THE PROFESSIONAL NEGLIGENCE LAW REVIEW

Fifth Edition

Editor
Nicholas Bird

THE LAWREVIEWS

THE PROFESSIONAL NEGLIGENCE LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Nicholas Bird

THE LAWREVIEWS

B

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADER
Katie Hodgetts

SENIOR BUSINESS DEVELOPMENT MANAGER
Rebecca Mogridge

BUSINESS DEVELOPMENT MANAGERS
Joey Kwok and Juan Hincapie

BUSINESS DEVELOPMENT ASSOCIATE
Archie McEwan

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITORS
Anne Borthwick and Robbie Kelly

SUBEDITOR
Tessa Brummitt

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-087-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BLD BACH LANGHEID DALLMAYR

BOMCHIL

DEMAREST ADVOGADOS

GORRISSEN FEDERSPIEL

HINSHAW & CULBERTSON LLP

KNOETZL

REYNOLDS PORTER CHAMBERLAIN LLP

STAIGER ATTORNEYS AT LAW LTD

URÍA MENÉNDEZ

CONTENTS

PREFACE

This fifth edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in most of the key jurisdictions. The *Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders who are concerned with the liability and regulatory issues of professionals across the globe. The variation in law and practice across the different jurisdictions is very noticeable and underlines the usefulness of a guide such as this.

This edition is the product of the skill and knowledge of leading practitioners in these key jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all those who have contributed to this edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found in Appendix 1. I would particularly like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and especially to Bryony Howe, who has assisted in its production with great knowledge and skill. Finally, the team at Law Business Research has managed the production of this fifth edition with passion and great care. I am grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
London
June 2022

Chapter 5

ENGLAND AND WALES

Nicholas Bird and Bryony Howe[1]

I INTRODUCTION

i Legal framework

The core obligation of a professional is to provide services to the client with reasonable care and skill. Such a term is implied by statute[2] in the contract of the retainer and usually arises concurrently in tort. A professional is rarely taken to have warranted to the client that any particular outcome will be achieved.

The scope of the professional's duty of care is determined by a combination of the terms and purpose of the retainer, the client's instructions and sometimes the relevant professional regulatory and legal context. The performance of the duty of care is usually judged by reference to 'the standard of the ordinary skilled man exercising and professing to have that special skill'.[3] In some cases, the court will depart from that standard if it imposes unacceptable risk or is illogical.

Increasingly, the issue of liability may be determined by reference to the quality of risk advice given by the professional. In some cases, the courts have adopted nuanced and complex tests for assessing whether the client was properly informed of material risks.[4] Another strand of case law allows for the professional to be found liable despite being correct about a matter of interpretation if the court considers that he or she should have warned the client that others could take a different view.[5]

The role of professional regulation may also be significant in some circumstances: codes of conduct may be asserted as the distillation of good practice or even giving rise to an actionable duty. Many regulatory schemes also mandate a framework for client redress and compensation that exists alongside the court jurisdiction. These tend to adopt lower criteria for proof and are usually cost-free to the client.[6] They tend to be used for single low-value

1 Nicholas Bird is a partner and Bryony Howe is a senior associate at Reynolds Porter Chamberlain LLP.

2 See Section 13, Supply of Goods and Services Act 1982: 'In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.'

3 See *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

4 See *Montgomery v. Lanarkshire Health Board* [2015] AC 1430. The test proposed was 'whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should be aware that the particular patient would be likely to attach significance to it'. See also *O'Hare and Anor v. Coutts & Co* [2016] EWHC 2224 in the context of financial advisers.

5 See *Barker v. Baxendale Walker Solicitors (a firm) & Anor* [2017] EWCA Civ 2056.

6 For example, the Financial Ombudsman Service or the Legal Ombudsman.

claims, but the regulator may also have powers to require the professional to carry out a past business review to identify all clients who have suffered harm and provide redress to them. The exercise of such powers may greatly increase the professional's liability exposure.

In addition to a failure to discharge the duty of care, a professional may also be found liable on other grounds (e.g., for breach of warranty of authority, for breach of trust when safeguarding client funds, and for breach of fiduciary obligations of loyalty and of acting in good faith in the best interests of the client). These routes to liability may involve the court in adopting different approaches to causation and quantification of loss (see below).

ii Limitation and prescription

The limitation period that is most commonly engaged in professional negligence disputes is the six-year period for causes of action in contract and tort. This arises under Sections 2 and 5 of the Limitation Act 1980. The six-year period starts on the date that the cause of action accrues. In contract, it is usually quite straightforward to establish the date of the accrual; it will be when the defendant's breach of contract occurs irrespective of when damage is sustained. In tort, the cause of action accrues upon the claimant sustaining actionable damage. This is often later than the date on which the breach of duty occurs.

There are a number of possible extensions and alternatives to the six-year limitation period. Sometimes a claimant will not appreciate that it has suffered damage until after the expiry of the six-year period. Under Section 14A of the Limitation Act 1980, a claimant may bring a claim within three years of the date on which it first acquires the requisite knowledge for bringing the claim. There is a significant body of statutory and case law governing how this works and there is a 15-year longstop provision.

The six-year period can be extended by agreement either at the outset of the professional's engagement (for example, if the engagement is made by deed) or during the course of any subsequent dispute. It is also possible to extend the limitation period in certain other cases. If the case is based on the fraud of the defendant or where a material fact has been deliberately concealed, the limitation period will not begin to run until the claimant has or could reasonably have discovered the fraud or concealment (see Section 32 of the Limitation Act 1980). Limitation for claims in equity is subject to more complex provision and needs special care.

iii Dispute fora and resolution

Civil claims against professionals are generally brought in either the business and property courts of the Chancery Division of the County Court and the High Court or in the Technology and Construction Court (TCC). The procedure for the prosecution of claims through the courts is set out in the Civil Procedure Rules 1998 (CPR), with Part 60 of the CPR and the related practice direction setting out the procedure specific to the TCC. The TCC primarily deals with claims against engineers, architects, surveyors and accountants where the amount in dispute is in excess of £250,000. The TCC also deals with claims against solicitors that involve technical matters such as planning, property and construction. Additional guidance on the conduct of claims can be found in the Chancery Court Guide and the TCC Guide.

Prior to commencing proceedings, parties are expected to have adhered to a pre-action protocol. There is a Pre-Action Protocol for Professional Negligence Claims and a separate Pre-Action Protocol for the Construction and Engineering Disputes for claims against

engineers, architects and quantity surveyors. The pre-action protocols provide a framework for parties to resolve disputes without involving the court. The court may impose costs sanctions on parties who fail to comply with the pre-action protocols.

Even after proceedings have been issued, the courts encourage parties to engage in alternative dispute resolution (ADR). This can take the form of direct negotiations or mediation. Again, there is a risk of costs penalties being imposed by the court against any party or parties if they unreasonably refuse to engage in ADR, even if that party succeeds at trial.

Another method used for resolving claims against professionals is arbitration. It is most frequently used in claims involving construction professionals in circumstances where the parties have entered into a contract and it provides for any disputes arising from the contractual works to be referred to arbitration. Arbitration is a non-judicial means of resolving disputes where the parties appoint an arbitrator or panel of arbitrators. Arbitration is sometimes a quicker and cheaper means of dispute resolution than litigation. It has the benefit of being a confidential process but enforceable by the court. The arbitrator's decision is binding on the parties and there are limited grounds of appeal.

iv Remedies and loss

The aim of compensatory damages for professional negligence is to award 'the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong'.[7] This test requires the careful identification of the nature of the advice that ought to have been provided and, thereafter, the claimant will have to prove on a balance of probabilities that he or she would have followed such advice so as to achieve some better outcome.[8] Where the better outcome also involves the unrestricted volition of a third party the court may award damages for loss of the chance of achieving that outcome.[9] Some cases have awarded claimants recovery for lost chances significantly smaller than 25 per cent.[10] Defences to professional negligence claims commonly focus on these kinds of causation and loss arguments.

In addition, the courts do not compensate for loss arising from risks that it was no part of the professional's duty to protect against.[11] A client is usually taken to have accepted the risks of a transaction in respect of which he or she has not sought advice. This principle traditionally required the court to make fine distinctions between the nature of advice and information provided by the professional, although recently the Supreme Court endorsed a shift towards examining the 'purpose' of the advice.[12] The prominence of this principle when assessing a professional's liability tends to eclipse other filters for limiting damages (e.g., arguments that loss is too remote).

7 See *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

8 See *Perry v. Raleys Solicitors* [2019] UKSC 5.

9 See *Allied Maples Group Ltd v. Simmons & Simmons (a firm)* [1995] EWCA Civ 17, [1995] 1 WLR 1602.

10 See *Hanif v. Middleweeks (a firm)* [2000] Lloyd's Rep PN 920. A different approach may be adopted where the lost chance concerns medical negligence and the prospects of recovery from an untreated condition – see *Gregg v. Scott* [2005] UKHL 2; [2005] 2 AC 176.

11 See *BPE Solicitors & Anor v. Hughes-Holland* [2017] UKSC 21, [2017] 2 WLR 1029.

12 'In cases falling within [the] "advice" category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover

Compensation for the other forms of professional liability may be assessed on different bases: for example, the solicitor who incorrectly warrants authority to commence litigation may be liable for damages on the assumption the warranty was true; the professional trustee may be required to restore in full lost trust funds regardless of issues of fault; and the fiduciary that receives an undisclosed profit may be required to disgorge it to the principal even if the principal would have agreed to its retention if it had been disclosed.

Finally, while contractual devices for limitation and exclusion of liability are often used in retainers as a means of reducing liability exposure, they do not feature prominently in reported cases. There are probably two reasons for this: the first is that such devices are subject to statutory control[13] and, therefore, are not always effective; the second is that the professional's regulatory arrangements often prohibit or limit their use.[14]

II SPECIFIC PROFESSIONS

i Lawyers

The Law Society is an independent professional body that represents the 145,000 solicitors in England and Wales. It provides support and advice to the legal profession and promotes the role of solicitors.

Solicitors are regulated by the Solicitors Regulation Authority (SRA). The SRA's role is to prescribe standards for the solicitors' profession to protect the public and to ensure that clients receive good service. The SRA's rules are 'SRA Standards and Regulations' and comprise a collection of free-standing codes and rules covering, for example, the professional conduct of solicitors (the Code of Conduct for Solicitors, RELs and RFLs[15]), regulated firms (the Code of Conduct for Firms), the holding of client money (the SRA Accounts Rules) and the requirements for professional indemnity insurance (the SRA Indemnity Insurance Rules). These standards include mandatory principles for all solicitors, such as upholding the rule of law and administration of justice and acting in the best interests of clients.

A firm of solicitors must appoint a compliance officer for legal practice (COLP) and for finance and administration (COFA), who are responsible for the firm's systems and for managing the risks to the firm's delivery of legal services. The COLP and COFA must record any misconduct or breaches of compliance with the SRA rules and self-report breaches promptly to the SRA. The SRA has statutory grounds to intervene in the running of a firm of solicitors if it suspects dishonesty or material breaches of the SRA Handbook.

---

all loss flowing from the transaction which he should have protected his client against . . . . By comparison, in the "information" category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers).' See *BPE Solicitors* at paragraphs 40 and 41. See, however, the recent Supreme Court decision in *Manchester Building Society v. Grant Thornton*, which is said to represent an expansion of the principles laid down in *BPE Solicitors*: the information versus advice distinction is now less rigid, and the courts must examine the purpose of the advice and the risks that the advice was intended to protect against.

13 See the Unfair Contract Terms Act 1977 and, where the client is a consumer, the Unfair Terms in Consumer Contracts Regulations 1999.

14 For example, mandatory Outcome 1.8 of the SRA Code of Conduct 2011 prohibits solicitors from excluding liability below the minimum mandated limit of insurance cover.

15 Registered European lawyers and registered foreign lawyers authorised by the SRA.

The Solicitors Disciplinary Tribunal (SDT) is an independent tribunal in which solicitors can be prosecuted for their conduct. The SDT is independent from the SRA and has its own powers and procedures. It can make findings of misconduct and impose sanctions, including fines, suspending a solicitor from practice or striking a solicitor off the Roll.

All solicitors' firms are required to maintain professional indemnity insurance in the event of claims against the firm. The insurance policy must comply with the SRA's Indemnity Insurance Rules. The insurance policy must be with an authorised insurer that has entered into a participating insurer's agreement with the Law Society. The policy terms must include a limit of cover of £3 million for any one claim.

ii Medical practitioners

Negligence claims against medical practitioners can arise in any discipline and range from lower-value claims to multimillion-pound complex cases (such as brain injury caused by perinatal error, or late diagnosis of cancer). They will almost always be claims for personal injury, including where the patient denies having given informed consent to treatment.

While such claims follow the general applications of the law of tort, usually negligence (duty, breach, causation), there are key differences, particularly in relation to limitation periods and remedies. For medical claims, the limitation period is three years (except where the claimant is a child or lacks capacity) and runs from the negligent event, the claimant's date of knowledge or the patient's death.

In negligence claims against clinicians the claimant's most important remedy is damages where the aim is to put the claimant in the same position he or she would have been in had the tort not occurred. Damages are split into two parts. General damages are awarded for pain, suffering and loss of amenity and are determined on a tariff-style basis (additional psychiatric injury will increase the award). Special damages are case-specific and compensate a claimant for financial loss suffered as a result of the clinician's negligence. Provision is made for anticipated future loss with complex calculations using discounts and multipliers to ensure an appropriate outcome. Different quantification principles apply when the patient has died.

Each medical professional body has its own regulator. These include the General Medical Council (GMC) for doctors, the Nursing and Midwifery Council for nurses, and the Health and Care Professions Council for certain others, including, for example, psychologists and radiologists. Each regulatory body will set standards and codes for its members. For example, the GMC's Good Medical Practice guidance sets out the relevant standards for doctors. All regulators stipulate that medical professionals must have adequate or appropriate indemnity arrangements in place before they can practise.

iii Banking and finance professionals

The key legislation governing the regulation of banking and financial professionals is the Financial Services and Markets Act 2000 (FSMA). Under Section 19 of FSMA a person cannot carry out a regulated activity unless authorised or exempt. Regulated activities include accepting deposits and advising on, arranging or dealing in investments.

The three main regulators are the Bank of England, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The Bank of England is primarily responsible for failing banks. The PRA promotes the safety and soundness of financial institutions, and the FCA is responsible for protecting consumers and the conduct of business. Both the PRA and the FCA promote competition within the industry.

Aside from FSMA, the main rules applicable to banks and financial professionals are contained within the PRA and FCA handbooks. Both the PRA and the FCA issue further guidance and thematic reviews, which establish expectations of banks and financial professionals.

The PRA and FCA can both take disciplinary action against banks or regulated financial institutions, and against controlled function holders that have contravened their rules. In addition, by virtue of the Senior Managers and Certification Regime, the PRA and FCA's conduct rules have also been extended beyond controlled function holders to certain other individuals within such institutions.

Claims can be brought through the courts or through the Financial Ombudsman Service (FOS) or the Pension Ombudsman Service (POS). In contrast to claims brought through the courts and the POS, claims through the FOS will not be decided on the basis of legal principles but on a fair and reasonable basis. When deciding on a fair and reasonable outcome, the FOS is expected to take account of the law, relevant rules and good practice in the industry.

The Financial Services Compensation Scheme (FSCS) acts as deposit insurance for eligible customers and is funded by financial services firms. Where an authorised financial institution is insolvent, individuals can claim up to £85,000 for deposits and, for investment or mortgage advice, £85,000 if the insolvency occurred after 1 April 2019, or otherwise £50,000. In addition, most FCA-regulated firms are required to have professional indemnity insurance as an extra financial resource and to prevent excessive claims on the FSCS.

iv Computer and information technology professionals

Claims against software and information technology professionals by their clients tend to be governed by standard form service contracts. There are a range of voluntary professional standards to which information technology professionals may subscribe and which can be written into service contracts. Among the range of issues most likely to arise in disputes are:

a the incorporation of terms and conditions into the service contract;
b interpretation of client requirements for the scope of services;
c representations relating to scope, price and timescale;
d effect of limitations of liability;
e contract termination; and
f service levels.

For organisations controlling or processing personal data, the impact of the EU and (post-Brexit) the UK General Data Protection Regulation (GDPR) will need to be considered.

Article 24(1) of both the EU GDPR and the UK GDPR requires that data controllers 'implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with [the GDPR]'. Article 32(1) requires that data controllers and processors 'implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk'. Breach of these requirements could lead to enforcement action by the Information Commissioner's Office in the UK and, in cross-border cases, by other EU and European Economic Area bodies. These requirements are often written into commercial agreements.

Both the EU GDPR and the UK GDPR contain rights of recourse for data subjects for data protection breaches.[16] Direct claims by data subjects against data controllers have expanded significantly; however, a number of recent decisions handed down across all levels of the courts have created various potential barriers to data subject claims.[17] Nevertheless, this continues to be an area of potential exposure to professional service providers controlling personal data.

v Real property surveyors

Surveyors have been adapting to the introduction of the amended RICS Home Survey Standard. This is aimed at ensuring that surveyors provide the most appropriate type of survey to their customer. It should cover all the information they might require for that type of survey and ensure that the customer understands what he or she will be getting from the outset. It should reduce the number of complaints and claims.

Surveyors also saw the outcome of the appeal in *Chris Hart and another v. Richard Large*.[18] In that case the court at first instance had found that a defendant surveyor was liable to the claimants for the difference in the value of their property attributable not only to defects that the surveyor should have reported on but also to those defects he could not, with due care, have identified at the time of his inspection. The Court of Appeal upheld that decision, concluding that the measure of loss applied by the trial judge was appropriate and that any other measure would not have compensated the claimants for Mr Large's negligence. This was even though Mr Large could not reasonably have identified all the defects upon making his inspection. He should, however, have 'seen enough to give rise to a trail of suspicion' and to recommend obtaining a professional consultant's certificate (PCC), which, if obtained, would have provided the claimants with some protection against the risk of latent defects. The Court of Appeal concluded that this was an 'advice' rather than an 'information' case and that, but for Mr Large's failure to recommend that the claimants seek a PCC, the purchase would not have gone ahead. The Court of Appeal went on to emphasise that the outcome of the case was fact-specific, so that it will not apply in the majority of claims concerning surveys, and it should not be regarded as changing the law relating to the damages that can be recovered in a claim for an alleged negligent survey.

vi Construction professionals

The Grenfell Tower fire continues to have a significant impact on construction professionals. The cost of insurance covering fire safety claims has increased significantly (to the extent it is available at all). Claims against contractors and consultants involved in the design and construction of cladding on high-rise buildings continue to be debated where compliance with building regulations is at issue; and the outcome of the Grenfell Enquiry is anxiously awaited, possibly later this year, to see which bodies or organisations may then be in the firing line for claims.

In April 2021 the Fire Safety Bill received Royal Assent to become the Fire Safety Act 2021. The Act makes amendments to the Regulatory Reform (Fire Safety) Order 2005 placing obligations on the 'responsible person' to undertake fire risk assessments of the external walls

16 Articles 79 and 82.

17 *Lloyd v. Google LLC [2021] UKSC 50, Warren v. DSG Retail [2021] EWHC 2168 (QB), Johnson v. Eastlight Community Homes [2021] EWHC 3069 (QB), Stadler v. Currys Group Ltd [2022] EWHC 160 (QB).*

18 *Chris Hart and another v. Richard Large* [2021] EWCA Civ 24.

and balconies (if any) of any multi-occupied residential building. We are currently waiting to see when the amendments will come into force. It may be delayed until the Building Safety Bill, first published in July 2020, and currently at the committee stage, also comes into force. That Bill looks to introduce a number of new fire safety measures but has been subject to considerable amendment as it has made its way through Parliament. Its core objectives of protecting leaseholders and ensuring, so far as possible, that the construction industry pays the costs of remediation required to cladding on residential properties are unlikely to change.

vii Accountants and auditors

The accountancy and audit professions are regulated by their professional accountancy bodies, with individuals and firms being enrolled as members of one or other of them, subject to the current oversight of the Financial Reporting Council (FRC).

The FRC has statutory oversight of the audit profession pursuant to the Companies Act 2006. The FRC discharges these responsibilities by recognising certain professional accountancy bodies as recognised supervisory bodies (RSBs) and recognised qualifying bodies (RQBs). Currently, the RSBs are the Institute of Chartered Accountants for England and Wales (ICAEW) and Scotland (ICAS), Chartered Accountants Ireland (CAI) and the Association of Chartered Certified Accountants (ACCA), and the RQBs are the ICAEW, ICAS, CAI, ACCA and the Association of International Accountants.

The FRC delegates certain regulatory tasks, including registration and authorisation, monitoring, professional conduct and discipline, to the RSBs in respect of their members who are statutory auditors and audit firms. The issue of recognised professional qualifications for statutory auditors is delegated by the FRC to the RQBs. The FRC ensures that each RSB and RQB properly carries out its delegated functions and undertakes certain non-delegated functions itself, including investigation and disciplinary action for public interest cases. The FRC has power to impose enforcement orders or penalties against any RSB or RQB that does not comply with its responsibilities.

Accountants and accountancy firms who are not exercising an audit function are regulated by the professional accountancy bodies to which they belong. By agreement with six professional accountancy bodies, the ICAEW, ICAS, CAI, ACCA, the Chartered Institute of Public Finance and Accountancy and the Chartered Institute of Management Accountants, the FRC has a non-statutory role in the oversight of the regulation of their members beyond those that are statutory auditors. This oversight also includes registration and authorisation, monitoring, professional conduct and discipline.

Each professional accountancy body has its own insurance scheme requirements. They all require their members to have some form of professional indemnity insurance including compulsory limits of indemnity and minimum terms.

The government previously announced plans for the FRC to be replaced by a new regulator called the Audit, Reporting and Governance Authority (ARGA) following a review of the FRC's powers in 2018 and 2019 by Sir John Kingman, the Competition and Markets Authority and Sir Donald Brydon. The ARGA is intended to take over responsibility for licensing and regulating the large audit firms involved in public interest entity audits from the UK accountancy bodies, in particular the ICAEW. It is understood that the ARGA's authority will be put on a statutory footing as soon as parliamentary time allows.

viii Insurance professionals

Insurance professionals have been heavily scrutinised in recent years. The FCA's thematic review, a tough line taken by judges in claims against brokers, the implementation of the Insurance Act and, now, concerns over insured clients not being covered for all their covid-19 losses (and blaming their brokers for this) have contributed to ensuring that insurance professionals have high standards to uphold.

Insurance professionals are governed by the FCA. The FCA's thematic review of insurance professionals investigated issues such as broker conflicts and the transparency of broker commissions. Insurance professionals have been reflecting on how they manage any conflicts of interest within their business models and making necessary changes. Following the review, merger and takeover activity within the broker community increased.

Case law has further highlighted that brokers must understand their client's business, their client's insurance requirements and the insurance that they are placing for their clients. Linked to this, a broker must take time to ensure that its client understands the insurance that it has procured, including highlighting any particularly onerous aspects of the policy. Decisions in cases such as *Jones v. Environcom*, *Ground Gilbey v. JLT*, *Eurokey v. Giles* and *Dalamd Limited v. Butterworth Spengler Commercial Limited* have provided up-to-date guidance for brokers in this area. Topical issues include the need to understand (and explain to their clients) what a cyber policy covers; and the practical implications of a covid-19 or infectious disease exclusion.

Insurance professionals must understand the Insurance Act 2015, which came into force in August 2016. As part of the duties highlighted in the paragraphs above, a broker has a duty to understand and highlight the impact that the Insurance Act 2015 has on the policies that it is placing for its client.

Finally, insurance professionals will be aware that the FOS limit has increased from £150,000 to £350,000 for complaints after 1 April 2019. Coupled with the widening of the definition of eligible complainants to the FOS, this could lead to an increase in attempts to make claims against insurance professionals through the FOS.

In summary, insurance professionals must understand the insurance that they are placing and the nature of the business for which they are seeking to procure insurance. They must also ensure that their clients are aware of the cover that they have and the relevant cover that they do not have. The developments in case law, the fact that lots of professionals are now paying more in premiums (but obtaining less cover), the Insurance Act 2015 and the FCA's thematic review have made this clear.

III YEAR IN REVIEW

The year in review section of the past two editions involved a considerable emphasis on the impact of covid-19 on the professional sector. Regrettably, 2021 did not involve the return to business as usual that had been expected. Restrictions were substantially eased in England in June 2021, only to be swiftly re-imposed in December 2021 with the emergence of the highly contagious Omicron variant. Covid-19-related claims against professionals therefore remain nascent and are likely to take some time to be realised, as the true financial and economic impact of the events of the past two years start to become clear. It is also interesting to note that the predicted boom in corporate insolvencies (and the correlated rise in claims) has not

yet come to pass, albeit that could soon change. Ultimately, we know from experience that different types of claims will emerge at different times and only truly tail off as limitation starts to bite.

We also previously reviewed the impact of the Court of Appeal's decision in *Manchester Building Society v. Grant Thornton*.[19] That case involves the long-standing 'SAAMCo' principle, which governs the extent of damages recoverable from a negligent professional adviser where a claimant suffers loss on a transaction it had entered into in reliance on negligent advice. SAAMCo provides that the professional is only liable for losses that fall within the scope of that professional's duties. The Supreme Court held in *BPE Solicitors and another v. Hughes-Holland*[20] that this test is further distilled into a distinction between a duty to provide either information or advice. Only in an advice case can the claimant recover the entirety of the losses suffered on the transaction. In 2021 the Supreme Court used *Manchester* as an opportunity to clarify and expand upon the appropriate test, and the result was a surprising key development in the law of professional liability.

Manchester was concerned with whether accountants were liable for the costs of a building society extricating itself from interest rate swap contracts. Causation was established because MBS was able to demonstrate that the swaps had been entered into in reliance on incorrect advice from the accountants as to the appropriateness of adopting a hedge accounting method. The Court of Appeal had held that its costs (approximately £37 million) were nonetheless not recoverable because the accountants did not guide the building society's entire decision-making process; it had only provided information. The Supreme Court held that the costs were recoverable. The courts now have to consider the purpose for which a professional's advice was sought and the risks that the advice was intended to guard against. The professional is only liable for harm representing the 'fruition of that risk'. Practitioners have debated the extent to which this decision has changed the law. It is clear that there are now new layers of analysis required when assessing the application of SAAMCo principles that claimants are likely to take advantage of. This is likely to lead to more disputes over the recovery of damages for professional negligence exacerbated by the current economic climate.

There was also a significant brokers' errors and omissions insurance case before the Court of Appeal in 2021 in *ABN AMRO Bank NV v. Royal & Sun Alliance Insurance Plc and others*.[21] This 200-page judgment covered almost every insurance law issue, from duties of disclosure, construction of policy terms and avoidance to duties of a broker. The judgment reaffirmed the harsh regime that exists when assessing a broker's duties to clients. A broker is under an obligation to identify the scope of cover required and to advise its client on that cover, as well as taking reasonable steps to arrange cover and ensure it meets the client's requirements. Insurance professionals will be aware of this too especially in the wake of the pandemic as underwriters seek to recoup substantial losses (particularly those following on from the FCA's successful test case, which saw the majority of business interruption policies pay out for covid-related losses). The insurance market is hardening. Insurers are, for example, tightening their business interruption policy wordings, and brokers will need to remain vigilant in reviewing and advising on policy wordings and identifying possible novel gaps in cover for policyholders going forward.

19 [2019] EWCA Civ 40.

20 [2017] UKSC 21.

21 [2021] EWCA Civ 1789.

Finally, class actions have been a hot topic in the litigation sector lately, fuelled in part by a substantial rise in litigation funding in the UK (and linked to the litigation funders of the claims management companies, which are sophisticated and aggressive in their advertising). Commentators have pointed towards slow but steady progress towards establishing a class action regime in England and Wales: the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 came into force on 31 July 2020 and allows group proceedings to be brought in Scotland for all claims, and the Consumer Rights Act 2015 permits US-style opt-out collective redress for breaches of competition law. Post-Brexit, if the English system is to remain relevant and at the forefront of legal and social developments, there appears to be some pressure to permit class actions even if not on the wholesale basis adopted in Scotland. That said, progress in this regard has stalled following on from the Supreme Court's 2021 landmark decision in the case of *Lloyd v. Google*.[22] This was a class action arising out of the use of a workaround that allowed Google to place a third-party cookie on iPhones, bypassing default privacy settings to collect and sell information on users' browsing habits. The judgment addressed key questions on the permissibility of opt-out class actions, ultimately finding against them. This is welcome news for those in the data protection field and, arguably, has slowed the development of class actions in the UK more generally. The general view too is that even if they do emerge, class actions may not be hitting professionals to any great extent (given that professionals typically act pursuant to a private retainer), but it is not a risk to be altogether dismissed: the risk to most professionals could still be secondary – that is, those acting or advising on class actions, and those whose advice might be relied upon by a client who in turn is exposed.

IV OUTLOOK AND FUTURE DEVELOPMENTS

In last year's edition, we reported that 'economic turbulence encourages claims across a broad spectrum of professions'. That statement remains as relevant today, as the UK is on the verge of a cost-of-living crisis and the markets are reacting to Brexit and the worsening war commenced by Russia in the Ukraine. Moreover, the covid-19 pandemic has dragged on for longer than many predicted.

We therefore continue to predict a variety of claims against professionals as losses start to crystallise. Investment losses, for example, will prompt scrutiny over financial advice and disputes around foreseeability of losses (and *Manchester* will most likely fuel those disputes). Times of economic turmoil tend to reveal more instances of fraud, and so practitioners (whether solicitors, accountants or other financial advisers) who were in a position to detect wrongdoing but failed to do so will find themselves in the firing line. Cyber-crime has also increased substantially during this period as perpetrators seek to take advantage of vulnerabilities in IT systems and verification procedures; the UK is also on high alert with an increased threat of cyber-attacks out of Russia as the sanctions imposed by the UK on Russian businesses and oligarchs as a result of Russia's invasion of Ukraine start to bite.

There is also now intense regulatory and commercial pressure on professionals to review existing commercial arrangements, identify problematic or imminent payments and consider the adequacy of their sanctions policies. The pressure faced is both internal and in respect of

22 [2021] UKSC 50.

the advice being given to commercial clients on these matters. Exacerbating the challenges faced, lawyers and financial professionals face strict liability tests and substantial fines for failure to report sanctions breaches.

Finally, one of the biggest growing issues for professionals is the increasing importance of environmental, social and governance (ESG) matters around the world and across all sectors. For example, we can expect the adequacy of advice on ESG matters to come under scrutiny, and ESG claims risks arising from investors, employees and others; and regulatory and governmental intervention.

Appendix 1

ABOUT THE AUTHORS

NICHOLAS BIRD

Reynolds Porter Chamberlain LLP

Nick Bird is a leading insurance and professional negligence lawyer at RPC. He acts for a number of the leading legal, accountancy and architecture practices and is top-ranked in the leading lawyer directories.

BRYONY HOWE

Reynolds Porter Chamberlain LLP

Bryony Howe is a New Zealand-qualified insurance and professional negligence lawyer. She advises London market insurers on complex coverage disputes, as well as defending high-value claims against financial and legal professionals.

REYNOLDS PORTER CHAMBERLAIN LLP

Tower Bridge House
St Katharine's Way
London E1W 1AA
United Kingdom
Tel: +44 20 3060 6000
Fax: +44 20 3060 7000
nick.bird@rpc.co.uk
bryony.howe@rpc.co.uk
www.rpc.co.uk

ISBN 978-1-80449-087-7