



**PROFESSIONAL NEGLIGENCE AND
LIABILITY UPDATE**

ENGLAND & WALES

LONDON CONFERENCE

"Financial Services & Group Litigation"

20th March 2023

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

LONDON CONFERENCE

Monday 20th March 2023

- 0900–0930 Registration and Refreshments
0930–0935 PNLA Introduction
0935–0945
“Introduction”
Nicole Blakey
Penningtons Manches Cooper/PNLA London Representative
<https://www.penningtonslaw.com/people/a-e/nicole-blakey>
- 0945–1015
“Chairman’s Keynote Address”
David McIlroy
Head of Chambers, Forum Chambers
Visiting Professor in Banking Law at Queen Mary, University of London
<https://forumchambers.com/our-people/david-mcilroy/>
- 1015–1100
“Financial Services litigation – Opportunities and Elephant Traps”
Michael Brown
Partner, Pennington Manches Cooper
<https://www.penningtonslaw.com/people/a-e/michael-brown>
- 1100–1115 Refreshments
1115–1130
“ATE Insurance and Litigation Funding”
Jamie Molloy
Ignite
<https://igniteins.com/about/>
- 1130–1215
“Contract Damages and causation, hypothetical problems”
Ruhi Sethi-Smith
Forum Chambers
<https://forumchambers.com/our-people/ruhi-sethi-smith/>
- 1215–1300
“The Forensic Accountant Expert’s Perspective”
Steve Cornmell FCA
Managing Director, Testifying Expert - Kroll
<https://www.kroll.com/en/our-team/steve-cormmell>
- 1300–1400 Lunch
1400–1445 *“Getting out of the contract – penalties, undue influence, extortionate credit bargains and more”*
Jonathan Lester
Forum Chambers
<https://forumchambers.com/our-people/jonathan-lester/>
- 1445–1530
“Consumer Duty”
Daren Allen
Partner, Shoosmiths
<https://www.shoosmiths.co.uk/people/cvdetails/daren-allen>
- 1530–1540 Refreshments
1540–1610
“IDisclosure preservation, processing & authenticity”
Dominic Tucker
Associate Director, iDiscovery Solutions Ltd
https://idsinc.com/en_gb/Array/dominic-tucker/
- 1610–1625 Questions and discussion session and Chair’s closing remarks
1625–1630
Katy Manley
President, PNLA
<https://www.pnla.org.uk/members/mrs-katherine-susan-manley-13521/>
- 1630–1800 **Drinks Reception at The Anthologist, 58 Gresham St, London EC2V 5AY**
– sponsored by iDiscovery Solutions Ltd & Ignite

Live Talks = 5 hours 30 mins

Conference Pack Review = 1 hour

Total CPD = 6 hours 30 mins

**PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE
Penningtons Manches Cooper, 125 Wood St, London EC2V 7AW
20th March 2023
ATTENDEES (1 of 2)**

David McIlroy	Forum Chambers	London
Daren Allen	Shoosmiths	London
David Bailey	Healys LLP	London
Nicole Blakey	Penningtons Manches Cooper	London
Stuart Broom	Taylor Wessing LLP	London
Michael Brown	Penningtons Manches Cooper	London
Daniel Brumpton	Nelsons Solicitors Limited	Nottinghamshire
Andrea Cohen	Weightmans/PNLA	Cheshire
Steve Conrmell	Kroll	London
Dru Corfield	Fenchurch Law	London
Christopher Cox	CJ Cox Solicitors	Leicestershire
Gillian Crotty	Shoosmiths	Belfast
Paul Daniel	The Specter Partnership Limited	London
Nicholas Davidson KC	Hailsham Chambers	Surrey
Conor Fagan	Forum Chambers	London
Kevin Farrell	Mason Hayes & Curran LLP	Dublin
Andrew Foyle	Shoosmiths LLP	Scotland
David Green	Ignite	London
Colin Hayes	Penningtons Manches Cooper	London
Dipti Hunter	Keidan Harrison LLP	London
Robert Johnson	Healys LLP	London
Mark Kenkre	Keller Postman UK Limited	London
Alistair Kennedy	Tyr Law	Leeds
James Kingston	New South Law	West Sussex
Ben Leandro	Moore Kingston Smith LLP	London

Michael Lent	Lakehouse Risk Services Limited	London
Jonathan Lester	Forum Chambers	London
Rachel Lobo	Penningtons Manches Cooper	London
Katy Manley	PNLA President	Cheltenham
Matthew Middleton	Penningtons Manches Cooper	London
Jamie Molloy	Ignite	London
David O'Brien	Penningtons Manches Cooper	London
Mark Osgood	Moore Barlow LLP	Southampton
Matthew Pascall	Temple Legal Protection Limited	Surrey
Sarah Perry	Knights Professional Services Limited	Newcastle-under-Lyme
Ruhi Sethi-Smith	Forum Chambers	London
Byron Sumner	Ignite	London
Dominic Tucker	IDiscovery Solutions	London
Tereza Verdoliva	Penningtons Manches Cooper	London
Graham Weatherston	Graham Weatherston	Glasgow
Robert Whittock	Gatehouse Chambers	Kent
Alex Williams	Burt Brill and Cardens Ltd	Brighton



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Nicole Blakey
Penningtons Manches Cooper
PNLA London Representative

“Introduction”



**PENNINGTONS
MANCHES
COOPER**



Nicole Blakey
Senior associate
London

Email: nicole.blakey@penningtonslaw.com

Tel: 020 7457 3237

Nicole is a senior associate in the commercial dispute resolution team in London, specialising in complex and high value group claims.

She frequently acts for large groups of claimants in cases against their professional advisers and also has extensive experience advising insolvency practitioners on contentious insolvency matters.

Nicole joined Penningtons Manches Cooper in 2019.

Areas of Expertise

- Commercial Dispute Resolution
- Group Action Litigation
- Restructuring and Insolvency

Recent work highlights

- Assisting hundreds of claimants in bringing a group action for professional negligence against their solicitors in relation to failed investments in residential property, hotel and care home schemes.
- Acting for numerous office holders and creditors on a broad range of insolvency matters: for example, challenging the abuse of the IVA procedure; acting for the liquidators of Simon & Co Ltd in a £15 million wrongful trading claim brought against two former directors; and acting for joint liquidators challenging the sale by the former administrators of EPGs at an undervalue.
- Advising on a multi-million pound cross-jurisdictional partnership dispute in England, the UAE, and the BVI.
- Successfully obtaining a Norwich Pharmacal order on behalf of a property development company that was the subject of cyber fraud.



David McIlroy
Head of Chambers, Forum Chambers
Visiting Professor in Banking Law
at Queen Mary, University of London

“Chairman’s Keynote Address”



David McIlroy

Head of Chambers

Call 1995



David is Head of Chambers at Forum Chambers. He specialises in banking and financial services law, commercial law, and professional negligence.

His combination of experience and insight enables him to identify persuasive arguments and to see where the law might be developed in the future.

Recent Banking (EU) Cases:

Advising on the introduction of Unexplained Wealth Orders into the law in Kosovo.

Advising on cross-border issues relating to the Electronic Money Regulations 2011 and the Payment Services Regulations 2017.

Acting for investor given advice in Cyprus by an Appointed Representative of a UK firm.

Acting for Irish investors into a failed UK property development scheme.

Advising an Irish businessman in respect of claims for breach of contract, breach of fiduciary duty, and mis-selling against an Irish bank and its UK subsidiary.

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

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

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

Recent Banking (UK) Cases:

Philipp v Barclays Bank [2022] EWCA Civ 318: Acting for intervener in Court of Appeal case relating to APP fraud.

Acting for elderly victim of APP fraud involving multi-million pounds being transferred to the Middle East

Areas of Expertise:

- Banking (EU)
- Banking (UK)
- Commercial Litigation
- Financial Mis-selling
- Financial Services regulation
- Insolvency
- Professional Negligence



Advising victims of the fraud at HBOS Reading in their submissions to the Foskett Panel.

Davis v Lloyds Bank Plc [2021] EWCA Civ 557: claim against bank for breach of the complaints handling rules in the FCA Handbook.

Scarborough Group v BOS: multi-million pound claim against BOS for manipulation of LIBOR (2020).

Advising lenders on the enforceability of security.

Standish v RBS [2019] EWHC 3116 (Ch), [2020] 1 BCLC 826: Claim by shareholders that RBS GRG and West Register had conspired to expropriate their shares.

Financial Conduct Authority v Allied Wallet Ltd [2019] EWHC 2808 (Ch), [2020] BCC 147: application by FCA for the appointment of a Provisional Liquidator over a fintech company.

Claims against Lloyds Banking Group related to the Impaired Assets Office of BOS/ HBOS at Reading and elsewhere.

Claims against secondary lender for disguising loans as lease finance transactions, undue influence and other malpractice.

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

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

R (Mazarona Properties Ltd) v Financial Ombudsman Service [2017] EWHC 1135 (Admin): Judicial review of the Financial Ombudsman Service's refusal to consider a complaint about the conduct of the Interest Rate Swap Redress Scheme by a bank.

Blackwater Services Ltd v West Bromwich Commercial Ltd [2016] EWHC 3083 (Ch): Interpretation of a market disruption clause in a loan agreement.

Recent Commercial Litigation Cases:

Acting on behalf of the Claimants in a claim against a solicitor for breach of a stakeholder contract: NPPM Claimants v 174 Law Solicitors Ltd [2022] EWHC 4 (Ch).

Appearing as Co-Counsel in an arbitration in Singapore in a dispute between a cryptocurrency operator and its IT security provider.

Acting in AA v Bitfinex, the first case where a worldwide freezing injunction was granted by an English court over Bitcoin.

Acting for accountants in claim against a former partner for diverting a commission payment.

Acting for corporate borrower resisting claim for repayment of loan on the grounds of misrepresentation by the lender.

Acting for entrepreneurs in shareholder dispute with major PLC.

ETL v Munn: Acting for purchaser in claim for breach of warranties in a Share Purchase Agreement.

Acting for minority shareholder in unfair prejudice petition.

Acting for foreign bank in claim to recover foreign exchange from Travelex.

Appearing in the Gibraltar Supreme Court in *Magner v Royal Bank of Scotland* on an application for inspection witness statements and exhibits under CPR 32.13.

Recent Financial Mis-selling Cases:

Angelgate Claimants v Key Manchester Ltd [2020] EWHC 3643 (Ch), [2021] PNLR 15: Acting for claimants who have entered into unregulated collective investment schemes (UCIS) in relation to property in the UK and abroad.

Acting on behalf of an individual given negligent financial advice in Cyprus by the Appointed Representative of a UK firm.

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

Acting on behalf of businessman who claimed that bank had reneged on promises of lending: *Hodell v Clydesdale Bank* [2018] EWHC 1009 (QB).

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

Acted on behalf of investor who was advised to invest in UCIS in Cape Verde and then to invest into the Connaught Income Fund.

Acted on behalf of investor who was advised by Merrill Lynch to invest in AIG's Enhanced Fund.

Poulton Plaiz Ltd v Barclays Bank Plc [2015] EWHC 3667 (QB): Interest Rate Swap mis-selling claim.

Hundreds of swaps cases in which a small business was mis-sold an unsuitable interest rate swap or a fixed rate loan which contained an embedded swap.

Recent Financial Services Regulation Cases:

Asking foreign banks as to their post-Brexit obligations and in respect of applications for authorisation in the UK.

Advising private banks which wish to enter into mortgages secured on land in the UK as to the UK's regulatory frontier and conduct of business rules.

Acting for borrower who faced extortionate repayments in loan made by unauthorised lender.

FCA v Allied Wallet Ltd [2019] EWHC 2808 (Ch): Acting for e-money and payment services provider in FCA's application to wind up the company.

Advising Egyptian borrowers and guarantors as to their liabilities under commercial financing agreements and hedging agreements which are subject to English law.

Advising foreign banks on consumer protection legislation in England and Gibraltar.

Recent Insolvency Cases:

Dormco SICA Ltd [2021] EWHC 3209 (Ch): acting for Defendant in Part 20 claim against director who had devised a transaction at an undervalue.

Advising a victim of an accident on obtaining an assignment from the liquidators of Thomas Cook.

Financial Conduct Authority v Allied Wallet Ltd [2019] EWHC 2808 (Ch), [2020] BCC 147: acting for fintech company resisting application by FCA for the appointment of a Provisional Liquidator.

Recent Professional Negligence Cases:

Angelgate Claimants v Key Manchester Ltd [2020] EWHC 3643 (Ch), [2021] PNLR 15: Acting in a class action against solicitors for failing to protect the interests of foreign buyers purchasing properties off plan in the North of England.

Acting on behalf of a liquidator in a claim against a solicitor for negligent advice which led to a company paying unlawful dividends.

Acting for a high net worth individual in a claim against accountants for negligent tax advice.

Acting against a solicitor for professional negligence in failing to address the tax consequences of a corporate takeover.

Acting in a claim against a quantity surveyor for professional negligence in project monitoring.

Right to Buy Litigation [2015] EWHC 1559 (Ch): Group litigation of claims for professional negligence against solicitors conducting conveyancing under the Right to Buy Scheme.

[David McIlroy]

Financial Services and Group Litigation: Keynote Address



Phillip V Barclays Bank:



Fraud and Banks in the Supreme Court

Having been deceived by fraudsters, Mrs Phillip and her husband:

- Transferred £400,000 to one account in the UAE;
- A few days later transferred £300,000 to a second account in the UAE;
- Six days later attempted to transfer a further £250,000 into the second account, but this transfer was blocked

Should the Bank have spotted that these unusual transactions indicated that there was a real risk that Mrs Phillip was being defrauded? If so, was the Bank

Phillip V Barclays Bank: Fraud and Banks

- The judge at first instance said the bank could not be liable in any circumstances. Banks only have to take reasonable steps to protect their customers against fraud by the customer's own agents (directors, employees)
- The Court of Appeal said that the bank could be liable if the bank had reasonable grounds for believing the order was an attempt to misappropriate funds, regardless of who the fraudster was





Philipp V Barclays Bank: Fraud and Banks

- In the Supreme Court, the bank argued it could only be liable if it actually knew the customer was being defrauded
- UK Finance said the Court of Appeal's decision conflicted with the Payment Services Regulations 2017
- Which? said the Court of Appeal's decision dovetailed with the Payment Services Regulations 2017
- Mrs Philipp's team argued (ambitiously) the bank would be liable whenever it should have identified a threat to the customer's central purpose/intention
- The Supreme Court reserved judgment

The Point of Intervention Advocacy



The Point of Intervention Advocacy



"Leave is given to such bodies to intervene ... in the expectation that their fund of knowledge or particular point of view will enable them to provide the [Court] with a more rounded picture than it would otherwise obtain. The [Court] is grateful to such bodies for their help. An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. ... It is not the role of an intervener to be an additional counsel for one of the parties." (*E v Chief Constable of the RUC* [2009] 1 AC 536)

The Point of Intervention Advocacy

- Keep It Short
- Keep it Simple
- Keep Focussed on the Main Points
- Keep it "On Message"
- Win, and keep, the confidence of your side and of the Court.



The Point of Intervention Advocacy

What we said:

- 1) By 2018, banks were already carrying out checks on transactions so that the duty of care the Court of Appeal had recognised was nothing additional or onerous;
- 2) Banks would not, as they claimed, go out of business were the duty to be upheld by the Supreme Court;
- 3) The moves to combat APP fraud in Parliament and through financial services regulation were too little, too limited, and too late to deal with the problem;
- 4) The Payment Services Regulations 2017 did not prevent the courts developing the common law.



Policy and Intervention Advocacy





The Impact of Policy on Intervention Advocacy

Interventions only happen when there is an issue of policy involved in a case:

- Identify what the issue of policy is;
- Explain why the policy considerations favour "your side"
- Deal with the policy considerations raised by the other side
- Explain how the development of law will be consistent with principle as well as with policy

Policy and Professional Negligence



Policy Issues and Professional Negligence

- The insurance company which has to pay out because their client is found liable *pour encourager les autres*;
- The claimant whose claim fails because, were their claim to succeed, professionals carrying out certain activities could no longer obtain any (affordable) professional indemnity insurance;
- The nuances of the law on causation and loss in the cases from SAAMCO to Manchester Building Society

And more subtly:

- The sole practitioner who cannot get any lender work because lenders will only instruct two partner firms (because a sole practitioner's insurance will be voided if they have acted fraudulently)





Politics and Mrs Philipp

- 41% of all crime against individuals is fraud (National Audit Office, 2022)
- The cost to individuals in 2016 was £4.7 billion. The government has no reliable estimate of the cost of fraud to businesses.
- Less than 1% of police personnel are involved in conducting fraud investigations (National Audit Office, 2022)
- Fraud has reached a scale where it "is now a national security threat" (UK Finance, 2021 and 2022)
- The government has taken the *undeclared* policy decision to leave it to the private sector to prevent, to prosecute, and compensate cases of fraud



The Future

- Effective private and public sector efforts to prevent fraud
OR
- De-risking, with certain activities uninsurable or in reality uninsured because so many policies are avoided

Claimants and their lawyers and insurers and their lawyers have a common interest in intervening to get the government to up its game in catching fraudsters, prosecuting fraudsters, and confiscating their assets



ANY QUESTIONS?





Michael Brown
Partner
Pennington Manches Cooper

***“Financial Services litigation
– Opportunities and Elephant Traps”***



**PENNINGTONS
MANCHES
COOPER**

Michael Brown
Partner
London

Email: michael.brown@penningtonslaw.com
Tel: 020 7457 3043



Michael is a partner in Penningtons Manches Cooper's commercial dispute resolution team. He advises clients on a wide variety of financial services and complex commercial disputes as well as on regulatory investigations, enforcement actions, and civil fraud claims.

He has conducted group litigation for shareholder and investor claimants, and acted in international arbitrations and litigation in a number of high profile cases arising out of the last global financial crisis. His clients include funds, investor groups, banks and other financial institutions, high net worth individuals and corporates, particularly real estate investment and development businesses.

Michael is individually ranked in Chambers UK for banking litigation and is described as 'very hands on and very good with clients' and 'a very experienced litigator with an encyclopaedic knowledge of all aspects of civil fraud' in Chambers UK and The Legal 500 respectively. He is also a solicitor advocate.

Areas of Expertise

- Commercial Dispute Resolution
- Banking and Financial Services Disputes
- Financial Services Regulation



**PENNINGTONS
MANCHES
COOPER**



Michael Brown
Partner
London

Email: michael.brown@penningtonslaw.com

Tel: 020 7457 3043

Recent work highlights

- Acting for the Consumers' Association (Which?) as intervener in *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318, an APP fraud case in which the Court of Appeal decided unanimously that the duty of care identified in *Barclays Bank Plc v Quincecare Ltd* could apply to an individual customer's instructions and not just an agent's, including where they are a victim of APP fraud.
- Defeating a worldwide freezing order against an offshore business that was said to have received stolen cryptocurrency, and having the claim successfully discontinued against his client.
- Acting for the defendant bank in *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, a negligence claim brought by the Club relating to a bank reference which was successfully defended in the Supreme Court.
- Acting for the claimant in *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2016] EWHC 3342 (Ch), a claim alleging the mis-selling of swaps, LIBOR manipulation and the misconduct of RBS's Global Restructuring Group.
- Representing a joint venture corporate partner in an LCIA arbitration concerning a US\$750 million investment in a Nigerian oil and gas company.

FINANCIAL SERVICES LITIGATION – OPPORTUNITIES AND ELELPHANT TRAPS

Michael Brown, Partner, Penningtons Manches Cooper LLP

HANDOUT FOR PNLA CONFERENCE ON 20 MARCH 2023

1. Areas to be covered:
 - a. Who is the defendant;
 - b. Who is the proper claimant,
 - c. To whom & when the duty is owed;
 - d. The dynamics of group claims; and
 - e. Thoughts on the future

The Defendant

2. **Financial Advisers** – these are the frequent targets of professional negligence (or negligence) claims in the FS sector.
3. FAs must be approved or authorised by the FCA. This then gives the consumer/client access to the FOS and the FSCS and (hopefully) professional indemnity insurance. The FCA requires certain firms to hold PII cover for the obvious reasons that it provides an extra financial resource to meet valid claims and can reduce the burden on the FSCS which is funded by Firms that are still trading.
4. The FCA stipulates minimum levels of cover that must be purchased. For personal investment firms with relevant income up to £3 million the cover should be no lower than £500k for a single claim against the firm and £500k in the aggregate. Where income is over £3 million, then the single claim limit is no lower than £650k and £1 million in the aggregate. Other limits apply depending on the type of adviser but this indicates the levels are not that high (and see Dynamics of group claims below).
5. There are two types, independent and restricted. As the titles suggest independent advisers can offer a wide range of financial products and providers, whereas restricted advisers will generally focus on a limited selection of products and/or providers. It is important to know if there is a company of substance behind your target adviser.
6. The services provided may not amount to advice. If given only general information about investment products then this may only be regarded as guidance rather than advice. The FCA indicates that the main difference between guidance and advice is that the client decides what product to buy without having one recommended to them.
7. In the FCA's "*Understanding advice and guidance on investments*", it explains that "advice" is used to mean a "recommendation of what you should do". That recommendation is personal to the client, based on their specific circumstances and financial objectives and can only be provided by an authorised firm.
8. On the other hand, guidance can include information about different types of investments or general principles for the investor to consider when investing. No specific course of action is recommended to the client nor a personal recommendation about how that client should invest. Organisations or firms do not

have to be authorised to provide guidance – in other words, anyone can provide guidance.

9. Advisers are responsible and liable for the accuracy, quality and suitability of the recommendations they make. Those who provide guidance are also responsible for the accuracy and quality of the information they provide but as they are not recommending investments, suitability is not a consideration.
10. From cases, there is much debate over whether or not advice was given – the clear distinctions between advice and guidance that the FCA sets out are not so readily apparent in reality.

The Claimant

11. Stanford International Bank Ltd (In Liquidation) v HSBC Plc [2022] UKSC 34 – a *Quincecare* duty and Ponzi scheme case - company in liquidation did not sustain loss where its bank had paid money out of its accounts in alleged breach of duty, while the company was still trading, and where the company had later entered into an insolvency process.
12. Had the defendant complied with its *Quincecare* duty and refused to pay out the money, then, in the counterfactual, the claimant would have had an extra c.£116 million to its credit and would not have discharged any of the payments due to the “early” customers before going into liquidation. In that counterfactual, there was no distinction between early and late customers only a single pool comprising all the customers who, at the moment of liquidation, had been owed money and had not received it. On the assumption that all customers shared *pari passu* in the liquidation, they would all have those debts discharged for the same dividend as part of the same winding-up procedure. In the actual scenario and in the counterfactual, no additional customer indebtedness was paid off. If the claimant had lost the chance by the defendant’s actions to pay out the same amount but to the general body of customers rather than just the early ones, the claimant had not suffered the loss of a chance that had any pecuniary value to it.
13. *s138D FSMA 2000* - a “*private person*” can bring a claim against an “*authorised person*” for a breach of FCA or PRA rules which has caused a loss. In practice, a private person means an individual and does not extend to an SME.
14. Under 138D(2) “*The contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.*”
15. Rights of Action Regulations 2001, SI 2001/2256 reg 3(1)(b) allows for a non-individual to be a *private person* if the loss is not suffered in the course of “*carrying out business of any kind*”. Titan Steel Wheels Ltd v RBS [2010] that “*corporate entities who sustain losses as a result of the purchase of financial products will usually be in business of some kind*” and will not therefore be private persons.

To whom & when the duty is owed

Attempts to extend the duty

16. Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA [2018] UKSC 43 - “Ingenious” but “fallacious”: the view of the UKSC of an argument that attempted to expand a duty of care for a banker’s reference to an undisclosed principal on the basis that the relationship between the bank and that principal, the Club, was equivalent to contract.
17. “The rule of English law that an undisclosed principal may declare himself and enter upon a contract is an anomalous legacy of eighteenth and nineteenth century jurisprudence, which survives in the modern law on account of its antiquity rather than its coherence”
18. Equivalent to contract – *Hedley Byrne v Heller* [1964] AC 465 pre Lord Devlin:

... wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer ... There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows.

When the duty is owed

19. Property Alliance Group Limited v The Royal Bank of Scotland Plc [2018] EWCA Civ 355 - PAG’s case on negligent misstatement substantially based on the judgment of Mance J in Bankers Trust International plc v PT Dharma Sakti Sejahtera [1996] CLC 518. That case included that the bank was liable in misrep and misstatement in failing to give a full and proper explanation in connection with the decision of the D to replace an existing swap with another.
20. “a bank in negotiating and contracting with another party owes in the first instance no duty to explain the nature or effect of the proposed arrangement to that other party. However, if the bank does give an explanation or tender advice, then it owes a duty to give that explanation or tender that advice fully, accurately and properly. How far that duty goes must ... depend on the precise nature of the circumstances and of the explanation or advice which is tendered.” (emphasis added)

The Dynamics of Group Claims

21. The PII issue – Not only is there the limit of indemnity issue when acting against a financial adviser, there is also the issue of aggregation. In group litigation this is an important consideration that has an impact on the optimum size of any group. A series of small value claims that can be grouped not only for the purposes of the claim but also aggregated under the defendant’s insurance, could mean that the limit of indemnity is soon reached.

Thoughts on the future

... to be delivered at the conference.









FINANCIAL SERVICES LITIGATION - OPPORTUNITY AND ELEPHANT TRAPS

Michael Brown, Partner







Introduction

- Financial services and professional negligence – the banker/customer relationship
- Bankers/Financial services providers' role:
 - The services offered – execution only v advisory
 - The role played – salesperson or advisor
 - Authorised persons & regulatory overlay

The Defendant

- Financial Advisers:
 - "mis-selling" claims
 - FCA approved or authorised?
 - Protections and redress – FOS, FSCS, PII cover
 - Guidance or advice & the blurring of the lines
 - **Opportunities** – (i) an insured defendant, (ii) with FSCS protection - potential redress beyond the financial standing of the FA, and (iii) testing of the waters &/or "fair & reasonable in all the circumstances" approach with the FOS.
 - **Elephant traps** – (i) unauthorised FA with no FSCS protection and no PII (ii) mistaking guidance for advice; (iii) losses/damages exceeding the level of indemnity and/or FSCS compensation limits.

The Claimant

- Companies
 - Companies in liquidation – who has suffered the loss & who can bring the claim? (Stanford International Bank v HSBC)
 - Rule against reflective loss
- Individuals
 - s.138D FSMA 2000
 - *The contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty*



To whom & when the duty is owed

- Attempts to extend the duty
- Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA [2018] UKSC 43:
 - The case of the banker's reference, the suspect cheque and the disappearing gambler.
 - an attempt to extend the duty as being owed to an undisclosed principal and via an *equivalent to contract* basis
 - Why the need for the *ingenious argument*?



To whom & when the duty is owed (cont.)

- When the duty is owed
- Property Alliance Group Limited v The Royal Bank of Scotland Plc [2018] EWCA Civ 355:
 - The case of the salesman, the advisors, and the customer who doesn't have a CLU
 - No duty to speak – but if you do speak then a duty not to be dishonest or fraudulent



The Dynamics of Group Claims

- PII and Aggregation
- The investors – degrees of sophistication
- The defendant with the deepest pockets (or best insurance)



Thoughts on the future

- Regulatory sanction not a sure-fire way to individual consumer redress
- Ingenious but fallacious arguments = costly and unsuccessful
- Carefully calibrated – but in whose favour – consumer's or bank's? Watch this space (Fiona Philipp –v- Barclays Bank)



LONDON MADRID
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www.penningslaw.com

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Jamie Molloy
Ignite

"ATE Insurance and Litigation Funding"



Jamie Molloy

Head of ATE and Co-founder

Jamie.Molloy@igniteins.com

0798 4388 544

Jamie has worked in the ATE market for the past 15 years. Jamie's experience includes underwriting and managing a significant volume of High Court disputes as well as supporting successful appeals to both the Court of Appeal (*Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745) and Supreme Court (*Braganza v BP Shipping Ltd* [2015] UKSC 17).

Jamie has created bespoke hedging products for commercial litigation funders and also a number of novel insurance schemes across the areas of privacy, property and nuisance litigation. Jamie holds both Bachelors and Masters Degrees in Law as well as Cilex and CII qualifications. Jamie has a keen interest in the development of the litigation risk transfer market, having written both his undergraduate and postgraduate dissertations around these topics.



PNLA Conference – 20th March 2023

Jamie Molloy LLB (Hons), LL.M, Cert CII
Head of ATE, IGNITE

Discussions points

Emerging Trends in professional negligence and group litigation – An ATE Insurer’s perspective

- Procedural Points and their impact
- Emerging Case Types/Opportunities for Practitioners

Developments in ATE Insurance and Litigation Funding – How Ignite can help you

- Innovative Pricing Structures
- Unlocking access to Litigation Funding
- WIP Policies

Trends in Professional Negligence and Group Claims – Procedural Stifling

- More and more instances of procedural stifling by defendants
- Rise in Security for Costs Applications – some meritorious, some not
- Emergence of Group Claims creates more significant Judicial Scrutiny
- Issues such as case certification and Security Applications can add 6-9 months delay to procedural timetable
- Recommend addressing issues prior to commencing Proceedings – e.g. ensuring suitable ATE insurance purchased, etc
- Multi Party actions – way forward for smaller group claims?

Trends in Professional Negligence – New Opportunities

- Forced Demise of Road Traffic and other Injury claims has caused large numbers of volume injury lawyers into new and uncertain areas such of litigation
- At the same time, Litigation Funding investment into the consumer sector has increased massively – well in excess of £150m – without proper oversight
- Civil Litigation very different to injury litigation – no portal, proper law, challenges on liability, uninsured opponents
- Net result – missed limitation periods, meritless cases pursued, meritorious cases abandoned, undisclosed commissions paid to CMC's and experts, unsuitable ATE insurance in place
- Ultimate losers – Consumer claimants and Litigation Funders
- Potential Actions against law firms?

Trends in ATE Insurance & Litigation Funding – How Ignite can help you

Ignite - ATE Product Offering

- Providing substantial 'A' Rated cover for all types of commercial and consumer professional negligence litigation
- Bespoke litigation insurance products offered for higher value work – up to £10,000,000 cover
- Volume scheme arrangements available for lower value, higher volume work
- Historic examples include schemes for solicitor negligence cases relating to Miners Compensation Claims and Toxic Lease claims

Ignite - Innovative Pricing and Model Structures

- Premium payment are often linked to success
- Staged premium pricing to provide for reduced payments in the event of early settlement
- Can be provided on a traditional priced model or priced as a percentage of damages
- Can also be arranged for Group Litigation, whether as formal groups (GLO's etc) or multi claimant actions on single claim form

Ignite - Unlocking Access to Funding Capital

- Fair Criticism of the Litigation Funding market – process slow, complex and excessive cost
- Ignite offers Capital Protection Insurance (CPI) to litigation funders enabling funders to make prompt investment decisions and reduce the funding cost to the litigant
- Ignite can unlock capital from funders for as little as £50,000 to as much as £10,000,000 per case
- Working example: *Richards and another v Speechly Bircham LLP and another* [2022] EWHC 935 (Comm)
- Professional Negligence Case against Solicitors - funded through CPI backed litigation funding and Staged/delayed ATE offering

IGNITE WIP Policies

- Innovative new offering which provides for an agreed percentage of own sides solicitors and counsels fee to be underwritten
- Intended for Professional Negligence and Insolvency Lawyers who would ordinarily operate on CFAs
- Premium for product tied to damages - nothing to pay unless case succeeds
- Enables practitioners to run matters knowing that some fees will be earned in the event of case failure

IGNITE



Questions?





Ruhi Sethi-Smith
Forum Chambers

“Contract Damages and causation, hypothetical problems”

Ruhi Sethi-Smith

Barrister at Forum Chambers

Call 2012



Ruhi has a broad commercial litigation practice which includes a wide range of commercial disputes, banking and financial services litigation, insolvency and property litigation.

Ruhi is a robust and meticulous advocate who regularly appears in the County Court, High Court and Court of Appeal. She also has experience of obtaining and resisting urgent injunctions in the High Court.

Recent Banking cases:

Acting for the victim of a sophisticated APP fraud in which the fraudsters defrauded her of £3.8 million.

Acting for a large national bank in defending claims for undisclosed PPI commissions.

Obtaining Norwich Pharmacal orders against banks following APP frauds on customer accounts.

Assisting on claims against Lloyds Banking Group related to the Impaired Assets Office of BOS/HBOS at Reading and elsewhere.

Assisting in advising and representing claimants in swaps cases where they have been mis-sold swaps and interest rate hedging products.

Advising a consumer in relation on a claim for breach of statutory duties resulting from losses sustained in CFD trading in forex and cryptocurrency.

Advising and representing individuals in mortgage mis-selling claims.

Recent Commercial Litigation Cases:

Representing a professional football club in a breach of contract claim for £350k which resulted in a successful order for security for costs and eventually the claim being struck out.

Representing a global travel company in a claim for £750k in relation to the interpretation of force majeure clauses in an accommodation supplier agreement which also involved a successful relief from sanction application
Representing a cryptocurrency platform provider in a claim brought by a victim of a BitTrust fraud against a number of cryptocurrency exchanges for

Areas of Expertise:

- Banking (UK)

-Commercial
Litigation

-Injunctions

-Insolvency

-Professional
Negligence

damages for unlawful means conspiracy and fraudulent misrepresentation valued at £1.5 million.

Defending a company in a breach of contract claim worth £100k involving an application for summary judgment and/or strike-out.

Acting for a partner in a dispute over the dissolution of the partnership and the sale of the partnership asset which resulted in a favourable settlement for the partner.

Pursuing guarantee claims on behalf of a national platform lender involving numerous applications for summary judgment and/or strike-out.

Defending a claim for ownership of an aeroplane used for a solo round the world flight and breach of contract worth approximately £200k, defending the claim on the basis of wrongful interference pursuant to the Torts (Interference with Goods) Act 1977.

Recent Injunctions:

Acting for Joint Liquidators in obtaining a worldwide freezing order in respect of company assets located in multiple locations in Europe.

Obtaining numerous Norwich Pharmacal against numerous banks in respect of customer fraud and mistaken payments.

Acting for company directors on injunctions to restrain presentation of winding up petitions.

Recent Insolvency Cases:

Pursuing an application for possession and sale on behalf of trustees in bankruptcy of a former solicitor.

Representing the wife of a deceased bankrupt in defending an application for an order pursuant to section 339 Insolvency Act 1986 in respect of an alleged transaction at an undervalue.

Advising a former partner of a law firm in a claim against the firm's liquidator for a contribution to the firm's liabilities upon dissolution.

Acting for a company director of a consultancy firm in disqualification proceedings and claims for misfeasance.

Acting for the wife of a bankrupt in an application pursuant to section 339 Insolvency Act 1986.

Representing a management consultancy firm with offices in the UK and UAE in an application for rescission of a winding up order and the subsequent petition.

Advising liquidators and company directors in relation to claims for wrongful and/or fraudulent trading and preferences.

Acting for company directors, lenders and guarantors in relation to applications to set aside statutory demands.

Recent Professional Negligence Cases:

Pursuing solicitors in a professional negligence claim relating to the handling of a breach of contract and quantum meruit claim in the sum of £700k.

Defending solicitors in a professional negligence claim relating to the drafting of a share purchase agreement.

Successfully pursuing a solicitor for his role in a high-profile tax avoidance scheme.

Representing a project management company in a negligence claim involving multiple parties.

Advising company directors in relation to a professional negligence claim against its auditors for the negligent preparation of company accounts.

Ruhi Sethi-Smith

DAMAGES IN CONTRACT




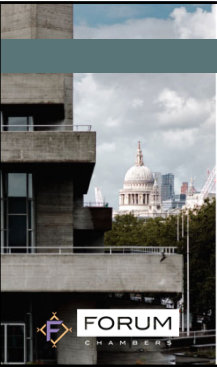
Examining the assumptions for measuring damages in contract and the operation of the 'minimum obligation' rule



PURPOSE OF DAMAGES



- The law of contractual obligations seeks to provide contracting parties with a measure of certainty over the behaviour of others.
- Principle of measuring contractual damages first considered in *Robinson v Harman* [1848] Ex Rep 850:

"Where a party sustains loss by reason of a breach of contract, he is, so far as money can do it to be placed in the same situation, with respect to damages, as if the contract had been performed."
- Compensatory principle – compensate the innocent party for the loss caused by the actions of the contract breaker rather than punishing the contract breaker for its conduct.

PRIMARY AND SECONDARY OBLIGATIONS

- Primary obligation – to honour the contractual promise made to the other party.
- Secondary obligation – to compensate the innocent party i.e. pay a sum of money to place them in the position that they would have been in had the primary obligation been performed.
- Photo Production Ltd v Securicor Transport Ltd [1980] SC 827 848 – 849*** – "contract, however, is just as much the source of secondary obligations as it is of primary obligations... Every failure to perform a breach of contract. The secondary obligation on the party of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequences of the breach"
- Damages are a substitute for performance.

FACTUAL CAUSATION

- Framework for analysis of contract law claims:
- (1) Has an agreement been reached?
- (2) Express and implied terms governing parties obligations
- (3) Has either party breached any contractual obligations?
- (4) Has the breach of an obligation caused the innocent party a loss?
- (5) Is the loss recoverable or is it too remote in light of the test in **Hadley v Baxendale**?
- (6) What is the amount of recoverable loss?



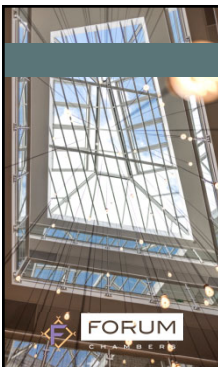
FACTUAL CAUSATION CONT.

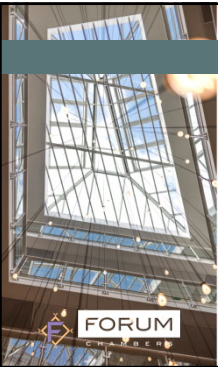
- Compensatory principle is based on performance and what the innocent party would have gained if there had been proper performance.
- Calculations of loss involves comparing the real world scenario with the hypothetical scenario of performance.
- The innocent party must provide evidence of the situation following the breach.
- Duty to mitigate – this is also a matter of causation i.e. did the actions of the innocent party in failing to mitigate mean that the contract breaker is not liable for those losses. Separate from the question of whether the breach of the contract breaker caused the loss sustained by the innocent party. See **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London [1912] AC 673 at 689**



FACTUAL CAUSATION CONT.

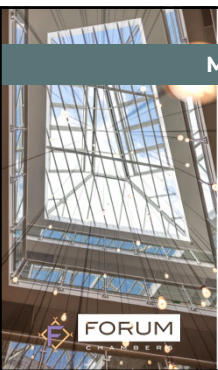
- Doctrine of collateral actions (res inter alios act) – if following the breach by the contract breaker, the innocent party receives a sum of money which is received independent of the circumstances of the breach, the Court will disregard that from the real world position increasing the value of the innocent party's claim.
- See **Swynson Ltd v Lowick Rose LLP [2017] UKSC 32**, **Tiuta International Ltd v De Villiers Surveyors Ltd [2017] UKSC 77**, more recently discussed in **ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd [2022] EWCA Civ 1704**.
- Pre-existing insurance policy – **Bradburn v Great Western Railway Co [1874-5] LR 10 Ex 1**





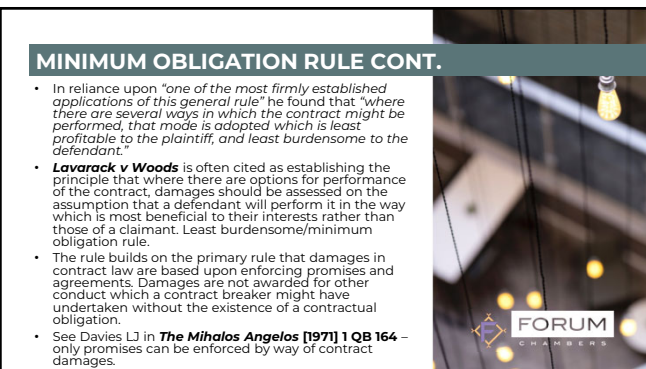
MINIMUM OBLIGATION RULE

- Hypothetical performance position – Court has to make some assumptions about conduct i.e. that given the existence of a contract, the provision of performance by the contract breaker.
- Assumptions are more straightforward in contracts with a single method of performance e.g. contracts for sale of a vehicle.
- Contract breaker is not liable for failing to do that which it is not required to do pursuant to the contract. The Court should compensate the innocent party based on performance of the contract and no more.
- Minimum obligation rule first stated by the Court of Appeal in the case of **Lavarack v Woods of Colchester** [1967] 1 QB 278



MINIMUM OBLIGATION RULE CONT.

- Lavarack had a 5 year fixed-term employment contract with Woods but was dismissed in the 3rd year of the contract and claimed for wrongful dismissal. In considering the correct measure of damages Diplock LJ accepted the proposition of Scrutton LJ in the case of **Abrahams v Reich** as follows at 294 et seq:
- *“The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors – not with expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.”*



MINIMUM OBLIGATION RULE CONT.

- In reliance upon “one of the most firmly established applications of this general rule” he found that “where there are several ways in which the contract might be performed, that mode is adopted which is least profitable to the plaintiff, and least burdensome to the defendant.”
- **Lavarack v Woods** is often cited as establishing the principle that where there are options for performance of the contract, damages should be assessed on the assumption that a defendant will perform it in the way which is most beneficial to their interests rather than those of a claimant. Least burdensome/minimum obligation rule.
- The rule builds on the primary rule that damages in contract law are based upon enforcing promises and agreements. Damages are not awarded for other conduct which a contract breaker might have undertaken without the existence of a contractual obligation.
- See Davies LJ in **The Mihalos Angelos** [1971] 1 QB 164 – only promises can be enforced by way of contract damages.

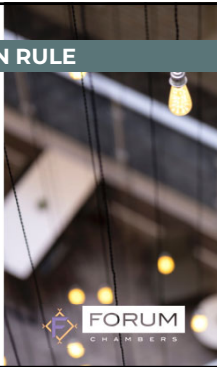
ORIGINS OF MINIMUM OBLIGATION RULE

Cockburn v Alexander [1848] 6 CB 791

- "The question upon a breach of the contract is, what is the condition in which the plaintiffs would be if the defendant had performed the contract. Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome (sic) to the defendant."

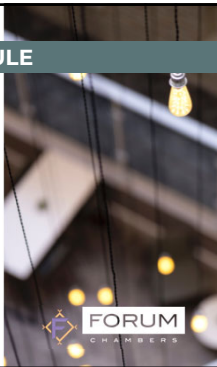
Robinson v Robinson [1851] 1 De GM & G 247

- "Where a man is bound by covenants to do one of two things and does neither, there [is] an action by the covenantee the measure of damages is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee."



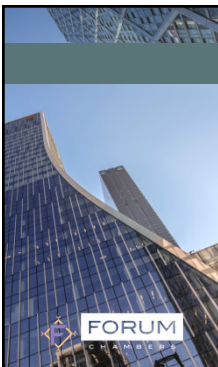
JUDICIAL ACCEPTANCE OF THE RULE

- The minimum obligation rule has been widely accepted by the Courts in England & Wales
- House of Lords in **Bunge Corpn, New York v Tradax Export SA v Panama [1981] 1 WLR 711** – damages based on buyer's minimum obligation
- **Geys v Societe Generale, London Branch [2013] ICR 117** – wrongful repudiation cases
- **Redbourn Group Limited v Fairgate Developments Ltd [2018] EWHC 658 (TCC)** – damages for loss of chance refused on the basis of the rule
- **Mihalos Angelos** – example of damages being limited to least burdensome hypothetical performance by the Defendant



WATERING DOWN OF THE RULE?

- There have been attempts to minimize the application of the rule in cases where there is a single obligation but the contract does not specify how it should be performed.
- **Abrahams v Reich** – difficulties with the application but they were resolved in this by the consideration of an implied term in relation to causation i.e. that the publisher would reasonably publish a book rather than just publish a book.
- There is potential for a factual assessment which could open up the possibility of damages being greatly.
- **And So to Bed Ltd v Dixon [2001] F.S.R. 47** – application of the rule does not have an obvious answer



MARGINALISING THE RULE – DURHAM TEES

Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485

- BMI Baby agreed a contract with Durham Tees Airport Ltd to commercially fly 2 based aircraft at the airport for a period of time. BMI Baby then discovered that the base 2 aircraft at the airport would cause it to lose millions of pounds. Therefore, BMI Baby did not introduce 2 aircraft and the Durham Tees Airport sued.
- The rule does not provide a simple answer to the question of the measure of damages. Mummery LJ at 69 and 79 which essentially encouraged the Court to undertake a factual assessment where there is a single obligation which provides a measure of discretion on the part of the defendant as to how to perform it.
- Toulson LJ agreed that a factual assessment does justice in cases where it is difficult to discern what a defendant's minimum level of performance would have been.

POTENTIAL PROBLEMS WITH DURHAM TEES

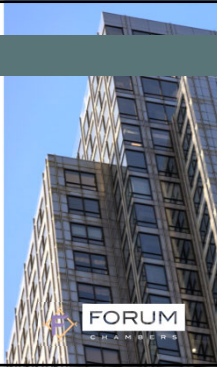
- Hypothetical fact inquiry in **Durham Tees** can be difficult to apply and could be weaponised by claimants to override the simple causation analysis to increase their losses.
- **Medsted Associates Limited v Canaccord Genuity Wealth (International) Limited [2020] EWHC 2952 Comm** - key issue was whether Medsted was entitled to damages on the basis that it was entitled to commission on all the undeclared trading, or on the basis of what trading would have been done if the defendant had complied.
- The problem faced by the Judge was that unequivocal evidence was adduced at trial that the investors would not have traded with the defendant if they knew the real level of commission. The Judge found that the trades would have been halved.

POTENTIAL PROBLEMS WITH DURHAM TEES CONT.

- It appeared that the Judge was awarded Medsted a high level of damages and in justification, the Judge said "contractual damages are not intended to put the Claimant in the position had there been no breach of contract."
- This appears to be contrary to the basis of the rule and the compensatory principle.
- **AMT Vehicle Rental Ltd v Volkswagen Group United Kingdom Ltd [2022] EWHC 2934 (Comm)** – the Judge followed the factual assessment approach per Durham Tees but seemed to flout the fundamental principle of contract law damages being awarded in respect of promises.

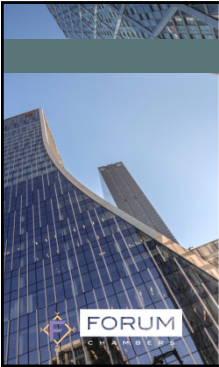
THE FUTURE OF THE RULE

- There appear to be many who wish to see the rule curtailed by moving instead to a balance of probabilities approach to what a defendant would have done.
- **Mackenzie v AA Ltd [2022] ICR 1362** – comments of Gavin Mansfield KC “*the rule should no longer be followed*”. He also argued that damages for contract law should permit a claimant to recover damages, not just for what the defendant contractually agreed to do but what it can be shown the defendant would have additionally done as a voluntary act without contractual compulsion. Court of Appeal rejected this.



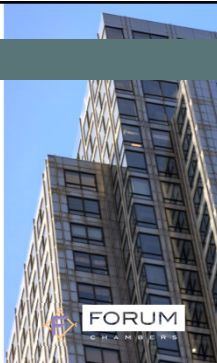
THE FUTURE OF THE RULE CONT.

- The Court of Appeal noted that the principle is one of higher authority than the Court of Appeal:
- *“Cases where there is a single obligation with a range of ways in which it can be performed do not detract from the force and clarity of the rule in cases involving alternative methods of performance of a contract, an in particular alternative methods of termination of a contract of employment.” “I do not accept the argument that the rule is unsound and contrary to principle. In any event, it is simply not open to this court to depart from a consistent line of authority going back 150 years, and recently cited with approval at the highest level.”*



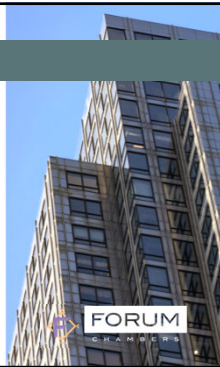
UTILISING THE RULE

- Given that the rule is here to stay for the foreseeable future, if you are pursuing a claim for breach of contract, it is imperative to consider the duty upon the defendant.
- Was it a single duty which gave the defendant discretion as to how to perform it?
- The Durham Tees approach of factual assessment is preferable as it can significantly increase the level of recoverable damages.
- Consider whether there ought to be an implied term for a vague obligation. They are relevant when considering damages as well as duty and breach.



UTILISING THE RULE CONT.

- If the contract provides a clear discretion to your defendant client and specified the options, utilize the minimum obligation rule to the benefit of the client.
- Loss should be assessed on the basis of the cheapest method of performance. Whilst it is not always the least burdensome, it is highly likely to be. See Bean LJ at paragraph 44 in **Mackenzie**.



ANY QUESTIONS?



CONTACT

rsethi-smith@forumchambers.com
forumchambers.com





Steve Cornmell FCA
Managing Director, Testifying Expert
Kroll

"The Forensic Accountant Expert's Perspective"



Steve Cornmell

Managing Director, Testifying Expert
Expert Services
London

steve.cornmell@kroll.com

Steve Cornmell is a managing director in the Expert Services practice. His practice is focused on providing fraud investigation and expert assistance in commercial disputes.

Based in London, Steve has over 20 years of experience in criminal fraud investigation having assisted the UK Serious Fraud Office, amongst others, on a wide range of enquiries involving fraudulent trading, theft, share ramping and conspiracy to defraud regulatory authorities. He has also acted for numerous corporate clients in investigations of alleged fraud and accounting irregularity and breakdown, and twice been appointed as an Inspector in respect of Companies Act and Financial Services Act (Insider Dealing) enquiries. He has also acted in the defence of individuals charged with serious fraud and money laundering offences.

Steve has acted as expert in a number of cases and has provided evidence in court in criminal and commercial cases, international arbitrations and disciplinary hearings brought by professional bodies. His cases have covered a broad range of business sectors.

Before joining Kroll, Steve was a partner and head of Grant Thornton's UK Forensic and Investigation Services department.

Steve earned a bachelor's degree in politics from University of Leicester. He is a Fellow of the Institute of Chartered Accountants in England and Wales and trained and qualified as a Chartered Accountant with a Lloyd's panel audit firm.



KROLL

Steve Cornmell

Managing Director, Testifying Expert

Expert Services

London

steve.cornmell@kroll.com

Professional Negligence

- Led the forensic accounting team supporting the audit expert for Deloitte Singapore in both professional disciplinary hearings and the London High Court in its defence of allegations of audit negligence following the collapse of Barings Bank and its failure to identify the activities of Nick Leeson.
- With the Executive Counsel of the UK professional discipline body, led an investigation of the conduct of members and member firms in relation to the audits of a casino. Provided evidence in person in the subsequent professional disciplinary tribunal brought against the former audit partner and his personal accountant regarding the theft of an asset of the audit client.
- Leading the investigation by the UK professional discipline body in relation to the audits of a failed integrated travel company.
- Investigation on behalf of insurers into a claim made under a professional indemnity policy by the Cyprus member firm of an international accounting affiliation.
- Acting for the Financial Reporting Council discipline team in its investigation of the conduct of members and member firms under both the accounting and actuarial discipline schemes in relation to audit and actuarial services provided to a Lloyd's insurance syndicate.
- Assisted the defence of a former solicitor charged with fraud and money laundering offences relating to the provision of offshore companies for overseas investors.
- Investigation on behalf of the liquidator of a gas bottling business of the conduct of the audits carried out by a regional accounting firm to support a civil claim against that firm.
- Acted in the defence of a head mistress in relation to a disciplinary investigation of allegations regarding the financial management of a school.

The Forensic Accountant's Perspective

Steve Cormell, Managing Director, Kroll Expert Services
Professional Negligence Lawyers Association London Live Conference 20 March 2023

The Forensic Accountant's Perspective

Agenda

- | | | |
|--|--|---|
| 1 Collective Investment Schemes <ul style="list-style-type: none">• What are they?• Where they go wrong• Examples• What happens next | 2 Implications for Solicitors <ul style="list-style-type: none">• Acting for collective investment schemes• Solicitor Accounts Rules• SRA Actions | 3 Auditor negligence <ul style="list-style-type: none">• Auditor and fraud• Bringing an audit claim• Defence to an audit claim |
|--|--|---|

The Forensic Accountant's Perspective



The Forensic Accountant's Perspective

Risk and Financial Advisory Solutions

Unique insights, data and technology
Providing foresight clients need to create an enduring
competitive advantage
6,500 professionals worldwide
Continuing the firm's nearly 100-year history of
trusted expertise

Valuation

Compliance and Regulation

Corporate Finance and Restructuring

Cyber Risk

Environmental, Social and Governance

Investigations and Disputes

Business Services

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Across 32 countries and territories worldwide



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Setting the scene



Annual Enforcement Review 2022



Financial Reporting Council

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Setting the scene

- "PwC probed over its auditing of collapsed property group Intu"
[PwC probed over its auditing of collapsed property group Intu | Financial Times \(ft.com\)](#)
- "EY quits as auditor of MI Hudson following 'loss of trust'"
[EY quits as auditor of MI Hudson following 'loss of trust' | Financial Times](#)
- "EY under fire over its two roles at battery start up Britishvolt"
[EY under fire over its two roles at battery start-up Britishvolt | Financial Times \(ft.com\)](#)
- "HMRC heightens focus of professional enablers of tax fraud, says top official"
[HMRC heightens focus on professional enablers of tax fraud, says top official | Financial Times](#)
- "FTSE 100 CFOs tell Big Four to cut costs after audit price jump"
[FTSE 100 CFOs tell Big Four to cut costs after audit price jump | Financial Times](#)
- "KPMG settles with Carillion liquidators over £1.3bn audit negligence claim"
[KPMG settles with Carillion liquidators over £1.3bn audit negligence claim | Financial Times \(ft.com\)](#)
- "UK watchdog fines PwC for failings in Babcock audits"
[UK watchdog fines PwC for failings in Babcock audits | Financial Times \(ft.com\)](#)

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The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes

- What are they?
- Who should invest in an unregulated collective investment scheme?
- High risk/High return
- Illiquid

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The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Northern Powerhouse Developments

- [How Gavin Woodhouse raised millions for a string of stalled projects | Business | The Guardian](#)



How Gavin Woodhouse raised millions for a string of stalled projects
Gavin Woodhouse, 54, is a former investment banker who has raised millions for a string of stalled projects in the Northern Powerhouse.
Woodhouse, who has worked for HSBC, Citigroup and Citibank, is a former investment banker who has raised millions for a string of stalled projects in the Northern Powerhouse.
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Unregulated Collective Investment Schemes – Carlauren

- [Carlauren: Collapsed care home boss involved in US scam - BBC News](#)

England | Local News | Regions | Tone & View

Carlauren: Collapsed care home boss involved in US scam

By Hannah Jones



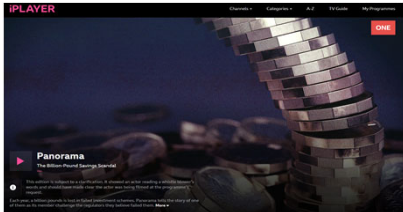
Tom Harty, BBC News, investigating

A whistleblower at the heart of a multi-billion dollar scam says that three millions of pounds he lent out was involved in a property scam in America, the BBC has learned.

The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Blackmore Bonds

- [BBC iPlayer - Panorama - The Billion-Pound Savings Scandal](#)



The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes in practice

- Complex group structures
- Poor record keeping and mixing of funds
- Third-party funding arrangements diluting investor security
- Substantial payments to third parties
- Minimal funds available to repay investors

The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Role of solicitors

- SRA Warning Notice
<https://www.sra.org.uk/solicitors/guidance/investment-schemes-including-conveyancing/>
- Risks of facilitating high risk or dubious investment schemes
- Not allowing client accounts to be used as a banking facility
- Risk of providing an impression of credibility and security

The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Case study

- Legal services – purchase of properties to be used as care homes/hotels and sale of studios and suites in the properties to investors
- £44m of investor funds received
- Transfers to group and connected parties
- Breaches of SRA Accounts Rules
- Fined £2,000, with £1,350 costs

The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Role of the auditors

- Fraud and the auditor
- Red flags
 - Low proportion of investor funds retained in the business
 - High fees
 - Misleading information on progress
 - Returns to investors funded from new investor funds
- Sufficiency of evidence
- Professional scepticism and challenge to management

“... a material uncertainty would exist if investor money suddenly ceased which would result in the group being unable to pay its contractually committed payments. The group is therefore dependent on continued investor subscriptions...”

-Going concern note to the audited financial statements

The Forensic Accountant's Perspective

Unregulated Collective Investment Schemes – Audit negligence claims

- Duty of care
- Breach of duty
- Breach caused loss
- Losses within scope of the auditor's duty
- Defences

Thank You

The Forensic Accountant's Perspective

Steve Connell, Managing Director, Kroll Expert Services



Steve Connell
Managing Director, London
Contact:
T: 020 7089 4747
steve.connell@kroll.com
Fellow of the Institute of
Chartered Accountants in
England and Wales

Steve is a Managing Director in the London Expert Services team. Steve is a specialist in fraud investigation and has a wide range of experience of commercial litigation and disputes. He has acted as expert in a large number of cases and has provided evidence in court in criminal and commercial cases, international arbitrations and disciplinary hearings brought by professional bodies. His cases have involved the quantification of loss, complex accounting issues and the tracing of funds and have covered a broad range of business sectors.

Steve has extensive experience of criminal fraud investigation having assisted prosecuting authorities on a wide range of enquiries involving fraudulent trading, theft, share ramping and conspiracy to defraud regulatory authorities. He has also acted for numerous corporate clients in investigations of alleged fraud and accounting irregularity and breakdown, and twice been appointed as an Inspector in respect of Companies Act and Financial Services Act (Insider Dealing) enquiries. He has also acted in the defence of individuals charged with serious fraud and money laundering offences.

Steve is recognised by Who's Who Legal as a leading global practitioner in the separate disciplines of Investigations, Asset Recovery and Dispute Consulting.

AREAS OF EXPERTISE

Expert Witness

Gives evidence in both the UK courts and in international arbitrations, particularly in relation to the quantification of damages and accounting matters.

Investigations

Performs fraud, regulatory compliance and financial investigations.

KROLL 19



For more information, please contact:

STEVE CONNELL
Managing Director, Expert Services, London
Kroll Advisory Limited
Level 14, The Shard, 32 London Bridge Street
London SE1 9SG
T: +44 20 7089 4747
E: steve.connell@kroll.com

About Kroll
As the leading independent provider of risk and financial advisory solutions, Kroll brings our unique insights, data and technology to help clients stay ahead of complex demands. Kroll's global team continues the firm's century-long history of trusted expertise spanning risk, governance, intelligence and valuation. Our advanced solutions and intelligent people clients the benefit they need to create a lasting competitive advantage. At Kroll, our values define who we are and how we partner with clients and communities. www.kroll.com
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Jonathan Lester
Forum Chambers

“Getting out of the contract – penalties, undue influence, extortionate credit bargains and more”



JONATHAN LESTER

CALL - 2016

"Excellent, commercial, and a pleasure to work with."

✉ jlester@forumchambers.com

☎ 020 3735 8070

Jonathan focuses on property, commercial disputes, and professional negligence, but his capability extends to all areas of Chambers' offering. As well as in the County Court, he has represented clients in the High Court and the First-tier Property Tribunal.

Before being called to the Bar, Jonathan practised as a solicitor for over 4 years, the majority of which was spent at a leading professional negligence firm in the City where he specialised in claims for secured lenders and real estate investors. Jonathan also provided non-contentious advice on compliance with the FCA Handbook.

As well as his imaginative application of the law, Jonathan's prior experience as a solicitor allows him an insight into the practicalities of litigation which those instructing him continue to value greatly.

AREAS OF EXPERTISE

COMMERCIAL DISPUTES AND INSOLVENCY

Jonathan has acted in a broad range of commercial disputes and insolvency process.

Recent Notable Cases

- Acting for the guarantor of a £2.5m facility to defend a claim on the guarantee on the grounds of misrepresentation;
- Document review for disclosure on a £2billion bribery and political misfeasance case involving a guarantee given by a sovereign nation to an global investment bank.
- Obtaining a Freezing Order and multiple *Norwich Pharmacal* Orders in the High Court to preserve and trace £440,000 overseas, resulting from a suspected authorised push payment fraud.

- Obtaining a Freezing Order and multiple *Norwich Pharmacal* Orders in the County Court to preserve assets of £100,000 and obtain information to ensure the efficacy of the Freezing Order.
- Representing the Defendant in a two-day High Court trial to determine if certain clauses within a settlement agreement were unenforceable penalties, with some £680,000 at stake.
- Providing non-contentious advice on the application of the Money Laundering Regulations 2017 (pre and post Brexit) to a proposed new software application for use across the globe.
- Acting in a number of cases for the Administrators of a large goods manufacturer in collecting disputed trade debts and advising on resisting an application for leave to claim against the company in Administration.

In his practice, Jonathan regularly appears for Administrators applying to extend the period of Administration and for petitioning creditors and debtors in both winding-up and bankruptcy hearings, dealing with issues such as disputed debts, crossclaims, title to the petition debt, and the consequences of procedural irregularity.

PROPERTY LITIGATION

Jonathan has a wealth of experience in many areas of property litigation.

Mortgages

Recent Notable Cases

- Acting for borrowers in defence of possession claims brought by unauthorised lenders on the grounds that the loans were regulated mortgage contracts and therefore unenforceable against the borrowers.
- Acting for a lender against chargors seeking to set aside a charge for undue influence exerted by a third-party.

Landlord and Tenant

Jonathan has acted extensively in commercial and residential landlord and tenant disputes, advocating and advising in such areas as contentious commercial lease renewal, breach of covenant, service charges, forfeiture of commercial leases, and possession.

Recent Notable Cases

- Advising on and successfully appealing a decision of the First-Tier Tribunal on the reasonableness of service charges (acting for landlord).
- Advising a commercial tenant on claiming the existence of a new lease by proprietary estoppel and the impact of a CVA on the landlord's claims to rent.
- Advising a commercial tenant on the terms likely to be contained within a new lease awarded by the Court under the Landlord and Tenant Act 1954.

Trusts and Competing Rights

Jonathan has acted in cases concerning the avoidance of a property transfer for undue influence, an appeal on a novel point of law concerning the application of limitation periods to claims to equitable interests under a trust of land, adverse possession, and constructive trusts arising out of domestic co-habitation. He has advised on areas as diverse as the establishment of easements, wavier and estoppel in relation to leasehold covenants and trespass by satellite dishes.

Recent Notable Cases

- Advising on the acquisition of equitable rights of drainage.
- Several successful claims by Trustees in Bankruptcy for possession and sale of the bankrupt's home.
- Advising on and securing a High Court injunction preventing the sale of property pending the resolution of his client's claim to be entitled to an equitable charge.
- Advising on and securing a High Court injunction to require the removal of a Notice registered on title at HM Land Registry to allow a sale to proceed.
- Successfully opposing a High Court injunction preventing the sale of property in the context of an undue influence claim.
- Applications under the Trust of Land and Appointment of Trustees Act 1996 and for Orders under sections 44 and 50 of the Trustee Act 1925.
- Advising on the claimant's right to register an easement by prescription and on consequent Tribunal proceedings.
- Advising on the meaning of a restrictive covenant preventing the building of new dwellings on land.

PROFESSIONAL NEGLIGENCE

Having spent over 3 years as a solicitor specialising in claims against lawyers and surveyors in the secured lending space, Jonathan has an in-depth knowledge of professional negligence claims for lenders and real estate investors.

At the Bar, Jonathan has acted in claims against solicitors for negligent advice with respect to defending bankruptcy proceedings and the prospects for annulment, and for negligence and for restitution involving issues of apparent authority and fraud.

Jonathan has provided advice on claims against solicitors concerning failure to include conditions as to planning permission in a contract for the sale of commercial property, failure to protect an option on land by registration, and failure to observe a deadline for serving notice to acquire a new lease under the Leasehold Reform, Housing and Urban Development Act 1993.

Jonathan Lester

Getting out of the contract

Penalties, undue influence, unconscionable bargains and more



Introduction



The risk

Transactions and contractual obligations can be avoided at Law or in Equity:

- Duress
- Undue influence
- Unconscionable bargains
- Economic duress

Contractual obligations can also be negated:

- Penalty doctrine

Introduction



The risk

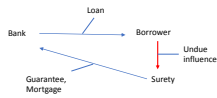
Solicitors retained to complete a transaction or draft a contract could face a claim if the transaction or contractual obligations are liable to be set aside or unenforceable.

Undue influence: case-types

Two-party case

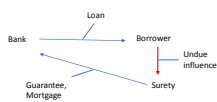


Three-party case



Undue influence

Three-party case: acting for surety



Padden v Bevan Ashford [2011] EWCA Civ 1616

"She should have been told in clear terms that a hurried short meeting was simply inappropriate, bearing in mind the importance, riskiness and probable pointlessness of the transaction she was about to enter into, the inadequacy of the information available at the moment, and her inevitably upset and emotional state, coupled with the pressure being put on her. The Judge seemed to think that it was for the claimant to ask for such a further meeting, but it seems to me that a solicitor who [] had given the claimant 'independent legal advice' should have explored and tested her reasons for entering into the transaction, or at least advised her as to the importance of doing so."



Undue influence

Three-party case: acting for bank



Bank put on inquiry: *Royal Bank of Scotland v Etridge* (No. 2) [2001] UKHL 44

- "As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200."
- "The only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial"



Undue influence

Three-party case: acting for bank



The Etridge Steps: *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44

1. "Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor acting for the wife, that he has advised the wife appropriately."
2. "to check directly with the wife the name of the solicitor she wishes to act for her."
3. "to send to the solicitor [advising the surety] the necessary financial information."
4. Inform the solicitor of any information indicating undue influence or misrepresentation.
5. "obtain from the wife's solicitor a written confirmation to the effect mentioned above".



Undue influence

Three-party case: acting for bank

Mitigating your risk in acting for bank-client:

1. Ensure your client is aware of the Etridge steps.
2. Identify any relationships of trust and confidence or non-commercial relationships between the parties.
3. Clarify whether the bank is relying on you to complete any of the steps.
4. Ensure adequate disclaimers regarding investigation of the underlying rationale for the transactions / relationship between the parties.



Unconscionable bargains and economic duress

The rule: unconscionable bargains

Equity may relieve a party of his obligations on the grounds of unconscionability on the basis:

- (i) that one party was at a serious disadvantage to the other, "whether through poverty or ignorance or lack of advice or otherwise", so that circumstances existed of which unfair advantage could be taken;
- (ii) that the weakness of the one party had been exploited by the other in some morally culpable manner; and
- (iii) that the resulting transaction had been not merely hard and improvident, but overreaching and oppressive."

- *Jones v Morgan and anor.* [2002] 1 EGLR 125



Unconscionable bargains and economic duress

The rule: "economic" duress

The law may rescind a contract on the basis of "economic" or unlawful-act duress:

- "a threat (or pressure exerted) by the defendant that is illegitimate.
- "illegitimate threat (or pressure) caused the claimant to enter into the contract."
- "claimant must have had no reasonable alternative to giving in to the threat (or pressure)"

- *Pakistan International Airline Corp. v Times Travel (UK) Ltd* [2021] UKSC 40



Unconscionable bargains and economic duress

The risk

- Weakness of mind: age-related infirmity
- Ignorance / lack of understanding: language barrier?
- Time pressure: "return signed PG by 4pm today"



Penalties

The rule

Mokdessi v Cavendish Square Holdings BV [2015] UKSC 67

- "The penalty rule regulates the remedies available for breach of a party's primary obligations, not the primary obligations themselves."
- "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation."
- A penal obligation in a contract ("penalty clause") is not enforceable.



Penalties

The risk

- Failure of the solicitor to draft terms so as to circumvent the penalty rule could be a breach of duty;

Risky areas

- Loans / loan facilities
- Settlement agreements
 - *Permavent Ltd v Makin* [2021] EWHC 2021
 - *Heritage Travel and Tourism Ltd v Windhorst* 2021 EWHC 2380 (Comm)



Penalties

The strategy

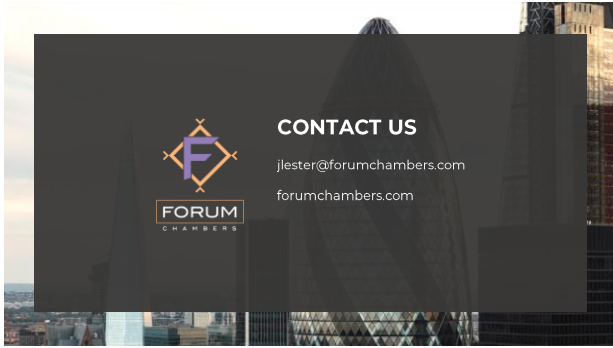
Drafting techniques can circumvent the penalty rule:

- price-adjustment clauses
 - *Makdessi*
- detriment not triggered by a breach:
 - *OFT v Abbey National PLC* and *ors.* [2008] EWHC 2325 (Comm)
- contractual estoppel:
 - drafting to include recital/acknowledgment that detriment is a genuine pre-estimate of loss.



ANY QUESTIONS?







Daren Allen
Partner, Shoosmiths

“Consumer Duty”

Daren Allen

Partner, London

Dispute resolution & litigation, Regulation,
business crime & compliance

020 7282 4129

daren.allen@shoosmiths.co.uk

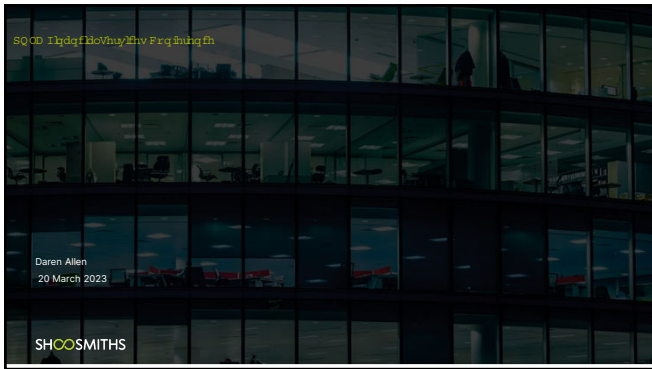


Daren is a Partner in the Dispute Resolution and Litigation team and has over 30 years experience in acting for financial institutions, large corporations, Governments and individuals in relation to complex investigations, litigation, regulatory enforcement proceedings and legal and regulatory compliance.

Daren regularly advises clients on matters relating to fraud, bribery, corruption and money laundering. He assisted the Ministry of Justice in drafting the Guidance on the Bribery Act 2010. He has also advised the Joint Money Laundering Steering Group on the Guidance Notes for the financial services sector.

Notable cases/matters include:

- acting for the Bank in *N v The Royal Bank of Scotland PLC* [2019] EWHC 1770 (Comm) and in *NCA v N and The Royal Bank of Scotland PLC* [2017] EWCA Civ 253;
- acting for the Bank in *Property Alliance Group Limited v The Royal Bank of Scotland PLC* in the first major Court of Appeal decision on LIBOR manipulation and Interest rate hedging products [2018] EWCA Civ 355;
- acting as a Section 166 skilled person in connection with the widely publicised mis-selling of Interest Rate Hedging products to non-sophisticated customers, including designing the methodology of the file reviews, designing customer communications, recruiting and training a team of file reviewers, reviewing customer files, attending skilled persons forums at the FCA and determining redress for customers;
- advising a large international Bank on anti-money laundering compliance across 22 jurisdictions;
- advising over 60 individuals in relation to a complex FCA investigation into a firm's anti-money laundering systems and controls;
- advising a payment services firm on its anti-money laundering systems and controls following an FCA visit and advising on subsequent VREQ;
- acting for the bank in the seminal case of *Jayesh Shah & Another v HSBC Private Bank* [2009] EWHC 79 (QB), and [2010] EWCA Civ 31, [2011] EWCA Civ 1154, [2012] EWHC 1283(QB) in a US\$300 million claim brought by two former customers. This is the leading case in relation to Banks and their obligations to file Suspicious Activity Reports and the outcome received a significant amount of commentary; and
- acting for the bank in *Stone and Another v National Westminster Bank and Paul Aplin* [2013] EWCH 208 (CH). This case was a claim against the Bank arising out of a significant Ponzi scheme and has been widely reported.



The FCA wants to set higher expectations as to the standard of care provided to retail customers

This includes:

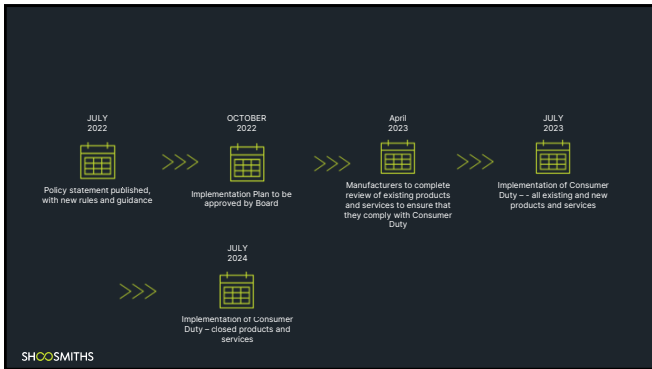
- Focus on proactively seeking to deliver good customer outcomes
- Firms placing customer interests at the centre of their business
 - 'am I treating my customers as I would expect to be treated'*
- Competition driving market-wide benefits
- Firms competing to attract and retain customers based on high standards and customer satisfaction
- Firms innovating in pursuit of good customer outcomes
- Firms considering the needs of customers, including those that are vulnerable
- Firms continuously learning lessons from focus on customer experience
- Products that are fit for purpose, provide value and do not cause harm
- Customers getting prompt and appropriate redress when it is due to them

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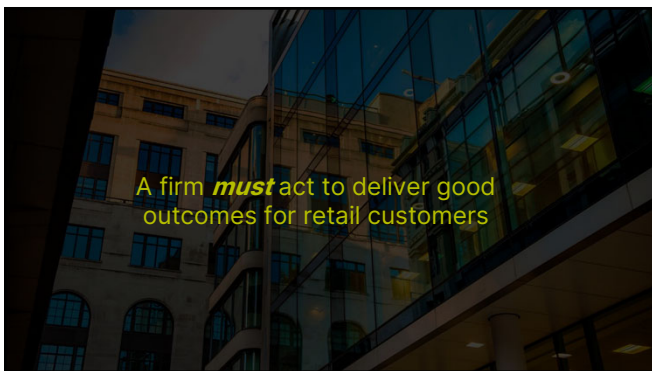
The Drivers Behind Consumer Duty

The FCA defines culture as the habitual behaviours and mindsets that characterise an organisation, and focuses on four key drivers which it believes can lead to harm: purpose; leadership; approach to rewarding and managing people; and governance.

1 Leadership
2 People policies
3 Governance
4 Purpose







Act in good faith towards retail customers

Avoid causing foreseeable harm to retail customers

Enable and support customers to pursue their financial objectives

CO

FCA proposes to align with existing sectoral sourcebooks

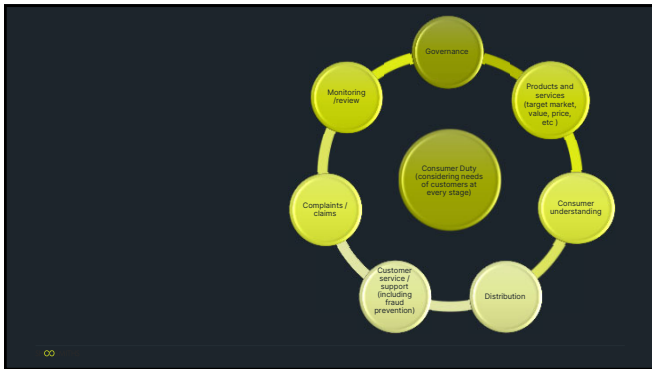
- **BCOBS** – a banking customer or prospective banking customer
- **ICOBS** – a policyholder or prospective policyholder
- **COBS** – a customer who is not categorised as a professional client
- **In relation to any other activities (e.g MCOB)** - a customer

✦ Including any person who is, or would be, the end retail customer

CO

Key elements of the firm customer relationship

SHC/SMT/HS



All Products and Services to be fit for purpose – designed to meet the needs, characteristics and objectives of consumers in the identified target market

Design

Identify target market (including whether it includes vulnerable consumers)

- focus on customer outcome
- fees will need to be reasonable
- avoid "sludge" practices (e.g. processes that discourage exits or changes)

Distribution

- targeting of Products and Services
- avoiding harm through the distribution chain

Product Manufacturers

Firms working together to manufacture a product or service:

- ability to determine or materially influence the design and distribution of a product
- must be a written agreement outlining roles and responsibilities
- agreement must confirm which firm is responsible for meeting the different rules under the product and service outcome

Manufacturers must approve existing products or services, any *significant* adaptation to a product or any new product or service they introduce

- for existing products significance depends on potential impact to customers
- are significant features added or removed?
- does the change affect the target market?
- are there changes to terms and conditions?

Product Manufacturers (and co-manufacturers)

Required to design products according to the target market:

- to meet identified needs, characteristics and objectives of customers in target market
- target market to be identified at a "sufficiently granular level"
- for simple products aimed at mass market the exercise should be straightforward
- the more niche or high risk (e.g. investment products) the more complex the exercise to prevent or mitigate customer harm

Manufacturers must develop a distribution strategy appropriate for target market and must make all appropriate information available to distributors to enable them to understand:

- the product or service
- the target market
- the needs, characteristics and objectives of customers (including vulnerable customers)
- the intended distribution strategy; and
- to ensure that the product/ service will be distributed only to the target market

∞

Product distributors

Distributors must:

- have distribution arrangements for each product or service they distribute
- understand the products or services they distribute by getting appropriate information from manufacturers
- not distribute a product or service if they do not understand it sufficiently
- identify or create a clear distribution strategy consistent with that of the manufacturer
- review their distribution strategy regularly
- share information with manufacturers as requested or where they take remedial action following any review of distribution arrangements or where they identify consumer harm
- monitor compliance with the outcome

∞

Products to be fit for purpose and represent fair value

- Firms must consider whether the price for a product or service is reasonable given the benefits
- Assessment of value will include:
 - the nature of product including benefits that will be provided or may be reasonably expected, their quality and any limitations
 - the type and quality of service
 - the expected total price the customer will pay (including fees and charges over lifetime of relationship; and
 - any characteristics of vulnerability in the target market

∞

Communications enable customers to make informed decisions

- Firms should support customers by ensuring communications meet the information needs of customers and are clear, fair and not misleading
- Firms will need to tailor communications dependent on nature of product, target market and information needs
- Firms should consider what they know or ought to know about customer (sophistication, financial awareness, vulnerability, etc)

Channels of communication

- Need to be effective and accessible

Testing and monitoring of communications

- Adapt communications where appropriate to support understanding and good outcomes

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Firms expected to provide support that meets customer needs.

Firms should:

- Consider support customer needs and make sure their customer service meets those needs.
- Support customers in a way that takes their needs into account and not design processes with unreasonable barriers (known as sludge practices - e.g. making it mandatory to communicate through a particular channel where a customer wants to switch or exit products or make a complaint).
- Monitor the quality of support offered and identify where support fell short and address the issues identified.
- Ensure that they do not disadvantage particular groups of customers including those that are vulnerable.

- ❖ Support should not lead to the product costing more than the consumer expected.

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- Delivering good outcomes to be at **the centre of the firm's strategy** and business objectives

- Firm's Board or equivalent management body will be responsible for assessing whether it is delivering good outcomes for customers which are consistent with the consumer duty

- Objective will be supported by SM&CR which establishes clear senior management responsibility for compliance with regulatory requirements

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Firms will be expected to:

- monitor and regularly review the outcomes that customers are experiencing to ensure that products and services are delivering outcomes consistent with the duty.
- Identify where customers or groups of customers are not getting good outcomes and understand why
- Have processes in place to adapt and change products and services or policies and practices to address any risks or issues and stop it occurring again in the future

Firms will need to identify sources of data to enable them to assess whether customer outcomes are consistent with their obligations under the Consumer Duty.

'One question firms can ask themselves is whether they are applying the same standards and capabilities to monitoring customer outcomes as they are generating sales and revenue'

Types of data / information firms could use:

- Business persistence
- Distribution of products / pricing and fees and charges
- Behavioural insights
- Training and competence records
- Files reviews
- Customer feedback / staff feedback
- Number of complaints / complaints root cause analysis
- Results of regular testing and monitoring
- Feedback from others in the distribution chain
- Compliance reports
- Research / testing customer experiences

Fair value

- Customers pay a fair value
- Poor value products and services removed from market
- Reduction in complaints

Products and services

- Customers receive products and services that have been designed to meet their needs
- Reduction in complaints that products and services do not work as expected

Treatment

- Customers receive good customer service
- Reduction in complaints about switching, cancellation and service levels

Confidence

- Increase in customers confidence in financial services market
- Reduction in complaints

• **No private right of action for breach of any part of the Consumer Duty**

• **No recourse to FSCS or any FCA redress scheme (section 404 FSMA)**

- Complaint handling
- Referrals to FOS
- Action by the FCA

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FCA expects firms to resolve matters directly, with FOS as the fallback but

- The new Duty creates greater scope for complaints
- Complaints are likely to be framed by reference to the Consumer Duty and broad obligations (e.g. failure to act in good faith)
- Scope for minor complaints based on service issues (e.g. slow response times)
- Response to complaints will need to take into account the Consumer Duty even if not specifically raised
- FOS will view complaints from the perspective of the consumer
- Where FOS upholds a complaint that will not necessarily be evidence of breach of the Consumer Duty but it will depend on the specific facts of the case
- There will be evidential and commercial challenges with demonstrating compliance (e.g. price and value)

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Daren Allen
20 March 2023

SHOOSMITHS



Dominic Tucker
Associate Director, iDiscovery Solutions Ltd

“IDisclosure preservation, processing & authenticity”



DOMINIC TUCKER

Associate Director, UK/EEA



Before joining iDS, Dominic developed his consultative expertise in eDiscovery over the course of 15 years, consulting on the use of technology in support of a range of significant investigations, High Court litigations, and arbitration matters across public and private sectors. In his previous role, Dominic lead EMEA operations and eDiscovery consulting for another leading eDiscovery provider.

At iDS, Dominic's role is focused on the application of technology across all phases of disclosure, including the use of analytics and predictive coding, and he has a particular interest in the Disclosure Pilot Scheme currently proceeding in the English courts. Since the introduction of the GDPR, Dominic has also assisted various law firms and corporations to manage their responses to high volumes of Data Subject Access Requests (DSARS).

Dominic lives in Oxfordshire with his wife and two young daughters. When he's not crunching evidence, he enjoys the great outdoors with his family, some offroad cycling, a bit of running and an even smaller bit of windsurfing.

iDiscovery Solutions, Inc.
28 Queen Street, London
EC4R 1BB

+44 (0)7818 406834

dtucker@idsinc.com

[Profile on LinkedIn](#)

[@iDiscoveryInc](#)

EDUCATION

- GDL & LPC, BPP Law School
- University of Reading

"It's not a faith in technology. It's faith in people."

– Steve Jobs



eDisclosure in Litigation – Preservation, Processing & Authenticity
 Data Management and Early Case Assessment

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AGENDA

- The Practice Direction (PD57AD) – Previously *‘the pilot scheme’*
- Scoping & Data Collection & Disclosure
- Authenticity

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Electronic Discovery Reference Model (EDRM)

Volume Information Management Identify Collect Preserve Review Analyze Process Produce Present Relevance

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• How Much Data Are We Talking About?

- Prior to 2003, 5 Exabyte (5 billion GBs) of data had been created
- Currently, the world creates 5 Exabyte of data every 2 to 7 days
- There will be 10 times the amount of data created this year as last year
- 90% of the world's data was created in the last 2 years



The challenge?

- We live our lives through the use of computers and technology driven devices
- Need to analyse ESI to either make a case, break a case, respond to a request, or investigate issues internally

The Practice Direction (PD57AD) – Previously 'the pilot scheme'

- Co-operate to a fixed timetable up to the CCMC.
- Choose from a 'Menu' option of different disclosure models.
- Identify approach to searching.
- Justify use or non-use of technology



Technology Assisted Review

Machine Learning

- Popular terms include:
 - Technology-assisted review (TAR)
 - Predictive coding (TAR 1.0)
 - Continuous active learning (CAL, TAR 2.0)
- A subject matter expert trains a predictive model by tagging documents as relevant or non-relevant.
- The predictive model assigns scores to documents based on the likelihood of the document being relevant.
- Reviewers focus on the documents that are most likely to be relevant and deprioritize the documents least likely to be relevant



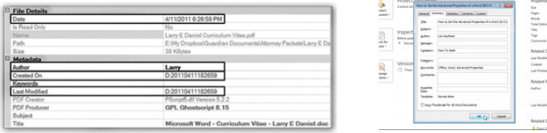
AGENDA

- The Practice Direction (PD57AD) – Previously *'the pilot scheme'*
- Data Collection & Disclosure
- Authenticity



Metadata: Precious and Fragile

- Not a Copy & Paste event!
- When was a photograph taken and who's mobile?
- Sort and search: document created, edited, printed, etc.,
- Group items authored or sent by or between certain people.
- It's what lies **beneath the documents**.



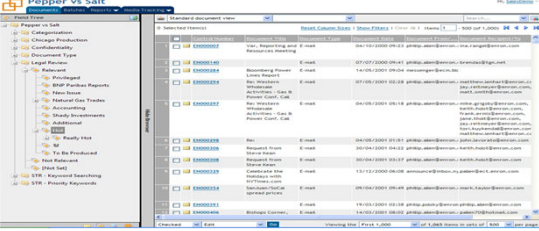
Exemplar Capabilities

- We can collect and preserve precious data and metadata from:



Review

Review Software: Field Tree View

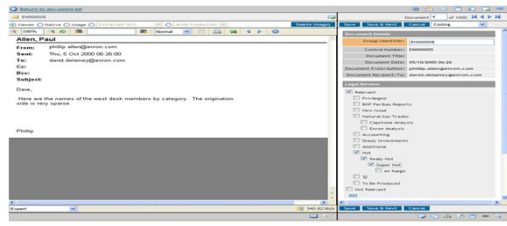


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Review

Review Software: Document View



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AGENDA

- The Practice Direction (PD57AD) – Previously ‘the pilot scheme’
- Data Collection & Disclosure
- Authenticity



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Remember these words



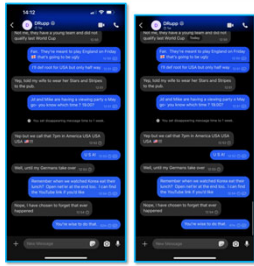
If a single piece of perfect evidence is submitted with no original, and is paired with a complicated backstory, then a check is warranted.



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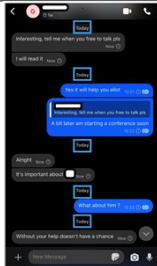
Fake Mobile Phone Chats – Signal Screen Real Estate



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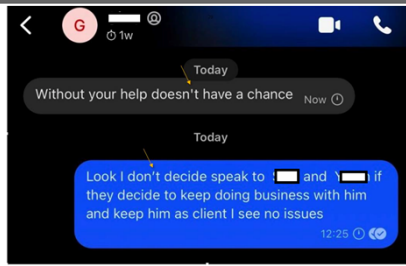
Fake Mobile Phone Chats – Signal Stamps



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Fake Mobile Phone Chats – Signal Typeface and Full Stops



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What to look for

Mobile Chats

- Fonts/TypeFace: do they look the same?
- Time stamps
- Ephemeral message indicators
- Contact display name: does this comport?
- Bubble size, colour, dimensions
- Are there double—spacings but no full stops?
- Icon size, shape, placement, and other display bar indicators.
- Much more...

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Fake E-mails

Thursday, March 2, 2023 at 10:40:16 Greenwich Mean Time


Subject: Payment Transfer
Date: Thursday, 2 March 2023 at 10:39:44 Greenwich Mean Time
From: Timothy LaTulippe
To: Dawn Tucker
Attachments: image001.png

Hi Dawn

Pursuant to our chat of 1 March in your offices, I would be pleased if you could advise on the money transfer due in the amount of £2.5M.

I await your reply.

Regards,
Tim

 **Timothy J. LaTulippe MSc.**
Director, Europe
IDS
UK: +44 (0)1753 311981 | tim@ids.com
US: +1 (520) 8542 4150 | tim@ids.com
Germany: +49 (0)202 2020 2020

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Fake E-mails

TI

Subject: → Payment Transfer
Date: Thursday, 2 March 2023 at 10:39:4
From: Timothy LaTulippe. →
To: → Dom Tucker
Attachments: image001.png

Hi Dom

Pursuant to our chat on 1 March in your offi



THANK YOU! QUESTIONS?

CONTACT DETAILS

- **Dan Rupprecht: Director Europe**
 - drupprecht@idsinc.com
 - +44 (0) 7379 274 577
- **Tim LaTulippe: Director Europe**
 - tlatulippe@idsinc.com
 - +44 (0) 7733 331 858
- **Dom Tucker: Associate Director Europe**
 - dtucker@idsinc.com
 - +44 (0) 7818 406 834





Q&A

Chairman's Closing Remarks



Katy Manley LLB
PNLA President

“Conclusions”



Katy Manley LLB PNLA President

Katy Manley trained in London and qualified as a solicitor in 1989 moving to the west country in 1991. She was made an equity partner in a leading Bristol practice in 1995 becoming Head of the Professional Negligence team. She remained with this firm until the launch of Manley Turnbull in 2006 which, until closure in 2022, specialised in professional negligence claims.

Katy is a founder member and President of the Professional Negligence Lawyers Association ('PNLA') launched in 2004. With the management team, Katy has been responsible for arranging seminars and events, lobbying Government and consultation with regulatory and other bodies. Through the PNLA seminars Katy has developed a very strong network of relationships with members of the Bar, experts and solicitors throughout the UK and Ireland with an identity of interest in this niche practice area.

Katy is one of the leading names for claimant professional negligence work and is known not only for her practice but also from publishing articles and lecturing on this subject.

Publications: Strategy & Tactics Chapter 4 – Simpson: Professional Negligence & Liability loose leaf



**5 hrs 30 mins – Total talk time
1 hr - Conference Pack Review**

Total CPD – 6 hours 30 minutes

To complete your feedback form please go to

<https://www.pnla.org.uk/event/professional-negligence-liability-financial-services-and-group-litigation-london-20-march-2023/>

Please join us now for a drink:

**at The Anthologist,
58 Gresham St,
London EC2V 5AY**