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New duties, misconduct and mistakes, limitations on recovery, and limitation: 5 key cases from 2025-2026

Simon Wilton KC and Alice Nash

Vanquis Bank Ltd v TMS Legal Ltd [2025] EWHC 1559 (KB)

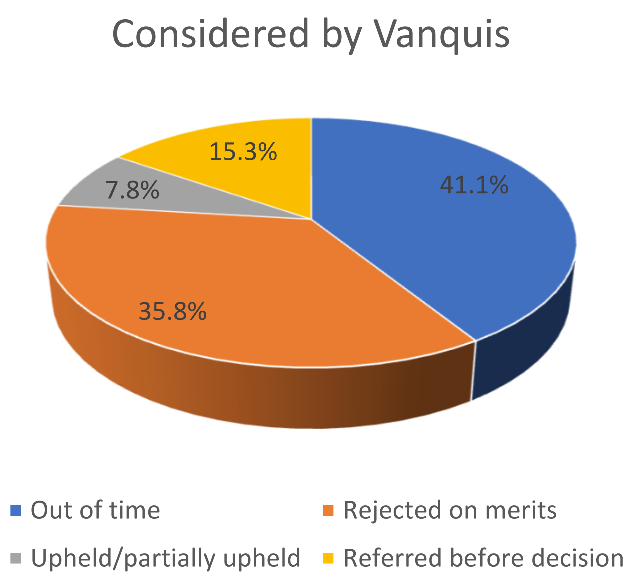
A new weapon against claims factories?

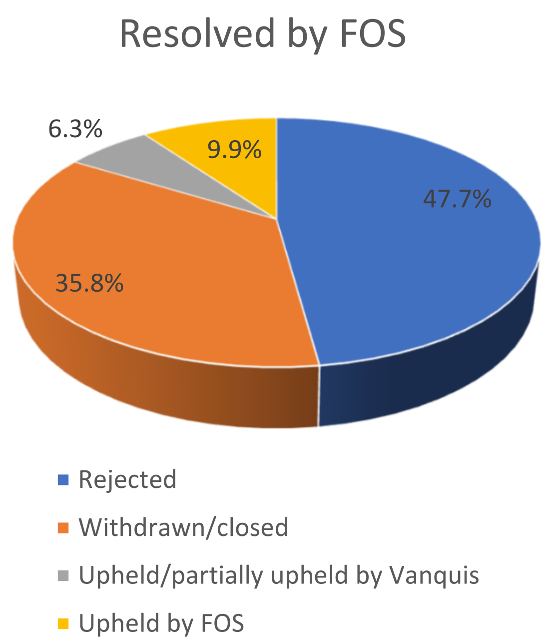
Vanquis Bank Ltd v TMS Legal Ltd [2025] EWHC 1559 (KB)

- “Second chance” lender vs volume claims solicitors
- TMS operated on no-win-no-fee basis (30–45% of redress)
- Complaint to lender → Final Response Letter
- If dissatisfied → escalate to Financial Ombudsman Service (FOS)
- FOS fee per complaint once >3 complaints/year

Vanquis Bank Ltd v TMS Legal Ltd

- October 2022-August 2024 ~33,000 complaints to Vanquis; 12,250 resolved by FOS





Vanquis Bank Ltd v TMS Legal Ltd

Alleged shortcomings vis-à-vis clients:

- submitting claims without reasonable grounds;
- failing to gather adequate information;
- failing to warn clients that Vanquis was likely to suspend credit;
- failing to engage with Vanquis's detailed "final response letters" on the merits of each claim;
- making "merits representations" recklessly.

Vanquis Bank Ltd v TMS Legal Ltd

Vanquis's losses:

- £2.8M temporary staff
- £930k/year management time
- £9M+ FOS fees
- Lost profits

Vanquis Bank Ltd v TMS Legal Ltd

- Lord Hoffmann in *OBG v Allan* [2007] UKHL 21 at [47]:

"(a) a wrongful interference with the actions of a third party in which the claimant has an economic interest, and (b) an intention thereby to cause economic loss to the claimant."

Jay J broke this down into four limbs:

- **Unlawful acts** against a third party, which would be independently actionable by that party (unless the only reason for non-actionability was absence of damage to the third party).
- **Interference** with the third party's freedom to deal with the claimant.
- **Intention** to cause loss.
- **Loss** in fact caused.

Vanquis Bank Ltd v TMS Legal Ltd

- Alleged breaches of contract, breaches of fiduciary duty and deceit all capable of being relevant **unlawful acts**;
- Arguably (with reservations) the mere fact of causing a complaint to be made = **interference** with customers' freedom to deal with Vanquis; a fortiori if Vanquis was compelled to withdraw credit;
- **Intention** could be established if TMS knew its business model would inevitably cause loss to Vanquis;
- **Loss** not limited to lost profits; if claims should never have been brought, all loss directly caused by TMS's conduct.

Vanquis Bank Ltd v TMS Legal Ltd

Implications?

- Potentially seismic for volume claims firms – but how likely?
- Is anyone acting on a CFA in the frame?
- What about other financial services professionals – rules of conduct may have similar effect to withdrawal of credit
- Potential flexibility of economic torts vs. negligence

Novitas Loans Ltd v Amtrust [2026] EWHC 592

- Failed litigation funding scheme in respect of failed consumer claims.
- Claim by lender against ATE insurer settled for £48.5m.
- Onward claim by ATE insurer against (insurers of) solicitors alleging breaches of (1) contractual and concurrent tortious duties under Terms of Business Agreements with the solicitors, and (2) free-standing duty of care.
- Difficulties in the way of holding that lawyers acting for claimants owe free-standing duties to parties with collateral commercial interest eg funders or ATE insurers: eg *Greene Wood McClean LLP v Templeton Insurance Limited* [2010] EWHC 2679 (Comm).

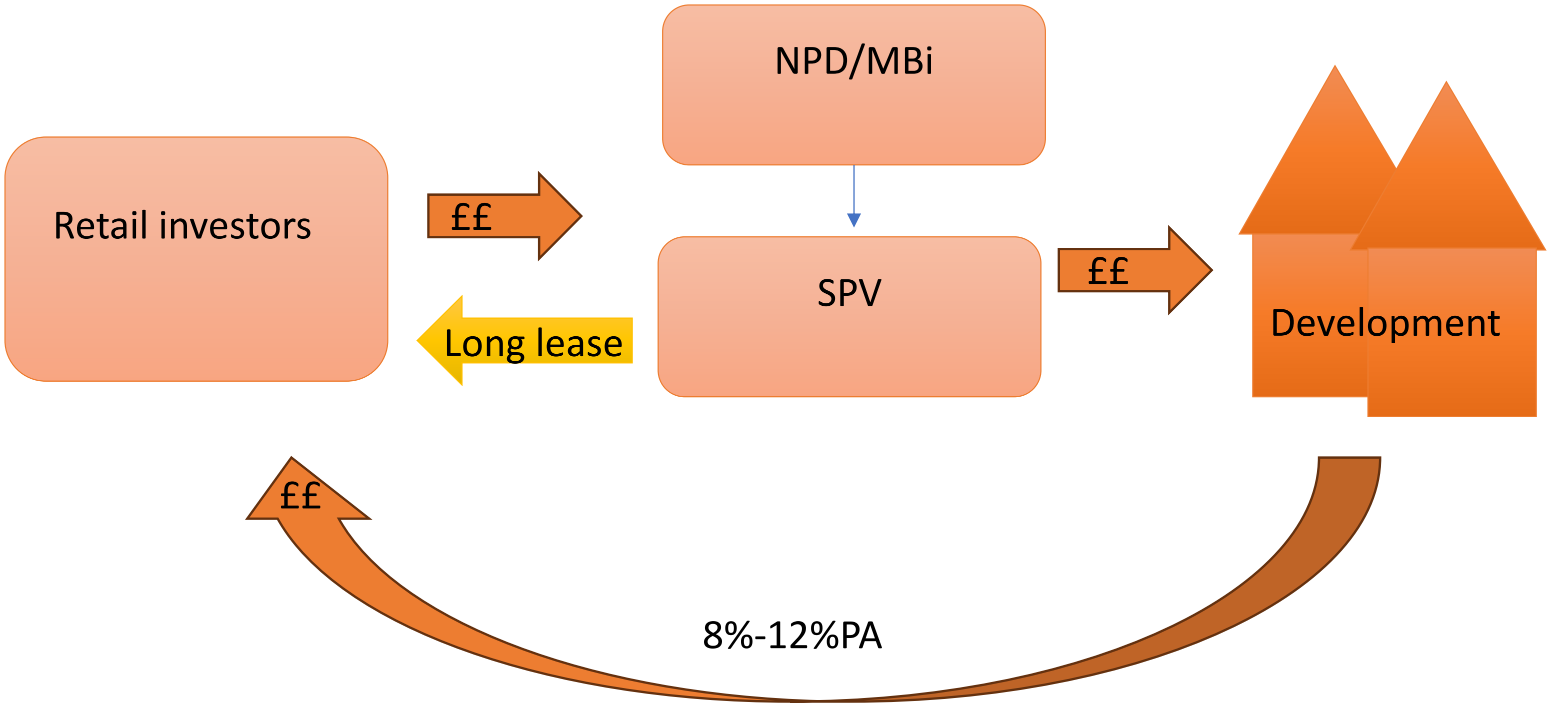
Novitas Loans Ltd v Amtrust [2026] EWHC 592

- Court upholds existence of express contractual obligations of the solicitors to the ATE insurers under the TOBAs and of concurrent tortious obligations insofar as the TOBAs expressly imposed what amounted to a contractual 'duty of care'.
- But no free-standing duty of care of more general character to risk-assess and conduct each claim with reasonable skill and care.
- The potential for a conflict of interest and the presence of a detailed contract defining the duties owed militated against any such duty.

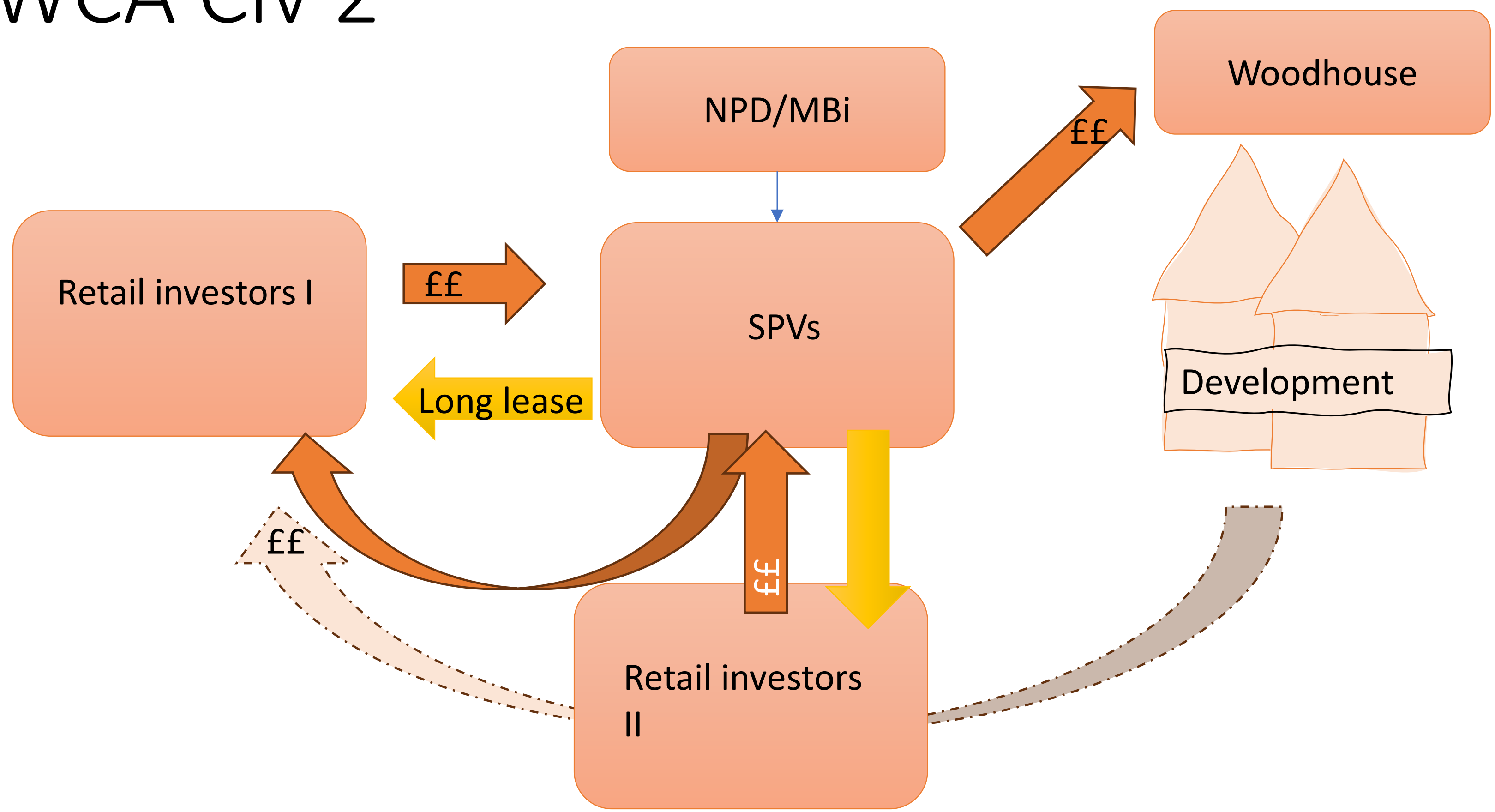
Novitas Loans Ltd v Amtrust [2026] EWHC 592

- The sting in the tail: any liability of the solicitors under the TOBAs would not be covered under the PI policy as did not arise from "*the provision of services as a Solicitor*". Alternatively, the liability was excluded from cover as "*assumed or accepted by the Insured under* [a] *contract o*[r] *agreement for the supply to, or use by the Insured of goods and services in the course of Professional Business…*"
- The potential antidote to the sting: the ATE insurer might have a claim based on subrogation – in effect bringing a claim the claimants would have had against the solicitors which it could do if and insofar as the insurer had indemnified the claimants for their losses. That claim *might* be covered under the policy.

Afan Valley v Lupton Fawcett LLP [2026] EWCA Civ 2



Afan Valley v Lupton Fawcett LLP [2026] EWCA Civ 2



Afan Valley v Lupton Fawcett LLP

Allegations:

- LF failed to advise the schemes were/might well be CISs under FSMA
- Hence operating without authorisation was a breach of s.19 FSMA and investors entitled to remedies under s.26
- Cs said schemes would not have proceeded if proper advice given
- LF sought summary judgment arguing no recoverable loss

Afan Valley v Lupton Fawcett LLP

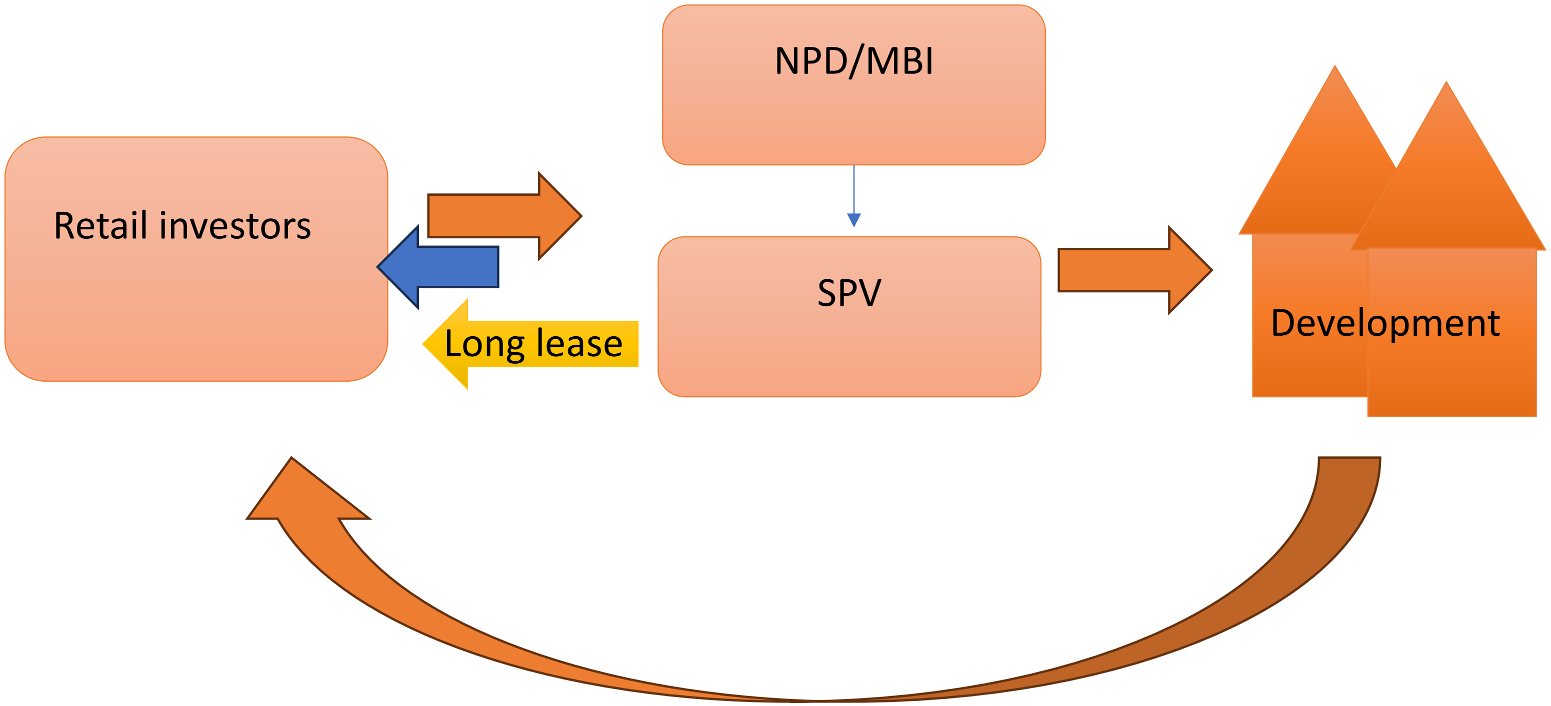
High Court (Sheldon J):

- Liability to repay was not a loss: £ in, £ out

  “There is no relevant distinction between the case of a borrower accepting a loan (and thereby incurring an obligation to repay the money it has received from the lender) and the case of the Claimant companies here accepting an investment (and thereby incurring a potential obligation under s. 26 FSMA to repay the monies they have received from the investors).”

- Losses arose from the way the money was dealt with, not from initial receipt

Afan Valley v Lupton Fawcett LLP



Afan Valley v Lupton Fawcett LLP

Grounds of appeal:

- £ in, £ out ignored professional fees, commissions etc – not balance sheet neutral
- Losses generated by operating the schemes fell within LF's duty because it knew the relevant facts
- Liability to pay additional compensation under s.26(2)(b) of FSMA amounted to additional loss

Afan Valley v Lupton Fawcett LLP

Recoverability: MBS v Grant Thornton LLP [2021] UKSC 20

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote/different effective cause/C has mitigated/failed to mitigate loss (the legal responsibility question)

Afan Valley v Lupton Fawcett LLP

CA held:

- LF retained solely to advise whether schemes were CISs and the consequences of that status;
- Not advising on commercial viability, risk of fraud, Mr Woodhouse's conduct, etc
- Hence only losses directly connected to regulatory consequences were within the scope of LF's duty

Afan Valley v Lupton Fawcett LLP

So:

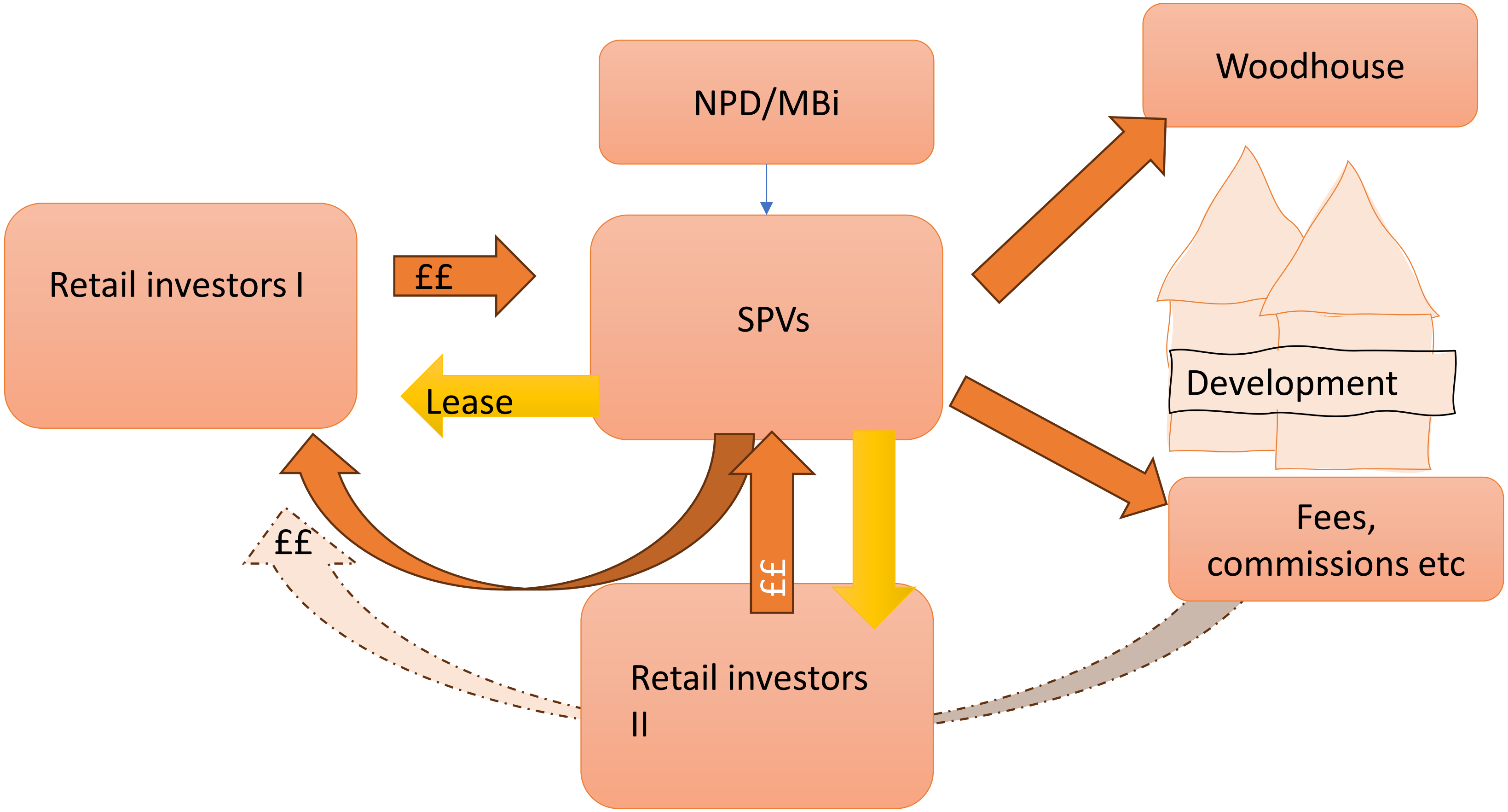
- Fees, commissions etc outside scope – would have been incurred even if schemes were not CISs
- Losses generated by operating the schemes were outside LF's duty as the same failure and collapse would have occurred in any event
- Liability to pay additional compensation under s.26(2)(b) of FSMA amounted to additional loss – not pleaded, but in any case no loss because there would have been at least equivalent civil claims.

Afan Valley v Lupton Fawcett LLP

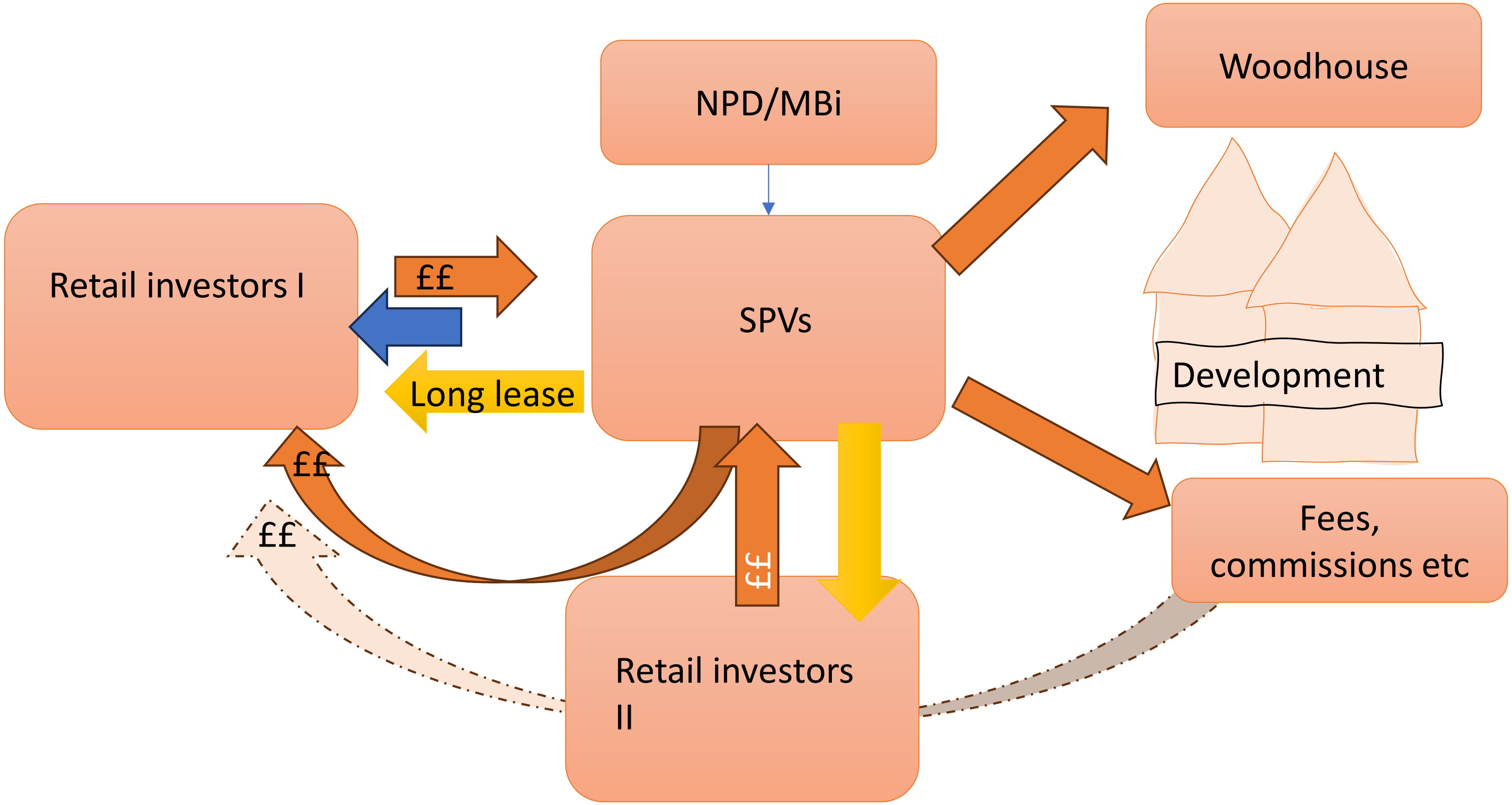
Discussion

- Shows rigour of “scope of duty” rule – particularly the use of the counterfactual

Afan Valley v Lupton Fawcett LLP



Afan Valley v Lupton Fawcett LLP



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Adcamp Limited v Office Properties PL Ltd [2026] EWCA Civ 50

- The problem of the Claimant ("A") who sues a later incarnation ("C") of the professional entity ("B") which should have been sued: can A substitute B for C after limitation has expired?
- Two gateways under section 35(6) of the Limitation Act 1980:
  - *"(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name"*
  - *(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action"*

Adcamp Limited v Office Properties PL Ltd [2026] EWCA Civ 50

- *Insight Group Ltd v Kingston Smith* [2012] EWHC 3644 (QB).
- Leggatt J. distinguishes between (1) always intending to sue the solicitors who acted for you but making a mistake about their name, thinking they were C not B, and (2) making a legal mistake to the effect that C can be sued for the mistakes of B.
- Holds that the mistake in that case– suing the LLP not the prior practice, an unincorporated partnership - could be corrected under s.35(6)(a) as it was a mistake of the first kind, whereas clear law a mistake of the second kind could not be corrected under s.35(6)(a).
- Says, obiter, that if it had been a mistake of the second kind then could have been corrected under s.35(6)(b).

Adcamp Limited v Office Properties PL Ltd [2026] EWCA Civ 50

- In *Office Properties* A sued C which had taken over B's business. A should have sued B. A mistakenly believed that C could be liable as the 'successor practice' to B.
- The parties agreed that s.35(6)(a) did not assist because this was a mistake of law which cases say is not curable under s.35(6)(a).
- Judge holds, following Leggatt J., can be cured under s.35(6)(b).
- CA disagree, s.35(6)(b) was much narrower – this was not carrying on the same claim involving the same or substantially the same factual allegations as it involved a new defendant and a new basis for liability.

Adcamp Limited v Office Properties PL Ltd [2026] EWCA Civ 50

- A major problem for claimants who make legal mistakes when deciding who to sue and then try and correct the position out of time.
- The CA grant permission to appeal and the SC will hear the appeal in early 2027.
- Likely SC will depart from (meritless?) distinctions between different kinds of mistake so that the court will have jurisdiction to cure the problem whatever the character of the mistake?
- But, if so, there still has to be a mistake, and there is a still a discretion to be exercised which may not always favour the claimant.

Kay v Martineau Johnson [2026] EWCA Civ 224

- S14A of the Limitation Act 1980. 3 years from when you know:
  - *"(7) 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) …damage attributable in whole or in part to the act or omission which is alleged to constitute negligence"*
- Knowledge includes constructive knowledge: "*(10) …which you might reasonably have been expected to acquire (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek".*

Kay v Martineau Johnson [2026] EWCA Civ 224

- *Haward v Fawcetts* [2006] UKHL 9 – a case about what amounts to actual knowledge sufficient to start time running– dicta suggest little difference between actual and constructive knowledge.
- Lord Nicholls at [9]: "*In other words, the claimant must know enough for it to be reasonable to begin to investigate further*"
- Lord Mance at [126]: "*Actual knowledge …involves knowing enough to make it reasonable to investigate whether or not there is a claim …Constructive knowledge…involves a situation where, although the claimant does not yet know sufficient for* [actual knowledge] *to apply, he knows sufficient to make it reasonable for him …to acquire further knowledge*."

Kay v Martineau Johnson [2026] EWCA Civ 224

- 2008: MJ represents W in ancillary relief proceedings culminating in 'clean break' settlement approved by the court.
- 2008-2009: W, experiencing financial hardship, discovers indications of what she believes may be undisclosed wealth on the part of H, returns to MJ, but is told insufficient to re-open settlement.
- 2017-2018: W, now has new partner, a solicitor, and investigates H's circumstances with a view to re-opening the settlement.
- May 2020: Counsel's advice obtained – no basis for doing so, but MJ potentially at fault in respect of basis of settlement.
- March 2023: Proceedings issued against MJ.

Kay v Martineau Johnson [2026] EWCA Civ 224

- HHJ Russen KC: Actual or constructive knowledge by end of 2009 as C knew had a bad outcome which might be due to failings by D. Or constructive knowledge by end of 2018 as should have investigated more promptly the possibility of setting aside settlement whereupon would discover claim against MJ. Alleged lack of funds needed to get expert input (from counsel) irrelevant.
- CA: All agree judge wrong to find actual knowledge in 2009. Majority consider judge right to find constructive knowledge then. All consider he was right to find constructive knowledge for reasons he gave by end of 2018. Lack of means unlikely to be relevant and evidence did not show lack of means prevented investigation in any event.

Kay v Martineau Johnson [2026] EWCA Civ 224

- Actual knowledge requires an <u>actual</u> appreciation not just of a bad outcome, which C had in 2008-9, but also that it was or might be due to failings by D, which C did not have.
- Males LJ at [80]: "*It is not enough for actual knowledge that the claimant knows the facts from which the possibility of a claim against the defendant can be inferred if he or she does not actually draw the inference. ….that may be enough for constructive knowledge but not for actual knowledge*."
- Cf Constructive knowledge in 2008-9 because given poor outcome and advice by D nothing could be done to re-open the settlement it would have been reasonable for C to investigate further the possibility of a claim against MJ.
- Lack of means unlikely to be relevant when asking if all reasonable steps taken for purposes of constructive knowledge issue, and even if relevant need to show it was in fact reason why investigations not undertaken/knowledge not acquired.