



**PROFESSIONAL NEGLIGENCE AND
LIABILITY UPDATE**

LONDON CONFERENCE

Thursday 3rd October 2024

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

LONDON CONFERENCE – “*The Ultimate Round Up*”

Thursday 3rd October 2024

0900-0930 Registration and refreshments

0930-0935

“*Chair’s Introduction*”

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

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

0935-1000

“*Keynote Address*”

The Honourable Mrs Justice Joanna Smith KC

<https://www.wilberforce.co.uk/news/joanna-smith-qc-appointed-high-court-judge-2/>

1000-1035 (inc 5 mins Q&A)

“*Discovery Land v Axis*”

William Flenley KC – Hailsham Chambers

<https://www.hailshamchambers.com/our-people/profile/william-flenley-kc>

1035-1110 (inc 5 mins Q&A)

“*Joint Talk: Managing multi-party professional negligence claims: processes and pitfalls*”

David E. Grant KC & Andrew Spink KC – Outer Temple Chambers

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

<https://www.outertemple.com/barrister/andrew-spink-kc/>

1110-1125 Refreshments

1125-1200 (inc 5 mins Q&A)

“*Joint Talk Continued*”

1200-1210 (inc 5 mins Q&A)

“*The Tumaini Trust*”

Kathryn Jenkins

**Sustainability consultant and non-practising solicitor - LLB (Hons) BSc (Hons) MSc IEMA
Certificate in Environmental Management**

<http://tumainitrust.org.uk/>

1210-1230 (inc 5 mins Q&A) “*Litigation Funding & ATE Insurance update*”

Matthew Pascall – Temple Legal Protection

<https://www.temple-legal.co.uk/about-us/our-people/>

1230-1400 Lunch – *Middle Temple Hall*

1400-1425 (inc 5 mins Q&A)

“*Insurance Claims: The Inside Scoop*”

Rachel Auld & Thomas Pangbourne – Indemnity Law

<https://indemnity.law/person/rachel-auld/>

<https://indemnity.law/person/tom-pangbourne/>

1425-1450 (inc 5 mins Q&A)

“*Solicitors Compliance Update*”

David Osborne – Senior Associate/Client Relations Manager – Fraser Dawbarns

<https://www.fraserdawbarns.com/people/david-osborne/>

1450-1515 (inc 5 mins Q&A) “*Artificial Intelligence and Professional Negligence*”

Elaine Palser - Outer Temple Chambers

<https://www.outertemple.com/barrister/elaine-palser/>

1515-1530 Refreshments

1530-1630

“*Team Case Study Discussion session*”

Sue O’Brien & Sara Benbow – Property Mediators – Oxfordshire

<https://thepropertymediators.co.uk/our-property-mediators/sue-obrien/>

<https://thepropertymediators.co.uk/our-property-mediators/sara-benbow/>

1630-1635

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

1635-1640

“*PNLA News Update & Future Events*”

Katy Manley – PNLA President

1700-1900

Sponsored Drinks - Outer Temple Chambers & Hailsham Chambers

@ The Old Bank of England, 194 Fleet St, London EC4A 2LT

- invitation to PNLA Network - all Welcome

Total CPD = 5 Hours

**PROFESSIONAL NEGLIGENCE AND LIABILITY
LONDON CONFERENCE
Thursday 3rd October 2024**

ATTENDEES (1 of 2)

The Honourable Mrs Justice Joanna Smith KC		London
Rachel Auld	Indemnity Legal	London
Sara Benbow	The Property Mediators	Oxford
Jemma Brimblecombe	Kingsley Napley	London
Helen Brown	Paris Smith Solicitors	Southampton
Tadge Channer	John Hodge Solicitors	Avon
Tim Constable	Bates Wells	London
Aimee Cook	Shoosmiths LLP	Reading
Christopher Cooney	Campbell Courtney & Cooney	Surrey
Paul Daniel	The Specter Partnership	London
Nicky Doble	Independent Mediators	London
Catherine Duggan	Ellisons Solicitors	Colchester
Rob Evans	Moore Barlow LLP	Southampton
Alice Eveleigh-Taylor	Stanley Tee LLP	Hertfordshire
William Flenley KC	Hailsham Chambers	London
David E Grant KC	Outer Temple Chambers	London
Jonathan Grigg	Foot Anstey LLP	Southampton
Elliott Grosvenor-Taylor	Kingsley Napley	London
Colin Hayes	Penningtons Manches Cooper LLP	Oxfordshire
Rachel Hetherington	Moore Barlow LLP	Guildford
Beth Holden	Anthony Gold	London
Matthew Howarth	Brabners LLP	Leeds
Kathryn Jenkins	The Tumaini Trust	Cardiff
James Johnston	Burnetts Solicitors LLP	Carlisle
Ben Leandro	Moore Kingston Smith	London

Katy Manley	PNLA President & BPE Solicitors LLP	Cheltenham
Karim Mohamed	Lime Solicitors	London
Alison Neate	Smith Partnership Solicitors	Leicester
Sue O'Brien	The Property Mediators	Oxford
Pradeep Oliver	Cripps LLP	Tunbridge Wells
David Osborne	Fraser Dawburns	London
Joanna Osborne	Edwin Coe LLP	London
Mark Osgood	Trethowans LLP	Bournemouth
Elaine Palser	Outer Temple Chambers	London
Thomas Pangbourne	Indemnity Legal	London
Matthew Pascall	Temple Legal Protection Limited	Guildford
Jayna Patel	Dutton Gregory & PNLA South of England Representative	Wiltshire
Andrew Spink KC	Outer Temple Chambers	London
Caroline Thompson	Withers LLP	London
Louise Tunstall	Taylor Rose Ltd	Bath
Fleur Turrington	Shoosmiths LLP	Reading
Anil Virji	Civil & Commercial Cost Lawyers	London
Brian Walker	Walker McDonald	Armagh
Kelly Whittaker	Freeths Solicitors	Bristol
David Wingate	We solicitors	Manchester
Katrina Yates	Landmark Chambers	London
Margaret Young	Taylor Rose Ltd	Bath



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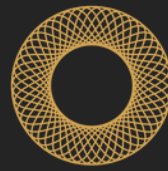
 **Dutton Gregory**
SOLICITORS

 **hailsham** chambers

 *the*
Property Mediators

 **Outer Temple**

OUR PROFESSIONAL NEGLIGENCE SERVICES



Outer Temple

Outer Temple Chambers is renowned for providing specialist advisory and adversarial services in the field of professional negligence.

What we do

Our barristers act in a full spectrum of claims including professional liability work, breach of fiduciary duty, breach of trust, negligence, breach of contract and misfeasance, and in many regulatory matters.

Who we work for

Our multi-disciplinary approach gives us unrivalled knowledge and expertise in disputes, acting for and against a wide variety of professionals including Accountants, Actuaries, Administrators, Architects, Auditors, Bankers and financial intermediaries, Barristers, Insurance intermediaries, Liquidators, Receivers, Surveyors, Tax Advisers, Solicitors, and Pension Advisers.

Why choose us

Our pensions barristers are highly sought after by solicitors, barristers, actuaries, and the major consultancies and are regularly instructed in the biggest contentious claims in the industry including, most recently, Virgin Media, BBC Pension Trust, and ITV's Box Clever.

The team is described by Legal 500 UK as “outstanding on pensions-related professional negligence claims with members noted for their experience in disputes involving trusts and financial services professionals.”

Our barristers also have a strong track record of successfully negotiating settlements, including at mediations and other without-prejudice settings, and accept instructions in all forms of ADR.




To find out more about any of our Professional Negligence barristers contact Lexie Johnson or Matt Sale on +44 (0)20 7353 6381 or email lexie.johnson@outertemple.com and matt.sale@outertemple.com



Hailsham Chambers strives to provide clients with excellent service. The multi-award winning set is frequently praised for its friendly and helpful clerking, the quality of its members' work and for its reliability. Established more than 100 years ago and today offering 57 barristers, 12 of whom are silks, Hailsham Chambers contains many of the most sought-after barristers at the London Bar. The set's progressive thinking and use of modern technologies help chambers to run efficiently and to offer clients choice and flexibility.

The set's main practice areas are **professional liability, medical law, costs litigation, regulatory & disciplinary, personal injury and commercial law**. Members of chambers provide advice, represent and appear on behalf of their clients before all levels of courts and tribunals in England and Wales and in courts throughout the world.

For further details please contact
Marketing

 0207 643 50

 jan@hailshamchambers.com



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What we do

Indemnity Law is a boutique policyholder insurance litigation firm based in London. We specialise exclusively in resolving complex, high value or “high stakes” insurance coverage disputes for policyholders. We never act for insurers, so we are always conflict free.



Our policyholder clients instruct us when they need to:

- Unlock cover under their own insurance policies;
- Secure cover under an insolvent opponent’s policy in order to pursue a claim against them; or
- Procure insurance recoveries, by their insolvency practitioners, in the context of their insolvency.

The sorts of issues we encounter frequently include

- Late notification of claims
- Alleged breaches of policy conditions
- Third Party (Rights against Insurers) Act claims
- Underinsurance and average disputes
- Scope of policy cover disputes (and the notification of ‘circumstances’)
- Aggregation and policy limits disputes
- Allegations of fraud and dishonesty

As well as instructions by policyholders directly, we are frequently instructed by law firms on behalf of those firms’ own clients, either to advise the firm or the client directly on insurance issues which have arisen in the course of the firm’s instruction. For example:

- where the firm’s ongoing fees should be recoverable under an insurance policy but for a policy issue;
- where a policy issue has been taken by an opponent’s insurers which is affecting the client’s claim against that opponent – for example, if policy cover has been avoided and this needs to be challenged.

Our philosophy

At Indemnity, we love insurance. And when it works, we quite like insurers too.

Many claims are complex, and sometimes this means that coverage disputes arise. Cutting through that complexity, and resolving those disputes, is why Indemnity was founded.

Our mission is to ensure that every valid insurance claim is paid, however complicated it might be. The way we do that is unique.

1. We’re the only firm whose entire team consists of lawyers with experience of working for or in the insurance market.
2. Indemnity Law positions itself as part of the insurance market - not in principled opposition to it.
3. We do not take on cases where we consider the insurer has reached the correct coverage position.



Whether we are involved at the very outset of a claim, or once a dispute has arisen, we provide specialist legal support to deliver pragmatic solutions, find common ground, and avoid the time and expense of litigation wherever possible.

Get in touch today



Thomas Pangbourne: thomas.pangbourne@indemnity.law
0203 900 4123

Rachel Auld: rachel.auld@indemnity.law
0203 890 2760





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

“Chair’s Introduction”



Jayna Patel

Partner, Dutton Gregory LLP
PNLA South of England Representative
j.patel@duttongregory.co.uk
07562 680 111

Jayna regularly advises businesses and individuals on contractual disputes and has a proven track record of securing successful outcomes for her clients. Her client testimonials speak for themselves, and she has built up a reputation within the Southeast and her wider network as a professional negligence claimant lawyer. This past year, Jayna has successfully concluded various professional negligence claims e.g. architect's failure to advise on tax, solicitor's negligence in failing to advise on a pay less notice. She currently has conduct of several professional negligence cases including failed family/ financial proceedings, corporate buy back of shares, broker and accountant negligence.

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

Jayna has been instrumental in Dutton Gregory's commercial litigation department being listed in the Legal 500 this year.

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

Jayna Patel

Partner, Dutton Gregory LLP

PNLA South of England Representative

Testimonials

"I was recommended to Jayna for advice in a complicated dispute involving professional negligence over VAT in a building contract ,not helped by the death of the defendant who died intestate during proceedings. It was resolved satisfactorily with both common sense and an impressive legal knowledge." -

R.P, July 2024

"We were advised to contact Jayna for advice on the best way forward after a very difficult couple of years , we found her the utmost professional, but with a very human touch, and she was a pleasure to work with, to end up achieving a very satisfactory result." - January 2024

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

"I had cause to pursue a claim against a firm of Solicitors for Professional Negligence in relation to a property lease granted some years before when the serious error came to light. I instructed Dutton Gregory Solicitors to act on my behalf and after their initial scrutiny and some early contact with the firm concerned Jayna Patel a partner of Dutton Gregory took over my case. I found Jayna to be extremely helpful to me and a very efficient communicator both with me and the other side who had by then passed the matter to the solicitors for their insurer. Jayna quickly made it clear to the opposition that we had a very strong case about which the facts were clear and that she was instructed to take the matter to Court unless an early settlement could be achieved. Jayna also proved to be a very good negotiator for me in eventually agreeing a global settlement to cover both my losses and her firm's fees and the case was settled before the end of the year. I have no hesitation in recommending Jayna as a highly able litigator and an extremely friendly and helpful advisor." 2023



The Honourable Mrs Justice Joanna Smith KC

"Keynote Address"



The Honourable Mrs Justice Joanna Smith KC

Dame Joanna Angela Smith, DBE, styled Mrs Justice Joanna Smith, is a High Court judge in England and Wales .

She attended Christ Church, Oxford, matriculating in 1986, and graduated with a first-class MA in jurisprudence.

She was called to the bar at Lincoln's Inn in 1990, practising commercial, professional negligence and construction law from Cornerstone Chambers and Wilberforce Chambers. Smith took silk in 2009 and was appointed a deputy High Court judge in 2017. As a practitioner, she appeared in the 2015 Cavendish Square Holding BV v Talal El Makdessi case before the Supreme Court of the United Kingdom. Prior to her full-time judicial appointment, she took appointments as an arbitrator.

On 15 February 2021, Smith was appointed a judge of the High Court and assigned to the Chancery Division.

<https://www.wilberforce.co.uk/news/joanna-smith-qc-appointed-high-court-judge-2/>



Notes: -

A series of horizontal dashed lines provided for taking notes.



William Flenley KC
Hailsham Chambers

“Discovery Land v Axis”

William Flenley KC

Call: 1988 | Silk: 2010



Overview

"William is the best professional negligence barrister in the UK. His approach (beyond meticulous) and manner (friendly and affable whilst brutally honest when needed) are both perfect for the kind of work we do" (*Chambers Directory 2024*).

"He is the pre-eminent professional negligence lawyer and is very approachable and technically adept. Clients love him too." (*The Legal 500 2023*.)

William Flenley KC specialises in all aspects of professional liability, and related insurance issues. His recent cases in the law reports include appearing

- in the Court of Appeal and the Commercial Court in the leading case on the meaning of 'to condone' in the solicitors' Minimum Terms for insurance (*Axis v Discovery Land* [2024] PNLR 16),
- in the principal authority on the mental element of dishonest assistance in breach of trust (*Group Seven v Nasir*, [2020] Ch 129), and
- in a wasted costs application in complex multi-party proceedings in the Commercial Court (*King v Stiefel*, reported at [2023] PNLR 18).

William is also instructed as an arbitrator, mediator and adjudicator, and worked on the design of the Professional Negligence Bar Association's adjudication scheme.

He is the co-author, with Mr Justice Leech, of the leading text on claims against solicitors, *The Law of Solicitors' Liabilities*, first published in 1999 and now in its fourth edition. He is a former Chair of the Professional Negligence Bar Association, has contributed to *Professional Negligence and Liability and Cordery on Legal Services*, and was deputy editor of *Lloyd's Reports: Professional Negligence*. He is a Bencher of the Middle Temple, and Vice-Chair of its Estates Committee. He has been recommended for professional negligence in *Chambers' Directory* for 24 years, and is a popular speaker on professional liability topics.

William is a former board member of homelessness charities Bondway and Thames Reach Housing Associations.

Professional liability

Accountants & auditors

William acts in complex and large-scale claims against auditors and accountants. This includes advising in the defence of a £20m claim against auditors for alleged failure to report fraud, and a £5m claim against auditors in relation to the sale of a national chain of retailers.

Insurance brokers

William's work involving insurance brokers includes acting in claims relating to alleged failures concerning business interruption cover, and failures to give proper advice concerning a burglar alarm warranty. In this area, William additionally benefits from his substantial experience of dealing with insurance coverage disputes between insured and insurer.

Financial professionals

William is active in this area of work and has acted for financial advisors in a 14-party claim under the Financial Services and Markets Act and at common law, listed for a 4 week trial before it settled, and a £500,000 claim against financial advisors in relation to their alleged promotion of an investment bond which failed.

Lawyers

William is co-author of the leading text *Flenley & Leech, Solicitors' Negligence & Liability*, now in its third edition. He regularly advises and appears in high value and complex claims against lawyers. Recent cases include *Group Seven and Giambrone*, both mentioned at the start of this c.v.

Surveyors & valuers

William is very familiar with claims against surveyors and valuers, including mortgage lenders' and contribution claims. He wrote the discussion of *SAAMCo in Professional Negligence and Liability* (ed.Simpson). In *Nationwide BS v Dunlop Haywards* [2010] 1 WLR 258, a lenders' claim, he obtained an order that fraudulent surveyors pay contribution of £4.5m. He also acts in claims by purchasers against surveyors, and recently represented surveyors in a complex case as to whether purchasers should give credit for improvements to their property after the date of the surveyors' negligence.

Mediation

William is a trained mediator and, at the invitation of the parties, recently gave early neutral evaluation of a claim's merits. He also appears as a mediation advocate, advising on whether and when to mediate and preparation for mediation, settling

mediation statements and appearing at mediations.

Insurance coverage

William regularly deals with a variety of issues relating to insurance coverage, particularly in connection with professionals, often appearing at arbitrations, as well as acting as an arbitrator in this context. Recent work has involved a £10m coverage dispute in relation to insurance of wind farms, which settled, and successfully showing lack of cover under the Solicitors' Minimum Terms in relation to over 50 claims.

Arbitration and adjudication

William appears at arbitrations and as an arbitrator (see the last heading), and has been involved in the launch of an Adjudication scheme for professional liability cases. He has acted as an adjudicator under that scheme, having previously undertaken a short course in Adjudication at University College, London.

What others say

"William is the best professional negligence barrister in the UK. His approach (beyond meticulous) and manner (friendly and affable whilst brutally honest when needed) are both perfect for the kind of work we do." *Chambers UK, 2024*

"William is an expert in this field. He is incredibly intelligent, hard-working and technically adept but he is also prepared to think outside the box." *Chambers UK, 2024*

"William is very approachable and has an excellent way with clients." *Chambers UK, 2024*

"William gets straight to the heart of the matter. Makes the complex simple." *Chambers UK, 2024*

Clear, considered, detailed and well structured advice, both written and in conference. Understanding and considerate of views of clients. Always fabulously well prepared. Respectful and never too busy to discuss." *Legal 500, 2024*

"William is unrivalled in his attention to detail; there is absolutely no way that William would ever take a matter to trial that he does not know inside out and backwards. You just know that everything will be done right." *Chambers UK, 2023*

"He is the pre-eminent professional negligence lawyer and is very approachable and technically adept. Clients love him too." *Legal 500, 2023*

"He's a very cerebral barrister and fantastic to work with." "He's fantastic, the perfect foil to difficult clients. You can be confident that he's looking unemotionally at the issues, not getting distracted by the heat and noise." "Quite simply the best in my opinion. He's excellent, not only extremely bright but user-friendly and really good with clients, and responsive. He lives up to his reputation." *Chambers UK, 2022*

"Very willing to listen to the ideas of others and assimilate them as necessary. Very experienced indeed in solicitor negligence and insurance coverage. Gives extremely clear advice. Very good on tactics and thinking through the consequences of strategic decisions." *Legal 500, 2021*

"His knowledge and ability to get to grips with the evidence is impressive." *Chambers UK, 2021*

"A top KC because he is incredibly intelligent and hard working." *Chambers UK, 2021*

"His technical attention to detail is fantastic and we are confident that he'll sort through everything carefully and properly." *Chambers UK, 2020*

"An outstandingly good performer in his field." *Chambers UK, 2020*

"When it comes to professional liability, there can be few at the Bar who are as knowledgeable and as skilled as he is" *Legal 500, 2020*

"He is outstanding technically, and just completely straightforward and transparent – no pomposity or flannel. I know he gives me the right advice, without any attached motive" *Chambers UK, 2019*

"An impressive advocate with some fearsome intellect. He instantly gets to the nub of the issues and comes up with novel arguments to blow the other side's case out of the water" *Chambers UK, 2019*

"He is fabulously persuasive in court and his advice is clear, concise and utterly reliable" *Legal 500, 2019*

"He has phenomenal knowledge and an amazing mind. Judges really listen to him. He's a great talent" "Extremely knowledgeable in dealing with complex solicitors' claims" *Chambers UK, 2018*

"He is approachable and user-friendly, and has the gravitas required to intimidate the opponent" *Legal 500, 2017*

"William Flenley is concise, and incredible likeable as well." *Chambers UK, 2017*

"Technically very strong" *Legal 500, 2016*

Chambers UK, 2016 said that he "has a wealth of experience acting in all kinds of major negligence claims, including those brought against barristers, financial advisers and insurance brokers. Frequently instructed to act in the most sophisticated matters at the cutting edge of the field."

“Extremely tenacious and thorough”. *Legal 500, 2015*

“an eye for detail and is very good at thinking outside the box.” “He is very clever, meticulous in his approach and an excellent cross-examiner.” *Chambers UK, 2015*

“excellent analytical skills.” *Legal 500 2014*

“a real favourite of large insurers, and a lawyer with particular expertise on solicitors’ negligence cases. ‘Meets deadlines, gives clear advice and is also exceedingly nice’. ‘He’s a quick-witted advocate’.” *Chambers UK, 2014*

Notable cases

Axis v Discovery Land [2024] PNLR 16 – solicitors’ professional indemnity insurance, meaning of ‘to condone’, aggregation.

King v Stiefel [2023] PNLR 18 – the test for stage 1 of a wasted costs application in the context of complex Commercial Court litigation.

Discovery Land v Axis [2021] Costs LR 777. Costs budgeting in the Commercial Court.

Addlesee v Dentons Europe [2020] Ch 243, Court of Appeal authority on what happens to the legal professional privilege of a company after it has been dissolved.

Group Seven v Notable Services [2020] Ch 129, the most recent Court of Appeal authority on the mental element of dishonest assistance in breach of trust.

Various Claimants v Giambrone [2018] PNLR 2, breach of trust and the application of BPE and Saamco to claims against lawyers.

Purrusing v A’Court [2016] 4 WLR 81, (Ch Div), identity fraud, liability of lawyers acting for buyer, and for seller. Widely discussed in the legal press.

Harding Homes v BDB [2015] EWHC 3329 (Ch), successfully proved that solicitors who admitted negligence re banking security documents had caused no loss.

Edwin Coe v Aidiniantz [2015] 1 Costs L0 129, assessment of solicitor’s costs, s.70 Solicitors Act 1974.

Credit & Mercantile v Nabarro [2015] PNLR 14 (Ch Div), achieved summary judgment for the defendant in limiting damages for professional negligence to diminution in value.

Nationwide BS v Davisons [2013] PNLR 12. Court of Appeal authority on claims against solicitors for breach of trust and allegations of breach of strict contractual duty.

St Anselm v Slaughter & May [2013] EWHC 125 (Ch), acting for the defendant, struck

out half of claim on limitation grounds.

Hellard v Irwin Mitchell [2013] PNLR 8 implied waiver of privilege as to evidence of barristers.

Nationwide BS v Dunlop Haywards [2010] 1 WLR 258, [2009]. An important decision on contribution between valuers and solicitors in lenders' claims.

Pickthall v Hill Dickinson LLP [2009] EWCA Civ 643, and [2009] PNLR 10. Limitation and abuse of process.

Taylor Walton v Laing, [2008] PNLR 11. Solicitors' negligence, successful strike out of relitigation as abuse of process (also the subject of a feature article in The Times).

Stone Heritage v Davis Blank Furniss, [2007] EWCA Civ 765, [2007] 31 EG 80 (CS): successful appeal on scope of solicitor's duty to give commercial advice.

Luke -v- Wansbroughs [2005] PNLR 2, QBD: duty of barristers and solicitors in the conduct of litigation.

Luke -v- Kingsley Smith & Co [2004] PNLR 12, QBD: test in law as to when solicitors and barristers may seek contribution from each other.

Laib -v- Aravindan [2003] EWHC 2521, QBD, The Times, 13 November 2003: claim for loss of litigation, accrual of cause of action.

Direct Line Insurance v Khan [2002] Lloyd's Rep IR 364, CA: insurance; joint policy; whether fraud of one policyholder entitled insurers to recover sums paid to both policyholders.

Ruparel v Awan [2001] Lloyd's Rep PN 258, Ch D. Enforcement of solicitors' undertakings and the Partnership Act; whether work done in the ordinary course of solicitor's business.

Jenmain Builders v Steed & Steed [2000] PNLR 616, CA. Measure of damages for professional negligence, whether loss of profits recoverable.

Matlock Green Garage Ltd v Potter Brooke-Taylor & Wildgoose [2000] Lloyd's Rep PN 935, QBD: measure of damage for solicitors' negligence leading to loss of business tenancy; valuation of tenancy.

Nationwide BS v Balmer Radmore [1999] Lloyd's Rep PN 241, [1999] PNLR 606, Ch D. Managed list of 400 cases relating to solicitors' liability to mortgage lenders, contributory negligence in solicitors' cases, breach of fiduciary duty, relevance of surveyors' negligence. Specifically, William acted as junior counsel in:

- *Nationwide Building Society v. A.T.M. Abdullah* [1999] Lloyd's Rep PN 616, Ch D: causation, role of surveyors
- *Nationwide Building Society v Vanderpump & Sykes* [1999] Lloyd's Rep PN 422, Ch D: fraud/breach of fiduciary duty
- *Nationwide Building Society v Littlestone & Cowan* [1999] Lloyd's Rep PN

625: terms of solicitor's duty to report to lender

Bristol & West Building Society v. Daniels & Co [1997] PNLR 323, Ch D. Solicitors' negligence/breach of fiduciary duty.

Melinek & Back [1997] BPIR 358, The Times 10 April 1997, ChD. Solicitors' negligence, insolvency law.

Mahoney v. Purnell [1996] 3 All ER 6 QBD. Solicitors' negligence, accountants' negligence, undue influence.

R v. Poole BC, ex parte Cooper 27 HLR 605, Crown Office List. Judicial review, homelessness.

Irtelli v. Squatriti [1993] QB 83, CA. Contempt of court.

Further information

Publications

Co-author, *Solicitors' Negligence and Liability* (Flenley & Leech, 3rd ed., 2013).

An original contributor to *Professional Negligence and Liability* (Informa): sections on SAAMCo, causation, mitigation, contribution.

A former contributor to *Cordery on Legal Services*.

Formerly assistant general editor, *Lloyd's Reports: Professional Negligence* (2000-2003).

Ough and Flenley, *The Mareva Injunction and Anton Piller Order* (2nd ed., 1993): freezing orders, search and seizure orders.

He has also spoken at professional negligence events organised by CLT, Informa, Lexis Nexis, the insurers' Professional Indemnity Forum, the Professional Negligence Law Association, and the Professional Negligence Bar Association (PNBA), including webinars. From 2007 until 2010, he was co-chair of the annual PNBA Lawyers' Liability Day.

Education

MA (Oxon) (Jurisprudence) (1985), Open Exhibition

LL M (Cornell Law School, USA), St Andrew's Society of the State of New York Scholar (1986)

BCL (Oxon) (1987), Middle Temple Astbury scholarship (1988)

Mediation training (ADR Chambers)

Appointments

Part-time lecturer in Law, London School of Economics, 1988-89

Bencher of the Middle Temple, 2014

Committees

Executive Committee, Professional Negligence Bar Association, 2004-2015; Vice-Chairman 2011 to 2013; Chairman 2013 to 2015.

Since 2015, he has sat on a committee seeking to introduce a scheme of Adjudication to Professional Liability cases.

Member, Board of Management, Thames Reach Housing Association, a charity for people who are homeless or in danger of homelessness in London.

ICO Data protection registration number: **Z6874737**.

William Flenley KC is a barrister regulated by the Bar Standards Board. [Click to view William Flenley KC's Privacy Notice](#)

Coverage: *Axis v Discovery Land* (2024)

William Flenley KC



1

Axis v Discovery Land [2024]

Under the SRA Minimum Terms and Conditions

- Condonation
- Aggregation

2

SRA Minimum Terms cl.6.8

"Fraud or Dishonesty

The insurance may exclude the liability of the insurer to indemnify any particular person to the extent that any civil liability or related defence costs arise from

dishonesty or a fraudulent act or omission committed or condoned by that person,

except that: [see next slide]

3

... except that:

1. the insurance must nonetheless cover each other insured; and
2. the insurance must provide that no dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company, or in the case of an LLP, all members of that LLP.”

4

Axis’s clause 2.8

- Excludes cover for
- “Any claims directly or indirectly arising out of or in any way involving dishonest or fraudulent acts, errors or omissions committed or condoned by the insured, provided that...
- (b) no dishonest ... act ... shall be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company [and equivalent for LLPs]”

5

Axis para [43] (Andrews LJ)

- “someone condones a pattern of dishonest behaviour which is of the same type as the dishonest behaviour that directly gives rise to the claim, and of which the latter [the dishonest behaviour that gives rise to the claim] forms part (for example, if one member/director condoned the regular use by the other member/director of client funds for their own purposes.). The question in each case would be whether or not knowledge and acceptance or approval of other acts in the same pattern amounted to condonation of the act or acts which gave rise to the claim.”

6

Aggregation - SRA Minimum Terms and Conditions

“The insurance may provide that, when considering what may be regarded as one claim for the purpose of [the limits on cover]

(a) all claims against any one or more insured arising from: ...

(iv) similar acts or omissions in a series of related matters and transactions...

will be regarded as one claim.”

7

Axis v Discovery Land: similar acts or omissions

There were not ‘similar acts or omissions.’

One relevant act was stealing US\$14 million as soon as it came into the solicitors’ client account.

The other relevant act was, many months later, mortgaging the client’s property without permission, and taking the proceeds of the mortgage (about £5 million).

8

Axis v Discovery Land: ‘in a series of related matters or transactions’

- The two claims were not part of a series of related matters or transactions:
 - the act relevant to the first claim was part of the purchase of the Castle
 - the act relevant to the second claim was the mortgage of a property which a claimant already owned
 - It was not enough that the acts involved the same property, and clients who were related companies.

9





David E. Grant KC
&
Andrew Spink KC
Outer Temple Chambers

“Joint Talk: Managing multi-party professional negligence claims: processes and pitfalls”

David E Grant KC

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

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	0207 353 6381



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

He has extensive advocacy experience in courts and tribunals up to the European Court of Justice. He has been instructed as an English law expert in proceedings in the US and Canada. He has also attended numerous mediations and round table meetings in a wide variety of cases. David is happy as sole advocate or leading a counsel team and enjoys the process of working with his instructing solicitors, lay clients, experts and other interested parties.

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

David has been recommended in a total of 4 areas in Chambers and Partners and the Legal 500 since 2007 and is currently described as "a go to practitioner in this area" and "analytical and creative at finding solutions to difficult problems", "he will do his utmost to find the answer to support the client's position".

Areas of Expertise

Pensions

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

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

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

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Notable Pensions cases

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

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

[Safeway Ltd v Newton & Anor \[2020\] EWCA Civ 869](#)

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

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

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

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

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

[Re G4S Pension Scheme \[2018\] Pens.L.R. 16](#)

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

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

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

Private Client & Trusts

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

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

Notable Private Client & Trusts cases

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

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

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

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

Phillips v Chatfeild-Roberts

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

Jones & Anor v Roundlistic [2019] 1 WLR 4416

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

Webster v Ashcroft [2012] 1 WLR 1309

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

Professional Negligence

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

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

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

Notable Professional Negligence cases

Stanley Gibbons v Alexander Clay & Ors HC13D003111

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

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

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

PPF v Hill

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

Aon Pension Trustees Ltd v MCP [2012] Ch 1

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

Financial Services & Banking

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

Notable Financial Services & Banking cases

Cologlu v Citadel

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

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

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

Application for extension of time to prove debt.

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

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

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

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

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

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

Employment & Discrimination

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

Notable Employment & Discrimination cases

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

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

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

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

Parsons v Airplus International Ltd 2017 EAT

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

Herry v Dudley Metropolitan Council [2017] ICR 610

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

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

Successful appeal Adjournment of disciplinary hearing in unfair dismissal claim.

Missirlis v Queen Mary University of London EAT 16 May 2016

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

Chenembo v Lambeth LBC [2014] EWCA Civ 1576

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

Insolvency & Restructuring

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

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

Notable Insolvency & Restructuring cases

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

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

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

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

Re Rangers FC

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

Webster v Ashcroft [2012] 1 WLR 1309

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

Herry v Dudley Metropolitan Council [2017] ICR 610

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

Trustee Corporation Ltd v Nadir [2001] BPIR 541

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

Commercial Litigation

David has experience in numerous commercial litigation matters including:

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

Notable Commercial Litigation cases

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

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

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

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

Memberships

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

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Languages

- French
- Serbian(basic)

Publications

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

Awards

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

Recommendations

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Andrew Spink KC

Year of Call: 1985
Year of Silk: 2003
Direct Access: Yes

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Andrew Spink KC is a highly respected advocate with 38 years' experience at the Bar and over 20 years as a successful silk (QC/KC). He is a recent Chair of the Commercial Bar Association of England and Wales, was one of the Heads of Outer Temple Chambers for 9 years until October 2022 and is a part-time judge who has sat as a Deputy High Court Judge in the King's Bench and Chancery Divisions of the English High Court and is a Justice of the **Astana International Financial Centre** Court in Kazakhstan. He also sits as an arbitrator.

Andrew has an extensive business law practice, specialising particularly in disputes or advisory work relating to the interpretation or breach of most types of **commercial** contract and **trust deed**, claims for breach of **fiduciary duty**, freezing injunctions & asset recovery, cross-jurisdictional issues, claims for damages & other relief in the context of pensions & other commercial trusts, **banking & financial services**, **fintech** & a wide range of other commercial contracts, **professional negligence** claims and company law and insolvency issues. Andrew was nominated as Legal 500 technology, data & crypto Silk of the Year 2023 (in which **OTC also won "set of the year"**).

As well as appearing as a leading advocate, he is highly sought after for the provision of expert technical and strategic advice to clients early in proposed litigation or arbitration and in non-contentious situations (such as mergers and acquisitions, corporate insolvency or regulatory issues) in all of the above areas.

Internationally, Andrew is a registered **DIFC** Court advocate and provides advice to the DIFC governing body on law reform (company law, trusts, digital assets and smart contracts, banking and finance) and other strategic projects. Andrew has led various team members from Outer Temple Chambers on providing the DIFC Authority with advice on the areas listed above. Andrew and the Outer Temple team, continue to provide strategic legal advice to the DIFC Authority on a number of current issues.

He is ranked in Band/Tier 1 for Pensions in Chambers & Partners ("he is an extremely well-respected silk, winning glowing praise from market sources for his exceptional advocacy skills and client-focused approach") and in Legal 500 ("probably the best advocate at the pensions bar"; "a powerful advocate, who has the ear of the court and can be relied on in an emergency"; "definitely someone you want on your side...he has extensive expertise and is a real pleasure to work with"). Andrew is also listed in Tier 1 in Legal 500 for Crypto and as a leading silk in Legal 500 for Commercial Litigation ("he always finds the right argument, and the right way to deliver it, he also knows when to step in and fits in very well to a client team"), in EMEA Commercial Law and in Professional Negligence.

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Areas of Expertise

Pensions

Andrew has been listed as a leading silk in pensions in *Chambers & Partners* (Band 1) and *Legal 500* (Tier 1) ever since being appointed KC in 2003. Over that time, he has appeared in many of the leading pieces of litigation in the Chancery Division and in the newer and fast-developing field of work involving the Pensions Regulator.

He remains one of the most prominent and sought-after pensions silks, whether it be in technical Part 8 work, regulatory work, or hard-fought Part 7 pensions litigation, professional negligence or advisory work all of which are reflected in the high profile cases in which he has been involved in including – British Telecom, British Airways, Honda, Atos, McGraw-Hill RBP (the first case on the locus standi of pension scheme trustees to object in the Companies Court to a cross-border merger of one of the scheme employers) and a number of ground-breaking Regulatory matters.

Notable Pensions Litigation Cases

Railways Pension Trustee Co Ltd v Atos IT Services UK Ltd (Chancery Division 2021-22, permission to appeal applied for in February 2023) [2022] EWHC 3236 (Ch)

Andrew acted for the employer of members of the Atos Section of the Railways Pension Scheme in Part 8 proceedings brought by the Trustee seeking the direction of the court as to the way in which the “shared cost” structure of the RPS should operate in circumstances where additional employer and/or member contributions are required to meet a funding shortfall under the Rules of the RPS, the role of the Actuary in determining the level of such contributions, the interaction between the relevant Rules of the RPS, on the one hand, and the provisions of the Railway Pensions (Protection and Designation of Schemes) Order 1994 (“the Protection Order”) on the other hand and, in particular whether Article 7 of the Protection Order imposed a balance of cost obligation on an employer such as Atos in the circumstances which had arisen. Judgment in favour of the Trustee was handed down by the Chancellor of the High Court in December 2022. An application to the Court of Appeal seeking permission to appeal is awaiting determination as at March 2023.

BBC v BBC Pension Trustee Limited and Christina Burns (2021-23 and continuing)

Part 8 claim relating to the scope of the Scheme’s power of amendment due for hearing in the Chancery Division in May 2023. It will be the first case to consider the scope a fetter on the power of amendment that applies to a member’s “interests” and the outcome of the case will determine whether the BBC can close the BBC Pension Scheme to future accrual or otherwise reduce future accrual. It will require reconsideration of many of the well known historic “fetter” English authorities such as *Courage*, *Lloyds*, *Wedgwood*, *IMG* and *Gleeds* as well as a number of Commonwealth authorities.

The AB Retirement Benefits Scheme (2016-20 and continuing, proceedings shortly to be issued in the Chancery Division)

Andrew is jointly instructed by all companies of the Group and the Trustees of the Scheme in a soon to be issued Part 8 claim which raises a multitude of issues concerning the validity of a large number of deeds entered into in relation to a single scheme over a 20-year period where it is alleged that various different formality requirements were not met, also

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raising numerous estoppel issues, some quite novel, Section 37 issues, and forfeiture issues. There is a complex associated professional negligence claim against the scheme's former actuarial and legal advisers.

Atos UK IT Ltd & Ors v Atos Pension Schemes Ltd (Chancery Division 2014-20) [2020] EWHC 145 (Ch) [2020] Pens. L.R. 17

Andrew represented the Atos group of companies in Part 8 Proceedings heard in January 2020 in which judgment was given by Nugee J. The issues included i) whether RPI should now be regarded as having been functionally replaced by some other index for the purposes of the indexation provisions in the scheme rules where RPI has lost its national statistic status, and ii) whether the power to select an alternative index was engaged. In light of recent events in relation to RPI (which occurred after the trial in the BT case below), the Judge accepted that its publishers, the ONS, no longer regarded it as an appropriate measure of inflation and warned against its use, but on the interpretation of the pension increase rule adopted by the Judge, this was insufficient to engage the power to switch indices.

British Telecommunications plc v (1) BT Pension Scheme Trustees Limited and (2) Linda Bruce-Watt ("BT") (Chancery Division and Court of Appeal 2017-19) [2018] EWCA Civ 2694 [2019] Pens. L.R. 1

Andrew represented BT in highly significant proceedings brought urgently by BT (with a court order for expedition) to determine whether, under the rules of the BT Pension Scheme applicable to "C Section" members, it might be permissible to make a change from the RPI, as the inflation index used. The Scheme with c. 300,000 members has a current deficit of c. £14bn. The value at stake in this case alone was estimated to be c. £2bn.

The case raised issues of construction in relation to two different indexation rules as well as a complex factual assessment (requiring cross examination of expert witnesses) of whether RPI has now "become inappropriate" for the indexation of C Section pensions. A first instance judgment determining some of the issues against BT and some in favour was handed down in January 2018 and BT's appeal and the members' cross-appeal to the Court of Appeal were determined in a judgment handed down in December 2018. The Supreme Court denied permission to appeal in May 2019.

Honda Motor Europe Ltd & Honda of the UK Manufacturing Ltd v Tony Powell & Honda Group UK Pension Scheme Trustee Ltd (Chancery Division 2018 – 20)

Andrew acted for the Honda companies in their claim for rectification of a Deed of Adherence entered into in 1986, which the Court of Appeal held at [2014] PLR 255 did not, on a true construction provide the intended level of benefits for Honda manufacturing employees joining the scheme. Hotly contested Part 7 action with up to £70m of liabilities at stake, raising novel facts and rectification legal issues listed for 2-week trial in November 2018 including rare live evidence and cross-examination of five witnesses. Trial adjourned for consideration of proposed settlement.

Baldwin & others v Standard & Poor's Credit Market Services Europe Limited (McGraw-Hill Pension Scheme) (Companies Court 2018)

The context for these proceedings, of a type never brought before by UK pension scheme trustees, was a Brexit-inspired proposed cross-border merger whereby one of the S&P group of UK companies, which was a sponsoring employer of the group's UK pension scheme, would merge into an Irish group company and thereafter cease to exist in accordance with the fast track procedure provided for under the Companies (Cross-Border) Mergers Regulations 2007, leaving the pension scheme with a significantly altered UK employer covenant. This raised significant issues of concern for the trustees, for whom Andrew acted, as to the security of the benefits payable under the Scheme, as well as issues of English companies

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and pensions law and Irish law. Proposed compromise approved by Nugee J at a hearing in May 2018.

Wedgwood Pension Plan Trustee Ltd v Keith Salt (Chancery Division 2014 – 18) [2018] EWHC 79 (Ch) [2018] Pens. L.R. 9

Andrew represented the Trustee of the Wedgwood Pension Plan in complex Part 8 proceedings after the collapse of the iconic Wedgwood group. This led to the Plan entering into a Pension Protection Fund assessment period.

The case highlighted multiple issues of interest and importance to pension schemes generally. These included whether a fetter on the power of amendment prevented the employer from reducing both past and future service benefits, the current status of part of the well-known decision in *Bestrustees since Pitt v Holt* on the true scope of the rule in *Hastings Bass* and what the meaning and effect is of a number of provisions in the parts of the Pensions Act 2014 relating to the PPF. Judgment in favour of the Trustee was handed down in January 2018.

IBM UK Ltd & IBM Holdings Ltd v Dalgleish & Others (“the Project Waltz Proceedings”) (Chancery Division and Court of Appeal 2013 – 17) [2017] EWCA Civ 1212 [2018] Pens. L.R. 1

Following Warren J’s massive “duty of good faith breach” judgment in April 2014, a further wide-ranging “remedies” hearing took place in July 2014, where Andrew (for the Trustee, leading a team of seven barristers including two other silks) took the lead role in successfully arguing a large number of complex legal issues ranging across trust, contract and employment law on behalf of the members.

Following many consequential remedies hearings and two further judgments, the case was appealed by IBM and cross-appealed by the Representative Beneficiaries. The Court of Appeal’s judgment was handed down in July 2017, finally bringing this huge piece of litigation to an end.

Merchant Navy Ratings Pension Trustees v P&O (& Others) (Chancery Division 2013 – 15) [2015] EWHC 448 (Ch) [2015] Pens. L.R. 239

A major piece of commercial litigation with significant financial and legal implications arising out of a dispute between the Trustee of and the many shipping companies contributing to the Merchant Navy Ratings Pension Fund. With hundreds of millions of pounds at stake as between the competing contributors and 7 QCs appearing this was understandably one of *The Lawyer’s* Top 20 Cases for 2014.

Andrew represented the P&O Group, which took the leading role representing a large group of scheme employers in opposition to the Trustee’s deficit reduction plans. His role involved cross-examining the Chairman of the Trustee over two days, as well as having to deal with wide-ranging legal issues.

The case produced the leading judgment on whether and, if so, in what circumstances and to what extent trustees can take into account the interests of scheme employers when considering how to act. This case followed on from the earlier first instance and Court of Appeal decisions in *Stena v MNRPF Trustees* [2011] EWCA Civ 543, which concerned whether the Trustee had the power to introduce a new contribution rule by amendment, a case in which Andrew also acted for P&O.

Philips Pension Trustees Limited & Philips Electronics UK Limited v AON Hewitt & AllianceBernstein (Chancery Division 2011 – 16) [2015] EWHC 1768 (Ch)

Fiercely fought Part 7 claims for damages for professional negligence by the employer and trustees of a large UK pension

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scheme against the scheme's former investment strategy consultants and one of its fund managers, arising out of the scheme's investment in 2007 of £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets, which caused the scheme massive losses during the Credit Crunch.

The issues include the scope of the duty owed by the Defendants to the trustee/employer, the risks inherent in the financial products, and an important issue as to whether or not the investment consultant was an authorised person carrying on regulated activities for the purposes of FSMA 2000. The court was engaged for several days in 2016 on a strike out application. The matter was thereafter listed for trial and settled for a substantial sum later in 2016.

Pollock v Reed & Halcrow Group Limited ("Project Gravity") (Chancery Division 2015) [2015] EWHC 3685 (Ch) [2016] Pens. L.R. 129

Andrew acted for the trustees of the Halcrow Pension Scheme in one of the most important pensions cases of 2015 in which the trustees of a pension scheme (with an employer which expected to go into liquidation but for a restructuring of the benefits provided to members under the scheme) sought approval, on an expedited basis and subject to a privacy order, of their decision to agree to a novel form of restructuring in which members would be transferred without their consent to a new scheme with lower "headline" benefits but with much better prospects of survival. Numerous significant pensions law issues were raised. In addition, important guidance was given as to the circumstances in which privacy orders would be made in cases such as this.

Other cases of note – Court of Appeal

Court of Appeal cases in the field of Pensions in which Andrew has acted include both *BT* and *IBM* (see above), the appeals against certain aspects of Warren J's decision in the massive Pilots National Pension Fund litigation (one of *The Lawyer's* Top 10 Cases of 2010), *Stena v MNRPF Trustees* in 2011 (see above) and in the leading equalisation case concerning the Foster Wheeler Pension Plan.

Other cases of note – first instance

Andrew has also represented the trustee in the leading decision on the approach to be taken to Courage-style fetters on powers of amendment, *Re IMG Pension Plan*, and the representative beneficiary in *Danks v QinetiQ Holdings Ltd*, in which Vos J considered the power of trustees to change the index used to make increases in pensions in payment and to revalue deferred benefits from RPI to CPI. He also appeared in two well-known rectification claims: *Pioneer GB Ltd v Webb & ors* and in *AMP v Barker*. In 2011-13 he appeared in a series of well-known and significant pensions liberation cases – *Dalriada v Nidd Vale*; *Dalriada v Faulds*; *Dalriada v Woodward*).

Notable Pensions-related Professional Negligence Cases

See the extensive list of cases in the Professional Negligence section of this CV (below)

Notable Pensions Regulatory Cases

Andrew has been involved in a number of the leading cases involving regulatory intervention by the UK Pensions Regulator, including its attempts to exercise its financial support direction ("FSD") jurisdiction extra-territorially. He is working on a ground-breaking case involving foreign entities alleged to have acted to the material detriment of a UK pension scheme

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with Section the meaning of 38A of the Pensions Act 2004, in which a Warning Notice has been issued.

The Pensions Regulator v X & Y (2017-20)

Andrew represented several US-based private equity companies who are targets in a confidential and ground-breaking "material detriment" regulatory action brought by the Pensions Regulator arising out of the breaking up and separate selling off of the members of a large group of companies leaving a UK pension scheme with the financial support of what the Regulator alleges was a materially weaker employer covenant, to the benefit of the private equity former owners. The Regulator sought to about £50m from the Targets. The detailed and aggressive defence mounted by Andrew and the rest of his

clients' legal team in response to the Regulator's Warning Notice was successful in persuading the Regulator to drop its case against his clients in its entirety.

Guinness Peat Group Plc ("GPG") and the Coats UK Pension Plan (2014 -16)

Andrew was instructed over a two-year period as leading counsel by the Trustees of the Coats UK Pension Plan. This case was probably the largest and most complex on-going regulatory action brought by the Pension Regulator over one of the UK's largest schemes (c. 27,000 members). The Pensions Regulator was seeking Financial Support Directions against various GPG entities. The case raises very important questions over the "insufficiently resourced" jurisdiction.

Proceedings were hotly contested by GPG and the case proceeded as a major piece of multi-party commercial litigation before settling in December 2016 – described by the Regulator as "*the most important settlement the Pensions Regulator has ever reached*".

Carrington Wire (2012 –15)

Andrew acted for the Trustee of the Carrington Wire DB Pension Scheme in a case in which the Pensions Regulator sought Contribution Notices against Severstal (one of the largest mining companies in the world) and the director of the corporate purchaser of Severstal's former UK business. Andrew acted for the Trustees who sought to recover the multi-million pound scheme deficit from these Targets.

The case was ground-breaking given that it was the first time the Regulator had sought to invoke the "material detriment" test set out in Section 38A of the Pensions Act 2004. Important issues of construction of that section arose, as well as heavily disputed issues of fact. The case settled against Severstal, but proceeded successfully against the director in March 2015 with important rulings on the issues of law being made.

Lehman (2010 – 14)

The Lehman litigation has been the largest and most wide-ranging series of UK proceedings arising out of the 'moral hazard' legislation. Andrew acted on behalf of four Lehman companies from the outset of the case in 2010 when two of those companies successfully secured a determination that no FSD should be issued against them. Upon the Trustees initiating a reference from that determination to the Upper Tribunal, his clients' application to strike out the reference became the first ever pensions case to reach the Court of Appeal from the Upper Tribunal and is the leading case on the Regulator's FSD jurisdiction. The underlying references went back to the UT and were proceeding to a three-week hearing in February 2015 before settlement.

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Chemtura (2011)

Andrew acted on behalf of all six members of the worldwide Chemtura Group of companies against which the Regulator was seeking the issuing of a Financial Support Direction, the matter settling shortly before a Determinations Panel hearing.

Nortel (2010)

Andrew provided expert evidence on UK pensions legal issues to the Court in Ontario in proceedings arising there out of the Regulator's attempt to obtain a Financial Support Direction against members of the Nortel Group of companies.

Notable Pensions Advisory Work

Project Taurus (2015)

Andrew was instructed jointly by Philips Electronics UK Ltd (sponsoring employer) and the Trustee of the Philips Pension Fund to advise on key aspects of the de-risking of the Fund by way of a c. £2.4 billion transaction with Pension Insurance Corporation PLC (PIC). The transaction, which was announced in November 2015, involved the entering into a bulk annuity policy with PIC that will transfer to PIC responsibility for payment of retirement benefits owed to approximately 26,000 current and former UK employees and their beneficiaries. The transaction results in the transfer of £2.4 billion of the Fund's defined benefit obligations to PIC and is expected to give rise to the largest full pension buy-out in the UK.

New workplace savings pension vehicle (2015 –16)

Andrew advised on technical issues arising under the pensions legislation (in particular the scope of the definition of "occupational pension scheme") in the context of the development of a proposed new workplace savings pension vehicle.

Other advice in the context of large final salary pension schemes

Andrew has given advice on numerous occasions in recent years to the employers and trustees of several major schemes on the pensions implications of corporate acquisitions, restructuring and insolvency, continuing problems over equalisation, construction of powers of amendment, closure to accrual, breaking final salary linkage and other benefit restructuring proposals including bulk transfers without consent, non-pensionable agreements and other South West Trains agreements, section 75 debt issues and (post-IBM) on whether historic benefit restructurings might be vulnerable to arguments that the employer acted in breach of the Imperial duty and/or its contractual duty of trust and confidence owed to its employees.

UK Government and Local Government pension issues

Andrew has advised the Ministry of Defence on a number of pensions-related issues, as well a large local government pension scheme on its powers of investment.

Employment – related pensions advice

Andrew has given advice both to employers and employees on particular issues that have arisen concerning individual pension rights under employment contracts.

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Commercial Professional Negligence

Andrew has over 30 years' experience of commercial professional negligence cases, starting with several years of acting for banks in claims against commercial property surveyors and valuers arising out of the property crash at the end of the 1980s, which caused dramatic falls in the value of the banks' security. His extensive experience since then covers, in addition, claims against lawyers, accountants, financial advisers and financial service intermediaries in the context of a wide range of financial products, pension scheme investment managers, actuaries and pension scheme administrators and benefits consultants. He is as a leading silk in professional negligence in Chambers & Partners and Legal 500.

Andrew is regularly instructed to act both on behalf of and against leading law firms and actuarial and investment consultants, with his extensive experience of both prosecuting and defending actual and threatened claims being much sought after, as his ability to lead teams of counsel in cases of the highest quantum,

Andrew has wide experience of advising, on both sides, in relation to legal and actuarial negligence alleged to have occurred in the context of failed attempts to equalise normal retirement ages post-Barber, as well as in many other pensions-related contexts. As well as raising breach of duty, causation and (often complex) quantum questions, these cases almost invariably involve issues over limitation.

Notable Professional Negligence Cases

PSGS Trust Corporation Ltd v Aon UK LTD, Aon Consulting Ltd and Aon Solutions UK Ltd (2016-2022) [2022] EWHC 2058 (Ch) | [2022] 7 WLUK 445 | [2023] P.N.L.R. 2

Andrew acted on behalf of the Claimant trustees of a pension scheme and the PPF (the scheme employer was in liquidation so the scheme is in a PPF assessment period) in another complex and high value proposed claim against various Aon entities (which acted as the scheme administrators and legal advisers on certain issues) for many years over a failure to comply with formality requirements in relation to the closure of the scheme to future accrual. In 2022, Andrew represented the Claimant at a hearing in the Chancery Division at which strike out applications brought by the Defendants in which it was argued that the claims were time barred were defeated, leading to the subsequent successful settlement of the claim.

R Re XY Pension Scheme (2023 ongoing)

Andrew acts for the former administrators of a pension scheme against whom a claim for professional negligence has been intimated in relation to the validity of execution of a deed of removal and appointment of trustees in 2007. Other potential defendants in the professional negligence claim (the scope of which is likely to be determined by prior Part 8 proceedings in the Chancery Division to determine various legal questions which will affect the professional negligence claim) include one or more leading firms of solicitors. The claim raises numerous issues concerning company and trustee execution of deeds in the pension scheme context, including complex questions as to how equity might treat an invalidly executed deed as valid, together with estoppel, extrinsic contract and limitation issues.

Re AB Retirement Benefit Scheme (2016-23 ongoing)

Andrew acts for the proposed claimants, the employer and trustees of a pension scheme with a 20-year history of alleged serial failures by their professional advisers to advise properly on compliance with formality requirements in relation to

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scheme documentation amendments. This has given rise to complex overlapping and interlocking high value professional negligence claims against the scheme's former administrator and multiple firms of solicitors. The outcome of the claims will be influenced by Part 8 proceedings shortly due to be commenced by the trustees to determine the effect of the formality failures and various other legal issues in which Andrew is also acting.

Re XY Pension Scheme (2020-23 ongoing)

A potential Part 7 claim for professional negligence against a leading law firm (Firm A) for failing to advise the employer and the trustee of a pension scheme about (a) the need for a deed to implement benefit changes introduced in 2003 and (b) the potential negligence during 2002-3 of another leading law firm (Firm B) which advised the employer and the trustee about those benefit changes (leading to a "loss of a chance" claim against Firm A), the claim against Firm B in respect of its negligence being time barred. Andrew is advising the proposed claimant employer and the trustee. The extent of Firm A's liability is likely to be determined by the outcome of Part 8 and/or 7 proceedings for construction and rectification to be pursued first by the employer and the trustee.

P Group Pension Trustees and others v various Q entities and Law Firm Y (2016-18)

Andrew was instructed on behalf of various proposed defendant entities which acted for many years as administrators to the X's Pension Scheme. Predecessor firms to Law Firm Y were the Scheme trustees' legal advisers. A professional negligence claim against Andrew's clients and Law Firm Y based upon a failure by the scheme to equalise Normal Retirement Dates as had been intended. Andrew was closely involved in developing the defence strategy on behalf of his clients including limitation, duty and quantum arguments deployed in their letter of response to the letter of claim. The claim settled following two mediations at both of which Andrew represented his clients' interests.

Philips Pension Trustees Limited & Philips Electronics UK Limited v AON Hewitt & Alliance Bernstein (Chancery Division 2011 – 16)

Investment advice and management negligence claims for over £200m, brought by the employer and trustees of a major UK pension scheme, for whom Andrew acted, against the scheme's former investment strategy consultants and one of its fund managers. The claim arose out of the scheme's prior investment of £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets that caused the scheme huge losses during the Credit Crunch.

Issues included the scope of the respective duties owed by each of the Defendants to the trustee/employer, the risks inherent in the financial products, and importantly, whether or not the investment consultant was an authorised person carrying on regulated activities for the purposes of FSMA 2000. The claim settled at a mediation after an extensive and hard fought interlocutory battle.

Sopra Steria Ltd and others v Punter Southall Ltd, Stuart Southall and Nabarro LLP (Chancery Division 2017)

Andrew advised two of the defendants (the scheme's actuarial advisers) in this highly complex professional negligence claim also brought against the scheme's legal advisers arising out of a benefit restructuring process.

Legal professional negligence claim – pensions law – RAA (2014 – 16)

Andrew advised the potential defendant (the pensions team of a well-known law firm in relation to a claim brought by scheme trustees and the Pension Protection Fund for damages for alleged negligence in relation to the law firm's advice in

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connection with a regulated apportionment agreement entered into by the trustees.

Actuarial professional negligence claim – failure to equalise (2012)

Andrew advised the potential defendant, a major actuarial firm, on a claim brought against it by trustees of a pension scheme arising out of an alleged failure to equalise benefits, which was successfully settled at a mediation. The claim raised issues relating to scope and breach of duty, construction of amendment powers, causation, quantum and limitation.

Legal professional negligence claim – pensions law – equalisation / failed amendment (2011 – 13)

Andrew advised and represented at a mediation the proposed defendant, the pensions team of a well-known law firm, in a claim against them for professional negligence alleged to have occurred in the context of benefit changes purportedly introduced into pension scheme rules but which fell foul of the scope of the power of amendment.

Legal professional negligence claim – pensions law – pension increases / failed amendment (2011)

Andrew advised the proposed claimants, the trustees and principal employer of a final salary scheme in relation to a claim against the scheme's former solicitors for negligence arising out of an alleged failure to comply with the power of amendment in the scheme rules when purporting to reduce the annual rate of increase on pensions in payment. The issue related to the correct actuarial basis for calculating the trustees' or employer's losses.

Actuarial negligence claim – failure to equalise (2011)

Andrew advised the proposed claimant, a pension scheme's trustees and principal employer, on a claim against the scheme's former actuarial advisers for negligent advice relating to an allegedly failed equalisation of normal retirement ages. The issues included scope and breach of duty and limitation.

Philips v Hewitt (No. 1) (Chancery Division 2006 – 09)

Andrew advised the trustee and employers of the Philips Pension Plan in its successfully settled claim against Hewitt, based upon allegations of actuarial negligence.

Credit Lyonnais Securities and 6 others v Watson Wyatt (Chancery Division (trial in front of Warren J): 2003-05)

In one of the very few actuarial negligence claims ever to go to a full trial, Andrew represented the trustee and employers of a large pension scheme in a claim alleging that their actuarial advisers prepared a negligently over-optimistic valuation of scheme liabilities (indicating that it was in surplus when in fact it was in deficit) as a result of which, amongst other things, the employer banks paid large bonuses to staff that would not otherwise have been paid. Although the matter went to trial, it settled on the third day after Andrew's opening speech. The judgment would have determined many of the legal issues on duty, breach, causation and quantum that remain unresolved to this day.

Commercial, Banking & Financial Services

Andrew has a reputation as a strong advocate and as such is regularly instructed by domestic and overseas clients seeking heavyweight representation in English law (and non-English Law) commercial matters both in England and abroad including the Middle-East, Europe, US, Asia-Pacific and Caribbean.

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These cases are often substantial, complex and arise in a wide variety of contexts and industry sectors including disputes involving a range of participants, including governmental or quasi-governmental entities and all kinds of corporate entities and individuals in the business, financial services and banking sectors, involving shareholders, partnerships, corporate transactions and joint ventures, contractual disputes in investment and finance, IT and telecoms and supply of services, and cryptoassets (dealt with in more detail below), cases involving trusts, civil fraud, asset recovery, professional negligence, insolvency and pensions schemes. Such disputes arise in general litigation, interlocutory proceedings, Injunctive relief and satellite litigation including those arising from arbitration proceedings. Others are themselves the subject of arbitration.

Examples of recent cases include Andrew being instructed directly by the General Counsel of a large manufacturer and global supplier of fashion items based in the US to advise on the legal consequences of the Covid-19 pandemic on one of its major international sports sponsorship contracts (the other counterparty to which is a well-known UK company), the benefits of which were dramatically affected by the cancellation of a global series of sporting events to which the sponsorship related. He also recently advised a US corporation in relation to a potential ICSID investment treaty arbitration worth approximately USD 80 million against Saudi Arabia.

He has also undertaken a number of cases recently involving cryptoassets, including representing a cryptocurrency exchange in the first case considering the legal status of cryptocurrency to reach the Dubai International Financial Centre Court of Appeal; representing a defendant in the Commercial Court in London which successfully procured the lifting of a freezing order and dismissal of all claims against it by consent in a case where a relatively small proportion of a very large amount of stolen Bitcoin belonging to the claimant was traced to a wallet controlled by Andrew's client; and advising (in a regulatory context) an entity seeking registration from the FCA as a cryptoasset exchange and custodian wallet provider under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, an application which is currently the subject of an FCA Warning Notice.

The depth of Andrew's expertise in the fields of cryptoassets and smart contracts is further reflected in his role as the leader of a team of Outer Temple barristers which is currently advising the Dubai International Finance Centre Authority (DIFCA), in its capacity as the law making body in the DIFC, on how DIFC Laws might be updated by amendment to promote legal and regulatory certainty in relation to cryptoassets and smart contracts, for the benefit of the DIFC-based domestic and international business, banking and fintech sectors as part of the DIFC's forward looking "Future of Finance" project.

Beyond this, company Law has always formed part of Andrew's business law practice. In the autumn of 2016, instructed by DIFC, Andrew led a four-strong team from Outer Temple Chambers to review, amend and redraft a new Companies Act based on English Law, for the DIFC. This high profile and important work included the provision of extensive and detailed advice on numerous company law issues including directors' duties, shadow directors, shareholders, companies purchasing own shares, redemption rights, financial assistance, reduction in capital, penalties, mergers and acquisitions, accounting records and requirements.

Andrew was previously Chair of the Commercial Bar Association. He is highly sought after as a leading silk in a wide range of commercial cases in both the Commercial Court and the Chancery Division, as well as in the DIFC Courts in Dubai and in arbitrations. He also sits as a Deputy High Court Judge in the Queen's Bench and Chancery Divisions, as a Justice at the Astana International Financial Centre ("AIFC") Court and acts as an arbitrator (LCIA; DIFC-LCIA) and carries out expert legal determinations in a variety of commercial contexts.

Andrew is ranked as a Leading Silk for Commercial Litigation by Legal 500.

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Notable General Commercial Litigation Cases

Huobi (2022-23 ongoing) [aka (1) Gate Mena DMCC and (2) Huobi Mena FZE v (1) Tabarak Investment Capital Ltd and (2) Christian Thurner – Claim No: TCD 001/2020]

Andrew acts for the appellant to the DIFC Court of Appeal in a claim brought by the appellant, a cryptocurrency exchange, in the DIFC Court for damages for the failure by the defendants to guard against the theft of the claimants' Bitcoin, resulting in a first instance judgment against the Claimants being handed down by Justice Sir Richard Field on 5 October 2022. The case was the first trial in the jurisdiction to consider the legal status of cryptocurrency and custody arrangements for its transfer and was listed in the DIFC Court's own Annual Report for 2022 as one of three "Notable Cases" for the year. It is now proceeding to the DIFC Court of Appeal, permission to appeal having been granted by the trial judge. Andrew was brought in to lead Justina Stewart of Outer Temple Chambers (who represented the Claimants at the trial) at the (since successful) permission to appeal stage and for the Court of Appeal hearing, which is expected to take place later in 2023. This is the first cryptocurrency appeal against a final trial judgment to reach Court of Appeal level in the DIFC Courts (something that has not yet happened in the courts of England and Wales).

The issues include (1) the extent to which the Defendants were liable for breach of confidence under the DIFC Law on Obligations for the disclosure to the Bitcoin thieves of a 12-word seed phrase which enabled them to remove the Bitcoin from the wallet to which the Claimants transferred them as part of an intended sale transaction being conducted with the assistance of the Defendants; (2) whether the Defendants fall to be treated as custodians of the Bitcoin for the purposes of the intended transaction; (3) what contractual, tortious and/or fiduciary duties the Defendants owed to the Claimants arising out of the Defendants role in the intended transaction.

P v Q (2023 ongoing)

Andrew acts for the trustees of two very large, connected, pension schemes in relation to disputes each of them have with the security agent appointed pursuant to an intercreditor agreement providing for the allocation and distribution of the proceeds of the realisation of secured assets in accordance with the priority assigned to the various secured debts owed by the borrowers, including debts owed to each of the pension schemes. The multi-million pound disputes arise out of disagreements over the interpretation of key provisions of the Intercreditor Agreement.

Ellis v Shehadi and Plustech Ltd and 12 others (2022)

Andrew appeared in the Commercial Court (Jacobs J) on behalf of one of the many defendants/respondents to this claim/application for damages and other remedies together with a worldwide freezing order arising out of an alleged multimillion pound cryptocurrency fraud.

This was one of the first cases of its kind to reach the Commercial Court, involving the cross-border tracing of digital currency through exchanges and digital wallets. The well-known exchanges (including Kraken, Binance) and most of the defendants, including Andrew's client (the company holding the wallet into which a relatively small proportion of the stolen Bitcoin eventually found its way), were all out of the jurisdiction. Getting to grips with and challenging the tracing on the blockchain was critical to the defence. It was Plustech's case that the Bitcoin traced to its account had been paid into that account as part of a genuine transaction without its knowledge that it had in fact been stolen from the Claimant.

After three return dates spanning January to March, and an aggressive defence presented on behalf of Andrew's client (and also one other defendants/respondents, represented by Helen Pugh of Outer Temple Chambers), the claimant agreed to

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the lifting of the worldwide freezing order and the dismissal of all claims against Andrew's and Helen's clients.

Prakash Industries Ltd v Peter Beck Und Partner Vermögensverwaltung GmbH (Commercial Court) (2019-22) [2022] EWHC 754 (Comm)

Andrew successfully represented the German investment fund, Peter Beck, in a Commercial Court action tried in 2022 in which his client was the defendant in declaratory proceedings brought by an Indian company, Prakash which had issued foreign currency convertible bonds to Peter Beck. The dispute concerned whether an event of default had occurred in relation to the bonds. Peter Beck also brought a counterclaim for the late delivery of shares following the exercise of its conversion rights under the terms of the bonds. The 4-day trial involved cross-examination of experts in the trading or and investment in foreign currency convertible bonds as well as a number of factual witnesses, including a number who were abroad and had to be cross-examined remotely.

A v B and C (2021-23 ongoing)

Andrew acts for a global clothing brand and manufacturer seeking a declaration in the Commercial Court that a purported assignment to one of the defendants (B) of all of its rights to one of its brands (including all intellectual property rights) has no legal effect on the grounds that it is a forgery or that the purported assignment document was signed the other defendant (A), purportedly on behalf of Andrew's client, without authority to do so and/or in breach of fiduciary duties owed by A to Andrew's client.

X Inc v Y Ltd (2020-21)

Andrew advised a US-based company, which is a party to a sponsorship contract with a UK company, on its rights under the contract's force majeure provisions following the cancellation due to Covid-19 of sporting events to which the sponsorship contract relates.

MacQuarie Capital (Europe) Ltd v Nordsee Offshore MEG I GmbH (Commercial Court, 2019)

Andrew appeared for Nordsee Offshore in a contractual dispute with international bank, MacQuarie at a Commercial Court trial in front of Butcher J in May 2019. The dispute concerned the correct construction of the terms of the English law engagement contract under which MacQuarie agreed to raise equity and debt finance for a £1.7bn German offshore windfarm development. The 4-day trial involved cross-examination of foreign law experts as well as a number of factual witnesses.

Dell Emerging Markets (EMEA) Ltd v IB Maroc SA (Commercial Court 2017-2019)

Commercial Court claim and counter claim concerning failings in designing and implementing a major IT project for Morocco's largest telecommunications provider. Proceedings were initially brought in Morocco, but moved to the Commercial Court in England following an anti-suit injunction obtained before Teare J. Andrew was brought into the case to argue an application for permission to appeal a key aspect of Teare J's order consequent upon the anti-suit injunction which raised a particular point of construction on the jurisdiction clause in the contract which it was alleged had been breached. Thereafter, he remained instructed on the case as it progressed through the pleading and early stages of preparation for trial before settling.

In the matter of X (Holdings) Ltd and others (in administration) (2019)

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Andrew advised on numerous insolvency, trust and pensions legal issues arising out of the entry into administration of several group companies over whose valuable assets (held by the Administrators) the Trustee of the group pension scheme claimed to hold priority charges under a mortgage ahead of other creditors including the companies' bankers. Andrew was jointly instructed by two clients with potentially adverse interests with a view to exploring whether an agreed settlement could be reached between the Administrators and the Trustee as to whether the general creditors as a whole or the pension scheme alone should receive the benefit of the assets.

Baldwin & others v Standard & Poor's Credit Market Services Europe Limited (McGraw-Hill Pension Scheme) (Companies Court 2018)

The context for these Companies Court proceedings, of a type never brought before by UK pension scheme trustees, was a Brexit-inspired proposed cross-border merger whereby one of the S&P group of UK companies, which was a sponsoring employer of the group's UK pension scheme, would merge into an Irish group company and thereafter cease to exist in accordance with the fast track procedure provided for under the Companies (Cross-Border) Mergers Regulations 2007, leaving the pension scheme with a significantly altered UK employer covenant. This raised significant issues of concern for the trustees, for whom Andrew acted, as to the security of the benefits payable under the Scheme, as well as issues of English companies and pensions law and Irish law. Proposed compromise approved by Nugee J at a hearing in May 2018.

X v Y (2018-2019)

Andrew advised on remedies and claims against parties involved in an alleged conspiracy to give false evidence in foreign arbitral proceedings.

Bluewaters Communications Holdings Ltd v (1) Ecclestone, (2) Bayerische Landesbank Anstalt Des Öffentlichen Rechts ("BLB") (3) Bambino Holdings (2016)

Claim arising from sale of Formula One in 2005. Claimant, whom Andrew advised up to issue of proceedings in 2016, was a bidder for the shares in one of the companies controlling Formula One and alleged that, owing to a corrupt bribery agreement entered into between Bernie Ecclestone and the chief risk officer of BLB in order to ensure the sale to a purchaser amenable to Mr. Ecclestone (as found in an earlier case, Constantin Median AG v Ecclestone & ors), it lost the opportunity to acquire those shares and thus control of Formula One. The claim raised complex issues of fact and law, including jurisdictional issues and questions, under both English law and German law, relating to liability for unlawful interference with the Bluewaters' economic interests, conspiracy by unlawful means, deceit, fraudulent misrepresentation, fraudulent misstatement, and vicarious liability or equivalent civil wrongs, together with remoteness and quantification of loss issues.

Mengiste & anor v Endowment Fund For The Rehabilitation Of Tigray & Ors ("EFFORT") (2012 – 2016) Two strands: (1) [2013] EWHC 599 (Ch) (2) [2013] EWHC 857 (Ch), [2013] EWHC 1087 (Ch), [2013] EWCA Civ 1003; [2014] P.N.L.R. 4

Strand 1: Chancery commercial claim seeking to have judgments obtained in Ethiopia by the Defendants set aside and damages awarded on the grounds of an alleged fraudulent conspiracy in the prosecution of the original claims. Raised complex issues of Ethiopian law (including issues about the ambit of restitutionary causes of action) as well as an important jurisdictional forum issue as to whether a claimant in civil proceedings against defendants with alleged links to the Ethiopian government could expect to receive a fair trial of his action in Ethiopia or whether the action should be tried in England. Andrew's cross-examination of the other side's Ethiopian law expert, described by the Judge as a "thorough and

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comprehensive destruction”, was instrumental in securing a resounding victory for his clients. In 2015, the claimants sought to have the stay of their action imposed in 2013 lifted. Their application was unsuccessful at first instance but is now proceeding to the Court of Appeal, for hearing in 2016.

Strand 2: Application for wasted costs by successful Defendants on Strand 1 against solicitors representing unsuccessful Claimants on grounds that Strand 1 claims were effectively an abuse of process owing to fundamentally inappropriate expert evidence relied on by Claimants to which solicitors should not have lent their support. Went to Court of Appeal on decision of Strand 1 trial judge not to recuse himself and on his substantive stage 1 wasted costs decision. A leading decision on both recusal and wasted costs.

Philips Pension Trustees Limited & Philips Electronics UK Limited v AON Hewitt & Alliance Bernstein (2011 – 2016)

Fiercely fought Part 7 claims for damages for professional negligence by the employer and trustees of a large UK pension scheme against the scheme’s former investment strategy consultants and one of its fund managers, arising out of the scheme’s investment in 2007 of £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets, which caused the scheme massive losses during the Credit Crunch.

The issues include the scope of the duty owed by the Defendants to the trustee/employer, the risks inherent in the financial products, and an important issue as to whether or not the investment consultant was an authorised person carrying on regulated activities for the purposes of FSMA 2000. The court was engaged for several days in 2016 on a strike out application. The matter was thereafter listed for trial and settled for a substantial sum later in 2016.

X v Y (Law Firm) (2014 – 2015)

Andrew acted for an international law firm in a claim against it for injunctive relief concerning whether it should be permitted to continue to act for a party to an international commercial arbitration in London on the grounds of conflict and/or having come into possession of confidential/privileged information. He also gave advice to that party concerning English legal and procedural issues arising in the context of related commercial litigation in New York.

Pavel Sukhoruchkin & Others v Marc Giebels van Bekestein & Others (Hadar Fund) (2013 – 2014)

A multi-party, multi-jurisdictional high value shareholder dispute concerning various alleged frauds, breaches of fiduciary duties and numerous other claims in respect of an investment fund in the Cayman Islands and its investment manager in the BVI. The case was listed for a five-day interlocutory hearing in July 2014 in the Chancery Division for permission to continue a double-derivative claim (brought by the Defendants in a counter-claim) and a strike out application (of some (but not all) other elements of the counterclaim) by the Claimants. Andrew acted for the directors of the corporate entities central to the dispute.

Gate Gourmet Luxembourg IV SARL v Morby & Other Related Actions (2010 – 2011)

Three related commercial and insolvency matters in the Chancery Division arising out of disputes between companies over alleged breaches of warranty in a share purchase agreement, breaches of fiduciary duty and trust by company directors and preferential payments.

Ruttle v DEFRA / Farm Assist v DEFRA (2002 – 2009)

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A series of hard-fought commercial claims against DEFRA in the Technology and Construction Court in which Andrew acted for companies involved in the clean-up works following the 2000 and 2001 outbreaks in the UK of Swine Fever and Foot and Mouth. These raised a large number of complex construction issues in the areas of contractual and statutory interpretation, corporate insolvency, assignment of causes of action, legal professional privilege and quantum. There were eight first instance judgments and two trips to the Court of Appeal, in both of which Andrew's client was successful, most recently in relation to the recoverability of interest under the Late Payment of Commercial Debts (Interest) Act 1998 and the Supreme Court Act 1981.

Notable Banking & Financial Services Litigation & Regulatory Cases

In the matter of an application by X Ltd to the Financial Conduct Authority ("FCA") for registration as a cryptoasset exchange and custodian wallet provider under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR")

Andrew acts for an entity currently embroiled in a dispute with the FCA over its application to the FCA to be registered as a cryptoasset exchange and custodian wallet provider under the MLR, an application which is currently the subject of an FCA Warning Notice, which Andrew's client is challenging under the FCA's internal decision-making procedures. If this is unsuccessful it is likely to lead to the decision being challenged by the client in the Upper Tribunal (Tax and Chancery Chamber).

The matter has required, amongst other things, a detailed understanding on the part of Andrew and his junior, Henry Reid of Outer Temple Chambers, of (a) the requirements imposed under the MLR (the case raises significant and novel legal issues in relation to the correct interpretation of some of the MLR's most key provisions), (b) the FCA's 'Executive Decision Making' procedure and (c) the business structure and plans of a complex cryptoasset exchange and its proposed compliance architecture including its risk monitoring processes.

Prakash Industries Ltd v Peter Beck Und Partner Vermögensverwaltung GmbH (Commercial Court) (2019-22) [2022] EWHC 754 (Comm)

Andrew acted for the successful German investment fund, Peter Beck, in a Commercial Court action tried in 2022 in which his client was the defendant in declaratory proceedings brought by an Indian company, Prakash which had issued foreign currency convertible bonds to Peter Beck. The dispute concerned whether an event of default had occurred in relation to the bonds. Peter Beck also brought a counterclaim for the late delivery of shares following the exercise of its conversion rights under the terms of the bonds. The 4-day trial involved cross-examination of experts in the trading or and investment in foreign currency convertible bonds as well as a number of factual witnesses, including a number who were abroad and had to be cross-examined remotely.

MacQuarie Capital (Europe) Ltd v Nordsee Offshore MEG I GmbH (Commercial Court, 2019)

Andrew appeared for Nordsee Offshore in a contractual dispute with international bank, MacQuarie at a Commercial Court trial in front of Butcher J in May 2019. The dispute concerned the correct construction of the terms of the English law engagement contract under which MacQuarie agreed to raise equity and debt finance for a £1.7bn German offshore windfarm development. The 4-day trial involved cross-examination of foreign law experts as well as a number of factual witnesses.

Philips Pension Trustees Limited & Philips Electronics UK Limited v AON Hewitt & AllianceBernstein (2011 – 2016)

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Claims by the employer and trustees of one of the biggest UK pension schemes against the scheme's former investment strategy consultants (one of the UK's biggest) and one of its fund managers, arising out of the scheme's investment in 2007 of £2 billion of trust assets in credit default swaps and £500 million in US sub-prime mortgage backed assets, which caused the scheme massive losses during the Credit Crunch. The issues include the risks inherent in and the market perception of the financial products, and an important and untested issue as to whether or not the scheme's investment strategy consultant was an authorised person carrying on regulated activities for the purposes FSMA 2000.

Warners Retail Ltd -v- National Westminster Bank and Barclays Bank (Chancery Division 2014)

Action against bank for misselling of interest rate hedging products to a company in 2006 and 2007, in this case bank cancellable swaps, in relation to the selling of which the bank owed a statutory duty to observe FSA conduct of business rules. The swaps were entered into to hedge loans made by the bank to the company. Issues arose as to the suitability of the swaps for the customer, the relevant standard of practice in the banking industry at the time, causation and quantum, and as to the appropriateness and need for expert evidence.

Axa Sun Life v Ideal Financial Planning & ors (2011) [2011] EWCA Civ 133

Court of Appeal decision in case involving issues of contractual estoppel, various contractual construction issues including the scope of an "entire agreement" clause, a "conclusive evidence" evidence clause and an exclusion clause, misrepresentation, whether an exclusion clause fell within the scope of the Unfair Contract Terms Act 1977 and, if it did, whether it was reasonable for the appellant to rely on it. All issues arose in relation to the appellant's standard form agreement under which it appointed the various respondents to act as its representatives to sell investments and other products on its behalf.

Various Claimants v Various Banks (2009 – 2010)

Advised in relation to allegations of negligence, breach of contract and statutory and fiduciary duty made against the financial services/wealth management departments of a number of banks by a group of investors whose assets were invested on their behalf by or on the advice of those banks in the collapsed **AIG Enhanced Variable Rate Fund** marketed as an alternative to a cash deposit account.

Equitable Life (2007)

Advised in 2007 in relation to the group action brought by several hundred investors against **Equitable Life** involving allegations of mis-selling of with-profit pension annuities.

Notable Banking & Financial Services Advisory Work

DIFCA advisory work on open banking and finance in the DIFC, UAE and internationally (2022-23 ongoing)

As part of a broad range of advisory work being undertaken by Andrew, as leader of a team of barristers from Outer Temple Chambers (and supplemented in this case by partners and solicitors at Mayer Brown) to facilitate the Dubai International Financial Centre's major new "Future of Finance" project, Andrew and his team are providing the DIFC Authority ("DIFCA") – the law making body in relation to DIFC Laws and a significant player in developing the DIFC's financial services, fintech and banking strategy – with advice on the strategic and implementation steps that it can take to create a modern, forward-looking and internationally competitive open banking and open finance structural environment. This is a highly innovative

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project, not only in terms of the subject-matter of the advice but in relation to the team structure created by Andrew for his longstanding client, DIFCA, by bringing together Outer Temple Chambers barristers with leading practitioners from a major international law firm working collaboratively under his direction.

New workplace savings pension vehicle (2015 – 2016)

Advising on technical issues arising under the pensions legislation (in particular the scope of the definition of "occupational pension scheme") in the context of the development of a proposed new financial product.

P Trust v M Financial Services Ltd (2010)

Advising a network of IFAs authorised and regulated by the FSA under FSMA 2000 on a claim arising out of loan-backed purchases by sophisticated investors of portfolios of traded endowment policies in the context of a Final Notice having been issued against the product provider. Issues included whether there had been breaches of fiduciary duty in relation to commission, non-disclosure and unsuitability of the product and date of crystallisation of loss and quantum.

A v B (2010)

Advising in relation to a proposed claim arising out of advice given by an IFA to a high-earning senior academic member of a fully funded final salary pension scheme to leave the pension scheme and invest the transfer value in a SIPP.

International Arbitration

Andrew acts as counsel and arbitrator.

He is a founding member of the panel of arbitrators at the International Arbitration Centre of the Astana International Financial Centre in Kazakhstan.

In 2019, he was appointed to the panel of arbitrators at the DIFC-LCIA and undertook a significant arbitration as a co-arbitrator to two other London-based commercial silks arising out of a dispute between UAE entities and individuals over a share purchase agreement, prior to the DIFC-LCIA being merged into DIAC.

He is currently (March 2023) about to commence an LCIA arbitration under Indian Law as a panel Chair in a dispute about .

Andrew also acts arbitrator to resolve pension scheme disputes.

Andrew has wide experience of providing independent expert legal determinations, as well as significant judicial experience (outlined elsewhere in this CV).

His experience typically arise from commercial, finance, pensions and construction disputes and Andrew has been instructed to act as counsel / co-counsel in arbitration proceedings including non-English Law. Andrew has also acted in satellite litigation arising from arbitration proceedings including a claim against it for injunctive relief concerning whether it should be permitted to continue to act for a party to an international commercial arbitration in London on the grounds of conflict and/or having come into possession of confidential/privileged information.

Andrew has advised parties concerning English legal and procedural issues arising in the context of related commercial

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litigation in New York. He has also advised on remedies and claims against parties involved in an alleged conspiracy to give false evidence in foreign arbitral proceedings.

Recently Andrew advised a US corporation in relation to a potential ICSID investment treaty arbitration worth approximately USD 80 million against Saudi Arabia.

Memberships

- Legal consultant at the New York State Bar
- Chair of the **Commercial Bar Association** (COMBAR) (2017-2019) having previously served as COMBAR's Vice Chair as well as Chair of its International Committee, which is responsible for coordinating the Association's activities in all non-UK jurisdictions.
- Registered advocate at the **Dubai International Financial Centre**
- Deputy High Court Judge in both the Chancery and Queen's Bench Divisions and has been a Civil Recorder since 2005.
- Justice at the **Astana International Financial Centre Court** in Kazakhstan together with Lord Woolf (Chief Justice), Sir Robin Jacob, Sir Rupert Jackson, Sir Jack Beatson, Sir Stephen Richards and Lord Faulks KC.
- Bencher of the Middle Temple since 2010
- Joint head of Outer Temple Chambers and Head of the Business Department from 2012 to 2021

Languages

- French

Awards and Educational Achievements

- Judicial and other professional appointments and roles, see "Professional appointments and memberships" above.
- Andrew is ranked as a Leading Silk by Legal 500 for Pensions, Professional Negligence and Commercial Litigation and Middle East (Commercial) and by Chambers and Partners for Pensions and Professional Negligence.
- Andrew Graduated from Queens' College Cambridge in 1984 with a BA Hons (subsequently an MA) in Natural Sciences and Law. He was awarded a Harmsworth Exhibition by Middle Temple in 1985.

Recommendations

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EMEA

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Outer Temple

The Ultimate Round Up – PNLA London Conference

Managing multi-party professional negligence claims: processes and pitfalls

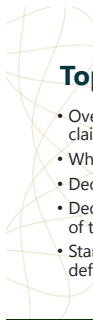
03rd October 2024

Andrew Spink KC and David E. Grant KC



Horizontal lines for notes

1



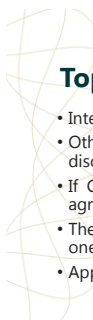
Topics

- Overall points – the more parties, the more complex is the claim
- Who should be claimants
- Deciding whom to sue
- Deciding whether to join D2/D3 etc before or after resolution of the claim against D1
- Standstills – the practicalities of different standstills as new defendants arise

(cont/...) 2

2

Horizontal lines for notes



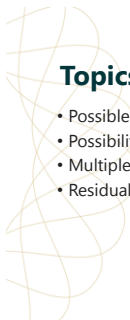
Topics

- Interrelationship of Part 8 and Part 7
- Other consequences of joining defendants in different disciplines – e.g. expert evidence
- If C only claims or intimates a claim against D1, should D1 agree to a mediation with C?
- The benefits of C maintaining a good relationship with at least one D
- Applications C can make

(cont/...) 3

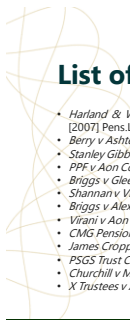
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Topics

- Possible applications D1-D3 can make
- Possibility of contributory negligence
- Multiple Defendant Causation issues
- Residual legal uncertainties



List of cases

- *Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* [2006] EWHC 1778 (Ch) [2007] Pens.L.R. 201
- *Berry v Ashtead Plant Hire Co Ltd* [2011] EWCA Civ 1304
- *Stanley Gibbons v Alexander Clay*, HC13DO0311.
- *PPF v Aon Consulting*, HC-2014-002064
- *Briggs v Gledes (Head Office)* [2015] 1 Ch 212; [2016] EWCA Civ 1284
- *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 (Ch)
- *Briggs v Alexander Clay* [2019] 102 (Ch)
- *Virani v Aon Consulting Ltd (2) Aon UK Ltd (3) Barnett Waddingham LLP* PE-2020-00003
- *CMG Pension Trustees Ltd v CGIT UK Ltd* [2022] EWHC 2130 (Ch)
- *James Cropper v Aviva Life & Pensions UK* [2022] EWHC 1689 (Ch)
- *PSGS Trust Corporation v AON UK* [2022] EWHC 2058 (Ch)
- *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.
- *X Trustees v ABC Ltd* – claim not issued yet. Subject of recent mediation



Questions





Outer Temple

Thank you

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Kathryn Jenkins

Sustainability consultant and non-practising solicitor

LLB (Hons) BSc (Hons) MSc

IEMA Certificate in Environmental Management

“The Tumaini Trust”



Kathryn Jenkins

Sustainability consultant and non-practising solicitor
LLB (Hons) BSc (Hons) MSc IEMA
Certificate in Environmental Management

The Tুমাইনি Trust (registered charity number 1113901) was founded by Kath Jenkins in 2005 to raise funds to enable her former primary school students in Tanzania to continue their education.

Working in partnership with some of Kath's former pupils and local villagers in Kilimanjaro, The Tুমাইনি Trust now focuses on planting trees as well as making and distributing reuseable sanitary kits to local women and girls.

@tumaini_trust

<http://tumainitrust.org.uk/>

PNLA Conference: 3rd October 2024

Speaker: Kath Jenkins
Founder of The Tumaini Trust



1

Primary Schools Kilimanjaro



2

Primary Schools & Saturday Club



3

Holiday Club Kilimanjaro



4

First Day at Boarding School Kilimanjaro



5

Village Environment Development Group: VEDG



6

VEDG Nursery and Tree Planting



7

The Importance of Trees

- 1) Sustainable livelihoods
- 2) Skill sharing
- 3) Reforestation KINAPA
- 4) Climate Change



8

Period Poverty



9

Sanitary Kits



10

Bees and Honey



11

Carbon Literacy in Tanzania



12

Some of our Volunteers



13

What your donations can fund

£1 – 1 tree

£5 – a sanitary kit

£45 – a beehive



14

Thank you

Asante sana

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Insta: [@tumaini_trust](https://www.instagram.com/tumaini_trust)
Website: <http://tumainitrust.org.uk/>



15



Matthew Pascall
Temple Legal Protection

“Litigation Funding & ATE Insurance update”

Matthew Pascall
Legal Director
Head of Commercial



Matthew was called to the Bar in 1984 and joined Guildford Chambers two years later. Spending more than 30 years in practice there, he was listed as a Legal 500 Tier One barrister.

He joined the commercial team at Temple Legal Protection as Senior Underwriting Manager in 2017.

Matthew was appointed to Temple's Board in December 2022 as Legal Director and Head of Commercial.

His knowledge of the commercial legal sector and litigation practice is invaluable to the business and our clients, providing specialist experience to lead the commercial litigation insurance team.

Litigation Funding and ATE Up-Date

How Much?

PACCAR & Funding

Matthew Pascall
Legal Director & Head of
Commercial

Temple Legal Protection Limited



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1

PACCAR & Funding

PACCAR - The Decision

R. (On the application of PACCAR Inc) v Competition Appeal Tribunal [2023]
UKSC 28

- Background – proceedings before the Competition Appeal Tribunal (CAT) in which representatives of truck owners and operators alleged that a group of manufacturers had engaged in unlawful price fixing (as found to have taken place by the EU commission some years ago).
- CAT required to be satisfied that the truck owners were able to fund their own costs and pay any adverse costs in the CAT proceedings.

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2

PACCAR & Funding

PACCAR - The Decision

- The manufacturers argued that the owners were not adequately funded because the Litigation Funding Agreements (LFAs) by which their claims were funded were damages based agreements (DBAs) which were unenforceable because they failed to comply with the relevant DBA regulations.
- The relatively short question was: Were these agreements damages based agreements? The owners conceded that if they were, they were not enforceable.

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3

PACCAR & Funding

PACCAR - The Decision

- The CAT decided that the LFAs were not DBAs.
- The Divisional Court agreed.
- The UKSC allowed the manufacturers' appeal and held that the agreements were DBAs. It did so because it concluded (Lady Rose JSC dissenting) that the funders provided "claims management services" within the meaning of section 58AA of the Courts and Legal Services Act 1990.
- The LFAs in question provided that in the event of a successful outcome, the funder would be entitled to a specified percentage of the compensation.

4

PACCAR & Funding

PACCAR - "Best Bits"

- *"As Henderson LJ observed, funding of litigation by third parties is now a substantial industry which, although driven by commercial motives, is widely acknowledged to play a valuable role in furthering access to justice."*
- *"In particular, the effectiveness of group litigation may depend on the use of third party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial."*

5

PACCAR & Funding

PACCAR - "Best Bits"

- *"The court was told that if LFAs of this kind, whereby the third party funders play no active part in the conduct of the litigation but are remunerated by receiving a share of any compensation recovered by their client, are DBAs within the meaning of section 58AA, the likely consequence in practice would be that most third party litigation funding agreements would by virtue of that provision be unenforceable as the law currently stands."*
- *"The statute book is not neat and tidy"*

6

PACCAR & Funding

PACCAR - "Best Bits"

- *"Sir Rupert Jackson, ... identified improving access to justice as a regulatory objective and endorsed the use of third party funding based on receipt of a percentage of the sums recovered in the action. [He]... noted that there had been a sea change in the common law of champerty to allow such arrangements to be enforceable, at least so long as the funders did not have control over the conduct or settlement of the litigation...[He] recommended that a satisfactory voluntary code.... should be drawn up and the question whether there should be statutory regulation of third party funders by the Financial Services Authority ought to be revisited if and when the third party funding market expanded."*

7

PACCAR & Funding

PACCAR - The Response

- Initial panic
- Litigation!!! (Funded???) – challenging existing DBAs
- A call for the decision to be reversed by statute
- Some more thoughtful reflections

8

PACCAR & Funding

Litigation Funding Agreements (Enforceability) Bill

The Bill was a victim of the 2024 general election. It has yet to be reintroduced.

In August Justice Minister Lord Ponsoby said: *the government "... recognises the critical role third-party litigation funding plays in ensuring access to justice."*

"Following the PACCAR judgment, concerns have been raised about the need for greater regulation of litigation funding agreements, or greater safeguards for claimants. The government is keen to ensure access to justice in large-scale and expensive cases, whilst also setting up adequate safeguards to protect claimants from unfair terms. The Civil Justice Council is considering these questions and others in its review of third-party litigation funding, and hopes to report in summer 2025. The government will take a more comprehensive view of any legislation to address issues in the round once that review is concluded."

9

PACCAR & Funding



Reviews

The Civil Justice Council has established a working group to consider possible reforms of Third Party Funding (TPF). In particular, it will consider:

- Whether TPF should be regulated and if so, how and by whom.
- Whether and, if so, to what extent a funder's return on any TPF agreement should be subject to a cap;
- How TPF should be best deployed relative to other sources of funding, including but not limited to, legal expenses insurance, and crowd funding;



PACCAR & Funding



Reviews

- The role that rules of court, and the court itself, may play in controlling the conduct of litigation supported by TPF, or similar funding arrangements, including whether and, if so, what provision needs to be made for the protection of claimants whose litigation is funded; and the interaction between pre-action and post-commencement funding of disputes;
- The relationship between TPF and litigation costs;
- Duties concerning the provision of TPF, including potential conflicts of interest between funders, legal representatives and funded litigants;
- As to whether funding encourages specific litigation behaviour such as collective action.



PACCAR & Funding



Reviews

<https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/#:~:text=The%20CJC%20will%20look%20to.The%20reports%20will%20be%20published.>

See also "A review of litigation funding in England and Wales - A legal literature and empirical study" submitted to the Legal Services Board in March 2024: <https://legalservicesboard.org.uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>



PACCAR & Funding

Reviews

March 2024 LSB Review:

- The research indicates that, probably by virtue of both the competition between litigation funders and the economics of the sorts of cases which funders typically fund and which can entail significant costs, the funders' return-on-investment is very rarely above 50%.
- Litigation funders carefully choose a minority of cases (between 3% and 5% of funding opportunities), which means that litigation funding is not a solution that could be scaled up to provide access to justice to a large proportion of the population across a wide range of subject matters, types of grievances, and value of claims.

13

PACCAR & Funding

Final thoughts & Questions:

Irish Fixed Costs in the County Court – c. 1890 (adjusted for inflation)

- | Amount Claimed | Fixed Costs |
|----------------|-------------|
| • £216 | £108 |
| • £539 | £323 |
| • £1,079 | £323 |
- Csl's fees allowed at £107
 - Claims worth more than £2,159, csl's fees between £107 to £324

Average Irish agricultural labourer's wage in 1890 c. £32 to £37 per week.

14

PACCAR & Funding

Final thoughts & Questions:

- How Much?
- Why is funding or ATE necessary?
- Does funding fuel social inflation – see views of the re-insurance market;
- Why is litigation so expensive?
- Legal Aid rates v. Magic Circle rates;
- Have we just become greedy?

PS: Don't forget ATE!!!

15



**Rachel Auld
& Thomas Pangbourne
Indemnity Law**

“Insurance Claims: The Inside Scoop”

INDEMNITY.

Thomas Pangbourne

Partner

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Thomas is a leading specialist in resolving tricky and valuable coverage disputes. Tom has particular expertise in financial lines insurance, including Warranty & Indemnity, Directors & Officers and professional indemnity coverage issues.

Tom joined Indemnity in January 2024 having spent two decades advising insurers on policy coverage disputes, including representing insurers as an advocate in arbitration. He now brings that expertise to bear for his policyholder clients, seeking to ensure that problems with valid claims are resolved quickly.

Tom's experience has also included defending numerous large claims against professionals, including several well-known firms of City and West End solicitors. As an experienced Solicitor Advocate, he is also experienced at leading and managing solicitor and counsel teams through trial. This experience means that Tom's approach is to think about the end-game at the outset – and such an approach means that, at the outset of a matter, his clients benefit from clear advice on the merits and the evidence. <https://indemnity.law/person/tom-pangbourne/>

INDEMNITY.

Rachel Auld

Senior Associate

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An ex-advisor to insurers, Rachel has particular expertise in resolving financial lines and commercial property coverage disputes.

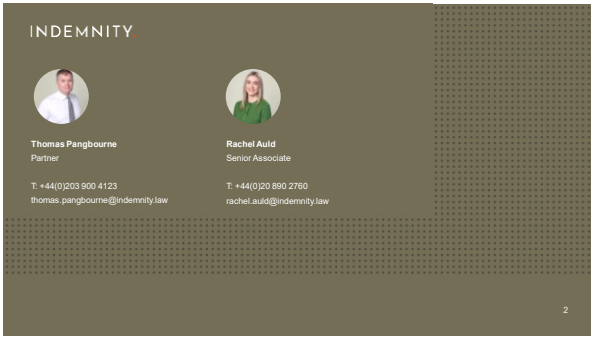
Rachel joined Indemnity as an Associate in 2021. Prior to joining the team, she advised leading insurers on a broad range of coverage issues and worked with loss adjusters, insolvency practitioners, brokers, and policyholders to resolve claims both in and out of court.

Rachel now advises policyholders on the most effective ways to resolve complex coverage disputes.

<https://indemnity.law/person/rachel-auld/>



1



2



3

Policy limits – don't be caught short!

INDEMNITY 4

4

Policy limits

1. How PI policy limits typically work
2. Minimum limits of indemnity
3. Aggregation
4. Excess

INDEMNITY 5

5

Minimum limits of indemnity

Code	Requirement / Note	Limit
PL	"The professional liability cover (like all and insurance professional indemnity insurance) that provides adequate and appropriate cover in respect of current or past practice taking into account any alternative arrangements that apply to the claimant's work"	£10 per claim – £25 per claim – £10 per claim – Aggregation at these limits for claims, no cross-aggregation
BICS	"All previous and current professional work is covered to adequate and appropriate professional indemnity cover"	£1m each and every claim basis or aggregate plus individual fund-the-fund investment basis
BHW	"The requirements in respect of professional indemnity insurance, including the minimum terms, are concerned with securing consumer protection, specifically that there is adequate cover for liabilities which BHW regulated persons and BHW regulated services may incur to their clients or other parties to whom they may owe duties when performing their legal services"	£20k each and every claim basis or aggregate
PLA	"The purpose of this chapter is to ensure that a claimant is paid the type and level of professional indemnity insurance necessary to engage their work"	£1.5m for a single claim, £1.5m plus 10% interest at the aggregate
ICAW	"ICAW does not make it reasonable to require any claimant that acts from home or public practice"	£20 per claim and as the aggregate

INDEMNITY 6

6

● Aggregation of limits

AIG Europe Limited v Woodman and others
[2017] UKSC 18

Axis Speciality Europe SE v Discovery Land Company LLC and other companies [2024] EWCA Civ 7

7



Fraud and dishonesty exclusions in professional negligence policies

8

● Dishonesty exclusion

SRA:

"The insurance may exclude liability of the insurer to indemnify any particular person to the extent that any civil liability or related damages arise from dishonesty or a fraudulent act or omission committed or condoned by that person, except that:

1. the insurance must nonetheless cover each other insured; and
2. the insurance must provide that no dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company, or in the case of an LLP, all members of that LLP."

9

● Dishonesty exclusion

BSB excludes:

"Claims arising out of any fraudulent dishonest or malicious act or omission on the part of the Insured, save that (a) the Insurer must indemnify the Insured against Claims arising out of any fraudulent dishonest or malicious act on the part of the Insured's servant or agent for which the Insured is liable in law provided that the Insured establishes to the reasonable satisfaction of the Insurer that it did not commit or condone the fraudulent dishonest or malicious act or omission, and in any event (b) the Insurer must indemnify any other Insured which did not commit or condone the fraudulent dishonest or malicious act or omission."

10

● Dishonesty exclusion

Insurance implications

1. Claims arising from the dishonesty excluded.
2. Excluding liability of dishonest person only – unless e.g. all partners dishonest.
3. Process: RoR, investigate

11

Regulatory findings:
the helpful and the *not so* helpful

12

● Regulatory findings

1. Solicitors Regulation Authority (SRA) and the Solicitors' Disciplinary Tribunal (SDT)
2. Financial Reporting Council (FRC), Audit, Reporting and Governance Authority (ARGA)

INDEMNITY. 13

13

King's Speech, 17 July 2024

My Lords and Members of the House of Commons. My Government will govern in service to the country.

My Government's legislative programme will be mission led and based upon the principles of security, fairness and opportunity for all.

Stability will be the cornerstone of my Government's economic policy and every decision will be consistent with its fiscal rules. It will legislate to ensure that all significant tax and spending changes are subject to an independent assessment by the Office for Budget Responsibility (Budget Responsibility Bill). Bills will be brought forward to strengthen audit and corporate governance, alongside pension investment (Draft Audit Reform and Corporate Governance Bill, Pension Schemes Bill).

INDEMNITY. 14

14

(When) can insurers avoid the policy for non-disclosure?

INDEMNITY. 15

15

● Insurance Act

Insurance Act 2015

1. Duty of fair presentation
2. Remedies

INDEMNITY. 16

16

●

Making a Third Party (Rights against Insurers) Act claim against insurers

INDEMNITY. 17

17

● TPRAI/ Act claims

1. Before the Acts
2. Third Party (Rights against Insurers) Act 1930
3. Third Party (Rights against Insurers) Act 2010

INDEMNITY. 18

18

- (i) whether there is a policy in place
- (ii) identity of insurer
- (iii) terms of the policy
- (iv) whether insurer has claimed not to be liable under the policy
- (v) whether there are any coverage proceedings
- (vi) how much of the limit has been paid out

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19

- Has the claim been notified?
- Is the defendant a “relevant person”?
- What are the policy limits?
- Arbitration clause?
- Solvent insurer?

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20

20

Practical application

INDEMNITY

21

21

● Points to check

- Information gaps
- Resolving them as far as you can
- Framing your case
- Dealing with policy issues mid-stream

INDEMNITY. 22

22

Thanks!

If you require any further information from us, please do not hesitate to ask.

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INDEMNITY. 23

23



David Osborne
Senior Associate/Client Relations Manager
Fraser Dawbarns

“Solicitors Compliance Update”



David Osborne

Senior Associate

Client Relations Manager

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David Osborne is a Solicitor and Senior Associate in the Dispute Resolution department, based in the King's Lynn office. David is also the firm's Client Relations Manager. David specialises in all forms of dispute resolution with a particular focus on professional negligence, where he is a member of the PNLA (Professional Negligence Lawyers Association).

David also focusses on matters involving insurance, inquests, and Solicitors' regulatory and compliance issues.

David's typical clients are those who need guidance and advice on professional negligence issues, representing both businesses and individuals as claimants and professionals such as solicitors, accountants, architects, and developers as defendants. David particularly enjoys the problem-solving aspect of his work and enjoys it when his work presents a challenge. Clients can expect clear and objective advice, delivered honestly, whether the news is good or bad.

David studied Modern & Medieval Languages (German and Latin) and Law at Magdalene College, Cambridge where he was involved in the Union Debating Society and coxed the college's 1st crew. David then completed his Law Society Finals at Birmingham Polytechnic, qualifying as a Solicitor in 1990.

Before joining Fraser Dawbarns in 2003, David worked in the city and at local law firms. His early legal career was spent in London firms where he was focused on maritime and shipping law which often involved complex cross jurisdictional issues. During this time, David was involved in the Zbrugge Ferry Disaster Formal Inquiry and the MV Derbyshire Formal Inquiry.

<https://www.fraserdawbarns.com/people/david-osborne/>

Conduct of Litigation

3 OCTOBER 2024
OUTER TEMPLE CHAMBERS/PNLA
DAVID OSBORNE

Fraser Dawbarns LLP
SOLICITORS

1

Conduct of litigation – SRA guidance

- ▶ Updated Warning Notice 31.05.24
- ▶ SRA Thematic Review – 14.02.23
- ▶ SLAPPS Warning Notice - 28.02.22
- ▶ Conduct in Disputes Guidance - 04.03.22
- ▶ Balancing Duties in Litigation – November 2018

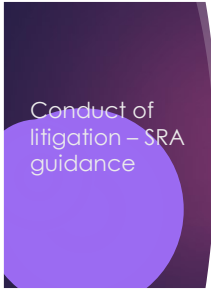
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Conduct of litigation – SRA guidance

GENERAL COMMENTS OF THE REVIEW

- ▶ Solicitors should not put forward meritless or legally flawed arguments just to keep their client happy
- ▶ Solicitors should also not place undue pressure on other parties, such as making aggressive or intimidating threats when corresponding with their opponent, especially if they are unrepresented

3

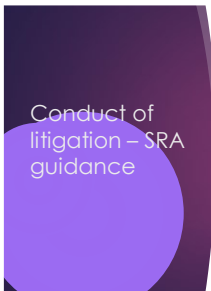


MANAGING THE RISKS IN DISPUTES

SRA Expect:

- ▶ As an officer of the court, if a solicitor encounters a situation where our Principles come into conflict, then those which safeguard the wider public interest take precedence over an individual client's interests
- ▶ Where necessary, solicitors should also be prepared to explain the circumstances where their duty to the court and professional obligations outweigh their duty to the client. Solicitors should undertake sufficient investigation of the matter with the client and establish a proper underlying legal basis before threatening to bring a claim

4

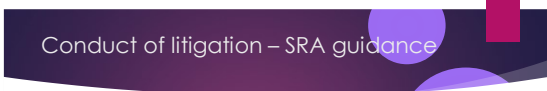


MANAGING THE RISKS IN DISPUTES

SRA Expect:

- ▶ Solicitors should make sure they do not improperly prioritise their client's interests above everything else.
- ▶ Solicitors should consider why they are sending any written correspondence and whether it furthers their client's case
- ▶ However, solicitors must not assist a client to send a letter which is inappropriate or makes improper threats of litigation

5



Must:

- ▶ Take special care when dealing with or corresponding with an opponent who is unrepresented or vulnerable. Solicitors must make sure that they do not take advantage of such opponents, for example, by setting artificially short or wholly unnecessary deadlines to reply to correspondence

Must not:

- ▶ Improperly prioritise the client's interests above others.
- ▶ Make exaggerated claims of adverse consequences including alleging liability for costs that are not legally recoverable
- ▶ Send letters in abusive, intimidating or aggressive in tone or language

6

Three cases


- ▶ Mackenzie-v-Rosenblatt Solicitors [2023] EWHC 331
- ▶ Cutler Holdings (formerly Sheffield United Ltd)-v-Shepherd & Wedderburn LLP [2023] EWHC 720 [Ch]
- ▶ Lewis-v-Cunningtons [2023] EWHC 822 [KB]

7



8

Thank you



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9

Cases of interest

Mackenzie v Rosenblatt Solicitors [2023] EWHC 331

Case Summary:

Witness statements:

- Did not identify documents from which had refreshed memory
- Had passages arguing the case rather than setting out recollection of facts
- Not written using the witness's own words. Witnesses were different personalities and had very different levels of recall of events (and, indeed, willingness to engage with the facts), but the four witness statements were of a uniform style and tone, giving the impression of a person with a clear overview of events, if not their detail, and a clear picture of the case to be advanced. Held to be careful work of legal team contrary to PD57AC

Breaches of Duty:

Based on old IB not to draft documents in proceedings containing contention not considered properly arguable (cf. Code 2.4)

- Held not to apply to writing correspondence generally – but consider now the 2019 Code and thematic review
- But held as a matter of principle – failure to act in accordance with the Code (2011 in the case) was likely to be a breach of duty
- “However, the lawyer needs to be aware of the issue of reliability of the client's account. The more extreme the allegation, or limited the material, or inconsistent it is with other available material, the less it might be reasonable to rely on the client's word as the source of the allegation”
- Held on the facts – “In my judgment, although the claim as pleaded was an optimistic one, lacking in hard evidence to support the factual allegations, it was not so hopeless that it should never have been pleaded. Nor was it fatally flawed for want of particularity. There was, in my judgment, sufficient in the material facts pleaded to raise a prima facie case”

Outcome:

Breaches of duty

Based on conduct of litigation more generally:

- Duty at common law to keep client apprised of developments affecting the tactical approach or chances of success
 - Held – Defendant should have advised claim was weak and what weaknesses were and why original tactics affected by recent developments. Held in breach of duty for not doing so
 - Held breach of duty in failing to advise that was a risk defendants (in underlying claim) would respond seeking strike out
- Failure to advise that if strike out Claimant could be ordered to pay costs on indemnity basis
 - Held – Claimant well aware of costs risk if lost. “BM was well aware (having been advised by the Defendant) that once he had issued proceedings he was at risk of costs. He would therefore have understood that if he lost the claim at any stage he would very likely have to pay costs to the defendants.A perfect solicitor would have included this level of detail in his advice, but the Defendant was not required to be perfect, and in my judgment many solicitors giving competent advice would not have descended to such a level of detail about costs liability.
- Failure to give adequate costs benefit advice or analysis - no breach of duty found on facts
- Failure to inform of QC's advice that (underlying) claim (for conspiracy) would be struck out (as it was)
 - Held was breach not to pass on initial informal telephone advice of Counsel

Cutler Holdings (formerly Sheffield United Ltd) v Shepherd & Wedderburn LLP [2023] EWHC 720 (Ch)

Case Summary:

Legal Principles:

- Implicit in retainer that will provide advice that is reasonably incidental to the work carrying out.
- Incidental – have regard to all circumstances including character and experience of client
- Duty to take reasonable care to protect client from risk of litigation
 - Breach even if vindicated at trial if fail to advise of possibility of litigation where obvious risk different view might be taken

Legal Principles - Risk of Litigation:

- If the construction of the provision is clear, it is very likely that whatever the circumstances, the threshold of 'significant risk' will not be met and it will not be necessary to caveat the advice given and explain the risks involved
- it is perfectly possible to be correct about the construction of a provision or, at least, not negligent in that regard, but nevertheless to be under a duty to point out the risks involved and to have been negligent in not having done so
- It is more likely that there will be a duty to point out the risks, or ...that a reasonably competent solicitor would not fail to point them out when advising, if litigation is already on foot or the point has already been taken, although this need not necessarily be the case

Outcome:

Case Decision

- Reasonably competent solicitor would have concluded there was a lacuna in the wording which gave rise to significant risk of frustration of the objectives of the clause.
- Would reasonably competent solicitor have sought to address the point, which brings question of whether feasible to do so. Held was reasonably feasible and therefore breach of duty found.
- However, held not breach of duty not to have advised of the other ruse the Prince used to avoid having to buy the stadium which in fact failed-
 - The threshold for negligence is therefore rightly not based on what arguments might potentially be dreamed up by the other side, no matter how fanciful those arguments might be. Rather, it is based on the risk that those arguments might be accepted by the court.
- S&W negligent in failing to bring effect of an amendment regarding valuation to attention of Claimant client.
- Reasonably competent solicitor faced with amendment to contract the effect of which is unclear and outside scope of expertise should refer the issue to client and seek further instructions.

Warning-

- As Ms Morris-Smith clarified in her oral evidence, however, she could not actually recall her reasoning at the time when she accepted the permitted use assumption. The comments in her witness statement as to her reasoning were, therefore, simply speculation as to what might have been her thought process
- Finally, the defendants relied on SUL's instructions to S+W to get the deal done as quickly as possible, and Ms Morris-Smith's awareness that the conclusion of the transaction was being held up by the negotiation of the Stadium valuation mechanism. That is not, however, a justification for the failure to take instructions from the clients on an amendment whose impact was, as Ms Morris-Smith knew, outside her area of expertise, and which she could not therefore assume was immaterial

Case Decision – conflict

- A solicitor will be in a position of own interest conflict where the solicitor's duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with the solicitor's own interests in relation to that matter or a related matter
- A paradigm case in which an own interest conflict will arise is where a solicitor has been negligent, or there is a significant risk that the solicitor has been negligent, in earlier advice given on the matter on which the solicitor is continuing to advise the client
- In my judgment, where an own interest conflict arises the reasonably competent solicitor must at the very least inform the client and advise them to seek independent legal advice. That duty, in my judgment, arises irrespective of the degree of sophistication of the client, and irrespective of whether or not the client is aware of the facts which might establish prior negligence by the solicitor
- Just as the solicitor does not come under a duty to advise their client of a risk of litigation where that risk is fanciful or spurious, they should equally not be required to do so where there is no significant risk that they were negligent, and therefore no significant risk of an own interest conflict. The duty will, however, arise where the solicitor knows or ought to know that there is a significant risk that their earlier advice was negligent

Held breach of duty

- Quite apparent was real risk drafting allowed Prince to avoid obligation to exercise property options despite acquiring control of Blades. Gave rise to significant risk that S&W drafting and advice on the point had been negligent
- S+W should therefore have been aware that there was a significant risk that their drafting of and advice given in relation to clause 9.1.12 of the ISA was negligent
- On the basis of my conclusions set out above, S+W should have advised SUL that there was an own interest conflict, given the significant risk that S+W had been negligent. They should also have advised SUL to seek independent legal advice on the point

Warning –

- Fact that Claimant said (by Defendant S&W) to have all information to make a decision to take independent legal advice does not absolve S&W from duty to provide advice on conflict issue

Lewis-v-Cunningtons Solicitors [2023] EWHC 822

Case Summary:

Legal Principles:

- Implicit in retainer that will proffer advice which is reasonably incidental to the work being carried out. In considering what is reasonably incidental regard is had to inter alia the character and experience of the client. As regards a limited retainer there may be situations where client cannot afford to pay for all relevant research and advice solicitor competent to provide. In those situations, choice may be between limited retainer and no retainer at all. (*Minkin-v-Landberg [2016] 1 WLR 1489*)
- Reasonably incidental includes a duty to warn or report something if you become aware of an issue in course of retainer, there is a duty to inform client of the risk

Outcome:

Case Decision

- Long period before disclaimer signed when retainer was not limited to drafting consent order. During that time defendant had a clear duty to advise claimant in respect of financial matters. The offers and settlement were on any account not fair
- Defendant should have served Form P and should have made clear to claimant well before claimant's discussions direct with H that could expect court would make pension sharing order and starting point 50-50 split. Defendant did not need full disclosure to so advise
- Reasonably incidental advice required advice as to what would reasonably receive if pursued to court in comparison to the settlement. Claimant should have been advised was foregoing opportunity to be awarded several hundred thousand pounds
- Any reasonably competent solicitor would have advised the settlement was obviously one-sided in H's favour. Scope of duty was to advise claimant that if accepted settlement would benefit c£30,000 but if pursued to court a pension sharing order would most certainly be made and likely about 50% to give her value to her of c£500,000





Elaine Palsler
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“Artificial Intelligence and Professional Negligence”

Elaine Palser

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Direct Access: No

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Elaine Palser has an extensive chancery and commercial practice, with an emphasis on **contentious trusts and probate, insolvency, commercial disputes and professional negligence**.

"An excellent advocate", "technically superb", "very good with clients", "a team player", and "a seasoned legal gladiator" (Legal 500), Elaine is recommended as a Leading Junior for Private Client: Trusts and Probate, Insolvency, and Professional Negligence.

With degrees in both law and business, Elaine is uniquely placed to handle the complex commercial and financial issues that arise in all of her practice areas.

Elaine is also a CEDR-accredited **mediator**, and a former lecturer in Trusts, Land and Tort at Oxford University.

Areas of Expertise

Private Client & Trusts

Elaine has a strong contentious probate and trusts practice, including Inheritance Act claims, challenges to the validity of wills, proprietary estoppel, constructive and resulting trusts, the interpretation of wills and trusts, removal of personal representatives, TOLATA claims, charitable trusts, statutory wills, and the administration of estates. She is also highly sought after for related insolvency and professional negligence claims, and has experience in dealing with children and vulnerable parties in litigation and in the Court of Protection.

Elaine is "a seasoned legal gladiator" who is "technically superb" on the law and "an excellent advocate" in court (Legal 500). She is "very good with clients" and is equipped with the necessary "robust intellect, empathy and pragmatism" to deal sensitively and effectively with private client disputes (Legal 500). Elaine is recommended as a Leading Junior for Private Client: Trusts and Probate.

Elaine is a full member of **STEP, ACTAPS** and **ConTrA**, a former lecturer in Trusts at Oxford University, and a **CEDR**-accredited mediator.

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Notable Private Client & Trusts cases

Acting for the claimant in a proprietary estoppel and constructive trust claim for a beneficial interest in her late father and step-mother's property: *Morley v Morley* [2023] WTLR 299

Acting for the executors in a claim to revoke letters of administration on the grounds of polygamy: *Re Mendy (deceased)* [2023]

Acting for two children in a claim under the Inheritance (Provision for Family and Dependants) Act 1975 for reasonable financial provision from their estranged father's estate: *Re R (Deceased)* [2021] EWHC 936 (Ch).

Acting for a beneficiary in a claim under CPR 64.2 to determine several disputed issues in the administration of two substantial estates: *Papadopolous v Papadopolous* [2021].

Acting for the deceased's brother in a challenge to the validity of the deceased's will on grounds of lack of capacity, want of knowledge and approval, and undue influence.

Acting for the deceased's son in a claim under the Inheritance (Provision for Family and Dependants) Act 1975 by his mother's partner: *Banfield v Campbell* [2018] EWHC 1943 (Ch).

Acting for a beneficiary in a claim to remove the executors of his mother's estate on grounds of impropriety and delay.

Acting for a beneficiary in a dispute concerning the interpretation and rectification of a trust contained in a life insurance policy.

Acting for a Russian businessman in a US\$2 billion claim concerning breach of trust and dishonest assistance: *Gaydamak v*

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Leviev [2014] EWHC 1167 (Ch).

Acting for the trustee in a multi-million pound claim by his father for an account in light of alleged breaches of trust spanning several decades.

Acting for a high-profile businessman in a Quistclose trust dispute.

Acting for the trustee in bankruptcy in applications for possession and injunctive relief in respect of English and foreign properties purportedly held on trusts containing a power of revocation.

Insolvency & Restructuring

Elaine Palser's insolvency practice covers:

- corporate and personal insolvency;
- related professional negligence;
- insolvency claims containing a trusts dimension; and
- commercial and contractual disputes arising within the insolvency context.

Elaine is "a tenacious advocate", "very analytical", "technically excellent", and "very astute and commercial" (Legal 500). She is "a top choice for professional negligence claims against insolvency practitioners" and "clearly an expert in her field" (Legal 500). Elaine is recommended as a Leading Junior for Insolvency, as well as for her crossover specialisms of Trusts and Professional Negligence.

With degrees in both law and business, Elaine understands businesses and is well placed to deal successfully with the complex commercial and financial issues that arise in insolvency cases.

Notable Insolvency & Restructuring cases

Acting for stylist and influencer, Caroline Stanbury, in a long-running claim about director duties and personal goodwill: Reynolds (as liquidator of CSB123 Ltd) v Stanbury [2021] EWHC 2506 (Ch).

Acting for a publicly-listed company in an urgent application in private for an injunction to restrain advertisement of a winding up petition and to strike it out as an abuse of process.

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Acting for the neutral trustee in bankruptcy in two connected multi-million pound appeals against the admission of a proof of debt, involving the construction and interpretation of several agreements: Claims Direct Plc (in liquidation) v Hinton [2021] EWHC 1613 (Ch) and Poole v Hinton [2019] EWHC 2331 (Ch).

Acting for the former administrators in a substantial misfeasance claim by the liquidator, involving allegations of the disposal of numerous assets at an undervalue.

Acting for an Italian judgment creditor in a multi-million pound appeal against the registration of an Italian judgment in England, forming the basis of a subsequent bankruptcy petition: Percival v Motu Novu [2019] EWHC 1391 (QB).

Acting for a trustee in a claim involving the exercise of a trust power of revocation so as to reclaim properties in several jurisdictions for the bankrupt estate, and related freezing injunction applications.

Securing the dismissal of a winding up petition against a company on the basis that the debt was disputed on bona fide and substantial grounds: Re a Company [2016] EWHC 1046 (Ch).

Acting for a trustee in bankruptcy in a claim involving sham trusts, transactions at an undervalue, and transactions defrauding creditors.

Acting for a company and its liquidator in a claim by a former high profile tax advisor for alleged conspiracy, abuse of process, and malicious prosecution of civil proceedings.

Acting for several sports clubs in insolvency matters, including Cardiff City Football Club.

Commercial and Chancery

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Elaine Palser has a broad commercial practice, including claims involving contentious trusts and those arising in the insolvency context.

Elaine is “very astute and commercial”, “with a good eye detail”, “technically superb” and “an excellent advocate” (Legal 500). She is recommended as a Leading Junior for Insolvency, Private Client and Professional Negligence.

With degrees in both law and business, Elaine understands businesses and is uniquely placed to deal successfully with complex commercial and financial issues.

Notable Commercial and Chancery cases

Acting for three joint venturers in a claim for damages for breach of a joint venture agreement: *Connoisseur Developments Ltd and others v Koumis* [2023] EWHC 855 (Ch)

Acting for stylist and influencer, Caroline Stanbury, in a long-running claim about director duties and personal goodwill: *Reynolds (as liquidator of CSB123 Ltd) v Stanbury* [2021] EWHC 2506 (Ch).

Acting for a commercial agent in a multi-million pound damages claim concerning risk-analysis software.

Acting for the neutral trustee in bankruptcy in two connected multi-million pound appeals against the admission of a proof of debt, involving the construction and interpretation of several agreements: *Claims Direct Plc (in liquidation) v Hinton* [2021] EWHC 1613 (Ch) and *Poole v Hinton* [2019] EWHC 2331 (Ch).

Acting for an Italian judgment creditor in a multi-million pound appeal against the registration of an Italian judgment in England: *Percival v Motu Novu* [2019] EWHC 1391 (QB).

Acting for a creditor in a Quistclose trust claim arising out of the liquidation of an international retail company.

Acting for a Russian businessman in a US\$2 billion claim concerning Angolan diamonds, breach of trust, dishonest assistance, and conspiracy: *Gaydamak v Leviev* [2014] EWHC 1167 (Ch).

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Acting for a major investment company in a claim by a Texan company for breach of an oil and gas exploration contract.

Acting for a company and its liquidator in a claim by a former high profile tax advisor for alleged conspiracy, abuse of process, and malicious prosecution of civil proceedings.

Acting for an Israeli businessman in a multi-jurisdictional contractual dispute worth over US\$100 million concerning mining ventures in the DRC and the enforcement of securities in the BVI and Gibraltar.

Professional Negligence

Elaine Palser's professional negligence practice focuses principally on claims arising out of her main practice areas, namely insolvency, probate, and trusts.

"Clearly an expert in her field", Elaine is "very efficient" and "thorough", with "great technical ability" in professional negligence law (Legal 500). She is recognised as "a top choice for professional negligence claims against insolvency practitioners" (Legal 500) and is recommended as a Leading Junior for Professional Negligence, as well as Insolvency and Private Client: Trusts and Probate.

As a former lecturer in both Tort and Trusts at Oxford University, Elaine has considerable academic strength in this area.

Notable Professional Negligence cases

Acting for a child and the new executors in a claim against an executor who negligently distributed the deceased's estate to the wrong parties: *Re K* [2022].

Acting for stylist and influencer, Caroline Stanbury, in a claim about director duties, alleged negligence, and personal goodwill: *Reynolds (as liquidator of CSB123 Ltd) v Stanbury* [2021] EWHC 2506 (Ch).

Acting for the former administrators in a paragraph 75 misfeasance claim by the liquidator of a company claiming disposal of assets at an undervalue.

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Acting for LPA receivers against a mortgagor alleging a sale at an undervalue of commercial and residential premises.

Acting for a large professional body in a negligence dispute involving insolvency bonds.

Acting for the former trustee in bankruptcy in a section 304 claim concerning alleged negligence in the disposal of an asset held on trust.

Acting for the trustee in a multi-million pound claim by his father for an account in light of breaches of trust spanning several decades.

Acting for a beneficiary in a claim that a deed of variation was negligently drawn up, necessitating rectification.

Acting for a beneficiary in a dispute over whether payments of capital ought to have been made out of a settlement.

Advising professional indemnity insurers on a potential multi-million pound claim arising from hundreds of defective appointments of LPA receivers.

Mediation

Elaine Palser is a CEDR-accredited mediator.

Elaine accepts instructions to act as a mediator principally in cases involving her areas of practice as a barrister, namely:

- Private Client and Trusts (e.g. Inheritance Act claims, testamentary capacity and undue influence validity challenges, and constructive trust and proprietary estoppel claims)
- Insolvency
- Commercial and Chancery
- Professional Negligence (e.g. of personal representatives and insolvency practitioners)

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Where appropriate, Elaine will also accept instructions to mediate in other areas of law.

Elaine's strengths as a mediator lie in identifying the issues which are most important to the parties, helping them to appreciate all the risks, and dealing sensitively with the intense emotions inherent in most disputes. A strong advocate of mediation as a successful means of resolving many disputes, Elaine will work hard to help the parties find a resolution with which they will all feel comfortable.

Elaine is able to conduct effective mediations both in person and online.

Memberships

- **STEP** (Society of Trust and Estate Practitioners)
- **ACTAPS** (Association of Contentious Trust and Probate Specialists)
- **ConTrA** (Contentious Trusts Association)
- **ChBA** (Chancery Bar Association)
- **COMBAR** (Commercial Bar Association)

Publications

- "Twists and Turns in Proprietary Estoppel" [2023], ACTAPS newsletter, April 2023.
- "Proprietary estoppel and the position of the stranger" [2023] *Trusts and Trustees*, Vol 29, No 3, pp1-11.
- "Caution for liquidators and resounding success for director in breach of duty claim" [2021], LexisNexis Legal News, 8 October 2021.
- "Remote Mediation: The New Normal and the Future" [2020] ACTAPS newsletter, July 2020, and *OTC Insights*.
- "The super power of the revocable discretionary trust" [2019] *Corporate Rescue and Insolvency*, August, 145.
- "The court's approach to claims against an estate by a cohabitee" [2018] Lexis Nexis Legal Analysis, 13 Sept 2018.
- "Bold Petitioning Creditors Beware" [2016] Lexis Nexis Case Analysis, 8 June 2016.
- "A trust by any other name" [2015] *New Law Journal*, 23 October, 15.
- "Costly consequences: who bears the costs of statutory demands?" [2015] *New Law Journal*, 22 May, 18.
- "Appointment of Administrators Out of Court: Clarity at Last?" [2012] *Insolvency Intelligence* 25(8) 113.
- "Appointing administrators out of court: validity problems and retrospective administration orders" [2011] *Insolvency Intelligence* 24(8) 113.
- "The duty of care in gross negligence manslaughter" (with Jonathan Herring) [2007] *CLR* 24 (described by the Court of Appeal in *R v Evans* [2009] *EWCA Crim* 650 as "an illuminating analysis").

Awards

- Outstanding Expertise in Commercial and Chancery Law 2020, Women in Law Awards
- Contentious Trusts and Probate Lawyer of the Year 2017, Women in Law Awards

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- Contentious Trusts and Probate Lawyer of the Year 2016, Women in Law Awards
- Commercial Disputes Barrister of the Year 2015, the Lawyer Monthly Awards
- Highly Regarded in Insolvency Law – UK 2015, Corporate LiveWire Awards
- Outstanding Expertise in Contentious Trusts and Probate 2015, Women in Law Awards
- MA (Oxford)
- MA (Cambridge)
- BBusSc (Cape Town)

Recommendations



Privacy Policy

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



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AI IN PROFESSIONAL NEGLIGENCE

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1

Topics

1. Pros and cons of AI
2. Bringing an AI-based claim
3. Running a trial of an AI-based claim
4. AI top tips

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2

Pros of AI

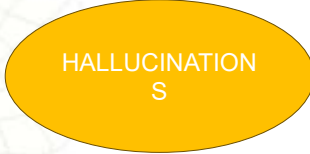


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3

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Cons of AI




HALLUCINATIONS




LACK OF EMPATHY



INCOMPLETE ANSWERS




DIFFICULTIES WITH COMPLEX REASONING






BIAS?

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4


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Hallucination examples

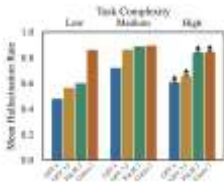
Mata v Avianca Inc 22-cv-1461 (PKC), US DC Southern District of New York	
Harber v The Commissioners for HMRC [2023] UKFTT 1007 (TC)	
Zheng v Chan 2024 BCSC 285	

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5

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Hallucination statistics

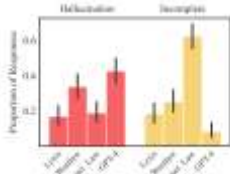


From: Dehl, Magesh, Suzgun and Ho, Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models (Journal of Legal Analysis, Volume 16, Issue 1, 2024, Pages 64-93) - <https://academic.oup.com/jla/article/16/1/64/7699227>

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6

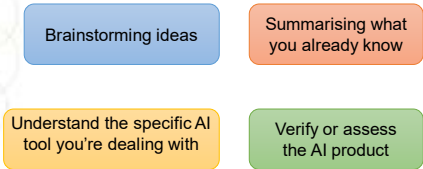
Hallucination statistics



Comparison of hallucinated and incomplete answers across generative legal research tools. Hallucinated responses are those that include false statements or falsely assert a source supports a statement. Incomplete responses are those that fail to either address the user's query or provide proper citations for factual claims.

From: Magesh et al. *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*
https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf

Balance



Bringing an AI-based claim



Elements of a negligence claim

- Duty of care
- Breach of the duty of care
- Causation
- Remoteness
- Loss

Duty of care

- Professional or organisation using the AI
- AI developer or manufacturer
- Third-party provider of data, algorithms, components?
- AI itself? No legal personality.

Breach of duty

1. Not using AI at all.
 2. Not using AI properly.
- Standard practice in the profession.
 - Guidance from regulatory bodies.
 - Due diligence and training on how the AI tool works, and its risks and limitations.
 - Human verification.
 - Reliability statistics.



Causation and remoteness

- Who or what caused the loss?
 - Professional using AI?
 - Professional using AI improperly?
 - A fault with the AI tool itself?

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13



Ultimate liability

- Contributory negligence
- Intervening act
- Vicarious liability

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14



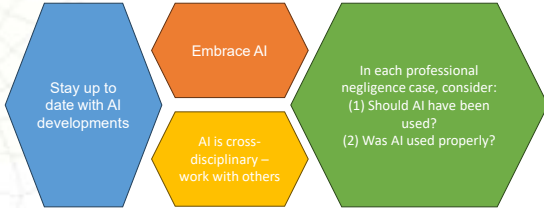
AI-based trial

- Mostly like any other trial
- **Expert evidence key**
 - How the AI works, risks, limitations
 - **Statistics** on usage and/or reliability
- Standard practice in the profession
- Regulatory body guidance on usage

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15

Top tips



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16

Suggested reading

- Dahl, Magesh, Suzgun and Ho, *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models*, Journal of Legal Analysis, Volume 16, Issue 1, 2024, Pages 64–93: <https://academic.oup.com/jla/article/16/1/64/7699227>
- Magesh et al. *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*: https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf
- Sir Geoffrey Vos, *Damned if you do and damned if you don't: is using AI a brave new world for professional negligence?* Address at Lincoln's Inn, 22 May 2024: <https://www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-professional-negligence-bar-association/>

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17

Suggested reading (continued)

- Guidance for Judicial Officeholders: <https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf>
- *Generative AI: The Essentials* <https://www.lawsociety.org.uk/topics/ai-and-lawtech/generative-ai-the-essentials> (and at the bottom there is a further pdf link called *Generative AI: The Essentials*, 4 August 2024, published by the Law Society)
- *Lawyers cross into the new era of generative AI*: <https://www.letsnexis.co.uk/insights/lawyers-cross-into-the-new-era-of-generative-ai/index.html>
- *Considerations when using ChatGPT and generative artificial intelligence software based on large language models*: <https://www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-Generative-AI-Software-based-on-large-language-models-January-2024.pdf>

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18



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AI IN PROFESSIONAL NEGLIGENCE

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**Sue O'Brien
&
Sara Benbow
Property Mediators**

“Team Case Study Discussion session”



the
**Property
Mediators**

Sue O'Brien

Solicitor

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Sue spent her early career in the City and in Paris (with Holman, Fenwick and Willan, and Slaughter and May) and subsequently became Head of Dispute Resolution at a major regional firm.

Her practice as a solicitor focused on property, professional liability, commercial and probate disputes.

Sue was accredited as a mediator by ADR in 2008 and has been mediating full time since 2016. Sue is a Fellow of the Civil Mediation Council and a member of the PLA and PNLA.

Formerly a leading disputes solicitor, Sue trained as a mediator with the ADR Group and was accredited in 2008. She is a Fellow of the Civil Mediation Council. She is also a member of the Property Litigation Association / RICS Boundary Disputes Panel.



the
**Property
Mediators**

Sara Benbow

Barrister

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Sara was a practising barrister for nearly 30 years and is a senior member of Gatehouse's Property Team. As well as her property mediation and advocacy work, Sara is regularly called upon to write articles, to provide seminars and webinars, and to speak at conferences on various areas of property law. She is also a contributing author to Cousins: Law of Mortgages.

At the heart of Sara's practice has been property litigation, and she brings that knowledge and experience into her work as a specialist property mediator. She has considerable expertise in disputes over real property such as boundaries, easements and adverse possession, co-ownership, mortgages, trusts of land and the impact of insolvency on property rights, as well as conveyancing disputes including issues as to specific performance, rescission or registration, rectification and, especially in the property-development context, cases about planning, covenants, regulated user, options or overage provisions.

Sara is also an experienced and knowledgeable commercial and residential landlord and tenant lawyer, covering both contentious and non-contentious work and understanding the perspectives of landlords, tenants and others such as beneficiaries, guarantors or insolvency practitioners who hold interests related to commercial or residential leasehold land.

Sara was trained and accredited by the ADR Group in 2003.




MEDIATION LOG-JAMS
.... and how to avoid them !

A session for the PNLA Autumn Conference 3 October 2024
By Sara Benbow and Sue O'Brien of The Property Mediators

1

Setting the **AGENDA**


- Preliminaries
- Identifying (and avoiding) potential log-jams
- Breakthrough strategies
- The nightmare scenario
- Conclusions



2

Preliminaries

- Mediation not trial
- Mediation mindset
- Prepare to settle not to fight !
- Practicalities matter



3

Mediation mindset

- Preparation
- Communication
- Creativity



4

- What does your client need?
- What would your client like if possible?
- What does the other side need?
- What would the other side like if possible?



5

Potential log-jams

- Different perspectives
- Personalities
- Incompatible interests
- Authority
- Advice
- Distrust
- Team pressure
- Expectations



6

Take evasive action asap

- Preparation – anticipate what’s ahead
- Manage expectations
- Focus on solutions
- Use your resources
- Collaborate where you can
- Objective foundations are gold
- Careful with your language
- Greater authority will be required !



7

Breaking through the log-jam.....



8

**Help !
What can I do ?????**


- Change the energy
- Deploy a creative solution
- Review the BATNA
- Pre-empt the problem
- Reframe
- Empower the solution-seeker



9


The nightmare scenario

- Angry clients
- Showboating advisers
- Multiple parties & insurers
- Cast-iron certainty
 - with counsel's advice !!
- They know we're right
- We're not blinking first !!!
- Authority limits outside ZOPA
- Eyewatering costs already
- Battle of the boilerplate



10

Conclusions



- Litigation issues are the context for mediation not the focus of it
- Negotiate with your actual opponents
- Preparation, communication and creativity are key
- Stay on target
- Free your mind and your client's !

11



the
Property Mediators

12

Professional Liability Mediation scenario.

For PNLA London Conference 3 October 2024

Bob and Julie Jessop, who are in their late fifties, moved from the Midlands to the South Coast having found their dream retirement home, a plot with a sea view, a dilapidated 1930s house and some outbuildings. The purchase price was £1.75m. They plan to develop it into a modern property in Grand Design style. They already have planning permission. Julie envisages plenty of room for the family, including grandchildren, to visit. Bob wants to rebuild his classic cars and to grow vegetables to sell at the local farmers' market.

However, after purchase they discovered that the rear section of the property comprising a lot of garden and some outbuildings is in a separate title from the front and is subject to restrictive covenants against building or development and against any non-residential user in favour of next door, owned by Agnes Brown. Agnes is keen on the "heritage" look for the coast line and is unlikely to agree to any development or relaxation of the covenants.

The development plans can go ahead in modified form without consent from Agnes, but one of the bedrooms intended for the children would have to be sacrificed. It is not clear whether an application to discharge or modify the covenant would succeed. In any event the Jessops "bought a house and a lifestyle, not a law suit".

They were not informed about the restrictive covenants by their solicitors (ABC Property Law LLP) when they purchased, and are now suing them. They seek damages for

- Diminution in value of the property – they understand that this measure is the difference between the value with and without the restrictive covenant. One of their friends from the Midlands is a surveyor and he has told them that the property is now worth only £950,000 – a loss of £800,000. He has confirmed this in a brief letter which was annexed to the Letter of Claim. He is with them at the mediation for "moral support"
- Costs associated with the change of plans – put at £50,000
- Damages for distress and inconvenience (unquantified but Julie Jessop says she is "extremely distressed" and her "dreams are in tatters". They have read many newspaper reports about substantial compensation for far less).

ABC are infuriated by the claim and the tone of the Jessops' complaints against them. ABC admit they did not inform the Jessops about the covenant but say

- Their expert values the diminution at £0 - 25,000
- They are prepared to pay sundry expenses not exceeding £5,000
- The Jessops were so set on the purchase that they wouldn't have listened anyway. They were demanding clients who had no patience with efforts to communicate anything that they didn't want to hear.
- No damages are payable for distress and inconvenience. (NB Julie takes this as a lack of recognition of the issues caused and her distress increases).

Since commencing proceedings, the Jessops have changed solicitors twice and consider that they have been very poorly served again by the legal profession. Their costs are already in excess of £100,000 and witness statements have not yet been produced.

A mediation has been arranged.



Q&A

Chair's Closing Remarks



Katy Manley LLB
PNLA President/BPE Solicitors

“PNLA News Update & Future Events”



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



Notes: -

A series of horizontal dashed lines provided for taking notes.



Total CPD – 5 hours

To complete your feedback form please go to

<https://www.pnla.org.uk/event/the-ultimate-round-up-3-10-24-london-conference/>