The Professional Negligence Law Review

Fourth Edition

Editor
Nicholas Bird

The Law Reviews

THE

Professional Negligence Law Review

Fourth Edition

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Nicholas Bird

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Jack Bagnall, Joel Woods

BUSINESS DEVELOPMENT MANAGERS
Katie Hodgetts, Rebecca Mogridge

BUSINESS DEVELOPMENT EXECUTIVE
Olivia Budd

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Jonathan Allen

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 978-1-83862-815-4

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:

ALRUD LAW FIRM

BLD BACH LANGHEID DALLMAYR

BOMCHIL

BSA AHMAD BIN HEZEEM & ASSOCIATES LLP

DEMAREST ADVOGADOS

GORRISSEN FEDERSPIEL

HINSHAW & CULBERTSON LLP

HOGAN LOVELLS

KNOETZL

MATHESON

REYNOLDS PORTER CHAMBERLAIN LLP

STAIGER ATTORNEYS AT LAW LTD

URÍA MENÉNDEZ

WIKBORG REIN ADVOKATFIRMA AS

CONTENTS

PREFACE

This fourth edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in 15 jurisdictions. *The Professional Negligence Law 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.

In most jurisdictions we now face a period of claims and regulatory issues arising out of the current economic and social turbulence. Jurisdictions and professions will be affected in different ways. In the United Kingdom, we will have the further changes following the country's departure from the EU. The implementation of new trade arrangements and new jurisdiction and choice-of-law arrangements will follow. Rapid changes such as these and economic downturns are the dry tinder for professional mistakes and wrongdoing.

This fourth edition is the product of the skill and knowledge of leading practitioners in 15 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 fourth edition with passion and great care. I am very grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
London
June 2021

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] into the contract of 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 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 (e.g., in respect of the likelihood of future adverse events occurring). In some cases, the courts have adopted very 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 give rise to an actionable duty. Many professional regulatory arrangements also mandate a framework for client redress and compensation that exists alongside the courts. These frameworks tend to

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.

adopt lower criteria for proof and are usually cost-free to the client.[6] While these frameworks tend to be used for single, low-value claims, the applicable regulator may also have powers to require the professional to carry out a past business review, 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 significantly 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 statutory and case law regime 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 procedure specific to the TCC. The TCC primarily deals with claims against engineers, architects, surveyors and accountants where the amount

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

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 the 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. However, the arbitrator's decision is generally binding on the parties and there are usually 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 typically focus closely on these kinds of causation and loss arguments.

In addition, the courts have a shown a marked reluctance to compensate for loss arising from risks that it was no part of the professional's duty to protect against.[11] A client is, therefore, usually taken to have accepted the risks of a transaction in respect of which he or she has sought no advice. This principle may require the court to make fine distinctions between

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.

the nature of advice and information provided by the professional.[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).

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 regulatory arm of the Law Society. 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 named 'SRA Standards and Regulations' and comprise a collection of freestanding codes and rules covering, for example, the professional conduct of solicitors (the Code of Conduct of Solicitors, RELs and RFLs), 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 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

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 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.

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.

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.

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 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, the aim being 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: (1) 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); (2) special damages are entirely case-specific to compensate a claimant for the 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, including: the General Medical Council (GMC) (doctors), the Nursing and Midwifery Council (nurses), and the Health and Care Professions Council (for example, psychologists and radiologists). Each regulatory body will set standards and codes for their members; for example, the GMC's Good Medical Practice guidance 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: (1) the incorporation of terms and conditions into the service contract; (2) interpretation of client requirements for the scope of services; (3) representations relating to scope, price and timescale; (4) effect of limitations of liability; (5) contract termination; and (6) 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.[15] Direct claims by data subjects against data controllers appear to be increasing in volume (for example, *Lloyd v. Google LLC*[16]). This is likely to be a growing area of potential exposure to professional service providers controlling personal data.

v Real property surveyors

The year 2020 was obviously dominated by the covid-19 pandemic. While office and retail values went into sharp decline, as people worked from home and shops were closed, the residential market boomed, with the benefit of an extension to the government 'Help to Buy' scheme and an extended holiday for Stamp Duty Land Tax. People who had grown tired of their homes, realised they needed more space or were no longer tied to areas from which they could commute took the opportunity to move, driving up prices and averting the feared fall in property values that could have led to an increase in the number of claims.

In terms of case law, 2020 was all about the decision in the case of *Hart and Hart v. Large* and others, in which the court found that a defendant valuer had failed to report that he could not see any damp-proofing where he should have expected to see it and wrongly assumed, without evidence, that it was present; and had failed to advise that the claimants must obtain a Professional Consultant's Certificate before proceeding with the purchase. While accepting that it should follow the decision in *Watts v. Morrow*, whereby damages should be quantified on the basis of the difference in value rather than the cost of repairs, the court accepted submissions made on behalf of the claimants that the correct measure was not the diminution in value attributable to defects that the defendant surveyor should have reported on, but rather the difference in value between the property with the defects as reported and its value with all the defects that in fact existed. This significantly increased the value of the claim and left the defendant, who had inadequate insurance, facing ruin. The case has therefore sparked considerable concern in the surveyors market and debate about what documents and further investigations a surveyor should recommend as part of a survey. Although some claimants will try to rely on this case to inflate the value of their claims, the case is highly fact-specific and, while providing a salutary warning to surveyors, 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 very 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 strenuously debated where compliance with building regulations is at issue.

In July 2020, the government published the Building Safety Bill, which looks to introduce a raft of new fire safety measures. The key proposal is to introduce a new building safety regime, overseen by the Health and Safety Executive, which will apply to all new multi-occupancy residential buildings over 18 metres in height in England, with existing buildings to be brought within the system on a phased basis. The Bill aims to drive cultural

15 Articles 79 and 82.

16 *Lloyd v. Google LLC* [2019] EWCA Civ 1599.

change in the construction industry by imposing new obligations on those involved in building residential properties (including construction professionals), which will be enforced by a regulator with powers to impose significant penalties for non-compliance. Construction professionals are keeping a close eye on the progress of the Bill so that they can be ready to meet the obligations they will face once it becomes law.

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 for 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, although all require their members 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, 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 (1) their client's business, (2) their client's insurance requirements and (3) 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. The cases of *Jones v. Environcom*, *Ground Gilbey v. JLT*, *Eurokey v. Giles* and *Dalamd Limited v. Butterworth Spengler Commercial Limited* provide good guidance for brokers in this area. Topical issues for brokers to familiarise themselves with to avoid claims are (1) the need to understand (and explain to their clients) what a cyber policy covers; and (2) 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 uncomfortably 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 2020 will obviously be remembered for the covid-19 pandemic. It has been a year of unparalleled disruption for global economies. At the time of writing, lockdown measures in the UK, first imposed in March 2020, are only just beginning to ease. Professionals across the spectrum have been contending with daily and unique risks presented by the pandemic and have had to react and adapt at speed to manage these risks for their own businesses and clients. Remote working has given rise to an increased focus on data protection and has tested the strength of information technology (IT) systems and case management and other processes. These measures have for many proved successful and it is expected that few professionals will return to their offices full-time when cities reopen.

Insurance professionals have experienced a nerve-racking year watching the FCA's business interruption test case (brought on behalf of policyholders against eight insurers) progress from the High Court to the Supreme Court. The High Court found in favour of the policyholders on the majority of the key issues, leading to relief from brokers that might otherwise have faced claims by disgruntled policyholders (forced to lock down their businesses and denied cover under their business interruption policies). Following appeals on points by both sides, the case was leapfrogged to the Supreme Court, which rejected the insurers' appeals. While the threat of claims against insurance brokers in particular has subsided with this decision, it is expected that insurers will react by tightening their business interruption policy wordings, and brokers will need to remain vigilant in reviewing and advising on policy wordings, and identifying possible gaps in cover for policyholders going forward.

Professionals have also faced challenges independent of the pandemic. To name just two examples: for construction professionals, the Grenfell Tower tragedy and the subsequent Hackitt Review have led to a host of claims relating to, and investigations into, fire safety and the suitability of cladding on buildings. In the legal sector, 2020 brought an increased focus on solicitors' involvement in facilitating investment schemes such as buyer-funded developments and leasehold interests in hotel or care-home rooms. These schemes are usually quite complicated and can attract investment from inexperienced investors. Where the schemes fail, the solicitors' involvement can give rise to both civil and regulatory claims.

The Supreme Court has also had a productive year dealing with important points of law arising out of claims against professionals.

In last year's edition, we reflected on a number of key decisions involving dishonest claimants and referred to *Stoffel & Co v. Maria Grondona*.[17] In *Stoffel*, the Court of Appeal allowed a solicitor's client to recover damages notwithstanding that the client had used the solicitors to enable her to commit mortgage fraud. This was the first time the Court of Appeal had applied the Supreme Court's 2016 illegality test (in accordance with *Patel v. Mirza*) to a claim against professionals. The Court found that the solicitors had no knowledge of the fraud and their retainer was not central to the fraud. The Court found that the public interest was better served by ensuring clients are not barred from seeking civil remedies from solicitors for negligence and breach of contract. The decision caused some consternation among professionals and, following an appeal to the Supreme Court, that concern has not been dispelled – the Supreme Court dismissed the appeal, affirming the Court of Appeal's approach to public policy considerations.[18]

The Supreme Court's judgment is awaited in an appeal by Manchester Building Society against the Court of Appeal's decision in *Manchester Building Society v. Grant Thornton UK LLP*.[19] That case concerns the long-standing (but apparently still contentious) '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 relying on the 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 confirmed 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

17 [2018] EWCA Civ 2031.
18 [2020] UKSC 42.
19 [2019] EWCA Civ 40.
20 See footnotes 11 and 12.

recover the entirety of the losses suffered on the transaction. The test is fact-sensitive, however, which means that it remains fertile ground for litigation, as demonstrated by *Manchester*. The auditors in that case had negligently advised the building society that it could apply hedge accounting in recording its interest rate swaps and mortgages. Causation was established when the building society demonstrated that it had relied on that advice when it purchased further swaps and advanced more loans. It was nonetheless held that the auditors did not guide the building society's entire decision-making process and so had negligently provided information, not advice. The building society was unable to establish that the losses claimed would not have been suffered had the information been correct; the losses (brought about when the building society was forced to sell the swaps at a loss) related instead to market forces for which the auditors had not assumed responsibility. The appeal seeks to upset most of these findings. For professional advisers, it is hoped that the Supreme Court will not be swayed – the current recessionary climate means that it is of importance to professionals that claimants do not seek to place all market-related losses at the professional's door.

IV OUTLOOK AND FUTURE DEVELOPMENTS

Economic turbulence encourages claims across a broad spectrum of professions. Experience from the 2008 crash suggests that different types of claims will emerge at different times and only tail off as limitation starts to bite.

As losses start to crystallise in the wake of the pandemic, we predict a variety of claims against professionals. Investment losses will prompt scrutiny over financial advice, and disputes around foreseeability of losses. In the legal and accounting sectors, case management, adequate supervision and adherence to court and other deadlines will be areas of focus and, where these standards slipped, we can expect to see an increase in claims as a result. 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.

We also anticipate that insolvency practitioners and accountants advising businesses facing financial difficulties as a result of the covid-19 pandemic may face increased exposure to claims in the next few years and the biggest test is likely to come towards the middle and end of 2021, as governments' financial support is withdrawn and small and medium-sized businesses that have struggled during 2020 begin to fall into insolvency. This may give rise to claims against insolvency practitioners from disgruntled creditors or shareholders. For accountants and auditors, insolvent firms will inevitably face significant scrutiny of their work prior to the businesses' insolvency (even more so following the Court of Appeal's decision in *AssetCo v. Grant Thornton*, which is seen by some claimant firms as encouragement to pursue claims against auditors for companies' trading losses). There is also potential exposure for failing to identify 'furlough fraud' in company accounts.

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

an LBR business

ISBN 978-1-83862-815-4