

**Managing litigation risk:
Corporate and commercial disputes**

Tuesday 10 October 2023



Introduction

Richard Garcia

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Practical guide to contractual termination

Ed Davis and Guy Harper

Practical guide to contractual termination

Introduction

- Termination rights:
 - Common law
 - Repudiatory breach
 - Renunciation / anticipatory breach
 - Express contractual terms
 - “Without cause” or “convenience” right upon occurrence of a specified event (e.g. material adverse change)
 - Identified breaches
- Pre-contractual misrepresentations identified?
 - Also consider rescission, which restores parties to their precontractual positions and could therefore result in a higher recovery of damages where there is a bad commercial bargain.

Practical guide to contractual termination

Common law termination rights should not be overlooked

Loss of bargain damages are usually not available if only contractual termination rights are exercised

What are loss of bargain damages?

- Damages to put an innocent party into the position that it would have been in if the contract had been properly performed.
- In addition to claiming pre-termination losses, an innocent party accepting a repudiatory breach of contract is therefore entitled to claim an amount to compensate for **the lost opportunity to receive performance of the contract.**
- This therefore allows for a claim for **future lost profits** (subject to contractual exclusions, and principles of mitigation and remoteness).

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EE forfeited a claim to over £200 million of loss of bargain damages against Phones 4U by failing to exercise common law termination right in its contractual termination notice

"In accordance with [our contractual termination right], we hereby terminate the agreement with immediate effect...

Nothing in this notice shall be construed as a waiver of any rights EE may have with respect to the agreement... Without limiting the generality of the previous sentence, nothing herein shall be deemed to constitute a waiver of any default or termination event, and EE hereby reserves all rights and remedies it may have under the agreement..."

Phones 4U Limited (in administration) v EE Limited [2018] EWHC 49 (Comm)

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Three categories of contractual term

- **Condition** (any breach, however minor, will entitle the innocent party to terminate the contract)
 - Express designation: “Time is of the essence”
 - Breach will “deprive the innocent party of substantially the whole benefit of the contract”
 - Designation by statute: Title under SOGA for example
- **Innominate term** (breach will entitle the innocent party to terminate only if it “goes to the root of the contract”)
 - Fact sensitive inquiry into consequences of breach
- **Warranty** (unless agreed otherwise, a breach will not entitle the innocent party to terminate (damages only))

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- Renunciation / anticipatory breach
 - Where a party has clearly demonstrated – by words or conduct - an intention not to perform the contract, the innocent party does not need to wait until the time for performance to see whether the counterparty will in fact be in breach. The right to terminate arises immediately.
 - Refusal needs to be clear and absolute.
 - Cannot be any threatened breach; needs to be a threatened breach of a condition or a sufficiently serious breach of an innominate term.
 - Purporting to terminate when the right to do so does not exist will amount to a renunciation by the innocent party (and therefore expose them to a claim for loss of bargain damages).

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Interpretation of contractual terminations rights

- “Material breach”
 - Courts are willing to find that a “material breach” does not have to be repudiatory; something less will suffice (Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200).
- “Substantial breach”
 - Same as repudiatory breach; no lower threshold (Crane Co v Wittenborg A/S [1999] All ER(D) 1487).
- “Any breach”
 - Restrictive interpretation; the breach must be repudiatory (Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191).
- Insolvency
 - Beware s.233B of the Insolvency Act 1986 (introduced by CIGA 2020), which provides that the contractual right of a supplier of goods or services (other than financial services) to terminate for a customer’s insolvency (or an automatic termination clause in the event of a customer’s insolvency) is no longer enforceable.

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Acceptance or affirmation – common law

- In event of a breach allowing termination, the innocent party needs to elect whether to accept breach or affirm contract.
- Making an election requires outward representation or conduct that unequivocally indicates, interpreted objectively, that a knowing, irrevocable election has been made.
- An election to affirm a contract means the end forever of the right to terminate the contract, but will not, without more, amount to a waiver of the right to claim damages.

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Acceptance or affirmation – common law

- Right to terminate a contract may be lost ("waived by election") if, before it is used, either of these events happens:
 - A reasonable time passes. What is reasonable depends on the situation when the right is exercised.
 - The innocent party does something inconsistent with termination: normally, it performs or demands performance of a primary contractual duty that would end on termination – e.g. making or demanding a payment.
- A party can preserve a termination right by expressly reserving its rights. But only goes so far.
- After becoming aware of a repudiatory breach of contract, a party has a reasonable time to investigate and decide whether to terminate or affirm.

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Election - timing

- What is a reasonable time is a question of fact, depending on the circumstances when the choice arises - varies from one case to another.
- Where the facts are simple, the agreement is a short-term one, or the contract relates to trading on a volatile market, a reasonable time may be short. For example, one judge thought "*a very short period*", certainly less than 13 days, was enough time to decide whether to terminate a contract to sell a racing car.
- Where there is no particular urgency or the facts are complex, the aggrieved party may need longer to decide: see *Force India Formula One Team Ltd v Etihad Airways PJSC* – where 2/3 months elapsing was not enough to affirm the contract.
- There is therefore a risk that aggrieved party may affirm a contract if it does not act quickly to accept a repudiation at common law.

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Waiver / affirmation – contractual termination

- Position where there is an express contractual right? Question of construction, but essentially same position as common law.
- Where there is an express right to terminate, it may well not, on the proper construction of the contract, require immediate exercise.
- But continued performance (e.g. continuing to accept payments) might operate as a waiver of a right to terminate.

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No waiver clause / reservation of rights

- Can you rely on a no-waiver clause? These rarely help, as it is a question of *election*, not waiver.
- Express term allowing termination at any time?
- Effectiveness of a reservation of rights letter in preventing election or waiver? Only goes so far: *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB).

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Practical issues

- Do you actually want to terminate? Are you better off keeping the contract (and claiming damages)?
- Practical consequences of termination - is there someone else to take over the contract? Do you need time to find someone else, and so risk affirmation? What will happen to e.g. goods to be sold?
- Are there good grounds to terminate? Is the breach "material"? Does it need to be?
- Does the breach need to be incurable (or has it not been cured)? Is it continuing (and does it need to be a continuing breach)?
- Take care not to waive rights / affirm – consider sending a RoR letter, do not take steps to perform, do not delay.
- Comply with contractual terms e.g. as to notice.

Practical guide to contractual termination

Practical issues

- Overlapping contractual rights to terminate and common law rights – rely on both (i.e. accept repudiation and exercise contractual termination right)? Where remedies conflict, identify which right is relied on.
- Consider if you need to identify the breach you rely on (if required under the contract).
- Regulatory issues?
- What are the post-termination duties / what clauses survive termination?
- Preserving privilege – unlikely litigation is in contemplation.

Any questions?



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Privilege - best practice on how to manage concurrent litigation and investigations

Donna Newman and Ellen Gallagher

Types of privilege

There are two main types of legal professional privilege:

- Litigation privilege
- Legal advice privilege

But also:

- Common interest privilege
- Joint privilege
- “Without Prejudice” privilege

Legal advice privilege

The basics:

- A communication
- Between a client and its lawyer
- Confidential
- Comes into existence for the dominant purpose of giving or receiving legal advice

Litigation privilege

The basics:

- A communication
- Between a client and its lawyer or either of them and a third party
- Confidential
- Litigation is in progress or in “*reasonable contemplation*”
- For the dominant purpose of conducting the litigation

Investigations

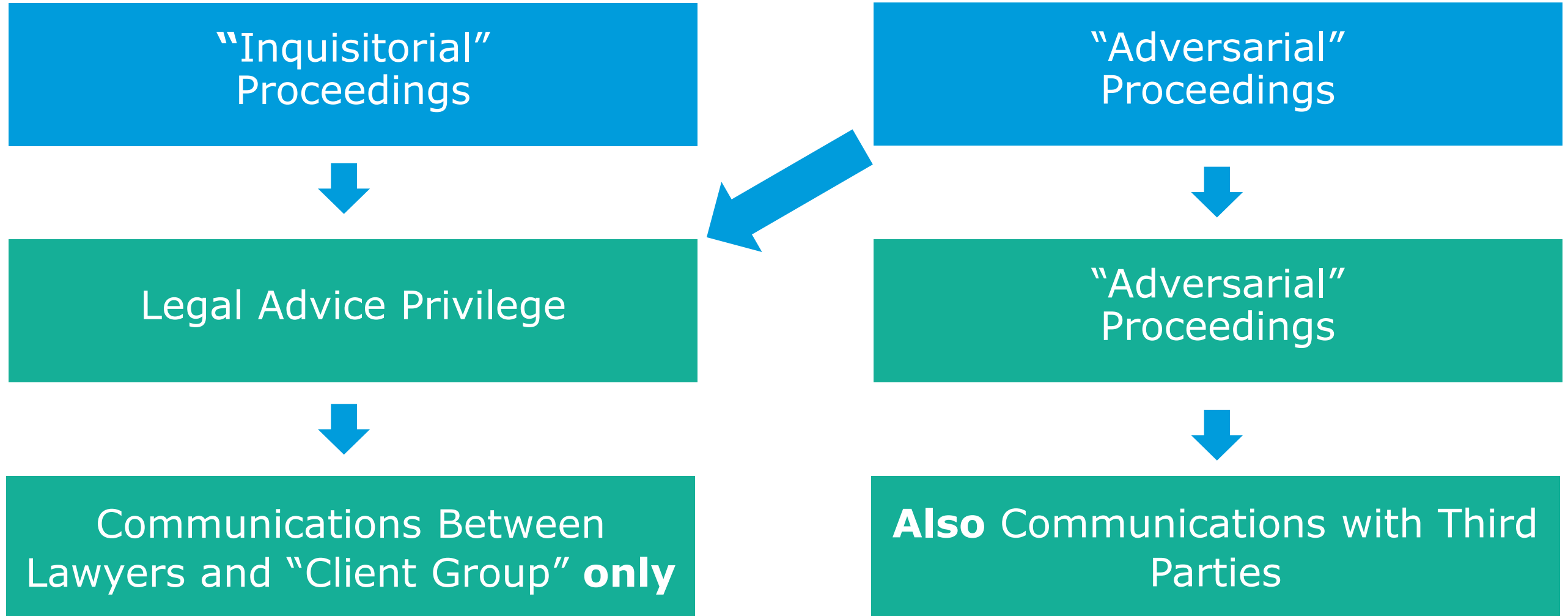
Internal investigations

- Whistleblowers / internal reports
- Customer complaints
- Compliance monitoring

External investigations

- Requests for information
- Employee suspected of wrongdoing
- Firms as target of investigation

Does privilege apply?



Internal Investigations

- Civil liability?
- Criminal / regulatory issues?
- Mechanics of investigation and Terms of Reference
 - Set up so that privilege applies as far as possible
 - Try to bring within scope of litigation privilege *where possible*
 - If only legal advice privilege applicable, confine communications with legal advisers to the “client group”
 - Third party advisers – reports by accountants / consultants may not be privileged (other than if providing expert services in a litigation context) – “*sole or dominant purpose*” test
 - Interviews: employees are a “third party” in a litigation/legal advice privilege context

External Investigations

- Information request
 - Compelled powers
 - Privilege – ground for resisting disclosure
 - Document review – identifying privileged documents / third party privilege
 - Disclosure of privileged material for credit
 - caution re use of limited waiver - civil liability risks and/or loss of privilege in other jurisdictions

External Investigations

- Dawn raids / on-site data collection
 - Marking privileged documents as such
 - Keeping a list of all internal and external counsel
- Creation of new documents
 - Balance risk of loss of privilege over need to respond to investigation and to have an audit trail of steps taken
 - Legal advice privilege will apply to documents created for the dominant purpose of seeking legal advice – restrict circulation of drafts to client group

Key points

- Application of privilege depends on the facts in each case
- Consider at an *early* stage
- External advice

How to navigate all of this

Best practice really comes down to:

- Think about structure and process at the outset
- Think about how you can get as much as you can in the privilege boxes
- Seek legal advice on privilege

Key principles (I would say this wouldn't I):

- Get a lawyer in there and get them giving legal advice
- Contemplate litigation

Creation of document and lines of communication

- Who needs to be involved? What lines of communication need to be open and who needs to report to who?
- Consider making a contemporaneous record of how matters were structured and why.
- Control the internal distribution of information.
- What documents need to be created? What documents don't need to be created?
- Consider whether some discussions should take place orally.
- Consider who is being copied into each email. Should they all be copied?
- Reduce the number of emails and keep email chains to a minimum.
- Think about sending attachments separately.
- If you only have legal advice privilege, who is the “client” within the organisation? Does anyone fall outside of this?

Fill your privilege boxes

- Label privileged documents clearly as “Confidential and Legally Privileged”.
- How should discussions be framed? Can the CEO update the external (or inhouse) lawyers, copied to the CFO?
- Consider the role that the in house lawyer is playing in the organisation at all times.
- Use language which makes clear something is legal advice such as “my legal advice is ...”, “from a legal perspective ...”.
- Make sure that discussions are introduced and framed appropriately.
- Make it obvious where litigation is your dominant purpose. Avoid other purposes getting in the way of the litigation purpose.
- In communications with third parties, fill that litigation privilege box where you can.
- If you think you might have litigation privilege soon, can certain tasks be deferred until that time?
- If you attend a meeting covering a mixture of privileged and non-privileged discussions, explain at the outset of the meeting when privilege will apply during the meeting and when it will not.
- Consider the content of any meeting notes carefully.

Wider dissemination of material

- Consider whether a document really needs to be shared outside of the organisation. Restrict any such distribution where possible.
- In communications with third parties, ensure that it is clear that the document/communication is being created for the dominant purpose of conducting the litigation.
- Take particular care when a document is being shared with a part of the organisation in another jurisdiction. Take local law advice on how privilege works in that jurisdiction where necessary.
- Consider whether the document can be shared pursuant to “common interest privilege”.
- Consider whether a formal confidentiality agreement could be put in place in order to recognise the confidential and privileged nature of the material and prevent any further dissemination.
- If you are communicating regularly with a third party recipient on this subject, consider whether they could form part of the defined client group.

And finally

- Provide non-lawyer colleagues within your organisation with our handout for colleagues
- Take a pack of jelly beans and mints
- Enjoy the rest of your day

Any questions?



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Strategy and settlement (including NDR)

Richard Garcia and Dan Smith

Settlement strategies and NDR

- Establishing a settlement strategy
- What to do when settling is worth it
- Communicating settlement proposals
- When mediation can work
- Securing the settlement
- What to put in DR clauses

Establishing a settlement strategy



Why establish a settlement strategy?

- Early merits assessment
- Potential outcomes
- Your objectives
- What can you get from a court?
- Who is in this dispute?
- Reasons for settling
- Keep objectives and strategy under review



**What to do when
settling is worth it**



What to do when settling is worth it

- Is it a sign of weakness?
- When to make a move
- Active litigation
- Cultural differences
- Credibility

A photograph of a business meeting around a wooden table. Three people are visible, focused on their work. One person in a dark suit holds a pen over a notebook. Another in a light beige blazer has hands clasped over a notebook. A third in a grey suit holds a pen. On the table are a laptop displaying charts, a tablet with a pie chart, a printed document with various data visualizations including a large green pie chart, and two coffee cups. The scene is brightly lit, suggesting a professional and collaborative environment.

Communicating settlement proposals

Communicating settlement proposals

- Without prejudice, WPSATC
- Who should communicate, and to whom?
- Mechanisms
 - Meeting
 - Call
 - Video call
 - Correspondence / Part 36 Offer
 - Mediation
- It doesn't need to contain an offer...

A close-up photograph of two hands holding two interlocking wooden puzzle pieces. The hands are silhouetted against a bright, hazy background of a sun low on the horizon, creating a warm, golden glow and lens flare. The puzzle pieces are light-colored wood. An orange semi-transparent rectangle is overlaid on the left side of the image, containing the text.

When mediation can work

Mediation

Advantages



- Prospects of success
- Focus on outcomes, not legal argument
- Innovative solutions
- Emotional connection
- Bypass opponent's lawyers
- Direct contact with witnesses
- Multi-party discussions

Disadvantages



- Depending on your case, most of the advantages...?
- Expensive – preparation and attendance
- Time-consuming, long day(s)
- Risk of exposing weaknesses
- Direct client exposure to opponents
- Undue pressure to settle

Mediation



- Preparing for the mediation
 - Mediator
 - Position papers
 - Rehearsals
 - Venue
 - Attendees
 - Authority to settle
 - Draft Settlement Agreement
 - "Walk away" red lines
 - Timing and deadlines

Mediation

- What if it fails?
- Is it really over?

Securing the settlement



Settlement Agreements

- Scope
- Payment
- Parties
- Releases, indemnities, undertakings
- Effect on proceedings
- Legal costs
- Confidentiality
- Public statements
- Enforcement

What to put in DR Clauses



Drafting DR clauses

- Litigation
 - Which jurisdiction? Match governing law
 - Exclusive or non-exclusive? One-sided exclusivity?
 - Consent to adequate forum
- Arbitration
 - Institutional or ad hoc
 - Seat
 - Language
 - Number of arbitrators, selection process
- Expert determination
- Avoid conflicting DR provisions!

Drafting DR clauses

- Escalation provisions
 - Good faith negotiations
 - “CEO” escalation
 - Mediation
 - Early neutral evaluations
- Contractual constraints
 - Thresholds and aggregates, liability caps, deferred consideration and escrow
 - Notices and time limits
- What does Business want
 - Survey your commercial & business needs
 - Develop a menu of DR options

Any questions?



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Limitation - how to avoid common pitfalls

Ben Sigler and Adam Culy

Introduction

- Whilst the rules applicable to limitation are relatively straightforward, their application is, in practice, a sequence of bear traps for the unwary.
- An awareness of the rules applicable to limitation is of fundamental importance to all practitioners given the consequences of falling into one of these bear traps; if a limitation defence is available, it is a complete defence, regardless of the merits of the time-barred claim.
- The application of the rules is a sufficiently complex area of law that even experienced practitioners find themselves caught out; indeed negligence claims arising out of a failure to promptly identify a time-bar are by some distance the most common type of claim asserted against solicitors.
- Some of the pitfalls we will be covering are worthy of a talk in their own right (e.g. the circumstances in which extensions to the primary limitation period are available); for today's purposes we will just be providing you with a high level overview so that you are able to spot them

Introduction

- The pitfalls we will be covering are:
 - Missing a contractual limitation period;
 - Failure to identify the time at which a cause of action accrues;
 - Failure to identify when the Claimant has sufficient knowledge required to bring the claim for the purposes of section 14A of the Limitation Act 1980 (the "Act"); and
 - Failure to identify the time at which a fraud or concealment was discovered (or could with reasonable diligence have discovered it) for the purposes of section 32(1) of the Act.
- We have also included some slides covering pitfalls relating to procedural issues (e.g. amendments to pleadings following the expiry of a limitation period) which, given time constraints, we will not be covering during this session as they are likely to be more relevant to external solicitors than in-house counsel
- However, you should be aware of these pitfalls if you intend to pursue litigation without external support

Overview of relevant rules under the Act

- Limitation periods are set in the Act.
- The general position under the Act:
 - Claims in contract (section 5 of the Act):
 - In claims pursuant to simple contracts, a Claimant has 6 years from the date of the breach of contract to bring their claim.
 - In claims pursuant to deeds, the limitation period is extended to 12 years from the date of the breach.
- Claims in tort (sections 2 and 14A and 14B of the Act):
 - A Claimant has six years to bring their a claim beginning on the date the cause of action accrued.
 - In cases of negligence:
 - This period is extended where the claimant does not have knowledge of all material facts at the time the cause of action accrued to 3 years from the date on which they had such knowledge.
 - However, there is a 15 year longstop date from the negligent act or omission in question in which claims must be brought regardless of the Claimant's state of knowledge.

Overview of relevant rules under the Act

- Statutory claims (section 9 of the Act):
 - A claimant has 6 years from the date of the breach of the relevant statutory duty to bring their claim.
- Other limitation periods apply in specific cases which are not relevant to this discussion (e.g. in respect of personal injury claims (section 11 of the Act), defamation claims (section 4A of the Act), etc).
- Extensions to primary limitation periods for fraud, concealment, or mistake (section 32 of the Act):
 - In cases of fraud or concealment or mistake, the primary limitation period identified above does not begin until a Claimant has discovered the fraud, concealment, or mistake or could have reasonably discovered it.

Overview of relevant rules under the Limitation Act 1980 (The "Act")

- Parties are generally free to vary the limitation period prescribed by the Act, either prior to a dispute arising, or thereafter, by contracting to this effect.
- In order to avoid a claim being time-barred as a matter of English law, a Claimant must merely seek to bring (i.e. issue) proceedings. However, that may not be the case if a claim is governed by foreign law.
- In ***St Helens v Barnes* [2006] EWCA Civ 1372**, the Court of Appeal held that a claim is "brought" for limitation purposes when the court receives the claim form, and not the date on which the claim form is issued.
- A claim can be brought outside of the limitation period and the Court will not take up this issue with the Claimant. It is for the Defendant to raise limitation defences and, if it can do so, it will provide it with a complete defence to aspects of the claim to which that defence applies.
- If a Defendant pleads a defence of limitation, the burden is on the Claimant to show that the claim is not time-barred; if the Claimant cannot do so, its claim will be dismissed.

Common Pitfalls:

Missing a contractual limitation period

- Contracting out limitation – clear clauses required.
- Reasonableness test – Unfair Contract Terms Act 1977 ("UCTA").
- Enforceability determined by reference to the overall facts and circumstances.
- Enforceability more likely for sophisticated commercial entities of equal bargaining strength.
- Contrast with an individual consumer where under the Consumer Rights Act 2015 the court will be less likely to enforce terms that appear unfair.
- Examples in practice:
 - The Court of Appeal held that a nine-month limitation period in standard trading conditions was reasonable under UCTA in ***Granville Oil & Chemicals Limited v Davis Turner & Co Limited CA [2003] EWCA Civ 570***: *"The 1977 Act obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. But I am less enthusiastic about its intrusion into contracts between commercial parties of equal bargaining strength, who should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms"*.

Common Pitfalls:

Missing a contractual limitation period

- ***Commercial Management (Investments) Limited v (1) Mitchell Design and Construct Limited (2) Regorco Limited (Formerly Roger Bullivant Ltd) [2016] EWHC 76 (TCC)*** the Court held that a clause which provided for claims to be made within 28 days of "*the appearance of any alleged defect...*" and "*the occurrence (or non-occurrence as the case may be) of the event complained of...*" did not satisfy UCTA reasonableness test as clause not "*practicable.*"
- Risk of claim being time-barred: (1) neglecting any contractual variation to the applicable limitation (2) evaluating whether it is enforceable.
- Helpful for defendants - extra grounds to strike out late claims, defences at trial or leverage in settlement negotiations.
- Common drafting involves shortening the primary limitation period (here 4 years):

Any claims must be formally commenced within 4 years after the cause of action accrued or...

Common Pitfalls:

Missing a contractual limitation period

- Shortening the period from date of knowledge (section 14A Limitation Act)
- This clause shortens this period from 3 to 2 years after knowledge of the damage:

.....in the case of a negligence claims, in the event that you are not aware of the claim within this time period, within a further 2 years after you become aware (or ought reasonably to have become aware) of the facts which give rise to the action, subject always, in the case of such negligence claims, to a long stop period of 15 years from the date from which the cause of action accrued. This provision expressly overrides any statutory provision that would otherwise apply.

Common Pitfalls:

Failure to identify the time at which a cause of action accrues

- Claims in contract:
 - There is no need for substantial loss to have been caused before a Claimant is able to sue in contract.
 - The cause of action accrues on the date of the breach of contract and the six year limitation period for claims in contract runs from this date.
 - In an action for payment for works or services, the cause of action arises on completion of the work (***Coburn v Colledge* [1897] 1 QB 702**).
 - Failure to identify when time starts running for the purposes of claims arising from the provision of services puts a Claimant at risk of a claim being time-barred.

Common Pitfalls:

Failure to identify the time at which a cause of action accrues

- Examples in practice:

Ice Architects Ltd in which the Court dismissed an appeal against a decision that the Claimant's cause of action accrued on the date when the work which formed the subject matter of its invoice was completed, rather than, as contended by the Claimant, 30 days after receipt of the invoice by agreement between the parties. The Court endorsed the obiter comments of Neuberger LJ in ***Legal Services Commission v Henthorn* [2011] EWCA Civ 1415**, that clear words are needed to displace the time of accrual of the cause of action in a claim for work and services, so as to give the creditor control over the start of the limitation period.

***Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* [2022] EWCA Civ 1699** in which the Court of Appeal held that a cause of action for payment for services accrues when the work is done and, unless there is a special term with clear words, is not deferred until invoice or demand, even in a contract that provides for payment to be made within a certain period.

Common Pitfalls:

Failure to identify the time at which a cause of action accrues

- Claims in tort:
 - The accrual of the cause of action in tort claims depends on the particular tort in question.
 - For example, in negligence, the cause of action accrues on the date on which damage is suffered, that is, the date on which a quantifiable or ascertainable loss is suffered.
 - A contingent liability is not sufficient to start time running ***Law Society v Sephton and Co and others* [2006] UKHL 22**, in which it was held that: “the possibility of an obligation to pay money in the future is not in itself damage”.
 - However, the Court has generally been very reluctant to categorise losses as pure contingencies.
 - Failure to identify when time starts running for the purposes of claims in negligence:
 - It is a common misconception that, in negligence claims, a putative Claimant will not have suffered loss until they suffer a financial impact arising from that negligence.
 - The general rule is that a loss is treated as having occurred at the date on which “*the client suffers damage if he does not get what he ought to have got*”.
 - For example, in professional negligence cases, this will generally be when negligent advice is acted upon by a client (e.g. by entering into a contract) and not when they subsequently suffer financial loss as a result of having received a “package of rights” less valuable than anticipated.

Common Pitfalls:

Failure to identify the time at which a cause of action accrues

- Examples in practice:

Shore v Sedgwick Financial Services Ltd [2008] EWCA Civ 863

- The Claimant pursued a claim for negligent financial advice regarding the transfer of pension benefits from one scheme to another scheme.
- The Court of Appeal determined that these claims were statute-barred as the claimant suffered loss for the purposes of the Act immediately upon the transfer when the Claimant obtained a bundle of rights which were, from the outset, less advantageous to him.

Axa Insurance Ltd (formerly known as Winterthur Swiss Insurance Company) v Akther & Darby Solicitors and others [2009] EWCA Civ 1166

- The Claimant pursued a claim arising from the negligent administration of certain, after the event insurance policies.
- The Court of Appeal determined that loss had been incurred, and therefore damage suffered for the purpose of the accrual of the cause of action in tort, as soon as the policies were issued.
- This decision demonstrates that there may be cases where there is both a contingent liability in the future, and actual damage at the time the relevant transaction is entered into.

Common Pitfalls:

Failure to identify the time at which a cause of action accrues

Holt v Holley & Steer Solicitors [2020] EWCA Civ 851

- The Claimant claimed that the Defendant, a firm of solicitors, had negligently failed to obtain expert evidence as to the value of certain property for the purpose of financial relief proceedings on divorce, which had adversely affected her financial position in the final order made.
- The Claimant alleged that she suffered damage, and therefore time had started running for limitation purposes when judgment was handed down and the order was made, as that damage was dependent on a contingency which might never occur i.e., the outcome of the final judgment in the financial relief proceedings.
- The Court of Appeal held, to the contrary, that the Claimant's loss was measurable, if not precisely quantifiable when she lost the ability to produce the expert evidence in the financial relief proceedings (at the latest by the end of the final hearing some weeks before the judgment was handed down).

Elliott v Hattens [2021] EWCA Civ 720:

- The Claimant instructed the Defendant, a firm of solicitors, in relation to the letting and sub-letting of her property.
- The Defendant failed to: (1) name the guarantors when preparing the lease; and (2) advise Ms Elliott to obtain property insurance. The documents were executed by the Claimant in February 2012.
- In November 2012, there was a fire at Ms Elliott's property and she suffered loss because of her lack of insurance and guaranteed rental income.
- On 10 April 2018, Ms Elliott commenced proceedings against the Defendant believing limitation to run from November 2012, when she first suffered financial loss.
- The Court of Appeal held that the claim was time-barred as Ms Elliott had received a "package of rights" less valuable than anticipated in February 2012.

Common Pitfalls:

Failure to identify when the Claimant has sufficient knowledge required to bring the claim for the purpose of section 14A of the Limitation Act ('LA') 1980

- S 14A – a further 3 years from “*date of knowledge*”

(6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both —

(a) of the material facts about the damage in respect of which damages are claimed;

(b) of the other facts relevant to the current action mentioned in subsection.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are —

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence;

(b) the identity of the defendant;

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

Common Pitfalls:

section 14A LA 1980

Haward v Fawcetts [2006] 1 WLR 428:

"It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence."

"a broad knowledge of the essence."

"...a claimant must know there was a real possibility the damage was caused by ("attributable to") the acts or omissions alleged to constitute negligence..."

"knew enough to justify setting about investigating the possibility that [the relevant] advice was defective."

Common Pitfalls:

section 14A LA 1980

Cole v Scion Ltd [2020] EWHC 1022 (Ch)

"What is required for a claimant to have knowledge of attributability is therefore knowledge in broad terms of: (a) the facts on which the claimant's complaint is based; (b) the defendant's acts or omissions; and (c) that there was a real possibility that those acts or omissions had been a cause of the damage".

McClean v Thornhill [2022] EWHC 457 (Ch)

"In such a case, what is required – as to knowledge of damage – is knowledge that if the Scheme did not attract the Tax Benefits, then the claimant would be sufficiently worse off, than if they had not entered into the Scheme at all, to justify instituting proceedings".

The key question is what would "...have caused a reasonable person in the position of the claimants to take independent legal advice?".

Witcomb v J. Keith Park Solicitors [2023] EWCA Civ 326

" ... time will not start to run under section 14A until a claimant has some reason to consider that the advice may have been wrong".

Common Pitfalls:

section 14A LA 80

***Integral Memory plc v Haines Watts* (unreported, 31 January 2012)**

requisite knowledge established:

"In view of the facts that the Claimant was himself considering consulting with his tax lawyers and/or the need to take tax counsel's advice about the continued viability of the Scheme..."

- *"factual essence"* of the damage suffered - defendant was in some way responsible.
- Not always obvious.
- Often early signs of the loss and who was responsible.
- Claims often too late.
- Highly technical area with many nuances to the cases.
- Can provide strong limitation defences and sometimes knockout success (provided issues not too evidence dependent).

Common Pitfalls:

Failure to identify the time at which a fraud or concealment was discovered (or could with reasonable diligence have discovered it) for the purposes of section 32(1) Limitation Act 1980

- Under section 32 of the Act, the limitation period does not begin to run until the claimant has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it.
- Millet LJ summarised the test as follows in ***Paragon Finance v DB Thakerar & Co* [1999] 1 All ER 400**:

"The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is upon them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take...the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive sense of urgency."

Common Pitfalls:

Failure to identify the time at which a fraud or concealment was discovered

- The Court will therefore enquire:
 - Whether there has been anything to put the Claimant, acting with reasonable diligence, on notice of a need to investigate; and
 - What a reasonably diligent investigation would then reveal, with time for limitation potentially running from this later date.
- How this standard should be applied in practice has been the subject of some judicial consideration, although the position is by no means settled and very much depends on the nature and facts of the case. At its highest, the standard could include issuing proceedings and/or making pre-action disclosure requests in order to enable the Claimant to investigate the matters that give rise to the fraud or concealment claim.
- These decisions emphasise that, while particular care must be taken in pleading fraud, still more care needs to be applied to limitation.

Common Pitfalls:

Failure to identify the time at which a fraud or concealment was discovered

- Examples in practice:

***Collins v Brebner* [2000] Lloyd's Rep PN 587**

- The Court held that a Claimant should not be considered to have discovered a fact so long as the Defendant was telling him the opposite of that fact and had no compelling documentary evidence to suggest that the Defendant was lying.

***Allianz Global Investors v RSA Insurance Group Limited* [2021] EWHC 2950 (Ch)**

- In this case limitation issues were considered in the context of shareholder litigation under s90A FSMA.
- The Defendant applied for strike out/summary judgment arguing that a portion of the Claimants' claims were time-barred. It contended that there was sufficient publicly available information about its own misconduct in news reports and the Defendant's own media announcements to enable a reasonably attentive investor to be in a position to bring a claim before 2015 such that claims brought in 2021 were out of time.
- The Court rejected this argument and in doing so affirmed the assessment is an "*objective standard*", in that the Court is concerned with what the Claimant could have identified based on an investigation using reasonable diligence, rather than what that Claimant did in fact learn. The assessment is based on the actual Claimant, and not some hypothetical Claimant.
- In this regard, the Court identified some the features that may affect steps that the investor could take to discover the fraud included the "*number of different kinds of businesses, purposes, sizes of holdings and losses*" of the relevant Claimant investor and "*that there may be differences in the kinds of investigations a fund might take depending on the proportion the relevant shareholding bears to its funds under management.*" The Court drew a distinction between "*actively managed funds, where managers make decisions about specific companies based on specific research into public information*" and "*tracker funds where investment decisions are based on the market capitalisation of the issuers making up an index and where the managers do not monitor the individual underlying investments.*"

Common Pitfalls:

Failure to identify the time at which a fraud or concealment was discovered

ECU Group Plc v HSBC Bank Plc & Ors [2021] EWHC 2875 (Comm)

- The Claimant pursued allegations of fraud and breach of contract, in relation to various foreign exchange transactions between 2004 and 2006.
- The Defendant applied to strike out or summarily dismiss those claims on the grounds that, amongst other things, they were time-barred.
- The Claimant argued that its claims were not time-barred because it did not have the requisite knowledge of the facts relevant to the cause of action until 2016, when it obtained relevant documents from a US regulatory investigation, and that HSBC, and that its claims, which were based in fraud, could not be pleaded on the basis of "*mere suspicion or belief held by one or more persons within ECU*".
- By contrast, the Defendant contended that the Claimant had actual or constructive knowledge of the essential facts of its claims by 2006 at the latest, when it had raised concerns and complaints with the Defendant about the transactions.
- The Court agreed with the Defendant and dismissed the Claimant's claims. In doing so, it held:
 - "*Sufficient knowledge*" to plead dishonesty does not require evidence in "*admissible form*". It was held that it was sufficient to have "*material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it.*"
 - If the Defendant had been "*reasonably attentive*", it would have sought legal advice and taken steps to pursue some of the claims in 2006. It noted "*reasonable diligence means not the doing of everything possible, but it means objectively exercising reasonable diligence*".
 - The exercise of reasonable diligence can encompass issuing substantive proceedings and/or making an application for pre-action disclosure, both of which the Claimant had failed to do promptly.

Common Pitfalls:

Failure to identify the time at which a fraud or concealment was discovered

***European Real Estate Debt Fund v Treon & Ors* [2021] EWHC 2866**

- The Claimant pursued claims in deceit and conspiracy in relation to the issue of loan notes totalling nearly £15 million, which would have been successful had they not been time-barred.
- While the Court accepted that section 32 of the Act only applies once a cause of action is complete, it held that "*it does not follow that the court investigating the claimant's state of mind must ignore events, communications or things known to the claimant before then*" noting: "*[s]uch postponement is available to a defrauded claimant who could not normally have discovered the facts, but it is not available to all victims of fraud, however careless they may be in attending to and asserting their rights. If a claimant could reasonably have discovered the fraud by virtue of events and circumstances occurring before it actually suffered a loss, there is no principled rationale for allowing it the indulgence of more than the normal six years' period to bring its claim.*"

***Gemalto v Infineon* [2022] EWCA Civ 782**

- The Court emphasised that there is "*an element of uncertainty is inherent*" in terms of what is expected of the Claimant, as it will again depend on the facts and, indeed, the claims ultimately pursued by the Claimant.
- In this case, the Claimant's case was time-barred as it had failed to pursue a claim within the 6 year period following publicity of cartel activity by a regulator. The Court made clear that it is "obvious that, once the regulator publicises the fact that it believes, subject to defences, that there is prima facie case that certain persons have participated in an unlawful cartel, a claimant knows that it has a worthwhile claim."

Common Pitfalls:

Failure to plead all claims within time - amendments

- Section 35 LA 80 and CPR 17 - amending claims/adding parties.
- A complicated area!
- Joining a new defendant to an existing claim/counterclaims outside the limitation period ("*relation back*" to the original claim).
- Contribution claims for parties jointly/severally liable in connection with the "*same damage*" - 2 years after a judgment or settlement.
- New claims or adding/substituting parties under CPR 19 not a given.
- Amendments to pleadings after the limitation period has expired.
- Section 35 does not permit "*new claims*" unless they are permitted under court rules - CPR 17.4:
 - New claim arises from the "*same facts*" or "*substantially the same facts*" as already pleaded (CPR 17.4(2)).
 - You are correcting a mistake to the name of a party – but not identity (CPR 17.4(3)).
 - Altering the capacity of the party only (e.g. executor after death) (CPR 17.4 (4)).

Common Pitfalls:

New Claims/Substantially the same facts

- “*New claims*” and “*substantially the same facts*” have a lot of case law.
- New claims are new “*causes of action*” where the court will analyse:
 - The facts – is this the same factual situation?
 - The nature of the duty - e.g. contractual, statutory or tortious?
 - A new remedy or loss might not in itself be a new cause of action; ***Stock v London Underground Ltd, The Times 13 August 1999, CA.***
 - Whether the new claim arises from “*the same or substantially the same facts*” – can the defendant show that they need to investigate new facts outside those already at issue?: ***Kaplan v Super PCS LLP (formerly Chancery (UK) LLP) [2017] EWHC 1165 (Ch); Lokhova v Longmuir [2016] EWHC 2579 (QB); [2017] E.M.L.R. 7***
- Deliberate wrong-doing/fraud/new causes of action/not same facts: ***Blue Tropic Ltd v Chkhartishvili [2016] EWCA Civ 1259; Paragon Finance Plc v DB Thakerar & Co (A Firm); Paragon Finance Plc v Thimbleby & Co (A Firm) [1999] 1 All E.R. 400, CA.***
- Claimants will commonly make mistakes in the initial pleadings - Defendants wish to exploit mistakes at trial and thus resist amendments.

Common Pitfalls:

Failure to take necessary procedural steps to serve proceedings within an identified limitation period

- Failure to effectively extend a limitation period by way of a standstill agreement.
 - There are numerous cases of standstill agreements being held to have been ineffective to preserve claims, or, alternatively, not to have stayed claims, due to discrepancies in their drafting. See, for example, ***Russell v Stone* [2017] EWHC 1555 (TCC)**.
 - From a practical perspective, parties should not underestimate the length of time it may take to conclude a standstill agreement. Putative Claimants should ideally start negotiations for a standstill agreement at least six months before expiry of the relevant limitation period. This will avoid the Claimant having to issue proceedings at the last minute, when there may not be sufficient time to adequately prepare the claim.

Common Pitfalls:

Failure to take necessary procedural steps to serve proceedings within an identified limitation period

- Failure to identify the deadline in which to issue proceedings correctly:
 - Cases where the cause of action accrues at midnight (e.g. as a result of an omission to take a step within that day):
 - For the purposes of calculating limitation, the date on which the cause of action accrues is ignored.
 - In ***Matthew v Sedman* [2019] EWCA Civ 475**, the Court of Appeal held that where a cause of action accrues at midnight, the following day is counted for the purposes of calculating limitation.
 - Therefore, where the defendant trustees' alleged breach was a failure to claim under a court-sanctioned scheme of arrangement by the deadline of 2 June 2011, the last day for issuing the claim form was Friday 2 June 2017. The claim form was in fact issued the following Monday and so was out of time.

Common Pitfalls:

Failure to take necessary procedural steps to serve proceedings within an identified limitation period

- Failure to pursue proceedings with due despatch thereafter:
 - After being issued, the claim form must be despatched (by completing the steps required by CPR 7.5) within its four-month validity period, otherwise a fresh claim form will need to be issued within the relevant limitation period.
 - It should be noted in this regard that both the claim form and particulars of claim must be served before midnight on the calendar day four months after the date of issue of the claim form under CPR 7.5. See ***Maggistro-Contenta & Anor v O'Shea & Anor* [2019] EWHC 3035** for one of many examples of a failure to adhere to this rule.

Common Pitfalls:

Failure to take necessary procedural steps to serve proceedings within an identified limitation period

- Failure to adhere to relevant provisions of foreign law:
 - The High Court has held that proceedings were time barred where the claim form was issued in the English courts before the expiry of the applicable Greek limitation period, but was not served until after that period had expired: ***Pandya v Intersalonika General Insurance Company SA* [2020] EWCH 273 (QB)**.

Any questions?



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A Q&A on what matters to the Court: a view from the bench on what actually wins and loses cases

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Any questions?



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Closing remarks

Roland Foord

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