PROFESSIONAL NEGLIGENCE UPDATE

Holly Doyle, Guildhall Chambers

Samuel Parsons, Guildhall Chambers

1. This talk covers four key groups of cases that have emerged from the Court of Appeal: **(1) scope of duty; (2) duties to third parties; (3) loss of a chance; and (4) illegality.**

2. The cases we consider are divided accordingly:

   (1) Scope of Duty: *Manchester Building Society* and *Lyons v Fox Williams*
   (2) Duties to third parties: *Steel v NRAM*, *Dreamvar v Mishcon de Reya*, and *Playboy Club v Banca Nazionale del Lavoro*
   (3) The 'loss of chance' cases, which focus on claims for vibration white finger ("**VWF**"): *Perry v Raleys* (in which judgment has been given by the Supreme Court) and *Edwards v Hugh James* (in which judgment is anticipated from the Supreme Court soon).
   (4) Illegal transactions: *Stoffel v Grondona*, which was a claim brought, unusually, by a mortgagor in respect of a mortgage fraud

3. We are obviously limited in what we can say this in this talk. A fuller set of notes has been included in your packs, and we invite you to refer to those notes for more detail on all the cases we will be discussing today.

(1) Scope of the Duty

4. The first case is *Manchester Building Society* [2019] EWCA Civ. The key factual points were that Manchester had been negligently advised to include certain swaps on their balance sheet. The importance of that was that it enabled Manchester to offset the interest rate volatility it was subject to elsewhere in its accounts. That was negligent, and it was negligent because that 'hedge accounting' principle was no longer available under the then-prevailing accounting principles.

5. That negligence was admitted. The swaps remained off the balance sheet from 2006 until 2013, when the error was discovered, and they had to be brought onto the balance sheet. By that time, the 'mark-to-market' value of the swaps had decreased significantly. The effect of that was that Manchester was no longer able to comply with its regulatory capital requirements and had to cease lending.

6. The key questions were causation and the extent of the loss. At first instance, Teare J found that the majority of the losses could not be claimed for, because (i) the accountants had not assumed responsibility for entering into the transaction *per se*, but had only advised on one aspect of the building society's accounting and (ii) to the extent that the loss had followed from closing out the swaps in 2013, the operating cause of that loss was a decline in market value of the swaps between 2006 and 2013.

7. The appeal was brought on the basis that Teare J had wrongly approached this as an "information" case, rather than an "advice" case. In fact, he had not used that terminology at all.

8. The question of the 'scope of the duty' can be traced back to the seminal SAAMCO case. Many of you will probably recall the mountaineer's knee analogy promulgated by Lord Hoffmann in that case. Basically, if the duty is only to supply information, the adviser must take reasonable care that the information is correct and, if he is negligent, he will be responsible for all the foreseeable consequences of the information being wrong. So that is what is now broadly understood as an 'information' case. And that has to be distinguished from an 'advice' case, where the merits of taking a particular course of action or entering into a transaction is the true extent of the adviser's duty.

9. More recently, that distinction between 'advice' and 'information' came under fire from Lord Sumption in *BPE Solicitors v Hughes-Holland*, which regular attendees at this seminar may recall

from 2017. The criticism made by Lord Sumption is that 'advice' and 'information' are – outside of this context – unhelpful, because as a matter of syntax, they are virtually interchangeable.

10. And yet, it appears to have been on that basis that the Court of Appeal allowed the appeal to be heard. Hamblen LJ (giving the only reasoned judgment of the appellate court) decided that, notwithstanding Lord Sumption's criticisms, there was still significant mileage in that distinction. Hamblen LJ therefore agreed with the conclusion arrived at by Teare J, but this seems to be a significant 'rowing back' from the position established by the Supreme Court. Our position is that this is somewhat unhelpful.

11. As to the decision itself, MBS had argued that the relevant distinguishing factor here was that, as a result of GT's negligence, the swaps had to be closed out in 2013 and not the (presumably more advantageous) time of their choosing, but this also begs the question of the relevant counter-factual: what would have happened if they were not closed out in 2013? The evidence was that the MTM value of the swaps at trial was even lower (negative £56M) and MBS would also have been making payments to its counterparties under the swaps for an additional 5 years: [85]. Since MBS could not prove that that loss would not have been suffered if it had continued to hold the swaps, it could not prove it had suffered a loss caused by the need to close out the swaps in 2013 [89]. Perhaps the most controversial aspect is that the Court of Appeal seemed to leave the door open to a claim in respect of MTM loss if the Claimant could have proved at trial that the MTM value would have improved had it continued to hold the swaps, rather than having to sell them in 2013 – on the basis that closing the swaps **at that particular (disadvantageous) time** was arguably the consequence of the accounting advice.

Lyons v Fox Williams

12. *Lyons v Fox Williams* is the second case that falls for consideration. It concerns the so-called 'duty to warn', and in particular a solicitor's duty to warn a client. Our reading of the case is that the breadth of a retainer will be construed relatively narrowly, and raises the question of whether there really is any 'duty to warn' beyond that which might be implied into a contract by way of the usual principles on implied terms. In that sense, it is a bedfellow with the *BPE* case discussed just a moment ago.

13. The facts were that Mr Lyons had the benefit of two insurance policies, that had been arranged for him by his employer, Ernst & Young in Moscow. Mr Lyons was injured in a motorcycle accident, which ultimately led to his foot being amputated.

14. One of the policies was for 'accidental death and dismemberment'. One might think that the very label of that policy would lend itself to covering this type of incident, but the advice given by both the insurance broker and the solicitor at Fox Williams was that it did not provide such cover. In fact, it did.

15. The retainer said in its 'scope' section that it was concerned with the policies, but this was only in the context of bringing a claim against his employer for not putting in place a policy similar to that which he had previously been insured under. There were also issues in relation to the second policy, but for present purposes what matters is that the retainer asked for a copy of the relevant policies.

16. That brings us to the analysis of the so-called 'duty to warn' – was the solicitor under a duty to tell Mr Lyons that, contrary to everyone's understanding, he might in fact have had a claim under the policy?

17. There are competing principles under this duty. The *locus classicus* for the so-called 'duty to warn' is ***Boyce v Rendells*** (1983) 268 E.G. 268 at 272 col.2., which is summarised in *Jackson & Powell on Professional Liability (8th edn.)* at 11–172 as follows:

> *"if, in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks,*

then he should do more than merely advise within the strict limits of his retainer. He should call attention to and advise upon the risks."

18. The second competing proposition is that

> "*A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer…*"
>
> But *"if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions or is he doing "extra" work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions… If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly."*

19. The principles in the modern leading case is probably ***Minkin v Landsberg*** [2015] EWCA Civ 1152. That excerpt is included in the notes at para 33.

20. There was ultimately no finding that there was such a duty to warn here. Indeed, there was no challenge to that finding of fact on the appeal, and Patten LJ considered that such an appeal would not have succeeded in any event.

21. There are three points for consideration/to take home from *Lyons*' case. The first is whether the 'duty to warn' is really just an exercise in contractual construction, using the well-known test for implied terms found in cases like *ICS v West Bromwich* and the officious bystander test. If there is a distinction between professional retainers and other types of contract, why should there be a distinction?

22. The second point is whether the conclusion is ultimately correct. The retainer required Mr Lyons to hand over copies of the policies. The solicitor did not even read the policies. In the circumstances, should a solicitor be entitled to continue on the basis of the facts assumed by the insurer and the insurance broker, or should the solicitor not be required to at least check that those assumptions are correct when instructed? We all know what the answer to that should be as a matter of good practice. Is it justifiable that the law diverts to the extent it does from good practice?

23. Third, the case underscores the need for a clear retainer. We doubt whether the court would have approached the question with the same benevolent construction of the retainer it did if there had been no written retainer, or if reliance had been placed on an implied retainer.

Category 2: Steel v NRAM

24. We now move onto the second category of cases – liability towards non-clients and third parties.

25. Last year the Supreme Court handed down judgment in ***Steel & Another v NRAM Ltd*** [2018] UKSC 13. It considered the circumstances in which a solicitor for one party to a transaction may owe a duty of care and be liable for negligent misstatement to the other party. The reaffirmation is the primacy of the test found in well-known cases such as *Caparo v Dickman*: *was the reliance of the other party reasonable and was it foreseeable*? The Supreme Court concluded that the

lender's reliance on statements by the borrowers' solicitors, without independently checking those statements against its own records, was neither.

26. The Borrower owned 4 units on an industrial estate. NRAM made a loan to the Borrower secured by way of a charge registered against all the properties. In 2006 the Borrower wished sold 2 of the units. B agreed to repay a sum, and the balance was secured over the remaining 2 units. The day before completion, Ms Steel emailed NRAM asking for execution of certain documents. She stated in her email that the whole loan was to be paid off and she had a settlement figure for this. Those statements were wholly mistaken and made without authority. However, NRAM (who were not legally represented) did not double-check the position and complied with her request. The charges were all discharged and the other units were sold free of NRAM's charges. The company went into liquidation, meaning a personal claim against the borrower was worthless. NRAM brought a claim for negligent misstatement against the solicitor, Mr Steel.

27. After reviewing the line of authorities from *Hedley Byrne* through *Ross v Caunters*, *Smith v Eric S Bush*, and *Caparo v Dickman*, Lord Wilson alighted in particular on the statement of Neill LJ in *James McNaughton Paper Group* that the question of reliance requires consideration of whether the representee should have used their own judgment or sought independent advice, especially in business transactions conducted at arm's length, where it might be very difficult to prove that it was reasonable to do otherwise. Generally a solicitor owes no duty of care to the opposing party, unless it is reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so.

28. So the key principle here is that where the opposing party has the ability to check their own file, or ask for clarification, then it will not be reasonable for those statements to be relied on. In *Steel v NRAM*, the bank's officers had immediate access to the correct terms. And that is a key distinction, because it appears there are authorities where a solicitor essentially passes on information from an opposing party which is unknown to the claimant, and cases where the solicitor takes on responsibility for saying or doing something which they are peculiarly unable to do. In such cases, the tests of reasonable reliance and foreseeability may be met.

29. *Steel* appears to be a third category, where the information is within the knowledge of the claimant, or which the claimant can independently obtain. In such cases, reliance will not be reasonable, and so no liability will arise for negligent misstatement.

30. That leads neatly onto the two conjoined appeals considered by the Court of Appeal: *Dreamvar v Mishcon v Reya* and *P & P Property v Owen White & Catlin*.

31. Both of these cases involved property purchase frauds, in which the buyers were duped by the vendors in circumstances where the vendors' solicitors had carried out inadequate money laundering checks. The vendors did not in fact own the properties in question and absconded with the purchase monies.

32. As was identified in *Steel v NRAM*, there is a clear tension between the notion that a solicitor owes a contractual duty to his or her own client, which must be balanced against the foreseeability that the third party will rely on that professional to perform their task in a competent manner. In other words, the third limb of the *Caparo v Dickman* test becomes live: is it fair, just and reasonable to impose liability?

33. There were five key factors that made the imposition of liability unfair:

    (1) there was clearly no actual assumption of responsibility by the Defendant solicitors- they were instructed to act for the vendor in an arm's length sale of the property, and the Claimants instructed their own solicitors: [77].

    (2) The Claimant's solicitors were free to raise any enquiries they wished and could, at least in theory, have sought some undertaking from the vendors' solicitors that any necessary AML checks had been carried out. The highest it can be put is that the defendants in both actions should have realised that the purchasers would rely on them to carry out the AML checks in a full and competent way: [77]

    (3) The Money Laundering Regulations do not create a statutory duty which if breached gives rise to a cause of action at the suit of the claimants. They were imposed for the benefit of society at large. Their purpose is to deter money laundering and terrorism rather than to combat identity fraud: [78]

    (4) Adopting the incremental approach, there was a material distinction between this case and the so-called 'wills' cases like *White v Jones* [1995] 2 AC 207 where the instructions which the solicitor received were intended to benefit both the solicitor's own client (the testator) and the third party (the intended beneficiary) and for that reason there was no conflict of interest between the two parties. There the third party was in as proximate a position to the solicitor as he would have been had he been their client. Here the vendors and the purchasers were very much at arm's length and their solicitors owed no duties to anyone but their client when acting in relation to the sales [79].

    (5) There was nothing in the way that these transactions were conducted which made it objectively reasonable to assume that the AML checks would be complete and that the defendants should be legally accountable to the purchasers for the consequences [81].

34. The claimants were, however, able to bring claims on the basis of contract for breach of trust and breach of undertaking:

    (1) Breach of trust: the authority of the fraudsters' solicitors to release the moneys to his client depended on there being "completion" in accordance with paragraph 10 of the Law Society's Code of Completion by Post (2011) ("**the Code**"), which meant the completion of a genuine transaction of sale; that in the absence of a genuine completion, the seller's solicitor, in releasing the funds, did not have the purchaser's authority to make the payment; and had thus acted in breach of trust.

(2) Breach of undertaking: the fraudsters' solicitors had, by paragraph 7 of the Code, undertaken that they "*have the seller's authority to receive the purchase money on completion*" – an undertaking they had breached given that their imposter client could not properly be described as 'the seller').

35. To finish off the section on duties owed to third parties, it is also instructive to look to the case of *Playboy Club v Banca Nazionale*, decided by the Supreme Court last year.

36. …

(3) Loss of a chance and vibration white finger

37. That brings us back to a recent judgment of the Supreme Court, a forthcoming decision of that court, and our speculations about how the Supreme Court will deal with the outstanding appeal from the Court of Appeal.

38. Both of these cases concern claims brought by ex-miners for 'vibration white finger'; a medical condition caused by handling vibrating machinery, and which causes a loss of circulation to the fingers. The scheme consisted of general and special damages. The extent of special damages that would be awarded was determined by reference to whether the claimant could perform the so-called 'six tasks' without assistance. If he could not, because of the VWF, then his claim would be correspondingly greater. They included things like gardening, DIY, and car maintenance.

39. The negligent act in *Perry v Raleys* was that Raleys simply did not bring a claim for the 'services award' (the 'special damages' portion of the tariff under the scheme). Negligence was admitted, and so the key points were (i) whether the procedural route taken by the judge at first instance was permissible; and (ii) whether the claim for 'loss of chance' could succeed on the basis of the findings made.

40. On the claim brought against Raleys, HHJ Saffman heard two days of evidence on whether the negligence caused any loss. The key factual issue was whether Mr Perry in fact had a claim at all in respect of the 'six tasks', particularly since there was evidence before the court of him going fishing. The judge concluded that Mr Perry's case was fraught with issues as to credibility. The claim for the services award was essentially dishonest.

41. So why was this controversial? There has been a general pattern in cases ever since *Allied Maples* that, where a claim is brought for loss of chance, the question is whether, had the chance been given to the claimant, they would have succeeded. That normally does not require what has been described as a 'trial within a trial', because normally the question of loss cannot be finally determined.

42. It was on that basis that the Court of Appeal deprecated the trial judge's decision to conduct a 'trial within a trial', essentially on the basis that it displaced the burden of proof that would normally on a claimant – instead of it being handled in the usual way that a loss of chance case would be handled, the judge had descended into the ultimate factual issues.

43. In the Supreme Court, Lord Briggs summarised the authorities, and concluded that nothing in the line of cases after *Allied Maples* required the courts to abandon the basic requirement that a

claim in negligence requires proof that loss has been caused by the breach of duty. In short, if the claim was a dishonest one to start with, then what Mr Perry was claiming for was something to which he ought never to have been entitled (whether the claim had been brought within the scheme or against his lawyers).

44. Given that the court was able to form a concluded view on the issue that would ultimately determine Mr Perry's claim, it made no sense to ignore that finding of fact. Normally the court will have to do its best on the evidence available to it, as it did in cases like *Kitchen v RAF*. But that principle does not apply where the court can go beyond that and form a more definitive conclusion.

45. HHJ Saffman was therefore vindicated in his decision to hear live evidence and form a view on Mr Perry's credibility. Given the terms in which the Court of Appeal had criticised him, that vindication must have been welcome.

46. The second 'VWF' case is *Edwards v Hugh James* [2018] EWCA Civ. Judgment was given in this case after the Court of Appeal's decision in *Perry v Raleys*, but before the Supreme Court's decisions. For reasons we will see in a moment, it appears that the Court of Appeal may be overturned again by the Supreme Court. And of course all of this over relatively modest awards of damages.

47. The firm in *Edwards*' case acknowledged the existence of the services claim. A settlement offer was received from the scheme, which prompted the firm to send out a template letter to Mr Edwards saying essentially that (i) in order to continue the claim he would need to provide supporting evidence (which was wrong, given the 'light touch' way in which the scheme administered awards); (ii) failed to mention the interim payment that would be made, *whether or not* he accepted the settlement offer; and (iii) unless he proved that the VWF was the *only* cause of his inability to perform a task, he would have no services claim in respect of that task. That letter was found to be negligent, and there was no appeal against that finding.

48. That settlement offer had been made on the basis of the first medical report. A second medical report then emerged after the negligent letter, which showed that, in fact, the VWF was not as severe as had previously been thought. Consequently, Mr Edwards would have been unable to claim for as high a services award as had previously been thought, and his claim for general damages was much lower as well. In short, the settlement offer had been a very good offer indeed. But the question was to what extent the solicitors were liable. The question was essentially one of timing: should courts take into account material that arises later and sheds light on the value of the underlying claim? Or should the courts look exclusively to the date of the notional settlement, and use that date as the yardstick?

49. At first instance, the Recorder held that the measure of loss should be calculated by reference to what the claim was *in fact worth*. In other words, the later evidence should be taken into account.

50. The Court of Appeal rejected that analysis. It held that the correct approach was to look at the notional date of settlement and that, as a general rule, it was inappropriate to take into account any subsequent events *after* that notional date. It appears that analysis was premised on the view that cases of under-settlement require the court to look back to the date of settlement alone.

51. There is a curious omission in the authorities that are discussed by the Court of Appeal (the Recorder's decision is not available online), because it is our view that this question has already been answered. The House of Lords were split 3-2 on this very issue in *the Golden Victory*. That was a shipping case that considered the extent of the 'breach date rule'; the general rule that damages are to be measured at the time of the breach.

52. The majority of the House of Lords held that the court "*need not gaze into the crystal ball*" when one can read the book (as Lord Bingham described it, although he was in the dissenting minority). The essential question is: what has the claimant in fact lost?

53. In fairness to Counsel for the Defendant, this was essentially the argument they advanced. The emphasis of damages is restitutionary – it restores the claimant to the position that he would have been in, *had it not been for the negligence*. It follows that there must be a cap to any damages claim, which is that a claimant cannot gain an advantage over and above what his claim is known to be worth. And the court cannot turn a blind eye to subsequent information in coming to a conclusion on that.

54. The Claimant's argument in response to that would appear to be that the claim against a third party can actually exceed the value of the underlying claim. When an offer of settlement is made, that offer carries a distinct value at a notional point in time, which factors in a wide range of commercially sensitive data. In other words, even if the underlying claim only had a notional value, an offer of settlement carries a distinct commercial value as a *chose in action*. That value may be higher or lower than the value of the underlying claim.

55. This is an interesting question, which has no clear answer (and the fact that a similar question split the House of Lords on the issue demonstrates that point). Our view is that the Court of Appeal is wrong on this, because it ultimately would appear to offend against the compensatory principle that is central to claims for damages. It also strikes me as odd that one should be able to claim more from a solicitor than can be claimed from the original tortfeasor.

56. The same barrister also submitted at [49] that *Perry* had been wrongly decided by the Court of Appeal. Given Counsel's subsequent vindication on that point, the question remains whether he will also be vindicated on the substance of *Edwards* as well?