



**PROFESSIONAL NEGLIGENCE AND
LIABILITY UPDATE**

ENGLAND & WALES

LONDON CONFERENCE

"The Ultimate Round Up"

Thursday 12th October 2023

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

LONDON CONFERENCE – “*The Ultimate Round Up*”

Thursday 12th October 2023

0900-0930 Registration and refreshments

0930-0935 “*Chair’s Introduction*”

Jayna Patel – Partner, Dutton Gregory LLP & PNLA South of England Representative

<https://www.duttongregory.co.uk/site/people/profile/jayna.patel>

0935-1000 “*Keynote Address*”

The Honourable Mr Justice Adam Constable KC

<https://www.judiciary.uk/appointments-and-retirements/appointment-of-a-high-court-judge-constable-kc/>

1000-1035 (inc 5 mins Q&A) “*Current themes in pensions, trusts and estates*”

David E. Grant KC – Outer Temple Chambers

<https://www.outertemple.com/barrister/david-e-grant-kc/>

1035-1110 (inc 5 mins Q&A) “*Professional Negligence Update*”

Helen Evans KC – 4 New Square

<https://www.4newsquare.com/profile/helen-evans/>

1110-1125 Refreshments

1125-1155 (inc 5 mins Q&A) “*The Expert Architect’s Perspective*”

Samuel Morley – Architect, Hawkins & Associates

<https://www.hawkins.biz/experts/samuel-morley/>

1155-1230 (inc 5 mins Q&A) “*Professional negligence claims against financial services professionals*”

Simon Arnold & Georgia Purnell – 3 Hare Court

<https://www.3harecourt.com/barrister/simon-arnold/>

<https://www.3harecourt.com/barrister/georgia-purnell/>

1230-1300 (inc 5 mins Q&A) “*ediscovery & Artificial Intelligence*”

Philip Demetriou & Adrian Caley – DISCO

<https://www.csdisco.com/>

1300-1400 Lunch - *Daly’s Wine Bar - 210 Strand, Temple, London WC2R 1AP*

Sponsored by: Hawkins Forensic Scientists & Engineers, DISCO & ediscovery solutions

1400-1435 (inc 5 mins Q&A) “*Negligence arising from AI and Tech*”

Jeremy Scott-Joynt – Outer Temple Chambers

<https://www.outertemple.com/barrister/jeremy-scott-joynt/>

1435-1500 “*Team Case Study Introduction session*”

Chair - Gus Baker – Outer Temple Chambers

<https://www.outertemple.com/barrister/gus-baker/>

1500-1515 Refreshments

1515-1615 “*Team Case Study Discussion Session*”

1615-1645 (inc 5 mins Q&A) “*The New Fixed Costs Regime*”

Kevin Wonnacott – Costs Lawyer & Jayna Patel – Dutton Gregory

<https://wonnacott.co.uk/> kevin@wonnacott.co.uk

1645-1650 “*Chair’s Closing Remarks, Questions and Discussion*”

1710-1900 **Sponsored Drinks - Outer Temple Chambers, 3 Hare Court & 4 New Square
(at El Vino, 47 Fleet Street, London, EC4Y 1BJ) - invitation to PNLA Network
– all Welcome**

Total CPD = 7 hours 30 mins

**PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE
Thursday 12th October 2023**

ATTENDEES (1 of 2)

The Hon Mr Justice Adam Constable KC	Justice of the High Court	London
Jolyon Antill	Hawkins & Associates	Redhil
Simon Arnold	3 Hare Court	London
Gus Baker	Outer Temple Chambers	London
Sara Benbow	The Property Mediators	Reading
Simon Brew	TWM Solicitors	Guildford
Jemma Brimblecombe	Kingsley Napley	London
Helen Brown	Paris Smith Solicitors	Southampton
Adrian Caley	DISCO EMEA	London
Stephen Cannell	Blake Morgan	Southampton
Chris Cooney	Campbell Courtney & Cooney	Camberley
Christopher Cox	Bishopgate Law	Potters Bar
Gillian Crotty	Shoosmiths	Belfast
Philip Demetriou	DISCO EMEA	London
Charlotte Dennington-Day	TWM Solicitors LLP	Guildford
Catherine Duggan	Ellisons Solicitors	Essex
Helen Evans KC	4 New Square	London
Andrew Foyle	Shoosmiths	Edinburgh
David E Grant KC	Outer Temple Chambers	London
Colin Hayes	Penningtons Manches Cooper	Oxfordshire
Delwar Hussain	Healys	London
Sukbir Kaur	Temple Legal Protection	Guildford
Katherine King	Osborne Clarke	Bristol
Katy Manley	PNLA & BPE Solicitors	Cheltenham
Samuel Morley	Hawkins Forensic Investigations	Cambridge
Sue O'Brien	The Property Mediators	Oxfordshire
Pradeep Oliver	Cripps	Tunbridge Wells

David Osborne	Fraser Dawburns	Kings Lynn
Joanna Osborne	Edwin Coe Ltd	London
Jayna Patel	PNLA South of England Representative & Dutton Gregory Solicitors	Wiltshire
Lily Percival	Foot Anstey	Plymouth
Georgia Purnell	3 Hare Court	London
Bipin Regmi	Campbell Courtney & Cooney	Camberley
Andrew Reid	Moore Barlow	Southampton
Jennifer Rhind	Wright Hassall Leamington Ltd	Leamington Spa
Peter Rolph	Steele Raymond	Bournemouth
Jeremy Scott-Joynt	Outer Temple Chambers	London
Charlie Shillito	Penningtons Manches Cooper	Oxfordshire
Sandip Singh	Addleshaw Goddard	Leeds
Caroline Thompson	Withers Worldwide	London
Thomas Tilbrook	Best Solicitors	Sheffield
Brian Walker	Walker McDonald	County Armagh
Caroline Watson	Freeths	Oxfordshire
Jonathan Whatmough	PNC Legal Ltd	Leeds
Jen White	CMS Cameron McKenna Nabarro Olswang	London
Paul Wiggins	Freeths	Oxfordshire
Kevin Wonnacott	Wonnacott	London
Samantha Wragg	Addleshaw Goddard	Leeds
Charlotte Wright	Hugh James Solicitors	Cardiff
Margaret Wright	Hawkins Forensic Investigations	Redhill



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3 HARE COURT



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 - * Preparation of and advice on costs pleadings

 - * Representation at Detailed Assessment Hearings

 - * Strategic advice on settlement, effective disposal

CONTACT

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website: www.wonnacott.co.uk

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Case Study : Investigation on behalf of latent defects insurers

We were instructed by solicitors on behalf of latent defects insurers for a residential development where a claim had been received for alleged fire safety defects in relation to the facade.

The claimants contended that the defects to facades represented non-compliance with the Building Regulations and extensive remedial work was required.

For fire-related claims under latent defects policies, there must be both non-compliance with Building Regulations at the time of construction and a present or imminent danger to the health and safety of the occupants.

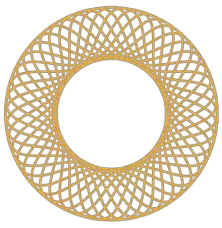
We reviewed reports provided by the claimants and concluded that many of the allegations were based on an assessment of the facades against Building Regulations that were current at the time of preparing the claim, rather than those current at the time of construction.

Whilst there were some areas where there was a potentially valid claim that required further investigation, we were able to provide advice to insurers so that they could assess a much-reduced loss.



Our Built Environment Expertise:

Acoustics & Vibration | Architecture | Building Defects & Regulations | Civil & Structural Engineering
Drains, Sewers & Septic Tanks | Fire Engineering | Flooding & Hydrology | Geotechnical Engineering
Glass & Glazing Systems | Health & Safety | Highway Engineering | Quantum & Delay



Outer Temple

Profile

Outer Temple Chambers has renowned experience of providing specialist advisory and adversarial services in the field of professional negligence. Our leading barristers undertake professional liability work and act in a full spectrum of claims including breach of fiduciary duty, breach of trust, negligence, breach of contract and misfeasance, and in many regulatory matters.

Our multi-disciplinary approach gives us unrivalled knowledge and expertise in disputes concerning a wide variety of professions. We regularly act both for and against professionals in a wide range of regulated industries including Accountants, Actuaries, Administrators and administrator receivers, Architects, Auditors, Bankers and financial intermediaries, Barristers, Insurance intermediaries, Liquidators, Receivers and managers, Surveyors, Tax advisers, Solicitors and Pension advisers.

For pensions we are the industry insiders' choice of representation for solicitors, barristers, actuaries and the major consultancies and are regularly instructed in the biggest claims in the industry. As a set we are ranked in the legal directories, along with individual members of the team, silk to junior, which provides strength and depth. The team is described by Legal 500 UK as "outstanding on pensions-related professional negligence claims with members noted for their experience in disputes involving trusts and financial services professionals.

To find out more about any of our Professional Negligence barristers contact **Sam Carter** or **Matt Sale** on

+44 (0)20 7353 6381 /email sam.carter@outertemple.com and matt.sale@outertemple.com


4 NEW SQUARE

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Professional Negligence

4 New Square is renowned for being the top set in the field of professional negligence. We boast not only star individuals but unrivalled strength in depth with more individuals ranked in the legal directories than any other set. Members of chambers appear in many of the most prominent and high value professional negligence cases.



“4 New Square offers unparalleled capabilities in the area of professional negligence. It is notable for its deft handling of the high-value and the legally complex”

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Jayna Patel
Partner, Dutton Gregory LLP
& PNLA South of England Representative

“Chair’s Introduction”

Jayna Patel

Partner

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Jayna regularly advises businesses and individuals on contractual disputes and has a proven track record of securing successful outcomes for her clients. Her client testimonials speak for themselves, and she has built up a reputation within the Southeast and her wider network as a professional negligence claimant lawyer. This past year, Jayna has successfully concluded various professional negligence claims arising out of building surveying and legal advice regarding SDLT and leases. She currently has conduct of several failed litigated matters e.g., family/ financial proceedings, shareholder/director/ unfair prejudice and construction.

Educated at Cardiff University, Jayna qualified as a solicitor in 2007. Prior to joining Dutton Gregory LLP she practiced in Salisbury and Cardiff and worked in London with a City firm, where she project managed high value and complex professional negligence claims and procured a 100% success rate for her lender clients.

Jayna has been instrumental in Dutton Gregory's commercial litigation department being listed in the Legal 500 this year as a firm to watch with extensive expertise in handling professional negligence and insolvency claims.

Based in Winchester, Jayna likes to keep active exploring the local surroundings with her husband and young daughters.

Recent Testimonials

"Jayna's meticulous and methodical efficient input, her professional acumen and considerable experience have been invaluable in resolving our protracted claim. Throughout the 6 months, (which were not entirely uneventful) we were particularly impressed with her calm and measured but firm approach, clarity, attention to detail, communication and negotiating skills which ensured our successful outcome.

Our case related to a professional negligence claim against a solicitor whose negligence had engulfed us in a long and expensive dispute. Our trust in the legal profession had been badly damaged not only by a particular negligent solicitor but also by some ineffective, confusing and at times, contradictory legal guidance we had previously received during the dispute years. Through her expert and effective advice and insightful guidance with the professional negligence claim, Jayna has managed to restore some of our faith in her profession.

The fact that we received such first-class service from Jayna who achieved in 6 months what her predecessors had failed to achieve in 6 years, speaks for itself." - July 2023

"Our case required a great deal of patience and determination on both our parts, however Jayna's professionalism and stoicism was of huge comfort to me over the past 2 years. There were times on our case where I was emotional, applied pressure on fees and challenged Jayna on her judgement and professional opinion, some of which were reflections of the strain that we were under and the significance and importance of the case to us. Jayna was always honest, fair, level and straight talking in response to this. It was through this that Jayna earned our trust and it will endure well beyond the conclusion of our case. We are ultimately delighted that our case has concluded and that we can finally move forward with making long awaited and exciting plans. But as we move forward it will not be forgotten or taken for granted that we would not be enjoying this privilege if it hadn't been for Jayna's hard work, skill and compassion. Thank you Jayna." - 2023



The Honourable Mr Justice Adam Constable KC
Justice of the High Court

"Keynote Address"



The Honourable Mr Justice Adam Constable KC

Justice of the High Court

After attending independent school in Croydon, Adam was the first in his family to go on to university. He studied Jurisprudence at Oxford University before being called to the Bar in 1995.

Adam was appointed as a Recorder in 2009 and as King's Counsel in 2011.

As a barrister and arbitrator, Adam specialised in onshore and offshore construction, engineering, energy, shipbuilding and professional negligence disputes.

His experience includes UK Courts (TCC, Commercial Court and Court of Appeal), and representing multi-national clients in front of international tribunals.





David E. Grant KC
Outer Temple Chambers

“Current themes in pensions, trusts and estates”

David E Grant KC

Year of Call: 1999
Year of Silk: 2022
Direct Access: Yes

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David E. Grant KC is a chancery and **commercial** practitioner with specialist expertise in **pensions, trusts, tax, will and estates, professional negligence, financial services**, asset recovery, **insolvency** and **employment**.

He has extensive advocacy experience in courts and tribunals up to the European Court of Justice. He has also attended numerous mediations and round table meetings in a wide variety of cases. David is happy as sole advocate, being led and/or leading a junior and enjoys the process of working in a team with his instructing solicitors.

David has been recommended in Chambers and Partners and the Legal 500 since 2007 and is described as "The go-to junior for Part 8 and professional negligence claims concerning pension schemes."

His clients have included many leading business including the Atos Group, British Airways, BT, ITV, the Royal Bank of Scotland, Lloyds Bank, Aegon and Transport for London. He has also acted for the Pensions Protection Fund, the Pensions Regulator and the Pensions Ombudsman as well as leading professional service companies such as Aon, Mercer and Barnett Waddingham as well as various high net worth individuals.

David studied law at undergraduate and post-graduate level at the University of Oxford and lectured and tutored as SOAS and Queen Mary and Westfield College respectively. He has spoken extensively at domestic and international conferences

Areas of Expertise

Pensions

David has been involved in some of the most high-profile pensions cases in recent years including appearing before the Grand Chamber of the ECJ in **Safeway Ltd v Newton & Anor [2020] Pens.L.R. 4** as to whether a scheme can be retrospectively levelled down.

David acts for employers, trustees, members, professional advisors and public bodies.

David has acted in nearly all the rectification cases in the last few years.

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Notable Pensions cases

McGaughey v University Superannuation Scheme Ltd [2022] EWHC 1233 (Ch)

Acted for two members of the USS who sought to bring a multiple derivative claim on behalf of the trustee company USSL against former and present directors. The claim was that the directors were in breach of their statutory duties in valuing the scheme at the height of market turmoil caused by Covid-19, when the scheme assets increased by c£20 bn subsequently and in adopting an unrealistically pessimistic investment return assumption which massively increased the amount of assets required to fund future liabilities.

Safeway Ltd v Newton & Anor [2020] EWCA Civ 869

The decision of the CA on the outstanding point as to whether s62 Pensions Act 1995 equalised the Safeway scheme.

Atos IT Services (UK) Ltd v Atos Pension Schemes Ltd [2020] EWHC 145 (Ch)

Whether a pension in payment can be indexed by reference to CPI having regard to the meaning of “the General Index of Retail Prices (all items)” and “where that index is not published”. Judgment awaited January 2020.

Blatchford Ltd v Blatchford & Ors [2019] EWHC 2743 (Ch)

The first decision to consider whether the subjective intention test identified by the Court of Appeal in FSHC is to be adopted in pensions rectification cases.

Re G4S Pension Scheme [2018] Pens.L.R. 16

Leading decision on whether a member of a defined benefit scheme closed to future accrual but with a final salary link is in “pensionable service” such that the scheme is “open” as opposed to “frozen” for the purpose of pensions legislation.

Beaton v Board of the Pension Protection Fund [2017] EWHC 2623 (Ch)

Nugee J, meaning of “attributable to his pensionable service” which has led the DWP to amend the legislation.

Private Client & Trusts

David is experienced in contentious and non-contentious issues, acting for beneficiaries, trustees, executors and advisors in a variety of disputes and matters.

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David is particularly interested in cross-over matters whether concerning the tax consequences of asset recovery proceedings, the responsibilities of pension scheme trustees in matrimonial disputes or otherwise. He is currently advising on applications for clearance to HMRC, the abilities of executors to vary trusts under a will and the enforcement of compromise agreements in probate proceedings.

Notable Private Client & Trusts cases

McGaughey v University Superannuation Scheme Ltd [2022] EWHC 1233 (Ch)

Acted for two members of the USS who sought to bring a multiple derivative claim on behalf of the trustee company USSL against former and present directors. The claim was that the directors were in breach of their statutory duties in valuing the scheme at the height of market turmoil caused by Covid-19, when the scheme assets increased by c£20 bn subsequently and in adopting an unrealistically pessimistic investment return assumption which massively increased the amount of assets required to fund future liabilities.

Chambers v Thomas Miller Wealth Management Ltd BL-2018-001811

A successful application by Mr Chambers to trace a £3.7m pension pot transferred on false premises as part of a pensions liberation scheme to cheat HMRC into certain assets held by the defendants.

Phillips v Chatfeild-Roberts

PT-2017-000117 contentious probate claim as to the whether the testator's will should be proved having regard to capacity, undue influence and fraudulent calumny. Settled the day before trial.

Jones & Anor v Roundlistic [2019] 1 WLR 4416

Court of Appeal, leading decision on property and March 2018. Whether a term in a lease preventing sub-letting is unfair under the UTCCR 1999.

Webster v Ashcroft [2012] 1 WLR 1309

First decision on ability of promisee's estate to bring claim for proprietary estoppel when promisee became bankrupt after acquiring relevant equity to bring claim.

Professional Negligence

David acts for claimants and advisers alike in professional negligence claims, often with a pensions focus most noticeably

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Briggs & Ors v Alexander Clay & Ors [2019] EWHC 102 (Ch) which was the biggest, most complex and high profile pensions professional negligence case but settled the day before trial. The case generated a reported judgment [2019] EWHC 102 (Ch) on whether without prejudice correspondence could be relied upon in a claim against former advisors

David is current acting in 4 ongoing cases for (respectively) the trustees, solicitors and actuarial consultants concerning variously compliance with the power of amendment, formalities and the tax consequences of investment in residential property

Notable Professional Negligence cases

Stanley Gibbons v Alexander Clay & Ors HC13D003111

In which David persuaded the court to order expert legal and actuarial evidence.

PPF v Aon Consulting Financial Services Ltd & Ors HC-2014-002064

In which the court considered the appropriateness of expert evidence in a claim against actuarial consultant and lawyers.

PPF v Hill

Claim against former pension trustees / scheme advisors for breach of the investment regulations by investing solely in a commercial property portfolio.

Aon Pension Trustees Ltd v MCP [2012] Ch 1

The first appellate consideration of s27 of the Trustee Act 1925 (protection of trustees by means of advertisements).

Financial Services & Banking

David has acted in various claims for financial institutions, their employees or individual investors.

Notable Financial Services & Banking cases

Cologlu v Citadel

Claim concerning whether a high quantity trader was in breach of confidence when approaching a competitor with a business proposal.

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A Pensions Ombudsman appeal concerning the duties of a SIPP provider when an individual is persuaded to transfer his pension into a product investing in foreign property speculation.

Re Lehman Brothers International (Europe) (In Administration) [2014] Bus. L.R. 1186

Application for extension of time to prove debt.

British Telecommunications Plc v Luck [2014] EWHC 290 (QB)

Preliminary hearing on limitation by Teare J concerning allegations of fraud, dishonesty and concealment.

Bulgrains & Co Ltd v Shinhan Bank [2013] EWHC 2498 (QB) HHJ Gore

Whether claim on letter of credit for \$825,000 could be avoided on grounds of, inter alia, fraud.

Bank of Scotland v Johnson [2013] All ER (D) 193 (Jun)

Court of Appeal (Lloyd, Jackson, Beatson LJJ). Successful appeal as to conduct of judge below on appeal by way of review.

Employment & Discrimination

David acts in a wide range of employment claims brought in the courts, by way of arbitration and before the employment tribunal for employers and employees.

Notable Employment & Discrimination cases

Dwyer v Fredbar & Bartlett – Claim No. BL-2020-001411

The leading case on the enforcement of post-termination restrictive covenants in the area of franchises. The claimant/appellant franchisor sought to restrain the defendant former franchisee from trading in the exclusive marketing territory contrary to restrictive covenants. The defendants (whom David represented) contended that the contract is voidable for misrepresentation, that the claimant was in fundamental breach of contract and that, even if the post-termination restrictions survive, they are unreasonably wide and, hence, unenforceable. The trial judge held the covenants to be unenforceable. Dwyer appealed to the Court of Appeal who unanimously dismissed the appeal, holding that inequality of bargaining power is one of, if not the, most significant factors for determining the reasonableness of a restraint against trade.

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Mukoro v Independent Workers' Union of Great Britain UKEATPA/18/BA

Appeal as to whether an ET was justified in refusing to adjourn a case management hearing when the claimant had to attend emergency medical treatment and then, in her absence, striking out the claim on the basis that the proceedings were not in her interest or well-being.

Parsons v Airplus International Ltd 2017 EAT

Appropriate test of a qualifying disclosure in whistle-blowing claims.

Herry v Dudley Metropolitan Council [2017] ICR 610

Successful appeal against an award of costs against a disabled out of work employee and a leading decision on the effect of bankruptcy in ET claims.

Nabili v Norfolk Community Health and Care NHS Trust EAT 21 June 2016

Successful appeal Adjournment of disciplinary hearing in unfair dismissal claim.

Missirlis v Queen Mary University of London EAT 16 May 2016

Successful appeal on redeployment following redundancy in unfair dismissal claim. Consideration of Polkey exclusion.

Chenembo v Lambeth LBC [2014] EWCA Civ 1576

David acted for Lambeth in successfully resisting an appeal in a disability discrimination claim.

Insolvency & Restructuring

David has acted for a variety of creditors and bankrupts in a variety of cases in the courts and tribunals.

David has also made and resisted numerous applications in the Interim Applications Court for freezing orders, suspension of possession orders, discharge and variation of orders concerning bankrupts and insolvent corporations

Notable Insolvency & Restructuring cases

Re Lehman Brothers International (Europe) (In Administration) [2014] Bus. L.R. 1186

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Acted for the applicant, Contrarian Funds LLC, who claimed to be a creditor of LBI(E) and applied for a further extension of time in which to challenge the rejection of its proof of debt by the respondent administrators. The court considered whether the time limit for bringing an application to challenge the rejection of a proof of debt was concerned with litigation.

Snell v Sirin Fine Art Ltd (In Administration) & Ors, HQ12X01256 Master Fontaine 17 January 2013

Whether the Master has jurisdiction and, if so, should exercise her discretion to grant permission to continue proceedings against company in administration.

Re Rangers FC

High profile proceedings arising out of the administration of Glasgow Rangers and allegation of conspiracy against various parties including Collyer Bristow. Acted for the Trustees of a pension scheme who had loaned money to Rangers and sought to prove their debt.

Webster v Ashcroft [2012] 1 WLR 1309

A contentious probate case which involved a proprietary estoppel claim brought by the estate of the promise and is the first decision on the ability to bring such a claim when the promise became bankrupt after acquiring relevant equity to bring claim.

Herry v Dudley Metropolitan Council [2017] ICR 610

Acted for Mr Herry, a discharged bankrupt, in his successful appeal against an order for costs made by the ET. The EAT set out guidance on the effect of bankruptcy on ET claims.

Trustee Corporation Ltd v Nadir [2001] BPIR 541

Acted for Asil Nadir (of Pollypeck fame) in his dispute with his trustee in bankruptcy as to who was entitled to his pension given the existence of a forfeiture provision in the case of bankruptcy.

Commercial Litigation

David has experience in numerous commercial litigation matters including:

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- **Company law**
- Asset tracing
- Interim relief including freezing orders and search orders
- Restrictive covenants
- Property disputes

Notable Commercial Litigation cases

McGaughey v University Superannuation Scheme Ltd [2022] EWHC 1233 (Ch)

Acted for two members of the USS who sought to bring a multiple derivative claim on behalf of the trustee company USSL against former and present directors. The claim was that the directors were in breach of their statutory duties in valuing the scheme at the height of market turmoil caused by Covid-19, when the scheme assets increased by c£20 bn subsequently and in adopting an unrealistically pessimistic investment return assumption which massively increased the amount of assets required to fund future liabilities.

Dwyer v Fredbar & Bartlett – Claim No. BL-2020-001411

The leading case on the enforcement of post-termination restrictive covenants in the area of franchises. The claimant/appellant franchisor sought to restrain the defendant former franchisee from trading in the exclusive marketing territory contrary to restrictive covenants. The defendants (whom David represented) contended that the contract is voidable for misrepresentation, that the claimant was in fundamental breach of contract and that, even if the post-termination restrictions survive, they are unreasonably wide and, hence, unenforceable. The trial judge held the covenants to be unenforceable. Dwyer appealed to the Court of Appeal who unanimously dismissed the appeal, holding that inequality of bargaining power is one of, if not the, most significant factors for determining the reasonableness of a restraint against trade.

Memberships

- Pensions Litigation Court Users Committee – Secretary
- **Association of Pensions Lawyers** – former chairman of Litigation Committee
- Bar Council – Race Working Group and Combar committee member
- **Combar** – former Executive committee member
- **Bar Council** – Pupillage Supervisor Network
- **Chancery Bar Association** – mentor
- **Employment Lawyers Association (UK)**
- **Financial Services Lawyers Association**
- **STEP**

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Languages

- French
- Serbian(basic)

Publications

- Will-Making in Difficult Circumstances: How to Comply with Formal Validity Requirements
- A poisoned mind: Some truths and misconceptions concerning fraudulent calumny (2020 Trusts Quarterly Review)
- The Rise and Potential Fall of Corrective Construction (2019 Trusts Law International)
- When all else fails: Rectification of voluntary settlements (2018 Trusts Quarterly Review)
- Further elephants in the room: pension trusts, professional negligence claims and what we still do not know (2015 Trusts Law International)

Awards

- Scholar of Worcester College, Oxford
- Major Scholar of the Inner Temple

Recommendations

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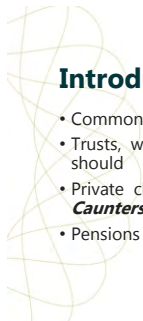
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The Ultimate Round Up – PNLA London Conference

Current themes in pensions, trusts and estates

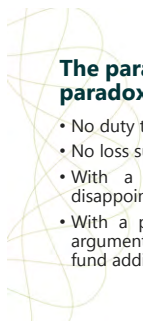
12th October 2023
David E. Grant KC





Introductory comments

- Common themes and differences
- Trusts, wills and pensions deeds which don't do what they should
- Private client – the “disappointed beneficiary” from *Ross v Caunters* to *White v Jones* & *Marley v Rawlings* and beyond
- Pensions – no substantive trials. Why and what this means



The paradigm trusts professional negligence paradox

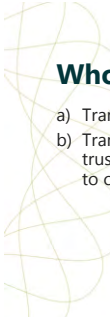
- No duty to the party who suffered loss
- No loss suffered by party to whom owe duty
- With a will, client is deceased, but loss suffered by disappointed beneficiary
- With a pensions deed, retainer often with trustee. Typical argument is that sponsoring employer is the one who has to fund additional (unintended) benefits



Who is my client?

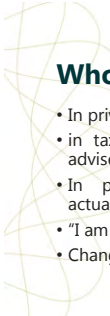
More accurately, to whom do I owe a duty?

- Common concept/question (cf *McClellan v Thornhill* and *BTI 2014 LLC v Sequana*)
- Duty to non-clients – in pensions, power of amendment is invariably bilateral in substance
- In pensions, possible cases where advisors do not owe duty to employer – separate representation employer & trustee



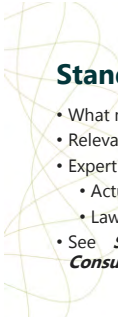
Whose loss is it anyway?

- Transferred Loss in estate claims – *White v Jones*
- Transferred Loss in pension claims – *res inter alios acta* – trustee's call on sponsoring employer's covenant irrelevant to claim against adviser



Who is liable? Multiple advisers

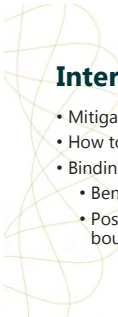
- In private client work, it is predominantly the solicitor
- in tax-related matters, possibly an accountant or financial adviser
- In pensions, claims are often against solicitors and actuaries/benefit consultants
- "I am not a lawyer" versus "I was kept out of the loop"
- Change of advisers in pensions cases. Duty to review?



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Standard of care and expert witnesses

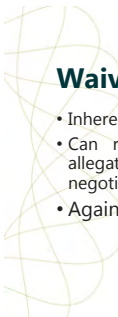
- What material is required to support my claim?
- Relevance of industry practice - specific examples
- Expert evidence – sought and obtained
 - Actuaries
 - Lawyers
- See *Stanley Gibbons v Alexander Clay*, *PPF v Aon Consulting* and return to orthodoxy



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Interaction between Part 8 and Part 7

- Mitigation – see *Walker v Medicott*
- How to co-ordinate the respective proceedings
- Binding non-parties CPR 19.13
 - Benefits and complications
- Position of settlement – to what (if anything) is the adviser bound?



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Waiver of privilege

- Inherent waiver in professional negligence claim
- Can reference be made to WP negotiations when the allegations against advisors concern their handling of WP negotiations *Briggs v Clay* [2019] EWHC 102 (Ch)
- Again, interaction between Part 8 and Part 7

Applications for early determination 1

Early determination of claim

- Summary judgment/Strike out
- Applications for interim payments - CPR 25.7 – not strictly determination of the claim but more than security. Provisional determination?
- **Berry v Ashted Plant Hire Co Ltd** [2011] EWCA Civ 1304
- Potential further deployment in other multi-party cases

Applications for early determination 2

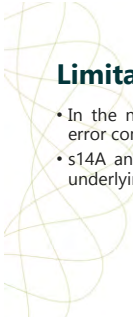
b) Early determination – Interim payments CPR Rule 25.7 (1)

- (c) if court is satisfied that claimant would obtain judgment for substantial amount against respondent to application whether or not only defendant
- (e) "in a claim in which there are two or more **defendants** and the order is sought against any one or more of those **defendants**, the following conditions are satisfied:
 - (i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the **defendants** (but the court cannot determine which); and
 - (ii) all the **defendants** are either [insured/public body]"

Applications for early determination 3

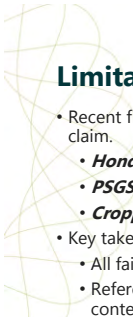
b) Early determination:

"the word "defendants" must, in my view, mean not the defendants in the action but the defendants against whom an interim payment is sought. It cannot be the contemplation of the rule that a decision under it could be made in the absence of one of the defendants, whom the claimant asserts to be liable. The whole point of the rule is that the court must be satisfied that one of the defendants will be liable but, if only one of the contenders for such liability is before the court and blames the other who is not before the court, the court will be hamstrung in its assessment of the certainty that one or other will be liable and in its assessment of the inability to tell which one of them it is. For that reason "the defendants", when it is used for the third time in the rule must mean "the defendants against whom the interim application is being made". It then follows that there is little difficulty in construing "the defendants" in the same way when it appears in the rule for the fourth time.



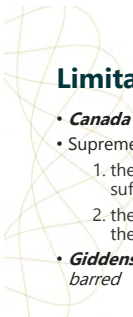
Limitation – preliminary points

- In the nature of wills and pensions deeds in particular that error comes to light decades later
- s14A and s14B issues (potential but unlikely laches issues in underlying trust claim)



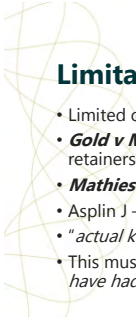
Limitation – s14A

- Recent flurry of pensions cases when adviser tried to strike out claim.
 - *Honda v Mercer* [2022] EWHC 3197 (Ch)
 - *PSGS v Aon* [2022] EWHC 2058 (Ch)
 - *Cropper v Aviva* [2022] 1689 (Ch) – Barber
- Key take away points
 - All failed
 - Reference to benefit of trial in assessing documents in context



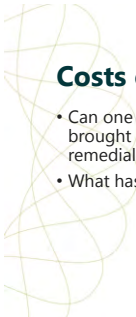
Limitation – s32

- *Canada Square v Potter* [2021] EWCA Civ 339
- Supreme Court decision awaited on:
 1. the meaning of 'deliberate' – whether recklessness is sufficient, or actual knowledge is required; and
 2. the meaning of 'conceal' in this case – does this require the defendant to have breached a legal duty to disclose?
- *Giddens v Frost* [2022] EWHC 1022 (Comm) – not statute barred



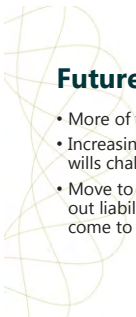
Limitation – loss of a chance

- Limited circumvention of s32 Limitation Act 1980
- **Gold v Mincoff** [2002] EWCA Civ 1157- two separate retainers over time
- **Mathiesen v Clintons (A Firm)** [2013] EWHC 3056 (Ch)
- Asplin J – no negligence re second retainer
- “actual knowledge of previous error” [182]
- This must mean “if defendant had advised properly it would have had actual knowledge of previous error”



Costs of remedial action

- Can one claim in relation to the costs of a remedial action only brought belatedly or is one limited to the costs of hypothetical remedial action at the time?
- What has been lost?



Future trends

- More of the same
- Increasing age and incapacity of population leading to more wills challenges
- Move to capitalise on favourable market conditions and buy out liabilities with an insurer likely to cause more gremlins to come to light

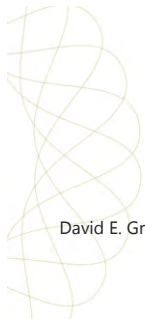


Questions

?



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Thank you

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“Professional Negligence Update”

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Helen Evans KC

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“She provides technically excellent advice and is a real fighter.”



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☎ +442078222132

Helen Evans KC is a leading barrister practising in professional negligence, fraud, disciplinary and insurance work.

Prior to taking silk, Helen was ranked by the legal directories as a leading junior in the fields of professional liability, insurance and professional discipline. In November 2021 she was named Chambers and Partners Junior of the Year in the Professional Negligence category and in April 2022 she was “Lawyer of the Week” in the Times. She has previously been identified by Who’s Who Legal as one of the two most highly regarded juniors at the professional negligence bar. Recent comments from the directories include:

- *“Helen is very hands on and approachable; she operates very much as “part of the team”. Her attention to detail is second to none and you are always confident that she has thought through every point and angle. Her technical skills are exceptional. Her advocacy is clear and precise; she is able to make the judge see exactly what she wants.”*
- *“Helen is great to work with. She is efficient and available despite being in huge (and well-deserved) demand.”*
- *“She is in a class of her own: wonderfully hands-on and pitch perfect in her ability to grasp the issues.”*
- *“Formidable on paper, on her feet, and in cross-examination.”*
- *“Helen Evans stands out as one of the most highly regarded barristers in the field. Peers regard her as “thorough and meticulous”, and say she “can unpick the most complicated of cases”.*
- *“Highly sought after for her professional negligence expertise and...considered a go-to by solicitors.”*
- *“She is an extremely skilled tactician and a joy to watch in court.”*
- *“Helen Evans is hailed as a “rigorous and immensely hard-working” advocate who “has an intense intellect and is terrifyingly intelligent.”*
- *“The exceptionally strong quality of Helen Evans’ work stands out to interviewees. They comment that “she is not afraid of standing up and fighting for a point.”*
- *“She provides technically excellent advice and is a real fighter.”*
- *“As an advocate, she has a wonderful ability to drill down to the core facts, paring away all that is irrelevant and presenting things in a clear and reasoned manner.”*
- *“She is intellectually brilliant, a clear thinker who cuts to the chase, and has exceptional knowledge of professional indemnity insurance. One of the most thorough barristers I have ever dealt with.”*

Helen is particularly known for her expertise in claims against accountants, auditors, other financial professionals and lawyers as well as her fraud and disciplinary work. Her work increasingly has an offshore, corporate or insolvency element.

Accountants, auditors and other financial professionals: Helen’s recent experience includes claims about a wide variety of

negligent tax and investment advice, and numerous claims against auditors arising from frauds. Helen's professional liability practice sits alongside her disciplinary work in the field, and she has in depth knowledge of both accountancy and financial services regulation. She has acted for several of the UK's leading accountancy firms as well as many other national firms. She has appeared before the FRC and been involved in advising on FRC investigations, as well as those of other accountancy regulators. She acted in the FRC proceedings arising out of the collapse of Carillion, named by the Lawyer as one of the Top 20 cases for 2022. She is currently instructed in a large tax negligence claim against one of the Big 4 accountancy firms.

Lawyers: Helen is involved in high profile claims against solicitors and barristers. Many of her cases have a very high value and some involve offshore or cross-border elements. Examples of her work include the leading Court of Appeal proceedings relating to abuse of process in claims against solicitors (*Allsop v Banner Jones*), and acting successfully for the defendant firm in a 5 week trial claim brought by the former CEO of Inchcape against his solicitors (*Brearley v Higgs & Sons*). Helen has acted on a wide range of claims against lawyers and is co-editor of the solicitors' and barristers' chapters in Jackson & Powell on Professional Liability (with Hugh Evans). She also undertakes disciplinary work, including proceedings before the Solicitors' Disciplinary Tribunal and the Bar Tribunal.

Other professionals and corporate work: Helen has experience of a broad range of disputes against surveyors and valuers (many of which have involved alleged large scale frauds). She also handles litigation by and against insurance brokers, insolvency practitioners, companies and company directors.

Civil fraud: Helen is known for her work handling complex long running fraud cases as well as numerous urgent applications for freezing and proprietary injunctions, *Norwich Pharmacal* and *Bankers Trust* orders. Since 2020, Helen has been involved in committal proceedings before the County Court, High Court and Court of Appeal against both solicitors and a barrister. Helen also appeared for the insurers in the claim brought by *Discovery Land Company* arising out of alleged fraud at the *Jirehouse* practice.

Insurance: Helen's practice involves a number of insurance disputes but particularly those involving business interruption, credit risk, professional indemnity and other management insurance. Examples of her current or recent work include appearing for the insurers in the claim brought by *Discovery Land Company* arising out of alleged fraud at the *Jirehouse* practice, managed arbitrations arising from Covid-19 business interruption, and a multi-party, multi-million pound claim against insurance agents.

Privacy Policy

Click here for a [Privacy Policy](#) for Helen Evans KC.

Expertise

Professional Liability

"She is fantastic on her feet. Knows the detail inside out and unflappable, but not arrogant. In fact she is the opposite of that and is incredibly kind and personable. She is a technician as well as showing being commercially sensible and astute. It is always a pleasure working with her." "Helen is very hands on and approachable; she operates very much as 'part of the team'. Her attention to detail is second to none and you are always confident that she has thought through every point and angle. Her technical skills are exceptional. Her advocacy is clear and precise; she is able to make the judge see exactly what she wants." – *Legal 500, 2023*

"Helen is great to work with. She is efficient and available despite being in huge (and well-deserved) demand." – *Chambers & Partners, 2023*

"She is such a pleasure to work with. Clients really like her; frankly it's impossible not to. She's impressively on top of the detail, she grasps issues very quickly and her drafting skills are second to none. She takes a very tactical, sensible and commercial approach." "Helen is incredibly astute, not afraid to really get into the details of a case and excellent with clients." "Fantastic. She gives clear, effective advice and is a pleasure to work with." – *Chambers & Partners, 2022*

"She is in a class of her own: wonderfully hands-on and pitch perfect in her ability to grasp the issues" – *Legal 500, 2021*

“She is brilliant at getting stuck into a claim and working as part of a team with solicitors. Her drafting and technical ability are excellent and she never misses a trick.” “She is very good on the detail, gets to grips with the case quickly, is very good at managing clients and building rapport, and her advice is very commercial and realistic.” – Chambers & Partners, 2020

Helen is described by the Legal Directories as “one of the most highly regarded barristers in the field”, “highly sought after for her professional negligence expertise” and “considered a go-to by solicitors.” She has been listed as a recommended junior for professional liability work for some years in the Legal 500, Chambers and Partners, Who’s Who Legal and Legal Experts. Comments include that Helen is “not afraid of standing up and fighting for a point”, that “she provides technically excellent advice and is a real fighter” and that she is “formidable on paper, on her feet, and in cross-examination”. Her work is described as being of “exceptionally strong quality” and “commercial”, and she is commended for her “first-rate service.”

Helen handles a broad variety of claims against solicitors, with recent examples including *Allsop v Banner Jones* (a case on collateral attack heard by the Court of Appeal in December 2020) and *Brearley v Higgs & Sons* (relating to the application of loss of a chance principles to allegations of dishonesty). Helen has acted in several pieces of large multi-party or managed litigation (including large frauds and “right to buy” schemes). Helen has also acted in numerous barristers’ negligence cases and has experience of wasted costs claims and civil restraining orders. Helen is the co-editor of the solicitors’ and barristers’ chapters in Jackson & Powell on Professional Liability (with Hugh Evans). She also undertakes disciplinary work and acts in proceedings before the Solicitors’ Disciplinary Tribunal and Bar Disciplinary Tribunal.

Helen has particular expertise in claims against financial professionals, including accountants, auditors, insolvency practitioners and IFAs. Such claims have encompassed a wide variety of negligent tax and investment schemes, due diligence, business valuation and advice about financial products. She has considerable experience of claims with a financial services, insolvency or auditing element. In recent years, Helen has acted in relation to several sets of proceedings brought by the Financial Reporting Council, and has also represented clients in ICAEW and ACCA matters.

Helen also acts in disputes against surveyors and valuers (many of which have involved alleged large scale frauds). She has represented banks bringing claims against a variety of professionals arising out of property frauds as well as for the professional defendants. She is well regarded for her expertise in obtaining freezing injunctions and other urgent interim remedies arising from fraud.

Lawyers

Helen is co-editor of the chapters on solicitors and barristers in Jackson & Powell on Professional Liability, and her lawyers’ liability practice has a broad scope:

- Helen appeared as sole counsel in the Court of Appeal in the leading collateral attack case of *Allsop v Banner Jones*. She also appeared in *Asif v Freer Askew Bunting*, struck out for abuse of process involving similar issues;
- A large number of Helen’s arise out of frauds. She is highly regarded for her work in obtaining urgent freezing orders and other interim remedies. In recent years Helen has acted numerous sets of complex sets of claims brought by firms against “rogue” solicitors arising from frauds, one of which culminated in committal proceedings challenged as far as the Court of Appeal;
- Helen has particular expertise of claims against solicitors arising from employment matters, particularly involving advice on restrictive covenants or fiduciary duties (e.g. where solicitors have advised on team moves). She appeared in *Brearley & Ors v Higgs & Sons*, a lengthy High Court trial arising from a prominent businessman being prevented by an injunction from pursuing a new venture;
- Helen also has extensive experience of dealing with cases arising from Financial Remedies on divorces and other aspects of matrimonial work. These cases have involved issues as diverse as assets being dissipated by one spouse, the proper division of assets between spouses, problems arising from settlements and concealment and non-disclosure. She is involved in a number of disputes relating to the valuation of pensions and other assets on divorce and appeared in *Lewis v Cunningtons*. Helen formerly sat as Deputy District Judge, with a family ticket;
- Helen has also dealt with numerous claims arising from solicitors’ or barristers’ regulatory matters, such as the operation of client accounts or committal proceedings brought against a QC for contempt of court;
- Helen has also acted in a number of negligence claims against barristers. Her work for and against barristers includes a diverse range of cases, including financial remedies undue influence claims, and allegedly mishandled disciplinary claims;
- Helen has been involved in several cases involving difficult or controversial issues of limitation and over many years has gained extensive experience of complex multi-party litigation;

- Helen also has considerable experience of advising on cases involving procedural defaults, and appeared in *Al-Fozan v Quastel Midgen*, a leading case on claimants' "warehousing" proceedings.

Accountants, Auditors & Actuaries

Helen is well regarded for her work involving accountants and auditors, which has included the following:

- A wide range of auditors' negligence cases, involving issues such as inadequate planning, inadequate conduct of an audit and complex causation, loss and damage points. Helen's experience of auditors' negligence work also encompasses failure by auditors to spot fraud perpetrated by directors or employees. Helen is also often called on to act for auditors in investigations or proceedings brought by the FRC or other professional bodies. She acted for a former KPMG partner in the FRC proceedings arising out of the audit of Carillion;
- Claims arising from negligent tax planning. Helen currently acts for a big 4 firm defending a multi-million pound claim relating to Enterprise Zone relief. In recent years Helen has acted in several sets of proceedings arising out of EBT schemes, some of which involved allegations of deceit and breach of fiduciary duty. She also has experience of film finance, SDLT and other areas of tax planning;
- Cases with a financial services element, particularly involving Collective Investment Schemes;
- Disputes over the valuation of businesses (e.g. in the context of shareholder disputes or sales) or errors in due diligence on the purchase of large companies;
- Litigation by insolvency practitioners against directors and officers (often involving onward claims against auditors and accountants);
- Helen also has experience of dealing with claims involving complicated accountancy and actuarial expert evidence, such as valuing lost profits, identifying increased costs, valuing assets and businesses and tracing misappropriated funds. Helen has also advised in relation to the potential liabilities of accountants acting as expert witnesses.

Financial Services Professionals

Helen has been involved in a number of claims against independent financial advisors including claims arising from a range of financial products such as equity release schemes and various mortgage, insurance and pension vehicles as well as offshore investments and tax schemes. She has also been involved in cases of allegations of mis-selling as well as negligent advice and investment strategy.

Recent examples of her work include:

- Involvement in several multi-million pound and multi-party claims (and potential claims) relating to alleged Unregulated Collective Investment Schemes;
- Proceedings arising from allegedly negligent structuring of a tax-efficient income scheme;
- Various substantial claims relating to mis-selling of geared traded endowment policies;
- Litigation arising from interest rate swap products;
- Several pieces of litigation arising out of inadequate or inappropriate inheritance, income or corporation tax mitigation advice;
- Litigation arising out of the sale of inappropriately risky investment products;
- Litigation against directors and officers (including under the Insolvency Act 1986);
- Advising on complaints to the Financial Ombudsman's Service or Financial Services Compensation Scheme.

Directors and Officers

Helen has acted in a number of disputes involving the alleged wrongdoing of directors and officers. Recent examples of her work include

- A claim by a company against a former director for breach of duty to the company plus involvement in an unlawful

- means conspiracy and breach of trust;
- A claim against directors of a BVI company for diversion of income;
 - Advising auditors on claims against directors of a company relating to inadequate internal controls and fraud by an employee;
 - Acting for the financial director of a company in relation to disciplinary proceedings against him brought as a result of his status as a qualified accountant;
 - Advising directors and officers on the D&O insurance aspects of an unfair prejudice petition brought by a member of a company relating to directors' alleged breaches of the Companies Act 2006.

Insolvency Practitioners

Helen has experience of defending insolvency practitioners from claims arising out of the allegedly negligent conduct of administrations or liquidations. Such claims have involved issues such as:

- The alleged failure to pursue claims against or to restrain the activities of directors;
- A failure to realise the company's assets and/or under-valuation of assets;
- Negligence regarding the novation of an insolvent company's contracts to a new company;
- Pursuing litigation against professional advisers where a company's claim is tainted by the fraud of directors.

Helen has extensive experience of defending professionals against claims initiated by insolvency practitioners, including direct claims and misfeasance proceedings under the Insolvency Act.

Surveyors and Valuers

Helen has acted on a number of claims both for and against valuers, involving residential and commercial premises (and both one-off and portfolio valuations);

Examples of Helen's work include the following:

- Defending a national firm of solicitors whose valuers were accused of deceit and involvement in mortgage fraud;
- Acting for mortgage lenders with regard to the involvement of panel valuers in large-scale fraudulent property transactions (including allied applications for *Norwich Pharmacal* relief relating to funds passing between other parties allegedly involved in the fraud);
- Acting successfully at a 6-day trial for a mortgage lender suing a national firm of surveyors with regard to the valuation of domestic property in South Wales. The case involved allegations of negligent lending practices as well as valuation issues, and entailed detailed cross-examination of expert witnesses over several days;
- Advising a bank with regard to a claim for negligent valuation of retail premises (including issues of overvaluation based on yield);
- Advising various lenders with regard to claims for alleged breaches RICS Red Book guidelines on valuing new build properties;
- Advising various lenders and firms of surveyors with regard to claims for negligently overvalued commercial and residential property (including claims arising out of large investment portfolios).

Insurance Brokers & Agents

Helen also has wide experience of claims both for and against insurance brokers, from disputes arising over one-off policies to placing larger insurance schemes. Her work involves a wide range of insurance products, from property and professional indemnity insurance to medical and disability insurance.

Recent examples of Helen's claims include:

- Acting for claims handling agents in multi-party litigation arising out of a large book of motor insurance business;
- Acting in a claim against brokers arising out of negligently placed credit risk insurance;

- Numerous pieces of litigation against brokers for inadequate explanation of terms/procuring inadequate cover (and failing to appreciate the exclusions or conditions of a policy);
- Allegations of fraud/breach of fiduciary duty against brokers based on their alleged mis-representation of cover allied with their desire to earn commissions;
- Coverage litigation arising from brokers' professional indemnity insurance and whether brokers were acting pursuant to an undisclosed binding authority;
- Claims relating to failure to notify and late notification.

Insurance & Reinsurance

Helen has been recommended for many years for her insurance practice in the Legal 500. Recent editions describe her as:

- *“intellectually brilliant, a clear thinker who cuts to the chase, and has exceptional knowledge of professional indemnity insurance. One of the most thorough barristers I have ever dealt with”*
- *“responsive, organised, focused, clear, and good with clients”*
- *“able to cut through large volumes of material and get to the nub of the problem”.*

Professional indemnity and related insurance

Helen has extensive experience in coverage disputes arising out of professional practice. In 2022, Helen represented AXIS (along with Patrick Lawrence KC and Ian McDonald) in the High Court trial of its coverage dispute arising out of the Jirehouse practices (*Discovery Land LLC v AXIS*). The dispute concerned whether the fraud was condoned by a 2nd partner in the practice (or whether he had only been a sham partner).

Helen frequently advises on issues relating to dishonesty, condonation, aggregation, non-disclosure and other questions of interpretation of policies.

Helen has experience of advising on policies covering professionals as diverse as solicitors, accountants, financial advisers, directors & officers, mortgage agents and construction professionals. Her work often involves dishonesty issues, or has a corporate or insolvency related angle. She is often instructed to advise insurers and insureds collectively at short notice on freezing injunction applications, which can often involve complex coverage questions that need to be accommodated before the applications can proceed.

Examples of Helen's recent work in this area include:

- Advising on the application of professional policies to regulatory matters, and in particular coverage for fines.
- Advising on the adequacy of disclosure given by and/or scope of cover for solicitors and accountants providing services arguably falling outside the usual scope of their role.
- Advising insurers for constructions professionals about the adequacy of notification and which “year” is in on risk.
- Advising on the operation of the Third Party (Rights Against Insurers) Act 2010.
- Acting in a dispute over the applicability of D&O cover to a shareholders' dispute.
- Acting for and against insurance brokers sued for negligence in relation to the cover they have procured for clients;
- Defending claims against professional advisers for prejudicing a client's insurance cover or delaying insurance claims.

Helen's insurance work tallies very well with her extensive experience of professional liability, disciplinary, corporate and injunctive matters.

Other types of insurance

Helen is also frequently called on to advise on other types of insurance dispute, most frequently with a construction, financial, insolvency, motor or property damage connection. Recent examples of her work include:

- Advising insurers on the complex interplay between the outcome of an Early Neutral Evaluation and a coverage dispute in a construction matter.
- Acting on multi-party managed arbitrations arising out of business interruption claims.
- Acting in a High Court coverage dispute relating to credit risk insurance after a large corporate collapse (as well as an

allied claim against insurance brokers).

- Acting on managed claims against cover holding or other insurance agents. In this regard, Helen has been instructed in two sets of large scale proceedings involving the handling of thousands of underlying motor insurance policies across a number of years.
- Advising insurers in a jurisdictional dispute concerning the appointment of arbitrators to determine a coverage claim involving a fraud on an Isle of Man company.
- Advising in disputes arising out of aviation hull and liability insurance (including freezing injunctions in that context and/or potential claims against brokers).
- Acting on claims arising out of fires, floods and other types of damage, particularly those involving allegations of dishonesty or other wrongdoing against insureds.
- Advising in disputes over costs, including claims relating to legal expenses insurance and whether insurers have “maintained” litigation and exposed themselves to costs liability as a result.

Regulatory & Disciplinary

“Extremely knowledgeable and empathetic.” – Legal 500, 2023

“The quality of Helen’s written work is exemplary. As an advocate, Helen is tenacious and impressive. Helen is unflappable under pressure and her attention to detail sets her apart amongst her peers”, “A name to note as she is instructed in high-profile disciplinary matters”, “An extremely bright junior who easily inspires clients’ confidence.” – Legal 500, 2020, 2021 and 2022 editions

Helen’s disciplinary and regulatory practice is primarily focused on lawyers, accountants and auditors. She is recommended in the Legal 500 for her disciplinary work. Comments in the directories include “she knows her stuff in regulatory issues like no one else and adds a lot of value”, and “hardworking, good with clients and has a good grasp of the detail”.

Helen has been involved in cases before the major accountancy regulators and the Solicitors Disciplinary Tribunal. Until it was disbanded in 2020 she was a member of the Bar Standards Board’s Panel of Prosecuting Counsel. She is now available to defend barristers facing BSB proceedings.

Featured Regulatory & Disciplinary cases

- Acting for the KPMG audit partner in the FRC proceedings arising out of the audit of Carillion (*FRC v KPMG & Ors*, 2022);
- Advising numerous national firms of accountants in relation to investigations by the ICAEW, FRC and offshore regulators;
- Acting for the BSB at first instance, in the High Court and the Court of Appeal in *Cannon v BSB* [2023] EWCA Civ 278, a case involving the reach of disciplinary proceedings into a barrister’s private life and when anonymity orders should be granted;
- Acting in multiple sets of SDT proceedings relating to the involvement of solicitors in alleged collective investment schemes;
- Acting for a partner of a prestigious city firm in SDT proceedings involving serious breaches of the Solicitors Accounts Rules (including in relation to the settlement of those proceedings);
- Acting for insurers of a firm of solicitors committing a former partner to prison for contempt of court in fraud proceedings;
- Defending a QC accused of contempt of court;
- Prosecuting a barrister for behaving in a way which was likely to diminish the trust and confidence which the public places in him in his correspondence about a judge: *BSB v Becker*;
- Prosecuting a barrister for failing to represent his client properly in Court of Appeal (Criminal Division) proceedings (*BSB v Matthew Boyden*);
- Acting for the finance director of the Equity Red Star Lloyd’s Syndicate in long-running proceedings before the Disciplinary Tribunal of the FRC relating to the adequacy of the Syndicate’s reserves (*FRC v KPMG and Morgan*);
- Defending two audit firms in separate proceedings before the ACCA regarding inadequate audits and defective reports to the SDT about solicitors’ accounts (*ACCA v Woodhouse* and *ACCA v Mungur*).

Helen is co-editor of the chapters on solicitors and barristers’ negligence in Jackson & Powell on Professional Liability and therefore has in-depth knowledge of lawyers’ practices and regulatory rules.

Helen also has extensive experience of accountants’ and auditors’ negligence cases, tax and financial services regulation, which provides an ideal backdrop for financial disciplinary work. She is often involved in cases focusing on the interplay between

financial services regulation and the role performed by professionals such as accountants (e.g. pursuant to ICAEW rules) and solicitors.

Helen is a member of the Association of Regulatory and Disciplinary Lawyers and regularly writes on disciplinary and regulatory matters.

Civil Fraud, Asset Recovery & Injunctive Relief

“Absolutely brilliant technically; she has certainly developed a niche in freezing orders and injunctions” – *Chambers & Partners, 2021*

Helen is sought after for her extensive experience in numerous multi-million pound claims arising from solicitors’ misappropriations of client funds. In recent years Helen has acted in multiple sets of complex litigation arising out of frauds by solicitors, one of which led to contempt proceedings before the Court of Appeal and another involved multi-party litigation in the Chancery Division.

Helen has also recently been involved in pursuing a high value insurance coverage dispute arising out of an underlying large-scale fraud by a solicitor at the Jirehouse practice (*Discovery Land v Axa*).

Helen regularly advises on the liability of accountants, auditors, directors, insolvency practitioners and others for frauds. Her cases often involve a company law or insolvency element and she is experienced at dealing with fraud in both the corporate and partnership context. She is adept at dealing with complex forensic accountancy evidence. Helen has extensive experience of obtaining urgent orders, including freezing injunctions, proprietary injunctions, orders to restrain parties from leaving the jurisdiction, committal and *Norwich Pharmacal* and *Bankers Trust* orders. She often handles multiple connected applications in quick succession. She is calm under time pressure and strategic in her approach.

Featured Civil Fraud cases

- Obtaining back-to-back proprietary injunctions, freezing injunctions, and *Norwich Pharmacal* relief in multiple cases involving frauds on solicitors’ client accounts;
- Appearing in the High Court and Court of Appeal on the committal of a solicitor to prison for contempt of court: *Law House v Adams* [2020] EWHC 2344 (Ch);
- Advising solicitors and accountants about injunctive relief in relation to a “Friday afternoon frauds” by email impersonation;
- Obtaining *Norwich Pharmacal* orders to assist with tracing the proceeds of a large-scale property fraud;
- Acting for a defendant on the return date of a freezing injunction arising out of an alleged breach of trust;
- Dealing with an application to restrain a defendant from leaving the jurisdiction and requiring the surrender of their passport;
- Acting for insurers in the coverage dispute arising out of the Jirehouse fraud (*Discovery Land v Axa*).

Awards



Qualifications

M.A. (Oxon.) (First Class) C.P.E. (City) (Distinction) M.A. Administrative Law (City)

Prior to joining chambers, Helen read English Literature at New College, Oxford, where she was Galsworthy scholar and obtained a first class degree. She then spent a year at the University of Aix-Marseille III in France. Helen studied law at City University, where she gained a distinction in the CPE exams. During her Bar School year, Helen was Astbury Scholar of the Middle Temple, won the Inn's Helena Normanton QC Prize for her performance in the Bar Vocational Course and also obtained an MA from City University. In 2004 Helen was awarded a Pegasus scholarship to work at Gowlings in Toronto, Canada.

For 10 years from 2013, Helen was a Deputy District Judge (and held both civil and family tickets). Until it was disbanded in 2020, she was a member of the Bar Standards Board's Panel of Prosecuting Counsel for disciplinary proceedings and still prosecutes cases for the BSB on an ad hoc basis. Helen has been involved in various pro-bono organisations and is active in the Equality & Diversity work in chambers. Helen regularly publishes articles on legal matters and is a sought after speaker on legal topics.

Professional Liability Update

Helen Evans KC, 4 New Square
October 2023

Overview

Duties to third parties:

- The "field guide" categorising cases: *Ashraf v Lester Dominic*;
- What sort of case is *McClellan v Thornhill*?
- What happens when you get the "reverse" *White & Jones*?

What's reasonably incidental to a retainer?

- A refresher as to where the law comes from;
- How have recent cases applied the idea of what's "reasonably incidental?"

Disclaimers

- Can you narrow your duties part way through a retainer?

Conclusions

- What can we draw from all of this?



Duties to third parties



The triumph of “assumption of responsibility”

- *Steel v NRAM* [2018] 1 WLR 1190 “there’s no better rationalisation for liability in the tort of negligent misstatement than the concept of an assumption of responsibility..... Although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of liability”.
- So how is the “incremental development” panning out?
- What cases fit within the concept?



The field guide to 3 “exceptional” categories where duties are owed by solicitors to third parties: *Ashraf v Lester Dominic* [2023] EWCA Civ 4

<p>Where the purpose of a retainer is to confer a benefit on a third party. For example, where a testator engages a solicitor to make a will in favour of a beneficiary (<i>White v Jones</i> [1995] 2 AC 413).</p>	<p>Where the Solicitor for one party makes representations to the other party upon which the other party – reasonably foreseeably – relies (relatively rare: reliance by an opposing party “presumptively inappropriate”) (<i>NRAM v Steel</i> [2018] UKSC 13).</p>	<p>The ‘Al-Kandari principle’ – Where a solicitor has stepped outside the role of merely acting for one party and accepted responsibilities for third parties (<i>Al-Kandari v R Brown & Co</i> [1988] QB 665)</p>
---	---	--

McClellan v Thornhill [2023] EWCA Civ 466

- Claim brought against Andrew Thornhill KC by a range of non-clients who had invested in film finance tax schemes.
- Mr Thornhill was the advisor to the promoters of the tax schemes- in other words he was on the “other side” of the transaction to the investors.
- However, Mr Thornhill consented to being named in the Information Memorandum and his opinions being made available to the investors if they requested them. The opinions contained no disclaimer of liability to third parties.



How does the Ashraf "field guide" apply to Thornhill?

- Core concept applied by the Court of Appeal- had there been reasonable reliance on Mr Thornhill's advice and should he reasonably have foreseen this? (Category 2 in Ashraf). Attempts to bolt on a "prospectus liability" were unsuccessful.
- Attempts were made in argument to depict the case as falling within the Al-Kandari principle (Category 3 in Ashraf). It was argued that he: "stepped outside his role as adviser" to the scheme provider and took on an "independent expert role advising both sides". Argument failed:



"he did nothing that could be regarded as stepping outside his role as a barrister advising on the scheme and the terms of the IM. He did not abandon his role as Scott's named tax adviser but remained in that role throughout. He did not at any stage become a neutral or independent expert. Nor is there anything to suggest that he took on a role as acting for all parties or as acting also for the investors".

Four difficulties with imposition of a duty based on "Ashraf Category 2" in McClean.

Lack of reasonable reliance:

The Information Memorandum advised investors to consult their own tax advisors.

Indeed, investors could only participate in the scheme if they warranted they had relied on the advice of their own tax advisors.

The promoters and the Claimant investors were on opposite sides of the transaction- was there a conflict of interest?

The schemes were commercial and only marketed to wealthy individuals. Sophisticated investors can be expected to take their own advice

Does Ashraf Category 1 apply if the retainer has disadvantaged a third party?

- Classic case of duties owed to third parties: *White v Jones* [1995] 2 AC 207 where a testator's bequest to a beneficiary failed because her husband witnessed the will.
- But what about where a testator made a will that would disadvantage his or her children. Can the children sue the solicitors involved?
- *Dorey v Ashton* [2023] PNLR 19- Guernsey case where children argued that testator lacked capacity. Defendant solicitor admitted a duty to testator but denied a duty to the children. Guernsey court held there was no lacuna in the law requiring a duty to be filled. Children could challenge the will.

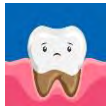


How elastic are retainers really? What's "reasonably incidental"?



The underlying principles: *Minkin v Landsberg* [2016] 1 WLR 1489

- A solicitor's duty is limited to carrying out the tasks which the client has instructed him or her to do, and the solicitor has agreed to undertake.
- The court must be wary of imposing on solicitors duties that go beyond the scope of what they had been requested and undertaken to do.
- However, it was implicit in any retainer that a solicitor would proffer advice that was "reasonably incidental" to the work he had agreed to carry out.
- What is "reasonably incidental" is an "elastic phrase". Where the boundary lies will depend on factors such as:
 - The character, sophistication and experience of the client; and
 - The extent of the burden that the allegedly incidental task placed on the solicitor. The "rotten tooth" analogy.



4 NEW SQUARE
.....

Spire Property Development LLP v Withers *LLP* [2022] EWCA Civ 970

Do solicitors have to fix things, particularly after a retainer comes to an end?

Issue with electricity wayleave came to light after the end of a retainer. Did the solicitors just have to answer factual questions, or should they proffer the solutions?

No need for solicitor "to carry out investigative tasks in areas that he has not been asked to deal with, however beneficial to the client that might in fact have turned out to be".

You can't build a claim on wishful thinking.



4 NEW SQUARE
.....

Detecting the dodgy agent? *Lennon v Englefield* [2022] PNLR 3.

"It was outside of Ms Bourne's retainer to ask her to advise about the commercial wisdom of paying the proceeds of sale into Mr Englefield's account. There would of course have been virtually no risk of doing this if Mr Englefield had been an honest man... It is unfair to invest Ms Bourne with the hindsight of what happened after the money was paid where it was directed to be paid".



Can you narrow your retainer after you've started?

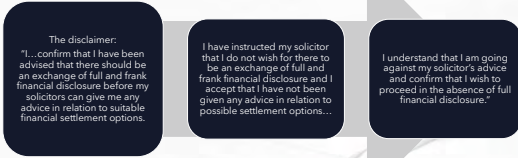


Can you narrow your retainer once you've started?

- *Minkin v Landsberg* recognises that solicitors can limit retainers. But what do the courts make of attempts to narrow your retainer once you've started?
- *Lewis v Cunningtons* [2023] EWHC 822. Family law case involving claimant who said she was unsophisticated and bullied by husband. Range of potential retainer options offered- 4 paths that could be chosen.
- After some time, Claimant chose to do direct deal with husband. What was the scope of the retainer then?



The approach the solicitors chose- the disclaimer



Disclaimer disapproved....

"I find that the contents of this disclaimer do not accurately reflect the position between the parties at this date. I find that the attempt to limit the defendant's responsibilities with a "one-size fits all" disclaimer was not appropriate at this stage in this case".



Closing observations



Conclusions – what can be drawn from recent cases?

- Multiple cases with a restrictive approach to duties to third parties- such duties are exceptional and the courts are increasingly on analysing if and how they fall into understood categories.
- Advice of a commercial nature is hard to characterise as being “reasonably incidental” to a retainer.
- Attempts to narrow retainers can run into difficulties if the judge regards them as inappropriately cutting down duties.



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Chambers, October 2023

These slides are not intended as a
substitute for legal advice. Advice about a
given set of facts should always be taken.



Samuel Morley
Architect
Hawkins & Associates

“The Expert Architect’s Perspective”

SAMUEL MORLEY

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Hawkins
Leaders in forensic investigation



Samuel graduated from the University of Bath in 2003 with a Masters in Architecture having previously graduated in 2001 with a BSc in General Architectural Studies from the same university. During his studies Samuel benefited from the unique interdisciplinary studio teaching with both architecture and engineering students contributing towards projects; preparing him for collaboration in professional life.

Upon graduation Samuel worked initially for University College London Hospitals on a project to document and assess their existing estate. In 2004 Samuel moved to the private practice in an architectural role at Thomas Nugent Architects whilst he completed his PgDip in Professional Practice in Architecture at University of Westminster; achieving Chartered status in 2007.

In 2008 Samuel moved to Mace to become part of their multi-disciplinary design **team where he led public sectors projects including children's centres, libraries and schools**. During this period Samuel was seconded for 3 years to Hampshire County Council to lead their nursing care programme, whilst also working on education and other civic projects, as part of their in-house design team working across all RIBA stages in a lead designer and contract administrator role.

In 2015 Samuel returned to private sector projects with a move to Geraghty Taylor where he held the role of associate and sat on the operations board with a remit covering contractual matters alongside resourcing and staff management activities. Samuel was predominately involved in leading large new build residential schemes at planning application and delivery stage. This was interspersed with commercial fit-out, healthcare and technology projects.

After carrying out the Contract Administrator role and becoming interested in design responsibility across the project team, Samuel decided to pursue the MSc in Construction Law and Dispute Resolution at Kings College London, achieving a merit in 2019. His dissertation focused on the impartiality of Contract Administrators and the challenges of the role.

An eagerness to promote best practice and help nurture the next generation led Samuel to become a Part 3 examiner at the University of Westminster in 2016 and then in 2018 at the Architectural Association, where he has subsequently become involved in writing the Part 3 exam and tutoring in professional practice at Part 1.

The Expert Architect's Perspective

Sam Morley BSc MArch MSc PgDip MCI Arb MPD RIBA

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WORKING TOGETHER

Residential



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Public

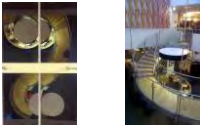
Commercial



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Public

Public Sector



Public

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Learning Objectives

- What does an architect do?
- What is forensic investigation?
- Case studies involving fires and building regulations

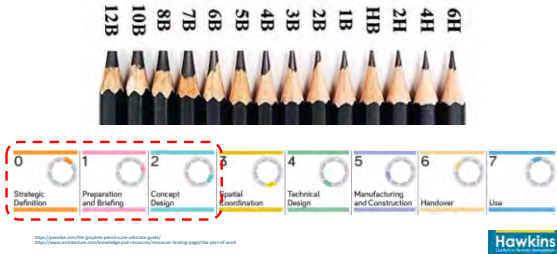
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What does an architect do??

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What does an architect do??



What does an architect do??



It depends on their contract:-

- Designer
- Lead Designer
- Contract Administrator
- Project Lead

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What does an architect do??



Architects are also frequently appointed as:-

- Principal Designer (CDM)

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What does an architect do??



An architect may be appointed as Principal Designer under the Building Regulations

- "Plan, manage and monitor work during the design phase"
- Mandatory Occurrence reporting (HRB)
- Different procurement routes
- Criminal sanctions



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What does an architect do??



"Having an audit trail showing that the member took account of the practices contained in the RIBA Job Book, may provide a partial defence to an allegation of negligence. When seeking an independent expert report to defend such a case, the expert may reference the RIBA Job Book as a measure of reasonable skill and care"

RIBA Job Book 10th Edition RIBA Publishing

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Architects Code

Standard 2 – Competence

"2.1 You are expected to be competent to carry out the professional work you undertake to do, and if you engage others to do that work they should be competent and adequately supervised."

Standard 6 – Technical and Professional Standards

"6.1 You are expected to carry out your work with the skill and care and in accordance with the terms of your engagement."

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Architects Code

- ARB fire safety case
 - Flats did not comply with Building Regulations in relation to fire resistance.
 - Building did not comply with drawings approved by Building Control
 - Design was satisfactory but workmanship was not.
 - Professional Consultant Certificates signed by Respondent confirming standard of construction
 - Outcome - Erasure
-
- CIC guidance on Professional Consultants Certificates

Public

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Forensic Investigation??

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Forensic Investigation??



<https://www.bbc.com/news/england-2018-05-18-forensic-investigation-180518001>

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Forensic Investigation??

Fire Investigator

What is the damage?

What is the cause?

Is there any potential recovery?

Policy coverage?

Forensic Fire Engineer

Was the damage caused by a construction defect?

What is the construction defect?

Did the building comply with Building Regulations?

Is there any potential recovery?

Forensic Architect

Is there a design defect?

What was the design scope?

Were there any inspection duties?

Were any certificates signed?

Was the architect lead designer?

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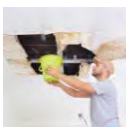
Forensic Investigation??



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Forensic Investigation??



How do you investigate a building? What is the role of a forensic investigator?
What is the role of a forensic investigator? What is the role of a forensic investigator?
What is the role of a forensic investigator? What is the role of a forensic investigator?

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Forensic Investigation??

Cases Types

1. Root cause
2. Root cause known. Any non-compliance with Building Regulations
3. Professional Negligence
4. Latent Defects Claims
5. Private Clients – Construction Problem

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Forensic Investigation??

Witness Information

Occupiers
Owners
Contractors
Consultants

Site Inspection

Root cause
Do the drawings match what has been built?
Opening-Up
Retain exhibits
Site testing
Laboratory testing

Document Review

Scopes
As-built design information
Instructions
Building Control records
Site Inspection records
Relevant regulations & standards
Product Information

Hear

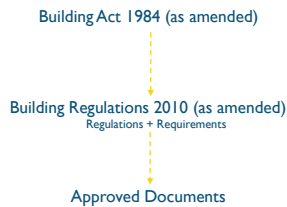
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Read

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Building Regulations



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Latent Defects Insurance

- Insured must investigate defects
- Assessment by Insurer – Major Physical Damage / Present and Imminent Danger

Present and Imminent Danger

Are the defects caused by a failure of the Developer to comply with the Building Regulations in force at the time the notice to build was deposited with the local authority?

AND

Do the defects pose a present or imminent danger to the physical health and safety of the occupants?

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Fire Spread – Domestic

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LAWYERS & ACCOUNTANTS

Fire Spread



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Fire Spread



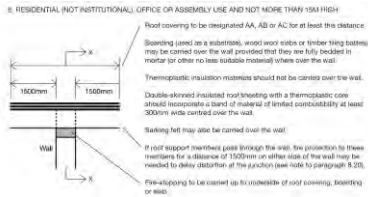
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Fire Spread

Extract from Approved Document B – Volume 2 2006, Edition incorporating 2007, 2010 and 2013 amendments.
Diagram 30 – Junction of compartment wall with roof

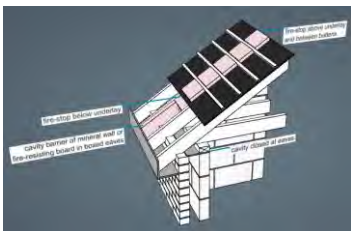


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Fire Spread

NHBC Guidance



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Podium Deck



Podium Deck



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Podium Deck



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Podium Deck



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Podium Deck

Table 16 Limitations on roof coverings¹

National Class	European Class	Minimum distance from any point on relevant boundary			
		Less than 5m	At least 5m	At least 10m	At least 20m
A6, A9 or A12	Steel/6	●	●	●	●
B6, B9 or B12	Ceramic/3	○	●	●	●
C4, C9 or C12	Steel/6	○	● ²	● ¹	●
A4, B3 or C3	Steel/6	○	● ²	● ¹	● ³
C4, B6, B9 or B12	Steel/6	○	○	○	● ³

Notes:
1. See paragraph 1.4 for limitations on glass parapets 15.4 for limitations on glass or metal parapets and paragraph 14.6 and 14.7 for steel 19.4 and 19.6 for parapets in public buildings.
2. The designation of national roof surface is approved in Appendix A. See table A6 for national designations of roof coverings.
3. Separation distance does not apply to the boundary between roofs of equal or lower absolute fire hazard than the roof under consideration.
4. Symbols in this table refer to the fire hazard class of the roof covering as defined in paragraph 15.1.1 from the Approved Document B of BS 5854.
5. Maximum aggregate size 4 mm, maximum 32 mm.
6. Sand/jammet screed to a thickness of at least 30 mm.
7. Cast stone or mineral slabs of at least 40 mm thickness.

Public



Podium Deck

Roof covering product/material	Specific conditions
Products intended to be fully covered in normal usage (by the inorganic coverings listed to the right)	Loose laid gravel with a thickness of at least 50 mm or a mass $\geq 80 \text{ kg/m}^2$ (minimum aggregate size 4 mm, maximum 32 mm) Sand/jammet screed to a thickness of at least 30 mm Cast stone or mineral slabs of at least 40 mm thickness

Public



Podium Deck

- Revision to Regulation 7
- Revision to Approved Document B
- CWCT Guidance
- BS 8579:2020



Public



Fire Spread – Residential

Hawkins
LIFE BY CONNECTION

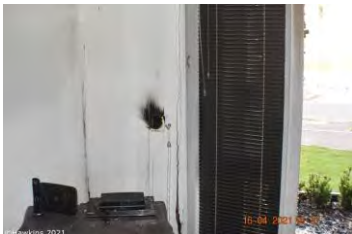
Fire Spread



Photo

Hawkins

Fire Spread



© Hawkins 2021

10-24-2021

Photo

Hawkins

Fire Spread



Public

Hawkins

Fire Spread

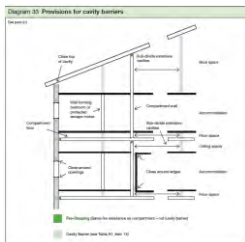


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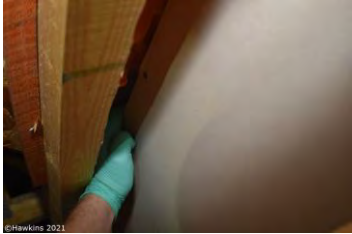
Fire Spread



Public

Hawkins

Fire Spread



Pub

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Fire Spread



Pub

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Pub

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Pub



Pub

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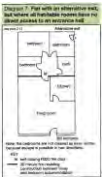
Pub



Pub

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Pub



Pub

Hawkins

Fireplace



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LUXURY REPAIRS

Fireplace



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Photo



Fireplace



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Photo



Fireplace



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Public

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Fireplace



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Fireplace



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Public

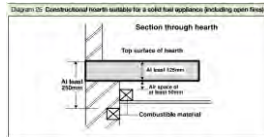
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Fireplace



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Public



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Further changes?

Grenfell Tower Inquiry Phase 2 Report – awaited

Changes to Building Safety Act and associated regulations?

Further changes to an Architect's duties?

Public

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Any Questions?



Feel free to ask questions now or to contact me at your convenience on sam.morley@hawkins.biz

Hawkins



Simon Arnold & Georgia Purnell
3 Hare Court

*“Professional negligence claims against
financial services professionals”*

Simon Arnold

Call Date: 2017 | Solicitor: 1998



Simon is an acknowledged commercial litigation specialist.

His commercial litigation experience spans banking and financial services litigation, arbitration (domestic and overseas), construction litigation and professional liabilities including bringing and defending claims against a range of professionals in the legal, property, insurance, and construction sectors. Simon's commercial litigation practice includes advising on partnership and franchise disputes, insurance coverage matters (for both insurers and policyholder) and disputes arising from the sale of goods and manufacturing equipment, often with a conflict of laws element.

Highlights of Simon's High Court advocacy and drafting practice include:

- Defending an application for security for costs (£18m) brought by a clearing bank against a litigation funder where the underlying proceedings involved a LIBOR manipulation / mis-selling claim in which the damages claimed exceeded £600m (led by Michael McLaren QC, Fountain Court Chambers).
- Instructed by Shearman & Sterling LLP to assist with amendments to the Financial Services and Markets Bill promoting enhanced accountability for the U.K.'s financial services regulators and the introduction of a financial adjudication scheme and the establishment of a new financial services tribunal. The drafting included significant amendments to the Financial Services and Markets Act 2000, the Financial Services Act 2012 and the First Tier Tribunal and Upper Tribunal (Chambers) Order 2010.
- Instructed in respect of alleged mis-selling of structured foreign exchange derivatives. The issues involved complex technical issues concerning the nature and effect of the transactions and the close out costs (led by Adam Tolley QC, Fountain Court Chambers).
- Acted unled for several large (generally) Far East based claimant groups advancing claims (total value over £10m) against multiple firms of solicitors who acted for the claimants in the purchase of units in off-plan buyer funded mixed-use developments. Simon advised several of the claimant groups from inception, drafted the Particulars of Claim and other statements of case, and attended several interim hearings before a successful resolution of the claims shortly before the lead multi-week trial. Simon conducted (unled) the lead claim (various separate claims were case managed together in the Manchester District Registry) which was listed for a 5-week trial in the Chancery Division of the Manchester District Registry.
- Acting for a prominent city law firm defending a multi-party claim brought by claimants concerning building works connected to a Grade 11* property in central London.
- Defended to a multi-day trial a claim advanced by residential homeowners against a building contractor which concerned allegations of defective workmanship and/or negligent design.
- Acted for a regional contractor in a series of disputes with its groundwork sub-contractor across several projects, including advising on various adjudications; successful enforcement of an adjudicator's award; the defence of Part 8 proceedings; prosecution of separate Part 8 proceedings

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regarding declaratory relief as to whether a document was a valid 'pay-less' notice; and the defence of Part 7 proceedings involving the underlying dispute in the adjudication enforcement proceedings.

- Defending as sole counsel claims against an independent financial advisor (settled by leading counsel) concerning alleged breaches of fiduciary duty, breach of trust, fraud and deceit in addition to alleged breaches of retainer.
- Settled the Defence in a substantial claim brought by several claimants against an insurance broker. It was alleged that the broker failed to effect the relevant insurances for an industrial unit and stock that was subsequently destroyed by a fire.
- Acting for several homeowners in claims brought against a national homebuilder alleging negligent design, defective workmanship, failures to comply with Building Regulations and NHBC codes of practice and breaches of the Defective Premises Act 1972.
- Acting in a multi-party dispute in the TCC in Manchester concerning claims arising in respect of an 'eco-village' development.

Further details of Simon's commercial litigation practice can be found in the sections below.

Legal Services

Banking and Financial Services Litigation

- Defending an application for security for costs (£18m) brought by a clearing bank against a litigation funder where the underlying proceedings involved a LIBOR manipulation / mis-selling claim in which the damages claimed exceeded £600m (led by Michael McLaren QC, Fountain Court Chambers).
- Instructed by Shearman & Sterling LLP to assist with amendments to the Financial Services and Markets Bill promoting enhanced accountability for the U.K.'s financial services regulators and the introduction of a financial adjudication scheme and the establishment of a new financial services tribunal. The drafting included significant amendments to the Financial Services and Markets Act 2000, the Financial Services Act 2012 and the First Tier Tribunal and Upper Tribunal (Chambers) Order 2010.
- Instructed in respect of alleged mis-selling of structured foreign exchange derivatives. The issues involved complex technical issues concerning the nature and effect of the transactions and the close out costs (led by Adam Tolley QC, Fountain Court Chambers).
- Instructed by a global firm to settle Particulars of Claim to enforce various security documents when the collateral held by the security agent was insufficient. Claims against several overseas-based guarantors.
- Advised a firm of solicitors in a claim against a clearing bank concerning its 'global restructuring group' and settled the Particulars of Claim.
- Acting in a wide variety of financial disputes concerning claims which included alleged Financial Conduct Authority regulatory breaches under COBS and ICOBS, including issues as to whether such claims were actionable.
- Acting for two clearing banks in relation to a series of claims (ongoing) concerning the unfair relationship provisions under section 140A and the available remedies under section 140B of the Consumer Credit Act 1974. The legal issues involved include limitation (and often allegations of deliberate concealment under s32 of the Limitation Act 1980, compromise, unfairness, and the entitlement to statutory interest.

Commercial

- Instructed to advise the liquidators of a multinational company in respect of potential claims exceeding \$750m against its former auditors.
- Advising on an LCIA arbitration concerning a dispute arising under an international distribution agreement. Value circa \$20m.
- Instructed to enforce or oppose enforcement of several adjudicator's awards in the High Court in London, Leeds, Newcastle, and Manchester (including *MG Scaffolding (Oxford) Ltd v Palmloch Ltd* [2019] EWHC 1787 (TCC))
- Successfully represented the claimant in Part 8 declaratory relief proceedings regarding whether an individual entered into a construction contract in a representative rather than personal capacity. *Maftoon t/a FM Construction Services v (1) Ahmed Sayed and (2) Lebaneat (Yarm) Limited* [2020] EWHC 1801
- Instructed in respect of a claim made by a well-known Japanese car manufacturer against an Italian based manufacturer of 'stop-start' batteries. The claim value exceeded £100m and included claims made in several European countries.
- Acted for a regional contractor in a series of disputes with its groundwork sub-contractor across several projects, including advising on various adjudications; successful enforcement of an adjudicator's award; the defence of Part 8 proceedings; prosecution of separate Part 8 proceedings regarding declaratory relief as to whether a document was a valid 'pay-less' notice; and the defence of Part 7 proceedings involving the underlying dispute in the adjudication enforcement proceedings.
- Represented residential homeowners in a multi-day trial defending a claim for wrongful termination of a building contract and a lost profits claim.
- Acting for several homeowners in a claim brought against a national homebuilder alleging negligent design, defective workmanship, failures to comply with Building Regulations and NHBC codes of practice and breaches of the Defective Premises Act 1972.
- Acting in a multi-party dispute in the TCC in Manchester concerning claims arising in respect of an 'eco-village development'.
- Advised and settled proceedings in respect of allegedly defective electrical installation work to an on-shore wind farm.
- Advised a Czech based manufacturer of specialist farming equipment in respect of a multi-party claim in which jurisdiction issues arose.
- Advised on several franchise dispute and have acted for the franchisor and franchisees in proceedings in the Business and Property Courts.
- Instructed to advise on factoring agreements / enforceability of assignments and proceedings against off-shore based parent company guarantors.

Professional Liability

Simon has many years of experience advising the leading insurers on claims concerning construction professionals (architects, engineers, project managers, quantity surveyors, geotechnical engineers, and design and build contractors). Simon has developed his professional liabilities expertise to advise on claims concerning legal, insurance, property and construction professionals and a summary of his experience is identified below.

Lawyers

Simon has significant experience of bringing and defending a wide variety of solicitor negligence claims

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including commercial and residential property transactions, alleged negligent conduct of litigation, failed transactions, claims in respect of multiple dwelling relief and defending alleged breaches of the GDPR, breach/invasion of privacy, negligence, misuse of private information and breach of confidence claims. Examples include:

- Drafting Particulars of Claim and other statements of case and attending interim hearings in respect of several claims brought by (generally) Far East based claimants against several firms of solicitors who acted for the claimants in the purchase of residential units in an off-plan mixed-use residential development. Simon acted unled for numerous claimants in several separate proceedings which were together case managed in the Manchester District registry. One of the actions in which Simon was sole counsel for the claimants was listed for a 5-week trial (November 2021) in the Chancery Division of the Manchester District registry but that (and other claims) were resolved at mediation.
- Acting for a firm of solicitors and defending at a multi-day trial allegations of professional negligence arising from the conduct of litigation concerning the renewal of a commercial lease.
- Acting for a City firm in a complicated matter where the Claimant alleged negligence in respect of advice given concerning her status as a potential executrix of an estate (where the death occurred abroad but the death certificate could not readily be obtained) and her potential interest in the proceeds of litigation in which she asserted an equitable interest. Trial listed for later in 2022.
- Advising generally concerning claims against solicitors in respect of commercial and residential property transactions, alleged negligent conduct of litigation and failed transactions.
- Advised a firm of solicitors in respect of numerous claims made by former and existing clients regarding alleged breaches of GDPR, breach/invasion of privacy, negligence, misuse of private information and breach of confidence claims.
- Advising on a potential claim against a barrister concerning the conduct of a multi-day trial regarding a claim by an individual against a bank and advising on related potential claims against the solicitors and other parties.

Insurance and Insurance Brokers

- Settled the Defence in a substantial claim brought by several claimants against an insurance broker. It is alleged that the broker failed to effect the relevant insurances in respect of an industrial unit and stock that was subsequently destroyed by a fire.
- Advising and settling Particulars of Claim in respect of claims brought under both Third Party (Rights Against Insurers) Act 2010 and the earlier 1930 Act.
- Advising insurers on coverage matters including breach of warranty, misrepresentation, scope of notification, extent and application of cover and advising on and drafting declinature letters.
- Advising policyholders in respect of denial of indemnity by insurers and acting in the subsequent litigation.

Surveyors

Simon's practice includes advising both lenders and residential purchasers on claims against surveyors and defending such claims. In particular:

- Advising a specialist lender on a claim (£1m+) against a commercial property surveyor concerning the valuation of a significant purpose-built student accommodation development.
- Drafting pleadings, attending interim hearings, and conducting several trials in respect of claims brought against cavity wall surveyors and installers.

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- Defending and/or bringing claims against building surveyors in which it is alleged that the surveyor failed to identify defects in the buildings, Simon's experience spans both residential and commercial units.
- Prosecuting and defending claims against valuation surveyors.

Property Professional (excluding construction)

Simon defends claims brought against managing and letting agents, including claims (and appeals) in both the First Tier Tribunal (Property Chamber) and Upper Tribunal (Property Chamber):

- Defending in a two-day hearing in the FTT claims against the managing agent concerning the calculation and collection of maintenance charges and the application and/or validity of various section 20 notices and the operation of the Landlord and Tenant Act 1985.
- Acted for the successful respondent management company in an appeal to the Upper Tribunal. The claim had a complicated background and involved many applications by the tenant to the First Tier Tribunal over a number of years: see *Brett v Harlow Court Limited* [2022] UKUT 52 (LC)
- Drafting various defences in claims advanced against letting agents.

Construction Professionals

Simon's construction expertise spans claims both for and against construction professionals which is complemented by his experience of acting in non-insurance related construction matters. Simon's recent construction professional indemnity experience includes:

- Represented a design and build contractor in a claim against its engineering sub-contractor regarding the negligent design of an academy school roof.
- Acting for a quantity surveyor in two separate adjudications concerning interim valuations of two property developments. The claims arose on the administration of the contractor and it was alleged the interim valuations were negligently over-valued. Successful in both adjudications.
- Instructed on a multi-party £10m+ claim concerning an allegedly defective rain-screen cladding system.
- Advised and settled proceedings in respect of allegedly defective electrical installation work to an on-shore wind farm.
- Represented insurers of a mixed-use development heavily damaged by fire in claims against the architect, engineer and design and build contractor.

Construction and Engineering

Simon's non-professional liabilities construction experience includes:

- Instructed to enforce or oppose enforcement of several adjudicator's awards in the High Court in London, Leeds, Newcastle, and Manchester (including *MG Scaffolding (Oxford) Ltd v Palmloch Ltd* [2019] EWHC 1787 (TCC))
- Successfully represented the claimant in Part 8 declaratory relief proceedings regarding whether an individual entered into a construction contract in a representative rather than personal capacity. *Maftoon t/a FM Construction Services v (1) Ahmed Sayed and (2) Lebaneat (Yarm) Limited* [2020] EWHC 1801.
- Acted for a regional contractor in a series of disputes with its groundwork sub-contractor across

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several projects, including advising on various adjudications; successful enforcement of an adjudicator's award; defence of Part 8 proceedings; prosecution of separate Part 8 proceedings regarding declaratory relief as to whether a document was a valid 'pay-less' notice; and the defence of Part 7 proceedings involving the underlying dispute in the adjudication enforcement proceedings.

- Represented residential homeowners in a multi-day trial defending a claim for wrongful termination of a building contract and a lost profits claim.
- Acting for several homeowners in a claim brought against a national homebuilder alleging negligent design, defective workmanship, failures to comply with Building Regulations and NHBC codes of practice and breaches of the Defective Premises Act 1972.

Direct Access

Simon is able to accept instructions directly from members of the public, companies and other entities through the public access scheme (also known as direct access). He is happy to accept instructions on a direct basis in appropriate cases. If you wish to instruct Simon on a direct basis, please speak to the clerks.

For more information on public access, please see the Bar Council [website](#).

Memberships

- Professional Negligence Bar Association
- North Eastern Commercial Bar Association
- North Eastern Circuit
- The Society for Construction Law
- TECBAR

Education

- 1992 – 1995 University of Lancaster, Law and Economics (2:1)
- 1995 – 1996 College of Law, Legal Practice Course
- 1998 – admitted as a solicitor
- 2016 – Higher Rights of Audience (civil)

Georgia Purnell

Call Date: 2018



Georgia is a commercial litigator. She specialises in banking and financial services litigation, commercial fraud and company and insolvency disputes. Georgia also acts in professional liability claims related to her areas of expertise.

Georgia primarily acts in litigation involving accessorial liability, asset recovery/tracing, banking and financial services disputes, breach of fiduciary duty and trust, conspiracy and fraud and she has significant experience in company and insolvency disputes. Georgia is often instructed as sole Counsel in complex commercial litigation across her range of specialisms and has substantial High Court experience in both trials and interlocutory applications.

Legal Services

Banking and Financial Services

Georgia has significant experience acting for and against banks and other financial institutions in all aspects of banking and financial services disputes.

Georgia's recent experience includes:

- Advising on numerous proposed claims against leading banks for breach of the Quincecare duty of care for failing to prevent the misappropriation of company funds when put on inquiry, including a claim with a value exceeding £5.5million in which it was alleged the bank was put on notice that the instructions to execute transactions exceeding £5.5 million by the company's directors involved the misappropriation of company money.
- Advising as to the prospects of success of a proposed claim alleging dishonest assistance and/or breach of the Quincecare duty of care on part of an international bank connected with a Ponzi scheme.
- Successfully defending a claim brought against a bank for alleged interest rate swap mis-selling.
- Advising on a proposed claim for the mis-selling of complex interest rate hedging products.
- Part of the specialist Counsel team instructed to draft amendments to financial services legislation promoting enhanced accountability for UK's financial regulators.
- Advising and acting in many proposed and issued claims for actionable breaches under s.138D FSMA

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(including with limitation issues), including a claim brought against an insurance broker for breach of the ICOBS rules (and negligence and breach of retainer) for failing to arrange adequate insurance.

- Advising on the consequences of carrying on regulated activities under FSMA in breach of the general prohibition, including recently as to the prospects of a claim pursuant to s.26 FSMA for recovery of monies paid under a mortgage to an unregulated lender and a claim based on unauthorised investment advice.
- Advising in respect of a claim by a pension fund against an investment bank for losses incurred in the course of securities lending.
- Acting and advising in multiple claims defending banks and financial institutions for breach of statutory duty, breach of fiduciary duty and unfair relationships.
- Advising as to the prospects of success of challenging FOS decisions, and the available routes of challenge.
- Advising as to the prospects of success of defending a claim for irresponsible lending.

Civil Fraud and Asset Recovery

Georgia specialises in civil and commercial fraud. She primarily acts in litigation involving accessorial liability (including dishonest assistance and knowing receipt), asset recovery and tracing, breach of fiduciary and statutory duties, breach of trust, bribery, conspiracy, fraudulent misrepresentation and banking, financial and investment fraud.

The nature of Georgia's practice means she has particular strength in acting in cases in which urgent relief is sought (primarily freezing, search and disclosure orders alongside proprietary injunctions) and she is experienced in international cases or those with jurisdictional issues and challenges.

Georgia's recent experience as sole Counsel includes:

- Appearing successfully in a High Court trial against a director with a value of £1.3million concerning the director's misfeasance and breach of fiduciary duty as a result of the fraudulent misappropriation of company money and payment of unlawful dividends.
- Acting for the successful claimants in a High Court trial for breach of fiduciary duty arising from the fraudulent transfer of company assets.
- Currently instructed in proceedings with a claim value in excess of £1.5million for breach of trust and fiduciary duty.
- Advising as to a prospective conspiracy and deceit claim arising from a Ponzi scheme against multiple defendants with a value in excess of £2million.
- Advising on a derivative action with a value of £1.5million brought against the company's director for breaches of fiduciary duty, involving the misappropriation of company funds paid to investment fraudsters where the director was on notice of the fraudulent scheme.
- Advising as to the prospects of success of a knowing receipt claim against a third party arising from the receipt of significant funds with the alleged knowledge that they were fraudulently misappropriated by a director in breach of fiduciary duty.
- Significant experience obtaining and resisting freezing orders in fraud cases.
- Advising as to an application for a search order application in circumstances in which the defendant in fraud litigation threatened the destruction of financial data (and computers and remote storage systems containing the data) central to the claimant's case.
- Successfully defending an energy company at trial in a claim for fraudulent misrepresentation and breach of contract.

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- Advising in respect of disclosure applications in the High Court on behalf of an office-holder relating to underlying proceedings involving complex equitable proprietary claims (based on breach of duty, bribery, unlawful means conspiracy and knowing assistance).
- Advising in litigation with a value in excess of £1.5million for breach of trust and fiduciary duty in relation to the fraudulent misappropriation of company assets.

Commercial

Georgia's commercial practice covers a wide range of disputes and is complemented by her experience in banking and financial services litigation and corporate and insolvency disputes.

Georgia's recent experience includes:

- Acting and advising in a complex guarantee dispute with a value in excess of £1million.
- Advising a potential defendant to a substantial claim seeking to challenge the enforceability of complex personal guarantees and indemnities.
- Acting for a prominent PLC in the construction industry in the High Court in relation to debts owed by a construction company on three major development projects of over £1million.
- Acting for a pension trustee in Gibraltar in a dispute concerning the distribution of a £multi-million QROPS fund (led).
- Significant experience obtaining freezing orders in general commercial litigation disputes (non-fraud), including obtaining a freezing order in the High Court against a defendant who had been unjustly enriched by the mistaken payment of significant monies by an office holder based in the Republic of Ireland and on receipt started to dissipate those funds.
- Successfully representing one of the most prominent Emirati banks in a High Court application to contest the jurisdiction of the English courts in the context of a claim for breach of trust, breach of fiduciary duty and breach of contract.
- Successfully obtaining an order for summary judgment, alongside a significant indemnity costs order, on behalf of a Claimant domiciled in Hong Kong against a Defendant domiciled in Chile in a breach of contract claim. Currently advising as to enforcement of the judgment.
- Advising in relation to a security for costs application against an appellant domiciled in Australia.
- Advising a group of companies registered in Hong Kong as to the prospects of a contractual claim against a prominent Japanese automotive company with issues of the jurisdiction of the English Courts to hear the claim.
- Acting in relation to the enforcement of an adjudicator's award in the TCC.

Company and Partnership

Strengthening Georgia's commercial litigation practice is her extensive experience in company and partnership litigation. Georgia regularly acts in shareholder disputes and has particular experience in disputes with allegations of breach of fiduciary duty.

Recent cases in which Georgia has been instructed as sole counsel include:

- Advising a prospective petitioner in a £multi-million shareholder dispute alleging breach of fiduciary duty and unfairly prejudicial conduct arising from removing the petitioner as a director and preventing the petitioner from being involved in the management of the company, with further allegations of mismanaging and failing to account for company funds and assets with a view to preventing the

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petitioner from obtaining payment of fair value for their shares.

- Advising in relation to a derivative action with a value of £1.5million brought against the company's director for breaches of fiduciary duty, involving the misappropriation of company funds paid to investment fraudsters where the director was on notice of the fraudulent scheme.
- Advising on a high value partnership dispute regarding the enforceability of restrictive covenants.
- Acting in a complex unfair prejudice petition with a value of £1million.
- Acting in a high value partnership dispute concerning alleged serious breaches of the partnership agreement and diversion of the partnership's primary client base.

Insolvency

Georgia is frequently instructed in claims brought by office-holders against company officers, predominantly for breach of fiduciary and statutory duty, fraud, misfeasance and antecedent transactions, alongside litigation involving banks and other third parties. Georgia has significant High Court trial experience in all aspects of insolvency litigation.

Georgia's recent experience includes:

- Acting for the successful liquidators in a High Court trial against the company's director with a value in excess of £1million concerning the director's misfeasance and breach of fiduciary duty as a result of the fraudulent misappropriation of company money and payment of unlawful dividends.
- Significant experience acting for office-holders in the High Court in relation to defective office-holder appointments including in *Re Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch)*.
- Advising in proceedings brought pursuant to the Third Parties (Rights against Insurers) Act 2010 with a claim value in excess of £1.5million relating to underlying liability of the insured for breach of trust and fiduciary duty.
- Acting for the successful liquidators in a High Court trial against the company's director in a breach of fiduciary duty, preference, transaction at undervalue and s.423 claim.
- Successfully appearing in a High Court trial against a director for breach of fiduciary duty as a result of orchestrating a scheme of payments to connected parties disguised as payments for proper company purposes.
- Currently instructed by office-holders in proceedings brought against de jure and de facto directors with a claim value in excess of £1.5million for breach of trust and fiduciary duty.
- Appearing on behalf of a liquidator in an application in the High Court for a warrant for the arrest of company directors domiciled in Northern Ireland and the related seizure of documents for failure to attend a private examination and comply with an order to deliver up documents.
- Appellate experience, including acting for the successful trustees in bankruptcy in a High Court appeal relating to beneficial interests in land and successfully appearing on behalf of joint trustees-in-bankruptcy in the High Court in an application for relief from sanctions to pursue an out of time appeal.
- Acting for a prominent PLC in the construction industry in a creditor's administration order application in the High Court in relation to debts owed by a construction company on three major development projects of approximately £1million.
- Acting for directors in s.217 proceedings issued for breach of s.216 for acting as directors of a company with a prohibited name brought by prominent litigation funders. Issues as to whether the new company was "trading" within the meaning of the statutory exception in the 12 months prior to the liquidation.
- Successfully acting for the applicant in urgent injunctive relief proceedings in the High Court restraining presentation of a winding-up petition.

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- Advising in respect of disclosure applications in the High Court on behalf of a liquidator in relation to underlying proceedings involving complex equitable proprietary claims (based on breach of duty, bribery, unlawful means conspiracy and knowing assistance).

Notable Cases

Re Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch).

Application in the High Court relating to a defective administration extension where the consent of hundreds of international investors with claims exceeding £4.5 million, who should have been treated as secured creditors as holders of equitable liens, was not obtained. Significant judgment considering whether the Court can backdate a retrospective administration order for more than 364 days and determining that the post-Brexit legislation applied despite the order being backdated before the end of the transition period. Retrospective administration order plus an extension obtained.

Professional Liability

Georgia is experienced in directors' and officers' (D&O) claims and related coverage disputes, alongside claims against insolvency practitioners, in which she is particularly well positioned to act given her extensive experience in corporate and insolvency litigation.

Georgia regularly advises and acts (for both claimants and defendants) in claims concerning directors' and officers' breaches of fiduciary and statutory duty, insurance coverage disputes under D&O policies, claims with an insolvency element, proceedings brought pursuant to the Third Parties (Rights Against Insurers) Act 2010 and misfeasance proceedings against office-holders.

Georgia's recent experience includes:

- Successfully acting in a High Court trial with a value in excess of £1million concerning a director's misfeasance and breach of fiduciary duty as a result of the misappropriation of company money and payment of unlawful dividends.
- Successfully appearing in a High Court trial against a director for breach of fiduciary duty as a result of orchestrating a scheme of payments to connected parties disguised as payments for proper company purposes.
- Successfully appearing in a High Court trial against a director in a breach of fiduciary duty, preference, transaction at undervalue and s.423 claim.
- Currently instructed in proceedings brought against de jure and de facto directors with a claim value in excess of £1.5million for breach of trust and fiduciary duty.
- Advising on insurance coverage disputes under D&O policies, including recently advising at to the rejection of an indemnity relating to an underlying breach of fiduciary claim with a value of £1.5million.
- Advising and acting in claims under Third Parties (Rights Against Insurers) Act 2010, including currently instructed in proceedings brought under the 2010 Act with a value in excess of £1million.
- Advising a creditor of a company in administration as to the prospects of success of a misfeasance claim against the administrators for failing to realise the true value of the company's assets and incorrectly disclaiming property.
- Advising a group of creditors as to the merits of a misfeasance claim against the administrators for distributing dividends in breach of the order of priority, including the payment of a dividend to a lower ranking secured charge holder and the payment of the administrators' fees first where there was no secured creditor consent to prioritise the remuneration.

- Advising and successfully appearing in the High Court on behalf of joint administrators in relation to their proposed appointment as liquidators in circumstances in which many creditors had brought misfeasance proceedings against the joint administrators.

Memberships

- Chancery Bar Association
- TL4 Fire

Education

- Bar Professional Training Course (Outstanding) – BPP (2017 – 2018)
- GDL (Distinction) – BPP (2016 – 2017)
- BA History – Brasenose College, Oxford

Awards

- Cholmeley Scholarship – Lincoln’s Inn
- Lord Denning Scholarship – Lincoln’s Inn
- Hardwicke Scholarship – Lincoln’s Inn
- Buchanan Prize – Lincoln’s Inn
- Lord Haldane Scholarship – Lincoln’s Inn
- Prize for achieving the highest mark in Commercial Dispute Resolution – BPP
- Advocacy Scholarship – BPP

Professional Negligence Claims Against Financial Services Professionals

Simon Arnold & Georgia Purnell
PNLA

Professional Negligence and Liability Conference - London
12 October 2023

Introduction – what we will discuss

1. The general framework for claims against financial services professionals.
2. Remedies other than claims in contract and/or tort.
3. Specific analysis of claims against:
 - Auditors and accountants
 - Insolvency office-holders
4. Questions and answers.

The general framework

In principle, the legal rules are no different from those applying to others who undertake a specific task and profess some special skill in carrying out that task.

“Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of care and skill.”

Lanphier v Phipps (1838) 8 C. & P. 475, per Tindal CJ

Points to note:

- Rarely does a professional guarantee a particular outcome
- The law has regard to professional self-regulation historically permitted to professionals. Courts are thus unwilling to make findings of negligence in the absence of relevant expert evidence.

5 HARE COURT

Significance of Bolam

"The rule is well known: a professional (in this instance a doctor) acting in accordance with a practice accepted by a proper and responsible body of medical opinion was not negligent "...merely because there is a body of opinion which would take a contrary view"

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
[587-588] per McNair J

5 HARE COURT

Significance of Bolam

Should not be overstated:

- Judges increasingly willing to consider the general practices of professions to determine if a contrary approach does properly represent a body of responsible opinion: for examples see Bolitho v City & Hackney HA 1998] A.C. 232 at 241–243 (Lord Browne-Wilkinson). G & K Ladenbau v Crawley & de Reya [1978] 1 WLR 266 [282] (Mocatta J) Brown v Gould & Swayne [1996] P.N.L.R. 130 at 136–137, where Millett LJ said that issues of appropriate conveyancing practices should generally be regarded as questions of law

5 HARE COURT

Significance of Bolam

Limitations:

- Applies to 'known' problems.
- In so far as the negligence alleged is a failure to foresee a problem, then the fact that a large number of other equivalent professionals would not have foreseen the problem is likely to be of little assistance: see 199 Knightsbridge Development Ltd v WSP UK Ltd [2014] EWHC 43 (TCC).
- The TCC found that liability was established despite evidence that other designers of a water system in a high rise building would not have foreseen the issue (a catastrophic pressure surge following a partial drain down of the system). However, the Claimants failed on causation because it failed to establish that its personnel would have followed the correct procedure. Alternatively, because the required anti-surge valves would not have been installed in time.

5 HARR COURT

Duties to third parties

The law is slow to impose on professionals liability to third parties in respect of economic loss and will only do so in restricted circumstances.

The general principles derived from the case law are:

1. There must be a degree of proximity between the parties
2. The law will not generally create a liability to an indeterminate class of persons or in respect of an indeterminate class of transactions.
3. When a professional provides advice or information to a client knowing that the client intends to use that information or advice to encourage a third party to act on that information and if it does so and the advice or information is negligently wrong so the third party suffers loss, then the professional may (absent any clear evidence that the professional only accepts liability to his client) be visited with liability for economic loss in respect of that third party: see the recent decision in David McLean and others v Andrew Thornhill O.C. [2022] EWHC 457 (Ch). A barrister who provided advice to the promoters of a tax avoidance scheme did not owe a duty of care to investors to whom his advice had been made available by the promoters.
4. Ordinarily no duty will be imposed where the duty owed to the client would conflict with the prospective duty said to be owed to the third party: Connelly-Martin v Davis [1999] PN L.R. 826 which is a case on whether a barrister may owe a duty of a care to their opponent in litigation.

5 HARR COURT

2. Remedies other than claims in contract and/or tort

Do not overlook other potential remedies:

Trusts

1. In a financial advisory context, monies may be held on **trust**. Where a professional handles money or property on behalf of another, he becomes a trustee of it either because (a) the law imposes that obligation as it does in respect of funds held by solicitors, stockbrokers and insurance brokers (b) or by ad hoc arrangement, such as in a conveyancing transaction with a mortgage. In that type of transaction, the solicitors hold the mortgage monies on trust for the lender pending disbursement on completion.
2. If a trust arises the duty is to employ the funds strictly in accordance with the terms of the trust. Any contrary disbursement is a breach of the trust and the trustee is generally strictly liable and there is no need to prove fault (and ergo no possibility to argue contributory negligence).
3. Remember a trustee may seek the protection of the Trustees Act 1925 s61 if it can be established that "... [he] has acted **honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.**"

5 HARR COURT

Fiduciary duties

A professional may owe concurrent fiduciary duties to the client. The most obvious examples of circumstances where fiduciary duties are imposed is on trustees and company directors. Often it is easier to recognise when a fiduciary relationship exists than to explain how such a relationship arises.

A fiduciary is *"is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary"*.
Bristol & West Building Society v Mothew [1988] Ch. 1 [18] per Millet LJ

5 HARE COURT

Fiduciary duties

When might such a duty arise?

- Imposed by law when where the professional owes an exclusive loyalty to his principal's interests and must put those above all others, including his own.

What are the general duties?

- Not to alter the position to his own or a third party's advantage.
- Not, unless freely and with full information consented to by his principal (or authorized by law) to have a personal interest or inconsistent engagement with a third party.

5 HARE COURT

Remedies for breach of fiduciary duties

Often more attractive than a damages remedy. Can seek:

- **Disgorgement of profits.** It is irrelevant that the fiduciary acted in good faith or with no intent to benefit at the expense of the claimant or indeed that the claimant would not have made the profit. Profits are held on a constructive trust for the claimant and C can take ahead of general creditors or can trace them if converted into other assets.
- **Equitable compensation:** arises when the breach of duty causes loss. Essentially this is a claim for disloyalty. To be liable C must demonstrate a conscious and intentional breach of the relevant obligation: negligent failure to advise or pass on relevant information is insufficient.

5 HARE COURT

Exclusion clauses

Parties are generally permitted by agreement to limit or exclude their liability arising in either contract or tort provided the agreement covers the relevant matter and subject to public policy considerations precluding limitation of liability for a person's fraud or deliberate wrongdoing. There is also a statutory restriction on limitation of liability clauses (**LoL**).

The Unfair Contract Terms Act 1977: s.2(2) provides that in the case of loss or damage caused by negligence (other than personal injury) any exclusion or restriction of liability (including liability in tort to a third party) is ineffective except in so far as it satisfies the "requirement of reasonableness".

Reasonableness is defined by s.11 of the Act; and the onus of proving (as one would expect) that an exclusion of liability is reasonable rests on the person seeking to rely on it.

5 HARE COURT

Auditors and accountants

Accountants and auditors undertake a wide range of functions, often on a global scale. They may advise on financial transactions, tax efficient structures, provide forensic accountancy advice, advice on and prepare financial statements, advise on purchase and acquisition agreements and perform statutory and ad hoc audits. There is a large range of functions undertaken in a heavily regulated and global market

5 HARE COURT

Duties to the client

- Can be sued in both contract and tort
- Be mindful of other avenues: trustee relationship/ fiduciary duties / duties of confidence / regulatory obligations (beyond the scope of this talk but remember FSMA 2000).
- Note the statutory control on auditors to limit liability contained in the Companies Act 2006 s532-534. In summary, any limitations must be agreed for each audit year and limited to an amount which is 'fair and reasonable' (s537(1))

5 HARE COURT

Breach of duty

- Expected to use the level of skill to be expected of a reasonable practitioner in the field.
- As seen, following a reasonable body of professional practice is presumptive but not conclusive evidence of non-negligent practice.
- Reference should be made to the retainer to determine precisely what the accountant was required to do, as the scope of duty is framed by what the accountant was employed (and paid) to do:
 - An accountant employed to fill in tax returns was held not liable for failing to draw his employer's attention to fraud: Leach v Stokes [1937] 1 R. 787
 - An accountant advising on the disposition of a shareholding was not obliged to give unrequested advice on corporation tax: Pegasus Management Holdings SCA v Ernst & Young [2010] EWCA Civ 181
- An auditor must make a reasonable and proper investigation of the accounts and of the stock. If something is amiss, he must notify the employer. If an auditor discovers speculation, he must draw the employer's directors (or a third party's) attention to that fact: Sasea Finance Ltd v KPMG [2000] 1 All E.R. 676.
- A properly incorporated company has an identity and a legal personality distinct from its subscribers, shareholders and directors (as we all know from Solomon v Solomon & Co Ltd). A company must act through the medium of a human. The issue was when are the acts and the intentions of the human to be treated as the acts and intentions of the company?

5 HARR COURT

- In the circumstances of the case, there was no basis to attribute the fraud of the director to the company. Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm) [2009] UKHL 39 doubted.
- Thus, now difficult for an auditor to argue that in effect the company is seeking to rely on its own criminality (by attribution of the fraudulent director's acts and motives to the company) and thereby relying on an illegality defence to defeat the claim (ex turpi causa non oritur action).

5 HARR COURT

Loss and causation

In addition to proving breach of duty a claimant **must** establish that he suffered recoverable **loss** because of the breach. Examples:

- **Causation:** If negligent advice was given, must establish that reliance would have been placed on it. If the claimant would not have relied on the advice, even if correct, then causation is not established and the claim will fail: see Beary v Pall Mall Investments (a firm) [2005] EWCA Civ 415.
- **Loss:** where the net asset value of a company was not affected by defalcations (which the accountant negligently failed to identify in a report), then there is no recoverable loss in circumstances where the claimant acquired the company based on the negligent report: Dixon v Deacon (1990) 70 D.L.R. 609

5 HARR COURT

Insolvency

- Generally, immaterial if the claimant is insolvent as the loss is suffered by the creditors and thereby actionable.
- Sharp distinction drawn when the loss claimed to arise from an accountant's breach of duty leads to money being paid away such that one group of creditors is prejudiced viz a viz another creditor group.
- For example, a company continues to trade and makes payments to present creditors to the prejudice of other creditors. In that situation no legal and recoverable loss has been suffered: Stanford International Bank Ltd v HSBC Bank plc [2022] UKSC 34.

5 HARE COURT

SAAMCO / Manchester Building Society

- The court will apply the principles in SAAMCO and BPE Solicitors v Hughes Holland [2017] UKSC 21 that a professional providing advice is liable only for the consequences of that specific advice being incorrect and not for other foreseeable losses.
- If a loss falls within the scope of the accountant's duty to advise, it will be recoverable in full: AssetCo Plc v Grant Thornton UK LLP [2020] EWCA Civ 1151.
- Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20 provides a helpful and comprehensive analysis:
 - The scope of the duty of care assumed by a professional advisor is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given.
 - One looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.
 - The distinction drawn between "advice" and "information" in SAAMCO should not be treated as a rigid rule and the focus should rather be on identifying the purpose to be served by the duty of care assumed by the defendant.

5 HARE COURT

- Related to this, the SAAMCO counterfactual, which asks whether in an "information" case the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct, is simply a tool to cross-check the result given pursuant to an analysis of the purpose of the duty. It is subordinate to that analysis and should not supplant or subsume it.

5 HARE COURT

Measure of loss

- The sum which will put the claimant in the position which he would have enjoyed had the accountant properly performed the task. Illustrations:
 - If assets are sold at an undervalue, the recovery is the difference between the sale price and the market value: *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch).
 - If purchase a company based on negligently wrong audited figures the recovery is the difference in value between what was paid and what the company was worth at the time of the transaction: *West Coast Finance v Gunderson, Stokes, Walton* (1975) 56 D.L.R. (3d) 460.
 - If negligent tax advice is given, then the recovery will be the additional but unnecessary tax paid: *Midland Packaging Ltd v HW Accountants Ltd* [2010] EWHC 1975 (QB)
 - If accountants fail to identify that a company is insolvent (so it should be placed in liquidation) they are not liable for ordinarily trading losses arising simply because the company remains in existence: see *AssetCo*

5 HARE COURT

Insolvency office-holders

- The IA 1986 imposes wide ranging functions and duties on IPs.
- In discharging their functions, IPs are confronted with a wide range of stakeholders (the debtor, creditors, the debtor's associates, former office-holders, shareholders) and are often forced to make decisions in extremely challenging and urgent situations.
- There is obviously a lot that can go wrong...

5 HARE COURT

Meaning of "insolvency practitioner" – s.388 IA 1986:

- Companies – liquidator, provisional liquidator, administrator, administrative receiver, nominee or supervisor: s.388(1)
- Individuals – trustee, interim receiver, nominee, supervisor, administrator of insolvent estate: s.388(2)

5 HARE COURT

Routes to claim

- Part 7 proceedings.
- Under the statutory provisions in the IA, if claimant/applicant has standing:
 - "...or been guilty of any misfeasance or breach of any fiduciary or other duty..." (s.212 – liquidators and administrative receivers)
 - "... any misfeasance or breach of fiduciary or other duty by a trustee..." (s.304 - TIBs)
 - "...has breached a fiduciary or other duty in relation to the company..." (para 75 Sch B1 – administrators)
- "Other duty" wide enough to include in breach of a duty of skill and care, something which although not spelled out in the legislation "comes with the job" – per Hoffman LJ Be Centralcrest Engineering Ltd [2000] BCC 727.
- Also consider whether, rather than pitching the claim as a professional negligence claim, requiring the constituent elements, there is scope to apply on the basis the office-holder has acted outside their powers and accordingly are strictly liable for the consequences.

5 HARRIS COURT

To whom are the duties owed

- As a general rule an office-holder owes no duty to individual creditors. Individual creditors have no proprietary interest in the assets – they only have a right to have the assets administered in accordance with the statutory scheme.
- In the context of a winding up:

"The making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company. The responsibility for collecting the assets and implementing the scheme is vested in the liquidator subject to the ultimate control of the court. The creditors do not themselves acquire a beneficial interest in any of the assets, but only have a right to have them administered in accordance with the statutory scheme".

Mitchell v Carter [1997] 1 BCLC 673 citing
Ayerst v C & K (Construction Ltd) [1976] AC 167

5 HARRIS COURT

To whom are the duties owed

- Circumstances in which an IP will be found to have assumed a responsibility to an individual creditor during the insolvency process will be extremely rare.
- Liability to third parties is also exceptional – where contracts are entered into with third parties, it will often be expressly made clear that as per the IA the IP contracts as agent for the company and not in a personal capacity. Whether he or she does in fact is a matter for construction in accordance with the usual principles. But it would be extremely rare for a well-advised IP to incur personal liability (especially without an indemnity).

5 HARRIS COURT

Sources of duties

- Duties with which IPs must comply come from a number of sources depending on whether the IP is acting as (a) a contracted advisor (b) an agent of the company and/or (c) an officer of the court.
- Accordingly, the duties arise from:
 - Statute;
 - Equity;
 - Contract; and
 - Tort.
- As ever, duties intersect and can conflict.

5 HARE COURT

Statutory duties

- Created largely by the IA 1986.
- Core duty will usually be to get in, realise and distribute the assets of the debtor in accordance with the stakeholders' rights relative to one another and the *pari passu* principle, applying the "waterfall" of statutory priorities.
- From this essential duty all other statutory duties arise.

5 HARE COURT

Fiduciary duties

- An office-holder becomes a fiduciary on appointment – the task is to take into their custody or control *'all the property and things in action in which the company is or appears to be entitled'* – s.144(1) IA 1986; see also para 67 Sch B1.
- The IA expressly states in exercising his or her functions, the office-holder becomes agent: see e.g. *"In exercising his functions under this Schedule the administrator of a company acts as its agent"* – para 69 Sch B1.
- Therefore, exercise of the wide-ranging statutory powers is controlled by fiduciary as well as the other duties, with the aim of protecting the company as principal.
- The "single-minded" loyalty is to promote the interests of the creditors collectively.
- Key duties to consider (a) duty to act within powers (b) duty to act independently.

5 HARE COURT

Contractual duties

- Post-appointment, an IP does not have a "client" as such, with a relationship governed by a retainer.
- However, pre-appointment, very common for an IP to be engaged an advisory capacity with the relationship governed by contract.
- IPs will often be engaged to advise on the available insolvency procedures and will frequently be wearing different hats.
- For example, an IP who failed to properly advise the debtor during an adjournment of a creditors' meeting for a voluntary arrangement owed the debtor a duty of care because the IP had not given the debtor the indication that he was acting as nominee and not the debtor's adviser such that it was fair, just and reasonable to impose a duty on him: *Prosser v Castle Sanderson Solicitors (a firm)* [2002] EWCA Civ 1140.

5 HARR COURT

Duty of care

- Duty to exercise reasonable care and skill in the performance of their functions to the standard of an ordinary, reasonably skilled and careful IP: per Snowden J in *Davey v Money* [2018] Bus LR 1903 at [622].
- Equivalent of the common law duty of care.
- Claimant must establish the IP: "*made an error which a reasonably skilled and careful insolvency practitioner would not have made*" – *Re Charnley Davies Ltd (No. 2)* [1990] B.C.C. 605.

5 HARR COURT

Categories of claims

Commonly, claims against IPs will give rise to the following issues:

- Advice.
- Conflicts.
- Investigations.
- Sales and investigations.
- Conduct of litigation.
- Trading.
- Payments.
- Distributions.

5 HARR COURT

Examples

- Although IP owed a duty of care to debtor in giving advice at a creditors' meeting when he advised in respect of the proposed IVA, there was no causative loss to the debtor in the IP failing to advise of a possible adjournment of 14 days because the adjournment would have produced no different outcome in the creditors refusing to approve the IVA. The loss of chance was "very speculative indeed": Prosser v Castle Sanderson Solicitors (a firm) (Advice)
- Former liquidator was liable for breach of fiduciary duty for failing to make payments to unsecured creditors on a *pari passu* basis, with inadequate steps having been taken to ascertain the company's state of affairs, inadequate consideration given to its trading, assets and liabilities, inadequate instructions given to lawyers and overall inadequate enquires made: Top Brands Ltd v Sharma [2014] EWHC 2753 (Ch). (Payments)

5 HARE COURT

Examples

- Development site not sold by the former joint administrators at an undervalue – no breach of duty by the FJAs and the FJAs had properly marketed the development site, were entitled to instruct and rely on the advice of the same property agents who had previously instructed the syndicate of lenders and it was reasonable for them not to pursue a revised planning application and to rely on proper marketing rather than obtaining a valuation: Re One Blackfriars Ltd [2021] EWHC 684 (Ch). (Sale of assets)

5 HARE COURT

Defences

- Discretionary power of s.212 etc to grant or limit relief.
 - In Top Brands, the Judge rejected the liquidator's plea for relief, noting: "As to the fraud perpetrated on [the liquidator], she has no one but herself to blame for the payment away of the Sum" and "As to reliance on advice from [counsel], his advice was geared to his instructions and [the liquidator's] instructions were woefully incorrect and inaccurate".
- S.1157 CA 2006.
 - Very challenging to succeed.
 - Very few cases of IPs seeking to rely on s.1157. Again, rejected in Top Brands as being not reasonable.
 - Requirement to show action was both reasonable and honest.
 - Consider in particular reliance on professional advice where that reliance may be insufficient for the IP to succeed on breach, but may be sufficient to engage the relief under s.1157.

5 HARE COURT

3 HARE COURT



Georgia Purnell



Simon Arnold

3 HARE COURT



Philip Demetriou & Adrian Caley
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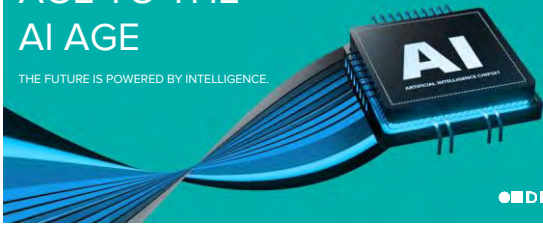
Philip is Senior Director of UK and European Sales at DISCO EMEA. With more than 20 years of international edisclosure experience working for KPMG, Epiq and Consilio, he has an extensive knowledge of how law firms and legal departments can embrace the benefits of cloud-based solutions to transform their businesses.

Adrian is an Account Executive at DISCO EMEA. Adrian is an experienced consultant and advisor, assisting leading corporate legal departments and law firms in their evaluation, implementation and optimisation of practice-focused technology, digital automation, and account business development.

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2

TAR 2.0 refers to a workflow where, generally, every document the TAR model identifies as most likely to be responsive is prioritized for review by human reviewers, and their coding further trains the algorithm.

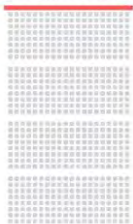
The Sedona Conference
TAR Case Law Primer, Second Edition
February 2023

Parties are to consider the use of technology / computer assisted review tools. These are software tools used for prioritizing or coding a collection of documents which take account of a senior lawyer's review and judgments on a set of documents and then extrapolate those judgments to the remaining document collection.

Where parties have considered the use of such tools but decided against it at this stage (particularly where the review universe is in excess of 50,000 documents) they should set out reasoning as to why such tools will not be used.

DRO - PD57AD

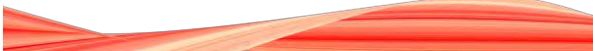
Natural document distribution



Search term prioritised distribution



DISCO AI prioritised distribution



■ ■ TAR 2.0 (AI) Review workflow process



Random Sample	Create a random sample of docs to determine content prevalence and start model training
Targeted Review	A review of targeted documents is used to further train the model
Document Review	Official document review commences
DISCO AI	DISCO AI picks up on the training and iterates until it is done finding relevant content
Validation Sample	Run a validation sample to confirm a negligible amount of relevant content remains

■ ■ AI-powered ediscovery



■ ■ Our approach to AI

<p>Integrated into Ediscovery</p>	<p>Cutting edge algorithms</p>	<p>Frequency of training and just-in-time batching</p>	<p>Cross-matter AI to speed up the next review</p>
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Success story

95% responsive documents found after reviewing only 17% of the total doc population

The challenge

- Firm type: Litigation boutique
- Case type: Contract dispute in the energy sector
- Review population: 1.375 million documents (low responsiveness rate)
- Goal: Protect the clients budget by reviewing the information that mattered most to the case, instead of irrelevant documents.

The verdict



50-80% in cost savings



113 avg docs/hr review speed



96% DISCO AI accuracy + 20x more effective than traditional review

Success story

DISCO AI reduces review population by 56%, yielding cost savings upwards of 80%

The challenge

- Firm type: Litigation boutique
- Case type: Employment dispute in the financial services industry
- Review population: 24,857
- Goal: Meet a strict three day deadline while keeping costs in check.

The verdict



86% cost savings



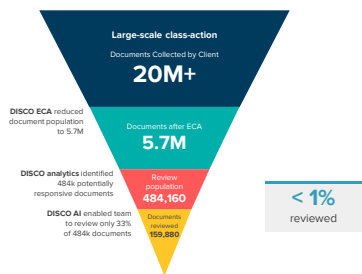
121 docs/hr effective review speed



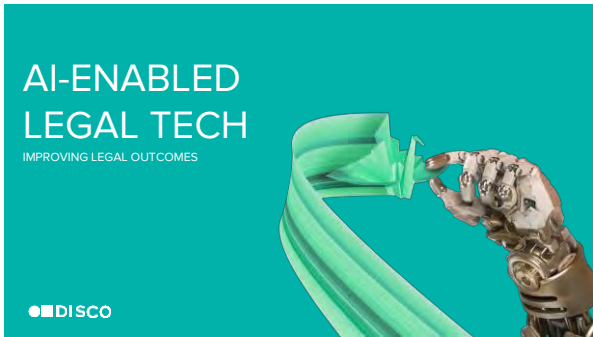
93% DISCO AI accuracy

Case study

DISCO AI review completed with eyes on only <1% of initial documents collected



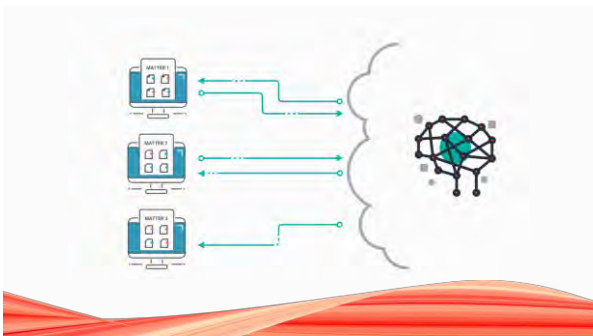
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Our approach to AI

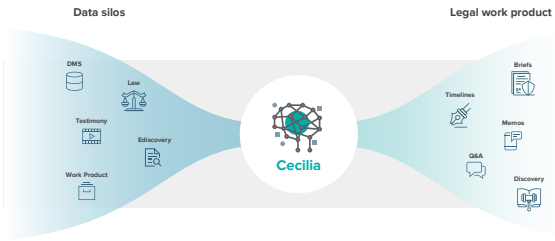
Integrated into Ediscovery	Cutting edge algorithms	Frequency of training and just-in-time batching	Cross-matter AI to speed up the next review





What is Cecilia?

16



Phil Demetriou Adrian Caley

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Jeremy Scott-Joynt
Outer Temple Chambers

“Negligence arising from AI and Tech”

Jeremy Scott-Joynt

Year of Call: 2018

Direct Access: Yes

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Jeremy's primary areas of practice include **business crime**, **sanctions**, regulation and **commercial litigation** – in particular financial crime, investigation and regulation, in both the public and private sectors. More widely, he acts in commercial and regulatory cases involving cryptoassets and data protection/privacy issues.

He is well-suited to advise and represent clients with complex commercial disputes, particularly those involving **financial services and regulators**. His commercial acumen arises from working in senior banking roles for several years, for which he provides a pragmatic approach and creative solutions for clients. As a former lead investigator for a London-based international bank, he is skilled in managing complex and delicate enquiries and investigations, while his experience in handling both **commercial** and **employment** litigation enables him effectively to mitigate the risks to which such an enquiry can give rise.

In 2023, Jeremy was appointed to the Attorney-General's C Panel of junior counsel to the Crown.

Jeremy came to the Bar after a successful career in banking and regulation, having run investigation and anti-corruption programmes for Standard Chartered Bank (ultimately as its deputy global head of AB&C) and then established an anti-fraud and anti-corruption function in EMEA for Bank of Montreal. Before going into banking, he was an intelligence and investigations specialist at the Financial Services Authority, latterly serving as its deputy MLRO.

Jeremy is public access qualified and accepts instructions directly from members of the public. He is also a qualified mediator: a skill which not only enables him to assist as a neutral arbiter in disputes, but to represent clients effectively in commercial mediations.

Areas of Expertise

Business Crime & Investigations

For almost two decades before coming to the Bar, Jeremy specialised in dealing with financial crime issues, intelligence and investigations. He is therefore a specialist in assisting clients get to the bottom of complex investigations and in dealing with allegations of fraud, bribery and corruption. His long experience in bribery and corruption matters led to his authoring

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the first chapter in Lissack and Horlick on Bribery and Corruption, the third edition of which was published in 2020.

Jeremy often acts for the Maritime and Coastguard Agency (MCA), both led by **Oliver Powell** and as sole counsel. He has acted for the MCA in a number of matters: investigations, advice, liaison with partner agencies and prosecutions.

He has experience of POCA orders, including the successful release for an overseas client of more than £500,000 frozen and marked for forfeiture by HM Revenue and Customs; and the release of goods and vehicles seized by the Directors of Border Revenue. Jeremy's experience in internal investigations enables him to both plan and run enquiries into misconduct or suspected criminality, and to advise on how to mitigate the legal risks which can arise from such enquiries. He can be engaged to assist with investigations on a direct access basis if desired.

More widely, he has experience of matters relating to law of international and multilateral organisations, and – with a number of colleagues – is panel counsel for the staff organisations of several such organisations based in Washington DC.

Among recent instructions:

Notable Business Crime & Investigations cases

Led by **Oliver Powell**, advising on the application of the UK's Russia sanctions regime to individuals and entities, including in the context of the UK's regulated financial services sector.

Led by **Oliver Powell**, advising the MCA on a major international fraud and money-laundering investigation.

Led by **Oliver Powell**, advising the MCA on the implementation of the Merchant Shipping (Watercraft) Order 2023, including helping the MCA liaise with partner agencies and training more than 100 MCA staff on how the new rules affect personal watercraft and their owners and users.

Led by **Ben Compton KC**, briefed to defend a London bar and restaurant chain accused of major health and safety violations; and assisting Ben in advising multiple clients on other health and safety matters.

Led by **Alex Haines**, representing a staff member of the IMF in a dispute with IMF management.

Assisting **James Counsell KC** and **Alex Haines** in the early stages of the contempt of court allegations in Business Mortgage

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Finance 4 plc v Hussein [2022] EWCA Civ 1264.

Advising on and representing the MCA in prosecutions under the 1993 Merchant Shipping (Registration) Regulations in the crown courts.

Acting for a pensions trustee in the case of R v Luckhurst, negotiating an agreement with the defendant over the use of funds restrained under PoCA.

Representing numerous importers of nitrous oxide whose goods have been seized on entry into the UK, achieving the return of the property without a condemnation hearing for several clients and appearing in the magistrates' and crown courts in relation to the Psychoactive Substances Act 2016.

Representing the management company of a residential development facing huge post-Grenfell redevelopment expenses, securing a judgment which allowed it to spend scarce resources on upgrading its fire alarm system rather than on a waking watch.

Assisting (along with several other counsel) in a major sanctions and money-laundering investigation undertaken by a Crown Dependency.

Sanctions & Export Controls

As well as his general business crime practice, Jeremy is building a significant practice in advising on matters relating to sanctions and export controls issues in the UK, US, EU and certain Crown Dependencies.

This advice has been for individuals, corporates, and governmental bodies, and covers a range of issues from the permissibility of corporate and commercial proposals, to assistance with the interplay of sanctions regimes and financial regulatory issues, to advising on the applicability of sanctions to private client matters.

Jeremy's work has given him a detailed understanding of the UK sanctions regimes created under the *Sanctions and Anti-Money Laundering Act 2018*, including but not limited to the *Russia (Sanctions) (EU Exit) Regulations 2019*; the "EU Blocking Regulation" (*Council Regulation (EC) 2271/96*); and the UK's export control architecture, in particular the *Export Control Act 2002*, the *Export Control Order 2008*, and the *UK Dual-Use Regulation*.

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Jeremy's work to date has included:

- Advising a UK technology company on computer and technology export licensing under the *Dual-Use Regulation*;
- Led by **Oliver Powell**, advising on the application of the *Russia (Sanctions) (EU Exit) Regulations 2019* to an individual and their family, including with application to trust structures and real property;
- Led by **Oliver Powell**, advising a regulated entity on the interplay between the *Russia (Sanctions) (EU Exit) Regulations 2019*, the UK financial services regulatory regime (including the *Financial Services and Markets Act 2000*, the FCA Handbook, and the *Payment Services Regulations 2017*); individuals and entities, including in the context of the UK's regulated financial services sector.
- Assisting (along with several other counsel) in a major sanctions and money-laundering investigation undertaken by a Crown Dependency.
- Advising several clients on the effects of changes to the *Russia (Sanctions) (EU Exit) Regulations 2019*, including those relating to trust structures, insolvency, and legal services.

Commercial and Chancery

Jeremy has a broad commercial practice, appearing in court (both at the interim and final stages) and advising on a variety of claims involving contract issues, restitution, company law and insolvency.

He is frequently instructed in disputes concerning professional negligence. He is currently advising and representing clients in matters involving both solicitors and financial advisers, including a claim which involves the alleged mis-selling of interest rate hedging products (IRHPs).

Jeremy acts in matters relating to cryptoassets and smart contracts. Within these areas, Jeremy has presented webinars on the financial crime aspects of cryptoassets, and been part of the legal team on disputes involving the question of whether (and if so, on what basis) cryptoassets can be considered property.

Recent instructions include:

Notable Commercial and Chancery cases

Led by **James Leonard KC**, defending a client facing multi-million pound civil fraud allegations.

Led by **Oliver Powell**, advising and drafting pleadings for an overseas energy company in the Admiralty Court, in litigation valued at some 30 million euro.

Led by **Justina Stewart** and as sole counsel, advising clients and litigation funders on potential crypto-related fraud claims.

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Advising insolvency practitioners on (among other things) assignment and novation of contractual rights and contractual liens in the context of a major shipping insolvency.

Strategic advice to a technology firm seeking to enforce restrictive covenants following the departure of key senior staff; and advising it on potential civil fraud litigation and private prosecution.

Advising a law firm on issues arising from its LLP agreement in relation to a planned merger.

Representing a technology firm in an ongoing dispute with its investors.

Advice and representation in a dispute between joint venture partners, including issues of both breach of contract and directors' duties.

Advice and drafting of particulars of claim against an IT services firm accountable following a ransomware attack on the claimant.

Advice to several clients on cross-border jurisdiction and choice of law cases, including advice on potential civil fraud and agency claims.

Advice and drafting of particulars for the claimant in a contract dispute, which led to concession and settlement (including costs) on the part of the prospective defendant.

Advising and drafting pleadings in a High Court claim based on agency and unjust enrichment.

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Advising and representing clients in company and insolvency matters.

Securing summary judgment for lenders in a number of actions against defaulting borrowers, including striking out civil fraud allegations.

Financial Services

Having spent more than a decade in banking and regulation, Jeremy has particular expertise in dealing with financial services matters. He has provided advice to, and been seconded to, the Financial Conduct Authority, working both with its General Counsel's Division and with Supervision and Enforcement; and the Payment Systems Regulator. He also spent a year supporting the Independent Third Party addressing complaints from small business customers of RBS's Global Restructuring Group. His regulatory experience includes work on the developing area of investments in, and regulation of, medicinal cannabis firms. He has advised and acted for clients in several crypto-related matters.

Recent instructions include:

Notable Financial Services cases

Led by **John McKendrick KC**, representing a trade body seeking judicial review of new FCA rules governing claims management companies.

Led by **Oliver Powell**, representing the CEO of a Lloyd's of London insurer in an appeal against a regulatory sanction imposed by the market.

Led by **Justina Stewart**, representing an individual client in a seven-figure dispute with a High Street bank.

Advising the Payment Systems Regulator on urgent Handbook amendments and long-term regulatory projects.

Successfully defeating an attempt by a claimant to extend the Quincecare duty to a receiving bank.

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Advising a US investment group on its application for FCA authorisation, including issues under the Senior Managers and Conduct Regime.

Advising UK and US clients on perimeter issues including cryptoassets, litigation funding, contracts for difference, and insurance.

Advising several clients on FOS claims, both complainant and respondent, involving six-figure losses and issues ranging from COBS and BCOBS to the Quincecare duty.

Representing an individual in a six-figure dispute concerning an alleged failure by a financial adviser to follow instructions and breach of trust.

Successfully appealing a County Court ruling against an authorised firm which risked leaving it liable to pay significant sums to its former appointed representatives.

Advising a law firm on the application of CASS and claims management regulations.

Advising UK and overseas clients on the use of blockchain technologies for regulatory purposes.

Employment & Discrimination

Jeremy's in-house commercial and investigative experience led to significant involvement with employment matters even before he was called to the Bar. He is often instructed by both claimants and defendants in complex employment matters, including whistleblowing, discrimination, TUPE and unfair dismissal disputes. He has assisted counsel including David Grant KC in appeals before the Employment Appeal Tribunal. He is co-author of the 8th edition of the Employment Law Handbook, edited by Daniel Barnett and published in November 2020.

His expertise in investigations has enabled him to undertake complex investigations into allegations of misconduct made between senior individuals at a leading UK university, as well as undertaking investigations into alleged harassment and

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misconduct among senior officers of a Europe-based international organisation.

Disciplinary & Regulatory

Jeremy has advised and represented regulators including the CQC in their oversight of regulated entities. He has also assisted clients in their dealings with the Financial Conduct Authority, the Gambling Commission, the Serious Fraud Office, the Maritime and Coastguard Agency and the Health and Safety Executive. He has represented the Metropolitan Police Service in misconduct and performance hearings, and advised the MPS in relation to data protection and other matters.

He acts in cases where there are data protection and privacy/confidentiality issues. Among recent instructions, he has:

Notable Disciplinary & Regulatory cases

Acted successfully for a major UK mobile phone carrier in one of the first UK cases to consider data protection and privacy liability for SIM-swapping fraud.

Advised and represented NHS trusts in matters dealing with complex data protection and privacy cases, on several occasions resulting in proceedings being either dropped or settled advantageously.

Advised and represented claimants seeking compensation for breaches by both public and private organisations, including helping a client win significant compensation from a public authority which unlawfully disseminated confidential information about sexual abuse.

Advised corporate clients on the handling of law enforcement data requests.

Public Law

Jeremy's instructions in financial services, regulation and crime often have public law implications. To that end, he sometimes acts in public law matters, both led and unled, including acting (led by [John McKendrick KC](#)) for a trade body seeking judicial review of new FCA rule-making, and successfully representing the Metropolitan Police in permission hearings in the Administrative Court. He has advised other clients in the financial services as to potential public law implications of their decisions and strategies.

International Administrative and Disciplinary Law

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Building on his experience with investigations, regulatory matters and public law, Jeremy has a growing practice in the law of international organisations as it relates to its staff and employee relationships. This includes representing both staff who are accused of misconduct or raise grievances with their employers, and advising international organisations both on procedural matters and rules and on investigations.

His instructions in this area include:

- Led by **Alex Haines**, representing a senior staffer at the International Monetary Fund (IMF) in an application to the International Monetary Fund Administrative Tribunal (IMFAT);
- Investigating allegations of misconduct and harassment made against two senior members of staff at a Europe-based international organisation, including advice to the organisation as to the jurisprudence of the International Labour Organization Administrative Tribunal (ILOAT).

Memberships

- **COMBAR**
- **Young Fraud Lawyers' Association**
- **Financial Services Lawyers' Association**
- **Employment Lawyers' Association**
- **Health & Safety Lawyers' Association**
- **Association of Regulatory and Disciplinary Lawyers**
- **London Sanctions Advisors Association**

Languages

- French, Japanese (intermediate)
- German, Brazilian Portuguese (basic)

Publications

- Contributor, Lissack & Horlick on Bribery and Corruption, 3rd ed (2020)
- Co-author, Employment Law Handbook, 8th ed (2020)

Awards

- Astbury Scholarship, Middle Temple (2017)

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Privacy Policy

Read Jeremy's [Privacy Policy](#).

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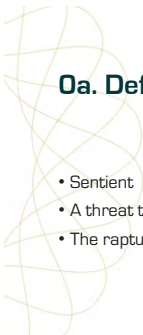
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“Computer says no...”

Negligence arising from AI: all change?

JEREMY SCOTT-JOYNT
OUTER TEMPLE

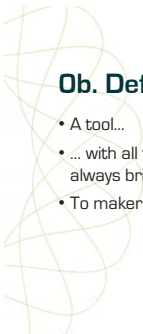


Oa. Defining our terms: what AI's not

- Sentient
- A threat to humanity
- The rapture of the nerds



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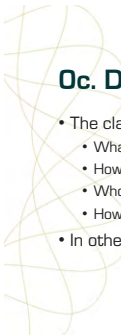


Ob. Defining our terms: what AI is

- A tool...
- ... with all the risks and opportunities that tools always bring.
- To makers, sellers, advisers and users.



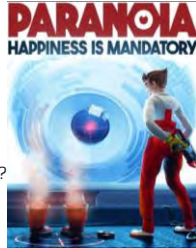
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Oc. Defining the problem

- The classic PN issues:
 - What's the duty?
 - How can it be breached?
 - Who's to blame?
 - How does it hurt?
- In other words: what could possibly go wrong?



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1. Two broad categories

- Generative AI: making up * new stuff
 - Large language models (and analogues for images, sound etc) used to generate brand-new content
 - ChatGPT, DallE, etc
- Predictive AI: categorising reality
 - Again, learning from large corpuses of source material... but in order to match inputs (images, text, video etc) to desired (or feared?) categories.
 - Facial recognition, probation planning, recruitment.

**this choice of words is deliberate*



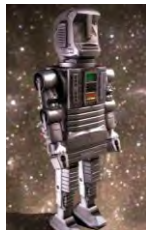
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2. Where's the duty?

- Remember: just a tool
- So:
 - Build it right
 - Sell it well
 - Use it carefully
- Or: just "move fast and break things"...



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3. Which means what?

- Again – how could it possibly go wrong?
- Avianca – well, **obviously**...
- ...but how else?
- Think of the **temptations** to use this tech... and whether the risks are really thought through.



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4. Who's to blame? For what?

- The Black Box problem:
 - Emergent behaviours: the "hallucination" problem
 - The "training set" issue
- Human involvement:
 - Article 22 GDPR: automated individual decision-making
 - (HMG reform plans remain unclear – but watch this space)
 - Generally, though: is solely AI-driven decision-making going to cause your clients trouble?
- Copyright:
 - Lawsuits in US, Thailand, elsewhere – IP-holders up in arms about use of materials in training corpuses
 - The US writers' strike. Over for now... but is that it?
- What else?



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5. What do we do?

- Preventative: help clients think through the **specifics** of the use case and the **technology** to be used.
 - "What could possibly go wrong?" is not a foolish question.
 - The value of the **premortem** when dealing with tools whose risks aren't terribly foreseeable.
- After the fact: as always, nail down who **promised** what... and who **did** what.
 - Can you require the algorithm?
 - Is it even going to help?

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n. What's next?

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Chair - Gus Baker
Outer Temple Chambers

“Team Case Study Introduction session”



followed by

“Team Case Study Discussion Session”

Gus Baker

Year of Call: 2015

Direct Access: No

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Gus' practice focuses on **employment, pensions, commercial litigation, international arbitration and professional negligence.**

He is recommended by Legal 500 and Chambers and Partners as a "rising star" and "up and coming" junior barrister.

Gus regularly instructed to advise and represent clients in courts and tribunals at all levels and has appeared in the High Court, the Court of Appeal, and the Employment Appeal Tribunal.

Areas of Expertise

Employment & Discrimination

His employment law practice regularly undertakes multi-day hearings against more senior counsel. Gus' clients include banks, FTSE 100 companies, public sector organisations and individuals. He is experienced at advising senior managers and employees on how to achieve exits on favourable terms.

Gus undertakes a significant amount of advisory work, including advising on TUPE transfers, pensions/employment crossover issues, holiday pay and restrictive covenants.

He often represents various senior executives dismissed for whistleblowing and misconduct in Employment Tribunal and High Court proceedings. In addition to advising on various pensions ombudsman matters and pension related claims in the Employment Tribunal, and often acts for various companies in High Court claims for breaches of restrictive covenants.

Where cases litigate, Gus provides robust advocacy. His submissions have been described as being advanced "seductively" and "with skill and detail" by Langstaff J (see [Dynasystems for Trade and General Consulting Ltd and Others v Mr M Moseley UKEAT/0091/17/BA](#)).

Gus' experience in litigating commercial, pensions and personal injury disputes means that he brings a broad perspective to his employment work, which often assists when there are complex issues involving damages and remedies.

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Recent examples include.

- Acting in a group claim representing 70+ individuals in relation to the Agency Workers Regulations 2010;
- Successfully represented the Claimant, a senior manager in an oil exploration production company, in a claim brought for disability discrimination, harassment in relation to disability and victimisation;
- Successfully acted for West Ham United Football Club Limited in a potentially sensitive claim for claim brought by a former employee who alleged he had been dismissed because of his race;
- Advising a national supermarket on holiday pay related issues;
- Succeeding in an appeal before Eady J overturning the ET's decision on victimisation and unfair dismissal – *Ms I Elston v 1) Robbie's Photographic Ltd 2) Mr W McRobbie* UKEAT/0282/18/RN;
- Representing a firm of solicitors in a civil appeal in relation to a professional negligence claim arising out of the handling of employment advice and litigation;
- Representing a large bank in claims for disability discrimination made by a senior employee;
- Advising the directors of a Dubai owned business on potential claims being brought by a former CEO;
- Representing various FTSE 100 companies in claims for disability discrimination;
- Acting in a multi week sexual harassment case on behalf of a senior individual;
- Acting in a multi week race harassment case, involving allegations of racially motivated assault with significant personal injury damages claimed;
- Acting for a senior manager of a large retail distributor on claims for unfair dismissal, breach of contract and non-payment of a contractual bonus;
- Instructed by the Government Legal Department in a High Court employment action involving over 70 claimants;
- Acting in a claim for disability discrimination brought against the Secretary of State for Justice;
- Acting for an individual in a case listed for three weeks involving racially aggravated workplace violence;
- Advising senior solicitors in major firms in relation to claims against their employer;
- Acting in multiple discrimination and whistleblowing claims concerning serving police officers;
- Court of Appeal in *Rabess v London Fire and Emergency Planning Authority* [2016] EWCA Civ 1017.

Gus is the co-author of the Law Society's "[Employment Law Handbook](#)", 7th edition. He is the editor of the chapter in Tolley's [Employment Law Service](#) (published by Lexis Nexis) dealing with the fairness of dismissals.

Pensions

Gus Baker is an experienced pensions barrister who is frequently instructed in significant claims of high value and sensitivity.

Gus acts for trustees, employers, defendant solicitors and administrators in part 8 claims, professional negligence proceedings, and applications for rectification.

Recent cases include acting for a representative beneficiary in a large Part 8 Claim, advising (unled) employers of a scheme in relation to various mistakes in historic deeds and various work bringing and resisting claims on behalf of scheme members in connection with negligent mistakes and representations made by employers and administrators.

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Commercial Disputes

Gus has a broad commercial disputes practice which often have an international dimension. He is frequently instructed in high-value commercial disputes ranging from breach of contract, fraud, misrepresentation, business, insolvency, finance, joint venture, shareholder, and matters involving force majeure and illegality across multiple sectors.

He is also regularly instructed on multi-million-pound international arbitration matters with experience under the LCIA and UNCITRAL rules.

More widely, Gus frequently acts in cases in which urgent injunctive relief is sought against individuals and businesses in relation to confidential information, these cases often require counsel to work at speed to secure urgent injunctions.

Recent instructions include:

- Instructed, led by **Andrew Spink KC**, to advise and draft legislation for a public authority in the Middle East in preparation for planned reform of jurisdiction's statute on company law;
- Instructed, unled, in a matter relating to the insolvency of one of the last remaining deep coal mines in the UK, Hatfield Colliery;
- Acting as part of the counsel team for Grant Thornton UK LLP in the multi-million-pound conspiracy claims brought by Robert Tchenguiz in the Commercial Court;
- Advising a private equity fund on a series of claims brought by a former CEO of a portfolio company, including questions of jurisdiction;
- advising and representing banks in claims by consumers;
- Advising and drafting pleadings in professional negligence actions with regards to purchases of high end cars and boats;
- Instructed to advise on issues relating to agency and apparent authority in proceedings against a global law firm;
- Instructed as part of a junior counsel team in international arbitration proceedings in relation to the breach of a joint venture agreement;
- Representing Defendants in breach of contract and claims under the Financial Services and Markets Act 2000 in the County Court;
- Instructed to attend court on behalf of a major bank in a complex case relating to manipulation of the dollar Libor rate, assisting **Michael Bowes KC**;
- Advising on Part 36 offers in cases concerning breaches of the Financial Services and Markets Act 2000 and the enforceability of agreements, assisting **David E Grant**;
- Instructed in a case concerning expulsion from an LLP agreement and the express duty of good faith;
- Acting in a seven figure fraud and conspiracy and conspiracy claim involving breaches of fiduciary duties by senior individuals impacting third parties;
- Representing a Bank in a claim for breach of contract and misuse of confidential information, in addition to claims under section 138D of the Financial Services and Markets Act 2000;
- Acting in high value claims for unpaid contractual bonuses against banks;
- Advising and acting in group claims involving banks and contractual discretions in mortgages;
- Representing solicitors in high value commercial litigation;
- Instructed in claims on behalf of pension trustees against scheme administrators;
- Acting in the leading multiple derivative claim (McGaughey and Davies v Universities Superannuation Scheme Ltd [2022] EWHC 1233 (Ch));

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- Acting in negligence claims against solicitors and barristers.

Professional Negligence

Gus is regularly instructed in professional negligence claims often involving those against solicitors, surveyors and pensions professionals including scheme administrators (acting both for claimant trustees and defendant solicitors)

Gus was recently instructed on behalf of the claimants (led by Patrick Lawrence QC and [David E. Grant](#)) in a five-week, high value, multi-party professional negligence claim against a pension scheme administrator, a firm of solicitors and a silk in a claim arising out of the decision of Newey J in *Gleeds Retirement Benefits Scheme* [2014] EWHC 1178. The claim resolved on the first day of trial.

Examples of Gus' work include:

- successfully acting for defendant solicitors in proceedings (including an appeal) concerning allegedly negligent advice on limitation;
- a large claim against a surveyor concerning a negligent valuation;
- acting on behalf of a trading company in claims relating to allegedly negligent advice and administration of CFD, forex and spread betting accounts;
- claims against conveyancing solicitors concerning negligent tax advice;
- acting on behalf of a FTSE 100 bank in claims concerning the allegedly negligent administration of various financial products;
- a claim against scheme administrators concerning financial advice (or the lack thereof) given to pensioners.

Financial Services

Gus is regularly instructed in financial services litigation, acting both for and against banks. Gus has particular expertise in mis selling claims and is the co-author of the chapter of [Butterworths Financial Regulation Service](#) dealing with the FCA's Conduct of Business Sourcebook.

Gus' recent work includes:

- Advising, acting and drafting pleadings in claims brought against banks under the Consumer Credit Act 1974;
- Representing high street banks and lenders in multi-track claims brought by consumers;
- Acting on behalf of consumers and businesses in large mis-selling claims, including drafting submissions and pleadings and advising on disclosure;
- Advising on whether undertakings were carrying out regulated activity in breach of the general prohibition in FSMA 2000;
- Acting in claims brought by a spread betting company under Section 138D of FSMA 2000;
- Advising a bank on the impact on the applicability of the FCA's Senior Managers and Certification regime to an internal disciplinary investigation.

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Gus is able to combine his knowledge of pensions and employment law with his experience in financial services litigation. He is the author of a recent article in the New Law Journal concerning pensions mis selling and the COBS rules ([here](#)).

Health & Safety

Gus is experienced at representing corporate defendants in the Crown Court and Magistrates Courts in relation to health and safety and environmental law matters. He is a member of the Health and Safety Lawyers Association ('HSLA') and is able to draw on his experience in employment and personal injury law to assist clients facing regulatory prosecutions relating to accidents at work.

Recent examples of Gus' work include:

- representing corporate defendants in the Crown Court in relation to an HSE prosecution;
- representing commercial fishermen in a multi-day in a prosecution under the Fisheries Act 1981 by the Marine Management Organisation ("MMO");
- representing a family at an inquest relating to a fatality in a hospital ward.

Memberships

- [Association of Pensions Lawyers](#)
- [Industrial Law Society](#)
- [Employment Lawyers Association](#)
- [COMBAR](#)
- [Health and Safety Lawyers Association](#)

Awards

- Recommended as a Rising Star by Legal 500 for Employment
- Recommended as 'Up and Coming' by Chambers & Partners for Employment

Recommendations

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Privacy Policy

[See Gus Baker's Privacy Policy here](#)

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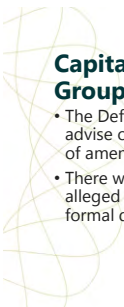
Case(s) study

•Honda Group-UK Pension Scheme Trustee Ltd & Ors v Mercer Ltd [2023] PNLR 8 ("Honda")

•PSGS Trust Corporation Limited v Aon UK Limited [2022] EWHC 2058 (Ch) ("PSGS v Aon")

•James Cropper Plc v Aviva Life and Pensions UK Limited [2022] EWHC 1689 (Ch) ("James Cropper")

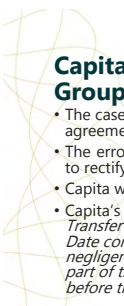
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Capita (Banstead 2011) Limited v RFIB Group Limited [2016] QB 835

- The Defendant provided pension services and had failed to advise of the need to make changes by way of a formal deed of amendment having prospective effect.
- There was a continuing retainer, which continued after the alleged negligent failure to advise about the need to execute a formal deed prospectively.

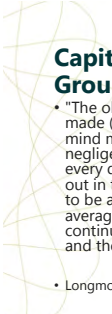
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Capita (Banstead 2011) Limited v RFIB Group Limited [2016] QB 835

- The case involved an indemnity clause in a share purchase agreement, rather than section 14B of the Limitation Act 1980.
- The error took place before the indemnity took effect. The failures to rectify the indemnity clause took place afterwards.
- Capita were the beneficiary of the indemnity. RFIB provided it.
- Capita's appeal was on the basis that: *"the entirety of the post-Transfer Date losses was effectively caused by the pre-Transfer Date conduct of Mr Le Cras; the fact that he continued to be negligent and made negligent or deceitful representations was all part of the original breach of contract and duty which occurred before the Transfer Date"*.

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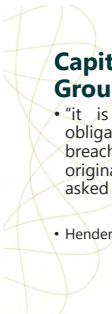
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Capita (Banstead 2011) Limited v RFIB Group Limited [2016] QB 835]

• "The obtaining and receiving of advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made. As Mustill LJ pointed out in the *Bel* case [1990] 2 QB 495 it would be unusual for there to be an express term in the average retainer contract (or the average pension adviser contract) requiring the adviser to exercise continuing vigilance to discover any mistakes he may have made and then to busy himself to put them right."

• Longmore LJ at [19]

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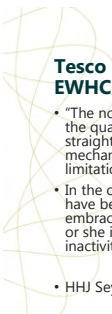
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Capita (Banstead 2011) Limited v RFIB Group Limited [2016] QB 835

• "it is impossible to construct a continuing contractual obligation, in the sense of one which gives rise to a fresh breach on a daily basis, from the mere failure to perform the original obligation in due time...even if the party in breach is asked to make good his default but fails to do so."

• Henderson J at [49]

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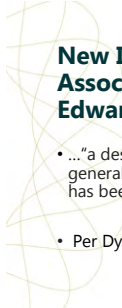
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Tesco Stores Ltd v Costain Construction Ltd [2003] EWHC 1487 (TCC)

• "The notion that a professional person owes a continuing duty to review the quality of the performance of his retainer or engagement is not a straightforward one unless it is intended simply as a transparent mechanism for delaying artificially the commencement of some period of limitation.
• In the ordinary conduct of human affairs a task which is considered to have been completed satisfactorily is put behind one as the next task is embraced. To expect someone in real life continuously to review what he or she is doing is to expect them to be paralysed into substantial inactivity by anxious traversing of old ground until eternity"

• HHJ Seymour QC at [270]

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New Islington and Hackney Housing Association Ltd v Pollard Thomas & Edwards Ltd [2001] PNLR 20

- "...a designer who also supervises or inspects work will generally be obliged to review that design up until that design has been included in the work"
- Per Dyson J (as he then was) at [14].

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James Cropper v Aviva Life and Pensions UK Limited

- Defendant administered the scheme on the basis that male and female NRDs were equalised at 65 from 1 November 1995. However, equalisation didn't occur until a 17 December 2002 deed.
- Consequently, the Scheme's "Barber Window" remained open until 17 December 2002, not closing on 31 October 1995, as intended and acted upon.
- Defendant advised that equalisation took place in 1995, and was wrong to do so.
- Members accrued benefits until 2002 on the basis of a NRD of 60.
- The claimant sued for extra costs to fund unintended benefits.

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James Cropper v Aviva Life and Pensions UK Limited

- Any claim where the negligence occurred before 15 December 2002 was statute barred.
- Original mistake was in 1995.
- Scheme administered on incorrect basis until deed put in place effective 17 December 2002. Defendant continued acting for Claimant until 2004.
- Claimant did not discover error until 2017.
- 2003 actuarial report stated that NRDs had been equalised in 2003.

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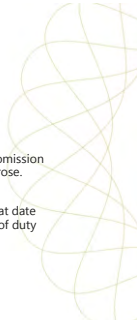




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Section 14B

- A 15 year 'longstop' which runs from the date of the act or omission alleged to constitute negligence, **not** the date the action first arose.
- Consequently, there was an "intense focus upon events after that date to determine whether there was any seriously arguable breach of duty on the part of Friends Life after 15 December 2002" [69].



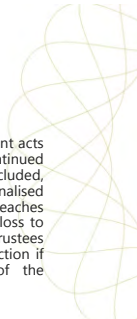
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HHJ Hodge KC at [73]

- "I accept Mr Hitchcock's submission that the negligent acts and omissions presently pleaded against Aviva ...continued through to the end of Friends Life's retainer and included, for example, the 2003 actuarial valuation report, finalised by Friends Life on 29 March 2004. These further breaches of Friends Life's duties are alleged to have caused loss to the claimants because James Cropper and the trustees were unable to require Friends Life, though legal action if necessary, to indemnify them for the cost of the unintended liabilities in the Scheme."



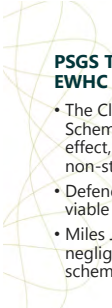
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PSGS Trust Corporation Ltd v Aon UK & Ors [2022] EWHC 2058 (Ch) (29 July 2022)

- The Defendants were the administrators and legal advisors to the Scheme.
- The Trustee and employer resolved to reduce scheme benefits.
- The Defendants did not execute any amending deed or pass any resolution by the intended effective dates of the amendments. Subsequently, the Defendants recommended that the trustee and employer retrospectively enact the amendments by executing deeds in 2004 and 2008. That was alleged to be negligent.

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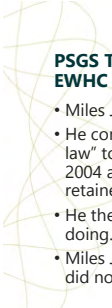


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PSGS Trust Corporation Ltd v Aon UK & Ors [2022] EWHC 2058 (Ch) (29 July 2022)

- The Claimant alleged it was negligent to administer the Scheme as if the 2004 and 2008 deeds had retrospective effect, with the consequent loss being the chance to bring a non-statute barred claim.
- Defendants' application to strike out unsuccessful because of viable s14A argument.
- Miles J struck out allegation that Defendants had been negligent until the end of their retainer for administering scheme on wrong basis.

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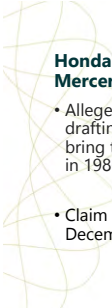


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PSGS Trust Corporation Ltd v Aon UK & Ors [2022] EWHC 2058 (Ch) (29 July 2022)

- Miles J applied **Capita**, although that was not a limitation case.
- He considered the Defendants did not owe "a legal duty in law" to advise on the validity and legal effectiveness of the 2004 and 2008 Deeds at all times up to the end of their retainer.
- He therefore they held they could not be negligent in not so doing.
- Miles J declined to follow **James Cropper** on the basis that it did not cite **Capita**.

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Honda Group-UK Pension Scheme Trustee Ltd & Ors v Mercer Ltd & Anor [2022] EWHC 3197 (Ch)

- Alleged negligence was a failure, during the course of the drafting of a deed eventually completed in 1998, to notice and bring to the claimants' attention an error which had occurred in 1986 (the "HUM Benefits Error").
- Claim issued in December 2009(!). So, anything before December 1994 was time barred.

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Honda Group-UK Pension Scheme Trustee Ltd & Ors v Mercer Ltd & Anor [2022] EWHC 3197 (Ch)

- The Defendants delivered a draft deed in 1994 which consolidated the Hum Benefits Error into the new deed. D's argue that any negligence took place at this time. D's relied on **PSGS** and **Capita**

C's argued that the Defendants 'were under a duty to take reasonable care in the steps they took to ensure the legal efficacy of the 1998 Deed, and it extended up to the date of its execution' [46].

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Honda Group-UK Pension Scheme Trustee Ltd & Ors v Mercer Ltd & Anor [2022] EWHC 3197 (Ch)

- **Capita** does not apply "while the task in respect of which the original duty arose was still being performed"
- "where a professional is still engaged in a task the product of which is not yet fit to be used by their client and remains the subject of further discussion and negotiation, there will be cases and this may well be one of them, where the professional must keep the form of the work he is engaged in under continuing review."

Per Trower J at [87].

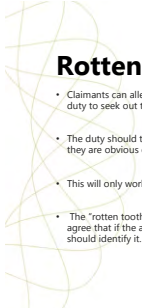
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Rotten teeth

- Focus on **duties** is confusing. There was a continuing duty of some type in **James Cropper, PSGS** and **Honda**. It just wasn't a duty to spot previous negligence.
- In none of these cases was there an express contractual requirement to check if the administrators had been negligent before.
- Per Laddie J in **Credit Lyonnais SA v Russell Jones & Walker** [2002] EWHC 1310 (Ch) ; [2003] Lloyd's Rep. P.N. 7; [2003] P.N.L.R. 2
 - "If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him"

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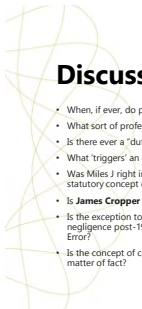


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Rotten teeth

- Claimants can allege that negligent omissions of professionals did not arise from a duty to seek out the errors, but instead arose because the errors amounted to a "rotten tooth".
- The duty should thus not be pleaded as a continuing duty to spot errors, but a duty to identify errors where they are obvious on their face.
- This will only work in cases of obvious negligence.
- The "rotten tooth" doctrine is capable of taking effect as an implied term. Contracting parties would surely agree that if the adviser spots a tooth that a reasonably competent adviser would identify as negligent, he should identify it. Even if there is no duty to look for rotten teeth.

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Discussion

- When, if ever, do professionals owe continuing duties?
- What sort of professional retainers are more likely to give rise to continuing duties?
- Is there ever a "duty to review previous work"? And when?
- What 'triggers' an obligation to review a previous mistake?
- Was Miles J right in **PSGS** to apply **Capita**, even though it was a case about a deed of indemnity, rather than the statutory concept of "negligence" pursuant to section 14B(1)(a) LA 1980?
- Is **James Cropper** an outlier? Was Miles J right to decline to follow it?
- Is the exception to **Capita** in **Honda** a distinction without a difference? Practically, was there new incident of negligence post-1994 when the Defendants failed to review the part of the deed that included the Hum Benefits Error?
- Is the concept of continuing duties necessary? Or is it better to assess if a professional has been negligent as a matter of fact?

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Kevin Wonnacott
Costs Lawyer
&
Jayna Patel
Dutton Gregory

“The New Fixed Costs Regime”



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

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

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

Principal Services:

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

Jayna Patel

Partner

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Jayna regularly advises businesses and individuals on professional negligence claims and has a proven track record of securing successful outcomes.

Her client testimonials speak for themselves, and she has built up a reputation within the Southeast and her wider network as the go to professional negligence claimant lawyer.

This past year, Jayna has successfully concluded various professional negligence claims arising out of building surveying and legal advice regarding SDLT and leases. She currently has conduct of several failed litigated matters e.g. family/ financial proceedings, shareholder/director/ unfair prejudice and construction.

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

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

Recent cases

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

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

"Jayna's meticulous and methodical efficient input, her professional acumen and considerable experience have been invaluable in resolving our protracted claim. Throughout the 6 months, (which were not entirely uneventful) we were particularly impressed with her calm and measured but firm approach, clarity, attention to detail, communication and negotiating skills which ensured our successful outcome.

Our case related to a professional negligence claim against a solicitor whose negligence had engulfed us in a long and expensive dispute. Our trust in the legal profession had been badly damaged not only by a particular negligent solicitor but also by some ineffective, confusing and at times, contradictory legal guidance we had previously received during the dispute years. Through her expert and effective advice and insightful guidance with the professional negligence claim, Jayna has managed to restore some of our faith in her profession.

The fact that we received such first-class service from Jayna who achieved in 6 months what her predecessors had failed to achieve in 6 years, speaks for itself."- July 2023

Fixed Costs Regime (FRC)

Jayna Patel, Partner

www.duttongregory.co.uk



Fixed Costs Regime (FRC)

- Limited costs recovery.
- FRC came into force on 1 October 2023.
- Applies to most civil claims.
- Less recovery. Could be as low as 10%.
- Some exceptions e.g. housing disrepair, Part 8 claims, protected parties.
- **FRC will apply to professional negligence claims with a value of up to £100,000.** (Rules are slightly different for clinical negligence).
- Original proposals were for cases up to £250k, but it was reduced. I think it is highly possible for the regime to be extended? Perhaps incrementally.
- Fast Track for applicable claims with a value of up to £25,000
- Intermediate Track for applicable cases with a value of up to £100,000.
- Proceedings **issued on or after 1 October 2023** – so no retrospective effect (slightly different for PI/disease claims).
- Changes to:
 - CPR Part 26 Allocation
 - CPR Part 28 The Fast Track and Intermediate Track
 - CPR Part 36 Offers to settle
 - CPR Part 45 Fixed Costs

Fast Track

CPR 26.9 (5)

- Up to a monetary value of £25,000
- Trial not likely to last more than 1 day
- Expert evidence is limited to 1 per party and evidence in 2 fields.
- Amount recovered depends on which complexity band the case is allocated to and when settlement/ discontinuance occurs and if the matter proceeds to Trial.
- 4 complexity bands set out in Table 1 (CPR 26.15); the higher the band the higher the costs.
- There is a table for complexity bands.
- **Professional negligence is specifically listed in Band 4.**

Fast Track-Fixed Costs - PD 45 - Table 12

	Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
A. If Parties reach a settlement prior to the statement issuing proceedings under Part 7				
(1) Where damages are not more than £1,000	£100	The greater of £100 or £100 + an amount equivalent to 20% of the damages	£1,100 + an amount equivalent to 10.2% of the damages	In each case - £2,000 + an amount equivalent to 10% of the damages + £10 per extra defendant
(2) Where damages are more than £1,000, but not more than £10,000	£1,000	£1,300 + an amount equivalent to 10% of damages over £1,000	£2,300 + an amount equivalent to 12.2% of damages over £1,000	
(3) Where damages are more than £10,000	£1,000	£2,300 + an amount equivalent to 20% of damages over £10,000	£3,000 + an amount equivalent to 20% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles or is discontinued before trial				
(1) Can or after the date that the claim issues the claim, but before the date that the claim becomes the claim under Part 20, but before the date that the claim becomes the claim for trial	£3,700	£1,400 + an amount equivalent to 20% of the damages	£3,200 + an amount equivalent to 20% of the damages	£3,000 + an amount equivalent to 40% of the damages + £70 per extra defendant
(2) Can or after the date that the claim becomes the claim under Part 20, but before the date that the claim becomes the claim for trial	£2,000	£2,300 + an amount equivalent to 20% of the damages	£3,000 + an amount equivalent to 20% of the damages	£1,400 + an amount equivalent to 40% of the damages + £70 per extra defendant
(3) Can or after the date that the claim becomes the claim for trial but before trial	£3,800	£3,300 + an amount equivalent to 20% of the damages	£3,100 + an amount equivalent to 20% of the damages	£2,000 + an amount equivalent to 40% of the damages + £70 per extra defendant
		C. If the claim is disposed of at trial		
	£1,000	£3,200 + an amount equivalent to 20% of the damages agreed or awarded	£3,100 + an amount equivalent to 30% of the damages agreed or awarded	£2,000 + an amount equivalent to 40% of the damages agreed or awarded + £70 per extra defendant

Fast Track-Fixed Costs - PD 45 - Table 12

	D. Trial advocacy fees		
(1) Where the value of the claim is not more than £1,000	£500	£500	£1,600
(2) Where the value of the claim is more than £1,000, but not more than £10,000	£600	£600	£1,600
(3) Where the value of the claim is more than £10,000, but not more than £25,000	£1,200	£1,200	£2,100
(4) Where the value of the claim is more than £25,000	£2,000	£2,000	£2,900

Fast Track continued

Stages A to C are the collective totals for costs incurred up to and including that stage.

Stage D is separate where the claim is disposed of at trial.

Nothing additional for ADR.

Claims assigned to Band 4 can recover additional costs for specialist legal advice (CPR 45.46 – Table 13):

A. Providing post-issue advice in writing or in conference	£1,000
B. Drafting a statement of case	£500

Only allowed where

- (a) the legal advice is obtained from, or a statement of case is drafted by—
 - (i) a specialist **legal representative** in respect of a matter within their specialist expertise; or
 - (ii) the intended trial advocate; and
 - (b) the use of that person to provide the advice or draft the statement of case is **justified**.
- Only allowed **one advice in writing or in conference** unless further advice is justified.

Fast Track Example

Band 4 Claim Settled for £20,000 (no extra Defendant)

When Settles Pre Issue	Stage	Fixed Sum	% of £20,000	FRC
	A	£2,600	15% (£3,000)	£5,600
Pre – Allocation	B(1)	£3,000	40% (£8,000)	£11,000
Pre – Listing	B (2)	£6,400	40%	£14,400
Pre-Trial	B (3)	£7,900	40%	£15,900
At Trial	C +D (4)	£7,900	40%	£15,900 Plus advocacy fee £2,900

IntermediateTrack

- Up to a monetary value of £100,000.
- Trial not likely to last more than 3 days.
- Expert evidence is limited to 2 per party.
- No more than 3 parties.
- Amount recovered depends on which complexity band the case is allocated to and when settlement/ discontinuance occurs and if the matter proceeds to Trial.
- 4 complexity bands; the higher the band the higher the costs.
- No specific mention of professional negligence on Intermediate Track.

Intermediate Track - Complexity Bands Table

CPR 26.16 Table 2

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
Any claim where— (a) only one issue is in dispute; and	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.
(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) road traffic accident related, non-personal injury claims; and			
(iii) defended debt claims			

Intermediate Track - Fixed Costs

PD 45 - Table 14 contd

S11	£1,400	£1,700	£2,000	£2,900
Advocacy fees for subsequent days, less an amount equivalent to 70% per day where, on any subsequent day, the fee does not exceed half a day.				
S12	£500	£500	£500	£500
Handling of a received judgment and consequential matters, where oral settlement takes place.				
S13	£1,200	£1,200	£1,200	£1,200
Alternative Dispute Resolution, additional fee payable once only where a mediation or joint settlement meeting takes place.				
S14	£1,400	£1,700	£2,000	£2,300
Alternative Dispute Resolution, additional fee payable once only for representative attendance at a mediation or joint settlement meeting convened by S13.				

Intermediate Track - Fixed Costs

PD 45 - Table 14 contd

S15	£1,200	£1,400	£1,700	£2,000
Approval of settlement for cases where the settlement is approved at trial.				

Intermediate Track continued

Stage 1 = pre-issue + post-issue fixed costs up to and including the date of service of the defence. No increase until defence is served. Encourage D to settle at Stage 1, but might wait until Stage 1 is exhausted and put Claimant to expense of issuing.

Stage 13 (joint settlement meeting/mediation) and 14 (legal representative attending joint settlement meeting/mediation) relate to ADR.

CPR 45.50

- Stages S1, S3, S4, S5, S6 and S8 are the collective totals for costs incurred up to and including that stage;
- Stages S2, S7 and S9 to S15 are separate sums for those steps, if carried out
- Costs in stages S2, S7 and S14 of Table 14 are only allowed where—
 - (a) legal advice is obtained from, or a statement of case is drafted by—
 - (b) a specialist legal representative in respect of a matter within their specialist expertise; or
 - (c) the intended trial advocate; and
 - (d) the use of that person to provide the advice or draft the statement of case is justified.

Intermediate Track - Worked Example

Band 4 Claim Settled for £90,000

When	Stage	Fixed Sum	% of £90,000	Total for Stage	Plus and other Stage?	Total FRC
Pre issue	1	£9,300	8% (£7,200)	£16,500		£16,500
Post issue, advice obtained from Counsel (in writing or in conference)	2	£2,300		£2,300	+ Stage 1	£18,800
After Defence filed, advice obtained from Counsel in writing or in Conference	7	£2,900		£2,900		
Unsuccessful mediation after Defence filed + Counsel attending	13	£1,200		£3,500		
After service of the later of expert/witness evidence and 14 days before the PTR or Trial whichever is the earliest	6	£24,000	18% (£16,200)	£40,200	+ Stage 14, 13, 7 and 2	£48,900
At Trial (and prepared the Trial Bundle)	8	£20,000	22% (£19,800)	£48,800	+ Stage 14, 13, 7 and 2	£57,500
Trial lasts 2 full days, instructing solicitor and counsel attend	9, 10, 11	£1,400 x 2 £5,800 x 1 £2,900		£11,500	+ Stage 8, 14, 13, 7 and 2	£69,000

- Additional sums for handing down of Judgment/ consequential hearing - £580.

Points which apply to both tracks

- VAT recovered in addition to fixed costs and disbursements (CPR 45.2 and 45.57(3)).
- Disbursements – see CPR 45, Section IX. Fast Track is prescribed and Intermediate Track disbursements need to be reasonable and not already allowed.
- If you are the **Claimant** it is a **% of what you recover**.
- If you are the **Defendant** it is a **% of damages claimed** on claim form excluding any amount not in dispute, interest or costs (CPR 45(6)).
- FRC applies to Counterclaims – see CPR 45.7. Defendants, if successful, could get FRC for defending claim and bringing counterclaim.
- Parties need to say on DQ what band is appropriate. Court does not have to agree.
- Court can (on application or on its own initiative) reallocate track and reassign band (CPR 26.18). Costs consequence? New track/ band applies as if it had been the track /band from the start (CPR 45.14).
- Total length of all witness statements per party = 30 pages.
- Any expert report limited to 20 pages (exc some docs).

Part 36

See CPR36.23/36.24

A new 35% additional amount to be awarded.

If a claimant makes a Part 36 offer and the defendant does not accept it, and the claimant then goes on to win the case at trial, they will be entitled to recover their costs from the defendant, plus an additional 35% from the stage applicable when the relevant period expired to the stage applicable at the date of judgment.

NB: defendants will not benefit from the new 35% additional amount to be awarded.

Points to note

- Does the FRC apply, pre-action? The rules say only apply to issued claims but see/consider:
 - Before and outside of FRC, no entitlement to pre-action costs (unless via Part 36), parties contractually agree to pay costs e.g. all inclusive or to assessed if not agreed.
 - CPR 45.1 (3) (b) "... the court may only award costs in an amount that is neither *more nor less than the fixed costs allowed by the applicable Section and set out in the relevant table in Practice Direction 45.*"
 - 45.43**—(1) This Section applies to any claim which **would normally be** or is allocated to the fast track.
 - CPR 45.49—(1) This Section sets out the costs which are to be allowed in any claim which **would normally be** or is allocated to the intermediate track.
- Pre-Action Stage 1 on Intermediate Track is subject to assessment!
 - See CPR 45.50 (3) "The costs to be awarded for stage S1 are subject to assessment up to a maximum of the figure shown for stage S1 in Table 14, except in a claim for personal injuries where the figure shown is fixed."
- Abandon claim pre-action – D can claim costs.

Points to note contd

- Banding arguments
 - e.g. A professional negligence claim worth c.£93,000 with one breach accepted but all other breaches, causation and loss in dispute should be allocated to what band? 1 or 4? What is the level of complexity?
 - Is value relevant if at the upper end of the Track? Can we use (CPR45.50 (2)) which assigns values to bands in non-monetary claims:
 - "In Table 14—
 - b) unless stated otherwise, "damages"—
 - (i) means any form of monetary relief; or
 - (ii) in a claim which has no monetary value, shall be taken to mean an amount equivalent to—
 - (aa) £25,000 in a claim assigned to complexity band 1;
 - (bb) £50,000 in a claim assigned to complexity band 2;
 - (cc) £75,000 in a claim assigned to complexity band 3; and
 - (dd) £100,000 in a claim assigned to complexity band 4."

Points to note contd

- Allocation points:
 - Large case with some issues settled pre-action and remaining issues in dispute are less than £100k, it might get allocated to Intermediate Track.
 - Is it too complex for Intermediate Track? Will Trial last longer than 3 days? Will both parties need to call more than 2 experts each?
- Costs shortfall is likely to be higher
 - Increase in Solicitor Client assessments
 - Check retainers re advice on costs exposure and recovery
 - Do you intend to deduct shortfall from damages? Do you have **informed** consent?
 - What advice should you give:
 - | | |
|--------------------|-----------------|
| Fast Track | Probably Band 4 |
| Intermediate Track | Probably 2 – 4 |
 - Give a range of likely minimum and maximum (bear in mind 12.5% increase for London weighting)
 - Explain that banding might re-assigned and track re-allocated so above range is not guaranteed
 - Pre-action amounts aren't fixed
 - If you abandon, D can claim costs (including pre-action)

Costs Certainty?

Access to Justice?



“Chair’s Closing Remarks, Questions and Discussion”

***1710-1900
Sponsored Drinks***

***- Outer Temple Chambers
3 Hare Court
& 4 New Square***

@ El Vino, 47 Fleet Street, London, EC4Y 1BJ

***- invitation to PNLA Network
– all Welcome***



Total CPD – 7 hours 30 minutes

To complete your feedback form please go to

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