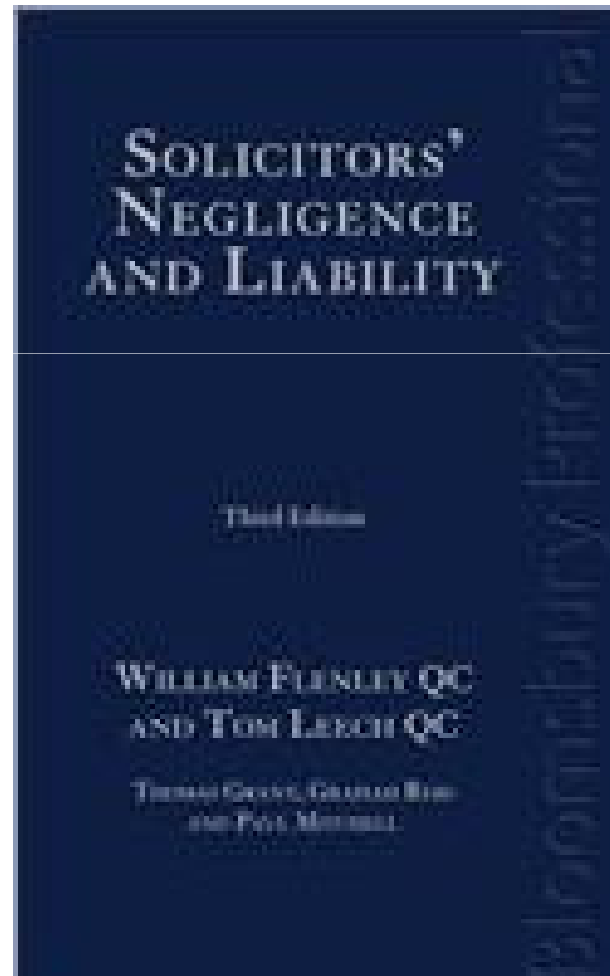


# **10 Lessons for Every Professional Liability Practitioner**

**William Flenley QC**





## Third Point

- ‘It’s the merits’
- Prepare case in a way that suggests the merits favour your client
- Ask: how is the judge likely to view the case, in terms of ‘gut instinct’ as to fairness?

## *Nationwide BS v Davisons*

- Identity fraud on mortgage lenders
- Fake firm of solicitors, 'Rothschilds', pretending to act for the seller of a property
- The fake firm behaved broadly as a normal conveyancing firm would
- Lender's solicitors released the lender's money to the fake solicitors; the money was lost due to the fraud

- No allegation that lender's solicitors had been negligent, or that any negligence had caused the loss.
- Lender's solicitors were in breach of trust
- Issue: should they be excused for having acted 'reasonably'? (s.61 Trustee Act)
- NB They had failed to comply with Law Society guidance as to the undertakings they should have sought from seller's solicitors

- Breach of trust is a matter of strict liability: so solicitors could be in breach of trust but blameless
- The solicitors had acted in breach of Law Society guidelines, but not majorly so
- Even if they had not acted in breach of the guidelines, the lenders' loss would still have been suffered
- Held: solicitors entitled to relief under s.61 so the lender lost
- See now: *Santander v RA Legal*

## *Needler v Taber*

- Needler financial advisors in breach of duty
- As a result Mr Taber transfers his pension to Norwich Union
- He should have remained in the Ilford Pension Scheme
- On demutualisation of Norwich Union he received a payment of £8k. Did he have to give credit for it in his claim?



## Fourth Point

- The other side may try to fundamentally alter their case at or before trial
- The judge may permit this if s/he thinks that there is something in the new allegations

## Fifth Point

- New points introduced at the last moment may often be weakened by the lateness of their introduction
- Example of an arbitration as to whether an insured condoned the dishonesty of an employee
- Or a claim that any reasonably competent professional would have done x or y

## Sixth Point

- Preferable to avoid last minute amendments
- The overriding objective has just been altered to include reference to the importance of ‘enforcing compliance with rules, practice directions and orders’

## *Swain-Mason v Mills & Reeve*

- (NB the claim against Mills & Reeve was rejected)
- Mr Swain had (i) a business to sell and (ii) a weak heart, which was about to be operated on
- Original case: Ds should have structured deal differently due to risk of death in the operation
- New case: should have structured it differently regardless of the operation

## *Swain (2)*

Court of Appeal: heavy burden on a party seeking to amend at the last minute, unless the new case arises out of new disclosure

## Seventh Point

- Mistakes made in drafting witness statements can be fatal
- It is easier to sort out inconsistencies with the documents when there's time to think about the issues, rather than in cross-examination
- Having to serve supplemental witness statements may make the errors in the earlier version obvious

## Eighth Point

*Mehjoo v Harben Barker* (June 2013)

- Relevance of experience of expert witnesses in relation to the specific type of transaction in question;
- *Mehjoo*: expert in the taxation of parties not domiciled in the UK

## *Webb v E Surv*

- Was it negligent for lenders to lend at high LTVs, with self-certification of income?
- Possibility for challenge, if lending expert evidence and disclosure of lender's business model



## *Mehjoo* again

- Experts worked for large firms of accountants
- Relevance of disclosure of what the accountants' own firms were doing at the relevant time

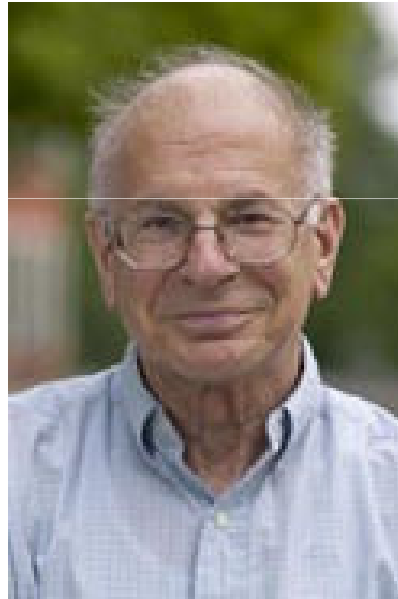
## Ninth Point: retainer letters

- *Mehjoo* (3): alleged failure of accountants to advise claimant to use his ‘non-dom’ status to avoid paying CGT when he sold his business
- Retainer letter limited
- Held retainer letter varied by accountants’ conduct: they had a duty to advise on saving CGT even though claimant had not asked them to do so
- Cf other professions

# **generalist's duty to suggest specialist advice**

- Generalist accountant had duty to suggest seeking advice of a 'non-dom' specialist

# Tenth Point: approaches to settlement



## You are the claimant

- You are advised you have a 95% chance of success; claim for £1m
- You are offered a payment of 90%
- Do you take it?

## You are the defendant

- You have a 95% chance of losing and having to pay £1m
- You are offered a settlement at 90%. Do you take it?

## Nuisance value claim

- You are the claimant
- You have a 5% chance of winning £1m
- Do you adopt an aggressive stance?

## You are the defendant

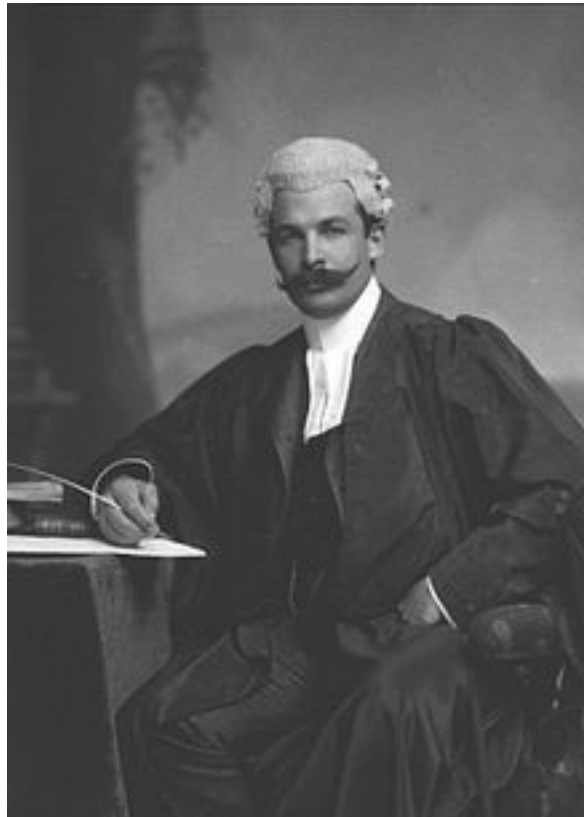
- Claim worth £1m, 5% chance of losing
- You are offered settlement of £100k (ie 10%). Do you take it?



## Transport for London

- You face 200 nuisance value claims a year
- 5% chance of losing each one
- If lose: pay £1m
- Offered settlement of £100k per claim (10% of the value of the claim)
- If fight all: you lose 10 cases and pay £10m in total
- If settle all: you pay £20m in all (20 x £100k)

# And finally: Waiver of privilege re Counsel



# Waiver of privilege re Counsel

- Client sues solicitor for negligent conduct of litigation
- Implied waiver of privilege re the solicitor sued: so that the solicitor may answer
- *Hellard v Irwin Mitchell*: held: implied waiver of privilege in counsel's advice too.