide Expert advice concerning a claim brought by the firm's audit client for failing to identify that the financial statements had omitted certain creditors and were therefore incorrect. Having looked at some of the accounting records it became clear to me that the Claimant company had an excellent case against the Defendant audit firm. Unfortunately for the Claimant, that excellent case was not the one pleaded in the Particulars of Claim, which was patently flawed. The Particulars were based on information provided by the Claimant company's liquidators. At the risk of offending any liquidators listening, it's my experience that insolvency specialists, particularly those from firms of accountants, sometimes believe they have sufficient accountancy knowledge to bring a claim for professional negligence without seeking the input of an Expert, when this is not in fact the case. This can be a perfect example of a little knowledge being a dangerous thing. The liquidators in this case failed to perceive that the so-called 'missing creditors' were part of quite a complex fraud involving the circulation of funds through bank accounts whose existence they didn't seems to be aware of. Since it would have been impossible for me to write an Expert's Report for the Court without setting out the full picture, my instructing solicitors settled the case as soon as they could but for a sum considerably less than may have been achievable had the liquidators set out their case properly. Their parsimony may have been to the cost of the creditors in the insolvency.

On a practical level, it simply doesn't make sense not to secure your Expert quickly in the current climate. In common with many other sectors of the economy, the accountancy sector is suffering from a severe shortage of resources. We simply have more work at the moment than we have people to do it. For the first time in my nearly 40-year career, my firm was forced in November to

close its doors to potential new audit work that would require resource commitment before the end of May 2022. My husband's firm is in the same position; both firms have turned away hundreds of thousands of pounds worth of recurring work through lack of staff – unheard of! Why is this happening?

As you will all no doubt be aware the audit profession is going through a major re-structuring process designed to improve audit quality in the wake of high-profile audit failures such as Carillion and Patisserie Valerie, and further reforms are on the cards. The Big 4 audit firms have been given little option but to drastically improve their audit processes, which requires more audit staff, more RI's and higher costs for their clients. To improve audit quality and meet their obligations the Big 4 are hoovering up staff from the smaller firms. At the same time they are shedding audits they perceive as too small or unprofitable, leaving some companies desperately searching for new auditors among the mid-tier firms who are struggling to staff their existing portfolios, let alone take on new clients. It's a perfect storm for mid-tier companies and audit firms alike. The pool of candidates willing to incorporate non-recurring Expert Witness work into their day job may be quite small.

Tip 6: talk to your Expert about issues beyond the detail of the case?

If your Expert is truly immersed in the profession in which he or she professes to be an Expert they will be able to talk on a general level about what's happening in that profession and any new developments that are impacting on its future.

The great hope for the future of the auditing profession is artificial intelligence, or AI, which, when it is fully on line, will remove or significantly diminish the need for audit teams to spend time doing mechanical tasks such as checking postings and verifying invoices. Even now, in its relatively embryonic stage, AI is helping auditors identify transactions that are out of the norm or are worthy of further investigation, leaving more time for human minds to focus on areas where judgement is required.

If the proposed reforms work out as anticipated, the audits of the near future will look very different, and any Experts who are not in tune with the momentous changes in the pipeline will in time come unstuck. Machines will be left to audit past transactions while human brains focus on areas that currently do not fall within the scope of auditing at all, or at least not to any great extent. The auditor's headlights will need to face forward, as well as backwards, so that they can assess the overall robustness of a company and its ability to withstand unexpected events that arrive out of the blue – such as pandemics for example! Non-monetary areas are also beginning to fall squarely within the auditors' area of focus – the possibility of more regulations covering the audit of a company's environmental, social and governance policies and controls is a realistic possibility. Your Expert needs to be on top of what is going on in their own profession if they are to retain any credibility in the Witness Box.

Tip 7: Think carefully about the instructions

Obviously giving your Expert the right instructions is key to them being able to give the legal advisers, and the Court, the right information and advice. I would always recommend asking your Expert to prepare an advisory report for your own purposes first, before you instruct them to prepare an Expert Witness report addressed the Court. Not only will you then know what your own Expert's views are likely to be, which may give you a chance to settle the case without incurring

further unnecessary costs, but it will also give your Expert the opportunity to guide you as to what questions he or she thinks you should be asking him. There have been many occasions when it is clear to me having read the Pleadings that the questions I have been instructed to respond to are not the right questions or will not give the complete picture. Whilst I will always answer all the questions put to me in an advisory report, I also have scope to address other areas or factors that seem to me to be relevant to my evidence and the lawyers then have an opportunity to consider whether to include these additional areas in the scope of my formal instructions.

Tip 8: Make sure your Expert sees all the relevant information

It goes without saying that an Expert will need to have sight of all the relevant information in order to express an opinion that the legal team can rely on. In cases involving a large volume of documents it may not be necessary or cost effective to share everything with the Expert. The difficulty is that the legal advisers may not be able to identify every document that is relevant to the Expert whereas the Expert may not know that they are missing a critical piece of information because they have not been provided with it. In most instances, however, it should be relatively easy to identify the technical documentation that the Expert needs to review and opine on. However they do need to have some understanding of the background to the case and the context in which the technical documents have been prepared. I am often provided with a set of audit files and asked to give my opinion on whether the files show any evidence of negligence on the part of the auditors. But there is no such thing as a perfect audit file and it will always be possible to identify the odd gap in the audit planning documentation or work that could have been done better. To know whether these apparent deficiencies had a significant impact on the overall quality of the audit or caused the auditors to issue an audit opinion that was incorrect it is necessary to know what has gone wrong – in what respect are the financial statements said to be incorrect and why. Without this critical information the Expert could write a report about how the audit of say, fixed assets, was non-compliant with the regulatory framework when the claim has nothing to do with misstated fixed asset values.

Tip 9: Let the Experts talk

The end result of not giving the Experts adequate context is that their reports are like ships passing in the night, with the two Experts focusing on completely different issues. Whilst it is sometimes necessary for the parties to give their Experts slightly different instructions, it can render the Expert meeting and Joint Statement process redundant and be less than helpful to the Court. In my experience Expert input can often be most helpful if the Experts are afforded the opportunity to talk to each other at a relatively early stage in the proceedings. In cases involving complex valuation methodologies or the measurement of loss it is preferable if they can agree their approach, or at least identify where they disagree, before either of them have prepared their formal Expert report.

Tip 10: Keep your Expert in the loop

Few people enjoy surprises in their professional work and Experts are no exception. Keeping them abreast of general developments in the case is a courtesy they will appreciate, since it allows them to assess the progress of the case and when or if their input is likely to be needed. We have all been involved in cases where there has been radio silence for a year or more, only for it to pop up again unexpectedly, often with a deadline we had not allowed for in our work schedule.

So those are my Top 10 tips for selecting and using Experts. Thank you for listening.

Roger Flaxman ACII MAE
Flaxman's Partners

"Changing roles and responsibilities of brokers"

45.17mins

ROGER FLAXMAN ACII; MAE;

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CEDR Solve Panel Accr. Mediator
CEDR Accr Negotiator - Dispute Resolution

Experienced Expert to the Courts in Matters of Insurance

CHAIRMAN and PRINCIPAL CONSULTANT
FLAXMANS

"There is so much more to a contract of insurance than the policy wording, alone. It is in the rich vein of insurance practice and market integrity standards that so often lies the solution to a dispute."

Roger's insurance career started in September 1970 as a property fire and accident insurance broker at Leslie & Godwin, Brokers at Lloyd's (long ago subsumed into what is now Aon), where he cut his teeth on a wide variety of international property insurances in UK, USA, Northern Europe and Scandinavia.

In the mid-1970s he migrated to, the then relatively new class of insurance, professional indemnity following upon the seminal case of Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964]; a leading case on economic loss and the duty of a professional adviser to a third party. The immediate demand for PII was fuelled by the rapid development of case law in the 1980s which opened the floodgates to a new source of remedy against the professions and service providers of all disciplines and all sizes.

In the decade 1979 to 1989 at Lloyd's broker C T Bowring (later integrated with Marsh) he became involved in the mandatory insurances of Lawyers, and the compulsory insurances Accountants and Chartered Surveyors. He became a leading adviser to professional bodies on the developing demands and needs of protection for both the practitioners and their clients. This was followed in the 1990s by the development of Directors and Officers insurances and other high-risk liability programmes both at home and overseas, which led Roger to be exposed to a rich vein of developing law and insurance needs for professionals and construction industries in particular. A period of time in Australasia in dealing with Mutuals and Defence Unions led to a new angle to tackling the development of insurance contracts to meet financial service industry needs and later, the evolving computer and Bio Science industries that were in need of insurance more flexible than the traditional lines.

In the mid-1990s Roger became involved with the PI insurance of insurance brokers at Lloyd's of London and soon thereafter with the British Insurance Brokers Association who engaged him to advise its members on broker duties, obligations and liabilities; and the management of the risks in an increasingly high-speed, high-tech sales environment.

In January 2000 after a thirty-year career as national and international broker Roger set up a business advising professional bodies and trade associations After the financial crash in 2008 Roger's business was in demand as a specialist claims advocacy service for policyholders in dispute with insurers about coverage.
This in turn led to increasing demand for his services as an expert to the courts; mainly in matters of insurance industry practice and broker/ agent negligence claims.

Since 2000 Roger has served in circa 200 cases as expert to the courts. He is a member of the Academy of Experts.

Roger is well known and respected in the industry for his independent advice and services and his special ability to get to the working heart of an insurance conundrum.

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The Changing Roles and Responsibilities of Brokers

Hello, I am Roger Flaxman and I am the chairman of Flaxman Partners.

We are insurance advocates for policyholders with disputed claims. We are all seasoned insurance practitioners but we are not lawyers. However, we spend a lot of time advising lawyers on insurance practice and also taking advice from lawyers in our role as alternative dispute resolution practitioners.

We also act separately as experts to the court. I have acted as expert adviser or expert witness in some 200 cases over the last twenty years.

The Activities

The activities of the insurance broker have changed enormously since I first set foot in the insurance industry in September 1969. The role has evolved rather than changed and today the active duties and responsibilities are almost unrecognisable from what they once were.

I mention this because the fundamental role of the broker remains more or less the same but what they do and how they do it brings about an entirely new set of obligations and attendant risks.

This is not sudden; it has been evolving over at least thirty years but where it stands today is worth looking at very closely.

To give you a comparable that puts today's industry into perspective let me tell you about the past and so you can see what today has evolved from.

Brokers evolved for two main reasons:

- Prospective buyers of insurance needed to know where to find insurance they could trust and rely upon.
- Seeing an opportunity to make money; as someone's agent and of course that has emerged as the agent of the buyer but closely associated with agency of the seller. There is an acknowledged conflict in the role of a broker acting for both customer and insurer which has been managed reasonably well for over 200years but it is still there.

For years, of course the industry was paper-based and very much a '**people industry'**……..

The ordinary role of the broker was to find insurance, compare terms arrange insurance for clients – they weren't called 'customers' in those days!

The client wanted to be sure ABOVE ALL they got the **best price – nothing has changed**

But also, there was a considerable amount of time given about risk management **coverage options** and **managing claims.**

Much of that has disappeared now except from that type of broker that specifically aims to provide what they describe as a **Bespoke** service**.**

There are some **3000 firms of brokers** around the country most of whom serve the community in or around where they work. They are at the coal face of UK commerce and industry and dealing with the minutiae of the needs of an infinite range of businesses and of course of consumer needs.

There was, and remains now, a **chasm of difference** between a broker in the **London market** and a broker in the '**high streets'** of cities, towns and villages throughout the country.

In the London market they are more often wholesalers specialising in insurances that they then supply to the nation's 'high street' brokers.

London market brokers tend to be traders in the insurance market more than are brokers around the country.

The role of technology in the period between the 1970s and now has irrevocably changed the dynamics of insurance transaction and advice.

It has:

- Put increasing distance between the insurer and the Insured
- Put increasing distance between the broker and the customer

The broker of yesteryear had quite a lot of time to spend with a client getting to know them, see their business in action and really understand their needs.

In 1969 when I started work my induction day included a rule that 'all correspondence must be answered within 10 working days'!

Today, the demands of customers are immediate and technology has been devised to make the *sale* of insurance immediate, remotely with or without an intermediary broker.

Today, the broker has too little time to do justice to most of its clients and therein lies **the nub of modern-day broker's problem**.

There is an irony in this situation:

Today, at the touch of button there is more information available than anyone can cope with and the expression 'data dumping' has got into the Lexicon.

Because brokers have educated their client to understand the meaning of a Fair Presentation of the Risk the client dumps as much information as they can muster and expects the broker to sort it out. The broker cannot; they often do not have the time or resources.

Much of this information and indeed the transaction with underwriters is carried out remotely and on-line. This is intended to make the job much easier for the customer and the insurer but it has had the unintended consequences of removing from the transactional process the ability to get good advice and direction.

I'll give you an example.

A broker arranged a commercial combined insurance for a **laundry**. The drop-down box, in the underwriting system of the insurer that they were intending to use, offered **launderette**

but not laundry. The broker chose launderette and issued the policy. A claim arose and the insurers voided the policy for misrepresentation.

Another example: A broker arranged an insurance for a property owner. The property a three-storey residential and commercial shop with flats above, was adjacent to his own shop and home. Very common.

The property he was insuring was semi furnished and undergoing refit to be let.

A water-damage claim arose when a storm had damaged the roof and which in turn had caused damage to the water cistern in the loft, which damage was not discovered for about four weeks.

Insurers refused to pay the claim and threatened voidance for failing to disclose the property was unoccupied. The broker did not find out anything about the status of the property and the customer was not asked any questions from the pre-determined list on the underwriting screen that would have elicited the information the underwriters relied upon at the time of the claim.

Proposal Forms and SoFs

The modern industry has almost done away with proposal forms so as to make the *buying process* easier for the customer. They rely instead on Statements of Fact which the Insured does not really understand.

One of my colleagues recently had a client in a large London villa home tell him that when the statement of fact told him that he was ‘not within 200 metres of a watercourse’ he believed them because they must know!

He knew of the rivulet 100 yards down the road. and down the hill. but thought insurers knew that and were just telling him what he already knew.

So when the subsidence claim arose the first thing the insurer did was to refuse cover - for misrepresentation. The watercourse being within 200 metres of the home

This kind of error is largely due to the weaknesses in the technology and processes that derive from automation and removing as much contact with the customer as possible. In my opinion Artificial Intelligence is a long way off as a substitute for the mind and expertise of a competent broker.

Brokers are ‘caught up in this’ rather than the culprits per se, but it is a growing problem to work out who is to blame.

50 Years On

The insurance industry has gone from a people industry 0years ago to a ‘numbers game’ industry in the nineteen eighties following the ‘big bang’ (Deregulation of Financial Services 1986) and now has become an algorithmic, actuarial, data management programme of process management that, to some extent makes the role of the broker redundant.

So how come there are some 3000 broker firms if they are redundant?

What are they doing that a customer (as we now have to call them) cannot do for themselves - online?

Herein lies the nub of the broker’s role today.

Brokers have become surrogate underwriters. The advent of the underwriting agency, Managing General Agency, and the broker network model in combination with the desire of insurance companies to outsource the distribution and administration of their products has led to underwriting authorities being liberally distributed to brokers throughout the land.

This gives the broker a new role. They are in fact the agent of the insurer in selling their product. They do this in the capacity of a broker with underwriting authority supplying the customer with a pre-determined product. The broker also has to meet premium volume targets imposed by the insurers in order to retain their 'agency'.

That is light-years away from the original role of the broker.

The ordinary role of the broker was to find insurance, compare terms arrange insurance for clients and gradually evolved to advise on coverage risk management and claims.

The broker still has something to sell to a client who, in many cases, has decided it does not want to pay for advice.

It has been the saviour of the broking industry and there are no signs of it changing.

So what are the issues to consider from your (solicitors) point of view?

The broker's duties are largely defined by common law duty of care & contract and the FCA regulations. I obviously don't need to tell this audience anything about that. However, as a practitioner in the claims advocacy and expert witness fields I am acutely aware of the things that cause brokers to be challenged by their customers.

- Most broker can't afford to provide the standard of service expected by the courts.
- The overarching problem in broker prof neg claims is the wide disparity between the standards by which the law judges them and the standards by which they are typically operating in the role of transactional sellers of a product and often a commodity product.

This is the **'elephant in the room'**. The client/customer expectation is that their broker is their adviser and confidant pari-passu with their solicitor, accountant or perhaps architect consulting engineer or chartered surveyor.

But each of these charges fees for advice whether the client takes the advice, or not.

The broker is rewarded on making a sale and the entire industry is geared towards reducing the time and frictional costs of sales.

That means the broker is moving further away from his customer or client and gets to know less and less about them. This is a crucial issue.

Conflicts of interest are a problem to the extent that many brokers now have underwriting authority to one degree or another.

Broker issues

So let me take you now to some of the most common issues that brokers talk about which I think are relevant to you as litigation lawyers.

- The automated quotation systems don't work when the question sets are not detailed.

- Demands and needs *assessments* are increasingly rare but are essential to evidence.
- Automated documents are replete with errors (e.g. recently, 17 errors in one Fleet insurance policy)
- Far too much paper *in addition* to the policy.
- Key facts documents. One cannot para phrase a contract!
- FCA regulation is tick-box and increasingly ineffective in the area of ICOBS and PRINS.
- How to sell on value rather than on price
- The contract of indemnity is not a 'promise to pay'.
- Brokers don't tell customers what the policy doesn't cover – it should be the starting point
- Dynamics of sales and targets have taken over from ethics and client relationships.
- Take away humanity and you remove 'the glue 'of the relationship.

- Must be seen as independent trusted advisor and not a sales robot.
- A broker must learn how to charge for their value – the value of paid-for advice
- Days of general broking are probably numbered but there is a great future in specialist broking

These are issues about which there is much more to say, but not in the time available today.

I hope they give you a flavour of the role of the modern insurance broker. I am happy to answer questions by email if that would help you.

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Rachel joined Indemnity Legal as an Associate in 2021 having worked in the insurance litigation sector since 2014. During this time, she has advised leading insurers on a broad range of coverage issues, and has worked with insurers, loss adjusters, insolvency practitioners, brokers, and policyholders to resolve insurance-backed, FSCS-funded, and Third Parties (Rights Against Insurers) Act claims – both in and out of Court. Rachel has a wealth of experience in claims involving property damage, construction-related disputes, and claims against professionals. She now advises individuals and businesses on the most effective ways to resolve disputes with their insurers and ensure that their legitimate claims are paid.

THIRD PARTIES' RIGHTS AGAINST INSURERS

PNLA Online Conference

Rachel Auld

Indemnity Legal

Rights to pursue insurers of insolvent insureds

Position before 1930

Proceeds of insurance = asset of the insured

Third Parties (Rights against Insurers) Act 1930

"Unfortunately, the 1930 Act does not work as well as it should"

(LAW COM No 272)
(SCOT LAW COM No 184)

What was wrong with the 1930 Act?

1. Two sets of proceedings
2. No right to information about the insurance
3. Proceedings to restore company to Register
4. Technical defences

Third Parties (Rights against Insurers) Act 2010

1. Transparency ⇨ right to information
2. Shortcutting the process ⇨ one set of proceedings

Third Parties (Rights against Insurers) Act 2010

Other benefits:

- No need to restore a dissolved company to the Register
- Insured can be added to the declaration proceedings
- Certain breaches are forgiven
- Dissolved insured's failure to assist insurers does not affect third party's claim

Which Act?

Redman (suing as widow and administratix of the estate of Redman, deceased) v Zurich Insurance plc and another [2017] EWHC 1919 (QB)

"In any given circumstances, either the 1930 regime applies or it does not"

Mr Justice Turner

1930 Act ← 1 August 2016 → 2010 Act

Insolvency event AND liability event

Insolvency event OR liability event

Transfer of rights

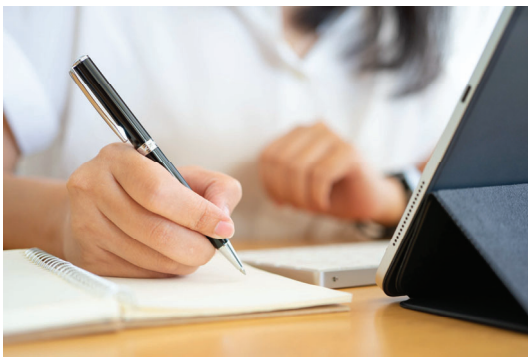
Individuals:

- administration order
- enforcement restriction order
- debt relief order
- voluntary arrangement
- bankruptcy order

Corporate bodies, etc.:

- voluntary arrangement
- administration
- receivership
- liquidation

Entitlement to information



Reasonable belief:

i. Liability incurred

ii. Insured against liability

iii. Rights have transferred

iv. Person with information

What information?

- Identity of insurer
- Terms of policy
- Has liability under the policy been rejected?
- Are there coverage proceedings?
- Limit on funds

Defences

Komives and another v Hick Lane Bedding Ltd (in administration) and another [2021] EWHC 3139 (QB)

Checklist

1. Act quickly: give notice
2. Engage with insured
3. Which regime?
4. Third party bound by settlement

AB and CD v Transform Medical Group (CS) Ltd and Travelers Insurance Company Ltd [2020] CSOH 3

5. Shortfall?
6. FSCS
7. Arbitration

Takeaway points

- 1930 Act may still apply
- Request information about the insurance position
- Consider coverage defences

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Rocco Pirozzolo
Harbour Underwriting

"Improving your chances of obtaining funding and ATE."

31.54mins

Harbour Underwriting

Rocco Pirozzolo

Underwriting Director

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Rocco has been with the Harbour Group since 2014. Rocco is a hugely experienced underwriter of complex litigation risks, having spent two decades developing legal expenses insurance business for a number of businesses.

A practising solicitor, Rocco was, up until 2016, a director in the investment team of Harbour Litigation Funding. In addition to being a member of the leadership team of Harbour Underwriting, Rocco is one of the leading figures in the dispute resolution community.

Since 2003, he has been serving on the forums and committees of the Civil Justice Council, a statutory body responsible for overseeing and modernising the civil justice system. Rocco has also been a member of The General Insurance Standards Council's Working Party on BTE insurance and the Chair of The Association of British Insurers' Legal Expenses Committee.

Rocco is the general editor of The Law Society's Litigation Funding Handbook and the author of a number of its chapters, including that on ATE insurance. He is the co-author of the chapter on legal expenses insurance in the practitioners' textbook Friston on Costs.

Harbour Underwriting

Your only certainty in a dispute

Professional negligence & liability – The new normal

Improving your chances of obtaining funding and ATE

Rocco Pirozzolo – Underwriting director

Harbour Underwriting

Harbour Underwriting is one of the leading providers of commercial dispute insurance for both claimants and defendants.

We provide bespoke insurance solutions to brokers, law firms, funders, advisors and corporates to help reduce the financial risk of litigation and arbitration.

After the Event (ATE) insurance is a fundamental tool for mitigating the costs involved in disputes, giving you and your clients the confidence to pursue or defend the claim.

Rocco Pirozzolo

An experienced underwriter of complex litigation risks, having spent two decades developing legal expenses insurance business for a number of businesses. A practising solicitor, Rocco was, up until 2016, a director in the investment team of Harbour Litigation Funding. In addition to being a member of the leadership team of Harbour Underwriting, Rocco is one of the leading figures in the dispute resolution community. Since 2003, he has been serving on the forums and committees of the Civil Justice Council, a statutory body responsible for overseeing and modernising the civil justice system. Rocco has also been a member of The General Insurance Standards Council's Working Party on BTE insurance and the Chair of The Association of British Insurers' Legal Expenses Committee.

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Within appetite

- Professional negligence claims are within the appetite of funders and insurers
- Some funders and insurers may feel more comfortable with cases against certain professionals – such as solicitors, surveyors, valuers, etc.
- Some funders and insurers may be wary of claims against other professionals – e.g., auditors
- There may be 'commercial sensitivities' – such as claims against solicitors and barristers
- Always carry out a conflict check with a funder and insurer

Success rate on obtaining funding/ATE cover

- No published statistics of success rates of obtaining funding or ATE insurance
- Some funders have publicised the number of enquiries that are ultimately funded: around 3% - 5%
- Various reasons – from lack of understanding of funder's investment appetite to failing to address issues required by the funder
- Expect a higher rate of enquiries to funded cases for professional negligence cases (3%-5% reflects all enquiries)
- ATE insurance – good conversion rate of requests for cover to professional negligence cases insured

Process – what is required?

- Litigation funding – tends not to be an application form and so there is a risk of 'missing the mark' of those issues that need to be addressed
- ATE – a proposal form will guide you through the matters you need to address; questions asked, and documents requested in the form

Funding – issues to address

- **Enforcement** – assessment of assets; where these are; enforcing against them; any insurance cover; potential limit available
- **'Economics of the case'**
  - Costs budget – ensure realistic and explains all assumptions
  - Likely recoveries – provide an assessment of quantum, such as a preliminary expert report
  - Does the ratio of costs compared to likely recoveries work? As a rule of thumb, ratio of budget: recoveries = 1:10 – but it may be lower
  - If the economics is tight, what can be done to help - e.g., instead of being paid 75% of hourly rates, could a lower % be paid?
- **Merits** – opinion from counsel

When to apply for funding

- Do not apply too early – at the very least, the factors above should be addressed
- When you can highlight not only the strengths of the case but also weaknesses and challenges – and how these weaknesses and challenges could be overcome
- Some funders are willing to invest in a case before full funding is available and so assist in the due diligence – e.g., by providing funding for an expert report

ATE insurance – issues to address

- **Meritorious claim** – look at the merits of the case assuming that the case goes to trial. Where there is more than one opponent, the prospects of success against each opponent will be considered
- **How will the case be funded to trial?** If funding is needed, what is current position with the funder?
- **The retainer in place with the solicitors and counsel** - underwriters should assess each proposal irrespective of the retainer in place. Consideration may be given as to whether the legal team have 'skin in the game' by exposing their work in progress and, if so, how much
- **Settlement expectations** – what would be a reasonable settlement?
- **Approach to settlement** – what is the strategy to settle?

When to apply for ATE cover

- Is it too early to obtain ATE cover? Still investigating the claim; unable to make a reasonable assessment of the merits
- Optimum time for seeking adverse costs cover - at the point of issuing proceedings
- Insurers are wary of adverse selection – some insurers refuse to look at any request for cover within 6 months of trial or the trial window

Concluding thoughts

- Call funders to talk about a case on a 'no names' basis to ensure it falls within their investment appetite
- Funders (through their investment) and insurers (through the cover) are financial stakeholders in a case – look at their involvement as akin to a joint venture
- Expect 'tyres to be kicked' – especially with funders as the case may go through more than one round of due diligence

Please contact me if you have any questions

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Thank you!
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Kevin Wonnacott
Wonnacott Consulting Ltd

"Third party rights against insurers'."

25.34mins

Kevin Wonnacott – Costs Lawyer and Managing Director, Wonnacott Consulting Limited

More than 30-years' experience – Kevin has led, managed and advised on many difficult costs matters for a wide breadth of clients and case types, often involving international and cross-jurisdictional elements, where the issue of costs has become contentious, complex and which requires concentrated and high skilled input from experienced costs lawyers.

Striving to deliver the best outcomes for clients whether it be by way of negotiated compromise at the budgeting stage or advice and advocacy within the resultant detailed assessment proceedings – Kevin's philosophy is to ensure the client receives robust, effective and efficient advice and representation at all times.

Having built strong professional connections with the key firms and practitioners operating in the dispute resolution and costs litigation sectors, Kevin is very well placed to advise and represent a party which is in need of an experienced costs lawyer.

Principal Services:

* Advice on retainers, funding arrangements
* Preparation of and advice on costs budgets
* Preparation of and advice on bills of costs
* Preparation of and advice on costs pleadings
* Representation at Detailed Assessment Hearings
* Strategic advice on settlement, effective disposal

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Kevin Wonnacott – Costs Lawyer – Managing Director, Wonnacott Consulting Limited

Notes of Kevin's talk to PNLA Conference – 2 March 2022

- Budgeting
- Summary Assessment
- Detailed assessment

1. Budgeting

So, the main purpose or at least the idea behind it - of costs budgeting is to manage the costs incurred throughout the litigation process – for the courts to manage prospective recoverable costs (between the parties) and for there ideally to be no nasty shocks at the end of the case as between litigants – the idea again, for there to be greater transparency on expenditure.

I am sure you will be familiar with the forms which parties are required to use – namely precedent H – which sets out the historic costs and prospective costs going forward by reference to phases of work.

And then after the parties have exchanged their precedent Hs, parties are required to agree or narrow the issues arising on budgeted costs and then exchange budget discussion reports, called Precedent R.

Default position is supposed to be that in Part 7 cases, where the damages claim does not exceed £10m, the court will make a CMO unless satisfied the litigation can be conducted justly and at proportionate costs without the court making one – CPR Part 3.12.

And then at the end of the day – On assessment, if the costs are to be assessed on the standard basis, the court will not allow *more or less* than the figures in the Receiving Party's last approved or agreed budget unless it is satisfied that there is good reason to depart from those approved or agreed amounts (per phase) (CPR 3.18) – it is not on a global basis it is per phase.

Timing

- If value of claim is less than £50k, the budget must be filed and served with the Directions Questionnaire (CPR Part 3.13(1)(a).
- In all other cases, unless court orders otherwise, parties need to serve and file precedent H no less than 21-clear days before the CCMC (3.13(1)(b)).
- Precent Rs to be filed and served no less than 7-clear days before CCMC

Important to keep these dates in mind – if you fall foul, you will then be in application for relief from sanction territory under CPR Part 3.9

Cost

Obviously, until a costs order is secured, the party cannot recover the costs of the budgeting process from the opponent – but in the event it is able to recover those costs, it will be entitled to;

- The recoverable cost of initially completing Precedent H are capped at the higher of £1,000 or 1% of the agreed/approved budget – and that will include pre and post budget costs – not just 1% of the budgeted costs.

- All other recoverable costs of the budgeting and costs-management process are capped at 2% of the agreed/approved budget.

(Part 3.15(5))

Some key points to consider include;

- Budget must be verified by a "senior legal representative"
- Any party that fails to file a budget despite being required to do so will be treated as having filed a budget comprising only of the applicable court fees. The defaulting party must apply for relief from sanction and there are only limited circumstances where relief from sanction will be given (CPR 3.14).
- Court does have discretion to manage costs in claims not automatically caught by CM provisions – 3.12(1A)
- Court cannot approve pre-budget costs (deemed to be all costs up and including the CCMC) but can make comments on them when deciding on future costs to be approved (3.17(3))
- Pre-budget costs subject to DA in normal way
- Applications to vary budgets need to be supported by a prec T – designed to provide more clarity and distinction as between costs subject to prior approval which might now be subject to a variation application
- If the costs order provides for costs on indemnity basis, the receiving party is not constrained by the approved costs budget – but in all cases, under Part 44(3)h), the court will have regard to last approved or agreed budget – and that might also mean if costs are to be assessed on IB.

Practical considerations when approaching preparation and resolution of budgets

- The CMO/agreement represents the likely recoverable amount for the budgeted costs of each completed phase in the event a costs order is secured for those costs on the standard basis

- Whilst the court will consider proportionality of the costs when making a CMO – it does not prevent a party taking the issue of proportionality later on in DA proceedings (Harrison v University Hospitals Coventry & Warwickshire NHS Trust – CoA 21 June 2017)– in other words – approved costs might still be reduced on account of proportionality – I think this is partly due to the fact that the rules provide that the CM process is not a DA in advance – and I think it can be said that in some cases, the landscape does eventually change in terms of what happened in the end compared to what was reasonably foreseen at the CMO stage.

- In terms of preparation of the budget – I would advise that you do not wait for directions, try to begin work at the earliest opportunity which gives the legal team the opportunity to review and attribute incurred costs to their respective phases in readiness for considering assumptions for future costs.

- Working with costs lawyers is a collaborative task – initially costs lawyers will work on attributing incurred costs to the correct phases. Costs lawyers will then guide litigators through the necessary considerations for assumptions and estimates of future costs.

- Assumptions underpinning the future costs need not be long but concisely set out the basis under which the future work is calculated – and of course contingencies should only be included if it is deemed more likely than not that it might occur.

- Monitoring the costs as you go along is strongly advised and of course the costs should be recorded and reported by reference to phasing so that you are in a position to better consider any variances between agreed or approved amounts per phase than what is being spent – and be on top of any need to apply to vary – or if for whatever reason you aren't going to do that – you will need to be ready to think about what reasons there were to depart from the agreed or approved amounts in the event you go on and get a costs order – that might even require engagement with the opponent at the point you know that – even if you do not apply to vary – it shows you did something about it at the time.

Summary Assessment

Only a few things I want to say about this, with which I am sure you will all be broadly familiar

- The usual deadline for filing any N260 is 24-hours before the start of the hearing unless it is fast-track trial when the N260 must be filed not less than 2-days before the trial (PF 44 – 9.5(4)).
- New guideline hourly rates came into force 1 Oct 2021 (https://www.gov.uk/guidance/solicitors-guideline-hourly-rates) which aside from increases to the rates, the guide stipulates that London 1 (city) is not restricted to particular London postcodes – instead the rates are reserved for "*very heavy commercial and corporate work by centrally based London firms*".
- The new rates have retrospective effect – they do not only apply to work from Oct 2021 onwards – and the guide does now say that the rates "may also be a helpful starting point on DAs" – which I think helps counter the usual point people make that GHRs are for SAs only and not DAs.

Detailed Assessment

Overview

- Detailed assessment is the procedure by which the amount of costs is decided in accordance with CPR Part 47.
- Bills for £75k and below will be assessed on the papers only – recoverable costs of DA on those cases are capped at £1500 plus VAT and court fee
- Generally, the costs of the case or any part of it will not be subject to detailed assessment until the end of the case (CPR 47.1).
- The court may order immediate detailed assessment before the end of the case, but an express order for immediate assessment is required.
- The Receiving Party begins the detailed assessment process by serving the bill ofcosts together with a notice of commencement (N252) and specified supporting documents. This must be done within three months of the event giving rise to the right for a detailed assessment (CPR 47.7).
- If RP hasn't commenced in the 3-month period, paying party can apply under 47.8(1) for an unless order – in the absence of misconduct, the only potential penalty for RP is a loss of interest for the period of delay (47.8(3)(b)
- RP does not need permission to commence beyond 3-month period.
- PP serves POD in 21-days – parties can agree to extend period
- RP may serve RPOD – 21-days – but service is optional
- RP must request a DA hearing within 3-months of expiry of commencement period – so 6-months from authority giving rise to DA – DA can be requested after POD before RPOD – parties usually do it after RPOD have been served.
- If no POD are served, PP may not be heard in DA unless court gives permission and RP may apply for DCC.

- RP can apply for ICC after POD served and a DA hearing has been requested
- Interest on the substantive costs will run at 8% from the date of the costs order until date of payment – it's a significant consideration and PP often prefer to mitigate that by making a POA

Cost

- Default position is that the RP is entitled to its reasonable costs of DA on SB – 47.20(1) – there is provision for the court to displace this by looking at matters such as the amount by which the Bill has been reduced, reasonableness of a claim or point taken or conduct – but more often than not, it is more difficult to displace the usual provision if you have not made an offer which you have beaten.
- Provisions of Part 36 (with modifications) apply to the costs of DA proceedings (47.20(4)).
- RP does not lose entitlement to costs of DA if it did not beat its own Part 36 offer – but conversely, it might seek to rely on the enhancement provisions in Part 36 – if it has beaten its own Part 36 offer.
- Normally expected to serve and file N260 for costs of DA 24-hours before the hearing and these are usually summarily assessed at the end of the hearing

Some key points when considering approach to detailed assessment

- For most claims for costs (Part 7 claims allocated to the multi- track), the work undertaken after 6 April 2018 must be presented in an electronic spreadsheet format which aggregates and reports the costs by reference to phase, task, activity and expense (precedent S – PD47 para 5.1)
- Whilst it is not mandatory for costs claimed as incurred before 6 April 2018 to be set out in e-bill, in practice for the most part – people do now – except there is no requirement to split out the costs by reference to phase and task.
- The costs of preparing the Bill are recoverable in the Bill – and the extent of recoverability falls outside the principal costs order which might have been made (e.g. partial costs order) – in other words, the RP can recover these costs separately and in addition.
- If you can record and report your time by reference to the phases and tasks provided for in the PD to Part 47 – this will not only reduce the time required to be spent preparing the Bills – it should lend itself to a better chance of pre-Bill settlement as there may be an opportunity to present costs to the PP that sufficiently informs them to engage in settlement discussions.
- Early Part 36 Offers are advised – the costs of preparing for and attending contested DAs are notoriously high and increase sharply as you get to the stage of having to prepare the documents for and then attend the hearing (the papers are usually lodged 7-days before the hearing but often work has to start on that much earlier than this – it is expensive and time consuming)

Signatures to a Bill and the information a Bill must set out regarding fee-earners claimed.

Barking, Havering & Redbridge University Hospitals NHS Trust v AKC [2021] EWHC 2607

Mrs Justice Steyn – 29 September 2021

Appeal from a CJ decision – the Bill when signed, needs to show the signatory as identifiable – the fact it did not, meant it did not comply.

Further – a Bill must set out the claims for each individual timekeeper/fee-earner by reference to their name and status – it is not acceptable to categorise time or batches of time spent by fee-earners into generic grades –I n this case, they did not split out the times as spent by each individual person and the Bill was struck out – I understand it is going to appeal but I must stress that when you are having bills prepared, that they set out the detail in this regard or you face the risk of a strike-out point against you.

Jayna Patel
PNLA South of England Representative

Conference Closing Remarks
1.45mins

CPD: 10 Hours
7 Hours – Filmed talks
1 Hour - Conference Pack Review
2 Hours - Questions & Answers live closing event held @ Outer Temple Chambers (1st November)

To complete your feedback form please go to

https://www.pnla.org.uk/event/the-new-normal-professional-negligence-liability-update-pnla-online-conference-hosted-by-jayna-patel-of-pnla/