hailshamchambers

Ten lessons for every professional negligence practitioner

Spike Charlwood,
Hailsham Chambers

Some questions

1. Where's the note?
2. The merits are on my side, is that enough?
3. C is a rogue, do I have to pay?
4. C has missed a deadline, am I home and dry?

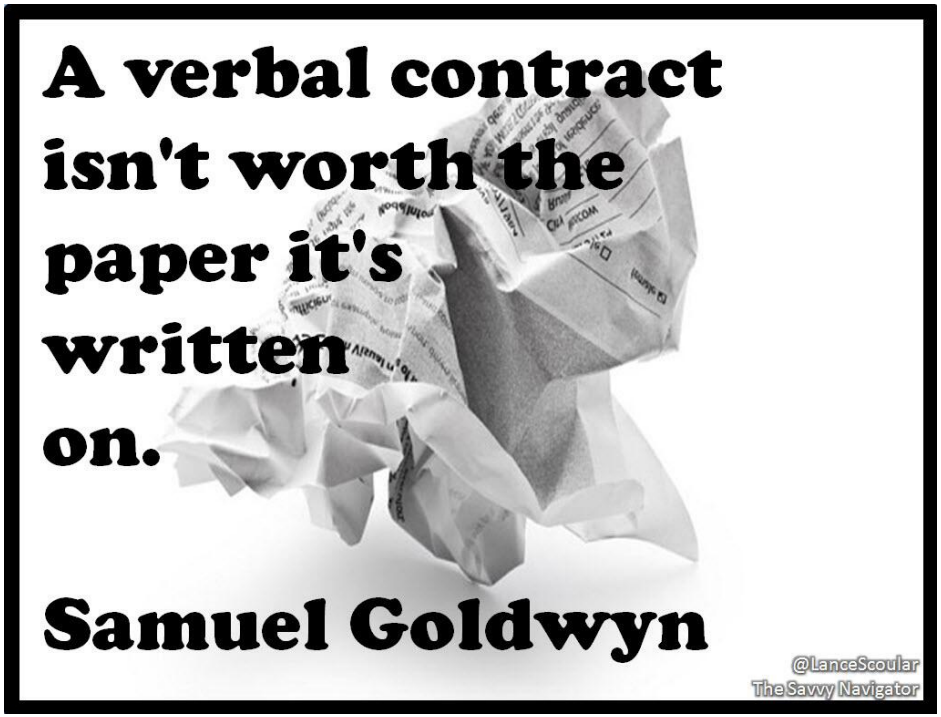
5. The judge doesn't like my case, what do I do?

6. Why doesn't this make sense?

7. The insured is clearly in breach, how do I win?

Attendance notes and files

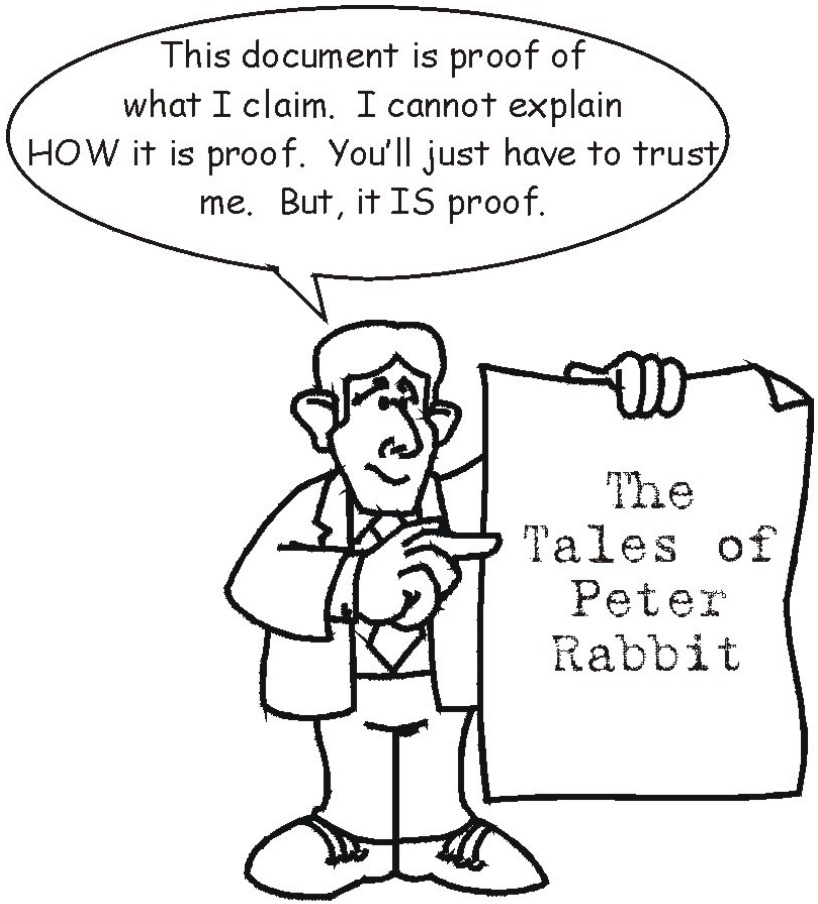
- *Darby & Darby v Joyce* [2014] EWCA Civ 677
  - "Mr Darby made no attendance note (an unprofessional omission that was a feature of all his dealings with Ms Joyce)."



- *Santander v RA Legal* [2014] PNLR 20

  - "56 In the context of a routine conveyancing transaction, the incidence of the burden of proof may frequently be crucial … such transactions are, in the working life of those involved, so routine and so frequent that a specific recollection of any part of one of them, not precisely recorded in contemporaneous correspondence, documents or attendance notes, will rapidly fade."

- Cp. *Fulham v Nicholson Graham & Jones* [2008] EWCA Civ 84
  - Alleged omission of a contract term
  - How did it come to be deleted?
  - No note existed
  - Although the various drafts showed when it went
  - And D won

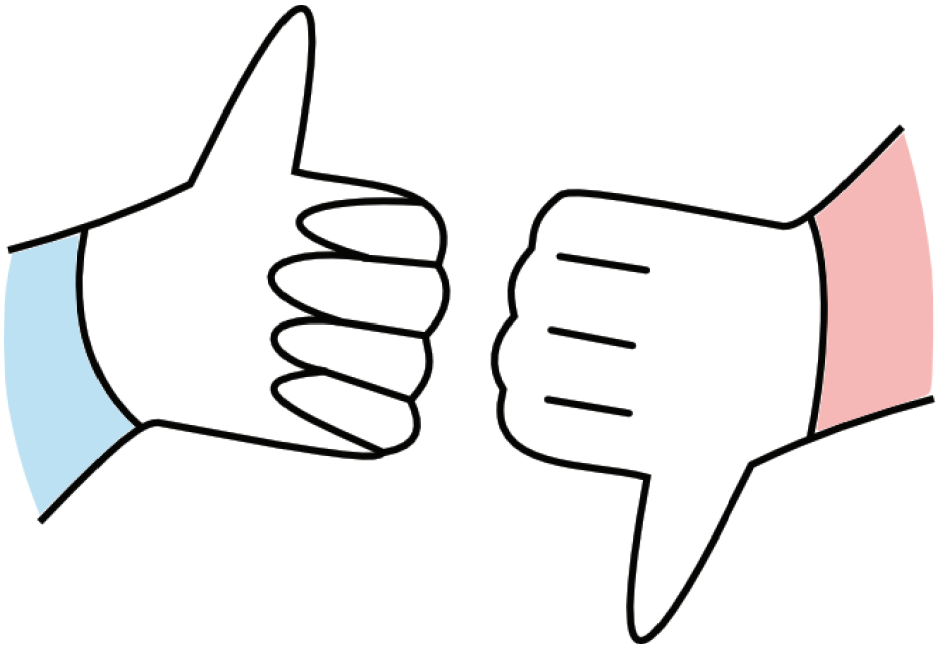


Subject: Burden of Proof

- But this is not just a burden of proof point
- C will often have a better reason to remember than D
- "There is no substitute for a proper attendance note"
  - *Jackson & Powell*, 11-182

The merits

- *Fulham* (above)
- Compare
  - *Nationwide v Davisons* [2013] PNLR 12
  - *Santander v RA Legal* (above)



- *McIlgorm v Bell Lamb & Joynson* [2001] PNLR 28, Gibbs J

  – “35These matters can also legitimately be coupled with the view that a court's sympathy might well be with [X], who had developed a very unpleasant industrial disease, and was left without a remedy against the company which had employed him or against any insurer. …

… Such matters, whilst not decisive in the legal sense, are examples of factors which an experienced barrister can, and in my judgment should, weigh in the balance in advising on a settlement. One reason for that is the psychological effect that it might have upon a trial Judge, in a case where the decision on matters of facts and law turned out to be otherwise finely balanced."

C is a rogue, do I win?

- Often, yes
- But what about …

- C and his partner owned a nightclub
- It burned down
- Insurers alleged that the partner started the fire deliberately
- C counterclaimed for a declaration, but that was struck out for want of prosecution
- C sued his solicitors
- The trial judge held that C had only a 25% chance of success on the arson point

- These were the facts of *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920

- C, not himself said to be a rogue, recovered

- *Raleys v Barnaby* [2014] EWCA Civ 686
  - A VWF under settlement claim
  - Alleged failure to include services claim
  - D denied any VWF and cross-examined on the basis that the claim was a fraud

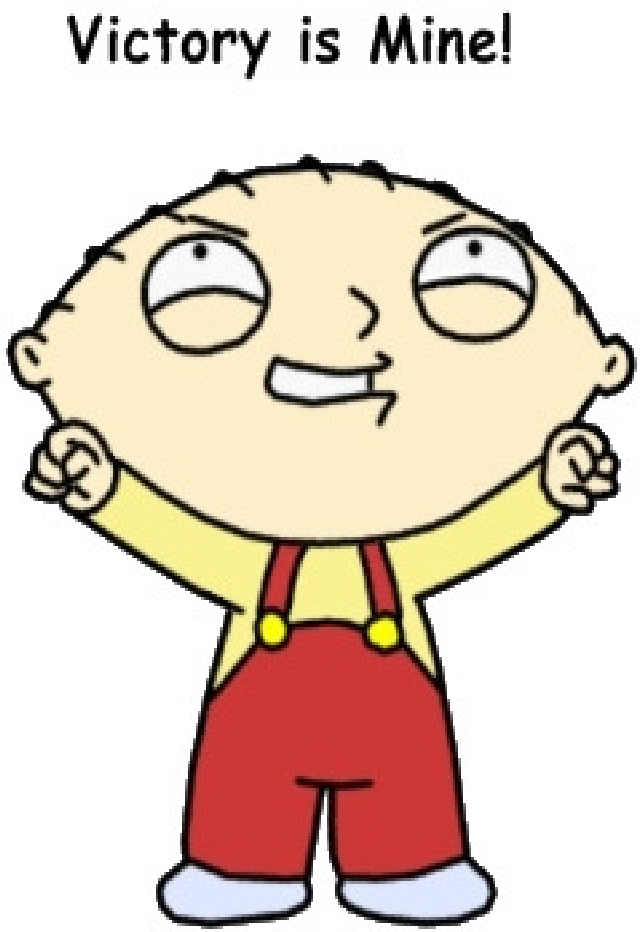
- The judge disagreed

- *Per* the Court of Appeal:
  - "the attack on his dishonesty, …, seems to me to have been misjudged"

- Where does this leave matters?
  - (1) It is often helpful to show that C is a rogue
  - (2) Loss of a chance claims may be different
  - (3) And don't forget that the judge may disagree with you

C has missed a deadline, etc

- November 2013 …
  - *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795
- July 2014 …
  - *Denton v TH White Ltd* [2014] EWCA Civ 906



- *Denton*
  - *Mitchell* needs to be “clarified and amplified” in certain respects
  - Now a three stage approach to relief from sanctions

- (1) Identify and assess the seriousness and significance of the failure to comply which engages CPR 3.9(1)

  - If the breach is neither serious nor significant, the court is unlikely to need to spend much time on (2) and (3)
  - "Trivial" is no longer the test
  - "Serious or significant" is
  - In many cases that will most usefully be measured by whether the breach imperils future hearing dates or otherwise disrupts the conduct of litigation, including generally
  - … but a failure to pay court fees is also specifically mentioned as serious

- (2) Why did the default occur?

- (3) Evaluate all the circumstances of the case including the two factors specifically mentioned (proportionality and the need for compliance)

  - Not the case that serious breach + no good reason = application for relief fails
  - The two specific factors in the rules are to be given particular weight

- “42 It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.”

(underlining added)

The judge doesn't like my case

- The *Swain-Mason* saga

- June 06 – solicitors retained
- March 09 – proceedings commenced alleging negligence
- April 10 – case came on for trial; adjourned
- May 10 – case amended

- November 10 – second trial date; C permitted to amend again; case adjourned
- Jan 11 – procedural appeal to CA
  - Important judgment on late amendment
- Feb 11 – third trial date; maintained
- Mar 11 – judgment for D
- Apr 12 – C's substantive appeal to CA dismissed

- Three trial dates …
- … two trips to the Court of Appeal

- Along the way …
  - **Counsel**: … the case has changed …
  - **Judge**: All right, I will direct the claimants to add [the expert's] report to the reamended particulars of claim.
  - **C**: They would need permission for that, My Lord.
  - **J**: If [the claimant's counsel] wants to stand up, he can have it. I'm not going to let these things to go on technicalities …

- **C**: My Lord, if your Lordship is going to give my learned friend permission to amend without hearing submissions from me …
- **J**: I don't think he needs it
- **C**: Your Lordship said if he stands up he'll get it
- **J**: Mm
- **C**: In that case, my Lord, I'm not quite sure what I'm supposed to do

- And there's more:
  - **J** (re costs): [leading counsel for the claimants] spent a lot of time dealing with letters and emails [from leading counsel for the defendant]. I have to say my response would have been … well it would have been two letters, two words, and the second one would have been "Off" but there we are."

Why doesn't this make sense?

- C buys a house and says he's worked on it over time
- The receipts for the works stopped a year before trial
- But C claims ongoing costs

- “Probing from [counsel] established that receipts were not, as they appeared to be, contemporaneous documents, but were in fact manufactured for the purposes of this litigation, …”

- “This episode lead me to be very reserved in my approach to the claimant’s credibility. … Such behaviour calls into question the integrity of a claimant’s approach to litigation.”

So breach won't help …

- What may?
  - Scope of duty *(SAAMCo)*
  - Causation
  - Heads of loss disallowed
  - Loss purely economic
  - Damages must be reasonable as between the parties
  - Too remote
  - Mitigation

- These are logically distinct, but interrelated
  - *Blue Circle Industries v Ministry of Defence* [1998] 3 All ER 385
  - *Smith New Court Securities Ltd v Scrimgeour Vickers* [1997] AC 254

- A possible practical question:
  - is the loss claimed by C sufficiently linked to D's failure to do what s/he was asked to do that it is appropriate (fair) to hold D liable for that loss?

The ten lessons

1. Attendance notes are often crucial

2. … particularly (but not exclusively) for solicitors / where the burden of proof is on D

3. … but there can be other ways for D to get home

4. The merits, including the court's likely sympathy, matter

5. … but that does not mean that D can necessarily pack up shop just because it thinks C a rogue

6. Procedural defaults are now less likely to be a knock out blow than recently

7. Sometimes you have to be ready for the long haul and to stand your ground in the face of adversity

8. Even small oddities / inconsistencies can be very important

9. Whatever many C's may think, breach is not the be all and end all: there are many post-breach questions that may help D

10. When looking at those, it often helps to focus on the facts first


Out to
LUNCH!