BUDDLEFINDLAY

# Legal update on litigation and dispute resolution - July 2017

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## Supreme Court and Court of Appeal weigh in on the duty to account for breach of trust

In *Adlam v Savage* [2017] NZSC 11, the New Zealand Supreme Court was asked to consider whether the profit derived from breach of trust ought to be apportioned between two related trusts.

In breach of trust, the Appellant (Adlam) made a profit of approximately $14m from power stations on land owned by Bath Trust. One of the stations (GDL station) drew geothermal resources from an adjacent property owned by a separate but related trust (Farm Trust).

The trustees of the Bath and Farm Trusts brought proceedings against Adlam in the Māori Land Court (MLC). Although the Farm Trust could not make out a claim against her, the Court ordered Adlam to account to the Bath Trust for the full amount of the profit.

Adlam appealed to the Māori Appellate Court, where she successfully argued that the profit from the GDL power station ought to be apportioned between the Bath and Farm Trusts, as the assets of both trusts had contributed to it. Given that Farm Trust could not make out a claim against her, Adlam therefore stood to retain a portion of the profit.

On appeal, the Court of Appeal reinstated the MLC's decision. The Court of Appeal concluded that:

- A causal link was required, not between the breach of duty and the trust property (as observed by the Appellate Court), but between the breach of duty and the profit
- The causal link in this case was clear; but for the breach of trust, a lease would not have been secured so that the power station could be built, and without the power station, there would have been no profit.

Adlam unsuccessfully sought leave to appeal to the Supreme Court. There was no valid reason why a deduction should be made for the Farm Trusts' contribution, the Court said. Nor was there any convincing reason why Adlam should keep any of the profit at the expense of innocent parties.

See the Supreme Court's decision here and the Court of Appeal's decision here.

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## Solicitor's error almost costs appellants their right to appeal

In *Almond v Read* [2017] NZSC 80, the New Zealand Supreme Court considered whether and to what extent the merits of an applicant's case will be taken into account when deciding whether to grant an extension for an out of time appeal.

The appellant, Almond, had instructed her solicitors to file an appeal against an unfavourable High Court decision. Almond's solicitors filed the appeal, but did so one day out of time. As a result, Almond sought an extension of time. The Court of Appeal refused to grant the extension, as they considered Almond's case to be hopeless. Almond appealed the ruling to the Supreme Court.

The Supreme Court held that the following factors were relevant:

- The length of the delay
- The reasons for the delay
- The conduct of the parties
- The significance of the issues at hand
- Whether any prejudice had been suffered by the respondent.

The Court also held that although the merits of one's case could be a relevant consideration, the merits are unlikely to be relevant if the above factors are overwhelming. In Almond's case, the merits of the case carried little weight as there had

been an insignificant delay caused by a solicitor's error, and the respondents suffered no prejudice. Unless the case is "clearly hopeless", consideration of the merits will not by itself warrant a denial for an extension of time where the delay is insignificant.

See the Court's decision here.

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## No broad jurisdiction of Electricity Rulings Panel to hear disputes

In *Unison Networks Ltd v Solar City New Zealand Ltd* [2017] NZHC 1343, the New Zealand High Court held that the Electricity Rulings Panel does not have broad residual jurisdiction to consider matters beyond what is specifically provided for in the legislative scheme.

The case arose from a complaint laid with the Electricity Authority by Solar City about new delivery prices payable for electricity provided by Unison Networks. Solar City alleged that Unison Networks' delivery prices were in breach of "pricing principles" contained in part 6 of the Code that governs the electricity industry. However the Electricity Authority, when considering the complaint, declined to take any action on the basis that part 6 did not apply in the circumstances. Solar City then sought to lay a complaint directly with the Rulings Panel.

The Panel concluded that it did not have any specific jurisdiction to consider the dispute under the Electricity Industry (Enforcement) Regulations 2010 (Regulations), which specify how disputes are to be determined. However, the Panel considered that it nonetheless had a broad residual discretion to hear the dispute, under r 76(1) of the Regulations, and also s 50(4) of the Electricity Industry Act 2010 (Act), from which the Regulations were derived.

The High Court held that the Electricity Rulings Panel was incorrect in that conclusion. Thomas J considered that Parliament had intended the Panel's jurisdiction to be restricted to disputes of a kind specifically identified as being referable to the Panel. The Regulations and the Code outlined a detailed and comprehensive scheme for the handling of disputes. The Panel could only exercise its powers subject to those provisions. The Panel had no residual jurisdiction to hear the complaint in the circumstances.

Thomas J held that this outcome was sound as a matter of legal policy. The legislative scheme provided sufficient oversight of the Electricity Authority's powers, and the interpretation against a broad residual discretion would not be contrary to rules of natural justice. This was because Solar City had the option to appeal the Electricity Authority's decision to the High Court on a point of law, or to apply for judicial review. Thomas J considered it entirely principled that if a complaint cannot pass the prima facie threshold for investigation, then there should be no further avenue for challenge other than review or appeal in the High Court.

See the Court's decision here.

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## Supreme Court rejects Banks' leave to appeal on costs

In *Banks v R* [2017] NZSC 98, the New Zealand Supreme Court declined to grant John Banks leave to appeal against the High Court's decision (upheld in the Court of Appeal) in which the Court declined to grant Mr Banks an award of costs arising from his criminal trial in 2014.

The appeal concerned Mr Banks' criminal trial of knowingly transmitting a false return of his electoral expenses. Mr Banks had initially been found guilty in relation to two of Kim Dotcom's donations made through Mr Dotcom's company, Megastuff. However, Mr Banks' conviction was subsequently quashed as Mr Banks' wife managed to locate two witnesses who essentially provided Mr Banks with an alibi as to when the Crown alleged the offending took place.

Mr Banks sought costs. The High Court refused his application - Mr Banks needed to establish that he was not guilty of the offending for which he was first convicted, and the High Court was not satisfied that Mr Banks was innocent. Mr Banks sought leave to appeal the High Court decision. The Court of Appeal refused to grant leave. Mr Banks then appealed to the Supreme Court.

The Supreme Court considered that there was no point of general or public importance in the appeal, and there appeared to be no miscarriage of justice. Accordingly, Mr Banks' application for leave to appeal was dismissed.

See the Supreme Court's decision here.

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## UK Supreme Court restates principles of contractual interpretation

The UK Supreme Court has had another opportunity to clarify the law on contractual interpretation in *Wood v Capita*

*Insurance Services Limited* [2017] UKSC 24, following the recent decision of *Arnold v Britton* [2015] 2 WLR 1593.

The case involved a sale and purchase of shares. After completion of the sale, the company's selling practices were brought into question, resulting in the implementation of a costly remediation scheme to compensate affected customers. Liability depended upon the interpretation of the indemnity clause.

In delivering the Court's judgment, Lord Hodge reiterated that textualism and contextualism are not conflicting paradigms. The search for objective meaning must be reached having regard to both the language of the provision in the context of the contract, and, depending on the nature, formality and quality of its drafting, on the wider context as a whole.

When the Court can determine two objective meanings, the Court may favour that which aligns with commercial common sense. However, the Court will be cautious, as one side may have agreed to something that did not serve its interests, or a provision may have been a negotiated compromise.

As was reflected in the outcome, the Court will not save a party from a bad bargain when the language and drafting clearly reveals the objectively intended meaning, however unfavourable it may be.

See the Court's decision here.

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## Witness the duty of confidentiality

In *Glenn & Anor v Watson & Ors* [2016] EWHC 3259 the English High Court considered whether the rules relating to the waiver of privileged information also apply to the waiver of confidential information.

The case concerned an application by Sir Owen Glenn and Kea Investments (a company wholly owned by Sir Owen, but which was owned by Corona Trust at the relevant time) for relief against a transaction that had allegedly been entered into by way of fraudulent misrepresentation. The defendants sought to question a prospective witness, Mr Miller, about certain matters. Mr Miller had a significant role, as protector of the Corona Trust, employee, close friend and advisor of Sir Owen for roughly 30 years, and thus a large amount of the evidence he was to give was confidential. The defendants alleged that the claimants had waived confidentiality in certain matters by referencing those matters in their pleadings. Conversely, the claimants maintained their right to confidentiality had not been waived.

It is common practice that pleading a privileged document amounts to an express waiver of privilege, and when doing so the claimant must elect to either to abandon their reliance on the document or to accept that the claimant has waived privilege. However, the Court noted that it is a separate issue as to whether these same principles apply to waiver of confidentiality in non-privileged communications. Justice Nugee considered that although confidential matters had been referred to in disclosed documents, and had thereby come into the possession of the other side, this did not mean that the potential witness, who owed a duty of confidentiality, was now free to discuss such matters with anyone else before trial. Mr Miller's duty of confidentiality remained, which prevented Mr Miller from discussing the relevant topics with the defendants.

See the Court's decision here.

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## A legitimate expectation of disclosure

Following on from *Glenn & Anor v Watson & Ors* [2016] EWHC 3259 (covered here), in *Glenn v Watson & Ors* [2016] EWHC 3346 the defendants applied for specific disclosure of two documents. The first, "the Roten communications" concerned all documentary communications between Sir Owen Glenn and Mr Roten, which allegedly were about whether Sir Owen could or would influence the Corona Trust.

Sir Owen's US-based children and grandchildren (the children) had been beneficiaries of two trusts - the Regency Trust and the Corona Trust. Assets of the Regency Trust had been transferred to the Corona Trust, but shortly before this transfer, the children had been removed as beneficiaries of the Corona Trust, meaning they could no longer benefit from either trust. Sir Owen's claim was that the transfer of assets and removal of the children as beneficiaries was done without his knowledge, and Mr Eric Watson owed him a fiduciary duty, which Mr Watson breached by failing to disclose the changes to the trusts.

The defendants alleged that the email chain between Sir Owen and Mr Roten showed that Sir Owen knew that he could not appear to be in a position in which he could influence the Corona Trust. This knowledge would be relevant as to whether Mr Watson owed Sir Owen a fiduciary duty, and if Sir Owen had a legitimate expectation of being consulted about investments of the Corona Trust. Justice Nugee agreed with the defendants that the content of the communications would shed light upon this issue.

The second class of documents, "the Wyoming Trust communications" were non-privileged communications discussing the reasons why the Wyoming Trust was established. These reasons allegedly included discussions about the benefit the children were to have because of changes to the Corona Trust. The defendants sought access to these documents to prove

Sir Owen had prior knowledge of the change in entitlements and established the Wyoming Trust for that reason. Justice Nugee concluded the material presented by the defendant made it prima facie likely that the claimants had documents in their possession, which would shed light on the reasons for the proposed establishment of the Wyoming Trusts. Justice Nugee granted the defendants' application for specific disclosure.

See the Court's decision here.

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## Parent company not responsible for child's mess

The case of *His Royal Highness Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2017] EWHC 89 (TCC) concerned the liability under English law of an English anchor holding company for claims made against a local (Nigerian) subsidiary.

The case concerned jurisdictional challenges by the two defendants, UK registered Royal Dutch Shell plc (RDS) (the ultimate holding company of the Shell Group), and its indirect Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC). Two sets of claimants, each set representing thousands of Nigerian citizens, had filed claims in the English courts for damages relating to serious ongoing pollution and environmental damage in the Niger Delta region from oil spills from SPDC's oil pipelines and other operating facilities. The English courts could only hear the claim against SPDC if the claimants had a claim against RDS which would "anchor" claims against SPDC (made under Nigerian law) in the English courts. The key question on which this case turned was whether RDS owed a duty of care to the Nigerian claimants under common law.

While the Court held in principle that a parent company may owe a duty of care to third parties for the acts of its subsidiary, this was not the case here for reasons including that:

- RDS did not have any operations in Nigeria
- RDS was not better placed than SPDC to prevent the relevant harm and SPDC had not relied on it to do so
- RDS did not directly hold shares in SPDC
- RDS "merely hold[s] the shares in its subsidiaries as if it were an investment holding company".

Both defendants were therefore successful in their jurisdictional challenges, meaning that the Court would either dismiss the claims, or assume jurisdiction and strike the claims out.

This decision can be contrasted to the recent judgment of Coulson J in the *Vedanta* decision (*Lungowe and others v (1) Vedanta Resources plc (2) Konkola Copper Mines plc* [2016] EWHC 292 (TCC)). Here, an anchor defendant was liable for claims made against a local (Zambian) subsidiary. There were two key factual differences between the cases that can be said to account for the different results. First, the companies in *Vedanta* were more closely related than the companies were in this case. Secondly, claims in *Vedanta* could not be brought under local (Zambian) law, whilst in Shell's case the claims could be pursued in Nigeria.

These decisions illustrate the increasing reach of international corporate responsibility law in the English courts.

See the Court's decision here.

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## We heard you the first time! Res judicata strikes out again

In *Ackerman v Thornhill QC* [2017] EWHC 99, the English High Court considered when a judgment can be set aside by way of *res judicata*.

In 2011, Mr Joseph Ackerman brought an action against the defendants, challenging a number of transactions that related to the demerger of property owned in a family group. The Judge dismissed the claim. The parties signed a consent order before any appeal was heard. In that order, they agreed that the appeal should be dismissed, and that Mr Ackerman would not continue to pursue the proceedings.

In 2015, Mr Ackerman brought a further claim against the defendants. The defendants applied to strike out the claim on the basis that either the doctrine of *res judicata* (ie the matter in dispute had already been decided by a competent court), or that the terms of the settlement in the consent order barred Joseph from pursuing the 2015 claim. Mr Ackerman sought to amend the pleading to apply to set aside the 2011 judgment, claiming the defendants obtained the 2011 judgment by fraud, collusion and dishonesty.

The defendants' strike-out application was granted. On the facts, the Court considered there was no prospect of Mr Ackerman succeeding in his fraud allegation.

In reaching this conclusion, the Court applied the House of Lords' approach in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, which set out when a judgment could be set aside. In particular, there needs to be:

- Fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the judgment in the earlier claim
- 'Conscious and deliberate dishonesty' in relation to the concealment of that evidence
- Material evidence, ie that such evidence would have entirely changed how the judge decided that earlier claim.

See the Court's decision here.

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## In Saudi Arabia we trust - the risks of Lex Situs

In *Akers & Ors v Samba Financial Group* (Rev 1) [2017] UKSC 6, the UK Supreme Court confirmed that British insolvency officers can only void dispositions of a company's assets held on trust in certain circumstances.

Mr Al-Sanea held shares in various Saudi Arabian banks on trusts governed by Cayman Islands law, on behalf of the claimant, Saad Investments Co Ltd (SICL). Six weeks after SICL's liquidation, Mr Al-Sanea transferred the shares to the defendant Samba Financial Group (Samba) in breach of the trust. SICL argued that the transfer was void under section 127 of the Insolvency Act 1986 (UK) (s 127), as the transfer was a "disposition of the company's property... made after the commencement of the winding up."

The case turned on the application of the conflict of laws rules, namely the lex situs rule as recognised in *Macmillan Inc v. Bishopsgate Investment Trust* (No 3) [1996] 1 WLR 387, and whether there was a "disposition" of property within the meaning of s 127.

The Supreme Court found that under English law, a trust may be created, exist, and be enforceable in respect of assets located in a jurisdiction where that jurisdiction's law does not recognise trusts (in this case, Saudi Arabia). With regard to s 127, the Court found that the section addresses cases in which legally owned assets are disposed of, not when a trustee holds an asset on trust and transfers it to a third party in breach of trust. Rather than being classified as a disposition under s 127, the beneficiary could protect and enforce its beneficial interest against the trustee through the application of regular principles of equity. However, the Court noted that the enforceability of beneficial interests will be inherently limited against third parties, for example by the common law rule protecting bona fide purchasers for value.

The decision is relevant to insolvency practitioners in the UK or in jurisdictions with avoidance provisions similar to s 127, and to practitioners dealing with them in relation to trust assets located anywhere in the world, under common-law jurisdiction or otherwise.

See the Court's decision here.

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## Proceedings not abuse of proceedings despite prior adverse arbitration decision

In *Michael Wilson & Partners Ltd v Sinclair and Another* [2017] EWCA Civ 3, the Court of Appeal for England and Wales considered whether it was an abuse of process to bring proceedings in relation to issues that had previously been decided in an arbitration involving the plaintiff (but not the defendant).

The appellant company, Michael Wilson & Partners Ltd (MWP), sought to recover assets, which, it said, a former partner (Mr Emmott) acquired in breach of his contractual and fiduciary obligations in the names of the respondents (Sinclair). There had been an arbitration hearing between MWP and Mr Emmott, which MWP had lost.

In the High Court, the Judge noted that Sinclair, who was seeking to take a benefit of the arbitration award by claiming abuse of process, had not been a party to the earlier arbitration, and so would not have been bound by any detriment had the arbitration been decided differently. Nonetheless, the High Court found that it was an abuse of process for MWP to pursue Sinclair now, due to a number of 'special circumstances', which included:

- The intent for the arbitration to have effect between the parties involved, including Sinclair
- MWP being estopped from being able to make out its central allegation and necessary pre-condition of the claim (that Mr Emmott had received the shares in breach of his fiduciary duty)
- The "unusual unfairness" in permitting MWP to have a second opportunity to make the same allegations against Mr Emmott, who had successfully defended himself in the arbitration.

On appeal, the Court considered there was indeed a jurisdiction for a court to take account of an earlier arbitration (as opposed to a court) award, when considering whether proceedings were an abuse.

In particular, the Court noted that under the 'special circumstances' test, the Judge placed too much weight on:

- The intent of arbitration and award, to which Sinclair was not a party
- His view that, because MWP was inviting the Court to come to a different view to the arbitrators in relation to the nature and discharge of Mr Emmott's obligations, MWP was mounting an illegitimate collateral attack on the award
- The position of Mr Emmott in the Court proceedings. It would not be manifestly unfair for Mr Emmott to face MWP's allegations for a second time, as MWP was not seeking any relief against Mr Emmott and he would be treated no more than a potential witness.

The Court also noted that the party making an application of abuse had the burden of proof in establishing that an order should be made. Consequently, the Court of Appeal overturned the decision to strike out the action.

(The same parties are also litigating issues in New Zealand: see *Michael Wilson & Partners Ltd v Thomas Ian Sinclair* [2016] NZCA 376.)

See the Court's decision here.

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## Privacy the winner in latest EU decision on mass data collection

In Joined Cases C-203/15 Tele2 Sverige AB v Post-och telestyrelsen and C-698/15 Secretary of State for the *Home Department v Watson and Others* [2016] All ER 107, the Grand Chamber released its decision on the compatibility of mass data collection legislation in the UK and Sweden with European law.

Ever since the CJEU's Digital Rights Ireland decision, there has been uncertainty surrounding domestic legislation that provides for the collection and retention of, and access to, mass data. The EU Directive on privacy and electronic communications (Directive 2002/58/EC) allows member states to adopt legislation that limits the privacy measures put in place by the Directive in relation to mass data collection.

The Grand Chamber clarified the breadth of this discretion in its judgment. In particular, the Grand Chamber held that the Directive, when read in light of privacy and personal data rights under the EU Charter of Fundamental Rights, precludes national legislation providing for general and indiscriminate retention of all traffic and location data. Retention must be limited to what is strictly necessary, and this requires clear and precise rules within the legislation. The Grand Chamber further held that access to collected data must be restricted solely to fulfilling the purpose of fighting serious crime, and that access requires prior review by a court or independent authority. The Court was of the opinion that "while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, however fundamental it may be, cannot in itself justify [the necessity of] national legislation providing for the general and indiscriminate retention of all traffic and location data."

The decision is a win for privacy advocates at the expense of broader indiscriminate powers to collect data in the fight against crime and terrorism.

See the Court's decision here.

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## Interest on interest bearing notes?

The English Court of Appeal in *Credit Suisse Asset Management LLC v Titan Europe 2006-1 PLC & Ors* [2016] EWCA Civ 1293 considered the proper interpretation of notes in a securitisation structure. The case arose out of a dispute about the correct calculation of interest for a tranche of notes issued as part of a commercial mortgage-backed securitisation (the Class X Notes). The issue on appeal was ordinary or default interest was payable following a default in the underlying structure.

The Court of Appeal held, with Briggs LJ dissenting, that the Class X Notes interest calculation did not include default interest. The majority's view was that natural construction of the phrase "per annum", read in context of the documentation in its entirety, excluded default interest, and that commercial common sense supported that construction.

It is evident from the decision that commercial common sense will rarely be able to impose a particular construction, and to too-readily do so would be to undervalue the "importance of the words used by the parties to express their bargain". In expressing the majority view, Arden LJ concluded that the Offering Circular was not merely part of the surrounding circumstances but is a document with a special status. While an Offering Circular cannot displace a transaction document, it was nonetheless an "aid to construction".

See the Court's decision here.

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## Stockbrokers stung by failing to look into fraudulent transactions

The case of *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch) concerned the liability of a stockbroking company for failing to investigate fraudulent transactions.

After termination of a trading relationship, Daiwa (the stockbroking company) held approximately $204m on behalf of its client, Singularis. Shortly before Singularis was put into liquidation, Daiwa, on the instructions of Singularis' principal director and sole shareholder, Mr Al Sanea, paid out the money to other companies in a related company group. Mr Al Sanea was found to have breached his fiduciary duty as director of Singularis by instructing these gratuitous and fraudulent payments to the related companies. Singularis' liquidators sought recovery from Daiwa on two grounds: dishonest assistance and negligence.

Despite the many obvious signs that Mr Al Sanea was perpetuating a fraud, the English High Court found that Daiwa had not dishonestly assisted with the breaches. Rather, Daiwa had failed to make proper inquiries into the transactions, as the employees had not understand what was required of them to fulfil Daiwa's obligations to Singularis. Therefore, Daiwa was, based on the duties set out in *Quincecare*, found to be in negligent breach of the coextensive implied contractual duty to act with reasonable care and skill.

The Court dismissed an illegality defence raised by Daiwa, as Mr Al Sanea's fraud could not be attributed to Singularis for the purposes of that defence. The Court noted that this attribution would undermine the purpose of Daiwa's duty of care (to protect Singularis from the fraudulent conduct of a trusted person) if the defence was allowed. The Court also dismissed Daiwa's equal and opposite claim in deceit against Singularis on the basis that it was Daiwa's negligence that had caused its exposure to Singularis. However, damages were reduced by 25% (from the full $204m) because of contributory negligence.

See the Court's decision here.

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## Building on sand: the scandalous collapse of Harlequin Property

For thousands of British retail investors, Harlequin Property's promise of a solid investment and a place in the sun proved too good to be true.

*Harlequin Property (SVG) Ltd & Anor v Wilkins Kennedy* (a firm) [2016] EWHC 3188 concerned a claim by Harlequin against Wilkins Kennedy (WK), an accounting and consultancy firm. Harlequin had engaged WK to provide advice regarding the construction of a luxury Caribbean resort in Buccament Bay.

After Harlequin took deposits from 1900 investors, only 195 units were built of which just 16-20 were passed on to investors. The arrangement was described as having the appearances of a significant Ponzi scam, given that the funding required for the development was filled by the deposits of other investors, as opposed to Harlequin attaining financing.

Harlequin paid building contractor 'ICE' USD$52m and made weekly payments, regardless of whether any work had been carried out. Remarkably, this occurred without any written contract or detailed agreement as to the scope or valuation of the works, which was arranged on the advice of Mr MacDonald of WK. Furthermore, during this time Mr MacDonald had provided advice to both Harlequin and ICE's owner, Padraig O'Halloran, with the latter of whom he had developed a close personal and business relationship.

Justice Coulson of the England and Wales High Court found that WK was liable for "failing to advise as to the necessity of a contract between ICE and Harlequin". Harlequin's pleaded case, however, was based upon the assumption that, but for the breaches of contract/negligence, nothing would have gone wrong with the project; a position described as fanciful by the Judge. WK's liability for breach of contract/negligence was ultimately found to have caused no loss, except for one portion of the action which survived this causation issue; namely, Harlequin's loss which arose from WK's failure to provide advice on a proper and contractually-binding method of valuing the work to be conducted. The Judge found that, against the USD$52m paid for ICE's work, the proper valuation was no more than USD$24.8m. WK was liable for this overpayment, although this sum was halved to reflect Harlequin's contributory negligence. The Judge held that this award be held on escrow, in the hope that the unfortunate investors might recover some of their money.

See the Court's decision here.

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