PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

ENGLAND & WALES

LONDON CONFERENCE

"Exploring the Professional Negligence Space"

19th April 2024

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

LONDON CONFERENCE

Friday, 19th April 2024

0930–1000	Registration and Refreshments
1000–1005	*"PNLA Introduction"* **Katy Manley** PNLA President https://www.pnla.org.uk/management-team/
1005–1015	*"Introduction"* **Nicole Blakey** Penningtons Manches Cooper - PNLA London Representative https://www.penningtonslaw.com/people/a-e/nicole-blakey\
1015–1100	*"Chair's Keynote Address"* **David McIlroy** Forum Chambers https://forumchambers.com/our-people/david-mcilroy/
1100–1115	Refreshments
1115–1200	*"Group actions and using a single claim form: Abbott v. MoD and subsequent cases"* **Simon Johnson** Enterprise Chambers https://www.enterprisechambers.com/our-people/simon-johnson/
1200–1215	*"ATE Insurance and Litigation Funding"* **Jamie Molloy** Ignite https://www.ignitespecialty.com/about
1215–1300	*"Negligence, Conduct and Disclosure arising from the Post Office Scandal"* **Paul Marshall** Cornerstone Chambers https://cornerstonebarristers.com/barrister/paul-marshall/
1300–1400	Lunch
1400–1445	*"Professional Negligence: recent cases of interest"* **Lloyd Maynard** Forum Chambers https://forumchambers.com/our-people/lloyd-maynard/
1445–1500	*"Latest news on disclosure"* **Dominic Tucker** Associate Director UK/EEA – IDiscovery Solutions https://idsinc.com/en_gb/team/dominic-tucker/
1500–1545	*"The Culture of Negligence and the Detection of Fraud"* **Philippa Hill** Partner and Head of Forensic and Investigation Services – Grant Thornton UK LLP https://www.grantthornton.co.uk/people/philippa-hill/
1545–1600	Refreshments
1600–1625	*"Questions and discussion session - Chair's closing remarks"*
1625–1630	**Katy Manley** President – PNLA
1715–1915	***"Drinks– The Fable 52 Holborn Viaduct, EC1A 2FD"*** **– sponsored by iDiscovery Solutions Ltd & Ignite**

Live Talks = 5 hours
Conference Pack Review = 1 hour
Total CPD = 6 hours

PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE
Penningtons Manches Cooper, 125 Wood St, London EC2V 7AW
19th April 2024
ATTENDEES (1 of 2)

David McIlroy	Chair - Forum Chambers	London
Phoebe Alexander	Kingsley Napley LLP	London
Ben Atkin	Kingsley Napley LLP	London
Nicole Blakey	Penningtons Manches Cooper	London
Jemma Brimblecombe	Kinglsey Napley	London
Paul Catherall	Alliance Corporate Finance Limited	London
Laura Chapman	Roythornes Limited	Lincolnshire
Jamela Collins	Temple Legal Protection Limited	Guildford
Tim Constable	Bates Wells & Braithwaite London LLP	London
Clyde Darrell	Forum Chambers	London
Nicholas Davidson KC	Hailsham Chambers	Surrey
Nicky Doble	Independent Mediators Ltd	London
Donna Grayson	The Judge	London
Matt Haddow	Menzies LLP	Surrey
Philippa Hill	Grant Thornton	London
Rachel Hucker	Burges Salmon LLP	Bristol
Kyle Hunter	The Judge	London
Robert Johnson	Healys LLP	London
Simon Johnson	Enterprise Chambers	London
Sukhbir Kaur	Temple Legal Protection Limited	Guildford
Alex Lerner	Stewarts LLP	London
Katy Manley	PNLA & BPE Solicitors	Cheltenham
Paul Marshall	Cornerstone Chambers	London
Lloyd Maynard	Forum Chambers	London
Gemma Mittell	Stephens Scown LLP	Exeter
Jamie Molloy	Ignite Specialty	London

David Niven	Penningtons Manches Cooper	London
David O’Brien	Penningtons Manches Cooper	London
Sue O'Brien	The Property Mediators	Oxfordshire
Paul O'Doherty	Forum Chambers	London
Pradeep Oliver	Cripps LLP	Tunbridge Wells
Julian Perez-Durias	Penningtons Manches Cooper	London
Michael Phillis	Forum Chambers	London
Lauren Pitts	Roythornes Limited	Lincolnshire
Alex Poplawska	Moore Barlow LLP	Eastleigh
Heather Rogers	Aston Accountancy Limited	Milton Keynes
Stephen Rome	Penningtons Manches Cooper	London
Amy Rothbarth	Ignite Specialty	London
Ruhi Sethi-Smith	Forum Chambers	London
Iain Shipley	Forum Chambers	London
Tom Stable	Penningtons Manches Cooper	London
Layla Todd	CMS Cameron McKenna Nabarro Olswang LLP	London
Dominic Tucker	IDiscovery Solutions	London
Louise Tunstall	Taylor Rose MW	Peterborough
Teresa Verdoliva	Penningtons Manches Cooper	London
Charlotte Woolven-Brown	Healys LLP	London
Margaret Young	Taylor Rose MW	Peterborough

PNLA
Professional Negligence Lawyers Association

With thanks to our sponsors

PENNINGTONS MANCHES COOPER

FORUM CHAMBERS

IGNITE

iDS™
iDiscovery Solutions

Katy Manley LLB
PNLA President/BPE Solicitors

"Introduction"

PNLA Professional Negligence Lawyers Association

bpe SOLICITORS

Katy Manley LLB

PNLA President
Consultant – BPE Solicitors

Katy Manley trained in London and qualified as a solicitor in 1989 moving to the west country in 1991.

She was made an equity partner in a leading Bristol practice in 1995 becoming Head of the Professional Negligence team. She remained with this firm until the launch of Manley Turnbull in 2006 which, until closure in 2022, specialised in professional negligence claims.

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

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

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

Nicole Blakey
Penningtons Manches Cooper
PNLA London Representative

"Introduction"

PENNINGTONS MANCHES COOPER

Nicole Blakey

Senior associate
London

Email: nicole.blakey@penningtonslaw.com
Tel: 020 7457 3237

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

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

Nicole joined Penningtons Manches Cooper in 2019.

Areas of Expertise

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

Recent work highlights

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

David McIlroy
Head of Chambers, Forum Chambers

Global Distinguished Professor of Law
at the University of Notre Dame (USA) in England
&
Visiting Professor in Banking Law
at Queen Mary, University of London

"Chairman's Keynote Address"

DAVID **McILROY**

HEAD OF CHAMBERS | CALL 1995
CALLED TO THE BAR OF GIBRALTAR PRO HAC VICE 2017

"David is a formidable trial advocate and a master of the facts."

dmcilroy@forumchambers.com **020 3735 8070**

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

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

Alongside his busy practice, David is Visiting Professor in Banking Law at Queen Mary University of London and at the University of Notre Dame (USA) in England.

AREAS OF EXPERTISE

Banking (EU)

David is a fluent French speaker and holds a Master's Degree in EU law from a French University. David frequently advises on questions of EU law. David acts for foreign banks which wish to sell financial services in the UK. David is regularly instructed on cases which involve conflicts of laws and analysis of foreign laws, and he has acted as an expert for the EU on the laws in Albania governing banking and money laundering. David has also recently been training lawyers in Cyprus on their new civil procedure rules.

Notable Banking (EU) Cases

- Advising on the introduction of Unexplained Wealth Orders into the law in Kosovo.
- Advising on cross-border issues relating to the Electronic Money Regulations 2011 and the Payment Services Regulations 2017.
- Acting for investor given advice in Cyprus by an Appointed Representative of a UK firm.
- Acting for Irish investors into a failed UK property development scheme.

- Advising an Irish businessman in respect of claims for breach of contract, breach of fiduciary duty, and mis-selling against an Irish bank and its UK subsidiary.
- Advising foreign private banks which wish to enter into mortgages secured on land in the UK as to the UK's regulatory frontier and the conduct of business rules which have to complied with in the event that their activities fall within the UK's regulatory frontier.
- Advising foreign banks on commercial financing agreements and hedging agreements which are subject to English law.
- Acting in a claim by an Indian bank against a guarantor involving questions of Belgian law and Indian law.

Banking (UK)

David acts and advises across the full range of financial services disputes and banking transactions, but with a particular focus on the business sector. David has dealt with hundreds of claims of financial mis-selling. He is increasingly instructed on claims of fraud, including authorised push payment (APP) fraud. David is as comfortable advising in respect of a commercial loan, a mortgage or a guarantee as he is analysing the financial services rules contained in the FCA and PRA Handbooks. David has particular expertise in misrepresentation claims, in claims about negligent financial advice, and in claims relating to complex financial products. David also advises debtors in cases where there has been an unfair credit relationship, economic duress, or other abusive practices by a bank or other lender. In addition, David has expertise in providing advice on regulatory questions, including on cryptocurrency and fintech, both on behalf of institutions seeking authorisation and those subject to investigation by the financial services regulators.

Notable Banking (UK) Cases

- Philipp v Barclays Bank [2022] EWCA Civ 318: Acting for intervener in Court of Appeal case relating to APP fraud.
- Acting for elderly victim of APP fraud involving multi-million pounds being transferred to the Middle East.
- Advising victims of the fraud at HBOS Reading in their submissions to the Foskett Panel.
- Davis v Lloyds Bank Plc [2021] EWCA Civ 557: claim against bank for breach of the complaints handling rules in the FCA Handbook.
- Scarborough Group v BOS: multi-million pound claim against BOS for manipulation of LIBOR (2020).
- Advising lenders on the enforceability of security.
- Standish v RBS [2019] EWHC 3116 (Ch), [2020] 1 BCLC 826: Claim by shareholders that RBS GRG and West Register had conspired to expropriate their shares.
- Financial Conduct Authority v Allied Wallet Ltd [2019] EWHC 2808 (Ch), [2020] BCC 147: application by FCA for the appointment of a Provisional Liquidator over a fintech company.
- Claims against Lloyds Banking Group related to the Impaired Assets Office of BOS/ HBOS at Reading and elsewhere.

- Claims against secondary lender for disguising loans as lease finance transactions, undue influence and other malpractice.
- BOS v Noel Edmonds: counterclaim by celebrity in respect of loss of business as a result of fraud by dishonest banker.
- Deane, Murphy, Savage and Wilcox v Coutts & Co [2018] EWHC 1657 (Ch): claims by footballers for investment advice given in breach of fiduciary duty.
- R (Mazarona Properties Ltd) v Financial Ombudsman Service [2017] EWHC 1135 (Admin): Judicial review of the Financial Ombudsman Service's refusal to consider a complaint about the conduct of the Interest Rate Swap Redress Scheme by a bank.
- Blackwater Services Ltd v West Bromwich Commercial Ltd [2016] EWHC 3083 (Ch): Interpretation of a market disruption clause in a loan agreement.

Commercial Litigation

David deals with commercial disputes and transactions, including those which have a cross-border element. He is experienced in appearing as Counsel in international arbitrations. He also deals with complex shareholder disputes, particularly where there have been breaches of fiduciary duties or of financial services or money laundering laws. David brings a common sense approach to commercial litigation. He is able to devise strategies which reflect the client's attitude to risk and maximise the outcomes in their case.

Notable Commercial Litigation Cases

- Acting on behalf of the Claimants in a claim against a solicitor for breach of a stakeholder contract: NPPM Claimants v 174 Law Solicitors Ltd [2022] EWHC 4 (Ch).
- Appearing as Co-Counsel in an arbitration in Singapore in a dispute between a cryptocurrency operator and its IT security provider.
- Acting in AA v Bitfinex, the first case where a worldwide freezing injunction was granted by an English court over Bitcoin.
- Acting for accountants in claim against a former partner for diverting a commission payment.
- Acting for corporate borrower resisting claim for repayment of loan on the grounds of misrepresentation by the lender.
- Acting for entrepreneurs in shareholder dispute with major PLC.
- ETL v Munn: Acting for purchaser in claim for breach of warranties in a Share
- Purchase Agreement.
- Acting for minority shareholder in unfair prejudice petition.
- Acting for foreign bank in claim to recover foreign exchange from Travelex.
- Appearing in the Gibraltar Supreme Court in Magner v Royal Bank of Scotland on an application for inspection witness statements and exhibits under CPR 32.13.

Financial Mis-selling

David has handled a wide range of claims where investors have been given financial advice which was negligent and/or in breach of fiduciary duty. He is able to identify a wide range of causes of action in tort and in equity and to advise on the liability of accessories to wrongdoing. David has also dealt with hundreds of claims of financial mis-selling. He specialises in claims relating to products governed by the ISDA Master Agreement including all types of interest rate hedging products including both vanilla and complex collars and swaps.

Notable Financial Mis-selling Cases

- Angelgate Claimants v Key Manchester Ltd [2020] EWHC 3643 (Ch), [2021] PNLR 15: Acting for claimants who have entered into unregulated collective investment schemes (UCIS) in relation to property in the UK and abroad.
- Acting on behalf of an individual given negligent financial advice in Cyprus by the Appointed Representative of a UK firm.
- Claims on behalf of high net worth individual against private bank for negligent and unauthorised investments.
- Acting on behalf of businessman who claimed that bank had reneged on promises of lending: Hodell v Clydesdale Bank [2018] EWHC 1009 (QB).
- Deane, Murphy, Savage and Wilcox v Coutts & Co [2018] EWHC 1657 (Ch): claims by footballers arising out of investment advice to invest in a UCIS in Spanish property given in breach of fiduciary duty.
- Acted on behalf of investor who was advised to invest in UCIS in Cape Verde and then to invest into the Connaught Income Fund.
- Acted on behalf of investor who was advised by Merrill Lynch to invest in AIG's Enhanced Fund.
- Poulton Plaiz Ltd v Barclays Bank Plc [2015] EWHC 3667 (QB): Interest Rate Swap mis-selling claim.
- Hundreds of swaps cases in which a small business was mis-sold an unsuitable interest rate swap or a fixed rate loan which contained an embedded swap.

Financial Services Regulation

David regularly advises on questions relating to financial services regulation, including issues relating to the EU and in developing areas such as cryptocurrency, fintech, open banking and payment services. David is a fluent French speaker and holds a Master's Degree in EU law from a French University. David frequently advises on questions of EU law, foreign laws, conflicts of laws and in relation to Brexit. David has acted as an expert for the EU on the laws in Albania governing banking and money laundering.

Notable Financial Services Regulation Cases

- Asking foreign banks as to their post-Brexit obligations and in respect of applications for authorisation in the UK.
- Advising private banks which wish to enter into mortgages secured on land in the UK as to the

UK's regulatory frontier and conduct of business rules.

- Acting for borrower who faced extortionate repayments in loan made by unauthorised lender.
- FCA v Allied Wallet Ltd [2019] EWHC 2808 (Ch): Acting for e-money and payment services provider in FCA's application to wind up the company.
- Advising Egyptian borrowers and guarantors as to their liabilities under commercial financing agreements and hedging agreements which are subject to English law.
- Advising foreign banks on consumer protection legislation in England and Gibraltar.

Insolvency

David is skilled at handling the interaction between financial services regulation and insolvency, particularly in cases involving applications to wind up a company on the just and equitable ground and in cases concerning the ring-fencing of customer assets. In the context of claims for financial mis-selling and other professional negligence, he focuses on the ability to recover damages as well as establishing liability.

Notable Insovency Cases

- Dormco SICA Ltd [2021] EWHC 3209 (Ch): acting for Defendant in Part 20 claim against director who had devised a transaction at an undervalue.
- Advising a victim of an accident on obtaining an assignment from the liquidators of Thomas Cook.
- Financial Conduct Authority v Allied Wallet Ltd [2019] EWHC 2808 (Ch), [2020] BCC 147: acting for fintech company resisting application by FCA for the appointment of a Provisional Liquidator.

Professional Negligence

David's professional negligence practice relates to claims which have a banking or a commercial element. David is particularly adept at addressing complex questions of causation and loss. David frequently works with others at Forum to devise strategies for handling group actions on claims for professional negligence relating to banking and finance. David has worked with Philip Currie and with Lloyd Maynard on class action cases relating to mortgage mis-selling, negligent conveyancing, and failed property developments.

Notable Professional Negligence Cases

- Angelgate Claimants v Key Manchester Ltd [2020] EWHC 3643 (Ch), [2021] PNLR 15: Acting in a class action against solicitors for failing to protect the interests of foreign buyers purchasing properties off plan in the North of England.
- Acting on behalf of a liquidator in a claim against a solicitor for negligent advice which led to a company paying unlawful dividends.
- Acting for a high net worth individual in a claim against accountants for negligent tax advice.

- Acting against a solicitor for professional negligence in failing to address the tax consequences of a corporate takeover.
- Acting in a claim against a quantity surveyor for professional negligence in project monitoring.
- Right to Buy Litigation [2015] EWHC 1559 (Ch): Group litigation of claims for professional negligence against solicitors conducting conveyancing under the Right to Buy Scheme.

Qualifications

- Diploma in French Gonville & Caius College, Cambridge.
- MA Law Gonville & Caius College, Cambridge.
- Maîtrise en Droit (International and European Law) Université de Toulouse I.
- PhD University of Wales.

Scholarships and Awards

- Major Scholarship Inner Temple.
- Concours Annuel Université de Toulouse 1ère Mention – European Competition Law.
- Tapp Studentship Gonville & Caius College, Cambridge.
- George Long Prize for Roman Law Cambridge University.
- Squire Scholarship Cambridge University.
- Senior Scholarship Gonville & Caius College, Cambridge.
- McNair Law Prize Gonville & Caius College, Cambridge.
- Exhibition Gonville & Caius College, Cambridge.

Professional Bodies

- Chartered Institute of Arbitrators.
- Financial Services Lawyers Association.
- COMBAR.
- Professional Negligence Lawyers Association.
- Franco-British Lawyers Society.

Professional Development

David regularly chairs conferences on Banking Litigation and Financial Mis-selling and delivers seminars on a variety of topics including professional negligence, misrepresentation, and financial services claims.

Teaching

David is Distinguished Fellow and Visiting Professor at the University of Notre Dame (USA) in England, where he delivers a course which critically examines financial services regulation and banking practices and asks: do the laws governing banking really benefit customers and serve the common good? David is also Visiting Professor in Banking Law at Queen Mary University of London where he teaches on emerging topics in banking law such as open banking, confidentiality and data protection, fintech and crypto-currencies.

Keynote Address: The State of Professional Negligence Litigation

David McIlroy
Barrister and Head of Chambers
Forum Chambers
Global Distinguished Professor in Law
University of Notre Dame (USA) in England

1

The Volume of Claims

- The number of "live" professional negligence claims in the High Court seems to be down
- We are at the end of the cycle of work generated by the actions of banks before and during the Global Financial Crisis
- We are also nearing the end of the film finance scheme claims
- We are over the crest of the wave of fractional investment claims
- The courts are listing cases far earlier than they were during or immediately after the pandemic

2

The state of the professional indemnity market

- The last few years have been expensive for professional indemnity insurers. Premiums have increased and, in some cases, it has become harder to get cover at all.
- Insurers are finding it challenging to price PII risk accurately.
- Market failure is a contingency that cannot be dismissed.
- A strategic review of the functioning of the PII market may be necessary.
- Professional indemnity insurers are transparently attempting to manage their cash-flow by delaying settlements and trials.

3

The state of ATE insurance and litigation funding

- Less capital available in the litigation funding market
- Some expensive and high profile losses in funding cases (e.g. *Farol Holdings Ltd v Clydesdale Bank Plc* [2024] EWHC 593 (Ch))
- Uncertainty created by the *PACCAR* decision [2023] UKSC 28
- Prospect of remedial legislation, *The Litigation Funding Agreements (Enforceability) Bill* being passed before the election
- The possibility of a wider review of litigation funding, for which *Mr Bates v. the Post Office* was the catalyst

4

How claims are being handled

Pre-Action Conduct: a quick reminder of the basic principles

- The aim of the Pre-Action Protocol for Professional Negligence is to avoid unnecessary expense (§2.2(d))
- The parties should supply promptly whatever information or documentation is reasonably requested (§8.4)
- Parties are encouraged to cooperate openly in the exchange of relevant information and documentation but should not use the Protocol to justify a 'fishing expedition' (§10.2)

5

Coverage Disputes

More satellite disputes about:

- Which insurer is on risk (were circumstances notified to a prior insurer?)
- Whether cover can be avoided on the grounds of fraud or dishonesty

The fact such disputes are resolved by arbitration means that currently there are no precedents to assist other parties in resolving future disputes.

Is it time for the awards in such cases to be published on an anonymised basis, like FOS decisions are?

6

Disclosure

- The disclosure regimes are now a major point of difference between litigating in the KBD and litigating in the ChD.
- The *Post Office* scandal highlights the importance of complying with disclosure duties.
- Robin Knowles J went out of his way to praise the lawyers on the losing side in *Nigeria v Process and Industrial Developments Ltd* [2023] EWHC 2638 (Comm) for their efforts to ensure that their clients gave proper disclosure.
- Some lawyers soon will be made an example of for failing to deal with disclosure properly

7

Witness Statements

- We have yet to see the impact of the new Practice Direction on Witness Statements (PD 57AC) in the Business & Property Courts
- The trend of judges placing emphasis on contemporaneous documents will continue
- Applications to vary certificates of compliance with the new regime will require disclosure of the supporting evidence as to why it was not possible to comply with certain aspects of the Statement of Best Practice (*Cook UK Ltd v. Boston Scientific Ltd* [2023] EWHC 2163 (Pat))

8

Fraud

Developments to be aware of:

- Although a party cannot exclude its liability for a fraud which induced another party to enter into a contract with it, it can exclude its liability for the fraud of its agent or employee during the performance of the contract: *Innovate Pharmaceuticals* [2024] EWHC 35 (TCC)
- The Supreme Court's approach to "deliberate concealment": *Canada Square Operations Ltd v Potter* [2023] UKSC 41
- Victims must prove 'conscious awareness' of the misrepresentation: *Loreley Financing v Credit Suisse Securities* [2023] EWHC 2759 (Comm)

9

Group Actions

- Group Litigation Orders (GLOs) continue to be relatively underused
- There are uncertainties about the extent to which multiple claims can be brought on a single Claim Form
- We don't have an authoritative template for managing multiple claims
- Courts will use a bifurcated process in cases involving both common issues and individual issues: *Barclays Bank UK Plc v Terry* [2023] EWHC 2726 (Ch)

10

Indemnity Limits

- The current position, in which an insurer can pay off one claim or set of claims to exhaust the indemnity leaving any other claimants without compensation is not optimal
- It would probably be better for insurers of an insolvent defendant to have to pay the indemnity to the insolvency practitioners, on trust for the class of eligible claimants who would then be paid out *pro rata*

11

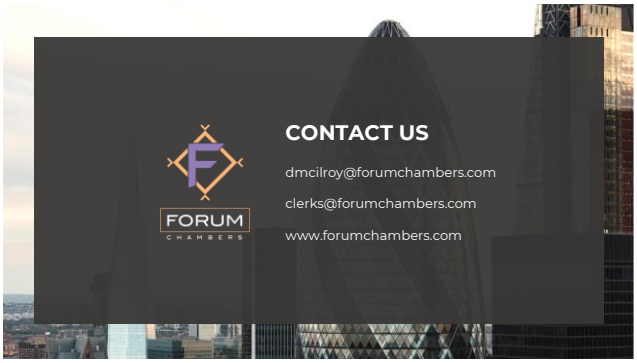
The Future

- Claims against financial advice networks in respect of the actions of their advisors, brokers, and other authorised representatives
- Claims for data breaches and other cyber-attacks
- Claims which come to light because of insolvencies, e.g. valuation claims, claims against auditors
- Fraud

12


ANY QUESTIONS?
FORUM
CHAMBERS

13


FORUM
CHAMBERS
CONTACT US
dmcilroy@forumchambers.com
clerks@forumchambers.com
www.forumchambers.com

14

Simon Johnson
Enterprise Chambers

"Group actions and using a single claim form: Abbott v. MoD and subsequent cases"

Enterprise CHAMBERS

Simon Johnson

Back

Year of Call: 2000
E: simonjohnson@enterprisechambers.com
T: 020 7405 9471
Clerk: Duane Hitchman
Clerk: Kenya Mendoza

PRACTICE AREAS

Commercial
Company
Insolvency & Restructuring
Banking and Finance
Professional Negligence and Disciplinary
Property

PROFILE

Simon is an experienced commercial chancery barrister specialising in large-scale, technically demanding litigation.

He has particular knowledge of and expertise in group actions arising from failed property investment schemes and the interlocking specialisms involved: civil fraud, freezing orders, banking, professional

negligence and private international law.

Simon also acts in a wide range of business disputes, including contractual claims of all kinds, claims for breach of warranty and fiduciary duty, together with company, insolvency and restructuring matters.

Simon's current caseload:

- Representing defendants to a £50 million fraud and conspiracy claim brought by 430 claimants. Among many other things, Simon conducted a 3 day application to discharge a worldwide freezing order. A 10 week trial will take place in the spring of 2024.
- Representing the claimants in a group action against negligent solicitors and their insurers. Simon overturned an arbitration award obtained by the insurers by which they purported to avoid liability and outflank the claim.
- Representing the claimants in a group action against negligent solicitors, who applied to strike out the case as an abuse of process. Simon was brought in to lead the case and resist that application, which turns on *Abbott v. MoD* [2023] EWHC 1475, on which Simon has published an article **here.**
- Representing the claimants in a multi-million pound claim for breach of contract and fiduciary duty, to be tried in December 2023. Simon recently defeated an application for security for costs of approximately £500,000, on the basis of stifling.

The directories describe Simon as "*an outstanding barrister who is a KC and High Court judge in the making"* and *"a fearless and compelling advocate*", who is "*always up for a very challenging case*". He is a seasoned trial and appellate advocate and has acted in the Court of Appeal (led and unled) and Supreme Court.

PRACTICE AREAS

Commercial

Simon advises clients on a wide range of business disputes including the interpretation, performance and termination of contracts, remedies for breach of contract including specific performance and account of profits, restitution, breach of confidence and claims against IFAs and financial institutions. He has particular expertise in cross-border cases involving foreign jurisdictions and issues of foreign law. He has extensive experience of obtaining, policing and challenging freezing orders. For 12 years Simon has represented large groups of UK citizens suing IFAs, property developers, banks and lawyers in connection with the purchase of investment properties. He also represents defendants in such cases, most recently in 4VVV v Spence.

Recent cases include:

- *4VVV Ltd & Ors v. Spence & Ors* [2023] EWHC 1 (Comm): Representing the third defendant in a £50 million fraudulent misrepresentation and conspiracy claim brought by 430 individuals concerning buy to let holiday properties and student accommodation.
- *Millbrook Healthcare Bidco Ltd v. Croll* [2023] EWHC 290 (Comm): Represented the defendants in a multi-million pound claim for breach of warranty arising from the sale of shares in a healthcare business. The judgment praises the "skill and dedication" with which Simon advanced his clients' case.
- *A v. B:* Representing 90 claimants in a £9 million damages claim against negligent solicitors. Having obtained judgment against the solicitors, Simon overturned an adverse arbitration award and will embark on a fresh arbitration against the solicitors' PI insurers.
- *Cormack & Ors v. AIG (UK) Ltd*: Representing 40 claimants in a £12 million damages claim against PI insurers listed for a 9 day trial in November 2023. The principal issue is aggregation.

- *Various claimants v. Giambrone Law & Ors* [2017] EWCA Civ 1193, [2018] PNLR 2: Defeated an appeal on the proper measure of compensation and damages for solicitors' negligence and breach of trust. Led by Zia Bhaloo KC. Successfully resisted the defendants' application for permission to appeal to the Supreme Court.
- *Barclay-Watt & Ors v. Alpha Panareti Public Limited & Ors* [2021] EWHC 1327 (Comm), [2021] 3 All ER 804; [2021] EWHC 1591 (Comm), [2021] Costs LR 659: Represented the successful claimants in a 7 week Commercial Court trial regarding misrepresentations in the sale of holiday properties in Cyprus with unaffordable loan packages (led by Stephen Nathan KC). Simon represented the claimants over 10 years.
- *Argos Ltd. & Homebase Ltd. v. Interserve (Facilities Management) Ltd:* Represented the claimants in a dispute concerning alleged overcharging under two service agreements.
- Represented the claimant company in a Commercial Court claim for damages and injunctive relief arising from the breach of a Tomlin order.

Company

Simon is a leading junior in company disputes (Legal 500, band 4) praised as "very bright, grasps issues quickly and pleads them well but succinctly". He advises company boards, individual directors and shareholders on their rights and obligations arising from companies' constitutional documents, the Companies Act 2006 and the common law. He regularly advises on acrimonious company and board meetings, the exercise of pre-emption rights in relation to the sale of shares, and allegations of unfair prejudice and the breach of fiduciary and other duties. Simon has advised and represented vendors and purchasers on breach of warranty and other claims arising from business acquisitions. He has pursued and defended directors and senior employees in multi-million pound claims for breach of duty and breach of confidence. Simon has prepared constitutional documents for companies and trusts and chaired company meetings.

Recent cases include:

- *Millbrook Healthcare Bidco Ltd v. Croll* [2023] EWHC 290 (Comm): Represented the defendants in a multi-million pound claim for breach of warranty arising from the sale of shares in a healthcare business. The judgment praises the "skill and dedication" with which Simon advanced his clients' case.
- *Przyborowski v. Brotherton*: Representing the claimants in a multi-million claim for breach of contract and fiduciary and good faith obligations arising from a joint venture in respect of tenanted properties in Germany (5 day trial in December 2023).
- Advising a joint venture partner on the dissolution and winding up of a partnership operating extensive commercial properties together with allegations of fraudulent withdrawals of partnership funds.
- *Re Arthur Court:* Represented freehold and management companies of a block of flats in London in a bitter dispute with leaseholders who purported to withdraw the directors' authority and claimed orders requiring Simon's clients to convene company meetings to dismiss the directors in circumstances which indicated that the claim was vexatious.
- Advising shareholders in a pay day loan company on their standing to object to a novel scheme of arrangement.
- Advising a transferee of shares on its entitlement to rectification of the company register to record its title to shares and whether the transfer was a transaction at an undervalue.
- Advising an LLP on reporting obligations and causes of action against a senior member of the LLP for breaches of the LLP agreement and misfeasance.
- Advising a financial institution on its entitlement to convert amounts outstanding under loan notes into shares.
- Advising shareholders and directors on the proposed sale of an internet business and the impact of restrictive covenants and good faith obligations in a shareholders' agreement.

Insolvency & Restructuring

Simon is a leading junior in insolvency disputes (Chambers, band 5; Legal 500, band 4), praised as “very approachable and very knowledgeable on insolvency litigation matters”. He is “an excellent insolvency junior, with an encyclopaedic grasp of the law and a calm and assured advocacy style”. Simon advises and represents officeholders, debtors and creditors in all manner of corporate and personal insolvency cases. He has particular expertise in clawback claims against directors and regularly defends officeholders in challenges to their appointments and claims for misfeasance. Simon has conducted or defended numerous applications under the Cross-Border Insolvency Regulations. He has many years’ experience of cross-border insolvencies of extreme complexity and high value, starting with T&N/ Federal-Mogul, where he was junior counsel to the administrators, and extending to cases in the US and Gibraltar. Simon edits the restructuring chapter of Gore-Browne on Companies and has advised debtors and creditors on proposed schemes of arrangement and CVAs.

Recent cases include:

- Advising shareholders in a pay day loan company on their standing to object to a novel scheme of arrangement.
- *Kerkar v. Investment Opportunities IV Pte Ltd* [2021] EWHC 3255 (Ch), [2022] BPIR 408: Represented the debtor in an application to set aside a statutory demand for £52 million on the basis of the creditor’s alleged bad faith.
- *Ahmed v. Habib Bank Zurich Plc*: Represented the creditor bank in an application to set aside a statutory demand for £1 million served by Simon’s client on a company director. The case raised numerous questions including the propriety of placing the company in administration, due process, alleged bad faith and undue influence.
- Advising a joint venture partner on the dissolution and winding up of a partnership operating extensive commercial properties together with allegations of fraudulent withdrawals of partnership funds.
- *Re Granton Retail Park Ltd*: Represented administrators in a multi-million pound misfeasance claim brought by a former director and shareholder in connection with the sale of a high profile mixed-use development in Edinburgh.
- Advising administrators on challenges to their appointment arising from an alleged conflict of interest and an alleged improper purpose to a paragraph 14 appointment.
- Advising an industrial company on insolvency issues arising from potential liabilities for personal injury caused by exposure to asbestos.
- Advising an Australian trustee in bankruptcy on the enforcement of orders of the Australian court against an English domiciliary.

Banking and Finance

Simon undertakes a wide range of banking work, including recovery proceedings under facility agreements, guarantees, mortgages and other securities. He has extensive experience of disputes concerning LPA receivers appointed by banks, including claims for injunctive relief. Simon advises on compliance matters and Sharia-compliant products. Simon is familiar with FSMA 2000 and has appeared for the proponents of Part 7 banking business transfer schemes. Simon has pursued appointed representatives of regulated financial advisory businesses in litigation concerning overseas property and via the Financial Services Compensation Scheme and the Financial Ombudsman Service.

Recent cases include:

- Representing banks in recovery proceedings against company directors pursuant to personal guarantees including resisting applications for injunctions to restrain the sale of charged property by LPA receivers.
- Representing guarantors and borrowers opposing such recovery proceedings.
- Acting for claimants against appointed representatives in the context of cashing in regulated investments to purchase off-plan property sold by the “Harlequin” companies in the Caribbean.
- Advising a company on the enforceability of rights under loan notes issued by the company and held by a commercial lender.

Professional Negligence and Disciplinary

Many of Simon’s cases concern allegations of breach of duty against professionals including solicitors, accountants, surveyors, IFAs, banks and insolvency officeholders. Simon represented the successful claimants in the Court of Appeal in the Giambrone litigation. The case raised important questions about the measure of compensation for solicitors’ breach of trust and negligence (SAAMCO). Simon has advised and represented numerous individuals in claims against IFAs and foreign lawyers in similar contexts. He has appeared for accountants in the disciplinary tribunal of the ICAEW.

Recent cases include:

- *Various claimants v. Giambrone Law & Ors* [2017] EWCA Civ 1193, [2018] PNLR 2: Defeated an appeal on the proper measure of compensation and damages for solicitors’ negligence and breach of trust. Led by Zia Bhaloo KC. Successfully resisted the defendants’ application for permission to appeal to the Supreme Court.
- *A v. B:* Representing 90 claimants in a £9 million damages claim against negligent solicitors. Having obtained judgment against the solicitors, Simon overturned an adverse arbitration award and will embark on a fresh arbitration against the solicitors’ PI insurers.
- Advising a high net worth individual on claims by former professional advisers and potential counterclaims for professional negligence

Property

Simon represented the claimant in a landmark claim for specific performance of a “heads of terms” contract to grant a lease over a strategic freight site in central London, worth tens of millions of pounds. This case, which settled on the eve of trial, raised questions concerning enforceability, uncertainty, section 2 LPMPA 1995 and estoppel by convention. Simon has extensive experience of proprietary tracing claims and claims under TLATA 1996 concerning beneficial interests in property arising from all manner of trusts in both commercial and family contexts. Property assets are central to many of Simon’s cases, particularly his commercial group actions.

Recent cases include:

- *L. Lynch (Plant Hire & Haulage) Ltd v. Devon & Cornwall Railways Ltd*: Represented the claimant in a multi-million pound claim for specific performance of a “heads of terms” contract for the grant of a lease of a strategic freight site in central London. Led by Zia Bhaloo KC.
- *Bokhari v. Shah*: Representing the claimants in a claim against an agent for breach of fiduciary duty arising from property investments in central London. Simon obtained a proprietary injunction and worldwide freezing injunction against the defendant, with challenges to those orders dismissed.

- *Barclay-Watt & Ors v. Alpha Panareti Public Limited & Ors* [2021] EWHC 1327 (Comm), [2021] 3 All ER 804; [2021] EWHC 1591 (Comm), [2021] Costs LR 659: Represented the successful claimants in a 7 week Commercial Court trial regarding misrepresentations in the sale of holiday properties in Cyprus with unaffordable loan packages (led by Stephen Nathan KC). Simon represented the claimants over 10 years.
- Advising the owner of a multi-million pound buy to let portfolio on the powers of LPA receivers.

SIGNIFICANT CASES

4VVV Ltd & Ors -v- Spence & Ors [2023]
EWHC 1 (Comm)

Representing the third defendant in a £50 million fraudulent misrepresentation and conspiracy claim brought by 430 individuals

Millbrook Healthcare Bidco Ltd -v- Croll [2023]
EWHC 290 (Comm)

Represented the defendants in a multi-million pound claim for breach of warranty. The judgment praises the "skill and dedication" with which Simon advanced his clients' case.

Re A Company

Advised shareholders in a pay day loan company on their standing to object to a novel scheme of arrangement.

A -v- B

Representing 90 claimants in a £9 million damages claim against professional indemnity insurers arising from failed property investments.

Cormack & Ors -v- AIG (UK) Ltd

Representing 40 claimants in a £12 million damages claim against professional indemnity insurers listed for a 9 day trial in November 2023.

Various Claimants -v- Giambrone Law & Ors [2017]
EWCA Civ 1193, [2018] PNLR 2

Defeated an appeal on the proper measure of compensation and damages for solicitors' negligence and breach of trust. Led by Zia Bhaloo KC. Successfully resisted the defendants' application for permission to appeal to the Supreme Court.

Barclay-Watt & Ors -v- Alpha Panareti Public Limited & Ors [2021]
EWHC 1327 (Comm), [2021] 3 All ER 804; [2021] EWHC 1591 (Comm), [2021] Costs LR 659

Represented the successful claimants in a 7 week Commercial Court trial regarding misrepresentations in the sale of holiday properties in Cyprus with unaffordable loan packages (led by Stephen Nathan KC). Simon represented the claimants over 10 years in this complex, multi-faceted litigation which involved jurisdiction disputes and appeals on consumer status and rights in rem in immoveable property together with claims against a Cypriot bank and IFAs. Simon has advised approximately 300 other claimants with similar claims involving other developments and defendants. Alpha Panareti required Simon to go well beyond the extra mile for his clients against well-resourced and aggressive opponents. Previous phases of the litigation are reported at [2018] 6 WLUK 295 and [2012] 11 WLUK 702.

Re A Partnership

Advised a joint venture partner on the dissolution and winding up of a partnership operating extensive commercial properties together with allegations of fraudulent withdrawals of partnership funds

Kerkar -v- Investment Opportunities IV Pte Ltd [2021]
EWHC 3255 (Ch), [2022] BPIR 408

Represented the debtor in an application to set aside a statutory demand for £52 million on the basis of the creditor's alleged bad faith. The claim arose from the collapse of the Cox & Kings travel business in India and raised allegations of a complex fraud involving myriad companies

L. Lynch (Plant Hire & Haulage) Ltd -v- Devon & Cornwall Railways Ltd:

Represented the claimant in a multi-million pound claim for specific performance of a "heads of terms" contract for the grant of a lease of a strategic freight site in central London. Led by Zia Bhaloo KC

Ahmed -v- Habib Bank Zurich Plc
(Business & Property Courts, Manchester)

Represented the creditor bank in an application to set aside a statutory demand for £1 million served by Simon's client on a company director. The case raised numerous questions including the propriety of placing the company in administration, due process, alleged bad faith and undue influence.

Re Granton Retail Park Ltd

Represented administrators in a multi-million pound misfeasance claim brought by a former director and shareholder in connection with the sale of a high profile mixed-use development in Edinburgh.

Re Chesterton International Limited & Ors [2017]
EWHC (Ch)

Represented the liquidators of the Chesterton estate agency companies in applications for Berkeley Applegate relief and directions regarding the proper treatment of company property and trust property worth millions of pounds.

Escuris SA v. John Lake Shellfish Ltd [2017]

Represented the claimant in a claim for damages arising from the termination of a contract for the supply of tinned shellfish; defended a counterclaim of £9.5 million for business interruption damages formulated on the "loss of a chance" basis.

Wilkinson & Ors v. North & Ors [2016]
EWHC 1242 (Ch)

Represented the claimants at the trial of an equitable tracing claim regarding trust property misapplied in breach of a trust arising in a commercial context.

Erlam & Ors v. Lutfur Rahman & Anor [2016]
EWHC 111 (Ch); [2016] BPIR 856; [2016] P&CR DG5

Represented the successful claimants at the trial of a claim proving that the disgraced former mayor of Tower Hamlets was the true beneficial owner of a freehold property; a trust deed purporting to show a constructive trust in favour of the wife was a sham.

Alexander-Theodotou v. Michael Kyprianou & Co LLC [2016]

EWHC 1493 (Ch); [2016] BPIR 1114

Represented the successful applicant in setting aside a statutory demand where the debt arose from the alleged liability of a solicitor to pay the fees of foreign counsel. Led by Andrew Henshaw QC

Re Lemma Europe Insurance Co Ltd (in liquidation)

Represented an alleged de facto or shadow director in claims for misfeasance and breach of duty.

Re An Insolvent Gibraltar Company

Advised the PI insurers of an LLP on the proposed settlement of a multi-million pound claim issued by the liquidators of a Gibraltar company.

Argos Ltd and Homebase Ltd -v- Interserve (Facilities Management) Ltd

Represented the claimants in a dispute arising from alleged overcharging under two service agreements. Led by Zia Bhaloo KC.

Ryan v. Tiuta International Limited (in CVA) [2015]
BPIR 123

Represented the successful applicant in setting aside a multi-million pound statutory demand issued against him on the grounds that the waiver of cross-claims in a deed of surrender was void for economic duress. The consequential claim settled shortly before trial.

Smith Medical International Ltd & Anor v. Hansraj Nayyar Medical India [2014]
EWHC (Comm)

Represented the applicant in a jurisdiction dispute concerning the scope of jurisdiction agreements in a chain of commercial agreements. Leggatt J described Simon's submissions as "presented with great skill".

Elek v Bar-Tur [2013]
EWHC 207 (Ch); [2013] 2 EGLR 159; [2013] 8 EG 107; and in the Court of Appeal [2013] EWCA Civ 1774:

Represented the successful defendants who defeated a claim for restitutionary compensation arising from the termination of a joint venture agreement. Ryder LJ described Simon's submissions as "objectively incontrovertible".

In re Skycat Group Limited [2007]
EWHC 3116 (Ch)

Represented the successful applicant in a contested application for an administration order in the context of a deadlocked company.

In re Metronet BCV Ltd (PPP Administration) [2007]
EWHC 2697 (Ch); [2008] Bus LR 823; [2008] 2 All ER 75

Rights of veto over a transfer scheme in a special administration. Led by Antony Zacaroli QC.

In re Rajapakse [2007]
BPIR 99; [2008] BPIR 283

Represented the successful applicant in the first London High Court application under the Cross-Border Insolvency Regulations.

Burdale Financial Limited v. Agilo Masterfund Limited [2008]
EWHC 1103 (Ch)

Defeated a vulture fund's attempt to accelerate the repayment of mezzanine loans. Led by Antony Zacaroli QC.

British Gas Trading Limited v. Perenco UK Ltd and Hess Limited [2006]
EWHC 233 (Comm) and in the Court of Appeal [2006] EWCA Civ 900, [2006] 2 CLC 57

Successfully defended the termination of long-term gas supply contracts. Led by Laurence Rabinowitz QC.

In re T&N [2005]
EWHC 2990 (Ch); [2006] 1 WLR 1792

The governing law of US mass tort claims in one of the most complex insolvencies of the last 25 years. Led by Richard Snowden QC and Peter Arden QC. Junior counsel to the administrators and draftsman of constitutional

documents for the T&N UK Asbestos Trust for the compensation of persons afflicted by asbestos-related disease.

The Solitaire Arbitration

The longest running arbitration in English legal history: Represented the owners in their defence of the builder's counterclaims for delay and variations valued at (Sing) $230 million. Led by Nick Dennys QC and Andrew Goddard QC.

In re Piacentini [2003]
EWHC 113 (Admin); [2003] QB 1497; [2003] 3 WLR 354

Represented the receiver in a successful application concerning the incidence of liability for income tax in a receivership under the Criminal Justice Act 1988.

CAREER AND ASSOCIATIONS

2021 Appointed a Deputy District Judge

2002 to 2008: Barrister and Senior Associate in the Advocacy Group of leading international law firm, Dentons.

1994 to 1997: BA (Hons) in Modern History, University of Oxford, First Class.

1995 to 1997: Elected as a Scholar of University College, Oxford.

1997: Prize for best First Class degree in Modern History from candidates at University College.

1998 to 2000: Queen Mother's Major Scholarship and Hardwicke Entrance Exhibition, Middle Temple.

Diploma in Law (City University – Commendation); BVC (Inns of Court School of Law – Very Competent).

Member of the Chancery Bar Association

Member of the Insolvency Lawyers Association

Member of the Commerical Bar Association

Simon is fluent in Spanish and literate in French.

Simon provided free legal advice for several years through the Citizens' Advice Bureau at the Royal Courts of Justice and the LawWorks Legal Advice Centre in Poplar. He is a volunteer with the CLIPS scheme operated by the Chancery Bar Association.

Simon has served as the governor of a primary school and a volunteer and fundraiser for a soup run for the homeless in central London. For 5 years he organized a week-long programme of voluntary work in southern France for approximately 30 university students and others. Simon has participated in this programme in

most years since 1997.

PUBLICATIONS

Contributor to ‘Gore-Browne on Companies: chapter 46, mergers, restructuring and amalgamation.’

Contributor to ‘Gore-Brown Special Release: published annually; a series of articles on piercing the corporate veil.’

Contributor to ‘Practical Law: company law and insolvency topics.’

Contributor to ‘The Journal of International Finance & Banking: the reform of insolvency law in Saudi Arabia.’

Simon regularly presents seminars and talks on matters of relevance to his practice. Details are available on request.

Enterprise CHAMBERS

LONDON

9 Old Square
Lincoln’s Inn
London
WC2A 3SR

T 020 7405 9471
E london@enterprisechambers.com

BRISTOL

4-5 College Green
Bristol
BS1 5TF

T 0117 450 7920
E bristol@enterprisechambers.com

LEEDS

43 Park Square
Leeds
LS1 2NP

T 0113 246 0391
E leeds@enterprisechambers.com

NEWCASTLE

65 Quayside
Newcastle upon Tyne
NE1 3DE

T 0191 222 3344
E newcastle@enterprisechambers.com

Barristers regulated by the Bar Standards Board.

CONNECT WITH US

Neutral Citation Number: [2024] EWCA Civ 376

Appeal No: CA-2023-001843
Case No: BL-2023-000165

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HH Judge Jarman KC (sitting as a Judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE FALK

- -

Between:

RYAN MORRIS
and 131 others

Claimants/Respondents

- and –

WILLIAMS & CO SOLICITORS (A FIRM)

Defendant/Appellant

Roger Stewart KC and **Scott Allen** (instructed by **Caytons Law LLP**) for the **Appellant/Defendant**

Simon Johnson and **Jennifer Meech** (instructed by **Penningtons Manches Cooper LLP**) for the **Respondents/Claimants**

Hearing dates: 19-20 March 2024

- -

APPROVED JUDGMENT

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 18 April 2024.

SIR GEOFFREY VOS, MASTER OF THE ROLLS

Introduction

1. In this case, the 134 claimants (the Claimants) issued a single claim form against Williams & Co Solicitors (the Solicitors). Each of the Claimants sought damages for breaches of the Solicitors' duty to advise properly in relation to their investments in one or more of 9 separate development projects promoted by the same group of companies. HH Judge Jarman KC (the judge) dismissed the Solicitors' application to strike out the claim form under CPR Part 3.4(2)(b) and/or (c) on the grounds that it was an abuse of process or an obstruction to the just disposal of the proceedings, or the claim form did not comply with CPR Part 7.3 (7.3).

2. Against that background, this appeal concerns the circumstances in which it is permissible under the CPR for multiple claimants to bring claims in one claim form and one set of proceedings. There are, in effect, three regimes for such claims under CPR Part 19, which is headed "Parties and Group Litigation". The first is governed by CPR Part 19.1 (19.1) (which needs to be read alongside 7.3, which appears in the Part concerning claim forms). It is that regime that is the subject of this appeal. The second regime is representative proceedings brought under CPR Part 19.8, and the third regime is group litigation established by CPR Part 19.21-19.24.

3. The argument in this court has revolved around the proper meaning of 19.1 and 7.3 and the correctness of the tests applied by the Divisional Court (Dingemans LJ and Andrew Baker J) in *Abbott v. Ministry of Defence* [2023] EWHC 1475 (KB), [2023] 1 WLR 4002 (*Abbott*). *Abbott* is important because HH Judge Jarman KC (the judge) expressly followed it in deciding this case, and there is no appeal from *Abbott* to this court.

4. 19.1 provides that "[a]ny number of claimants or defendants may be joined as parties to a claim", and 7.3 provides that "[a] claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings".

5. There has been controversy over what precisely *Abbott* decided. For present purposes, it is sufficient to refer to [73] of Andrew Baker J's judgment in *Abbott*, where he said that "[i]f there are likely to be common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims, that could be enough for a conclusion that common disposal rather than separate disposal of that set of claims would be convenient". This can be referred to as the "real progress" test of whether "all claims [in a single claims form] can be conveniently disposed of in the same proceedings" pursuant to 7.3.

6. In a nutshell, the Solicitors argue that *Abbott* was wrongly decided. They say that the words of 19.1 and 7.3 severely restrict the situations in which numerous claimants can bring separate claims in one claim form. In particular, the words "[a] claimant" in 7.3 is singular and does not, in context, include the plural. The word "claim" in 19.1 means "a cause of action", and not, as the Divisional Court in *Abbott* held, "proceedings". The Solicitors argue that it is inconvenient and unfair for these 134 Claimants to group together their disparate claims. The process has already led to inadequate disclosure, and will lead to the Solicitors being unable properly to defend themselves.

7. In response, the Claimants submit that *Abbott* was correctly decided, and that, even if it was not, claims of this kind have historically always been allowed to proceed under 19.1 and its predecessors. Whatever test is applied, all the Claimants' claims can be conveniently disposed of in the same proceedings within the proper meaning of 7.3. The judge was right, and the Solicitors' construction of 19.1 and 7.3 would set the clock back decades. The Claimants rely on the procedural history of group claims going back to the seminal decisions of the Court of Appeal and the House of Lords in *Hannay & Co v. Smurthwaite* [1893] 2 QB 412 (*Hannay CA*), and [1894] AC 494 (*Hannay HL*). The Claimants argue that, if the Solicitors succeed, the Claimants will be forced to give up their claims, because of the court fees of £5,000 per claimant, which will need to be paid if they each have to issue their own claim form.

8. I have decided that both the Solicitors' construction of 19.1 and 7.3 and the tests adumbrated in *Abbott* are incorrect in law. The regime allowing multiple claimants to bring their claims in one claim form under 19.1 has to be construed against the background of the previous regime established under the Rules of the Supreme Court (RSC) in general and Order 15 rule 4 of the RSC 1999 in particular (O15 r4). Even though the judge applied the *Abbott* test, he was right to allow the Claimants' claims to proceed in one set of proceedings. O15 r4 allowed multiple claimants where, amongst other things, "some common question of law or fact" arose. This formal requirement was not carried over into the CPR. It seems to me that the Civil Procedure Rules Committee (the CPRC) could usefully look again at whether it would have been better if it had been.

9. This judgment will proceed to deal with: (i) the essential background, (ii) the relevant provisions of the CPR, (iii) the *Abbott* litigation, (iv) other relevant authorities and RSC provisions, (v) when multiple claimants can issue a single claim form under 19.1, (vi) the article 6 point raised by the Respondents' Notice, (vii) disposal of the appeal, and (viii) my conclusions.

<u>The essential background</u>

10. This section is taken loosely from [1]-[9] of the judge's judgment. Northern Powerhouse Development Limited (Northern Powerhouse), operating through associated companies, promoted 9 development projects in different parts of England and Wales between 2017 and 2020. The investors were to be granted leases of units in the developments. Northern Powerhouse nominated the Solicitors to act for and advise the potential investors in each of the 9 projects.

11. When each of the Claimants instructed the Solicitors, they were provided with a standard pack of documents, including a client care letter, and standard terms and conditions of the retainer. There was some variation in the wording of these documents, but the Claimants maintain that the essential terms of the Solicitors' retainers were the same in each of their cases.

12. Two of those essential terms were set out expressly in writing. They were that the Solicitors would: (i) explain the effect of any important document, and (ii) advise of any risk of which the Solicitors were aware, or which was reasonably foreseeable.

13. The Solicitors' terms and conditions made it clear that they would not give commercial or investment or tax advice. Thereafter, the Solicitors provided the Claimants with a

report on title, a draft lease and sublease, drafts of two option agreements to sell or buy back the units and, in certain cases, draft guarantees. The reports on title: (a) advised that the Claimants would get good leasehold title, (b) warned that the investment deposits could be used by Northern Powerhouse prior to completion, (c) said that, if completion did not taken place by a certain date, the Claimants' investment would be refunded, and (d) warned of the risk of insolvency of Northern Powerhouse and its associated companies.

14. The Claimants' core case is that the Solicitors' advice failed to warn of the risks of completion not taking place, and of the dissipation of the investment deposits in the meantime. These were the risks which eventuated. The guarantees were mostly provided by associated companies without sufficient assets to honour them.

15. No defence had been served when the judge heard the strike out application, but a draft defence was made available shortly before the hearing. The Solicitors' argument to the judge was presented on the basis that they reserved the right to argue in the Court of Appeal that *Abbott* was wrong.

16. The judge dismissed the application on 25 July 2023. He said at [13] that *Abbott* had held that "subject to the test of convenience, any number of claimants can bring a claim pursuant to a single claim form". The judge set out at [14]-[20] the principles that he said emerged from *Abbott* at [63]-[73]. I shall return to those principles when I deal below with what *Abbott* decided. The Solicitors emphasised to the judge that the scope of a solicitor's duty to advise may vary according to the understanding and experience of the client. The judge then dealt at [24]-[36] with three of the 6 examples provided by the Solicitors to show that each of the Claimants would have to plead their particular understanding and experience, so that the outcome of one case would not be binding on another.

17. At [37]-[38], the judge held that there were significant common issues in these cases: (i) the scope of the Solicitors' duties arising from the retainer letters, terms of business, and any obligations implied by law, (ii) questions of breach involving consideration of the meaning and effect of the reports on title, (iii) what losses are recoverable in principle, (iv) whether the investments were unlawful as collective investment schemes, whether the Solicitors had duties to identify that possibility, whether they breached that duty and what types of losses were recoverable in principle, and (v) certain issues as to the guarantees. The judge then noted the existence of individual issues such as reliance and advice from other professionals. He referred to two other cases where claims by multiple claimants had been allowed to proceed in one or two claim forms, and where individual issues had been dealt with through effective case management (see *McLean & others v. Thornhill* [2019] EWHC 3514 (Ch), and *Various Claimants v. Giambrone & Law* [2017] EWCA Civ 1993, [2018] PNLR 2).

18. The judge concluded at [46] as follows:

> I am satisfied … that in these cases there is a sufficient commonality in the claims for them properly to proceed in one claim form. The commonality is as [counsel for the Claimants] identifies. I accept … that there are also individual issues, but that does not detract from the identification of the sufficient commonality for the claims to proceed conveniently under one claim form and for the usefulness and

helpfulness that that is likely to engender in respect of all claims, if not of a binding nature, then on the basis of a persuasive nature.

The relevant provisions of the CPR

19. CPR Part 1.1(1) provides that: "[t]hese Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost".

20. CPR Part 2.3 provides that: "'claimant' means a person who makes a claim".

21. CPR Part 7.3 provides that: "[a] claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings".

22. CPR Part 19.1 provides under the heading "Parties - general" that "[a]ny number of claimants or defendants may be joined as parties to a claim.

23. CPR Parts 19.2-19.7 appear under the heading "I ADDITION AND SUBSTITUTION OF PARTIES".

24. CPR Parts 19.8-19.20 appear under the heading "II REPRESENTATIVE PROCEEDINGS".

25. CPR Parts 19.21-19.26 appear under the heading "III GROUP LITIGATION".

26. I set out the relevant parts of CPR Parts 19.21 and 19.22 as follows so that the essential nature of a GLO can be understood:

> *Definition*
> **19.21** A Group Litigation Order ('GLO') means an order made under rule 19.22 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').
>
> *Group Litigation Order*
> **19.22**
> (1) The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues. The multiple parties may be claimants or defendants.
> (Practice Direction 19B provides the procedure for applying for a GLO where the multiple parties are claimants)
> (2) A GLO must –
> (a) contain directions about the establishment of a register (the 'group register') on which the claims managed under the GLO will be entered;
> (b) specify the GLO issues which will identify the claims to be managed as a group under the GLO;
> (c) specify the court (the 'management court') which will manage the claims on the group register; and
> (d) be made in the King's Bench Division with the consent of the President of the King's Bench Division; in the Chancery Division with the consent of the Chancellor of the High Court; or in the County Court with the consent of the Head of Civil Justice. Such consent will be sought by the court to which the application for the GLO is made. …

27. CPR Practice Direction 19B explains how solicitors for various claimants should go about obtaining a GLO as follows:

> *Preliminary steps*
> **2.1** Before applying for a Group Litigation Order ('GLO') the solicitor acting for the proposed applicant should consult the Law Society's Multi Party Action Information Service in order to obtain information about other cases giving rise to the proposed GLO issues.
> **2.2** It will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of that Group to take the lead in applying for the GLO and in litigating the GLO issues. The lead solicitor's role and relationship with the other members of the Solicitors' Group should be carefully defined in writing and will be subject to any directions given by the court under CPR 19.24(c).
> **2.3** In considering whether to apply for a GLO, the applicant should consider whether any other order would be more appropriate, and in particular whether, in the circumstances of the case, it would be more appropriate for –
> (1) the claims to be consolidated; or
> (2) the rules in Section II of Part 19 (representative parties) to be used.

28. It can be seen immediately that a GLO for multiple claimants covers a number of additional situations which would not be covered by 19.1. For example, a GLO can occur where there are multiple solicitors for different claimants in different sets of proceedings, the GLO can be made before or after proceedings are actually issued, and the permission of a Head of Division is required. Moreover, a GLO will lead to the establishment of a group register, and will specify the "common or related issues of fact or law" that are raised by the claims that are being managed together.

The *Abbott* litigation

29. In the briefest outline, the claim form in *Abbott* was issued naming Mr David Abbott and 3,559 other individuals in schedules against the Ministry of Defence (MoD). The claim details said that they were employees or members of the armed forces and brought claims for damages for injuries (noise induced hearing loss) arising out of their exposure to excessive noise during their service. Master Davidson decided in [2022] EWHC 1807 (QB) and recited in his order that "as a matter of law, it was impermissible under CPR7 and CPR19 … for the claimants to issue their claims by a single claim form". *Abbott* was the appeal against that ruling to the Divisional Court, which allowed the appeal, holding that a single claim form was appropriate under 7.3 and 19.1 for the claimants' 3560 claims, notwithstanding that each claim had separate individual circumstances. At [78], Andrew Baker J identified 7 generic issues arising from all these cases including, for example: (i) the content of the duty of care, (ii) the adequacy of standard protective equipment and training provided to military personnel, and (iii) whether age-related hearing loss is accelerated by military noise exposure.

30. At [42]-[43], the Divisional Court construed 19.1 ("[a]ny number of claimants … may be joined as parties to a claim") as meaning that any number of claimants could be joined as parties to "a set of proceedings commenced by a claim form". I should say at once that I agree with that analysis, bearing in mind that the word "claim" is used in many places in CPR Part 19 as meaning "proceedings" (see, for example, CPR Parts 19.7 to 19.10 inclusive). At [47]-[77], Andrew Baker J analysed the proper meaning of 7.3 and the correctness of Master Davison's decision. At [53], he noted that

"convenience" was "an ordinary word conveying usefulness or helpfulness in respect of a possible course of action". It did not need further elaboration or lengthy definition. Thus, he held that 7.3 required that "common disposal, rather than separate disposal, would be convenient". He said that 7.3 asked whether it "would be possible and useful or helpful to have all of [the individual cases] finally determined in the same proceedings rather than in two or more separate proceedings".

31. Having considered at some length the meaning of "the same proceedings" as used in 7.3, Andrew Baker J concluded at [63]-[66] that 7.3 did not require "a single final trial hearing to be possible or practicable". Again, I agree. Then, having considered the case management issues applicable to *Abbott* itself, at [73], Andrew Baker J promulgated what I have described above at [5] as the real progress test. In reaching that conclusion, he apparently accepted in the first part of [71] that the question was whether a cohort of claims (even if not all of them) had sufficient commonality of significant issues of fact that it would be useful or helpful, in the interests of justice, that their determination would bind the MoD and other claimants in that cohort. I will return at [51]-[52] below to the question of whether it is right to require that an issue determined binds some or all of the other parties to a 19.1 claim.

32. At [71(iv)], Andrew Baker J said that the governing principle was "the convenience of disposing of the issues arising between the parties in a single set of proceedings", so that "[t]he degree of commonality between the causes of action … will generally be the most important factor in determining whether it would, or would not, be convenient to dispose of them all in a single set of proceedings".

33. At [76], Andrew Baker J said that the MoD was not "self-evidently wrong" to suggest that it was in some way important or likely that the findings made upon the trial of lead claims would be treated by the parties as persuasive. At [77]-[78], he said that, if the "commonality across the claims cohort were very limited", there would not be the necessary convenience. In *Abbott*, Garnham J had approved 8 lead cases in which the MoD had accepted that there was enough commonality for the decisions made "to be of real significance for all the rest", which was a concession that acknowledged the convenience of common disposal. It is for consideration whether this passage put forward what might be described as a "real significance test" either in addition to or instead of the real progress test already mentioned. In the light of this and the promulgation of the real progress test, I am not sure that Andrew Baker J actually meant either in [71] (as to which, see [31] above) or in the concluding words of [77] to say that common issues had to bind other parties rather than just having a persuasive impact. He actually said in [77]: "whereby it will be beyond argument that the significance in question has the character of findings that bind and not merely findings that may have a persuasive impact". I will deal, in any event, at [51]-[52] with the correctness of that proposition. I should note, however, at this point that the first point in the Claimants' Respondents' Notice argues that *Abbott* ought to have decided (if it did not) that the trial of common issues in proceedings brought by multiple claimants would "produce a binding determination" on all parties.

34. Dingemans LJ agreed with Andrew Baker J, but added a short judgment of his own. It is sufficient to recite what he said at [91] as follows:

> It will be for Mr Justice Garnham and Master Davison to reflect on the submission made on behalf of the [MoD] that findings made in lead claims may not bind other

> claimants, [see [76] and [77] of Andrew Baker J], and to take such steps as they see fit to deal with that point.

35. These remarks seem to have prompted an application by the claimants in *Abbott* for a GLO that came before Garnham J and Master Davison at [2023] EWHC 2839 (KB). Those judges rejected the application for a GLO. The detail of that decision is not directly relevant to what we have to decide. It may be worth, however, noting two matters. First, despite the finding of common issues by Andrew Baker J at [78] in *Abbott* (as to which, see [29] above), Garnham J and Master Davison seem to have rejected a GLO at [56]-[59] on the basis that the findings in the lead cases would be "dispositive of few, if any, of the other claims". Secondly, at [57], they explained what they thought *Abbott* had decided as follows: "that "real progress" towards the resolution of the other claims [73] and/or "real significance" for all the rest of the claims [77] was enough to justify an omnibus claim form". The Claimants in this case submitted that that analysis was "flat wrong", and that *Abbott* had decided at [70]-[73] that the test was whether "the determination of common issues would bind all parties" (see also [33] above).

Other relevant authorities and RSC provisions

36. In 1893, the RSC provided by Order 16 rule 1 that:

> All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.

37. In addition, Order 18 rule 1 provided that:

> The plaintiff may unite in the same action several causes of action; but, if it appear to the Court or a judge that any of such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

38. In *Hannay CA*, the Court of Appeal decided (Lord Esher MR and Kay LJ, Bowen LJ dissenting) that these rules meant that claims by more than one plaintiff that arose from one transaction could be included in a single writ if such a course would not give rise to absurdity, unfairness or inconvenience (see pages 420-1). *Hannay HL* unanimously overruled this decision, upholding Bowen LJ's dissenting judgment. Lord Herschell rejected at page 501 the proposition that "any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants".

39. As a result of *Hannay HL*, Order 16 rule 1 was amended in 1896 to allow several persons to be joined in one action where their right to relief was "in respect of or arising out of the same transaction or series of transactions" and where "if such persons brought separate actions any common question of law or fact would arise" (see *Drincqbier v. Wood* [1899] 1 Ch 393 at 395-7).

40. The 1896 version of Order 16 rule 1 eventually became O15 r4, which continued in essentially the same form until the introduction of the CPR in 1999. O15 r4 provided as follows at that time:

> (1) Subject to rule 5(1) two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where-
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and
>
> (b) all rights to relief claimed in the action (whether they are joint several or alternative) are in respect of or arise out of the same transaction or series of transactions.

41. It is also worth noting that Order 15 rule 5 provided as follows:

> (1) If claims in respect of two or more causes of action are included by a plaintiff in the same action …, or if two or more plaintiffs … are parties to the same action, and it appears to the Court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient.

This rule (which appeared as early as 1910 if not before) may be the provenance for the use of the word "conveniently" in 7.3.

42. In the 1980s and 1990s, there was an upsurge in group litigation in which multiple plaintiffs utilised O15 r4 to enable them to bring their many claims in a single writ. I have in mind, in particular, the well-known Lloyd's litigation of that period (see, for example *Ashmore v. Corporation of Lloyd's* [1992] 1 WLR 446 (30 claimants) and *Deeny v. Gooda Walker Limited (in liquidation)* [1994] CLC 1224 (some 3,000 claimants)).

43. On 23 May 1991, the Supreme Court Procedure Committee produced a definitive guide for use in group actions (the Guide) (see 15/12/6 of the RSC 1999). It referred specifically to claims by investors in a collapsed investment fund. It said at page 5 that it was concerned with "litigation where there is a multiplicity of plaintiffs between whom there is sufficient common ground to justify them all being joined in one action. That common ground is defined in [O15 r4] and decisions of the courts applying that rule". At page 6, it discussed the types of claims where the issues were mostly identical (e.g. disaster claims) and types of claims where the liability issues are more complex (e.g. pharmaceutical claims). Chapter 3 of the Guide discusses the 4 possible procedures: representative proceedings, joint plaintiffs in one action under O15 r4, separate actions by individual plaintiffs and the test case or lead action. Interestingly, the Guide specifically directs attention to the financial advantage of starting one action at pages 17 and 18:

> If one solicitor has authority to act for a large number of plaintiffs … there would be some inconveniences if an action were started by that solicitor in the name of them all, but it would very often be less inconvenient (and less costly) than starting an action on behalf of each plaintiff separately. To issue one writ

> on behalf of 1,001 plaintiffs instead of one writ on behalf of each of those plaintiffs produces a saving of £70,000 in court fees for the writ alone …

44. Chapter 17 of Lord Woolf's final report on Access to Justice in 1996 was headed "Multi-Party Actions". He proposed reforms to group litigation, which eventually became the GLO provisions in section III of CPR Part 19, but he made no mention of abolishing the established process of multiple plaintiffs issuing a single writ.

45. Following Lord Woolf's report, the CPR were introduced in 1999. Various changes have been made, but the rules for group actions relevant to this case are now as described above at [19]-[28].

When can multiple claimants issue a single claim form under 19.1?

46. With that introduction, I come to the main issues in this case, namely whether *Abbott* laid out the correct tests to be applied under 7.3, and the circumstances in which multiple claimants can issue a single claim form under 19.1. I should say at once that it does not appear that the court in *Abbott* was referred to the history of group claims that I have recorded above. It seems to me that that history puts a rather different complexion on the rather stark construction exercise upon which the judges in *Abbott* thought they were engaged.

47. I have already touched upon the correct construction of both 19.1 and 7.3. The questionable nature of the Solicitors' preferred construction is demonstrated, I think, by the fact that they at first conceded in oral argument that the words "[a] claimant" in 7.3 could be read under section 6(c) of the Interpretation Act 1978 as including the plural, before retracting that concession upon realising that it went some way towards defeating their primary argument. Their initial concession was obviously appropriate. The meaning of the word "claim" in 19.1 is equally clear. It means, in the context of CPR Part 19, "proceedings" or as, Andrew Baker J said, more precisely, "a set of proceedings commenced by a claim form". It is true that the word "claim" is used elsewhere in the CPR to mean a cause of action, but it would make a nonsense of 19.1 if it meant that in that rule. After the changes to the RSC that I have mentioned in 1896, it was never doubted that any number of claimants could be joined as parties to a single set of proceedings. Lord Woolf's report did not suggest that the introduction of the CPR was intended to make any such radical change.

48. Against that background, the next issue is as to the proper meaning of 7.3, which provides that claimants "may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings". I do not think that the courts need to define the meaning of a simple English word such as "conveniently". "Convenience" is a most ordinary word, as Andrew Baker J pointed out at [53] in *Abbott*. It was first used in our procedural rules more than 100 years ago. The question is rather: in what circumstances can multiple claims be conveniently disposed of in the same proceedings? It seems to have been common ground at the end of the hearing that the answer to that question **included** the circumstances described in O15 r4. I entirely agree with that proposition for several reasons. First, it is obviously the case that claims can be conveniently disposed of in the same proceedings if common questions of law or fact arise in all the claims brought and if the claims are in respect of or arise out of the same transaction or series of transactions. Secondly, nobody ever suggested when the CPR was introduced that a radical departure was intended from the previous position

as to group actions, save for the introduction of GLOs. Thirdly, the concept of "convenience" appeared many years ago in Order 15 rule 5 where it was provided that if two or more plaintiffs were parties and the court thought that their joinder might embarrass or delay the trial or was otherwise inconvenient, separate trials could be ordered. It is this rule that seems to have been used as a foundation for the simplified words in 7.3. The intention of the CPR was to make the procedural rules intelligible to non-lawyers as well as lawyers. Finally, for the reasons given in the Guide, amongst others, interpreting 7.3 as excluding the cases brought by multiple claimants within O15 r4 would not serve the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

49. I turn next to the question of whether any of the three tests promulgated in *Abbott* are correct. I have described the three tests as the real progress test, the real significance test and the test that requires that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties. I do not think any of these tests is appropriate to exclude cases from the ambit of 19.1. It seems to me that 19.1 and 7.3 must be construed as meaning what they say: any number of claimants or defendants may be joined as parties to proceedings, and claimants may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. There is no exclusionary rule of real progress, real significance or otherwise. The court will determine what is convenient according to the facts of every case.

50. We were referred to the decision on HH Judge Worster in the Birmingham County Court on 8 September 2023 in *Angel v. Black Horse Rock Limited*, unreported, where he decided that it was not convenient on the facts of that case for multiple claimants to be joined in a single set of proceedings. All the individual claims demanded a separate evaluation of whether the separate relationship between the claimant and the defendant was unfair within the meaning of section 140A of the Consumer Credit Act 1974. No joint remedy was sought, and each claim was legally distinct and turned on the particular facts of the case, and a finding in one case would not bind the situation in another (see [19]-[22], [36] and [42] of Judge Worster's decision). The facts are quite different here, where there are common issues as the judge found. It seems likely at least that findings on the common issues the judge identified will apply to, and depending on the precise nature of the issue and any further orders made, bind all the claimants.

51. I accept that multiple claims will probably be capable of being conveniently disposed of in the same proceedings where common issues will bind all or most of the claimants (see [31], [33] and [35] above), but I do not think that is currently a requirement of the CPR. Nor, therefore, is it the correct test. There is no test beyond the words of rule 7.3, even if it is clear that cases within the old O15 r4 and cases where common issues will bind all the claimants will obviously be capable of being conveniently disposed of in the same proceedings. The case management tools of ordering lead claims and more than one trial, whether of preliminary issues or otherwise, are very much part of proceedings brought by multiple claimants under 19.1. Lead claims are often chosen specifically to resolve specific issues that arise in claims made by some claimants and not others. The current CPR does not restrict the flexibility of 19.1 and 7.3 by imposing a requirement that one or more issues has to be common to or bind all or even most of the other parties. As I said at [8] above, however, I would think it very useful if the

CPRC were to consider whether it would have been better and clearer if a requirement for common issues of the kind found in O15 r4 had been carried over into the CPR.

52. Accordingly, I would also reject the Claimants' submission in its Respondents' Notice that *Abbott* ought to have decided (if it did not) that the trial of common issues in proceedings brought by multiple claimants would "produce a binding determination" on all parties. That is not something that can be spelled out of 19.1 and 7.3. Nor is it the current test of whether it would or would not be convenient to dispose of claims by multiple claimants in the same set of proceedings.

53. I should mention for the sake of completeness that I do not accept in this case that it is inconvenient or unfair for the Claimants' claims to be grouped together in one claim form. The judge found that there were the common issues that I have identified at [17] above.

54. I do, however, accept that defendants to group actions initiated by a single claim form may face potential unfairness in the absence of active case management. For example, the circumstances that justify a single claim form may not be clearly identified, and the page and document limits in [5.3(3)] of CPR PD57AD (which apply to initial disclosure in the Business and Property Courts cases) may operate to allow the claimants to withhold key documents at the early stages of the case. Every possible step should be taken in such a situation to ensure that each claimant's case is properly explained so that the defendant knows the case it has to meet, and so as to facilitate early dispute resolution.

55. The questions of what disclosure is ordered and how the claims are managed generally can be dealt with by applications to the court at appropriate stages in the conduct of the litigation. A case such as this will inevitably require active case management and proper engagement with the court by the parties and their lawyers.

56. I should also make clear that I am **not** saying that the matters considered in *Abbott* were **irrelevant** to the question of whether it was convenient in that case to dispose of those claims in the same set of proceedings. Many matters will be relevant to that question. But the matters that are most relevant to the ultimate question of convenience will vary across the wide spectrum of cases that have been and will in the future be brought under 19.1. This court would not wish to confine the discretion of judges in deciding that question under rules that are written in plain English.

57. I will make two concluding remarks in this section. First, nothing in this judgment should be taken as casting doubt on the actual determination in *Abbott*. We are dealing only with the applicable law. Secondly, nothing I have said should be taken as discouraging the use of GLOs. GLOs are a very useful and desirable procedure in many cases. This case has not raised any questions about that process, but it is valuable for the parties and the court to consider in every case started by multiple claimants by a single claim form whether it would be appropriate for a GLO to be applied for. A GLO brings the advantages mentioned in [28] above, including in particular the specification of the "common or related issues of fact or law" that are raised by the various claims.

<u>The article 6 point</u>

58. The second point raised by the Claimants' Respondents' Notice argued that this court should approve *Abbott* on the basis that it gave effect to the Claimants' rights under article 6(1) of the European Convention on Human Rights. Since I am deciding that 19.1 and 7.3 allow a broad range of multiple claimants' claims to be brought in a single claim form, it does not seem to me that article 6 adds anything to the analysis.

Disposal of the appeal

59. The question then arises as to how the appeal should be disposed of. I have held that *Abbott* did not adumbrate the correct approach to the circumstances in which multiple claimants can bring their claims in a set of proceedings initiated by a single claim form.

60. It cannot be doubted that, on the judge's findings of fact as to common issues (which have not been appealed), the Claimants' claims would have satisfied the requirements of O15 r4. That was not seriously contested in argument. The judge found that common questions of law or fact arose in all the Claimants' claims, and the Claimants' claims all arise out of the same series of transactions. In these circumstances, it seems to me that there is no point in sending the case back to the judge to apply the correct test. We can make that decision now. The claims brought by the Claimants in their single claim form can be conveniently disposed of in these proceedings.

61. For those reasons, I would dismiss the appeal.

Conclusions

62. I have concluded, as already explained, that *Abbott* was wrong to suggest that 7.3 required the court to apply the real progress test, the real significance test or a requirement that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties.

63. 19.1 and 7.3 mean what they say. Any number of claimants or defendants may be joined as parties to proceedings, and claimants may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. The court will determine what is convenient according to the facts of every case. There is no test beyond the words of rule 7.3, even if it is clear that cases within the old O15 r4 and cases where common issues will bind all the claimants will obviously be capable of being conveniently disposed of in the same proceedings.

64. I reiterate, however, what I said at [8] and [51] above, namely that O15 r4 allowed multiple claimants to bring their claims in a single writ (now claim form) where "some common question of law or fact" arose and where their claims arose out of the same transaction or series of transactions. Those were not exclusionary tests, because there remained the fall back of the permission of the court. Nonetheless, it seems to me that it would be valuable for the CPRC to have another look at the current provisions, with a view to considering whether the existing rules are working well or whether a requirement for common questions of law or fact to be identified could usefully have been brought across from the RSC.

65. The appeal should be dismissed.

LORD JUSTICE LEWISON:

66. I agree.

LADY JUSTICE FALK:

67. I also agree.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Jamie Molloy
Ignite

"ATE Insurance and Litigation Funding"

IGNITE

Jamie Molloy

Head of ATE and Co-founder

Jamie.Molloy@igniteins.com
0798 4388 544

Jamie has worked in the ATE market for the past 17 years.

His experience includes underwriting and managing a significant volume of High Court disputes as well as supporting successful appeals to both the Court of Appeal (Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745) and Supreme Court (Braganza v BP Shipping Ltd [2015] UKSC 17).

Jamie has created bespoke hedging products for commercial litigation funders and also a number of novel insurance schemes across the areas of privacy, property, and nuisance litigation.

He holds both Bachelors and Masters Degrees in Law as well as Cilex and CII qualifications and has a keen interest in the development of the litigation risk transfer market, having written both his undergraduate and postgraduate dissertations around these topics.

IGNITE
Specialty Risk

PNLA Conference
Exploring the Professional Negligence Space

Post Office, PACCAR and Politics -
A review of recent developments in Litigation Funding and Insurance

Jamie Molloy LLB (Hons), LLM, Cert CII
19th April 2024

1

Summary (1)

Recent Developments

Saxon Woods Investment Ltd v Francesco Costa and others [2023] EWHC 850 (Ch)

Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited [2023] UKSC 28

The Litigation Funding Agreements (Enforceability) Bill 2024

2

Summary (2)

Forward Looking

Civil Justice Council Review of Litigation Funding

SSB Scandal - SRA Review of ATE Insurance

Points to Consider

Is Litigation funding the answer?

Return to Pre 2013 days?

3

4

Saxon Woods Investment Ltd v Francesco Costa and others [2023] EWHC 850 (Ch)

Addresses challenges to the use of an After The Event (ATE) Insurance policy for a Security for Costs Application (Part 25 CPR)

Premier Motorauctions Ltd (in liquidation) and another v PricewaterhouseCoopers LLP [2017] EWCA Civ 1872

Claim by Professional Office Holder. CoA considered still room for Insurer to rely on non-disclosures by insured, notwithstanding their professional capacity. Policy not sufficient for security purposes.

Lewis Thermal Ltd v Cleveland Cable Company Ltd [2018] EWHC 2654 (TCC)

Commercial Dispute. Question of dishonesty was central to the case so, following *Premier,* the ATE policy was not acceptable fortification

4

5

Saxon Woods Investment Ltd v Francesco Costa and others [2023] EWHC 850 (Ch)

UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV and others [2019] CAT 26

Competition claim with single class representative on behalf of commercial entities. Tribunal accepted that the claimant was a "*responsible well-established body*" seeking to act as a class representative in a follow-on cartel claim where there were no allegations of fraud. Policy with AAE accepted by Tribunal

Consumers' Association v Qualcomm Incorporated [2022] CAT 20

Competition claim with single class representative on behalf of Consumers. Same reasoning used as *UK Trucks* but in this instance, not even need for an Anti-Avoidance Endorsement. Standard Policy accepted by Tribunal

5

6

Saxon Woods Investment Ltd v Francesco Costa and others [2023] EWHC 850 (Ch)

Para 33 Judgment:

This means there can be no hard and fast rule – in each case the court will need to consider and weigh up these various factors. But the case demonstrates that where the insurers are well aware of the "extraordinary bargain" they are making in contracting out of the ability to avoid for fraud, and do so clearly in their wording, there is a strong argument, notwithstanding the public policy issues, that the AAE should stand as valid security from which defendants can ultimately benefit.

Recommendation: Consider Insurer rating and reputation, alongside wording of Policy and AAE

6

7

Paccar Inc and Ors v Road Haulage Association Limited and UK Claims Limited [2023] UKSC 28

Trucking Claim in the CAT

Supreme Court decided that "claims management services" includes litigation funding, meaning that Litigation Funding Agreements are (or at least can be) Damages Based Agreements (DBAs)

LFAs never drafted with this in mind so likely to be non-compliant with statutory regime (S58AA Courts and Legal Services Act 1990) and the Damages-Based Agreements Regulations 2013

Makes LFAs vulnerable to unenforceability challenges

7

8

The Litigation Funding Agreements (Enforceability) Bill 2024

Bill amends section 58AA of the Courts and Legal Services Act 1990 ("CLSA") to provide that LFAs, as defined in the amendment, are not Damages Based Agreements (DBAs).

Provides that the amendment will have retrospective effect.

Purpose of Bill: To confirm in legislation that LFAs are not DBAs, returning the position to that which existed before July 2023.

Timing: Second reading in HL on 15 April 2024. Royal Assent anticipated in July 2024.

8

9

Review of Litigation Funding

Civil Justice Council asked by Lord Chancellor to conduct a review

Preliminary report due in summer, final report thereaf

Priority is overturning *PACCAR*

Regulation on the horizon?

9

10

SSB Scandal- SRA Review of ATE Insurance

Sheffield based law firm – collapsed with 43,000 clients and funding liabilities exceeding £160,000,000

Specialised in mass consumer claims – Cavity Wall Insulation (CWI), Plevin/PPI, Car Finance, Timeshare, Data Breach, etc

Consumers left with significant liabilities for adverse costs owing to failure of ATE insurers

SRA/FCA investigating role of insurers

LSB to investigate SRA

Predicted 12 months ago

10

Points to Consider

Is Litigation Funding the Answer? Availability, pricing concerns, etc

If so, regulation? For All? Consumers only?

Change of Government prompt review?

Return to Pre-2013 Rules? Recoverable Uplifts and ATE Premiums?

Questions?

11

IGNITE
Specialty Risk

Contact

Jamie Molloy
Head of ATE
07984 388 544
Jamie.Molloy@Ignitespecialty.com

Amy Rothbarth
Technical Underwriter
07414 007 111
Amy.Rothbarth@Ignitespecialty.com

www.IgniteSpecialty.com

12

Paul Marshall
Cornerstone Chambers

"Negligence, Conduct and Disclosure arising from the Post Office Scandal"

cornerstone barristers

2-3 Gray's Inn Square, London, WC1R, UK
clerks@cornerstonebarristers.com
Tel. : 020 7242 4986 / 0333 240 0591
DX: LDE 316 (Chancery Lane)

Paul Marshall

Call: 1991

pmarshall@cornerstonebarristers.com
0207 242 4986

Profile overview

Paul specialises in dispute resolution in contract law, financial law, civil commercial fraud, professional negligence, and company law.

Apart from being for many years recommended by *Chambers and Partners* and *Legal 500*, Paul is also recommended in *Chambers Global* rankings.

As a result of his expertise in contract law, he also undertakes commercial advisory work that has included advising a global-brand computer manufacturer on the SPA for its UK facility. He has given evidence as an expert witness on English contract law in legal proceedings in Canada and in Italy.

Until reducing his practice as the consequence of illness, the majority of his work involved claims against banks and other financial institutions for mis-sold swaps, structured derivatives and SCARPS, where he secured successful outcomes for clients against all the major UK retail banks.

He is a regular contributor to *Butterworths' Journal of International Banking and Financial Law*. He has the unique distinction of having published three articles in consecutive editions of the journal: *Facing the end of LIBOR: the financial and legal implications* (with Hanif Virji and Arif Merali) (Dec 2019), *English law of vicarious liability: off on a frolic of its own – or the flight from principle?* (Jan 2020), *UK Inflation indexation and the replacement of the RPI – A (pressing) conundrum* (with Hanif Virji and Arif Merali) (Feb 2020).

He edited the last two editions of Atkin's Court Forms Vol 18(1) *Equitable Remedies*, and previously edited Atkin's Vol 35, *Sale and Supply of Goods and Services*. For several years he was on the editorial board of *Butterworths Corporate Law Service*.

He is widely published and frequently quoted. Recent quotations have included *The Times* (leading article) (25 April 2021) and the *Financial Times* (11 April 2022).

As a consequence of serious illness, Paul was able to devote his time to volunteering to assist, pro bono (without charge), three appellants in the Post Office appeals. The Post Office scandal has disclosed the most widespread miscarriage of justice in English legal history.

Paul, together with his junior Flora Page and his instructing solicitors Aria Grace Law, was responsible for eliciting from the Post Office the now infamous "Clarke Advice", the most important document in the appeals (Lord Falconer is on record as describing it as the "smoking-gun"). The identification of that document was critical in the Court of Appeal's eventual finding against the Post Office of "second category abuse of process". It transformed the appeals and resulted in the government from June 2021 elevating the inquiry by Sir Wyn Williams to a statutory inquiry. It is the ultimate cause of the government expressing a willingness to properly compensate victims of the Post Office who were party to the massive group civil litigation between 2016-2019. Paul has lectured widely on the Post Office fiasco and has been interviewed by BBC1 (Panorama) and BBC Radio 4. Nick Wallis, author, broadcaster and journalist, described Paul's lecture to the University of Law, in June 2021:

> *"Late yesterday afternoon, at the University of Law in London, the barrister Paul Marshall delivered one of the most important speeches on the Post Office Horizon Scandal to date. Mr Marshall pulls every detail of this appalling story out of the mud and connects the dots between the Post Office, Fujitsu the legal system and government. He explains why people are culpable and under what laws."*

Paul is engaged in writing books on legal aspects of the Post Office scandal and on the law of vicarious liability and corporate attribution.

Outstanding in his commercial practice.

Legal 500, 2022

Paul is very thoughtful, highly imaginative and a real fighter.

Chambers UK Bar, 2021

Paul Marshall is a fighter who thinks outside the box.

Chambers UK Bar, 2020

Commercial and Regulatory

Overview

Domestic and international business law, financial regulatory law, banking, commercial fraud including money laundering and company law.

The majority of Paul's work is in the High Court of Justice, usually in the Chancery Division, and in the Court of Appeal.

Expertise:

- Financial regulatory law and banking including mis-selling by regulated persons of financial products.
- Commercial licensing and leasing, including aircraft.
- International and domestic sales and carriage of goods.
- Economic torts (such as conspiracy), domestic and international commercial fraud and money laundering.
- Equitable doctrines and remedies including commercial secrets and confidentiality/ injunctions.
- EU and domestic competition law.
- Company law including shareholder rights and remedies, directors' duties and corporate governance.
- Related aspects of professional negligence.
- Public procurement.

News

Paul Marshall's address at Queen's University Belfast – 30th April 2022
26 Apr 2022

Paul Marshall thought leader – banking and financial law
12 Feb 2020

Paul Marshall joins Cornerstone Barristers
01 Jan 2018

Trust and Estates Law & Tax Journal – Consequences of non-compliance
01 Jan 2018

Selling-out on interest rate derivatives
01 Jan 2018

Directory Quotes

- Dispute Resolution – "He's a fighter who is creative in his arguments." *Chambers and Partners 2023*
- Commercial Litigation – "Outstanding in his commercial practice." *Legal 500 2022*
- Commercial Dispute Resolution – London (Bar) "He is very thoughtful, highly imaginative and a real fighter." *Chambers and Partners 2021*
- "Extremely personable and a joy to work with." *Legal 500 2021*
- "Paul Marshall is a fighter who thinks outside the box." "Paul Marshall is diligent and approachable, and he has a wealth of knowledge about financial services law." *Chambers and Partners 2020*
- "Extremely personable and a joy to work with." *Legal 500 2020*
- "Performs at a high level and is great at cross-examination." "He understands the law and he fights the client's corner." *Chambers and Partners 2019*
- "Meticulous and decisive in preparing and presenting the case in court." *Legal 500 2018*
- "Highly capable and very good with clients." "He brings very good independent legal analysis, backed up with an evident willingness to understand every aspect of the client's situation." *Chambers and Partners 2018*
- "A very bright and hardworking barrister with a good client manner." – *Legal 500 2017*
- "A strong advocate and a very good lawyer." *Legal 500 2016*
- "Capable and good with clients." *Chambers and Partners 2017*
- "He really goes above and beyond." *Chambers and Partners 2016*
- "Praised for his strong analysis." *Legal 500 2015*
- "He's a very thorough, dogged and determined lawyer who is both inventive and courageous." "He's very conscientious, his attention to detail is excellent, and he thinks outside the box." *Chambers and Partners 2015*
- "A tough opponent in a difficult case." *Chambers and Partners 2014*

Services

In November 2016, he is speaking at the Professional Negligence Lawyers' Association annual conference on the Purrunsing decision. In 2016 he spoke on money laundering and corporate transparency at the Midlands Annual Fraud Forum. In 2015 he spoke at a joint seminar of the International Committee of the Bar Council with the Deutscher Anwaltwerein with its Arbeitsgemeinschaft Bank-und Kapitalmarktrecht on regulatory approaches to financial mis-selling in England and Germany. He regularly takes part in training seminars/webinars for solicitors.

Associations

- Commercial Bar Association (COMBAR)
- Chancery Bar Association (ChBA)
- International Bar Association (IBA)
- Member of the Chartered Institute of Arbitrators (MCIArb.)

Publications

Failed Justice – how commercial interests displaced the interests of justice in the Post Office case
30 Mar 2022

English law's evidential presumption that computer systems are reliable; time for a rethink?
01 Jul 2020

UK Inflation Indexation and the replacement of the RPI – A (pressing) conundrum
01 Feb 2020

English law of vicarious liability: off on a frolic of its own – or the flight from principle?
16 Jan 2020

English judges prefer bankers to nuns: changing ethics and the Plover bird
01 Sep 2019

Disclosure of risk in SME swap transactions: the Court of Appeal wreaks havoc with accepted principles
10 May 2018

Equitable Remedies, in Atkin's Encyclopaedia Of Court Forms in Civil Proceedings 18(1)
01 Apr 2018

Travels in unreality: hard cases for SMEs and the making of English financial law
01 Oct 2017

Consequences of non-compliance
16 Nov 2016

Fault lines in English financial law: Thornbridge v Barclays Bank
01 May 2016

PNLA
Professional Negligence
Lawyers Association

Notes: -

Lloyd Maynard
Forum Chambers

"Professional Negligence: recent cases of interest "

LLOYD **MAYNARD**

CALL 2010

"Exceedingly bright and well considered... a truly modern barrister."

lmaynard@forumchambers.com 020 3735 8070

Lloyd practices in all areas of commercial law. He has particular expertise in disputes arising from distribution agreements, manufacture, sale and supply of goods and services and banking and financial services litigation.

Lloyd is a fearless advocate who presents cases strongly yet courteously. Lloyd's advocacy has proven successful at first instance and appellate level, with members of the senior judiciary identifying Lloyd's oral and written advocacy as being elegant and persuasive.

AREAS OF EXPERTISE

BANKING AND FINANCE

Lloyd has built an impressive practice in banking & financial services. Lloyd regularly acts for the largest peer-to-peer lenders in the UK on advisory and litigation matters, whether in respect to the lender's regulatory duties or recoveries work.

Lloyd also acts for claimants in respect of claims of mortgage mis-selling, negligent investment advice, negligent pensions transfers including in respect of overseas investments, and liabilities arising from transacting cryptocurrencies.

Lloyd has extensive knowledge of the provisions of the FCA Handbook, and has significant experience in advising on COBS, MCOB, PERG and CONC. Lloyd has assisted a number of FX and investment brokerages in response to FCA investigations into potential breaches of the financial promotion rules and unauthorised activities.

- Is a peer-to-peer investment platform entitled to reinvest an investor's funds after receipt of the investor's instruction to return them?

- Can a lender's encouragement of a borrower's sale of a secured property to a connected third party create an unfair credit relationship?
- When is advice to transfer out of a Defined Benefit pension negligent? Can the children of the recipient of negligent advice claim for loss of inheritance?
- Can a "complaint" be made within the meaning of the DISP rules of the FCA Handbook whilst a customer is participating in a bank's voluntary review process?
- Can a bank or financial institution's provision of accurate information to a Credit Reference Agency nevertheless amount to 'unfair' processing of data in breach of the Data Protection Act?
- Are a peer-to-peer lender's loan fees and default charges an unenforceable penalty?
- Can a guarantor incorporate terms into a deed of guarantee by indicating next to the signature that additional terms are set out in an attached letter?
- To what extent can victims of vishing or phishing frauds recover from their bank?
- In what circumstances can a respondent challenge the enforcement of a Financial Ombudsman Service award in the county courts?

Lloyd's burgeoning knowledge of banking & financial services law developed alongside his teaching of international banking law at postgraduate level at Cardiff University between 2013 and 2018. Lloyd has also been asked to preview a first edition academic banking law textbook.

Indicative Banking & Financial Services work:

- **Davis v Lloyds Bank plc (current Court of Appeal)**: together with David McIlroy, Lloyd has been instructed in the High Court ([2020] EWHC 1758 (Ch)) and the current Court of Appeal proceedings concerning the question of whether a "complaint" can be made within the meaning of the DISP rules of the FCA Handbook whilst a customer is participating in a bank's voluntary review process.
- **Credit Capital Corporation v Watson [2021] EWHC 466 (QB)**: Lloyd was successful in this recent 8-day trial concerning allegations of an unfair credit relationship arising from the sale of a secured property to a party connected to the lender.
- **Lendy Ltd and Saving Stream Security Holdings Ltd v Omoruyi(current, High Court)**: instructed on behalf of the Claimants for sums unpaid under a loan. Defending counterclaims for fraudulent misrepresentation and sale of property at an undervalue.
- **Sprint 1108 Ltd v RBS Bank plc, Business & Property Courts, Business List**: instructed as sole counsel for the claimant in proceedings alleging that RBS sold an interest rate swap pursuant to a fraudulent misrepresentation.

COMMERCIAL LITIGATION

Lloyd is adept at handling commercial litigation in the High Court. Lloyd has acted for a wide array of clients including banks, administrators of peer-to-peer lenders, insurance companies, small and medium sized businesses, supervisors of IVAs, consumers, investors, partnerships, and schools. Lloyd also has experience of acting in a range of complex shareholder and partnership disputes.

Lloyd has recently addressed the following issues in his cases:

- Does the creation of a new parent company breach of a shareholders' agreement in respect of the former holding company?
- Was the unilateral conversion of preference shares to ordinary shares unfairly prejudicial conduct?
- Is a director required to have knowledge of HMRC's likely treatment of an EFRBS tax scheme before being considered to be in breach of director's duties?
- Does a manufacturer's product recall of custom-made goods mean the goods were not of satisfactory quality or fit for purpose?
- The extent of a High Court Enforcement Officer's liability for goods lost after being deposited with a third party.
- Determining liability for breaches of duty under a Design Build Operate Lease Agreement for a water treatment plant.
- Whether unpaid fees on termination of a joint venture between two solicitors's practices were taxable as bills of costs.
- The scope of a distributor's duty of confidence under a distribution agreement.
- The extent of a Local Council's indemnity to an Academy Trust under a Commercial Transfer Agreement made in the context of the Academies Act 2010.
- The circumstances in which a company can lawfully sell a database of customer information without breaching data protection laws.
- Whether an evergreen clause in a company's standard terms and conditions was validly incorporated into an oral publishing contract.
- Whether a distribution company's commercial agency contract provided for a valid contractual lien over the principal's goods upon termination.

Indicative Commercial Litigation work:

- Advising and appearing at mediation on behalf of a ministry of defence contractor on claims arising from a terminated sub-consultancy agreement.
- Instructed to act for E Ltd, a business with claims for fraudulent misrepresentation and non est factum arising from entry into leases for printers.
- **Demand Media Ltd v Koch Media Ltd2019 HC Queens Bench**: 5-day trial acting as sole counsel for Koch Media Ltd. Defending claims arising from termination of a distribution agreement, including breach of contract, breach of confidence and breach of design right.
- **ITM Ltd v HM Ltd and another**: acting for the claimant in a claim for breach of a contract to provide exclusive tax mitigation advice.
- **Ladjevardi v Nikkhah**: successful 3-day trial acting as sole counsel for Mr Ladjevardi in claims for unjust enrichment in respect of an agreement to purchase shares in Gresham House plc.
- **Sesame Ltd v Orr-McAuley**: instructed by the claimant IFA network in respect of claims under a personal guarantee against the former director of an IFA member.
- **Bang & Olufsen UK Ltd v McMichae**l: instructed by the claimant to pursue a £400,000 debt against a former franchisee.
- **Rawdon Asset Finance Ltd**: advising on the regulatory implications of lending to individuals and

consumers. Drafting updated precedent loan, security and debenture documents.

- **Industrial Staffing Solutions Ltd v Take 4 Personnel Ltd**: instructed for the defendant in proceedings concerning an alleged underpayment pursuant to a contract for the supply of agency workers.
- **JS Burgess Engineering v Sash Hardware Ltd**: instructed by the claimant in a claim for damages arising from the defendant's failure to pay for bespoke stillages.
- **Direk v Kargin**: instructed at trial and on appeal by the successful claimant concerning a dispute arising from the failure to repay a corporate investment loan.
- **1stCredit Finance v Durrant**: instructed by the successful claimant to pursue a debt in county court proceedings.
- **Gazechim Plastics UK Ltd**: drafted a 'Cash-pool' Agreement on behalf of a multi-national group of manufacturing companies.
- **B&Y Publishing Ltd and CW Publishing Ltd**: acting in a number of claims for breach of a publishing contract, involving misrepresentation, negligent mis-statement, the Unfair Contract Terms Act and Unfair Terms in Consumer Contract Regulations 1999. Advising on breaches of Data Protection Act 1998.
- **Steel v Nationwide Building Societyand another**: instructed for the defendant in resisting a claim for breach of an insurance contract
- **Cresswell Holdings Ltd v Powerhall Development Ltd, White Elm Ltd and Clydesdale Bank plc**: acted for Clydesdale Bank Plc in part 8 proceedings concerning the enforceability of a charge over commercial premises sited on a former colliery.

PROFESSIONAL NEGLIGENCE

Lloyd has experience of advising in respect of claims against IFAs, solicitors and the Citizens Advice Bureau. Lloyd has advised numerous clients on the law on limitation and its application in a professional negligence context, as well as the merits and quantum of claims.

Lloyd is currently instructed as junior counsel together with David McIlroy on 3 group actions arising from failed developments in Liverpool and Manchester.

Recent issues Lloyd has addressed include:

- The extent of conveyancing solicitor's duty to advise their client of the full terms, meaning and effect of agreements for sale.
- Whether professional negligence proceedings in England were appropriate where the claimant received negligent pensions advice whilst situated in Hong Kong, from an IFA operating from England and Switzerland.
- Whether a barrister was negligent for advising a litigant to settle employment tribunal proceedings.
- The duties upon IFAs when advising upon Defined Benefit Pension Transfers.
- Whether SIPP providers were liable for allowing an IFA to invest funds in an Unregulated

Collective Investment Scheme.

- The duties and liability of a conveyancing solicitor acting as stakeholder when releasing funds outside the terms of agreements for sale.
- The limitation periods for claims to the Pensions Ombudsman.
- The limitation period for negligence claims against solicitors for allowing a claim to be struck out for want of prosecution.
- Whether the Financial Services Compensation Scheme should construe a trust deed subject to foreign law as though the foreign law applies or according to the English law position.
- Whether a solicitor who advised a client (without formal retainer) of a limitation period had a duty to remind the person of the pending expiry of that limitation period 2 years later.
- Whether a Citizens Advice Bureau was liable to its client for failure to issue an employment claim within the limitation period.

INJUNCTIONS

Lloyd's commercial practice frequently requires him to act in injunction hearings before the High Court.

Indicative Injunctions work:

- **Ultima Displays Ltd v Burdett, Very Displays Ltd**: Lloyd obtained a Search and Seizure Order and Imaging Order in one of the first cases to apply the principles in TBD (Owen Holland) Ltd v Simons and others[2020] EWCA Civ 1182.
- Advised a company that does business as a food wholesaler in pre-action correspondence which led to settlement of a potential application for injunction to restrain the use of confidential information obtained in breach of employment covenant.
- Obtaining a freezing order in connection with a familial pension dispute.

INSOLVENCY

Lloyd has acted in a wide range of insolvency matters, including applications for injunction to restrain the presentation and advertisement of petitions, applications pursuant to sections 212 & 213 Insolvency Act 1986 and section 1157 Companies Act 2006; applications to set aside statutory demands and petition hearings.

QUALIFICATIONS

- BA (Oxon)(Law)
- LLM Commercial Law Cardiff University
- BVC BPP London

SCHOLARSHIPS AND AWARDS

- Walter Wigglesworth ScholarshipLincoln's Inn
- BPP Individual Moot Winner Judged by Lord Walker of Gestingthorpe, former Supreme Court Justice
- Buchanan Prize Lincoln's Inn
- Lord Denning Scholarship Lincoln's Inn
- Hardwicke Scholarship Lincoln's Inn
- Farrar Award for Constitutional Law Pembroke College, Oxford University

PROFESSIONAL BODIES

- Financial Services Lawyers Association
- The Commercial Bar Association
- Professional Negligence Bar Association
- Chancery Bar Association

PROFESSIONAL DEVELOPMENT

Lloyd has delivered a number of talks on topics such as:

- The utility of pleading misrepresentation and pointers on responding to such claims.
- The Business & Property Court's Disclosure Pilot.
- What Lord Denning would do about financial market manipulation in the 21st
- Understanding recent jurisprudence on contractual interpretation.
- An update on Swaps mis-selling litigation.
- Understanding the Foreign Exchange scandal.
- Understanding the Repo-rate scandal.
- Maximising the chances of a successful Financial Ombudsman Service complaint.
- Maximising the chances of a successful Financial Services Compensation Scheme claim.
- How to make the most of consequential loss claims.

TEACHING

- Lloyd was a visiting Teacher of Law at Cardiff University, teaching on the LLM in Commercial Law between 2013 and 2018. Lloyd taught courses on International Banking Law, Competition Law and

Money Laundering.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Dominic Tucker
Associate Director UK/EEA
IDiscovery Solutions

"Latest news on disclosure"

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

+44 (0)7818 406834

dtucker@idsinc.com

Profile on LinkedIn

@iDiscoveryInc

DOMINIC TUCKER

Associate Director, UK/EEA

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

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

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

EDUCATION

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

_____

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

– Steve Jobs

iDiscovery Solutions

Disclosure Update

Professional Negligence Lawyers Association ~ 19 April 2024

1

- Predictive Coding > GDPR > Disclosure Pilot / PD57AD > Artificial Intelligence
- **Fake & Falsified Evidence**
- Evolution in **third party funding** applied to matters > aligning with CFA type agreements
- **Structured data** – cases where documents are least impactful part of disclosure.

2

Remember these words

> **I'm afraid this is super dry**
>
> -Jason Beer, KC

3

- Post Office Inquiry
- Covid-19 Inquiry
- Wagatha Christie (Vardy v Rooney)
- WhatsApp
- Artificial Intelligence

4

CONTACT DETAILS

- **Dom Tucker: Associate Director Europe**
  - dtucker@idsinc.com
  - +44 (0) 7818 406 834

5

Philippa Hill
Partner
Head of Forensic & Investigation Services
Grant Thornton UK LLP

"The Culture of Negligence & the Detection of Fraud"

Grant Thornton

Philippa Hill
Partner
Head of Forensic and Investigation Services
0207 865 2472
philippa.hill@uk.gt.com

Philippa has specialised in accounting and commercial disputes and investigations since 2001 and prior to that was an auditor.

She heads up the Accounting Integrity and Conduct special interest group within the firm and has particular expertise in matters concerning suspected financial misstatements and accounting misconduct, advising in the context of civil and criminal fraud, professional disciplinary enquiries, litigation and arbitration. She supports subject matter experts to act as expert witness on liability and conduct issues, particularly audit negligence claims, and acts as expert on causation and quantum matters associated with accounting irregularities and alleged deceit.

Philippa is a member of the independent Panel chaired by Sir David Foskett re-assessing claims for financial redress by more than 200 victims of the HBOS Reading Fraud.

'Who's Who Legal' 2021 for expert witnesses' notes:

"Philippa is very thorough and possesses an impressive depth of expertise in professional negligence matters".

Grant Thornton

PNLA conference
19 April 2024

The culture of negligence and detection of fraud

Philippa Hill — **Head of Forensics and Investigation Services at Grant Thornton UK LLP**

Accounting Integrity and Conduct team lead

1

Professional scepticism

"An attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of audit evidence."

ISA (UK) 200 - Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing (UK)

Paragraph 13 (l)

Grant Thornton

2

Fraud in plain sight?

ENRON

HBOS plc

FTX

wirecard

BERNARD L. MADOFF INVESTMENT SECURITIES LLC New York ◻ London

Autonomy

RBG resources PLC

Grant Thornton

3

FRC tribunal findings re Autonomy

"The Tribunal found that [the respondents] were culpable of Misconduct for failings in the audit work relating to the accounting and disclosure of Autonomy's sales of hardware during FY 09 and FY 10. They failed to exercise adequate professional scepticism and to obtain sufficient appropriate audit evidence

…

Similarly, in relation to certain of Autonomy's sales to [re-sellers], the Tribunal found that [the respondents] were culpable of Misconduct for failing to obtain sufficient appropriate audit evidence and for a lack of professional scepticism in relation to the nature of these sales"

4

Extracts from recent audit negligence claims

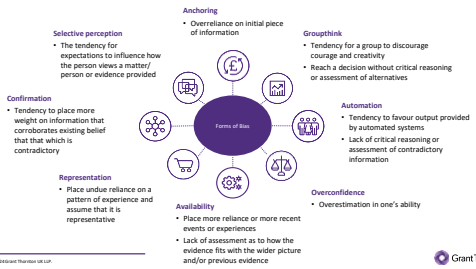
Exercise due care and/or professional scepticism in its review of senior management's disclosures as to going concern; and

Failed to carry out appropriate audit procedures and/or require and obtain sufficient appropriate audit evidence, and/or exercise due care and/or professional scepticism, including in circumstances in which there was a clear and obvious risk of management dishonesty, misstatement and/or fraud;

Failing or failing adequately to conduct the audit with the appropriate professional judgment and/or professional scepticism with respect to

5

Key forms of bias identified by the IESBA



6

Re Kingston Cotton Mill, Lord Justice Lopes ([1896] 2 Ch. 279)

"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. ***He is a watchdog, but not a bloodhound****. The auditor is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and rely upon their representations, provided he takes reasonable care". (page 288-289)*

"Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud, when there is nothing to arouse their suspicion ...So to hold would make the position of an auditor intolerable." (page 290)

[Emphasis added]

7

Changes to standards and guidance for auditors

2010 APB (part of the FRC) issued guidance - 'Auditor Scepticism: Raising the Bar'

2012 APB issued a paper, addressing the "*lack of consensus*", to ensure "*a consistent understanding of the nature of professional scepticism and its role in the conduct of an audit*"

2017 ACCA issued 'Banishing bias? Audit, objectivity and the value of professional scepticism'

8

Changes to standards and guidance for auditors

2021 FRC issued revised version of **ISA(UK) 240** The Auditor's responsibilities relating to fraud in an audit of financial statements "*to provide increased clarity as to the auditor's obligations, addressing the concern raised by Sir Donald Brydon in his review …. The revisions include enhancements to the requirements for the identification and assessment of risk of material misstatement due to fraud and the procedures to respond to those risks*"

2022 FRC issued report setting out examples of good practice to improve professional scepticism and what makes a good environment for auditor scepticism and challenge

9

ISA (UK) 240 - Fraud and the auditor - revised

"*The auditor shall remain alert for conditions that indicate a record or document may not be authentic*" (14-1)

Tampering guidance (A10-1) includes features of the invoice example:

- Serial numbers used out of sequence or duplicated (via the invoice number)
- Addresses and company emblems not as expected (postcode issue)
- Document style different to others of the same type from the same source (for example, changes in fonts and formatting)
- Invoice references that differ from others (difference in contract numbers)

Grant Thornton

10

ISA (UK) 240 - Fraud and the auditor – revised

Application and explanatory material refers to

- Obtaining audit evidence in an **unbiased** manner (A8-1)
- Professional skepticism assists the auditor in **remaining unbiased** and alert to both corroborative and contradictory audit evidence (A8-2)
- a belief that management and those charged with governance are honest and have integrity does not relieve the auditor of the need to maintain **professional skepticism** or allow the auditor to be satisfied with anything less than sufficient and appropriate audit evidence when obtaining reasonable assurance (A9)
- When seeking other information that relates to management's explanations or representations, the auditor does so in a manner that is **not biased towards excluding audit evidence that may be contradictory** (A34)

Grant Thornton

11

ISA (UK) 240 - Fraud and the auditor - revised

"*As described in ISA (UK) 200 (Revised June 2016), the potential effects of inherent limitations are particularly significant in the case of misstatement resulting from fraud.* ***The risk of not detecting a material misstatement resulting from fraud may be higher than the risk of not detecting one resulting from error****. This is where fraud may have involved sophisticated and carefully organized schemes designed to conceal it, such as forgery, deliberate failure to record transactions, or intentional misrepresentations being made to the auditor. Such attempts at* ***concealment*** *may be even more difficult to detect when accompanied by collusion.* ***Collusion*** *may cause the auditor to believe that audit evidence is persuasive when it is, in fact, false.*" (6)

"*While, as described above, the risk of not detecting a material misstatement resulting from fraud may be higher than the risk of not detecting one resulting from error, that does not diminish the auditor's responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement due to fraud.* ***Reasonable assurance is a high, but not absolute, level of assurance***." (7-1)

Grant Thornton

12

Q&A

Chairman's Closing Remarks

Katy Manley LLB
PNLA President/BPE Solicitors

"Conclusions"

PNLA
Professional Negligence Lawyers Association

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

Total CPD – 6 hours

To complete your feedback form please go to

https://www.pnla.org.uk/event/exploring-the-professional-negligence-space-pnla-conference-london/

Please join us now for a drink with PNLA members:

"The Fable"
52 Holborn Viaduct
EC1A 2FD

– sponsored by iDiscovery Solutions Ltd & Ignite