



**PROFESSIONAL NEGLIGENCE AND
LIABILITY UPDATE**

ENGLAND & WALES

CHELTENHAM CONFERENCE

"Day 1 and Day 2"

**Thursday 16th November
&
Friday 17th November**

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

CHELTENHAM CONFERENCE – “Day 1”

Thursday 16th November 2023

0900–0930 Registration and Refreshments

0930–0935

“PNLA Introduction”

Katy Manley – PNLA President / Consultant - BPE Solicitors LLP

<https://www.pnla.org.uk/management-team/>

0935–0940

“BPE Introduction”

John Carter – Partner – BPE Solicitors LLP / PNLA Midlands Representative

<https://www.bpe.co.uk/our-people/john-carter/>

0940–1000

“Chairman’s address”

Francis Bacon – Hailsham Chambers

<https://www.hailshamchambers.com/our-people/profile/francis-bacon>

1000–1045

“Keynote Address”

Michael Pooles KC – Hailsham Chambers

<https://www.hailshamchambers.com/our-people/profile/michael-pooles-kc>

1045–1100

Questions and discussion

1100–1115 Refreshments

1115–1200

“Professional Negligence Update”

Ben Patten KC – 4 New Square

<https://www.4newsquare.com/profile/ben-patten-kc/>

1200–1245

“Financial Services – negligence, fraud and more...”

Hugh Sims KC – Guildhall Chambers

<https://www.guildhallchambers.co.uk/barrister/hugh-sims-kc/>

1245–1300

“Litigation Funding and ATE”

Mark Baker – Client Care Options

<https://www.clientcareoptions.co.uk/about-client-care-options/>

1300–1400 Lunch

1400–1430

“Intellectual Property and the impact of AI”

Riyaz Jariwalla – Partner – BPE Solicitors LLP

<https://www.bpe.co.uk/our-people/riyaz-jariwalla/>

1430–1500

“Property and Lending cases – practical experiences of the appointed Experts”

Ruth Dooley & Hannah Griffin – Partners – Hazelwoods LLP

<https://www.hazlewoods.co.uk/people/profile/ruth-dooley>

<https://www.hazlewoods.co.uk/people/profile/hannah-griffin>

1500–1515

Questions and Discussion

1515–1530 Refreshments

1530–1615

“Costs update and the Fixed Costs Regime”

Nicholas Lee – Costs Lawyer & Mediator / Managing Director – Paragon Costs Solutions

<https://www.paragoncosts.com/site/people/profile/n.lee>

1615–1630

“Chair’s Closing Remarks - Questions and Discussion”

6 hours CPD

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

CHELTENHAM CONFERENCE – “Day 2”

Friday 17th November 2023

0900–0910

“BPE Countryside Day – Introduction”

John Carter – Partner – BPE Solicitors LLP / PNLA Midlands Representative

<https://www.bpe.co.uk/our-people/john-carter/>

0910–0920

“Chair’s address”

Francis Bacon – Hailsham Chambers

<https://www.hailshamchambers.com/our-people/profile/francis-bacon>

0920–0945 *“Keynote Address - Patrick was part owner of Coneygree - Winner of the Cheltenham Gold Cup 2015 and reported to be the first novice to win in 41 years!”*

Patrick Lawrence KC – 4 New Square

<https://www.4newsquare.com/profile/patrick-lawrence-kc/>

0945–1015

“Negligence and Sports Injuries Common Threads”

Megan Griffiths - 12 KBW

<https://www.12kbw.co.uk/barristers/megan-griffiths/>

<https://www.12kbw.co.uk/negligence-and-sports-injuries-common-threads/>

1015–1030

“Racing Tipster!”

Steve Conlay – BPE Solicitors LLP

<https://www.bpe.co.uk/our-people/steve-conlay/>

1030–1130 BPE Brunch

“Travel to racecourse – Subject to availability parking available at BPE’s offices – walking distance to racecourse.”

1200–

“Cheltenham Racecourse”

First Race 1310 – Last Race 1600

2 hours CPD

**PROFESSIONAL NEGLIGENCE AND LIABILITY
CHELTENHAM CONFERENCE
Thursday 16th November 2023**

ATTENDEES (1 of 2)

| | | |
|------------------------------------|---|----------------|
| Francis Bacon (Chair) | Hailsham Chambers | London |
| Michael Pooles KC (Keynote) | Hailsham Chambers | London |
| David Bailey | Healys | Brighton |
| Mark Baker | Client Care Options | Cheltenham |
| Tristan Bartlett | Litica | London |
| Jo Bewley | BPE Solicitors | Cheltenham |
| John Carter | BPE Solicitors/PNLA Midlands Representative | Cheltenham |
| Jamela Collins | Temple Legal Protection | Guildford |
| Steve Conlay | BPE Solicitors | Cheltenham |
| Christopher Cox | Bishopsgate Law | London |
| Clyde Darrell | Forum Chambers | London |
| Nicholas Davidson KC | Hailsham Chambers | London |
| Ruth Dooley | Hazlewoods | Cheltenham |
| Gordon Forsyth | CommProp Solutions | Cheltenham |
| Eleanor Gobey | BPE Solicitors | Cheltenham |
| Guy Goodall | BPE Solicitors | Cheltenham |
| Hannah Griffin | Hazlewoods | Cheltenham |
| Lucy Hodgkins | Paragon Costs | Bristol/London |
| Beth Holden | Anthony Gold Solicitors | London |
| Riyaz Jariwalla | BPE Solicitors | Cheltenham |
| Jemma Jones | BPE Solicitors | Cheltenham |
| Sukhbir Kaur | Temple Legal Protection | Guildford |
| Peter Knibbs | BPE Solicitors | Cheltenham |
| Nicholas Lee | Paragon Costs | Bristol/London |
| Sarah Lee | BPE Solicitors | Cheltenham |

| | | |
|--------------------------|-------------------------|-----------------|
| Patricia Lelliot | BPE Solicitors | Cheltenham |
| Anton Letten | Shakespeare Martineau | Nottingham |
| Kendal Litherland | Shakespeare Martineau | Nottingham |
| Andy Lyalle | Temple Legal Protection | Guildford |
| Katy Manley | PNLA & BPE Solicitors | Cheltenham |
| Lloyd Maynard | Forum Chambers | London |
| Pradeep Oliver | Cripps | Tunbridge Wells |
| Ben Patten KC | 4 New Square | London |
| David Patterson | Bonallack & Bishop | Salisbury |
| Gil Percival | Anthony Gold Solicitors | London |
| Rebecca Pike | BPE Solicitors | Cheltenham |
| Liliana Pina | Factor Risk Management | London |
| Daniel Quinn | Litica | London |
| Philip Radford | BPE Solicitors | Cheltenham |
| Annabel Rowland | BPE Solicitors | Cheltenham |
| Hugh Sims KC | Guildhall Chambers | Bristol |
| Paige Skudder | BPE Solicitors | Cheltenham |

**PROFESSIONAL NEGLIGENCE AND LIABILITY
CHELTENHAM CONFERENCE
Friday 17th November 2023**

ATTENDEES (1 of 2)

| | | |
|--------------------------------------|---|----------------|
| Francis Bacon (Chair) | Hailsham Chambers | London |
| Patrick Lawrence KC (Keynote) | 4 New Square | London |
| Philip Allen | BPE Solicitors | Cheltenham |
| Doug Armstrong | BPE Solicitors | Cheltenham |
| David Bailey | Healys | Brighton |
| Mark Baker | Client Care Options | Cheltenham |
| Tristan Bartlett | Litica | London |
| Andrew Call | 4 New Square | London |
| John Carter | BPE Solicitors/PNLA Midlands Representative | Cheltenham |
| Gavan Carty | Kent Carty | Dublin |
| Shane Carty | Kent Carty | Dublin |
| Jamela Collins | Temple Legal Protection | Guildford |
| Steve Conlay | BPE Solicitors | Cheltenham |
| Tim Constable | Bates Wells & Braithwaite | London |
| Clyde Darrell | Forum Chambers | London |
| Ruth Dooley | Hazlewoods | Cheltenham |
| Conor Fagan | Forum Chambers | London |
| Eleanor Gobey | BPE Solicitors | Cheltenham |
| Guy Goodall | BPE Solicitors | Cheltenham |
| Megan Griffiths | 11 Kings Bench Walk | London |
| Lucy Hodgkins | Paragon Costs | Bristol/London |
| Beth Holden | Anthony Gold Solicitors | London |
| Sukhbir Kaur | Temple Legal Protection | Guildford |
| Peter Knibbs | BPE Solicitors | Cheltenham |
| Nicholas Lee | Paragon Costs | Bristol/London |

| | | |
|---------------------------|-------------------------|------------|
| Andy Lyalle | Temple Legal Protection | Guildford |
| Katy Manley | PNLA & BPE Solicitors | Cheltenham |
| Pippa Manley | PNLA | Cheltenham |
| David Martin | Carbon Law Partners | Cardiff |
| Lloyd Maynard | Forum Chambers | London |
| Gil Percival | Anthony Gold Solicitors | London |
| Rebecca Pike | BPE Solicitors | Cheltenham |
| Liliana Pina | Factor Risk Management | London |
| Daniel Quinn | Litica | London |
| Morgan Rees | George Green | Birmingham |
| Jeremy Riley | Kennedys | London |
| Stephen Rome | Thursfieds | Birmingham |
| Annabel Rowland | BPE Solicitors | Cheltenham |
| Harrison Singleton | Forum Chambers | London |
| Paige Skudder | BPE Solicitors | Cheltenham |
| David Stedman | Clarke Willmott | Bristol |
| Holly Taylor | Hazlewoods | Cheltenham |
| Kelly Whittaker | PNLA South West | Bristol |



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Client Care Options Ltd (CCO) – Who are we and what to we do ?

We are a fully independent consultancy and brokerage specialising in assisting litigation solicitors to fully inform their clients about all available methods of financing litigation and financial loss protection when bringing a legal case.

We have the experience and specialist knowledge that enables us to offer the highest quality advice and service to explore and obtain the most up to date and competitive funding solutions for all types of legal disputes. We have agencies and relationships with most of the leading legal expenses insurers and litigation funding organisations in the UK. Using our independent service ensures full “client care” compliance because clients are always provided with a range of the best options for them and this is fully documented.



It can be hugely beneficial for solicitors, as part of structuring their own pricing arrangements to win business, to understand how much these evolving products and solutions might cost, their feasibility for a particular case and how they can be used to improve the economics of litigation for both clients and profitability for solicitors themselves.

Ultimately, the proactive provision of litigation loans and finance packages provide solicitors and clients with a wider range of pricing and payment options.

We understand that solicitors are experts in law and prefer not to advise on complex insurance and financial products. Because of this we provide a “CCO initial consultation” service for lawyers (and to their clients if requested) to discuss the most appropriate and beneficial methods of using ATE insurance and all types of litigation funding on a case-by-case basis.

“There is a myth that all clients are price driven. What clients actually seek is increased certainty, predictability and manageability - they want transparency over pricing.”

Burcher Jennings - Pricing and Costs experts

There is no question that clients appreciate being fully informed, especially if they can see a greater degree of certainty around the amount they stand to win against their budgeted expenditure and how they can protect against the chance of financial loss.

Solicitors will see many benefits from embedding the “CCO initial consultation” as a value added service to clients within their own day to day dispute resolution services; not only does it tackle the need to discuss funding options with clients, but also strengthens relationships and gives them a competitive edge over other firms.

It also ensures that clients who are concerned about engaging the firm’s representation services due to cash flow restrictions, or about being unable to afford any initial or projected legal costs, can be identified. Alternative solutions can then be found to overcome these concerns. This maximizes litigation fee income on cases that might otherwise not proceed.



Katy Manley
PNLA President
Consultant - BPE Solicitors LLP

“PNLA Introduction”



Katy Manley LLB
PNLA President
Consultant – BPE Solicitors

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 for publishing articles and lecturing on the subject.

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



John Carter
Partner – BPE Solicitors LLP
PNLA Midlands Representative

“BPE Introduction”



John Carter

Partner

01242 248243

john.carter@bpe.co.uk

John specialises in property litigation and professional negligence work.

He manages a varied workload which involves pursuing negligent professionals who have provided incorrect advice to lenders and other clients causing them to incur a loss.

He also specialise in commercial property litigation, often dealing with lease renewals and breaches of covenant. When issues arise, he advises landlords practically whilst ensuring their positions are protected.

John is the PNLA Midlands Representative and the Property Litigation Association.

John is identified as a Rising Star by Legal 500.



Francis Bacon
Hailsham Chambers

"Chairman's address"



Francis Bacon

Call: 1988

Overview

Francis specialises in complex, high-value professional indemnity, commercial insurance and commercial litigation. He has extensive experience in England and Wales and overseas in acting for professional clients and their professional indemnity insurers. He also acts for private individual and corporate clients in commercial disputes and in claims brought against professionals both in this jurisdiction and in commonwealth countries.

He appears regularly in the High Court and Appellate Courts and many of his cases are widely reported in the leading texts.

For over a decade Francis been listed in the very top tier of Professional Negligence barristers in Chambers & Partners and Legal 500. Francis has been described by Legal 500 as “*the outstanding professional indemnity junior at the Bar*” and was recognised as the Professional Negligence Junior Barrister of the Year by Chambers & Partners. Chambers 2022 comments: “*He’s extremely bright, even by the standards of the Bar. Very confident, very direct - you know exactly where you stand.*”

Professional liability

Lawyers

Francis acts for and against solicitors in many jurisdictions. He has considerable experience in managed and large-scale litigation involving solicitors. He was involved in the *Nationwide Managed Litigation* in the late 1990’s, *TAG* in 2006/2007 and *Composite Legal Expenses*. He has appeared in many of the leading High Court and Court of Appeal authorities on loss of chance claims. His work often takes him overseas and he has worked on high profile professional negligence claims relating to lawyers in the Bahamas, Milan, Paris and Jersey. Francis has particular experience of obtaining freezing injunctions

and pursuing tracing claims against dishonest lawyers and other professionals worldwide. He advises extensively on coverage issues especially in relation to dishonesty, successor practice and aggregation issues. He is regularly asked by his insurer clients to conduct indemnity interviews and has advised on very high value claims. Francis has acted as an adjudicator in complex professional negligence disputes.

Francis acts for members of the Criminal Bar on the instructions of Bar Mutual and has represented the Bar Standards Board. Building on his 18 years' experience as a Criminal Recorder Francis acts for barristers and higher court advocates in many claims arising out of the alleged negligent conduct of criminal proceedings including serious crimes such as complex fraud, murder and rape cases.

Trustees

Following on from being led by Michael Pooles KC in successfully defending Cantrust, a firm of professional Jersey based trustees, in the \$20m breach of trust/tracing claim *Shalson v. Russo* [2005] Ch 281, Francis continues to act for and against professional trustees in various commonwealth jurisdictions.

Between 2006 and 2010, he acted for the Ladies Al Hamrani in the \$120m breach of trust claim brought by the Ladies and various members of the Al Hamrani family against JP Morgan and others in the Royal Court in Jersey. The action became the longest running trial in Jersey's legal history. It was eventually resolved in a substantial settlement to the Ladies.

Francis continues to advise extensively on coverage issues relating to professional trustees in many jurisdictions and in particular in the Channel Islands.

Construction professionals

Francis has acted for architects, quantity surveyors, engineers and other construction professionals in numerous high value and complex High Court claims. Building on his experience of large-scale property fraud litigation, Francis has acted in many multi-million claims for and against well known commercial and residential property surveyors and valuers throughout the UK.

Accountants & auditors

Francis acts regularly for and against accountants and auditors in High Court claims. He has been involved in many cases involving complex tax issues and SDLT schemes. He has acted for insurers in recovery actions against auditors of legal practices.

Insurance brokers

Francis has acted in numerous high value claims for and against insurance brokers.

Commercial law

Francis has considerable domestic and international commercial litigation expertise. He has been

instructed in a very wide variety of disputes for private and insurer clients and is often instructed to take urgent interlocutory steps including obtaining freezing injunctions and search orders.

Many of his cases are related to commercial properties, ranging from multi-million £ or \$ insurance disputes to acting for commercial agents in commercial property purchases. Francis has been instructed in commercial litigation disputes which have taken him to Paris, Jersey, Milan, Washington, New York and Nassau.

Regulatory and disciplinary

Francis has defended professionals for very serious professional conduct matters before many different regulatory and disciplinary tribunals. He represented the chair of one regulatory body when that person's firm was facing disciplinary proceedings.

Francis has acted for the Bar Standards Board in High Court proceedings and he has represented members of the Bar before the Council of the Inns of Court and acted for Solicitors before the SDT.

Employment law

Francis has been instructed in complex employment disputes. He acted for the former directors of a multi-national company in injunctive proceedings which have been brought against them.

Media law

Francis acted for the Marquesa de Valera, the International Editor of Hello! Magazine in the early stages of the claim brought by Michael Douglas and Catherine Zeta Jones against the magazine. Since then he has acted for many well-known specialist libel lawyers in professional negligence claims arising out of their alleged negligent conduct of high profile defamation proceedings.

Recent cases

Moda International Brands Ltd v Gateleys LLP [2019] PNLR 27. Francis acted for the successful BVI Company in a professional negligence claim against Moda's former solicitors for the loss of chance of recovering a share of profits from a property development in Nottingham.

Group Seven Ltd v Notable Services LLP [2019] PNLR 22. The Court of Appeal gave important guidance on the law of dishonest assistance in breaches of trust and fiduciary duty.

Andrews v Messer Beg [2019] 1 Costs LO 1 and [2019] PNLR 23. Acting for Messer Beg in the claim for

the loss of chance of a better outcome of managed litigation originally brought by borrowers who took out shared appreciation mortgagees against Barclays Bank and Bank of Scotland. The case is ongoing.

Goddard-Watts v Burgess Salmon and others. Acted for a firm of accountants in a claim for the loss of chance of a better outcome of matrimonial proceedings. Case settled after exchange of skeleton opening submissions.

Paul v Lock & Marlborough. Acted for firm of solicitors in a very high value contentious probate claim. Case settled after exchange of skeleton opening submissions.

Group Seven Ltd v Nasir and others [2017] EWHC 2466 (Ch). Francis was led by William Flenley KC in a €9m claim brought by Group Seven against Notable Services LLP and others for dishonest assistance in breach of trust and unconscionable receipt. Following a 38 day trial, the claims of dishonest assistance and unconscionable receipt against Notable Services LLP were dismissed. However, following Francis' successful cross-examination of co-defendant Mr Louanjli, Mr Louanjli was held liable to the Claimants in deceit, conspiracy and dishonest assistance in breach of trust.

Robinson v Ness & Co [2017] EWHC (Ch). Francis defended Ness & Co in the High Court in a High Court trial in which it was alleged that the Claimant had committed mortgage fraud and was not entitled to recover damages from the solicitor on the grounds of public policy.

Group Seven Ltd v Nasir [2016] 2 Costs LO 303. Francis acted for the Notable Defendants in Morgan J's Costs Management Judgment [2016] 2 Costs LO 303 in which the Claimant's budgeted costs in excess of £5m were almost halved.

Mortgage Express v Awais Khan [2017] EWHC 53. Francis successfully acted for the lender in a claim against a dishonest mortgage borrower at a trial before Mr M Griffiths KC sitting as a Deputy High Court Judge in the Chancery Division.

Martin Francis v Charles Knapper [2016] EWHC 3093 (QB). Francis successfully defended the solicitor firm Knapper & Co in claims of fraudulent misrepresentation brought by Mr and Mrs Francis at a trial before Mr Justice Andrew Baker.

Haylett v Cayton [2015] EWHC 1951 (Comm) – a partnership valuation dispute tried before Colin Edelman KC.

Mark Lynn v Borneos LLP [2014] EWHC 254. Successful defence of multi-million £ claim following a four day High Court Action before HH Judge Cooke. The Defendant solicitors had admitted breach of duty in drafting a Share Sale Agreement of a UK registered company which had acted as an agent in selling off plan residential properties in the Dominican Republic. The Judge found the Claimant dishonest and the Claimant failed on causation.

Adelle Challinor & 20 Ors v Juliet Bellis & Co and Geoffrey Egan [2013] EWHC 347 (Ch) and [2013] EWHC 620. Successfully defending Geoffrey Egan, a chartered surveyor, in a contested £3m claim brought against him by the Claimants in misrepresentation and also successfully defending Part 20. Claim made by *Juliet Bellis & Co*, a solicitor, in dishonest assistance in breach of trust, breach of warranty of authority, breach of fiduciary duty and dishonestly procuring wrongdoing by his employers.

Mamun v Bar Standards Board [2012] QBD. Representing Bar Standards Board before The Visitors of the Inns of Court in successfully opposing Mr Mamun's appeal against exclusion from Lincoln's Inn.

Pritchard and others v Ingram Winter Green and Others [2011] 2 EGLR 1. Acting for Ingram Winter Green before Morgan J in successful application to strike out claims brought by litigants in person against the firm and in subsequently obtaining civil restraint orders against the Claimants.

Halliwells v NES v Quinn [2011] PNLR 30. Acting for Quinn Insurance in £1.5m undertaking claim against NES solicitors. Francis's own declinature of coverage was upheld on grounds of dishonesty and condonation of dishonesty by both partners and on the basis that the undertaking was not given in solictorial capacity.

Harris v Kingsley Napley [2011] Defending Kingsley Napley in substantial claim relating to alleged negligent advice in relation to stamp duty land tax saving scheme.

Arcscotts Limited v Harris [2010] EWHC Ch Acting for Arcscotts Limited in obtaining freezing injunction in claim against dishonest employee and her husband. Advising on tracing actions and subsequent recovery of substantial part of stolen monies.

Al-Hamrani v JP Morgan and Others [2009] Royal Court of Jersey. Acted successfully for the Ladies Al-Hamrani in the high profile \$120 million breach of trust litigation in the Royal Court of Jersey against JP Morgan and Others.

Perkin v Lupton Fawcett [2008] PNLR 30 – (Court of Appeal) loss of chance claim against solicitor in claim relating to lost chance of negotiating more favourable clauses in a share purchase agreement.

Nationwide v Browne Jacobson LLP: £7m lender claim settled.

Bank of Scotland v Shah Solicitors and Al Ansari [2008]: £7m claim against solicitors and property developers for fraudulent breach of trust and deceit. Acting for bank in obtaining freezing injunctions against fraudsters.

Hunter v Rhodes Dickson [2008]: successful defence at trial of claim against valuer.

The Accident Group [2007]: multi-million pound litigation concerning the lawfulness of a referral fee and the mediation of thousands of claims with the Lloyds markets.

Sweetman v Shepherds, Nathan, Russell Jones and Walker and others [2007] EWHC 137 : striking out multi-million claim for loss of chance.

Walker v Palfreyman and others [2006] EWHC – summary judgment and contempt application for

professional indemnity insurers against fraudulent borrower in multiple mortgage fraud where we had obtained a freezing injunction and obtained draconian tracing orders to recover the vast majority of the monies stolen.

Hammond Suddards v Jebb [2006] EWCA 777. Successful defence of claim against Hammond Suddards for loss of litigation opportunity.

Excel Polymers v Anston Commercial [2005] EWHC. 1927 (QB). Acted for insurance broker at trial of preliminary issue of meaning and effect of standstill agreement relating to limitation. Following findings in favour of insurance broker, action successfully dismissed.

Shalson and others v Russo, Cantrust and others [2005] Ch 281 Representing Professional Trustees. Equitable tracing of US\$7.5m + into privately owned \$20m motor yacht and into monies held on trust in Jersey based Settlement. In depth analysis of law of tracing. Successful defence of the claim that the Settlement was a sham.

Manolakaki v Constantinides and Lange [2004] EWHC 749. Successful defence of claim brought by solicitor against his professional indemnity insurers who had refused to indemnify him on the grounds of his own dishonesty in a \$1m plus financial instrument fraud.

McNab v Neal [2003]. Acting for innocent partners in obtaining freezing injunction and search orders against dishonest partner.

Sharpe v Addison Lister [2004] PNLR 426. Assessment of value of lost litigation opportunity resulting from negligence of solicitor who had advised claim had merit but who failed to give notice to insurers in a claim for damages for personal injury arising out of a road traffic accident. Review of all recent Court of Appeal decisions on loss of chance. Claimant awarded only 10% of value of total assessed loss.

Sharif v Garrett & Co. [2002] 1 WLR 3118. Leading case on loss of litigation opportunity where action struck out for want of prosecution – £4m+ claim.

Prosser v Castle Sanderson [2002] Lloyds Rep PN 584 Court of Appeal – £750k Loss of chance claim against an insolvency practitioner. Claim dismissed.

Egan Lawson Limited v Standard Life [2001] 08 EG 168 Court of Appeal – commercial estate agent's entitlement to commission in commercial property transaction.

Nationwide Building Society v Balmer Radmore [1999] Lloyd's Rep 241 – Managed litigation -extent of a solicitor's common law and fiduciary duty in a conveyancing transaction where the solicitor is instructed by a lender and borrower – Causation, measure of loss and contributory negligence.

Nationwide Building Society v Richard Grosse [1999] Lloyd's Rep 348 (causation and contributory negligence in claim against solicitor for breach of fiduciary duty)

Nationwide Building Society v Goodwin Harte [1999] Lloyds Rep 338 – causation and contributory negligence in claim against solicitor for fraud and breach of fiduciary duty.

Nationwide Building Society v Thimbleby [1999] Lloyds Rep 359 – whether contributory negligence

available as a defence to a claim for damages for deceit.

Barclays Bank v Caplan & Ronald Nathan & Co [1998] 1 FLR 532 – undue influence – solicitor`s duties to wife providing £1m+ guarantee for husband`s indebtedness to Bank. Acting for solicitor who was in prison at the time of the trial. The claim against solicitor failed.

What others say

"Francis is highly accessible, gets his hands dirty and is brilliant on civil fraud matters." *Chambers UK, 2024*

"Francis is a delight to work with, very easy to get along with and turns things around quickly and efficiently." *Chambers UK, 2024*

"His advice is always very clear; he is happy to listen to other points of view and is extremely good with clients too." *Chambers UK, 2024*

"Francis is very easy to deal with, a good team player and always on top of the detail." *Legal 500, 2024*

"Francis is very robust and has a good way with difficult clients." *Chambers UK, 2023*

"Loves to get his hands dirty on the detail and underlying commercial dynamic." *Chambers UK, 2023*

"Francis is always quick and efficient in responding to queries and a forceful advocate." *Legal 500, 2023*

"Go-to junior for professional negligence, grasps the issues quickly, excellent to work with and unrivalled knowledge." *Legal 500, 2023*

"He`s extremely bright, even by the standards of the Bar. Very confident, very direct – you know exactly where you stand. He relishes a challenge and approaches the complex cases with zeal." "He`s super experienced, keen to help out and a great advocate. He`s a very commercial barrister and doesn`t just think about one bit of paper at a time." *Chambers UK, 2022*

"A real street fighter whose knowledge of the law is immense. A proper specialist in professional negligence. A keen strategist who is very easy to work with." *Legal 500, 2022*

"Seriously impressive attention to detail. Very reliable and bright, easy to deal with, extremely accommodating." *Legal 500, 2021*

"He is very proactive, returns work before deadlines, which is amazing, turns instructions around incredibly quickly and the advice provided is always first-class." *Chambers UK, 2021*

"A very smooth cross-examiner." *Chambers UK, 2020*

"Has a really good breadth of knowledge and is very thorough." *Chambers UK, 2020*

“He is the outstanding professional indemnity junior at the Bar and a silk in all but name” *Legal 500, 2020*

“The level of analysis was impressively thorough, and distilled into an impeccably drafted defence. He is an absolutely charming man to deal with, and he adopts a truly collaborative approach” *Chambers UK, 2019*

“He brings a wealth of knowledge and experience and has an excellent strategic approach” *Legal 500, 2019*

“He is brilliant. A ruthless cross-examiner with a lot of experience” “His advice is always really practical and concise” *Chambers UK, 2018*

“Very user-friendly” *Legal 500, 2017*

“Very sharp, very good with clients and extremely good on his feet.” “Unflappable under pressure, he never backs down from difficult work.” *Chambers UK, 2017*

Francis is recognised as one of the leading commercial juniors in professional negligence, having been ranked by both *Chambers UK* and *The Legal 500* for many years. In 2016 he was shortlisted for *Chambers & Partners’ Junior of the Year* for Professional Negligence.

“He has an edge that other barristers don’t have – his experience and advocacy skills are strengthened by his wealth of knowledge and his investigative nature. He will leave no stone unturned.” “He has an excellent grasp of the documents and deals very well with the witnesses.” *Chambers UK, 2016*

“Really very good at cutting through pages and pages of material and getting to the core issues.” *Legal 500, 2015*

“very sound and unflappable, and has a wealth of experience in his core areas. He is outstanding, as he is extremely commercial and personable.” *Chambers UK, 2015*

“extremely capable and easy to work with. His insight into cases is second to none.” *Legal 500, 2014*

“is particularly strong on coverage issues. Solicitors appreciate the fact that he is robust in his advice and takes a line and sticks to it. ‘He’s first-rate, fast, clever and very user-friendly’.” *Chambers UK, 2014*

Further information

Education: Gray’s Inn Karmel Commercial Scholar

Keele University BA Hons Law and Economics

Loughborough University MSC Recreation Management.

Appointments: Recorder 2004. Francis sits in the Crown Court.

Lectures: Francis lectures to solicitors, insurers, brokers and underwriters on a wide range of subjects including fraud, dishonesty, loss of chance, policy issues, lender claims, trustees and expert evidence.

ICO Data protection registration number: **Z6991593**.

Francis Bacon is a barrister regulated by the Bar Standards Board. [Click here to view Francis Bacon's Privacy Notice](#)



Notes: -

A series of horizontal dashed lines provided for taking notes.



Michael Pooles KC
Hailsham Chambers

“Keynote Address”



Michael Pooles KC

Call: 1978 | Silk: 1999

Overview

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

Professional liability

Lawyers

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

Accountants & auditors

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

Financial professionals

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

Insurance brokers

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

Costs

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

Arbitration and mediation

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

Michael is a trained mediator.

Noteworthy cases

Percy v Merriman White [2022] EWCA Civ 493. Operation of s 1(4) Civil Liability (Contribution) Act 1978 and proof required for contribution claims.

Brearley v Higgs [2021]. Practical application of *Perry v Raleys* test to a very large loss of a chance claim.

Alsopp v Banner Jones [2021] EWCA Civ 7. Consideration of abuse of process strike out test considering res judicata and collateral attack.

Angelgate v Baltic House [2020] EWHC Civ 3643. Limits of s235 FSMA 2020 pleas.

Stoffel v Grondona [2020] UKSC 42. Consideration of application of dishonesty defence under *Patel v Mirza*.

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

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

Edwards v Hugh James [2019] UKSC 54. Admissibility of after-acquired evidence in professional negligence damages calculations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sweetman v Nathan [2004] PNLR 7 – Strike out / fraud on third party / subsequent negligence claim

against partners of fraudulent solicitor.

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

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

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

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

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

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

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

What others say

"One of the leading professional negligence barristers. Great advocacy and very user-friendly." *Legal 500, 2024*

"Michael is incredibly smart and incisive with a calm and charming manner in court. He is also very much a team player as well as an impressive leader." *Chambers UK, 2024*

"He is probably the most well-known and most respected professional negligence barrister in the last 20 years. He deals with the most difficult cases with incredible charm and charisma." *Chambers UK, 2024*

"Michael has an exceptional degree of experience. He is very sensible and wise and tremendously personable." *Chambers UK, 2024*

"Michael Pooles KC is simply excellent, there is no other word for it. His advice is spot on and reliable." *Chambers UK, 2023*

"He has the ear of the court. He's a lovely man to deal with and his juniors love working with him. He has a fabulous capacity to lead the team." *Chambers UK, 2023*

"Michael is an exceptional advocate. To see him cross-examine a witness is to watch a master class. He is always one step ahead, knows when to change tack or tone, and has the end goal in sight. He is quickly able to get a judge onside and explain his point of view. He is also a master at strategy and can cut through a lot of noise to pick out the salient points and identify which battles to fight." *Legal 500, 2023*

"You can really see where he's adding value: he knows just the right advice to give to take a claim forward. Very easy to work with and extremely bright." "Absolutely brilliant, a leader of the professional negligence Bar. He has the ear of the court and is a delight to work with." "He is just brilliant. He makes

difficult things look easy, has a really responsive manner with clients, and doesn't get hot under the collar." *Chambers UK, 2022*

"Michael is a highly polished performer and a wonderful cross-examiner. He is full of charm but is a smiling assassin." *Legal 500, 2022*

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

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

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

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

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

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

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

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

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

Further information

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

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

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

Professional memberships: Professional Negligence Bar Association; COMBAR; South Eastern

Circuit; London Common Law and Commercial Bar Association.

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

ICO Data protection registration number: **Z687517X**.

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PNLA KEYNOTE

Michael Pooles KC

NOVEMBER 2023

1. May I start by expressing my thanks to the PNLA for inviting me to speak to you today. It has been my pleasure and privilege to speak to the Association on a number of occasions over the years but on this occasion, as keynote speaker for the day and conscious that you have a galaxy of subsequent speakers who will address specific areas of the law, I have decided that I will take the opportunity to reflect upon my decades of involvement in our specialisation and hope to share my views as to where we presently stand and to reflect upon where the future may be taking us.
2. I will ask you to bear with me for a few minutes because I consider that it may be helpful to record how this area of law has developed, a process which might tell us something about where we are today. I recall that as an undergraduate, long, long ago in a galaxy far, far away, one of my tutors pointed out that it was frequently possible to identify when a particular judge had qualified from the format of his judgments which would start with a statement of the law as he originally understood it, rightly or wrongly, and then track subsequent developments to the date upon which he was delivering the judgment. In those days, when far more judgements were delivered *ex tempore*, that course was frequently adopted. It was certainly the case in my early years of practice, particularly in cases concerning professional negligence, where the jurisprudence was immature and developing very quickly. I will also note that

judgments were almost invariably shorter (much). That may, at least in part, have reflected the relatively short jurisprudential history being reviewed.

3. I was instructed in my first professional negligence case in 1982. *Hedley Byrne v Heller* [1964] AC 465, had been decided less than 20 years earlier, *Midland Bank v Hett Stubbs and Kemp* [1979] Ch 384, less than four years previously, barristers' immunity for non-trial work had been removed four years previously in *Saif Ali v Mitchell* [1980] AC 198, almost exactly the day I was called, but the immunity from suit for trial work would remain in existence for another 19 years until removed in *Arthur Hall v Simons* [2002] 1 AC 615, shortly after I took silk, (clearly the judiciary were conscious of the need for additional public protection as I entered and advanced in the profession).

4. The early 1980s was an era in which a party still had no obligation to disclose the identity of proposed lay witnesses, let alone what they might actually say, and the exchange of expert's reports was still novel. Trial estimates were rough and ready and, once the trial started, a judge would permit it to continue until it eventually came to an end. In the County Court, trials which overran could be adjourned for months, sometimes on multiple occasions. In the great majority of professional negligence claims there was significantly less paper and, of course, no electronic communications whatsoever. On a more positive note litigation was significantly cheaper in real terms, the parties could be confident regarding of the seniority of the judge to be provided to hear the dispute, and access to justice was facilitated by a civil legal aid system which cost the country as a whole a fraction of the true cost of modern day litigation funding

and provided a far greater facility for access to justice. It was altogether a very different place.

5. Not only was it a very different place, but it was also occupied by far fewer professional people. In 1980 there were 40,000 solicitors on the Roll. There were 4,500 practicing barristers. In 2023 those numbers have quadrupled with 159,500 solicitors and 17,400 barristers.
6. I have spent a few moments reflecting upon those varied differences before coming to what seems to me to be a much more telling jurisprudential difference. Any client who walks through our doors, or nowadays initiates an online retainer, wishes us to achieve the best possible outcome for them. If a claimant, the client will wish to achieve success, if at all possible, by way of settlement or judgment in the most advantageous terms. If a defendant, the client will likewise wish to achieve success, if at all possible, by way of settlement or judgment in the most advantageous terms. Our most difficult task, whether solicitor or counsel, is to achieve the highest level of reliability in our crystal ball gazing regarding the claim in which our client is involved so as to be as confident as possible in the advice we give as to the prospects of success.
7. In many cases, the unpredictability of outcome will be due to the vagaries of lay witness evidence, whether that is by reference to documentary material of one sort or another or, even more unpredictably, by reference to oral evidence and its likely impact, let alone the oral evidence which may be forthcoming from the opposition. However, it does seem to me that one of the areas in which a greater degree of confidence can be achieved in the 2020s than might have been achieved in our area of specialisation in the 1980s or 1990s relates to

confidence in the applicable principles of law and their application by the judges.

8. I reflected a few moments ago upon some key decisions in this area which occurred shortly before, or shortly after, I commenced in practice. Looking back, I have a distinct impression, in those decades, that barely a month would pass without a highly significant decision of one sort or another. The first edition of *Jackson & Powell*, then called "*Professional Negligence*" was published in 1982. The eponymous authors produced it themselves, without other editorial assistance. It was relatively compact. The current edition has 3 general editors, an academic editor and 23 other editors, of whom at least 12 are in silk. I will not compare the length of the 1st and 9th editions. I believe that such a growth of necessary input reflects the youth and relative immaturity of the law relating to claims of professional negligence at the time of the first edition compared to today. 40 years on, claims against professionals are a fact of professional life and relatively commonplace. As I have told many of the professionals I have represented over the years, the practitioner who says that he or she has never made a mistake is a liar or a fool. Fortunately, most of our mistakes do not have adverse consequences.
9. I will return in a few minutes to some of the areas where I believe that uncertainty remains in our area or where it seems to me that changing judicial attitudes might impact upon what otherwise has seemed to be settled law.
10. Before I do so, I would like to say a general word about an area which seems to me to have changed a very great deal over my professional lifetime and which, regrettably, seems to be the subject of ongoing change for the worse.

That is the area of professional ethics. Let me emphasise that I do not consider that professional people of previous generations were pure as driven snow. In the medical field Dr Shipman was by no means the first doctor to “ease the passing”. Major Armstrong, a solicitor of Hay on Wye, and clerk to the Hay Magistrates, was convicted of murder of his wife and attempted murder of a competitor in 1921. However, although I have been dealing with issues of dishonesty concerning professional people for over 30 years, I am increasingly troubled by the growth of what might be thought to be lesser forms of unethical conduct, but which are nevertheless, in my view, something which might reasonably be thought of as the thin end of the wedge.

11. Much of this stems from consideration of the question, what is professional practice? Even 30 years ago there was a distinct divide between professional practice and other forms of commercial operation. The professions were self-regulating and what was to be found within a conventional professional business of a certain type was clearly understood by both professionals and their clients. The Rules of Conduct provided bright lines concerning what was or was not permissible rather than the, often vague, “expected outcomes” we operate under today. In many areas one might fairly comment that modern regulators seem to positively encourage practitioners to push at the boundaries.
12. Having been directly involved in professional discipline and regulation both before and after the passage of the Legal Services Act reforms I have to say that I do not consider arrival of predominantly lay member-controlled regulators has achieved any rise in standards of performance or conduct. Indeed, it has always been my professional experience that it was the professionals who were

toughest on each other when it came to ethics and enforcement. My concern is that we are breeding a generation of professionals who do not have professional standards instilled and who are not provided with clear guidance from their regulators and Codes of Conduct. As an example, I recently interviewed a young solicitor who had agreed to “lend his name” as a “director” to an unqualified individual who was purchasing a corporate solicitors’ practice and would be the true controller thereof. He initially stated that he could not see that there was a problem because it was intended, at some time in the future, to convert the practice to an Alternative Business Structure. The fact that, in the meantime, false representations as to ownership and control of the practice would be made both to insurers and to the SRA were matters he had been prepared to disregard as mere matters of form.

13. By the same token I have seen an increasing number of cases involving solicitors’ practices trespassing into areas of work which I would suspect that none present would recognise as being matters which fall properly within the ambit of a solicitors’ practice. Once again, I have no doubt that the boundaries have been increasingly blurred over recent years and red lines are no longer as apparent as they once were.
14. These issues have implications for all of us. In our particular specialisation it has the potential to impact upon the existence and cost of insurance cover. Even the broad ambit of the SRA Minimum Terms and Conditions of Insurance does not extend to providing cover in respect of services falling beyond the accepted and recognisable practice of solicitors as such. This is not new law:

see *J.J Couglan v Ruparelia Thaker* [2003] EWCA Civ 1057, but I believe that it is an issue which is becoming increasingly relevant. This clearly has consequences for those who suffer as a result of the failures of those providing the services under the title of a solicitor's practice. However, it has broader implications as well. Professional Indemnity insurance cover has become increasingly expensive in real terms in recent years. The market is still hardening and a rather toxic mixture of traditional insurers taking a restrictive view of the types of practice for whom they wish to provide cover and new providers, some of whom may not be as financially secure, emerging in the market with a more liberal appetite, presents the possibility of practices being unable to obtain affordable cover or claims being made against the Compensation Fund because of an insurer's failure.

15. The Bar is not immune from these pressures. In *Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm), Robin Knowles J has recently considered the question of legal professional privilege and the impact upon an arbitration award of the unauthorised possession and use of privileged material by the other side's lawyers. The topic sounds interesting but not earth shattering on its face. That is, until you drill down a little further and find that the arbitrators' award against the Nigerian government now amounts to US\$11 billion inclusive of interest and that the subsequent challenge to the Award before the court in London included allegations that lawyers, including two leading counsel, had been the subject of bribery and corruption and others were guilty of perjury. The judge found that English leading counsel had a contingent interest in the judgment which could amount to £850 million; that he had

received what he appreciated was material subject to legal professional privilege which material permitted his party to monitor whether the arbitrators and their opponents knew that they were being deceived; that he had given false evidence on oath to the English Court; and that he had acted in a manner which was indefensible because of the money he hoped to make from a successful claim.

16. I believe that the great bulk of members of the legal profession have always acted with honesty and propriety. Nevertheless, there can be very few people who have been exposed to the temptations which might have existed in circumstances where the potential reward was such a “life changing” amount. The English legal system depends upon the probity and integrity of practitioners to a marked degree, whether in making proper disclosure of documents, providing all relevant authorities to a court, or protecting client account funds. There were good reasons why conditional fee arrangements were considered unacceptable for many hundreds of years, let alone damages-based agreements. Nevertheless, one cannot read the *Nigeria* judgment without an overwhelming sense of sadness. Could such an issue have arisen in the days when conditional fees of any sort were illegal?

17. This potential impact upon the professions of these troubling issues seems to me to have been accentuated by recent events both in and out of court. In *Baines v Dixon Coles & Gill* [2021] EWCA Civ 1211, the Court of Appeal considered the issue of aggregation of claims in the context of the SRA Minimum Terms and Conditions in a way which is at odds with the generally

accepted market experience over many years and which has materially increased the potential exposure of primary layer insurers in cases involving a dishonest professional who has raided client accounts consistently over an extended period of time. The Court considered that the resultant claims did not aggregate, an argument which the SRA intervened in the appeal to support.

18. The potential consequences of this for primary layer insurers and the profession as a whole may well come home to roost as a result of the recent Axiom collapse. It appears from the legal press and the comments of the SRA that the deficiency in the Axiom client account may well exceed £60 million. I do not know, but would tend to doubt, whether this will be tracked to one removal, in which case insurance cover will turn upon the extent of any excess layer protection. I suspect that the missing money will have come from multiple removals from different clients' accounts on different occasions in which case, applying the decision in *Baines* it will probably be the primary layer insurers who will be most exposed to the consequences. The primary layer insurers do not price this cover on the basis of the potential for such a level of exposure and the discovery that such exposures may exist may well cause a number of insurers to reconsider their interest in this market or alternatively to re-price in a manner which will be exceptionally painful in the years to come.
19. Of course, all of this is happening in the context of the SRA threatening an immediate levy to top up the Compensation Fund. Many questions have been raised as a result and more will doubtless be asked. How what began as a tiny practice in Watford grew over a very short period of years to a practice employing, as I understand it, 500 solicitors at the time of collapse, without

attracting the very closest attention of the relevant regulator will be at the forefront of those questions. Once again, this is simply a metamorphosis which could not have happened even 20 years ago and demonstrates the unintended consequences of the commercial and regulatory changes which have taken place.

20. Speaking of unintended consequences, it is appropriate to note that the SRA has, entirely inadvertently, dodged one bullet at least. I am sure that many present will recall that on two occasions in recent years the SRA has brought forward proposed changes to the compulsory insurance regime. I commented at some length on each occasion as I felt that the regulator had demonstrated a total lack of comprehension of the way in which the existing policy operated, how the market considered it, and the potential impact of their proposals upon consumers and the profession. In particular, one of the most dramatic proposals would have been to permit a relatively low total aggregate limit of indemnity. I do not know what the eventual outcome of any insurance claims will be in the case of Axiom, but I can say with confidence that, had an aggregate limit existed in the form the SRA so confidently proposed so recently, there would have been every probability that the exposure of the Compensation Fund, and thus the profession as a whole, might well have been very much greater and definitely more certain than is presently considered.
21. Having had my rant, can I turn to some areas of law where I consider that we can, or cannot, anticipate future developments. I will start with a particular bugbear of mine, an area which demands change but where the change would need to be statutory. That is the Limitation Act 1980. Almost 20 years ago I

conducted two separate limitation cases in the House of Lords in an 18-month period. In the Court of Appeal, during argument in both of the cases, the unsatisfactory nature of the 1980 Act had been the subject of judicial comment. There was then in existence a recently completed Law Commission Report with a draft bill attached. In advance of the hearing in the House of Lords I had contacted what was then the Lord Chancellor's Department to enquire whether there was any plan for the bill to be presented to Parliament. I was assured that it was under consideration and was expected to emerge in 2007. And the rest, they say, is history. Limitation cases continue to trouble the courts. There is a mismatch, and a significant mismatch, between the precise wording of, for example, section 14A of the 1980 Act and the manner in which the courts apply the section. There is also an increasingly significant mismatch between courts' approaches to limitation issues and the approach taken by the various ombudsmen. Neither the resultant uncertainty, nor the difference in approaches, can be justified. For example, is it really in the best interests of consumers that retiring professionals can have no confidence in the length of run-off cover they ought to obtain? Indeed, I am aware of professionals who have transformed their practices into corporate bodies in their later years of practice simply to provide protection from claims after retirement. However, as has frequently been said, there are no votes in law reform. I no longer expect to have to grapple with a new Limitation Act in my professional lifetime, however long that may prove to be.

22. So let us, on perhaps a happier note, turn to areas where we may, or may not, expect change to take place. One area which has become central to our field

of specialisation is the importance now attributed to the “scope” of a given professional’s obligations. This impacts upon the nature and ambit of his duty of care and the recoverable damages. It is an issue which has only become central within the last two decades or so but, it seems to me, that given the way in which practice has changed in the last 30 years and the likelihood of significant change in the future, not least given the existence of alternative business structures and a growing interconnection likely to occur between legal and other services, the scope of a given retainer, whether of a lawyer or an accountant, for example, is likely to continue to change, incrementally, and to have an impact in turn upon the consequential obligations of a particular professional person.

23. This is an area in which, sadly unusually, we have the advantage of the leading judgment having been delivered by an expert judge in the field, namely Jackson LJ, in *Minkin v Lansberg* [2015] EWCA Civ 1152. As might be expected a concise, precise, analytical approach is found which provides the answer in the great bulk of cases turning upon the scope of a professional’s obligations to a client. Happily, this approach then dovetails with the correct approach to causation by reference again to the scope of the duty of care originally set out by the House of Lords in *SAAMCO* [1997] AC 191 and endorsed most recently by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20.
24. Of course, even almost 30 years of maturity does not prevent a court occasionally dropping an unexpected stone into a smooth pond. In the recent case of *URS Corporation Ltd v BDW Trading Ltd* [2023] EWCA Civ 772,

Coulson LJ suggested that the principles set out in *Manchester Building Society* were not applicable to the “well-known and much-reported standard duties of care”. This has excited comment as to whether it represents a retreat from SAAMCO on the part of the Court of Appeal. Whilst the terminology is perhaps unfortunate, it is certainly *obiter*. The question of causation which arose in URS arose in the context of an obligation on the part of structural engineers, the scope of which was not in dispute. The questions under consideration were when the course of action was complete and whether the claimant had suffered loss. The first question was answered in a manner which was consistent with authorities over the last 50 years. The second question was answered by reference to the impact of the Defective Premises Act 1972, as most crucially amended by the Building Safety Act 2022, the impact of which was such that the developers, although no longer the building owners, had a continuing exposure to claims from the current owners and occupiers notwithstanding the passage of years.

25. Coulson LJ may well be right that it is frequently unnecessary to conduct a SAAMCO analysis in a case in which the measure of loss is well understood and the claim being made falls squarely within that measure. However, it does seem to me that in cases in which there is a real question as to whether the loss being claimed falls within the scope of the defendant’s obligations the claimant will continue to be confronted with demonstrating the true scope of those obligations and the causal connection demanded by the six-stage checklist in *Manchester Building Society*. This is in many ways a classic

example of an area in which the law applicable to our field of practice has matured over recent decades and can be considered to be robust.

26. Indeed, in assessing the likelihood of a departure from the approach most recently reinforced in *Manchester Building Society*, it is instructive to have regard to the speech delivered earlier this year by Lord Reed of Allermuir entitled, “*Departing from Precedent: The Experience of the UK Supreme Court*”. He goes out of his way to emphasise that the answer to the question, when will it be right to depart from its earlier decision is, “not very often”. He does emphasise that, in considering a precedent, the court is engaged in something which might be regarded as a dialogue with its predecessors but that nevertheless certainty remains of the utmost importance and the court is “very circumspect” before permitting itself to depart from its existing decisions. I consider that, notwithstanding the words of Coulson LJ we can continue to treat *Manchester Building Society* as secure and established law.
27. Perhaps I can be permitted to say a few words on areas where I think that developments may arise in the near future. Over the last 15 years I have had to deal with the number of claims arising out of failed group litigation. In the most recent I came distinctly second to Mr Lawrence KC, tomorrow’s keynote speaker. However, consideration of these cases, which have involved such diverse topics as the miners compensation scheme claims and claims made by former members of the Mau Mau, leads me to the view that it is impossible to underestimate the complexity of group litigation and its practical management, by which I mean not only the management of the litigation itself but equally the management of the client relationships and the differing interests of individual

clients and groups of clients. English law has come to group litigation relatively late, compared particularly with our transatlantic cousins. The group litigation which is now being pursued is of increasing complexity as illustrated only this month by the decision of the Court of Appeal in *Evans v Barclays Bank* [2023] EWCA Civ 876, a four-day appeal following a five-day directions hearing in the Competition Appeal Tribunal arising out of alleged distortion of foreign exchange trading over a very extended period. The claim is said to be worth £2.7 billion and is to be advanced, following the Court of Appeal judgment, as an opt-out group action.

28. I have no reason to believe that the action will not be advanced at the highest level of competence and ability. However, I have seen a number of group actions which have been pursued by lawyers with neither the experience, capacity, nor the expertise the cases clearly demanded and some of these claims have come to a very unhappy end.
29. A number of questions arise out of the next generation of group actions. They include the question of to whom duties of care may be owed. This becomes particularly problematic in cases where claimants have a number of different solicitors, but one practice becomes the lead solicitor. Other questions which will need consideration may include the ethical requirements to hold adequate insurance cover, and the consequences of such a failure generally. I can also envisage circumstances, particularly involving third-party funders, where the resolution of conflicts between the funders and the funded give rise to difficult issues.

30. Litigation on this scale is not wholly unprecedented, but group litigation on this scale has not been experienced in our jurisdiction previously. If it goes wrong, or is alleged to have gone wrong, which is not the same thing, one can anticipate some complex and interesting debates regarding the scope of duty and some equally difficult questions regarding professional obligations.
31. Another area where I think that our area of interest may become increasingly engaged relates to the ombudsmen. Those of us who have to consider ombudsmen's decisions on a regular basis have become familiar with the extent to which the awards depart from conventional expectations. Nevertheless, I believe that the attractions of an ombudsman's application are frequently overlooked by non-specialist practitioners who are rightly giving pessimistic advice regarding litigation prospects. This does seem to me to be an area in which the rather insidious growth of the ombudsman's jurisdiction may well give rise to claims down the road. I do not find it difficult to envisage an ombudsman's award recognising that the claimant has been deprived of an earlier opportunity to extract an ombudsman's award which would have been more liberal than a judicial finding in litigation.
32. Finally, as many will be aware, the Court of Appeal has been grappling with the equally complex topics of Japanese knotweed and compulsory ADR in *Churchill v Merthyr Tydfil County Borough Council*. A number of interested parties have sought to intervene and the long-expected challenge to *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, has been made. It is of course somewhat unusual context in which the issue is to be determined because the defendant council's complaint is that the claimant failed to pursue alternative

dispute resolution options before commencing litigation. That seems to me to be a very different issue to that raised by mandatory court-ordered ADR. However, the issue has been heard by the Lady Chief Justice, the Master of the Rolls, and Coulson LJ, all of whom have previously expressed strong views on the topic and the eventual decision is likely to be significant to the work we all undertake. Let us hope that it emerges soon.

33. If you have been, thank you for listening.



Notes: -

A series of horizontal dashed lines provided for taking notes.



Questions and discussion



Ben Patten KC
4 New Square

“Professional Negligence Update”

OUR PEOPLE

Ben Patten KC

CALL 1986

SILK 2010

CHAMBERS & PARTNERS

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

✉ b.patten@4newsquare.com

☎ +442078222086

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

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

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

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

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

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

Privacy Policy

Click here for a [Privacy Policy](#) for Ben Patten KC.

Expertise

Construction & Engineering

“Ben is very client-friendly and can distil complex issues into an easy to understand opinion, which makes clients use him time and time again. He is very commercial in his approach. He knows this area inside and out and he is one of our go to Silks for this type of work.” – *Legal 500, 2022*

“He is excellent to work with and always on top of his game.” “He comes out with strong advice and cuts through a dispute to get a simple solution.” – *Chambers & Partners, 2022*

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

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

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

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

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

Recent and current cases

- Acting for certificating architects in a claim brought by a number of purchasers.
- Acting for the employers of an auction mart in a dispute with the developer.
- Acting for architects and project managers in relation to a claim in respect of the renovation and development of civic premises.
- Acting for the Claimant in the groundbreaking vicarious liability case of *Biffa Waste Services Ltd. v Maschinenfabrik Ernst Hese GmbH*, both at first instance in front of Mr Justice Ramsey and in the Court of Appeal (late 2008). The case is now the leading authority on the application of the control test for borrowed employees and of the extent of the application of the “extra hazardous acts” rule in *Honeywill v Stein & Larkin*.
- Acting for the defendant architects in the appeal to the Court of Appeal in *Hunt v Optima*, an appeal from Mr Justice Akenhead, which is the leading authority on duties arising from professional consultants’ certificates.
- Acting for specialist contractors against whom a substantial claim was made arising out of a fire on the Isle of Wight.
- Acting for employers in respect of a biogas installation in a claim against the contractor.
- Acting for a firm of contractors in a multi-party dispute concerning piling and ground improvement works for a superstore in Kent.

- Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for a firm of contractors on a dispute concerning variations, extensions of time and loss and expense claims in relation to a residential development in Kensington.
- Acting for a firm of contractors in relation to a dispute over delays to a large development at Southbank London arising from a diesel spillage.
- Acting for a demolition contractor in relation to an inter-related series of adjudications and part 8 disputes concerning contractual interpretation.
- Acting for PI insurers of engineers on a large construction project in Ireland (essentially construction of bridges).
- Acting for UK design and build contractors in adjudication proceedings concerned with plant producing car parts (the issues are engineering).

Recent and current international cases

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

PFI AND RELATED FIELDS

Experience in PFI and related areas:

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

Professional Liability

“A go-to leader on high-value claims.” “Probably one of the most learned counsel at the Bar. He’s a terribly hard-working and terribly conscientious leader.” – *Chambers & Partners, 2022*

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

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

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

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

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

Accountants, Auditors & Actuaries

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

Featured cases

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

Construction Professionals

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

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

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

Featured cases

- Acting for the defendant architect in the appeal to the Court of Appeal in *Hunt v Optima*, a case concerning professional consultant’s certificates
- Acting for the design and build contractor of a superstore where substantial settlement was alleged to have been caused by inappropriate vibro-replacement treatment.
- Acting for engineers in relation to their design review and checking obligations concerning soil nailed walls in a railway embankment.
- Acting for a claimant in a dispute with former project managers concerning advice in relation to letters of intent and contractual remedies.
- Acting for engineers in relation to a dispute concerning soil stabilization works in a transport infrastructure project.
- Acting for a project manager in relation to a dispute concerning advice concerning planning on a residential development.
- Acting for a claimant in a dispute with a multi-disciplinary practice of architects, surveyors and project managers in

respect of the construction of a health centre.

- Acting for an architect in a dispute over the design and construction of an airport terminal.
- Acting for a claimant against M&E engineers in relation to the design of a heating and ventilation system.
- Acting for a firm of project managers sued in respect of the project management of restaurant fitting out works in central London.
- Acting for engineers in relation to a claim arising out of frozen ground affecting the construction of buildings erected on the site of a former cold storage unit.
- Acting for a lender in a claim against a project monitor. Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for specialist architects in relation to a claim concerning the restoration of a grade II* listed building and ancient monument.

Insurance Brokers & Valuers

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

Featured cases

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

Lawyers

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

Featured cases

- *Newcastle Airport v Eversheds*
- *Levicom v Linklaters*
- Acting for a firm of solicitors alleged to have given inaccurate advice to a US based engineering consultancy, said to have resulted in a multi-million pound loss
- Acting for a firm of solicitors where the partner was issued with a witness summons to give evidence about client confidential matters in *Young v Young*
- Acting for solicitors in a dispute with former clients and a barrister concerning advice in relation to an appeal against a Customs and Excise ruling on alcohol.
- Acting for a barrister on a wasted costs application.
- Acting for the former partners of a firm of solicitors where a rogue partner was engaged in multiple mortgage fraud.

- Acting for a firm of solicitors involved in a dispute with former clients arising out of commercial litigation in relation to a complex web of business interests.
- Acting for claimants against their former solicitors in relation to advice concerning the purchase and development of a large block of land.
- Acting for a lender in relation to a dispute with a solicitor concerning a fraudulent commercial loan.
- Acting for a solicitor in a claim brought by shareholders in a company which was one part of a corporate joint venture advised by the solicitor.
- Acting for claimants in a dispute with their former solicitors concerning the disposal of substantial overseas business.
- Acting for a firm of solicitors jointly sued with Leading and Junior Counsel in respect of commercial litigation which was allegedly mishandled.
- Acting for solicitors in a dispute with clients about the alleged misappropriation of client funds.
- Acting for solicitors in a dispute over funding and alleged champerty and maintenance.
- Acting for a firm of solicitors sued by a company in respect of the losses sustained by reason of contracts drawn up by the solicitors on the instructions of one of the directors, which instructions were alleged to be unauthorised.
- Acting for a firm of solicitors, sued along with two other firms, in respect of alleged negligence in the conduct of substantial property transactions which were themselves said to be fraudulent transactions.
- Acting for solicitors in relation to alleged negligent advice concerning international litigation and arbitration in different jurisdictions and specifically freezing orders.

Surveyors & Valuers

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

Featured cases

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

Financial Services Professionals

Featured cases

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

Commercial Dispute Resolution

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

Featured Commercial Dispute Resolution cases

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

Insurance & Reinsurance

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

Featured Insurance & Reinsurance cases

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

International Arbitration

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

guarantees and bonds.

Current and recent International Arbitration cases

National Infrastructure Development Co v BNP Paribas

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

S v H

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

N v F

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

U v A

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

T v N

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

E v A

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

W v W

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

SG v KT

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

C v P

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

I v C

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

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

Mediation

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

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

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

Awards



Qualifications

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

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION:

PROFESSIONAL LIABILITY UPDATE

BEN PATTEN KC, 4 NEW SQUARE CHAMBERS



IMPORTANT RECENT DEVELOPMENTS

| | | |
|-------------------------------|--------|----------------------------|
| Duty of Care to Third Parties | SAAMCO | Limitation in Construction |
|-------------------------------|--------|----------------------------|

DUTY OF CARE TO THIRD PARTIES

Carol Miller v Irwin Mitchell LLP [2022] EWHC 2252 (Ch)

Seema Ashraf v Lester Dominic Solicitors (a firm) and ors [2023] EWCA Civ 4

David McClean and Orthers v Andrew Thornhill KC [2023] EWCA Civ 466

Carol Miller - the facts

Mr Miller books a holiday for himself and Carol Miller with Lowcost Travel Insurance cover with Top Dog
13 May 2014 Mrs Miller falls down some stairs and breaks her leg. She is flown home.
In hospital Mrs Miller sees an advert for Irwin Mitchell and leaves a message. Irwin Mitchell respond and has various contacts with Mrs Miller and her son
2015 Mrs Miller very ill - she has a number of operations
Jan 2016 Irwin Mitchell send her a CFA (which she signs) and contact Lowcost telling them to contact insurers
Lowcost's insurers ("HCC") decline cover - notification too late
Lowcost in administration
Irwin Mitchell goes to counsel who advise that declinature is valid
Mrs Miller sues Irwin Mitchell for failing to advise her to contact Lowcost in 2014 and failing to do so itself.
Irwin Mitchell defend on a number of grounds including no duty

4 NEW SQUARE

Carol Miller - the outcome

Preliminary Issues in front of HHJ Cadwallader
No express retainer in May 2014 - responding to the advert does not create a contract
No implied retainer: test is whether the facts can *only* be consistent with a retainer: *Calendo v Mischon de Reya* [2016] EWHC 150
No tortious duty of care: in a given case it is the task of the court to consider all the facts and to assess whether they give rise to an implication that the defendant has voluntarily assumed responsibility to the claimant; test is set out by Patten LJ in *P&P Property Ltd v Owen White & Catlin LLP* [2018] 3 WLR 1244; it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair; The true nature of the relationship until was that Mrs Miller was only a potential client of the defendant until 25 January 2016 and no duty of care equivalent to that under a retainer was owed to her until then.
No assistance from *Crossan v Ward Bracewell & Co* [1989] 4PN 103: that was a case about advice given, not failure to advise
(In any event - no duty to remind Mrs Miller that Lowcost might have no resources)

4 NEW SQUARE

Seema Ashraf- the facts

Mr Ul Haq was the owner of 91 Argyle Rd Ealing - charged to the Bank of Scotland
Contracts exchanged but no completion - bulk of purchase money stolen by solicitors
BoS had advanced this money - it instructs Rees Page to act for it
Solicitors acting for the purchaser as Rees Page to register his interest
Rees Page take the view that the documents in respect of the transaction need to be perfected - he prepares and sends out docs
He receives back a TR1 purportedly signed by Mr Ul Haq
Unsatisfactory attempts to contact Mr Ul Haq
Rees Page register the transfer and the charge
Mr Ul Haq remained liable under the BoS charge
Bank eventually sells the Property
Mr Ul Haq died and his estate sued Rees Page for negligence
Rees page obtained summary judgment. The Estate appealed

4 NEW SQUARE

Seema Ashraf- the outcome

The Court of Appeal (LJJ Arnold, Nugee, Floyd) allow the appeal
The general rule is that a solicitor owes no duty of care to a third party
There are three classes of exception (1) the purpose of the retainer is to confer benefit on a third party; (2) where representations are made which the third party is entitled to rely upon and (3) where the solicitor steps outside his role as acting for his client.
There must be an assumption of responsibility - see Patten LJ in *PvP*
No duty to Mr Ul-Haq prior to registration - foreseeability of loss not enough
But when Rees Page complete the AP1 form they complete a Box representing that a named firm of solicitors were acting for Mr Ul-Haq when he signed the transfer
It is arguable that in so doing Rees Page stepped outside its role as the BoS solicitor - he was taking an important step to protect Mr Ul-Haq
Unlike the AML checks in *PvP* the completion of the AP1 is partly for the benefit of the proprietor

4 NEW SQUARE
.....

David McClean- the facts

This is a case about film finance tax schemes
Scotts promoted film finance partnerships as investments
The included Advices from Andrew Thornhill KC, tax specialist
The schemes failed and the investors sued Mr Thornhill for negligence
The case was dismissed at first instance. Amongst other reasons no duty of care
The investors appealed. They argue:
- reality is not advice by Mr Thornhill to his clients but participation by him in marketing
- he endorses the scheme
- nothing in the structure of the transaction to negate a duty of care
- no disclaimer in his advice
- it was objectively reasonable for the investors to rely upon the advice - this is a simple Hedley Byrne case
- his position is no different to that of expert giving investment advice
appealed

4 NEW SQUARE
.....

David McClean- the outcome

Court of Appeal (Flaux, Ch, LJJ Simler, Carr) dismiss the Appeal
A lawyer can owe a duty of care to a non-client by making representations but the critical question is whether (i) it was reasonable for the representee to have relied and (ii) whether the representor should have foreseen he was likely to do so: *Steel v NRAM Plc* [2018] UKSC 13
The representor must not only know that the statement is likely to be communicated to and relied upon by B. It must also be part of the statement's known purpose that it should be communicated and relied upon by B, if the representor is to be taken to assume responsibility to B and that depends on (i) whether the parties are at arms length and (ii) whether expressly or impliedly the representee is told to get its own advice
Here the IM advised the investors to get their own advice. They were highly sophisticated.
This was not a case where Mr Thornhill stepped outside his role as adviser to Scotts - he was consistently described as adviser to Scotts
The absence of a disclaimer is significant, but not enough
There is no basis to upset the "default position" of no duty of care

4 NEW SQUARE
.....

SAAMCO

Charles B Lawrence v Intercommercial Bank Limited [2021]
UKPC 30

Hope Capital Limited v Alexander Reece LLP [2023] EWHC
2389

4 NEW SQUARE
LONDON

Charles B Lawrence – the facts

The Bank wants to make a loan to "Singapore" to be secured by guarantee on "the Land"
Lawrence provides a valuation of \$15m
Bank loans \$3m in reliance on the valuation
Singapore defaults and guarantor is insolvent. Bank looks to enforce its security. It was only worth \$2.37m at date of valuation. Bank starts proceedings against Lawrence
Turns out that the guarantor did not own the Land. Bank recovers \$2.4m from its own lawyers
Bank carries on with its claim against Lawrence
Judge at first instance awards the Bank \$2.36m being \$3m plus commercial interest less \$2.4m
Trinidad and Tobago Court of Appeal reduce this by applying lower interest and contributory negligence – just over \$2m
Lawrence appeals to PC
- Loss caused by lack of title outside scope of duty
- Correct calculation is \$3m less value of land with good title (\$2.37m), less contributory negligence plus interest = \$833,204

4 NEW SQUARE
LONDON

Charles B Lawrence – the outcome

Privy Council (Lords Briggs, Arden, Kitchen, Burrows and Rose) allowed the Appeal
• in determining the scope of the duty of care, it is particularly important to consider the purpose of the advice or information being given: *Manchester Building Society v Grant Thornton* [2021] UKSC 20
• the purpose of Lawrence's report was to value the property on the assumption that there was good legal title to the Land
To do this it is necessary to exclude the from the total loss "that element of the loss that is outside the scope of Lawrence's duty of care"
The SAAMCO counterfactual should be regarded as a flexible and useful cross-check for deciding on the scope of the duty of care in most but not all cases: here it is unhelpful – had the Land been worth \$15m without the defect in title the Bank would have recovered all of its loss
The settlement with the lawyers is irrelevant

4 NEW SQUARE
LONDON

Hope Capital - the facts

Hope wants to lend £2.4m to Anselm to be secured on Cedar House (leased by the National Trust)
It obtains a valuation from ART in the sum of £4m
Anselm defaults. Cedar House is sold for £1.4m
Hope claims against ART and contends the true value was £1.95m and its recoverable loss is £2.05m plus interest (being less than its actual loss)
ART accepts breach of duty but says that the recoverable loss should be calculated to reflect issues which were not within the valuer's scope of duty being:

- The impact of a section 146 Notice served by the National Trust
- Delay in selling the property
- Covid

Hope contends that all of these matters were within scope of duty because ART knew the short term nature of Hope's lending business model
(The Court finds that the true value was £2.75m but actual loss is about £900,000)

4 NEW SQUARE
.....

Hope Capital - the outcome

Constable J - finds for ART
Criticality of the information to the decision process cannot of itself mean that the information provider is liable for all the foreseeable consequences of the transaction, because in of itself it is merely a necessary part of the causal analysis as to whether the transaction would, or would not, otherwise have proceeded.
ART was not privy to the other considerations which the Claimants in fact took, or objectively would have been considered to be taking, into account, such as how much money it has available, how much the borrower needed to borrow, the strength of his covenant, the attraction of the rate of interest or the other personal or commercial considerations which may have induced Claimants to lend
The effects of the 146 Notice and Covid should be stripped out from the actionable loss. By analogy with the reasoning of the Privy Council in the case of *Charles B Lawrence* the loss caused by the breach of relevant duty is nil, as it would have been in *Charles B Lawrence* if the value of the land (excluding the title issue) had been, say £3,500,000 instead of £2,375,000.

4 NEW SQUARE
.....

LIMITATION IN CONSTRUCTION

URS Corporation Limited v BDW Trading Limited [2023]
EWCA Civ 772

4 NEW SQUARE
.....

URS – the facts

BDW engaged URS as consultants for the design and construction of the Development.
Practical Completion February 2008. BDW sells the flats.
Following the Grenfell fire BDW investigates and sues URS in negligence
URS contends (1) no loss and (2) claim statute barred
Various preliminary issues complicated by the Building Safety Act
Fraser J decides in favour of BDW
URS appeals contending (a) losses claimed are outside its scope of duty and (b) at the time when the cause of action against URS accrued claims by third parties against URS would have been statute barred.
Court of Appeal finds that claim for defective work were within scope of duty even if URS could not be sued by the third parties but the second issue concerned the notoriously difficult issue of when time starts to run for building defects in tort

4 NEW SQUARE
LONDON

URS – the outcome

Court of Appeal (LJ King, Asplin and Coulson)
Distinction between defective buildings with and without physical damage
Where there is physical damage the claimant's cause of action accrues when that physical damage occurs. That is regardless of the claimant's knowledge of the physical damage or its discoverability: *Abbott v Will Gannon* [2005] EWCA Civ 198 following *Pirelli*
But that the fact that time starts to run for physical damage says nothing about when it starts to run for other cases. Here the cause of action accrues, at latest, at practical completion: *New Islington v Pollard* [2001] PNLR 20.
Where a consultant prepares a design for a contractor who is then liable to an employer the cause of action accrues at the date when the consultant delivers a package of defective design and the contractor acts on it (or, at latest, practical completion): *Co-op v Birse Developments* [2014] EWHC 530

4 NEW SQUARE
LONDON

Questions ?

4 NEW SQUARE
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Notes: -

A series of horizontal dashed lines provided for taking notes.



Hugh Sims KC
Guildhall Chambers

“Financial Services – negligence, fraud and more...”

HUGH SIMS KC

Call 1999 | Silk 2014

| | |
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Hugh Sims KC is recognised as a star of the UK Bar, with rankings in Chambers UK as a leading barrister across seven practice areas: [Commercial](#), [Professional Negligence](#), [Insolvency](#), [Banking & Finance](#), [Partnership](#), [Chancery](#) and [Company](#).

He is instructed with Juniors, and as sole leading counsel, in complex and substantial disputes where his advocacy and forensic skills are highly valued.

Expertise

Commercial Dispute Resolution

Hugh welcomes instructions across the whole spectrum of Commercial disputes, including:

- contract
- civil fraud
- sale & supply of goods
- corporate & insolvency disputes
- partnership disputes
- Banking & Finance
- Professional Negligence & indemnity
- insurance
- restraint of trade
- Business Protection & Injunctions
- breach of confidence and passing off

He has wide ranging sector knowledge including experience in the following sectors:

- accountancy
- agriculture
- banking

- care homes
- construction
- charities
- energy including electricity generation & power distribution, renewables
- insurance
- financial services
- hotel, hospitality & leisure
- marine
- pharmaceuticals
- software technology

He enjoys working as a team with clients, experts, solicitors and other barristers.

Featured Commercial Dispute Resolution cases

Quilter Private Client Advisers Limited v Bance & Others (Circuit Commercial Court, Bristol)

Hugh is representing the claimant IFA firm in relation to a share purchase agreement indemnity dispute relating to an indemnity concerning defined benefit pension transfer issues.

Ardeshir Nagshineh v Bank of Scotland Plc (Business and Property Courts, Chancery Division, London)

Hugh is leading John Virgo of Guildhall Chambers and Michael D'Arcy of One Essex Court in a £1 billion fraudulent misrepresentation/LIBOR rigging claim by Mr Naghshineh (as assignee of certain Targetfollow companies) against the Bank of Scotland Plc.

Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318 (The Chancellor, Birss and Coulson LJ)(on appeal from HHJ Russen QC, Bristol Circuit Commercial Court)

Hugh is representing Mrs Philipp in the high profile claim by her against Barclays Bank seeking to recover £700,000 lost by her as a result of becoming victim to an authorised push payment fraud ("APP fraud"). HHJ Russen QC found that the Bank did not owe a duty of care to Mrs Philipp at first instance and that decision was reversed on appeal, Birss LJ (giving the leading judgment) concluding that the Quincecare principle was capable of applying to APP fraud as much as fraud by an agent. The Supreme Court has granted permission to Barclays to appeal. Hugh is leading Lucy Walker and Jay Jagasia in the Supreme Court.

URE Energy Limited v Notting Hill Genesis (Commercial Court) (Christopher Hancock QC, sitting as a Deputy High Court Judge) (May 2021)

£4m dispute concerning electricity supply contract and raising issues concerning interpretation of breach and termination provisions, including in relation to amalgamations and installations of smart metres. Application for security for costs raising issues concerning adequacy of ATE policy. Hugh is leading James

Wibberley.

Promontoria (Oak) Ltd v Emanuel & Emanuel (Court of Appeal, May 2021)(Henderson, Nugee and Phillips LLJ); [2020] EWHC 104 (Ch) & [2020] EWHC 563 (Ch) (Marcus Smith J)

First appeal against decision of recorder, claimant assignee's money judgement based on lend book from Clydesdale/NAB failed as it relied on secondary evidence in the form of redacted deed of assignment in circumstances where unredacted deed could and should have been produced, but claim as registered legal proprietor succeeded. Second appeals heard together with 3 other conjoined appeals over 3 days before Court of Appeal in May 2021, judgement reserved. Hugh led Oliver Mitchell on the first and second appeals.

Fairford Water Ski Club Ltd v Cohoon & Others [2021] EWCA Civ 143 (Henderson, Males and Stuart-Smith LJ) [2020] EWHC 290 (Comm) (Bristol) (HHJ Russen QC)

Trial of claim relating to various and multiple alleged breaches of duties by directors of company, including diversion of opportunities, alleged misappropriations and the issue of the extent to which there had been a sufficient disclosure of interest. Appeal concerning directors' duties to disclose conflicts of interests. Hugh led Katie Gibb at trial in 2019 and on the appeal in 2021.

NHS High Weald Lewes Havens CCG v SinoCare Group Limited (Circuit Commercial Court, Bristol) (HHJ Russen QC)

£7m plus dispute relating to enforceability of parent company guarantee in name of company registered in Hong Kong. Hugh is leading Sam Parsons.

MDW Holdings Ltd v Norvill & Norvill & Norvill (ChD, Cardiff) [2021] EWHC 1135 (Ch) (HHJ Keyser QC)

Trial of claim by purchaser of waste company in South Wales in relation to alleged breach of warranties and/or misrepresentation claim relating to a share purchase agreement (SPA). Raises issues relating to waste disposal regulations, contractual limitation periods and quantification of damages in SPA warranty dispute cases. Hugh is leading Jay Jagasia.

Badyal v Badyal & Badyal (Business & Property Courts, Business List) (Deputy Master Nurse, May 2021); (Adrian Beltrami QC sitting as a Deputy High Court Judge) (January 2020)

Whether or not relief from sanctions should be granted in relation to accounts and inquiries concerning businesses in UK and in India. Trial of certain preliminary issues on the accounts in relation to businesses in partnership dispute in UK and India. Hugh leading Richard Ascroft.

Oliver Morley (t/a Morley Estates) v Royal Bank of Scotland Plc [2021] EWCA Civ 338 (Lewison, Males

and Birss LJ), [2020] EWHC 88 (Ch) (Kerr J)

Whether conduct of bank amounted to threat and economic duress and intimidation, whether bank in breach of its duties of good faith and/or reasonable skill and care, in relation to transfer of industrial property portfolio to subsidiary (West Register) whilst in bank's restructuring unit (GRG). Hugh led John Virgo at trial in 2019 and in the Court of Appeal in February 2021.

Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907, [2020] 4 WLR 100 (Floyd LJ, Henderson LJ and Flaux LJ)

Where a court is asked to construe a document, the whole of the document, without redactions, should ordinarily be placed before the court, though the position may be different in the context of a statutory demand by an assignee of a loan. Hugh led Graham Sellers (Atlantic Chambers, Liverpool) in the Court of Appeal.

Banking & Finance

Hugh acts in complex, high-value banking and financial disputes. He welcomes instructions in the following areas:

- All aspects of asset recovery for and against banks, finance houses and individuals, financial services regulatory field & consumer credit
- Mortgage and mortgage fraud disputes; personal and corporate guarantee claims
- economic tort claims by and against banks and financial advisors
- Payment & mistaken payment disputes
- Swaps and derivatives and disputes relating to foreign exchange fraud
- Pensions mis-selling
- Corporate & partnership disputes arising from and relating to the financial services industry.

Featured Banking & Finance cases

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Ardeshir Naghshineh v Bank of Scotland Plc (Business and Property Courts, Chancery Division, London)

Hugh, leading John Virgo, has been advising and represents the claimant in relation to multi-million proceedings issued against the defendant bank in relation to a LIBOR rigging claim. The claim relates to losses sustained as a result of entering into interest rate swaps, and associated loan facilities, entered into by companies in the Targetfollow group of companies owned by Mr Naghshineh before they entered into administration.

NHS High Weald Lewes Havens CCG v SinoCare Group Limited (Circuit Commercial Court, Bristol) (HHJ Russen QC)

£7m plus dispute relating to enforceability of parent company guarantee in name of company registered in Hong Kong. Hugh is leading Sam Parsons.

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Dayani v Investec (Circuit Commercial Court, Bristol) (HHJ Russen QC) (December 2020)

Representing applicant in proceedings requiring a receiver to agree to sale of development property in London owned by company owned by Dayani; raising questions as to the extent to which a court can direct an LPA appointed receiver. Hugh led Jay Jagasia.

Philipp v Barclays Bank UK Plc [2021] EWHC 10 (Comm) (HHJ Russen QC)

Whether bank owed duty of care to customer in relation to authorised push payment fraud.

Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907, [2020] 4 WLR 100 (Floyd LJ, Henderson LJ and Flaux LJ)

Where a court is asked to construe a document, the whole of the document, without redactions, should ordinarily be placed before the court. Though the position may be different in the context of a statutory demand by an assignee of a loan. Hugh led Graham Sellers (Atlantic Chambers, Liverpool) in the Court of Appeal.

Adam Anderson & Ors v Sense Network Ltd [2019] EWCA Civ 1395, [2020] 1 BCLC 555 (David Richards LJ, Hamblen LJ, Snowden J)

Whether network, as principal, was liable for losses suffered by individuals who had invested in fraudulent Ponzi scheme operated by one of its appointed representatives, concerning the proper interpretation of section 39 of the Financial Services and Markets Act 2000, vicarious liability and collective investment schemes. Hugh led Gerard McMeel and Jay Jagasia in the Court of Appeal. Claimants pursued successful claims against the FSCS based on the finding of the unauthorised CIS at first instance, as upheld by the Court of Appeal.

Insolvency

Hugh acts in complex and substantial company and personal insolvency disputes, including claims for and against insolvency practitioners. He welcomes instructions in the following areas: corporate insolvency, including administrations, liquidations and CVAs; claw back and recovery claims; directors and office holder misfeasance claims; directors' disqualification; personal insolvency, including bankruptcy and IVAs; and professional negligence claims involving insolvency practitioners.

Hugh, together with other authors, including members of Chambers' Insolvency Team, has written the first book focussed on insolvency practitioners: *Insolvency Practitioners, Appointment, Duties, Powers & Liability*, published by Edward Elgar in 2020.

Featured Insolvency cases

Re Premier FX (in liquidation) (Insolvency and Companies Court, London) [2021] EWHC 1321 (Ch) (Deputy ICC Judge Racquel Agnello QC)

Acting for the joint liquidators of Premier FX Limited (an FCA-regulated entity which collapsed in 2018 leaving 121 creditors with claims in excess of £6m) in seeking Berkeley Applegate relief and seeking approval of distribution plan to creditors. Issues arising in relation to trust claims and tracing via mixed funds. Leading Simon Passfield and Christopher Hare.

Secretary of State for Business, Energy and Industrial Strategy v Geoghegan & Others [2021] EWHC 672 (Ch) (Michael Green J)

Acting for two of the defendants to a Company Directors Disqualification Act (CDDA) claim and on application to strike out raising questions as to the scope of section 6 CDDA in relation to conduct of members of limited liability partnership. Leading Simon Passfield.

Re NMUL Realisations Limited (in administration) [2021] EWHC 94 (Ch)

Hugh Sims QC and Stefan Ramel acted on behalf of applicant administrators in an application for a declaration that they had been validly appointed as administrators. The issue arose as a result of a failure by the appointing party to give notice under para. 15 of Schedule B1 to the Insolvency Act 1986.

Dayani v Investec (Circuit Commercial Court, Bristol) (HHJ Russen QC)(December 2020)

Representing applicant in proceedings requiring a receiver to agree to sale of development property in London owned by company owned by Dayani; raising questions as to the extent to which a court can direct an LPA appointed receiver. Hugh led Jay Jagasia.

Rwamba v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 2778 (Ch)(Miles J)

Whether former director of failed company who had breached a previous CDDA undertaking should be given leave to act as a director of two companies; leave to act given on appeal.

Re Overfinch Bespoke Vehicles Ltd (in liquidation) (Business and Property Courts, Insolvency and Companies Court, Birmingham)

Hugh has been leading Simon Passfield, acting for the joint liquidators of Overfinch Bespoke Vehicles Limited (a company which customised Land Rover and Range Rover cars which entered into administration in 2010) in pursuing multi-million pound misfeasance claims against the former administrators of the

company.

Re Ethos Solutions Limited (in liquidation) (Business and Property Courts, Insolvency and Companies Court, London)

Representing liquidator in multi-million proceedings against multiple defendants, in which it is alleged there were multiple transactions defrauding creditors under section 423 of the Insolvency Act 1986 relating to tax avoidance scheme using employee benefit trusts via Jersey based trust companies. Proceedings issued in December 2018 and proceedings ongoing. Hugh is leading Simon Passfield.

Re DCL Hire Ltd [2019] EWHC 2086 (Ch) (Mann J)

Represented the former director of an insolvent company. The former director was said to have failed to prevent an alleged fraud said to be perpetrated by a former shadow director. Hugh successfully represented the defendant in securing dismissal of the majority of the claim at first instance before the Deputy ICC Judge Schaffer (neutral citation [2018] EWHC 3457 (Ch)), and successfully resisted the main ground of appeal raised in an appeal before Mann J (reported under neutral citation [2019] EWHC 2086 (Ch)). Leading Sam Parsons.

Professional Negligence

Hugh represents claimants and defendants in complex and substantial professional negligence and indemnity disputes. He welcomes instructions in bringing and defending claims against the following professionals: accountants, including insolvency practitioners and auditors, solicitors, surveyors, receivers, engineers, financial advisors, barristers and patent agents.

Featured Professional Negligence cases

Cheltenham Borough Council v Bevan Brittan LLP (Business & Property Courts in Bristol) (2020-2021)

Multi-million solicitors' negligence claim relating to development site in Cheltenham. Ongoing.

Re Overfinch Bespoke Vehicles Ltd (in liquidation) (Business and Property Courts, Insolvency and Companies Court, Birmingham)

Hugh has been leading Simon Passfield, acting for the joint liquidators of Overfinch Bespoke Vehicles Limited (a company which customised Land Rover and Range Rover cars which entered into administration in 2010) in pursuing multi-million pound misfeasance claims against the former administrators of the company. Settled in 2020.

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Representing applicant in proceedings requiring a receiver to agree to sale of development property in London owned by company owned by Dayani; raising questions as to the extent to which a court can direct an LPA appointed receiver. Hugh led Jay Jagasia.

Re Altala (2018-2019)

Multi-million professional negligence proceedings brought against former administrators in relation to loss of chance in relation to claim against insured defendant directors, relating to failure of health lottery company. Case settled in 2019. Hugh led Holly Doyle in this and earlier professional negligence proceedings against the company's former solicitors.

Devon Commercial Property Ltd v (1) Barnett & (2) Belcher [2019] EWHC 700 (Ch) (HHJ Matthews)

Whether receivers negligent and/or in breach of their duties of good faith in relation to the sale of a cider and bottling plant by receivers. Hugh led Neil Levy at trial.

Hammond & Others v JL Strategies Ltd & UBS AG London Branch (Commercial Court, London)

Multi-million claim brought in the Commercial Court in London, alleging negligent mis-selling of film finance schemes by financial advisors and that UBS participated in an unlawful joint enterprise in relation to the promotion and sale of the same. Hugh led Gerard McMeel. Case subsequently settled in 2018.

Lowick Rose LLP v Swynson [2017] UKSC 32, [2017] 2 WLR 1161 (Lord Neuberger PSC, Lord Mance JSC, Lord Clarke JSC, Lord Sumption JSC, Lord Hodge JSC)

Loan provided based on accountant's negligence advice in relation to financial due diligence. Where loan was partially repaid by ultimate owner of lender company, repayment was not to be ignored and lender not entitled to recover full loss. Principles of unjust enrichment and transferred loss did not apply. Hugh led Gerard McMeel and James Wibberley in the Supreme Court.

Gaze v Marcus Sinclair & Counsel (2016-2017), Bristol Circuit Commercial Court (HHJ Russen QC)

Acting for claimant (and counterclaimant) in complex multi-million professional negligence claim against former solicitors and counsel concerning the negligent handling of a previous professional negligence claim. Leading Holly Doyle. Case settled shortly before start of trial, in 2017.

Company Law

Hugh acts in complex and high value company, joint venture and partnership disputes in England & Wales.

He welcomes instructions in the following areas:

- Unfair prejudice petitions
- Directors disputes and misfeasance
- Derivative claims
- Share sale and purchase disputes
- Warranty claims
- Share rectification proceedings
- Partnership
- Joint venture disputes & Company Directors Disqualification Act (CDDA) proceedings.

Featured Company Law cases

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Acting for two of the defendants to a Company Directors Disqualification Act (CDDA) claim and on application to strike out raising questions as to the scope of section 6 CDDA in relation to conduct of members of limited liability partnership. Leading Simon Passfield.

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Whether or not relief from sanctions should be granted in relation to accounts and inquiries concerning businesses in UK and in India. Trial of certain preliminary issues on the accounts in relation to businesses in partnership dispute in the UK and India. Hugh leading Richard Ascroft.

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Hugh Sims QC and Stefan Ramel acted on behalf of applicant administrators in an application for a declaration that they had been validly appointed as administrators. The issue arose as a result of a failure by the appointing party to give notice under para. 15 of Schedule B1 to the Insolvency Act 1986.

Dayani v Investec (Circuit Commercial Court, Bristol) (HHJ Russen QC) (December 2020)

Representing applicant in proceedings requiring a receiver to agree to sale of development property in London company owned by Dayani; raising questions as to the extent to which a court can direct an LPA appointed receiver. Hugh led Jay Jagasia.

.Rwamba v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 2778 (Ch)(Miles J)

Whether former director of failed company who had breached a previous CDDA undertaking should be given leave to act as a director of two companies; leave to act given on appeal.

Re DCL Hire Ltd [2019] EWHC 2086 (Ch) (Mann J)

Represented the former director of an insolvent company. The former director was said to have failed to prevent an alleged fraud said to be perpetrated by a former shadow director. Hugh successfully represented the defendant in securing dismissal of the majority of the claim at first instance before the Deputy ICC Judge Schaffer (neutral citation [2018] EWHC 3457 (Ch)), and successfully resisted the main ground of appeal raised in an appeal before Mann J (reported under neutral citation [2019] EWHC 2086 (Ch)). Leading Sam Parsons.

Sports Law

Hugh acts in sports disputes both in court and in tribunal hearings, including contract, commercial and insolvency disputes concerning players, sports clubs and governing bodies in England & Wales.

Hugh welcomes instructions in the following areas:

- contractual disputes
- including promotion & agency disputes
- corporate & shareholder disputes
- compensation claims relating to players & disciplinary proceedings
- acting for & against football clubs, rugby clubs, hockey clubs & golf clubs acting for & against sports governing bodies

Featured Sports Law cases

The New Saints FC Ltd v (1) Football Association of Wales Ltd (2) Connah's Quay Nomads FC [2020]

EWHC 1838 (Ch) (Marcus Smith J)

Impact of Covid-19 on the Cymru premier league and whether the Welsh FA was entitled to determine final rankings by points-per-game model. Hugh led John Churchill at trial.

Frank Warren v Nathan Cleverly (Circuit Commercial Court, Cardiff)

Hugh was instructed to represent Nathan Cleverly, former world champion at light-heavyweight and cruiserweight, to assist him in defending a £1m plus claim brought by Frank Warren, who claimed damages for alleged breach of a boxing promotion agreement. The claim was discontinued by Frank Warren shortly before trial, in 2019.

Re The International Cricket Council

Advising the ICC in relation to arbitration proceedings, including the application of the BVI Business Companies Act 2004 and its equivalent to section 994 of the Companies Act 2006 (unfair prejudice petitions).

Exeter City AFC Ltd v Chelsea FC Plc (tribunal, London)

Hugh represented Exeter City in its application to the Professional Football Compensation Committee (the "PFCC"), chaired by His Honour Judge Robert Reid QC, against Chelsea for compensation under the Premier League's Rules and Regulations for their part in the training and development of the player Ethan Ampadu, who transferred to Chelsea from Exeter (signing with Chelsea in 2017, at the age of 16).

Re Caterham F1

Hugh was instructed to advise the liquidators of Caterham F1 (including Finbarr O'Connell of Smith & Williamson) on a variety of insolvency and commercial issues relating to the insolvency of the Caterham Formula 1 Team, during 2014-2017.

Gartell v Yeovil Town Football & Athletic Club Limited [2016] EWCA Civ 62 (Laws, Floyd and Bean LLJ)

Hugh represented the successful appellant in the Court of Appeal, in an appeal concerning non-performance of construction works carried out at Yeovil Town's football stadium, Huish Park, and the correct approach to quantification of damages.

Cuddy v Hawkes (Ch D (RCJ))

Acting in unfair prejudice shareholder dispute concerning shareholders in Neath Rugby Football Club (linked to previous proceedings reported at [2009] EWCA Civ 291, [2009] All ER (D) 42 (Apr); ([2007] EWHC

2999 (Ch).

Exeter City AFC v Southampton FC

FA arbitration dispute relating to alleged breach of player transfer contract.

Technology & Construction

Hugh has a First Class Honours degree in Physics. He enjoys cases with a scientific and technical background. He has particular expertise in complex and technical company, commercial, professional negligence and indemnity disputes in England & Wales.

Featured Technology & Construction cases

Cheltenham Borough Council v Bevan Brittan LLP (Business & Property Courts in Bristol) (2020-2021)

Multi-million solicitors' negligence claim relating to development site in Cheltenham. Ongoing.

MDW Holdings Ltd v Norvill & Norvill & Norvill (ChD, Cardiff) [2021] EWHC 1135 (Ch) (HHJ Keyser QC)

Trial of claim by purchaser of waste company in South Wales in relation to alleged breach of warranties and/or misrepresentation claim relating to a share purchase agreement (SPA). Raises technical issues relating to operation of waste disposal plant, waste disposal regulations, hazardous waste, contractual limitation periods and alleged manipulation of test result data. Hugh is leading Jay Jagasia.

Fleuron LLC v NIMA Energy & Well Services of Iran (Commercial Court, London) (Jacobs J), 2020

Claim by claimant company, registered in Hong Kong, in relation to recovery of receivables from Iranian oil companies.

Merthyr (South Wales) Ltd v (1) Cwmbargoed Estates & (2) Dowlais Top Investment Co Ltd (arbitration 2018-2019)

Dispute relating to largest remaining open cast coal mine in UK, including technical issues concerning coal composition.

Burrows Investments Ltd v Ward Homes Ltd [2017] EWCA Civ 1577, [2018] 1 P&CR 13 (Ruper Jackson LJ, Henderson LJ)

Proper interpretation of sale agreement in relation to residential development, negotiating damages.

Raised issues concerning stages of construction of development. Hugh acted as sole leading counsel in the Court of Appeal. Case subsequently settled before retrial of quantum issues in 2019.

Gartell v Yeovil Town Football & Athletic Club Limited [2016] EWCA Civ 62 (Laws, Floyd and Bean LLJ)

Hugh represented the successful appellant in the Court of Appeal, in an appeal concerning non-performance of construction works carried out at Yeovil Town's football stadium, Huish Park, and the correct approach to quantification of damages.

David v Crossman & Morgan & Infinite Renewables Ltd (ChD, Cardiff)(HHJ Jarman QC)

Trial of liability in unfair prejudice shareholder dispute concerning shareholders in a renewable electricity generation company in South Wales, requiring analysis of wind yields across range of sites (ChD, Cardiff), 2016-2018.

Dyson Technology Ltd v Pellerey [2015] EWHC 3000 (Ch) (Snowden J)

Injunction proceedings relating to former employee of Dyson and seeking to restrain him from working for Tesla, concerned technical issues relating to electric vehicles.

International & Offshore

Hugh's broad ranging commercial & insolvency expertise has resulted in him being asked to provide advice and assistance on his own and with juniors, in relation to international work and involving offshore jurisdictions, including corporate governance & unfair prejudice matters, as well as general commercial and insolvency disputes.

Featured International & Offshore cases

Fleuron LLC v NIMA Energy & Well Services of Iran (Commercial Court, London) (Jacobs J), 2020

Claim by claimant company, registered in Hong Kong, in relation to recovery of receivables from Iranian oil companies. Hugh leading James Hannant.

Badyal v Badyal & Badyal (Business & Property Courts, Business List)

Advising on issues relating to forum and jurisdiction issues in relation to partnership and company dispute in UK and in India. Hugh is leading Richard Ascroft (2019-2021).

NHS High Weald Lewes Havens CCG v SinoCare Group Limited (Circuit Commercial Court, Bristol)

(HHJ Russen QC)

Dispute relating to enforceability of parent company guarantee in name of company registered in Hong Kong. Hugh is leading Sam Parsons (2019-2020).

Re: ICC (BVI)

Advising the International Cricket Council (“the ICC”) in 2017 in relation to arbitration proceedings concerning, amongst other things, the application of the BVI Business Companies Act 2004, and its equivalent to section 994 of the Companies Act 2006 (unfair prejudice petitions) (2017).

Re: ICC (BVI)

Advising the International Cricket Council (“the ICC”) in relation to the meaning and application of its articles of association in relation to an internal governance dispute – the ICC is the global governing and sanctioning body for the sport of cricket. It is a company limited by guarantee incorporated in the British Virgin Islands (“BVI”) with its principal place of business located in Dubai, United Arab Emirates) (2016).

Dyson Technology Ltd v Pellerrey [2015] EWHC 3000 (Ch) (Snowden J)

Injunction proceedings relating to former employee of Dyson and seeking to restrain him from working for Tesla in California, concerned technical issues relating to electric vehicles and required consideration of jurisdictional issues.

Re: Les Salines IRS Co Ltd (Privy Council)

Development contract dispute in the Mauritius – advising with junior counsel (Stefan Ramel) on the application for leave to appeal to the Judicial Committee of the Privy Council from the Supreme Court of Mauritius (2014).

Re: MBI International & Partners Inc (Commercial Division of the High Court, BVI, and in the Eastern Caribbean Supreme Court)

Liquidation proceedings proceeding in the BVI – advising on appeal to the Eastern Caribbean Supreme Court from a decision of the Commercial Division of the High Court, which refused to terminate the liquidation of MBI International & Partners Inc (“the Company”) – consideration of the just and equitable test under section 233 of the BVI Insolvency Act 2003 (2013 & 2014).

Education

- BVC, Western & Wales: Prize for Best Overall Performance
- Diploma in Law (Dean's Commendation), University of Exeter
- Physics BSc (First Class Honours), University of Manchester

Appointments

- Deputy High Court Judge (2019)
- Attorney General's Panels of Junior Counsel to the Crown (pre-2014)

Memberships

- Commercial Bar Association (Combar)
- Chancery Bar Association (ChBA)
- Insolvency Lawyers Association (ILA)
- Professional Negligence Bar Association (PNBA)
- Association of Business Recovery Professionals (R3)

Financial Services – negligence, fraud and more...

November 2023

Hugh Sims KC



A bumper crop...

- As it's just after apple harvest time...



Topics

- (1) The Quincecare duty re-rationalized – **Philipp v Barclays Bank plc** [2023] 3 WLR 284
- (2) Statutory vicarious liability under FSMA – **KVB Consultants & Others v Jacob Hopkins McKenzie & Others** [2023] EWHC 1686 (Comm)



Part 1: Quincecare & Philipp

- (1) The Quincecare duty – a reminder
- (2) APP fraud – the problem
- (3) The decision in Philipp
- (4) Comment
- (5) Key take aways



(1) The Quincecare duty

- *"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. **How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer?** If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order?"*



(1) The Quincecare duty

- *In judging where the line is to be drawn there are counter-vailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. **In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for so long as the banker is "put on inquiry" in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate funds of the company** (see proposition (3) in *Lipkin Gorman v Karpnale Ltd* (1986) [1992] 4 All ER 331 at 349, [1987] 1 WLR 987 at 1006). And the external standard of the likely perception of the ordinary prudent banker is the governing one. **That in my judgment is not too high a standard.**"*



(2) APP fraud – the problem

- A push payment occurs when the customer is pushed to instruct the bank to pay someone else, whereas with a pull payment it is the receiving party who gives the instruction (such as in the case of a direct debit)
- Some concerning stats...a financial fraud epidemic...
- £485m – APP fraud 2022 – out of c. £1.2bn



(3) The decision in Philipp

- The facts: a payment instruction given by Mrs Philipp to Barclays Bank plc ("Barclays"), to transfer £700,000 in two payments in March 2018 from her current account to third-party bank accounts in the United Arab Emirates. Mrs Philipp's payment instruction was the result of a fraud perpetrated on her by third-party fraudsters who convinced her, and her elderly husband, Dr Philipp, that the funds needed to be transferred to "safe accounts" as a matter of urgency.



(3) The decision in Philipp

- The decision at first instance..on a SJ/SO app
- HHJ Russen QC - [2021] EWHC 10 (Comm)
- Quincecare duty restricted to agency cases
- Declined invitation to accept extended duty arguable



(3) The decision in Philipp

- The decision in the Court of Appeal – Birss LJ, Chancellor and Coulson LJ – [2022] QB 578
- The true ratio of Quincecare – three steps
- Whilst paradigm case involved agency that was not a critical factor in reasoning - arguable



(3) The decision in Philipp

- The decision in the Supreme Court – Lord Leggatt with whom Lords Reed, Hodge, Sales and Hamblen all agreed
- [2023] UKSC 25, [2023] 3 WLR 284
- If reasoning in Quincecare right arguable
- But reasoning in Quincecare wrong
- Appeal allowed in part



Part 1 – The SC decision

- Dismissal of Mrs Philipp's claim insofar as based on allegation duty owed to her not to execute
- Refusal of SJ re alternative case re breach of duty in failing to take adequate steps after notified of fraud



Part 1 – The SC decision - comment

- Conflict/tension v no conflict tension/debate
- Ryan duty/restriction -
- *"the defendant would act unreasonably in complying with the orders of the plaintiffs contained in the cheques if a reasonable banker properly applying his mind to the situation would know that the plaintiffs would not desire their orders to be carried out if they were aware of the circumstances known to the bank"*.



Part 1 – The SC decision - comment

- exercise reasonable skill and care *"in and about executing its customers' orders"* (Steyn J, *Quincecare* at 376a), and the statutory implied terms under s. 13 of the Supply of Goods and Services Act 1982 ("SOGSA 1982") (or equivalent under s. 49 of the Consumer Rights Act 2015 ("CRA 2015"))
- Now...*"interpreting, ascertaining and acting on"*...not prof neg?
- Warning duty in other agency contexts...



Part 1 – The SC decision - comment

- Cf Ryan duty with duty to warn in lender cases...*Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836 per Bingham MR at 842...*"... if, in the course of investigating title, a solicitor discovers facts which a reasonably competent solicitor would realise might have a material bearing on the valuation of the lender's security or some other ingredient of the lending decision, then it is his duty to point this out."*



Part 1 – The SC decision - comment

- *Goldsmith Williams Solicitors v E Surv Ltd* [2015] EWCA Civ 1147
- Endorsed *Bowerman* – and ? more widely duty to warn where reasonable sol would consider gives rise to significant risk fraud?



Part 1: Key take aways



or



?!!



Part 1: Key take aways

- (1) FOS complaint – fair and reasonable?
- (2) CRM code?
- (3) New mandatory reimbursement - 2024
- (4) Ryan duty/restriction – watch this space
- (5) Stop/recover after notice - ditto





Part 2: KVB & Others: Statutory Vicarious Liability

- Claims made against principal of AR, which included claims made under s.39 of FSMA
- First considered application of learning of CA in *Anderson v Sense Networks Ltd*, as to proper scope of s.39
- Could AR contract be used to cut down scope of responsibility under s.39?
- If at first you don't succeed...

KVB - Background

- 26 Cs invested c. £1.7m in one or more of 8 residential property development schemes
- Schemes were devised, managed and promoted by Mr C, through his company JHM
- JHM was an AR of KCL - KCL authorised person under FSMA
- All of the schemes failed - schemes were the only real business undertaken by JHM as KCL's AR
- Could KCL be held liable for Cs' losses?

KVB – Structure of Schemes

- Each scheme concerned one development site only
- Site to be acquired by SPV – **investors did not become SHs in SPV** – FSMA 2000 (Collective Investment Schemes Order 2001)
- Rather, each SPV made declaration of bare trust – investors were to acquire beneficial interest in site
- Investors were not to play part in day-to-day management of the site or its development – left to JHM and Mr C



KVB – Statutory Framework

- General prohibition – s.19 of FSMA – authorised (KCL) or exempt (JHM)
- Exemption can be achieved under s.39 of FSMA – spawned networks of ARs
- Authorised person effectively lends its permission to AR
- Form of statutory agency
- AR is not directly regulated
- Regulatory lacuna – intended to be filled by (1) SUP 12 and (2) statutory vicarious liability – aim is to ensure that investors entitled to same or similar level of protection as if they dealt directly with authorised person



KVB – Section 39(1)

*If a person (other than an authorised person) - (a) is a **party to a contract** with an authorised person ("his principal") which - (i) permits or requires him to carry on business of a prescribed description, and (ii) complies with such requirements as may be prescribed, and (b) is someone for whose activities in carrying on the whole or part of that business **his principal has accepted responsibility in writing**, he is **exempt** from the general prohibition in relation to **any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.***



KVB – Section 39(3)

*The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative **in carrying on the business for which he has accepted responsibility.***



KVB – The AR Contract

Relevant Business means regulated activities which the [AR] is permitted to carry out under this Agreement which are **subject to the limitations of the Appointor's part IV permission** as detailed in Schedule 5. For the avoidance of doubt, the AR is not permitted to carry out any investment management activities.

The [AR] is **permitted to market and promote its services, arrange business and give advice.**

The [AR] will conduct business **with professional clients, elective professional clients and eligible counterparties.**

The [AR] is **not permitted to conduct any business with retail clients.**

The Appointor acknowledges that the [AR] will offer advisory and arranging services to third party investors **with regard to residential property investment. There is no pooling of capital and no CIS.**



KVB – Were the schemes CISs?

- If CISs, schemes fall within regulatory perimeter
- JHM was not authorised or exempt to establish and operate CISs (and nor was KCL) – if schemes CISs, then they were unlawful in that JHM had contravened general prohibition – unlawful schemes should not be marketed!



KVB – CISs and S.235 of FSMA

(1)...“collective investment scheme” means any arrangements **with respect to property of any description, including money**, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) **to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.** (2) The arrangements must be such that the persons who are to participate (“participants”) **do not have day-to-day control** over the management of the property, whether or not they have the right to be consulted or to give directions. (3) The arrangements must also have **either or both** of the following characteristics – (a) the contributions of the participants and the profits or income out of which payments are to be made to them are **pooled**; (b) the property is **managed as a whole by or on behalf of the operator of the scheme.**



KVB – Schemes are CISs

- FCA v Asset LI Inc – leading case – land banking case – investors acquired legal and beneficial title to individual plots – BUT intention was to enhance value of land as whole and sell as a whole – ‘ingenious’ structure not ingenious enough to avoid CIS finding – focus on reality rather than form
- Schemes in KVB are primitive and obvious CIS
- [36]: “It is beyond doubt that the arrangements in which the investors participated were CIS...The whole basis of the schemes was that the investors would contribute money which would be used to purchase property which the investors would own in equity, but over which they would not have any day-to-day control; that the property would be managed for their overall and collective benefit by JHM and its SPV; and that the profits, if and when realised, would be shared. Those were arrangements falling within the letter and spirit of section 235.”
- [38]: “The first seven schemes were plainly unlawful: nobody involved in them had any authorisation to operate them, and there was no lawful route by which they could be promoted or marketed.”



KVB – Was KCL vicariously liable under s.39(3)?

- Leading case on scope of s.39(3) is *Anderson*, which concerned unlawful Ponzi scheme which principal knew nothing about – action failed because AR contract did not permit AR to engage in relevant business complained of (business restricted to defined company agencies)
- Scope of exemption (s.39(1)) and liability (s.39(3)) **co-extensive**
- ‘What’ and ‘how’ distinction – former relevant to scope – latter not
- [40] (per David Richards LJ): “liability cannot be excluded by reference to a failure properly to conduct the business...In my view it will be a rare case which presents any difficulty in distinguishing between what activity may be carried on and how a permitted activity is carried on”



KVB – S.39(3) and the balancing act

*The Court of Appeal's decision in Anderson shows that it would be wrong to apply section 39 with the single-minded objective of imposing the broadest possible liability upon those who appoint representatives...Promiscuously broad liability would entail promiscuously broad exemption, and that is not what the Act intends. Section 39 permits and requires lines to be drawn, based both on the prescribed categories of business for which exemption can be claimed, and the business for which the representative is appointed by the terms of the relevant agreement...But it is equally necessary not to dissect an appointment in a spirit of pedantry, divorced from commercial reality...Anderson reminds us that a claimant cannot use section 39 to hold a firm liable for activities of representatives which are outside the scope of the business for which responsibility was assumed. **But it is not to be read as encouraging or requiring the court to take an artificially narrow view, or to assist appointors to drift away or around responsibility for business which in commercial reality falls squarely within the contemplated appointment.***



KVB – JHM's Activities

- Operating CISs – regulated activity (art.51ZG of RAO) – court considered not possible to attribute liability to KCL under s.39 because exemption and responsibility intended to be co-extensive and JHM (or any AR) could not carry out this activity lawfully even if permitted under AR contract – see FSMA (Appointed Representatives) Regulations 2001
- Advising – regulated activity (art.53 of RAO) – closely connected with JHM's marketing – ARs can carry out these activities – fell within activities that KCL was authorised to undertake – in principle possible to attribute liability under s.39, subject to terms of AR contract



KVB – Client Categorisation – ‘What’ or ‘How’?

*Specifying the characteristics of those investors who may be appropriate candidates for an investment seems to me to be a central case of an instruction **which is directed at how** the appointed representative should carry on the business, **not part of the definition of the business**. It would strip section 39 of much of its intended effect **if a mistake about the categorisation of a client deprived the appointed representative of exemption, and the client of protection**. The line between “how” and “what” is drawn not by considering the way a particular limitation is expressed. Skilful drafting can easily express instructions about an agent's conduct (“do not market to retail clients”) or legal categorisation (“market only if the investment is suitable”) as if they were limitations on authority (“you may market only to professional clients for whom the investment is suitable”) or on the scope of the business (“relevant business is marketing suitable investments to professional clients”). **What matters is the commercial activity (“marketing”), and its substance.***



KVB – CIS Restriction?

- Curious drafting: "The Appointor acknowledges that the [AR] will offer advisory and arranging services to third party investors **with regard to residential property investment. There is no pooling of capital and no CIS**"
- Admissible background – only real business undertaken was schemes – KCL knew of schemes and structure – whole purpose of AR contract was to enable JHM to engage in regulated business in relation to schemes
- Construing AR contract – if properly construed, did not permit JHM to carry out CIS activities, then this is a 'what' rather than 'how'



KVB – Construction of AR Contract

When the Agreement is interpreted against the relevant background, it is beyond doubt that the parties intended that marketing these very schemes (or schemes structured as these ones were) to be "relevant business". The statement at the end of the definition, "There is no pooling of capital or CIS", did not limit the scope of the contemplated business, but expressed the parties' mutually agreed conclusion about the legal label that should have been attached to it. That conclusion was incorrect. There was a pooling of capital, and the schemes were CISs. But the retrospective discovery of that legal reality cannot affect the conclusion that this was in every sense the very business that the Agreement contemplated.



KVB – Was KCL liable?

- S.39(3) – KCL responsible for JHM's promotional and advisory activities
- BUT s.39 imposes responsibility not liability
- Liability is directed at JHM's failings – COBS – fault-based liability
- Summary determination – Cs limited to fact that schemes were unlawful CISs
- Period 1 & Period 2 - £902k invested in Period 2! – liability established summarily for Period 2 because could not have possibly complied with COBS when JHM had concerns whether schemes unlawful CISs



KVB – What about JHM’s promotions?

- S.238 of FSMA: “an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme”
- FSMA (Promotions of Collective Investment Schemes) (Exemptions) Order 2001 – N/A
- S.39(3) – KCL responsible to same extent as if it had expressly permitted it, for anything done by JHM
- Promotions in relation schemes permitted under AR contract
- Even though promotions undertaken by JHM, KCL is taken to have contravened s.238
- S.241 of FSMA – contravention actionable as breach of statutory duty
- **Argument did not rely on proving that KCL approved promotions**
- [56]: “Because of section 39(3) all of them, approved or not, fall within KCL’s responsibility. None of the promotions would have been a lawful one, whether purportedly approved by KCL or not”
- [71]: “In marketing those schemes to investors, JHM was acting within the business for which, under the Appointed Representative Agreement, KCL had accepted responsibility. All the promotional activities in that regard were, whether JHM knew it or should have done, prohibited by section 238 of the Act, and under section 241 of the Act each of the claimants has a cause of action for breach of statutory duty against KCL as a result”
- So, KCL liable for Period 1 & Period 2



Disclaimer

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Client Care Options

“Litigation Funding and ATE”



Client Care Options

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Client Care Options Ltd (CCO) was established by Mark Baker and Randolph Murray.

It has actively worked in the legal expenses insurance profession since the 1990's, underwriting, brokering and developing innovative products for solicitors and their clients.

It places great importance on face-to-face relationships and meeting with lawyers and their clients.

This helps lawyers to understand and access the most up-to-date risk transfer and litigation funding products and schemes.

Each piece of litigation is unique and we meet that challenge with solutions that are clear and case-specific.



After the Event
&
Litigation Finance



Consequences on the Market

- Fixed Cost Regime
- PACCAR – Funding Agreements constituting unlawful DBA's



Informed Clients

- Clients are more likely to bring their claim if they feel they have been fully informed about the most cost-effective ways to run their legal case so that they can budget with certainty knowing there is a maximum cap on their financial risk & legal spend.
- Improves Client Relations / manages expectations
- Competitive Advantage



Assessing Demands and Needs

- Don't want to risk spending money on a legal case or being exposed to adverse costs and possible financial loss.
- Can't see how they could afford litigation. They are unable to launch or continue with a legal dispute because of insurmountable court fees, legal expenses or cash flow restrictions.
- Would like or need an option for a deferred and contingent method of paying your fees but you do not wish to offer a CFA.
- Need to know if the benefits of winning their case and amount of damages they receive stack up against the hassle, costs and risk of bringing their claim.
- May be facing a Security for Costs order.
- **Are facing "strong-arm" tactics by opponents.**



Exploring the Solutions

1. Law Firm – (DIY)
2. Using an Independent Expert

At CCO we are happy to provide an **initial consultation** to discuss the feasibility of the following solutions and how they might apply on a client-by-client or portfolio basis.

Once we understand the preliminary details about a case and specific capital requirements, we can advise on the most suitable and cost effective financial solutions for a client or simply confirm a solution is not feasible

3. Leave it to the client





Notes: -

A series of horizontal dashed lines provided for taking notes.



Riyaz Jariwalla
Partner
BPE Solicitors LLP

“Intellectual Property and the impact of AI”



Riyaz Jariwalla

Partner

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Riyaz specialises in litigation with a bias on Intellectual Property claims and high value commercial disputes.

His clients include well-known UK entertainment and leisure brands, high street retailers and fashion houses, a well-known drinks and beverage brand and a reputable online publication. They can range from start-ups to companies with a £20 million turnover that are looking to expand or enforce their intellectual property portfolio or need help with an commercial dispute.

He is also a qualified mediator, resolving disputes quickly and effectively.

Riyaz has been named a Next Generation Partner by Legal 500



Intellectual Property and Artificial Intelligence



"You can have a job if you wanted to have a job for personal satisfaction. But AI would be able to do everything"

— Elon Musk

1

Illusions



The Dress



More than meets the eye...

2

Copyright

Copyright

- Creators are collaborating with machines
- Who is the owner of copyright?
- Author of the work, unless created in the course of employment

Originality: Author must have created the work through their own skill, labour and effort and that it is not copied from other works (*Ascot Jockey Club Ltd v Simons [1968] 84 WWR 411*).

Photographer expended sufficient photographic effort to establish a valid copyright claim

Adaptations and Derivatives

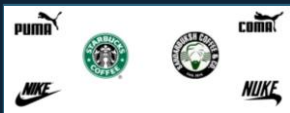


3

Trade Marks

Trade Marks

- AI generated branding and logos
- Challenges with protection and infringement
 - Distinctiveness
 - Confusion with existing brands



4

Patents



Patents

- Using AI to predict new/advancing sectors (transportation, language, telecoms, life sciences and medical)
- Recent shift in UK law – now recognises AI to be an inventor.
- AI's Language models and algorithms are mathematical in nature.
- **Question?** Section 1(1) of the Patents 1977 sets out four conditions:

- (a) the invention is new (1);
- (b) it involves an inventive step (2);
- (c) it is capable of industrial application;
- (d) the grant of a patent for it is not excluded another subsection



5

Trade Secrets



Trade Secrets / Confidentiality

- AI has the capability to access and learn from vast amounts of data (data sets).
- AI Server houses – potential target
- Uploading information to AI applications (an infringement / breach?)
- Network security – is your data safe? AI applications used to find vulnerabilities and exploit.
- Internal policies

6

Hallucinations

Hallucinations

- Outdated data
- Incorrect data
- Biases in the training data
- Insufficient programming to understand the data
- No context provided to language mode
- No ability to understand slang, colloquialisms, humour.

Dangers

- Misinformation (reliance)
- Health risks
- Legal risk
 - Infringement
 - Defamation
 - Data / Privacy breaches
 - Reputational Damage
 - Negligence



Notes: -

A series of horizontal dashed lines provided for taking notes.



**Ruth Dooley
&
Hannah Griffin
Partners
Hazelwoods LLP**

***"Property and Lending cases
- practical experiences of the appointed Experts"***



HAZLEWOODS

DRIVING LIFELONG PROSPERITY

Ruth Dooley

Partner, Forensic Accounting

01242 680000

ruth.dooley@hazlewoods.co.uk

Ruth has been an accountant, tax adviser and expert witness for nearly 30 years. Having graduated from Oxford University with a History degree and a Coxing Blue, She worked for Mars before training as an accountant. On qualification, She moved to the Cheltenham office of Grant Thornton where she progressed to Tax Partner and was delighted to join Hazlewoods in 2009.

She specialises in expert witness work and company and business valuations whilst also advising companies and their owners on a wide range of tax matters. Her creative yet practical solutions set my work apart. She have a hugely successful track record in accountancy and am a previous winner of South West Accountant of the Year.



HAZLEWOODS

DRIVING LIFELONG PROSPERITY

Hannah Griffin

Partner, Forensic Accounting

01242 680000

hannah.griffin@hazlewoods.co.uk

After qualifying as a chartered accountant in 2003, Hannah has specialised in litigation support services since 2005 and am a Fellow of the ICAEW. She began her forensic career with Grant Thornton and over the past 16 years, have worked on claims ranging from £100,000 to £100 million. Following 10 years at EY, She joined Hazlewoods in 2021.

Her expertise lies in litigation support services; She has extensive experience acting in litigation, arbitration, ADR and negotiated settlements. She specialises in contentious business valuations and assessing losses arising from commercial and contractual disputes through to professional negligence. She works with clients to develop innovative yet practical solutions and strategies.



Property and lending – practical experiences of the appointed expert

November 2023



Agenda

- | | | |
|---|--------------------------------------|-----------------------|
| 1 | How to get the best from your expert | Hannah Griffin |
| 2 | Property group restructuring | Ruth Dooley |
| 3 | Property companies tax issues | |
| 4 | Quantum | |



Market research

How many professional negligence claims in the last five years involving solicitors?

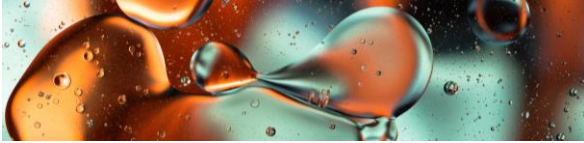
- 293
- 367
- 432



Market research

How many professional negligence claims in the last year involving solicitors?

- 23
- 49
- 88



Top 3 tips: how to get the best from your expert

1. Get to know your expert
 - Skills, adaptability, robustness
 - Building a connection



Top 3 tips: how to get the best from your expert

2. Early engagement
 - Appropriate planning
 - Accessing information
 - Securing the expert



Top 3 tips: how to get the best from your expert

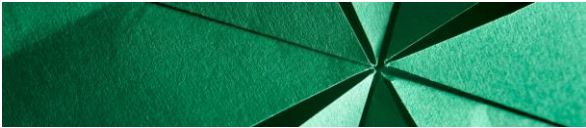
- 3. Team work
 - Improved communication
 - Better strategy
 - Clear roles
 - Collective vision of success



Property Group restructuring

Book value versus market value

- 2010 Case – retail business – new venture
- 2022 Case – splitting trade and leaseholds from freeholds



Property Group restructuring

Shadow Director

- 2010 case: retail business – new venture
- 2021 case: MBO restructuring – shadow director



Property companies – tax issues

Limits to expertise

- 2013: Shareholder dispute over valuations
- 2021: Tax advice on property company strike off



Quantum

- 2015 Case – solicitors advice on purchase of pub
- 2022 Case – banking advice on borrowing limits



Sector expertise



Jon Cartwright
Legal



Nick Dee
Farms & Estates



Lucie Hammond
Farms & Estates



Martin Howard
Healthcare



David Main
Corporate Finance



Phil Swan
Veterinary



Tom Woodcock
Corporate Tax



Contact us



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Notes: -

A series of horizontal dashed lines provided for taking notes.



Questions and discussion



Nicholas Lee
Costs Lawyer & Mediator
Managing Director – Paragon Costs Solutions

“Costs update and the Fixed Costs Regime”



Nicholas Lee

Managing Director

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nlee@paragoncosts.com

Nick began his career in costs in 2001. He qualified as an Associate of the Association of Law Costs Draftsmen in January 2009 and became a Fellow in January 2011. Following the Association being granted Reserved Legal activities under the Legal Services Act in 2007, he was admitted as a Costs Lawyer in 2011.

Nick worked in-house from 2001, initially attaining Associate status, and thereafter becoming Director of Costs and a fixed share partner for a Top 100 law firm.

In 2011, Nick created Paragon Costs Solutions which now has offices in London and Bristol. Clients have included many top 100 law firms, niche commercial practices, local authorities, insurers and international banks.

Advocacy, technical support, business development and client management are his primary responsibilities. Known for always being commercial and practical, colleagues and clients appreciate how thoroughly Nick assesses the merits in any claims, before giving his experienced and realistic advice.

Nick was President of Bristol Law Society (2018/19). He currently sits on the UWE Law advisory board, Bristol City Council's Economic advisory board, is an Enterprise Advisor through WECA and a Trustee for Quartet Community Foundation.

Nick is a frequent public speaker having arranged and spoken at numerous costs seminars. He is a member of Lexis PSL's Dispute Resolution Expert Panel. He has also written articles for numerous publications.

Paragon Costs

Nicholas Lee



Fixed Recoverable Costs



What is happening and when?

- Fixed Recoverable Costs will apply to most civil litigation claims with a value of up to £100,000.00 (CPR 45).
- Section VI- New Fixed Costs Regime for Fast-Track cases.
- Section VII- New Fixed Costs Regime for Intermediate Track.
- Section VIII- New Fixed Costs Regime for NIHL up to £25k.
- Section IX deals with disbursements.

When is it happening?

- In PI and disease claims- where the cause of action occurred on or after 1 October 2023.
- Otherwise where proceedings were issued on or after 1 October 2023.



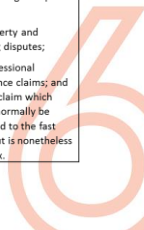
Fast Track

- A claim up to £25,000.
- Trial of no more than one day.
- One expert per party in relation to any expert field.
- Expert evidence in two expert fields.



CPR 26.15- FT Bands

| Fast Track | | | |
|--|--|--|---|
| Complexity band 1 | Complexity band 2 | Complexity band 3 | Complexity band 4 |
| (a) road traffic accident related, non-personal injury claims; and (b) defended debt claims | (a) road traffic accident related, personal injury claims which are or should have been started under the RTA Protocol; and (b) personal injury claims to which the Pre-action Protocol for Resolution of Package Travel Claims apply | (a) road traffic accident related, personal injury claims to which the RTA Protocol does not apply; (b) employer's liability (accident) and public liability personal injury claims; (c) possession claims; (d) housing disrepair claims; and (e) other money claims | (a) employer's liability disease claims (other than a claim for noise induced hearing loss); (b) complex possession and housing disrepair claims; (c) property and building disputes; (d) professional negligence claims; and (e) any claim which would normally be allocated to the fast track but is nonetheless complex. |



Fast Track Costs

- Table 12 for costs under the Fast Track.
 - A pre-issue settlement would attract costs of £660 - £2600 plus VAT and disbursements, plus 10-20% of damages.
 - Up to, but not including attendance at trial- £3,800 - £7,900 plus VAT and disbursements, plus 20-40% of damages.
- The figures in each of the stages are the cumulative totals for costs incurred up to and including that stage, save for attendance at trial.



FT Add-Ons

- Specialist post-issue advice in writing or in conference- £1,000.
- Drafting a statement of case- £500.
- Advocacy- £580 - £2,900.

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Intermediate Track

- A claim up to £100,000.
- Trial of three days or less.
- No more than two experts on each side.
- No more than three parties.

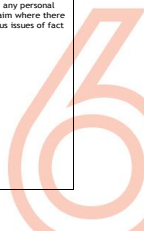
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CPR 26.16- Intermediate Track Bands

| Intermediate Track | | | |
|--|---|--|--|
| Complexity band 1 | Complexity band 2 | Complexity band 3 | Complexity band 4 |
| Any claim where— (a) only one issue is in dispute; and (b) the trial is not expected to last longer than one day, including— (i) personal injury claims where liability or quantum is in dispute; (ii) non-personal injury road traffic claims; and (iii) defended debt claims. | Any less complex claim where more than one issue is in dispute, including personal injury accident claims where liability and quantum are in dispute. | Any more complex claim where more than one issue is in dispute, but which is unsuitable for assignment to complexity band 2, including noise induced hearing loss and other employer's liability disease claims. | Any claim which would normally be allocated to the intermediate track, but which is unsuitable for assignment to complexity bands 1 to 3, including any personal injury claim where there are serious issues of fact or law. |

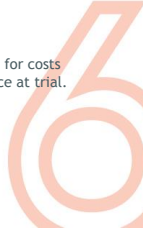
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Intermediate Costs

- Table 14 for costs under the Immediate Track.
 - A pre-issue settlement would attract costs of £1600 - £9300 plus VAT and disbursements, plus 3-8% of damages.
 - Up to, but not including attendance at trial- £6,600 - £29,000 plus VAT and disbursements, plus 15-22% of damages.
 - ADR- £1200 regardless of the complexity.
- The figures in each of the stages are the cumulative totals for costs incurred up to and including that stage, save for attendance at trial.

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Intermediate Track Add-Ons

- Post-issue advice and drafting statement of case- £2,000 - £3,500.
- Advice or conference post defence- £1,400 - £2,900.
- Brief fees- £3,200 - £5,800.
- Refreshers- £1,400 - £2,900.
- Handing down- £580.
- Counsel at mediation or JSM- £1,400 - £2,300.
- Approval of settlement- £1,200 - £2,000.

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Working Example

- One-day £25k prof neg claim
- Top end of FT- £7,900, plus 40% of damages(£10,000) plus advocacy fee of £2,900, plus advice/pleadings of £1,500 = £22,300.
- Bottom of IT- £6,600, plus 15% of damages (£3750), add-ons (£2,000 + £1400), advocacy fee £3200, solicitor attendance £580, ADR £2,600 = £20,130.

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Non-Monetary Relief?

- CPR 26.9(8)- Where the relief sought includes a claim for non-monetary relief, the claim will not be allocated to the intermediate track unless the court also considers it to be in the interests of justice to do so.
- CPR 45.45 & 45.50 assigns a notional monetary value to non-monetary claims.

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What else?

What about disbursements?

- Broad scope to recover disbursements so long as they are reasonable.
- Except any disbursements covering work for which costs are already allowed by Sections VI, VII or VIII.

What about pre-action and interim applications?

- Either £250 (FT Band 1-3) or £333 (FT Band 4 and IT)
- Summary judgment, interim payment or interim injunction- £750.

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What else?

What about beating a Part 36 offer?

- Additional 35% of the difference between the fixed costs at the stage when the offer expired and the stage applicable at the date of judgment.

Defending and Counterclaiming?

- Should be entitled to two sets of costs.

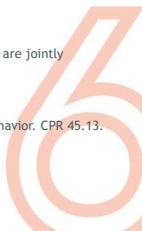
Multiple Claimants with the same firm?

- Two sets of costs unless the remedy is one to which the Claimants are jointly entitled. CPR 45.5.

Unreasonable Conduct?

- Costs can be reduced or increased by 50% due to unreasonable behavior. CPR 45.13.

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What else?

London Weighting?

- Extra 12.5% of fixed costs (excluding disbursements) where the party lives, works or carries on business in the relevant area and instructs a legal representative who practices in those areas. CPR 45.3

LIPs?

- Limited to two-thirds of fixed fee. CPR 45.4.

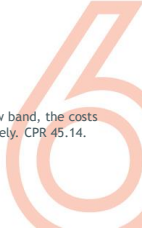
Defendants?

- Also subject to fixed fees. CPR 45.6.

Re-allocation?

- If a claim is reallocated to a different track or reassigned to a new band, the costs regime of the reallocated track/band will be allowed retrospectively. CPR 45.14.

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What else?

Exceptional Circumstances?

- In exceptional circumstances the court may assess the costs. CPR 45.9.

Vulnerable party or witness?

- Where the costs are more than 20% of the fixed costs, by reason of their vulnerability, the costs may be assessed. CPR 45.10.

However... CPR 45.11 and CPR 45.12

- If you apply and do not get more than 20% above the fixed costs, you will get the lesser amount and probably be liable for the costs of the application.

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All seems straight forward...

- Which banding will apply to your claim?
- Is your claim complex?
- What are reasonable disbursements?
- What if the claim has been exaggerated?
- What if proceedings are issued prematurely?
- What if the parties do not agree the length of trial or the number of experts?
- What if you settle without agreeing a band?
- What if you settle pre-issue?

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Advice for lawyers...


1. Training- do your staff know about these changes? They may affect live cases.
2. CCL / TOB- do your clients know about these changes? They may affect live cases.
3. Client documents- what changes to make to your generic costs advice and costs benefit analysis?
4. Will you charge the client the shortfall? Will the client keep any surplus?
5. Does this change your risk portfolio? More scope for solicitor and client disputes? Do you need to make any changes to your work acceptance processes?

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QOCS

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Why do we care?

- Brown v Commissioner of Police of the Metropolis & Anor [2019] EWCA Civ 1724
- Claims under the Data Protection Act and the Human Rights Act for misuse of private information
- Breach of contract not pursued. Misfeasance failed at trial. Misuse of private information succeeded
- Claim for PI arising out of the incident rejected
- C awarded £9,000. Ds had offered £18,000
- D ordered to pay 70% of the costs up to date of the offer and C pays the costs thereafter.
- C argued that because the claim included damages for PI she was protected by QOCS and D could not enforce for more than £9,000
- HHJ Luba QC agreed
- Upheld by the COA- in most mixed claims QOCS will apply

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Another example

- Wokingham Borough Council v Arshad [2022] EWHC 2419 (KB)
- D lost his hackney carriage vehicle license from the Council. He complained to the Local Government Ombudsman who found the Council had given him wrong advice. On a second appeal, he was given a new licence
- D brought a claim alleging discrimination, negligence (re the advice) and breach of duty in carrying out statutory duties
- He alleged that the Council's actions caused a depressive disorder involving mild to moderate depression
- D succeeded at first instance and was awarded damages, but this was overturned on appeal on the basis that there was not a duty of care to avoid psychiatric harm and that such harm was not reasonably foreseeable
- C awarded £0
- However QOCS applied
- D costs therefore limited to £0

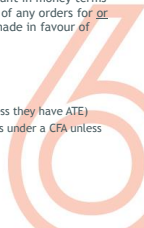
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What has changed?

- Old Rule CPR 44.14(1)- "...orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant"
- CPR 44.14(1)- "...orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant"
- QOCS now extends to costs
- C gets £150k in damages and £150k in costs. D also has a costs order
 - Old Rules = D could only enforce up to £150k (client gets nothing unless they have ATE)
 - New Rules = D can enforce up to £300k (solicitor potentially loses costs under a CFA unless the Claimant has ATE)

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Exceptions

- CPR 44.15 and 44.16
- Strike out
- Fundamental dishonesty
- Where the claim was not for the financial benefit of the Claimant or a dependant

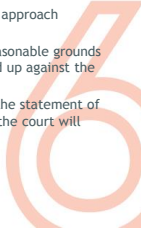
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Strike Out v Summary Judgment

- *Kasongo v CRBE Ltd and another* [2023] EWCA Civ 557.
- D2 initially succeeded in obtaining an order to strike out the claim on the basis it was not the occupier of the premises and CCTV showed the accident did not occur as the C alleged.
- This meant C lost the protection of QOCS.
- C appealed.
- The appeal was upheld on the basis that the Judge applied an approach suitable for summary judgment and not strike out.
- The pleadings themselves did not fail the test of disclosing reasonable grounds for bringing the proceedings (even if the evidence was stacked up against the C).
- In considering a strike out application the court will focus on the statement of case whereas in considering a summary judgment application the court will consider the prospects of bringing or defending the claim.

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Closing Stories
(especially chosen for Prof Neg lawyers)

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Kenton v Slee Blackwell PLC [2023] EWHC 2613 (SCCO) (19 October 2023)

- Mrs K instructs SB to pursue a prof neg claim against another law firm (ABC).
- She is told her costs pre-action could be £5,000 to £20,000.
- She is also told her costs to trial could be £30,000 to £50,000 or more.
- Mrs K recovers £295,000 in damages at mediation pre-issue.
- SB charge £235,263 plus VAT, including a 70% success fee.
- Mrs K sought an assessment of her costs.
- Court orders Mrs K to pay just £40,000 plus VAT as profit costs.
- Risk was not properly assessed. Judge allowed 50%.
- Solicitor allowed just £60,000 plus VAT.

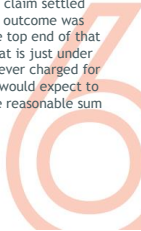
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Judge's comments

"In circumstances where the client was given a hopelessly inaccurate estimate, relied on the estimate by entering into a conditional fee agreement, lost the opportunity of doing something different, was not given proper costs information, was billed a sum several times the amount of the estimate, and where the solicitor failed properly to explain the difference between the estimate and the costs incurred, the amount that the client should reasonably be expected to pay must be a figure close to the estimate upon which she relied. The claim settled before issue and following mediation. The estimate given for that outcome was £5,000 to £20,000 plus "additional costs for mediation". Taking the top end of that bracket and adding £20,000 for mediation would give £40,000. That is just under half of the figure which Ms Slade referred to as the most she had ever charged for a case which went to trial. It is also not far off the amount that I would expect to have seen estimated and incurred. £40,000 seems to me to be the reasonable sum which the Claimant should be expected to pay."

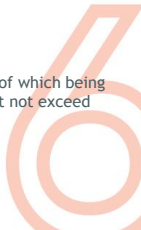
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Diag Human SE & Anor v Volterra Fietta (Re Assessment Under Part III Solicitors Act 1974) [2023] EWCA Civ 1107 (04 October 2023)

- Another solicitor and client dispute.
- A CFA between solicitor and client found to be unenforceable as it included a success fee that could exceed 100% and because it did not state the success fee percentage.
- Decision of Master Rowley upheld by the High Court and then the Court of Appeal.
- Solicitor's bill \$2.9m.
- Amount allowed \$0.
- There are only ten or so rules relating to a CFA. One of which being you must state the success fee. Another being it must not exceed any prescribed amounts.

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Paragon Costs

Costs Update

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Costs Solutions





Notes: -

A series of horizontal dashed lines provided for taking notes.



“Chair’s Closing Remarks, Questions and Discussion”

Total CPD – 6 hours

To complete your feedback form please go to
<https://www.pnla.org.uk/event/pnla-bpe-conference-cheltenham-16-17-november-2023/>



"Day 2"

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

CHELTENHAM CONFERENCE – “Day 2”

Friday 17th November 2023

0900–0910

“BPE Countryside Day – Introduction”

John Carter – Partner – BPE Solicitors LLP / PNLA Midlands Representative

<https://www.bpe.co.uk/our-people/john-carter/>

0910–0920

“Chair’s address”

Francis Bacon – Hailsham Chambers

<https://www.hailshamchambers.com/our-people/profile/francis-bacon>

0920–0945

“Keynote Address - Patrick was part owner of Coneygree - Winner of the Cheltenham Gold Cup 2015 and reported to be the first novice to win in 41 years!”

Patrick Lawrence KC – 4 New Square

<https://www.4newsquare.com/profile/patrick-lawrence-kc/>

0945–1015

“Negligence and Sports Injuries Common Threads”

Megan Griffiths - 12 KBW

<https://www.12kbw.co.uk/barristers/megan-griffiths/>

<https://www.12kbw.co.uk/negligence-and-sports-injuries-common-threads/>

1015–1030

“Racing Tipster!”

Steve Conlay – BPE Solicitors LLP

<https://www.bpe.co.uk/our-people/steve-conlay/>

1030–1130

BPE Brunch

“Travel to racecourse – Subject to availability parking available at BPE’s offices – walking distance to racecourse.”

1200–

“Cheltenham Racecourse”

First Race 1310 – Last Race 1600

2 hours CPD

**PROFESSIONAL NEGLIGENCE AND LIABILITY
CHELTENHAM CONFERENCE
Friday 17th November 2023**

ATTENDEES (1 of 2)

| | | |
|--------------------------------------|---|----------------|
| Francis Bacon (Chair) | Hailsham Chambers | London |
| Patrick Lawrence KC (Keynote) | 4 New Square | London |
| Philip Allen | BPE Solicitors | Cheltenham |
| Doug Armstrong | BPE Solicitors | Cheltenham |
| David Bailey | Healys | Brighton |
| Mark Baker | Client Care Options | Cheltenham |
| Tristan Bartlett | Litica | London |
| Andrew Call | 4 New Square | London |
| John Carter | BPE Solicitors/PNLA Midlands Representative | Cheltenham |
| Gavan Carty | Kent Carty | Dublin |
| Shane Carty | Kent Carty | Dublin |
| Jamela Collins | Temple Legal Protection | Guildford |
| Steve Conlay | BPE Solicitors | Cheltenham |
| Tim Constable | Bates Wells & Braithwaite | London |
| Clyde Darrell | Forum Chambers | London |
| Ruth Dooley | Hazlewoods | Cheltenham |
| Conor Fagan | Forum Chambers | London |
| Eleanor Gobey | BPE Solicitors | Cheltenham |
| Guy Goodall | BPE Solicitors | Cheltenham |
| Megan Griffiths | 11 Kings Bench Walk | London |
| Lucy Hodgkins | Paragon Costs | Bristol/London |
| Beth Holden | Anthony Gold Solicitors | London |
| Sukhbir Kaur | Temple Legal Protection | Guildford |
| Peter Knibbs | BPE Solicitors | Cheltenham |
| Nicholas Lee | Paragon Costs | Bristol/London |

| | | |
|---------------------------|-------------------------|------------|
| Andy Lyalle | Temple Legal Protection | Guildford |
| Katy Manley | PNLA & BPE Solicitors | Cheltenham |
| Pippa Manley | PNLA | Cheltenham |
| David Martin | Carbon Law Partners | Cardiff |
| Lloyd Maynard | Forum Chambers | London |
| Gil Percival | Anthony Gold Solicitors | London |
| Rebecca Pike | BPE Solicitors | Cheltenham |
| Liliana Pina | Factor Risk Management | London |
| Daniel Quinn | Litica | London |
| Morgan Rees | George Green | Birmingham |
| Jeremy Riley | Kennedys | London |
| Stephen Rome | Thursfieds | Birmingham |
| Annabel Rowland | BPE Solicitors | Cheltenham |
| Harrison Singleton | Forum Chambers | London |
| Paige Skudder | BPE Solicitors | Cheltenham |
| David Stedman | Clarke Willmott | Bristol |
| Holly Taylor | Hazlewoods | Cheltenham |
| Kelly Whittaker | PNLA South West | Bristol |



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Client Care Options



KEEFE, BRUYETTE & WOODS
A Stifel Company





John Carter
Partner - BPE Solicitors LLP
PNLA Midlands Representative

BPE Countryside Day
Introduction



John Carter

Partner

01242 248243

john.carter@bpe.co.uk

John specialises in property litigation and professional negligence work.

He manages a varied workload which involves pursuing negligent professionals who have provided incorrect advice to lenders and other clients causing them to incur a loss.

He also specialise in commercial property litigation, often dealing with lease renewals and breaches of covenant. When issues arise, he advises landlords practically whilst ensuring their positions are protected.

John is the PNLA Midlands Representative and the Property Litigation Association.

John is identified as a Rising Star by Legal 500.



Francis Bacon
Hailsham Chambers

“Chair’s address”



Francis Bacon

Call: 1988

Overview

Francis specialises in complex, high-value professional indemnity, commercial insurance and commercial litigation. He has extensive experience in England and Wales and overseas in acting for professional clients and their professional indemnity insurers. He also acts for private individual and corporate clients in commercial disputes and in claims brought against professionals both in this jurisdiction and in commonwealth countries.

He appears regularly in the High Court and Appellate Courts and many of his cases are widely reported in the leading texts.

For over a decade Francis been listed in the very top tier of Professional Negligence barristers in Chambers & Partners and Legal 500. Francis has been described by Legal 500 as “*the outstanding professional indemnity junior at the Bar*” and was recognised as the Professional Negligence Junior Barrister of the Year by Chambers & Partners. Chambers 2022 comments: “*He’s extremely bright, even by the standards of the Bar. Very confident, very direct - you know exactly where you stand.*”

Professional liability

Lawyers

Francis acts for and against solicitors in many jurisdictions. He has considerable experience in managed and large-scale litigation involving solicitors. He was involved in the *Nationwide Managed Litigation* in the late 1990’s, *TAG* in 2006/2007 and *Composite Legal Expenses*. He has appeared in many of the leading High Court and Court of Appeal authorities on loss of chance claims. His work often takes him overseas and he has worked on high profile professional negligence claims relating to lawyers in the Bahamas, Milan, Paris and Jersey. Francis has particular experience of obtaining freezing injunctions

and pursuing tracing claims against dishonest lawyers and other professionals worldwide. He advises extensively on coverage issues especially in relation to dishonesty, successor practice and aggregation issues. He is regularly asked by his insurer clients to conduct indemnity interviews and has advised on very high value claims. Francis has acted as an adjudicator in complex professional negligence disputes.

Francis acts for members of the Criminal Bar on the instructions of Bar Mutual and has represented the Bar Standards Board. Building on his 18 years' experience as a Criminal Recorder Francis acts for barristers and higher court advocates in many claims arising out of the alleged negligent conduct of criminal proceedings including serious crimes such as complex fraud, murder and rape cases.

Trustees

Following on from being led by Michael Pooles KC in successfully defending Cantrust, a firm of professional Jersey based trustees, in the \$20m breach of trust/tracing claim *Shalson v. Russo* [2005] Ch 281, Francis continues to act for and against professional trustees in various commonwealth jurisdictions.

Between 2006 and 2010, he acted for the Ladies Al Hamrani in the \$120m breach of trust claim brought by the Ladies and various members of the Al Hamrani family against JP Morgan and others in the Royal Court in Jersey. The action became the longest running trial in Jersey's legal history. It was eventually resolved in a substantial settlement to the Ladies.

Francis continues to advise extensively on coverage issues relating to professional trustees in many jurisdictions and in particular in the Channel Islands.

Construction professionals

Francis has acted for architects, quantity surveyors, engineers and other construction professionals in numerous high value and complex High Court claims. Building on his experience of large-scale property fraud litigation, Francis has acted in many multi-million claims for and against well known commercial and residential property surveyors and valuers throughout the UK.

Accountants & auditors

Francis acts regularly for and against accountants and auditors in High Court claims. He has been involved in many cases involving complex tax issues and SDLT schemes. He has acted for insurers in recovery actions against auditors of legal practices.

Insurance brokers

Francis has acted in numerous high value claims for and against insurance brokers.

Commercial law

Francis has considerable domestic and international commercial litigation expertise. He has been

instructed in a very wide variety of disputes for private and insurer clients and is often instructed to take urgent interlocutory steps including obtaining freezing injunctions and search orders.

Many of his cases are related to commercial properties, ranging from multi-million £ or \$ insurance disputes to acting for commercial agents in commercial property purchases. Francis has been instructed in commercial litigation disputes which have taken him to Paris, Jersey, Milan, Washington, New York and Nassau.

Regulatory and disciplinary

Francis has defended professionals for very serious professional conduct matters before many different regulatory and disciplinary tribunals. He represented the chair of one regulatory body when that person's firm was facing disciplinary proceedings.

Francis has acted for the Bar Standards Board in High Court proceedings and he has represented members of the Bar before the Council of the Inns of Court and acted for Solicitors before the SDT.

Employment law

Francis has been instructed in complex employment disputes. He acted for the former directors of a multi-national company in injunctive proceedings which have been brought against them.

Media law

Francis acted for the Marquesa de Valera, the International Editor of Hello! Magazine in the early stages of the claim brought by Michael Douglas and Catherine Zeta Jones against the magazine. Since then he has acted for many well-known specialist libel lawyers in professional negligence claims arising out of their alleged negligent conduct of high profile defamation proceedings.

Recent cases

Moda International Brands Ltd v Gateleys LLP [2019] PNLR 27. Francis acted for the successful BVI Company in a professional negligence claim against Moda's former solicitors for the loss of chance of recovering a share of profits from a property development in Nottingham.

Group Seven Ltd v Notable Services LLP [2019] PNLR 22. The Court of Appeal gave important guidance on the law of dishonest assistance in breaches of trust and fiduciary duty.

Andrews v Messer Beg [2019] 1 Costs LO 1 and [2019] PNLR 23. Acting for Messer Beg in the claim for

the loss of chance of a better outcome of managed litigation originally brought by borrowers who took out shared appreciation mortgagees against Barclays Bank and Bank of Scotland. The case is ongoing.

Goddard-Watts v Burgess Salmon and others. Acted for a firm of accountants in a claim for the loss of chance of a better outcome of matrimonial proceedings. Case settled after exchange of skeleton opening submissions.

Paul v Lock & Marlborough. Acted for firm of solicitors in a very high value contentious probate claim. Case settled after exchange of skeleton opening submissions.

Group Seven Ltd v Nasir and others [2017] EWHC 2466 (Ch). Francis was led by William Flenley KC in a €9m claim brought by Group Seven against Notable Services LLP and others for dishonest assistance in breach of trust and unconscionable receipt. Following a 38 day trial, the claims of dishonest assistance and unconscionable receipt against Notable Services LLP were dismissed. However, following Francis' successful cross-examination of co-defendant Mr Louanjli, Mr Louanjli was held liable to the Claimants in deceit, conspiracy and dishonest assistance in breach of trust.

Robinson v Ness & Co [2017] EWHC (Ch). Francis defended Ness & Co in the High Court in a High Court trial in which it was alleged that the Claimant had committed mortgage fraud and was not entitled to recover damages from the solicitor on the grounds of public policy.

Group Seven Ltd v Nasir [2016] 2 Costs LO 303. Francis acted for the Notable Defendants in Morgan J's Costs Management Judgment [2016] 2 Costs LO 303 in which the Claimant's budgeted costs in excess of £5m were almost halved.

Mortgage Express v Awais Khan [2017] EWHC 53. Francis successfully acted for the lender in a claim against a dishonest mortgage borrower at a trial before Mr M Griffiths KC sitting as a Deputy High Court Judge in the Chancery Division.

Martin Francis v Charles Knapper [2016] EWHC 3093 (QB). Francis successfully defended the solicitor firm Knapper & Co in claims of fraudulent misrepresentation brought by Mr and Mrs Francis at a trial before Mr Justice Andrew Baker.

Haylett v Cayton [2015] EWHC 1951 (Comm) – a partnership valuation dispute tried before Colin Edelman KC.

Mark Lynn v Borneos LLP [2014] EWHC 254. Successful defence of multi-million £ claim following a four day High Court Action before HH Judge Cooke. The Defendant solicitors had admitted breach of duty in drafting a Share Sale Agreement of a UK registered company which had acted as an agent in selling off plan residential properties in the Dominican Republic. The Judge found the Claimant dishonest and the Claimant failed on causation.

Adelle Challinor & 20 Ors v Juliet Bellis & Co and Geoffrey Egan [2013] EWHC 347 (Ch) and [2013] EWHC 620. Successfully defending Geoffrey Egan, a chartered surveyor, in a contested £3m claim brought against him by the Claimants in misrepresentation and also successfully defending Part 20. Claim made by *Juliet Bellis & Co*, a solicitor, in dishonest assistance in breach of trust, breach of warranty of authority, breach of fiduciary duty and dishonestly procuring wrongdoing by his employers.

Mamun v Bar Standards Board [2012] QBD. Representing Bar Standards Board before The Visitors of the Inns of Court in successfully opposing Mr Mamun's appeal against exclusion from Lincoln's Inn.

Pritchard and others v Ingram Winter Green and Others [2011] 2 EGLR 1. Acting for Ingram Winter Green before Morgan J in successful application to strike out claims brought by litigants in person against the firm and in subsequently obtaining civil restraint orders against the Claimants.

Halliwells v NES v Quinn [2011] PNLR 30. Acting for Quinn Insurance in £1.5m undertaking claim against NES solicitors. Francis's own declinature of coverage was upheld on grounds of dishonesty and condonation of dishonesty by both partners and on the basis that the undertaking was not given in solictorial capacity.

Harris v Kingsley Napley [2011] Defending Kingsley Napley in substantial claim relating to alleged negligent advice in relation to stamp duty land tax saving scheme.

Arcscotts Limited v Harris [2010] EWHC Ch Acting for Arcscotts Limited in obtaining freezing injunction in claim against dishonest employee and her husband. Advising on tracing actions and subsequent recovery of substantial part of stolen monies.

Al-Hamrani v JP Morgan and Others [2009] Royal Court of Jersey. Acted successfully for the Ladies Al-Hamrani in the high profile \$120 million breach of trust litigation in the Royal Court of Jersey against JP Morgan and Others.

Perkin v Lupton Fawcett [2008] PNLR 30 – (Court of Appeal) loss of chance claim against solicitor in claim relating to lost chance of negotiating more favourable clauses in a share purchase agreement.

Nationwide v Browne Jacobson LLP: £7m lender claim settled.

Bank of Scotland v Shah Solicitors and Al Ansari [2008]: £7m claim against solicitors and property developers for fraudulent breach of trust and deceit. Acting for bank in obtaining freezing injunctions against fraudsters.

Hunter v Rhodes Dickson [2008]: successful defence at trial of claim against valuer.

The Accident Group [2007]: multi-million pound litigation concerning the lawfulness of a referral fee and the mediation of thousands of claims with the Lloyds markets.

Sweetman v Shepherds, Nathan, Russell Jones and Walker and others [2007] EWHC 137 : striking out multi-million claim for loss of chance.

Walker v Palfreyman and others [2006] EWHC – summary judgment and contempt application for

professional indemnity insurers against fraudulent borrower in multiple mortgage fraud where we had obtained a freezing injunction and obtained draconian tracing orders to recover the vast majority of the monies stolen.

Hammond Suddards v Jebb [2006] EWCA 777. Successful defence of claim against Hammond Suddards for loss of litigation opportunity.

Excel Polymers v Anston Commercial [2005] EWHC. 1927 (QB). Acted for insurance broker at trial of preliminary issue of meaning and effect of standstill agreement relating to limitation. Following findings in favour of insurance broker, action successfully dismissed.

Shalson and others v Russo, Cantrust and others [2005] Ch 281 Representing Professional Trustees. Equitable tracing of US\$7.5m + into privately owned \$20m motor yacht and into monies held on trust in Jersey based Settlement. In depth analysis of law of tracing. Successful defence of the claim that the Settlement was a sham.

Manolakaki v Constantinides and Lange [2004] EWHC 749. Successful defence of claim brought by solicitor against his professional indemnity insurers who had refused to indemnify him on the grounds of his own dishonesty in a \$1m plus financial instrument fraud.

McNab v Neal [2003]. Acting for innocent partners in obtaining freezing injunction and search orders against dishonest partner.

Sharpe v Addison Lister [2004] PNLR 426. Assessment of value of lost litigation opportunity resulting from negligence of solicitor who had advised claim had merit but who failed to give notice to insurers in a claim for damages for personal injury arising out of a road traffic accident. Review of all recent Court of Appeal decisions on loss of chance. Claimant awarded only 10% of value of total assessed loss.

Sharif v Garrett & Co. [2002] 1 WLR 3118. Leading case on loss of litigation opportunity where action struck out for want of prosecution – £4m+ claim.

Prosser v Castle Sanderson [2002] Lloyds Rep PN 584 Court of Appeal – £750k Loss of chance claim against an insolvency practitioner. Claim dismissed.

Egan Lawson Limited v Standard Life [2001] 08 EG 168 Court of Appeal – commercial estate agent's entitlement to commission in commercial property transaction.

Nationwide Building Society v Balmer Radmore [1999] Lloyd's Rep 241 – Managed litigation -extent of a solicitor's common law and fiduciary duty in a conveyancing transaction where the solicitor is instructed by a lender and borrower – Causation, measure of loss and contributory negligence.

Nationwide Building Society v Richard Grosse [1999] Lloyd's Rep 348 (causation and contributory negligence in claim against solicitor for breach of fiduciary duty)

Nationwide Building Society v Goodwin Harte [1999] Lloyds Rep 338 – causation and contributory negligence in claim against solicitor for fraud and breach of fiduciary duty.

Nationwide Building Society v Thimbleby [1999] Lloyds Rep 359 – whether contributory negligence

available as a defence to a claim for damages for deceit.

Barclays Bank v Caplan & Ronald Nathan & Co [1998] 1 FLR 532 – undue influence – solicitor`s duties to wife providing £1m+ guarantee for husband`s indebtedness to Bank. Acting for solicitor who was in prison at the time of the trial. The claim against solicitor failed.

What others say

"Francis is highly accessible, gets his hands dirty and is brilliant on civil fraud matters." *Chambers UK, 2024*

"Francis is a delight to work with, very easy to get along with and turns things around quickly and efficiently." *Chambers UK, 2024*

"His advice is always very clear; he is happy to listen to other points of view and is extremely good with clients too." *Chambers UK, 2024*

"Francis is very easy to deal with, a good team player and always on top of the detail." *Legal 500, 2024*

"Francis is very robust and has a good way with difficult clients." *Chambers UK, 2023*

"Loves to get his hands dirty on the detail and underlying commercial dynamic." *Chambers UK, 2023*

"Francis is always quick and efficient in responding to queries and a forceful advocate." *Legal 500, 2023*

"Go-to junior for professional negligence, grasps the issues quickly, excellent to work with and unrivalled knowledge." *Legal 500, 2023*

"He`s extremely bright, even by the standards of the Bar. Very confident, very direct – you know exactly where you stand. He relishes a challenge and approaches the complex cases with zeal." "He`s super experienced, keen to help out and a great advocate. He`s a very commercial barrister and doesn`t just think about one bit of paper at a time." *Chambers UK, 2022*

"A real street fighter whose knowledge of the law is immense. A proper specialist in professional negligence. A keen strategist who is very easy to work with." *Legal 500, 2022*

"Seriously impressive attention to detail. Very reliable and bright, easy to deal with, extremely accommodating." *Legal 500, 2021*

"He is very proactive, returns work before deadlines, which is amazing, turns instructions around incredibly quickly and the advice provided is always first-class." *Chambers UK, 2021*

"A very smooth cross-examiner." *Chambers UK, 2020*

"Has a really good breadth of knowledge and is very thorough." *Chambers UK, 2020*

“He is the outstanding professional indemnity junior at the Bar and a silk in all but name” *Legal 500, 2020*

“The level of analysis was impressively thorough, and distilled into an impeccably drafted defence. He is an absolutely charming man to deal with, and he adopts a truly collaborative approach” *Chambers UK, 2019*

“He brings a wealth of knowledge and experience and has an excellent strategic approach” *Legal 500, 2019*

“He is brilliant. A ruthless cross-examiner with a lot of experience” “His advice is always really practical and concise” *Chambers UK, 2018*

“Very user-friendly” *Legal 500, 2017*

“Very sharp, very good with clients and extremely good on his feet.” “Unflappable under pressure, he never backs down from difficult work.” *Chambers UK, 2017*

Francis is recognised as one of the leading commercial juniors in professional negligence, having been ranked by both *Chambers UK* and *The Legal 500* for many years. In 2016 he was shortlisted for *Chambers & Partners’ Junior of the Year* for Professional Negligence.

“He has an edge that other barristers don’t have – his experience and advocacy skills are strengthened by his wealth of knowledge and his investigative nature. He will leave no stone unturned.” “He has an excellent grasp of the documents and deals very well with the witnesses.” *Chambers UK, 2016*

“Really very good at cutting through pages and pages of material and getting to the core issues.” *Legal 500, 2015*

“very sound and unflappable, and has a wealth of experience in his core areas. He is outstanding, as he is extremely commercial and personable.” *Chambers UK, 2015*

“extremely capable and easy to work with. His insight into cases is second to none.” *Legal 500, 2014*

“is particularly strong on coverage issues. Solicitors appreciate the fact that he is robust in his advice and takes a line and sticks to it. ‘He’s first-rate, fast, clever and very user-friendly’.” *Chambers UK, 2014*

Further information

Education: Gray’s Inn Karmel Commercial Scholar

Keele University BA Hons Law and Economics

Loughborough University MSC Recreation Management.

Appointments: Recorder 2004. Francis sits in the Crown Court.

Lectures: Francis lectures to solicitors, insurers, brokers and underwriters on a wide range of subjects including fraud, dishonesty, loss of chance, policy issues, lender claims, trustees and expert evidence.

ICO Data protection registration number: **Z6991593**.

Francis Bacon is a barrister regulated by the Bar Standards Board. [Click here to view Francis Bacon's Privacy Notice](#)



Patrick Lawrence KC
4 New Square

"Keynote Address"

Patrick was part owner of Coneygree
- Winner of the Cheltenham Gold Cup 2015 and
reported to be the first novice to win in 41 years!

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Patrick Lawrence KC

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“Patrick gives you the feeling of a really top class service in every aspect of his work, including dealings with the client and other parties. Having him on board gives you the winning edge.”

✉ p.lawrence@4newsquare.com

☎ +442078222146

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

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

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

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

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

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

Privacy Policy

Click here for a [Privacy Policy](#) for Patrick Lawrence KC.

Expertise

Commercial

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

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

Featured Commercial Cases

- *Cars Ltd v Essex Police Authority* [2013] EWCA CIV 514 D&G;
- *Cars Ltd v Essex Police Authority* 2015] EWHC 226 (QB) D&G;
- *Breyer Group Plc v Department of Energy and Climate Change* [2015] 2 711 ER 44; [2015] 1 WLR 4559;
- *Pennyfeathers Limited v Pennyfeathers Property Co Ltd* [2013] EWHC 3530;
- *Petrocapital Resources PLC v Morrison & Foerster* [2013] EWHC 2682;
- *THOMAS COOK TOUR OPERATIONS LTD (FORMERLY SUNWORLD LTD) v HOTEL KAYA* [2009] EWHC 720;
- *Rubicon Computer Systems Ltd v. United Paints Ltd* LTL 12/11/99;
- *Brill v. Penn* [1997] 1 WLR 1356 ; [1997] 3 ALL ER 470 ; [1997] 74 P&CR; 210 ; LTL 16/4/97;
- *Orb ARL v Fiddler* [2016] EWHC 361 (COMM);

Commercial Chancery

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

- Multi-jurisdiction litigation involving Israeli will and \$800m assets held in multiple offshore trusts; continuing
- *Shah v Forsters* [2018] PNLR 8; trusts, joint tenancies, administration of estates.
- A long-running matter (*Lexi Holdings PLC v Pannone*) before Briggs J., arising out of the frauds of Shaid Luqman. Issues arising included difficult points as to the implied actual authority and apparent authority of a director to give unconventional instructions on behalf of a company.
- *Smith v Contact Holdings Ltd*; scope of managing director's authority to instruct lawyers in connection with shareholder dispute.
- Litigation arising out of the Tax Tribunal's decision in relation to an *Eclipse* film finance scheme that the participants in the scheme were not trading.

- Litigation arising out of the failure of other film finance and container leasing tax avoidance schemes.
- *Former Queen of Malaysia v Lattey & Dawe*; trial before Hodge J. concerning tax advice given in connection with the late King of Malaysia's holdings in the UK and abroad.
- *Dore v Leicestershire CC*; 2 week trial before Sales J; issues as to trust law; charities; local government.
- £5m claim arising out of allegedly defective advice concerning rights to light.
- Probate litigation concerning allegations of undue influence in relation to a will.
- Litigation concerning delay in commercial conveyancing.
- Directors disqualification proceedings.
- *Christofi v Schubert Murphy*; claims arising out of the setting up of a bogus solicitor's practice; issues as to scope of solicitors' undertakings; jurisdiction of Compensation Fund.
- *Turpin v Brabners Chaffe Street*; allegations of breach of fiduciary duty and conflicts of interest in relation to the sale of a substantial company.
- *Pennyfeathers v Pennyfeathers Property Co Limited* [2013] EWHC 3530; acquiescence; breach of fiduciary duty; directors' obligations.

Featured Commercial Chancery cases

- *Pennyfeathers Limited v Pennyfeathers Property Co Ltd* [2013] EWHC 3530;
- *Noel Edmonds v Lawson* [2011] EWHC 2897;
- *Dore v Leicestershire County Council* [2010] EWHC 1387;
- *BUXTON COUNTRY HOMES LTD v (1) SURFBUILD LTD (2) SCSC DEVELOPMENTS LTD (3) JAMES CANSDALE (LITTLE CHALFONT LTD)* [2008] EWHC 1475 (CH);
- *Starbibi Raja (Administratrix of the Estate of Mohammed Sabir Raja Deceased) v. Austin Gray (A Firm)* [2002] EWCA CIV 1965; LTL 19/12/2002; [2003] 13 EG 117;
- *Mortgage Corporation Ltd v. Lewis Silkin & Anor : Same v. Marsha Shaire & Others* [2001] 3 WLR 639; [2001] 4 ALL ER 364; [2000] 1 FLR 973; [2000] 3 EGLR 131;
- *Bristol & West Building Society (Plaintiff) v. Fancy & Jackson (a firm) (Defendants) : Same (Plaintiff) v. Defendants* in 1995 B 2165; 1995 B 2401; 1995 B 2468; 1995 B 2858; 1995 B 3197; 1996 B 0784 LTL 25/9/97; [1997] 4 ALL ER 582;
- *Homsy v. Searle* LTL 28/2/96; [1996] EGCS 43;
- *Shah v Forsters* [2018] PNLR 8;

Costs

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

Disciplinary & Regulatory

“An intelligent barrister who is willing to spend the time required to ensure that all nuances in a case are fully explored. Has the ability to identify the core points in a complex case which need to be addressed to win the case.” – *Legal 500, 2022*

“He's extremely level-headed, and has gravitas but is personable and approachable.” – *Chambers and Partners, 2022*

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

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

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

In 2020 he appeared in *Gubarev*, a case in which partially remote proceedings were unlawfully live streamed. The court referred the matter to the Divisional Court, where this topical area was reviewed critically by the President of the QBD. Later in the year, Patrick appeared before the Court of Criminal Appeal in the ‘Postmasters’ appeal, on behalf of counsel in relation to a complaint that disclosed documents had been provided police and press.

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

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

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

Featured Disciplinary & Regulatory cases

- R (on appn of *Crookenden*) v ICAEW [2013] EWHC 1909;
- *Williams v SRA* [2017] EWHC 1478; EWHC 2005;
- *Felstead v Post Office Limited* [2021] EWCA Crim 25
- *Gubarev v Orbis Business Intelligence* [2020] EWHC 2167

Insurance & Reinsurance

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

Offshore

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

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

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

Pensions

Patrick is frequently retained in connection with claims arising out of the alleged mishandling of pension schemes; including, among others, claims concerned with defective amendments to the core scheme documents; failed equalisations; and mismanaged transfers into the PPF. He has acted both in relation to Part 8 proceedings aimed at remedying errors by means of rectification, estoppel and other equitable devices; and in the claims against advisers (pensions consultants and lawyers) that tend to follow less than wholly successful remedial action. He is very familiar with the issues that typically arise in this area; for instance, the difficulties in identifying the correct claimant and locating the real loss; long tail limitation issues involving s. 14B and the concept of a continuing duty; the capitalisation of losses founded on an outlay extending decades into the future, and the analogies that can be drawn with litigation in other areas concerning discount rates; claims for very substantial costs incurred in remedial proceedings; and the usual panoply of questions arising in relation to the tension between fairness-driven equitable principles and black letter construction of long term deeds.

Featured Pensions cases

- Acting for the claimant employer in the *Gleeds* litigation; a claim for £60m against multiple defendants (consultants, counsel, solicitors) for losses resulting from a failure to comply with statutory requirements as to the execution of deeds; see *Briggs v Clay* [2019] EWHC 102. The prior decision in the Part 8 proceedings is a leading case on the limited role of estoppel where the invalid execution of a deed is apparent on the face of the document. The case raised very complex issues as to capitalisation of future loss; limitation; and causation and contribution.
- Acting for pension consultants defending a claim founded on an alleged failure to comply with the provision in the governing deed as to the exercise of the power to amend. The case raises difficult questions as to the fiduciary obligations of trustees; conflicts between different companies within one group; and limitation.
- Acting for pension consultants defending a claim brought by the PPF on the basis of an alleged tortious duty of care, and a cause of action assigned by the insolvent employer. The case raised questions as to the identification and quantification of loss in the context of employer insolvency, and the PPF's title to sue.
- Advising generally as to issues in the pensions field relating to the causation and quantification of loss, the assignment of claims, and the application of the transferred loss doctrine; all in connection with title to sue and 'wrong claimant' points.

Public Law & Human Rights

Patrick has considerable experience of applications for judicial review arising out of his work in the disciplinary/regulatory context. He has appeared in a number of reported cases concerning the construction of statutes pursuant to s.3 of the Human Rights Act – eg. *Cachia v Faluyi*. In the last few years this grounding has enabled Patrick to develop his public law practice, especially in the field of political activity and the funding of political parties. In 2010 he acted in the Supreme Court for the successful appellant in *R (on application of Electoral Commission) v City of Westminster Magistrates Court*; UKIP as interested party [2010] UKSC 40. He acted for claimants in the claim against DECC for damages under the Human Right Act which arose out of the attempt to make retrospective changes to solar heating tariffs, the subject of the decision of the Court of Appeal at *DECC v Breyer* [2015] EWHC (Civ) 408, now a leading case in the jurisprudence on claims for damages for infringement of A1P1 rights.

Featured Public Law & Human Rights cases

- *Cars Ltd v Essex Police Authority* [2013] EWCA CIV 514 D&G;
- *Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) D&G;
- *Breyer Group Plc v Department of Energy and Climate Change* [2015] 2 711 ER 44; [2015] 1 WLR 4559
- *R (on application of Electoral Commission) v City of Westminster Magistrates, UKIP intervening* [2010] UKSC 40; [2010] 3 WLR 705;

- *Cachia v. Faluyi* [2001] EWCA CIV 998 ; [2001] 1 WLR 1966 ; [2001] 1 ALL ER 192;

Professional Liability

“He’s a fearsome courtroom performer with a Rolls-Royce mind. Someone you’d want to fight your corner in a hard case.” “If you ask him for an opinion to stand by he’ll give one, and he holds the attention of the court and intimidates the opposition with his gravitas.” “A brilliant advocate: he’s very clever, user-friendly and a good laugh. He’s a very rounded person as well as being incredibly able.” – *Chambers & Partners, 2022*

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

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

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

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

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

Accountants, Auditors & Actuaries

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

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

Financial Services Professionals

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

Insurance Brokers & Agents

He has acted in many claims against insurance brokers. Not many have reached court, but that may partly be because such claims tend to be rather difficult to defend on liability issues. He appeared in *Jones v Environcom* [2011] EWCA 1152. *Kirk v Aviva and others* settled shortly before trial in 2017; a fire case involving claims against insurers and brokers, and allegations of breaches of fiduciary duty arising out of undisclosed close commercial connections between broker and insurer.

Lawyers

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

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

Featured Lawyers cases

- *Ward Hadaway v DB UK Bank Limited* [2013] EWHC 4538;
- *Petrocapital Resources PLC v Morrison & Foerster* [2013] EWHC 2682;
- *Lexi Holdings v Pannone & Partners* [2009] EWHC 2590 BRIGGS J;
- (1) *William James Luke (2) Kingsley Smith & Co (A Firm) v (1) Wansbroughs (A Firm) (2) Caroline Addy* [2003] EWHC 3151 (QB); LTL 18/12/2003
- *Bowie v. Southorns* [2002] EWHC 1389, NELSON J; [2003] PNL R 7; LTL 9/7/02;
- *Martin William Cave v. Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18; [2003] 1 AC 385
- *Parry v. Edwards Geldard* LTL 9/2/98
- *Mortgage Corporation Ltd v. Lewis Silkin & Anor: Same v. Marsha Shaire & Others* [2001] 3 WLR 639; [2001] 4 ALL ER 364; [2000] 1 FLR 973; [2000] 3 EGLR 131;
- *Maes Finance Ltd v. Sharp & Partners* [1999] 69 CON LR 46; LTL 3/8/99
- *Bristol & West plc v. Bhadresa* LTL 13/11/98;
- *Halifax Mortgage Services Ltd v. S & S* [1998] PNL R 616; LTL 6/3/98
- *Parry v. Edwards Geldard* LTL 9/2/98
- *Bristol & West Building Society (Plaintiff) v. Fancy & Jackson (a firm) (Defendants) : Same (Plaintiff) v. Defendants in 1995 B 2165; 1995 B 2401; 1995 B 2468; 1995 B 2858; 1995 B 3197; 1996 B 0784* LTL 25/9/97; [1997] 4 ALL ER 582
- *Bristol & West Building Society v. May, May & Merrimans (a firm) & between The Bristol & West Building Society & 13 Other Parties* LTL 18/4/96; [1996] 2 ALL ER 801; [1997] 29 HLR 282; [1997] 73 P & CR 158; [1996] EGCS 69; [1996] 146 NLJ 625
- *Shah v Forsters* [2018] PNL R 8

Pension Advisors

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

Surveyors & Lawyers

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

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

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

Featured Surveyors & Lawyers cases

- TITAN EUROPE 2006-3 PLC v COLLIERS INTERNATIONAL UK PLC (In Liquidation) (2015) [2016] PNLA 7; [2015] PNLA 1;
- K/S Lincoln v CBRE [2010] EWHC 1156;
- Mortgage Express v Countrywide Surveyors [2015] EWCA 1110;

Sports Law

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

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

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

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

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

Featured Sports cases

- [2012] EWHC 2139 *Venturi v Coral Eurobet*
- [2011] EWCA CIV 668 *Vefa Ibrahim Araci v Kieren Fallon*
- [2006] EWCA CIV 998; [2005] EWHC 1629 (QB); LTL 11/8/2005 *Glyn (t/a Priors Farm Equine Veterinary Surgery) v. McGarel-Groves*
- LTL 6/1/00 *Exterior Profiles Ltd v. Curragh Bloodstock Agency Ltd*

Awards



Qualifications

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



Notes: -

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Megan Griffiths
12 KBW

***“Negligence and Sports Injuries
Common Threads”***

Megan Griffiths

Call: 2018
griffiths@12kbw.co.uk



AREAS OF EXPERTISE

Abuse, Personal Injury, Sport, Clinical Negligence, Military Claims, Credit Hire, Industrial Disease

Megan's practice spans many of chambers' specialisms but comprises mostly general personal injury, abuse and clinical negligence work.

Megan has a busy paper practice and is regularly instructed in six figure claims. She frequently advises on all aspects of claims for psychiatric injury arising from historic sexual abuse including limitation and to facilitate settlement negotiations, the quantum of amateur sporting injuries and the merits and quantum of claims for delayed and negligent clinical treatment.

Megan is also often instructed to assist leading counsel with disclosure issues in cases of significant value and/or importance because of her detailed and analytical approach. She was recently instructed as Second Junior in international group litigation for alleged breaches of human rights in the workplace by way of sexual abuse, harassment and gender-based discrimination; to advise on disclosure issues in a complex multi-million pound claim involving a traumatic brain injury and amputation; and to contextualise complex causation issues in an industrial disease group action.

Megan is regularly instructed to represent claimants and defendants in court at trials, interlocutory hearings and approval hearings. She is in court almost every week.

She has been praised by her instructing solicitors for her communicative and thorough approach to case preparation in both her court work and paper practice.

Megan is a member of the Government's Junior Juniors Scheme and of the Metropolitan Police Panel of Counsel. She regularly contributes to chambers' various blogs and her articles have been republished in AvMA's newsletters and on LexisPSL.

Before joining chambers Megan worked as a paralegal at two London law firms in domestic abuse and clinical negligence departments. She therefore appreciates the importance of working closely with solicitors to achieve the best results for clients.

Megan is happy to consider instructions on a CFA or legal aid funded basis where appropriate.

Abuse

This is an area of law which Megan is particularly passionate about, having represented survivors of domestic abuse as

a paralegal before joining chambers and having made abuse a mainstay of her practice since tenancy. Megan is frequently instructed to draft and advise on issues such as limitation, (vicarious) liability, expert evidence and quantum including for the purposes of settlement negotiations. She was also instructed as Second Junior in an international group action arising from sexual abuse, discrimination and harassment in the workplace amounting to violations of the workers' human rights.

Megan also has considerable experience advising in failure-to-remove type claims brought at common law and the Human Rights Act 1998. She is well-versed in the parallel jurisdictions and the different considerations required for each.

Personal injury

Megan's personal injury work spans a wide variety of factual settings including road traffic accidents, injuries sustained at work, on highways and on private property. She regularly deals with liability and quantum issues in court as well as on paper, including fundamental dishonesty. Megan acts for both claimants and defendants and recently carried out an extensive disclosure review with associated advice in a multi-million pound claim as a Junior.

Sports

Megan is a member of chambers' sports law group and sits on the Steering Committee. Whilst she cannot pretend to be much of an athlete herself, she is keen to develop her practice in sports law and to apply her expertise in general personal injury and abuse claims to the same. She has previously been instructed to advise claimants who have suffered amateur sporting injuries in gymnastics and football and was recently involved in industrial disease litigation arising from exposure in sport.

Clinical negligence

Megan is instructed by claimants and defendants in clinical negligence matters to draft pleadings and advices on liability, quantum and evidence. Recent subjects include ophthalmic treatment, delayed referrals/ diagnoses and provoked DVTs. Megan is able to draw upon her pre-chambers experience as a paralegal in a clinical negligence department to inform her approach to and understanding of clinical negligence litigation.

Military

Megan's military work to date has been mostly in relation to noise induced hearing loss, but she has also advised in abuse cases involving cadets. Megan is keen to undertake other forms of military work such as claims involving PTSD and/or abuse.

Credit hire

Megan regularly deals with the full range of mitigation issues that arise in relation to credit hire.

Industrial disease

Megan is instructed to draft pleadings and advise on industrial disease matters, most commonly in relation to asbestos and noise exposure.

Megan gained in depth experience of complex and high value asbestos claims in her pupillage. Since tenancy she has been instructed to advise on and plead claims for asbestosis and asbestos-related lung cancer resulting from (often historic) asbestos exposure. She has since completed a part-time secondment with a London law firm's industrial disease team, working directly with clients and closely with solicitors and partners on numerous asbestos-related matters, most of which were mesothelioma claims.

Megan's noise-induced hearing loss instructions often arise from military exposure although she has also been

instructed in claims arising from noise exposure in other settings.

Negligence and sports injuries: common threads



Megan Griffiths
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Megan practices from 12 King's Bench Walk in London and is regularly in trial around the country. She specialises in personal injury work including abuse, and clinical negligence. She is part of chambers' sports practice group.

This talk



- ▶ Negligence in play.
- ▶ 10 principles derived from case law including three recent(ish) cases.
- ▶ Then the races!

Summary of three recent(ish) cases



- ▶ **Tyckli v Gibbons** [2021] EWHC 3470 (QB).
 - ▶ Horse racing – collision between mounts during a professional race.
 - ▶ Trial – C succeeded.
- ▶ **Fulham Football Club v Jones** [2022] EWHC 1108 (QB).
 - ▶ Football – tackle during a competitive under 18's match.
 - ▶ Appeal against first instance dismissal of the claim – C succeeded – remitted for retrial.
- ▶ **Czerwik v King** [2023] EWHC 380 (QB).
 - ▶ Rugby – tackle during a developmental Union game.
 - ▶ Trial – C succeeded.

1. The underlying law is well settled.



► The basic test:

► Woollidge v Sumner [1963] 2 QB 43; Bootes v Shelton [1968] ALR 33; Condon v Basi [1985] 1 WLR 866; Caldwell v Maguire [2001] EWCA Civ 1054.

► Condon v Basi: "the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiffs injury ... Non-compliance with [rules of the game], conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances".

2. Recklessness is not necessary for negligence.



► Often a feature but not a separate requirement.

► Blake v Galloway [2004] 1 WLR 2844.

► Caldwell: "in practice given the circumstances, the threshold for liability [is] high".

► Ylviski: "while recklessness has been expressly stated not to be the test for a finding of negligence, in effect the evidential burden is such that requires a reckless disregard for the safety of others ... in placing the threshold at that high level, regard is being had to all the circumstances of the sport, the inherent dangers and the high degree of competitiveness with a requirement on jockeys to win or be best placed" [75].

► Carmichael: the test is "whether the Defendant failed to exercise such degree of care as was appropriate in all the circumstances ... I do not consider that the Court of Appeal, in Blake v Galloway, did, or intended to, lay down any rule or principle that, in the sporting context, the conduct complained of must be reckless or demonstrate a very high degree of carelessness in order for liability to be established" [60].

3. The laws of the game can inform, but do not determine, negligence.



► Fulham:

► The recorder at first instance misdirected himself in law by "closely aligning serious foul play in the Laws of the Game with actionable negligence", which "wrongly reduced the ambit of the inquiry required to answer the question" [64].

► The Rules of the Game were not drafted with negligence in mind.

► Carmichael:

► "the fact that the tackle is illegal for the purposes of the Laws of Rugby is simply one of the factors to be taken into account in deciding whether the Defendant's conduct was negligent because she had failed to exercise such degree of care as was appropriate in all the circumstances" [43].

4. If you are relying on the laws of the game, expert evidence is key.



- ▶ Fulham
- ▶ At the applicable level of the game: professional vs not.
 - ▶ Cermsuska: Extent to which the laws of the game apply, and extent to which a player should be required to abide by them, depends on the level of play: "at this level and against this opposition the Defendant should have modified her conduct" [61, 47].
 - ▶ Tilicki: "a jockey, particularly riding at this very high level, both needs to be, and is, able to assess and re-assess the constantly changing racing conditions" [74].
- ▶ Ensure they have reviewed all the relevant evidence, applied the correct test, can support their conclusions and that they will be able to hold their ground if challenged at trial.

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5. D's team's conduct, and conduct in the game as a whole, can be relevant.



- ▶ Cermsuska
 - ▶ Claim arose from a single tackle.
 - ▶ The findings of fact that informed the finding of negligence spanned the wider game and D's wider team. E.g.
 - ▶ D's team played in an "inappropriately aggressive and intimidatory manner" e.g. trash talk, including by D to C.
 - ▶ D's team's approach resulted in many injuries on C's team, not just C.
 - ▶ In the game D became increasingly frustrated that her tactics were not working, culminating in the incident.

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6. Contemporaneous reactions can be relevant too.



- ▶ From the referee?
 - ▶ Yes, needs to be taken into account.
 - ▶ Fulham: error in law to give zero weight to the fact that the referee did not award a foul for the tackle: although not determinative of negligence it was "a matter to be engaged with by the court" [89].
- ▶ From spectators?
 - ▶ Possibly depending on the available evidence but probably unreliable – biased one way or the other.
 - ▶ Fulham: no error in law for failing to take this into account in light of the available expert evidence [91].
 - ▶ Mentioned in Cermsuska but not part of the reasoning [17].
- ▶ From other players?
 - ▶ The same as spectators.

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7. Video footage is extremely useful.



- ▶ From broadcasts, coaches, spectators, online.
- ▶ Prioritize this in your own fact-finding investigations, and in disclosure requests.
- ▶ **Caerwisk:** the judgment featured stills from video footage [16].

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8. The heat of the moment can mean different things.



- ▶ **Trick:**
 - ▶ Breach of duty was over a few seconds.
 - ▶ "in the heat of a horse race where jockeys are required to make split second decisions and to be able to constantly make assessments and adjustments to their own riding, this was a sufficient period of time for a skilled jockey to make decisions" [90].
- ▶ **Caerwisk:**
 - ▶ By the time of the breach the "red mist" had descended: D was "so angry by this time that she closed her eyes to the risk to which she was subjecting the Claimant, a risk of injury which was clear and obvious" [58(x)].
- ▶ **Fulham:**
 - ▶ Advanced by D as a defence, the third ground of appeal.
 - ▶ Wrong of the first instance recorder to say "it does not matter that ... in a general sense it can be said the tackle was made in a fast moving heat of the moment context" [78-79]. Watch this space for the retrial.

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9. Every case is different.



- ▶ The common law is settled – facts are not!
- ▶ Do not simply rely on findings of fact from other cases – there will be variables – evidence your case well.
 - ▶ Different sports.
 - ▶ Amateur vs professional.
 - ▶ Children vs adults.
 - ▶ Different leagues/ competitions.
 - ▶ Laws of the game may change.
 - ▶ Conduct of the wider team.

12

10. Enjoy your day out!



12

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Steve Conlay
BPE Solicitors LLP

"Racing Tipster!"



Steve Conlay

Senior Associate

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Steve joined BPE in 2005 spending 6 years in the personal injury department working for both claimants and defendants.

He joined the Employment department in 2012 and transferred his personal injury skills to the employment law arena advising private sector clients, many with public sector contracts in areas such as discrimination, unfair dismissal and TUPE. He advises clients on day to day matters and have been instrumental in advising clients on the changing legal landscape involving holiday pay. He qualified as a Chartered Legal Executive with Cilex in 2017.

His work includes defending Employment tribunal cases for unfair dismissal, discrimination, as well as advising and assisting in company restructuring and employee/director exits. His clients vary from national retailers to private sector manufacturers.



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***1030–1130
BPE Brunch***

“Travel to racecourse – Subject to availability parking available at BPE’s offices – walking distance to racecourse.”

1200

***“Cheltenham Racecourse”
First Race 1310 – Last Race 1600***