



## CLAIMS AGAINST INSOLVENCY OFFICE-HOLDERS FOR PROFESSIONAL NEGLIGENCE - BUSH LAWYERS AND HUNTERS

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February 2017

### The easy part ...

1. As any student of the law of tort knows only too well, the basic ingredients of a claim in negligence against another person are (1) a duty of care, (2) a breach of that duty, whether by action or omission, which has (3) caused damage that was (4) foreseeable. In considering the duty of care that a person owes to another, and whether it has been breached, it is also necessary to have regard to 2(a) the precise scope of the duty and 2(b) the standard of care that is expected of the alleged tortfeasor.
2. As any lawyer practising in the field of professional negligence also knows only too well, proving in any given case that a professional has been negligent and successfully obtaining a remedy by way of an award of damages is rarely as simple as proving ingredients (1) to (4) at trial. There are many more subtleties than that, whether they arise from knotty legal issues or deciding between differing competing litigation strategies: a brief glance at the table of contents of *Jackson & Powell on Professional Liability*, 8<sup>th</sup> Edition, 2017, is enough to dispel any doubts<sup>1</sup>.

### The hard part...

#### Introduction

3. So much for the easy bit. How does all of that apply to insolvency office holders? We start with some terminology, specifically, what is meant by the phrases 'insolvency office-holder' or 'insolvency practitioner'. The Insolvency Act 1986 does not expressly define either phrase. The closest it comes to a definition is in s.388 which contains provisions relating to when a person is to be treated as acting as an insolvency practitioner. Some context is useful here: s.388 is the first section of Part XIII which deals with Insolvency Practitioners and their Qualifications. That part contains comprehensive (and recently re-modelled) rules on the qualification, regulation and sanctions that insolvency practitioners can face.
4. There are different provisions in that Part applying to personal and corporate insolvency. As regards the insolvency of a company, a person acts as an insolvency practitioner when a person is its liquidator, provisional liquidator, administrator or administrative receiver, or (if a voluntary arrangement has been proposed or approved) a nominee or a supervisor (s.388(1)). In relation to the insolvency of an individual, it is when (at least in relation to England and Wales) a person

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<sup>1</sup> Perhaps more reassuringly, a brief glance, but this time at the index of *Jackson & Powell*, reveals that the editors of that textbook do not yet consider it necessary to include "Insolvency Practitioners" as a relevant category of professionals. By contrast, in *Professional Negligence and Liability* (a loose-leaf), Chapter 20 is devoted exclusively to insolvency practitioners.



acts as a trustee in bankruptcy, an interim receiver of property, or, if a voluntary arrangement has been proposed, a nominee or supervisor in relation to that voluntary arrangement (s.388(2))<sup>2</sup>.

5. The Insolvency Act 1986 imposes a variety of functions on persons who act as insolvency practitioners. For example, the duty of a trustee in bankruptcy to get in and realise assets pursuant to s.305 of the Insolvency Act 1986, or the similar duty of a liquidator to get in, realise and distribute under ss. 143 (compulsory) and 107 (voluntary), and to investigate the causes of a company's insolvency (necessary so as to get in assets, and so as to furnish information to the OR under s. 143(2)). In order to enable the various insolvency practitioners to perform their functions in relation to a particular insolvent estate, the Insolvency Act 1986 endows insolvency practitioners with extensive powers. In the case of a liquidator, the powers can be found in Schedule 4 to the Insolvency Act 1986, and reference can be made to Schedule 5 for the powers of a trustee in bankruptcy. An administrator has very wide powers, conferred by paragraph 59 of Schedule B1 to the Insolvency Act 1986.
6. There is no doubt that in discharging their functions under the relevant provisions of the Insolvency Act 1986, insolvency practitioners are often confronted with challenging situations involving a variety of stakeholder groups (the debtor, associates of the debtor, creditors, the Insolvency Service, etc...) and in which the practitioner is required to make difficult and sometimes urgent decisions. There is always a risk that a mistake will occur, that something will go wrong, that the insolvency practitioner will have been negligent.
7. It is not difficult to imagine any number of different scenarios in which something might go wrong in an insolvency. To identify just a few examples, we would mention cases where an insolvency practitioner wrongly decided to trade a business<sup>3</sup>, or instances of "non-feasance" (i.e. a culpable failure or omission by the practitioner to act by bringing a claim in time<sup>4</sup>), or more classic cases of misfeasance, such as errors in the context of transactional and sales acts<sup>5</sup>. A final notable problem area is in the case of distributions. It is also worth mentioning an example of a scenario in which an insolvency practitioner may be negligent before even becoming an insolvency practitioner: in the context of voluntary arrangements, it is not unusual to find that the relevant practitioner gives advice to the debtor whilst still a nominee.
8. It is possible that an insolvency practitioner might be negligent in any one of those situations. However, in order for a prospective claimant to successfully sue the insolvency practitioner for professional negligence, it will be necessary for that claimant to establish each of the ingredients

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<sup>2</sup> There are also provisions dealing with acting as an insolvency practitioner in relation to a partnership, and the estate of a deceased individual.

<sup>3</sup> See for example *Re Centralcrest Engineering Ltd* [2000] BCC 727.

<sup>4</sup> See for example *A&J Fabrications Limited v Grant Thornton* [1998] 2 BCLC 227.

<sup>5</sup> Such as in cases like *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760, and see also more recently in the personal insolvency context *McAteer v Lismore* [2012] NICH 7, [2012] BPIR 812.



that we have described above: duty of care, breach of duty (including scope of duty and standard of care), causation and loss. We shall consider each of those in turn, along with a discussion of the extent to which expert evidence is required.

### Duty of care

9. Unlike in the case of other professionals, an insolvency practitioner (once appointed) does not have a traditional client with whom the insolvency practitioner might enter into a retainer. Post appointment therefore, an insolvency practitioner will not ordinarily (and absent special circumstances) owe any contractual duties of care to any third party. That leaves a common law tortious duty of care or a statutory duty of care. The procedural route for bringing a claim on the basis of a common law duty of care and a statutory duty of care would be different. A common law duty of care would ordinarily be brought by way of a standard CPR Part 7 claim, whereas a claim that an insolvency practitioner has breached a statutory duty of care would be by way of an application in the relevant insolvency process. There is no doubt whatsoever that an individual acting as an insolvency practitioner will owe a statutory duty of care. The more interesting question is whether an insolvency practitioner also owes a separate tortious common law duty of care. We shall turn to that shortly.
  
10. We have used the phrase 'once appointed' in the preceding paragraph advisedly: there are a number of authorities which support a conclusion that, prior to a debtor formally entering an insolvency process (including a voluntary arrangement), an insolvency practitioner may, depending on the existence and the terms of their retainer, owe a debtor a tortious duty of care: *Pitt v Mond* [2001] BPIR 624 & *Prosser v Castle Sanderson (A firm)* [2002] EWCA Civ 1140 [2002] BPIR 1163. *Prosser* was a professional negligence claim brought by an individual against his former solicitor and an insolvency practitioner who had become the supervisor of his IVA. The allegations of negligence concerned the advice (or, more accurately, the lack thereof) given to the debtor during the course of a break taken after the relevant creditors' meeting to consider the IVA proposals had begun. At first instance, HHJ Hegarty QC had found that, in relation to the events which occurred during that break, the insolvency practitioner did not owe a duty of care. His decision was reversed by the Court of Appeal (Clarke LJ) who held that the insolvency practitioner did owe a duty of care. The court's reasoning is apparent from this passage in the judgment:

"[66] ... The judge said that it was a fine line. I have reached a different conclusion from the judge on this point. I agree that the courts should be careful not to impose duties upon nominees or chairmen of creditors' meetings when they are acting in that capacity. However, to my mind Mr Sleight was not acting in that capacity during the discussion with the appellant and Mr Addlestone during the short adjournment. He was acting in precisely the same capacity as he had when he gave advice in the period before the meeting. Moreover, it was advice on the very same questions, namely what options were available to the appellant.



[67] In the absence of a clear indication to the appellant that he was no longer acting in that capacity but as nominee or chairman it would be fair just and reasonable to impose a duty upon him. Indeed, to my mind he was then acting pursuant to the contract just as he had been before...”

11. The law reports contain a number of examples of cases in which an aggrieved party has sought to render an insolvency practitioner liable for breach of a common law duty of care said to arise outwith the normal statutory provisions contained in the Insolvency Act 1986<sup>6</sup>. A recent example of an attempt to fix an insolvency practitioner with such a common law duty of care is *Oraki v Bramston* [2015] EWHC 2046 (Ch) [2016] 3 WLR 1231<sup>7</sup> which is a decision of Proudman J. The case concerned the actions of a trustee in bankruptcy. It was brought both as a normal common law claim for negligence and in reliance on s.304 of the Insolvency Act 1986. The claimants argued that, because the bankruptcy order ought never to have been made, and the estate was “cash-rich”, the trustee in bankruptcy owed them a common law duty of care (they relied particularly on s.330(5) of the Insolvency Act 1986, pursuant to which a bankrupt is entitled to any surplus from the estate). The judge did not agree. Her reasoning is apparent from these short passages from her judgment:

“33 I observe that it would be inconsistent with the requirement that the permission of the court must be given if the bankrupt had an unfettered right to take proceedings against his trustee. In any event there is no need for the bankrupt to have a general right of action based on a common law duty which would conflict with the statutory regime of rights, for example, sections 303, 304, 325(2), 326(3) and 363 of the 1986 Act.

34 I do not therefore consider that there is a common law duty in negligence apart from the statute. However, the trustee owes a statutory duty to the bankrupt because of section 330(5) of the 1986 Act, at any rate where the estate proves to be solvent: see *Hoffmann LJ in Heath v Tang* [1993] 1 WLR 1421...”

12. In short, the existence of a statutory duty and detailed statutory code meant that no duty of care would arise in negligence. A similar analysis was deployed by Norris J in *Re Coniston Hotel (Kent) LLP (in liquidation); Berntsen v Tait* [2013] EWHC 93 (Ch) [2013] 2 BCLC 405 which was a decision on a strike out application by former administrators seeking to strike out a claim brought against them by members of an LLP which had been in administration. The alleged claims were based on paragraphs 74 and 75 of Schedule B1 of the Insolvency Act 1986, but also included allegations of negligence in relation to events which had occurred *before* the defendants

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<sup>6</sup> To take an older example, see the decision of Michael Furness QC sitting in *Charalambous v B&C Associates* [2009] EWHC 2601 (Ch) [2013] BCC 491 in which a common law negligence claim was struck out applying *Oldham v Kyrris* [2003] EWCA Civ 1506.

<sup>7</sup> An appeal in *Oraki* was heard by the Master of the Rolls, McCombe and David Richards LJJ in December 2016. Judgment is awaited.



had been appointed. The judge accepted a submission that the latter allegations should be struck out, and ordered that the claim under paragraphs 74 and 75 should be re-pleaded. He said this<sup>8</sup>:

“[62] Third, counsel for the joint administrators submit that the present proceedings confuse claims by Mr Berntsen and Mr Richardson for personal losses caused to them by the alleged professional negligence of Ms Rayment and Mr Tait with claims for harm suffered by them as members or creditors of the LLP because of the alleged failure to act in accordance with the duties imposed by Sch B1: and that the former should be pruned from the action.

[63] I accept this submission.... Professional negligence proceedings for acts prior to the administration have as their objective the compensation of the claimant for personal losses caused by breach of a common law duty owed to him personally because of some retainer. The issues are very substantially different, and so is the procedure for their resolution.”

13. The better view therefore is that it will be very difficult for a prospective claimant to establish that an insolvency practitioner will owe a common law duty of care to a third party in respect of acts undertaken by the practitioner once he has taken office and in his capacity as trustee in bankruptcy / liquidator or administrator as the case may be. This does mean that, in framing a claim in professional negligence against an insolvency practitioner, it will be very important to determine whether the alleged instances of negligence relate to acts or omissions undertaken before or after the insolvency practitioner took office.
14. That leaves the statutory duties which insolvency practitioners owe. The Report of the Review Committee on Insolvency Law and Practice chaired by Sir Kenneth Cork submitted on 30 April 1981 contained a detailed consideration of the duty of care owed by an insolvency practitioner: paragraphs 777 to 787. The report contains these characteristically lucid observations in support of a recommendation that parliament enact a statutory duty of care:

“781 ... The insolvency practitioner will be a professional man charged with the responsibility of managing and realising property belonging to others. He must act honestly, reasonably and prudently, and display proper professional skill and competence. We consider that he should owe to the debtor, the creditors and other interested parties a duty of care appropriate to his professional standing, and the ordinary fiduciary duties appropriate to a professional trustee; the extent and characteristics of that duty will, we think, vary according to the person to whom it is owed.”

15. The existing statutory duties of care owed by insolvency practitioners are to be found in, or more precisely are reflected in, a number of sections of the Insolvency Act 1986: s.212 (liquidators and administrative receivers), s.304 (trustees in bankruptcy) and para. 75 of Schedule B1. The Insolvency Act 1986 does not therefore enact a single duty of care which applies across the

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<sup>8</sup> He was influenced by two decisions which were cited to him, firstly the decision of David Richards J in *Clydesdale Financial Services Ltd v Smailes* [2009] EWHC 1745 (Ch), [2011] 2 BCLC 405 and secondly the decision of HHJ Purle QC in *Re Automold Ltd* [2009] EWHC 3709 (Ch).



board to all insolvency practitioners<sup>9</sup>. All of the sections or paragraphs that we have cited have this wording in common:

“... or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to...” (s.212) (emphasis added)

“... any misfeasance or breach of fiduciary or other duty by a trustee...” (s.304) (emphasis added)

“... has breached a fiduciary or other duty in relation to the company...” (para. 75) (emphasis added)

16. It is settled law that the phrase ‘other duty’ is wide enough to include, in addition to a breach of trust or a breach of fiduciary duty, a breach of a duty of skill and care, albeit that the existence of such a duty is not spelt out in the legislation but is treated as something which “comes with the job”: per Hoffmann LJ in *Re D’Jan of London Ltd* [1993] BCC 646 (in the case of directors) and *Re Centralcrest Engineering Ltd* [2000] BCC 727 (in the case of a liquidator).

#### The standard of skill and care

17. The standard of skill and care which a court will expect of a professional is assessed by reference to other members of the same profession. *Jackson & Powell* suggests this formulation (which could also apply to insolvency practitioners):

“that degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank, and profess the same specialisation (if any) as the defendant” (para. 2-135 of the textbook)

18. This is often referred to as the *Bolam* principle, based on the direction given in a medical negligence case in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582.
19. The same applies in an insolvency context: see per Millett J in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 where he said:

“... An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company’s assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a

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<sup>9</sup> Although not a duty of care as such, it is worth recording that, as a result of s.391O(1)(e) of the Insolvency Act 1986, it is possible for a court to make a ‘direct sanctions order’ against an insolvency practitioner requiring the practitioner to make a contribution to a creditor of a company or individual in relation to which the practitioner was acting. That power applies across the board to all insolvency practitioners.



reasonably skilled and careful insolvency practitioner would not have made. None of this was in dispute before me.” (p759)

20. There are some qualifications to that standard as it applies to negligence issues in an insolvency context. They are as follows:

20.1 The standard against which an insolvency practitioner’s conduct and acts are assessed is the standard which prevailed at the time of the relevant conduct, not at the time when (no doubt many years down the line) the court comes to assess that conduct: see per HHJ Cooke in *Pitt v Mond* [2001] BPIR 624 (at p. 639 *et seq*).

20.2 In determining whether an insolvency practitioner has fallen below the standard, it is very relevant to consider that in many insolvencies, an insolvency practitioner will not have ready funds at his disposal (for example for the purposes of availing himself of legal advice) and time will often be short (see para. 20.63 of *Professional Negligence and Liability*). This lack of funds played a decisive part in the rejection (on the facts) of an alleged breach of duty (failure to obtain best price reasonably obtainable for sale of business by reason of undue haste) in *Re Charnley Davies Ltd (No 2)*.

20.3 By contrast, it is also worth bearing in mind these clear words of warning from Maugham J in *Re Home and Colonial Insurance Co* [1930] 1 Ch 102 at 125 which touch on the standard which an insolvency practitioner is expected to meet having regard to the fact that (in theory at least) an insolvency practitioner is or ought to be able to obtain advice from lawyers, or failing that, guidance from the court:

“... a high standard of care and diligence is required from a liquidator in a voluntary winding up. He is of course paid for his services; he is able to obtain whenever it is expedient the assistance of solicitors and counsel; and, which is a most important consideration, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the Court, and to obtain guidance.”

20.4 In relation to legal competence, it has been observed by the Supreme Court of Southern Australia, in characteristically frank terms, that “*a liquidator is not expected to be a bush lawyer*” and is to be judged primarily in relation to the accepted standards of his own discipline; see *Olsson J in Maelor Jones Investments (Noarlunga) Pty, Ltd, and others v Heywood-Smith; Van Reesema v Heywood-Smith* [1989] SASC 1928 at p36;

20.5 That said, obtaining legal advice from solicitors is not necessarily a bomb shelter, or safe harbour. Insolvency practitioners need to be astute to the fact that a determined claimant will look behind the legal advice, and enquire for example as to the quality and extent of the instructions which the insolvency practitioner gave to their lawyers, and also the extent



of the investigations which the insolvency practitioner had undertaken which informed those instructions. That is in effect what happened in *Top Brands Ltd v Sharma* [2014] EWHC 2753 (Ch), [2015] 1 BCLC 546, where HHJ Simon Barker QC considered that the relevant insolvency practitioner (acting in an MVL) was unable to get off the hook on the basis of legal advice that she had received. In other words, the safe harbour principle is only available where practitioners have reasonably and properly obtained advice and have acted on that advice;

- 20.6 Errors of judgment are not per se compatible with negligence, as is more classically illustrated in medical negligence cases; see *Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER 245 and *Sidaway v Bethlem Royal Hospital* [1984] 1 All ER 1018 at 1023;
- 20.7 When carrying out a sales function, the IP must bear in mind that they may be expected to strain for a better result than an ordinary vendor (who for example might be embarrassed to accept a gazumping offer); the guiding principles for fiduciary vendors were summarised in *Killearn v Killearn* [2011] EWHC 3775 (Ch) (at [16]);
- 20.8 It should not be assumed that the Courts will always accept the standards practised widely in a profession. In a conveyancing context liability was imposed notwithstanding evidence that the conduct reflected common practice, because the Court considered the practice was unreasonable: see *G & K Ladenbau (U.K.) Ltd. v Crawley & De Reya* [1978] 1 W.L.R. 266; *Edward Wong Finance Co. v. Johnson, Stokes & Master* [1984] A.C. 296. Whilst the Courts will not always articulate this expressly, they may be attracted by the idea a particular result could and should have been achieved whether or not an ordinarily skilled practitioner can be found who will say they (and others) would not have done so.
21. In the last couple of years there has been a shift away from the use of the *Bolam* test in professional negligence cases where the duty of care encompasses a duty to explain risks. Thus in *Montgomery v. Lanarkshire Health Board* [2015] AC 1430, the Supreme Court eschewed the *Bolam* test in the context of a doctor's duty to explain risks associated with treatment to a patient to whom advice is given, because this was not a matter of purely professional judgment. This was recognised in a conveyancing negligence case in Northern Ireland; see *Baird v Hastings* [2015] NICA 22. So too in the context of risk warnings in the context of the provision of financial services by Kerr J *O'Hare and anor v Coutts & Co* [2016] EWHC 2224 (QB). Kerr J cited the decisions in *Montgomery* and *Baird*, and noted that, in the context of investment advice too, there must be proper dialogue and communication between adviser and client. He concluded (at para. 204) that: "*I do not think the required extent of communication between financial adviser and client to ensure the client understands the advice and the risks attendant on a recommended investment, is governed by the Bolam test.*" This might be relevant to the standard of care to be expected by the IP acting in an advisory capacity pre-appointment, but the underlying reasoning by Kerr J in *O'Hare and anor v Coutts & Co* goes beyond that.





22. In drawing his conclusion, Kerr J pointed out that the relevant regulatory regime (there the Conduct of Business Rules Sourcebook, “COBS”) was strong evidence of what the common law requires (citing *Loosemore v. Financial Concepts (a firm)* [2001] Lloyds Rep PN 235, at page 241 per HHJ Jack QC; and *Green v. Royal Bank of Scotland (Financial Conduct Authority intervening)* [2014] Bus LR 168, at para 18 per Tomlinson LJ), and a duty to explain in terms not dissimilar to the *Montgomery* formulation is found in the COBS rules (in particular rule 2.2.1(1) and 2.2.2(1)(b); rule 4.2.1(1); rule 9.2.1, 9.2.2, 9.2.3 and 9.2.6),. He considered the content of those rules would be very difficult to square with the application of a conventional *Bolam* approach, as they do not include reference to a responsible body of opinion within the profession (see paras 208-9). He was not swayed by the defendant’s submission that there were differences between the medical and financial contexts - how much to say to a client was not a question to be decided according to whether the adviser acted in accordance with a practice accepted as proper by a responsible body of persons skilled in the giving of financial advice, because expert evidence tended to indicate that there is little consensus in the financial services industry about how the treatment of risk appetite should be managed by an adviser, and, as in the medical context, the extent of required communication with the client should not depend on the attitude of the individual adviser (at paras 204-5).
23. It is perhaps unsurprising that, in cases where there are comprehensive regulations which prescribe in detail what is required when undertaking particular tasks, a professional who fails to comply with these regulations should be held to have failed to exercise reasonable skill and care without reference to the general body of professional opinion. The editors of *Jackson and Powell on Professional Liability* (8<sup>th</sup> ed.) point out (at para 2-012) that “*In this way regulations and codes of conduct and guidelines can require a profession to achieve a higher standard than is currently being achieved and so effect a change in the required standard.*” With a growing trend amongst professional bodies to publish written standards which reflect the best practices of the profession, it is an open question how far in the future the “codification” of professional standards will overtake the *Bolam* test.
24. These latter observations are of particular relevance to IPs, who are heavily regulated. Only a licensed insolvency practitioner (IP) may be appointed in relation to formal insolvency procedures. All qualified IPs must be licensed and regulated by a recognised professional body (a ‘RPB’). Currently, there are five RPBs. Each is required to have proper procedures in place to ensure that a complaint made against an IP it authorises is properly investigated. IPs are required to comply with Statements of Insolvency Practice (SIPs), have regard to “Dear IP” letters, and act in accordance with their RPB’s codes and guidance<sup>10</sup>. Whether or not an IP has complied with guidance set out in the relevant SIP (such as, for example, the disposal of an asset to a

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<sup>10</sup> For a useful recent briefing paper on the regulation of insolvency practitioners see: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05531#fullreport>



connected person under SIP 13), a Dear IP letter or their code will be very persuasive, if not always determinative, of a negligence claim.

25. Moreover, in certain respects, if an IP acts outside their statutory powers, the liability which the IP is fixed with may be said to be strict, rather than based on a breach of a duty of skill and care. This may be because the allegation is they have acted outside their powers, effectively in breach of trust and/or in breach of their fiduciary duties, and where liability imposed may be strict. This is discussed further when considering the question of losses below and the decision of the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co* [2015] AC 1503 (SC).
26. Overall, however, it is important to keep in mind to consider the functions being discharged by the IP in question when considering whether the conduct fell below a permissible standard. The duties have to be considered in the context of the appointment and the purpose and objectives of the appointment<sup>11</sup>.

#### Expert evidence

27. A key issue which faces those who are considering bringing a professional negligence claim, including claims against an IP, is do I need to obtain expert evidence? By expert evidence, we mean the opinion of a fellow competent professional as to whether or not the conduct in issue fell below the standard of care to be expected from an ordinarily competent practitioner carrying out the task in question. Experts will often talk in terms of what they might, or might not have done themselves, though that is not in fact the correct test.
28. Given the prevalence of the use of expert evidence to bolster weak cases<sup>12</sup>, and the risk of proliferation as to costs, there is now a restriction on the use of expert evidence in proceedings in the following terms: the Court has a duty to restrict expert evidence “*to that which is reasonably required to resolve the proceedings.*”; CPR 35.1.
29. This has been interpreted as requiring a three step test by Warren J in *British Airways plc v Paul Spencer and others* [2015] EWHC 2477 (Ch), as follows at [68]:

*“...it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:*

*“(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.*

*(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not*

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<sup>11</sup> For a useful discussion of IP Liability from a functional perspective see “IP Liability – An Overview”, Nicholas Briggs & Philip May, April 2008, at [http://www.guildhallchambers.co.uk/files/IPLiability\\_NB&PMay.pdf](http://www.guildhallchambers.co.uk/files/IPLiability_NB&PMay.pdf)

<sup>12</sup> See for example the case of *Gumpo v Church of Scientology* [2000] C.P. Rep. 38



*necessary, then the court would be able to determine the issue without it (just as in Mitchell the court would have been able to resolve even the central issue without the expert evidence).*

*(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in para 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.”*

30. Pulling the other way, are cases such as the decision of Coulson J in *Pantelli Associates Limited v Corporate City Developments Number Two Limited* [2010] EWHC 3189 (TCC) at paragraphs 16-19, where it suggested that in professional negligence cases, it is expected that input will need to be obtained from an expert prior to making any allegation against that professional that their conduct has fallen below that of a fellow professional. The judge even went so far as to suggest it might be an abuse of process if the claimant had not obtained such evidence when they issued, since they would not properly be able to sign a statement of truth suggesting the competency had fallen below expected standards without such evidence.
31. A subsequent office-holder contemplating a claim against a former office-holder may be tempted to think that they could form a view themselves, and that it would be sufficient for them to articulate that view before the Court in evidence. However, the hunter might find themselves become the hunted in those circumstances, since it is well established that an IP cannot act as an expert in his or her own cause: see *Re Colt Telecom Group plc (No. 2)* [2002] EWHC 2815 (Ch) at para. 80, where it was made plain on conventional grounds that a liquidator cannot be his own expert in adversarial litigation. See to similar effect *Re Continental Assurance Co of London plc* [2001] BPIR 733 at para. 327.
32. Thus the general rule in professional negligence claims against an IP is that an expert opinion from an independent third party should be obtained before a decision is made to commence proceedings. This is reflected in most of the well-known cases, such as in *Charnley Davies (No 2)*, where each side relied on an IP expert. So too in *Pitt v Mond*. But like all good general rules there are some exceptions. Both the general rule and one possible exception to it is illustrated in the following passage from the judgment of Butler Sloss LJ said in *Sansom v Metcalfe Hambleton and Co* [1998] PNLR 542 (CA) at 549:

*“In my judgment, it is clear, from both lines of authority to which I have referred, that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule ... but, unless it is an obvious case, in the absence of the relevant expert evidence the claim will not be proved.”*



33. The following situations suggest that expert evidence is not appropriate:

*(a) The plain and obvious case*

34. This is alluded to by Butler Sloss LJ above. In all areas of commercial and professional negligence litigation, there may sometimes arise a plain and obvious case e.g. missed time limits.

35. In addition, parties sometimes seek to adduce expert evidence when in reality the issues are issues of fact; see *Re ISG Group Ltd (No 2)* [2003] BPIR 597, concerning the removal application of a liquidator and SIP 13.

*(b) Novel situations*

36. The conduct of a professional may come to be criticised in entirely novel situations, where by definition no evidence of the adoption of any particular practice or standard is available in any event. This is exemplified by *AB v Thameside & Glossop Health Authority* (1997) 8 Med L R 91 where the issue was as to the way in which a competent health authority ought to alert patients who had come into contact with a health worker diagnosed as HIV positive that there was a risk they may have been infected. The authority chose to alert patients by means of a letter. A number of patients claimed to have experienced psychological injury as a result of being informed in this manner. It was contended that a prudent authority would have communicated the information via general practitioners or through health workers experienced in providing counselling. While the Court of Appeal accepted that the standard of care was set by *Bolam*, it had to conclude that the Bolam test was of no assistance because of the entirely novel facts and the absence of any respectable body of medical opinion supporting any particular practice as to the appropriate method for disclosing such matters to the public.

*(c) Where the practice followed is unreasonable*

37. This is exemplified by the House of Lords consideration of the scope of duty on the part of the doctor to warn as to the risks of a particular type of treatment, a matter already discussed above. Lord Bridge indicated in *Sidaway v Governors of Royal Bethlem Hospital* [1985] AC 871 @ 900E “*even in a case where, as here, no expert evidence in the relevant medical field condemns the non disclosure as being in conflict with accepted and responsible medical practice, I am of opinion that the Judge might in certain circumstances come to the conclusion of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it.*” This analysis explains *Edward Wong Finance Limited v Johnson Stokes and Masters* [1984] AC 296 where the Defendant’s Solicitors handed over completion money to the vendor’s Solicitor in exchange for an undertaking that suitable security



would be provided within 10 days. No such security was in the event forthcoming and the vendor's Solicitors defaulted on the undertaking. The transaction thus carried on, however, was on the evidence conducted entirely in accordance with normal conveyancing procedures obtaining in Hong Kong. This notwithstanding, the Privy Council held the risk inherent in this style of completion was foreseeable and readily avoidable. It concluded there could only be an affirmative answer as to whether the Defendant firm was negligent in not foreseeing and avoiding the risk.

*(d) Where there is adequate text book learning or standard practitioner guidance as to the practice to be followed*

38. See *Re ISG Group Ltd (No 2)* [2003] BPIR 597 above and see also *LHS Holdings v Laporte* [2001] EWCA Civ 278, where it was concluded that expert evidence was not needed from an accountant on the meaning and interpretation of standard accountancy documents (SIP 13).

*Two final words of warning*

39. There are other areas where the Courts may conclude expert evidence is not required. Typically, this occurs in solicitors' negligence cases, and a judge will consider that they do not need another lawyer to tell them whether or not something falls below the standards to be expected of a reasonably competent lawyer. It is just possible that an experienced company court judge or registrar might form a similar view where the question is whether or not an IP has followed a provision in the Insolvency Act 1986 or a rule. But a word of warning if that is the case: such an enquiry might be suggestive that in fact the best case to be advanced is not a professional negligence case, requiring it to be shown that due skill and care has not been followed, but instead that an office-holder may have acted outside their permitted powers, and strictly liable for the consequences. See for example in the context of a distribution in an MVL the decision in *Re AMF International Ltd* [1995] 2 BCLC 529; [1996] 2 BCLC 9.
40. But the advantages of obtaining expert evidence, and in particular an advisory expert opinion from a third party IP will usually outweigh the disadvantages and will be a prudent investment. If the evidence is not necessary, and instead the expert remains in the shadows, it is likely to help inform the manner in which evidence and submissions are presented. And if the expert opinion proves to be both wrong and negligently so then the estate will have the ability to hold that expert to account for losses suffered by that negligence.

#### Causation, loss and damage

41. Factual causation principles ordinarily require it to be proven that but for the negligent act complained of the damage in question would not have been suffered. But this is not always so, and sometimes the case may be looking at whether or not a gain would have been achieved. In



that scenario different causation principles may arise. So, whilst causation and losses are distinct tests to apply, it is convenient to consider them together here as the issues can become intermingled when considering whether a chance of a better outcome has been lost. We propose to consider three points under this heading: first, the evaluation of a loss of chance; secondly, causation and losses in transactional and distribution cases; and thirdly, looking at the question of date of assessment.

#### *Loss of chance*

42. In November of last year, the Court of Appeal took the opportunity provided by *McGill v The Sports and Entertainment Media Group* [2016] EWCA Civ 1063 to revisit and confirm the key principles underlying the doctrine of loss of a chance recognized in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 W.L.R. 1602. In summary:

*“where the claimant’s loss depends, not on what he would have done, but on the hypothetical acts of a third party, the claimant first needs to prove (to the usual civil standard) that there was a real or substantial, rather than a speculative, chance that the third party would have acted so as to confer the benefit in question, thereby establishing causation; but that the evaluation of the lost chance, if causation is proved, is a matter of quantification of damages in percentage terms” (McGill, at para 60).*

43. The measure of damages is the sum which the claimant would have recovered in the underlying transaction multiplied by the percentage chance of the claimant making that recovery. So the threshold bar is set much lower on causation (i.e. the chance can be below 50%) but the amount of the award will be diminished to reflect that. This is contrasted with the case where the claimant is relying solely on their own actions to establish their loss, which need to be proved on the balance of probabilities (i.e. more than 50%) and where, once that threshold has been crossed, the claimant will recover in full.
44. This reasoning has been applied in insolvency advisor negligence cases, such as *Prosser v Castle Sanderson* (above). In *Prosser*, where both the solicitors and IP were sued, the claim failed against both of them because the Court was not satisfied that there was a realistic chance of a better outcome even if the debtor had been properly advised to seek an adjournment. That was no doubt informed by the judge’s “dim view” of the claimant and his activities. He thought the chances of proper and full information being provided to creditors and for them to change their mind as to whether, or not to accept the proposals were “very speculative indeed” (at [89]).
45. That is a relatively rare case since, since, as mentioned above, the chance lost needs only be real and substantial. Another IP negligence case in the context of personal insolvency which concerned a debtor seeking to exit bankruptcy is the decision of *Demarco v Perkins and another* [2006] BPR 645; [2006] All ER 650. Again the IP in question was acting in an advisory capacity. It was found that if properly advised an IVA should have been pursued, but there was a 15% deduction of the damages award to reflect the risk of the IVA failing.



46. In professional negligence cases it is not uncommon to see judges awarding percentages as low as 20%: see *Ball v Druces & Attlee* [2004] EWHC 1402 (QB). The test is whether something of value has been lost and if so then to place a percentage on that.
47. A scenario where loss of chance principles might apply based on acts carried out by an IP whilst office-holder is illustrated by the facts in *A & J Fabrications* above. In that case (which must now be treated with care for the proposition that an individual duty might be owed) the complaint concerned a failure by a liquidator to investigate claims within a reasonable period of time. Thus where a valuable claim against a third party has been lost as a result the liquidator may be found liable on loss of chance principles. And in that scenario it is important to understand that the relevant enquiry is not a trial within a trial: it is the prospects and not the hypothetical decision in the lost trial which has to be investigated; see *Sharif v Garrett & Co (a firm)* [2001] EWCA Civ 1269; *Dixon v Clement Jones Solicitors (a firm)* [2004] EWCA Civ 1005. In the latter case a 30% chance of success was awarded at trial and upheld on appeal.

#### *Transactional and distribution cases*

48. So far as transactional cases are concerned, the relevant enquiry will often be the price which could have been achieved if a competent sale process had been followed. Such a complaint failed on the facts in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760, but on the facts succeeded more recently in the personal insolvency context in *McAteer v Lismore* [2012] NICH 7, [2012] BPIR 812. Whilst on one view it might be argued that loss of chance principles should apply to such cases, because they involve the hypothetical actions of third parties, they do not tend to be approached in that way because the enquiry is what the market would have delivered, and expert evidence will usually be capable of being adduced to answer that question. So in *McAteer v Lismore* an undervalue calculation was made based on expert evidence adduced as to what the asset would have achieved at the time if the marketing had been carried out properly. This leads us to the third point we wish to briefly cover here.
49. Similarly, where the complaint is based on distribution failures, where the complaint is that a sum has been distributed in breach of duty then the usual starting point will be the amount which should not have been distributed, which is a class loss suffered by those who should have received a greater distribution. This is potentially subject to a contention that the IP should be relieved of their liability (whether by reason of the Court exercising a discretion vested in it under section 212 or possibly by praying in aid relief under section 1157 Companies Act 2006), though such pleas do not tend to gain much traction for the professional office-holder<sup>13</sup>.

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<sup>13</sup>In *Top Brands v Sharma* above the judge considered but rejected a plea for discretion not being exercised under section 212. In *Re Home Treat Limited* [1991] BCC 165 it was treated as an option for the administrator. And in *Rawnsley and Canal Dyeing Company Limited (In liquidation) v Weatherall Green & Smith North Limited and another* [2010] BPIR 449 it was viewed as being arguable a liquidator might be able to rely on it.



### *Date of assessment*

50. As noted above, parties will typically be focussed on assessing losses having regard to the improved position at the date of breach. This is consistent with the approach taken more generally in professional negligence cases. However, there are grounds for taking a different approach with an IP who is exercising fiduciary functions.
51. The above discussion has focussed mainly on a professional negligence claim simpliciter but the claim against an IP is also capable of being viewed through the prism (particularly in the corporate context) of their fiduciary duties. In *Brook v Reed* [2012] 1 WLR 419 at [16], the CA approved the following passage from the judgment of Ferris J in *Mirror Group Newspapers plc v Maxwell (No 2)* [1998] 1 BCLC 638 as applicable to all insolvency office-holders:
- "The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property which they deal with."*
52. Accordingly, their duties both as custodians and vendors of the company's property are equitable: *AIB Group (UK) Plc v Mark Redler & Co* [2015] AC 1503 (SC). Such agency, to adopt the language of the SC in *Redler* (at [51]) in relation to the custodial duty of a trustee, brings with it a "custodial stewardship duty" and a "management stewardship duty". In this respect the distinction drawn by Millett LJ between duties special to fiduciaries and their other duties must now be read as qualified by, in particular, paragraphs [118] – [132] of *Redler*. As Lord Toulson JSC stated (at [54]), the court makes good a breach of a trustee's management stewardship duty without proof of conscious wrongdoing. As Lord Reed JSC observed (at [94]), some typical trustee duties are strict, e.g. the duty to distribute the fund in accordance with the trust. So even where the case concerns a failure to act with skill and care in the custody or sale of a property, it may be said this is not simply a claim in professional negligence but a breach of equitable duties, such that the remedy should be to restore the trust property to the estate. Thus the liability may be said to arise for equitable compensation, including an assessment of lost value as at the date of trial/judgment. This can have strategic advantages to the claimant which may be worth adopting, depending on the facts of the case.