Post-holiday round-up: what were the courts up to over the summer?

As many of us return from the summer break and wonder what we may have missed in the pre-holiday rush (and, hopefully, the period of relaxation that follows), **Alice Nash** and **Amy Chapman** round up a mixed bag of recent cases of interest.

Cases:

- *Dilip Desai & Anor v Paul David Wood & Anor* [2025] EWCA Civ 906 – a lacuna in third party rights against insurers
- Avison v Harold Bell Infields & Co (A Firm) [2025] EWHC 1787 (Ch) 21 Jul 2025 – the limits of the doctrine of abusive collateral attack
- *Holcroft v Thorneycroft Solicitors Limited* [2024] EWHC 1473 (KB) – availability of solicitor-client assessment after deduction of fees from damages
- *Tescher v DAML & AXA v Spectra* [2025] EWCA Civ 733 – non-party costs orders against credit hire organisations
- *Niprose Investments Ltd v Vincents Solicitors Ltd* [2025] EWHC 2084 (Ch) – costs of strike out application when claim saved by amendment
- *Gable Insurance AG v Dewsall & Ors* [2025] EWCA Civ 884 – freezing orders and the use of assets to fund legal costs
- *Vanquis Bank Limited v TMS Legal Limited* [2025] EWHC 1599 (KB) – bringing volume claims without proper vetting is arguably an economic tort
- *Hopcraft v Close Brothers Ltd; Wrench v FirstRand Bank Ltd; Johnson v FirstRand Bank Ltd* [2025] UKSC 33 – undisclosed dealer's commissions do not amount to bribery or breach of fiduciary duty

Professional liability and insurance

A gap in the insurance safety net for third party claimants against insolvent companies

***Dilip Desai & Anor v Paul David Wood & Anor* [2025] EWCA Civ 906**

A claim is brought against a professional services company alleging negligence in the performance of those services. The company is insured. The policy contains a clause entitling the insurer, at its option, to pay the limit of indemnity directly over to the insured rather than continue to participate in and fund the defence of the claim. The company then goes into liquidation. Are the insurance monies ringfenced for the benefit of the persons who brought the claim in respect of which they were paid?

No, held the court of appeal in Desai v Wood: the funds formed part of the general asset pool, and the third party claimants were limited to such recovery as they could make my

proving in the liquidation. There was no implied term giving the claimants a proprietary interest in the insurance monies, and no constructive trust in favour of the claimants.

It was accepted that any implied term or constructive trust could not operate to prevent the company from using the payout to fund its defence – so any ringfencing in favour of the claimants could not be absolute. It was also accepted that in the case of a solvent company, there could be no question that the company was entitled to absorb such a payout into its own funds, rather than being obliged to use those exact funds for any later payment to the claimants. The Court plainly considered that both of these concessions were correct.

It was argued that what changed the analysis was the directors' and the insurers' knowledge of the insured's insolvency: this, it was argued, created a relevant state of mind that operated to impose trust obligations on the directors to deal with the payout in a specific way. The Court was not prepared to find that such an obligation was created in the absence of any express term to that effect in the contract between the claimants and the company.

The fundamental problem was that, by availing itself of the crucial clause entitling it to make full payment rather than await the outcome of the claim, the insurer brought its liability to the insured to an end: the company therefore had no subsisting rights against the insurer which could be transferred to the claimants on the happening of the insolvency event.

Such clauses are not uncommon – though it is to be noted that there is no such clause in, for example, the Solicitors' Minimum Terms (which, moreover, oblige insurers to fund defence costs on top of the limit of indemnity) and it must be arguable that any attempt to introduce such a clause would fall foul of the rule that any bespoke terms must be no less favourable, given the compulsory nature of that insurance and its specific object of client protection. Other regulators whose compulsory terms are less stringent may need to consider amendments.

For a detailed discussion of this case, see this case note by Nicholas Davidson KC and Joshua Munro.

The limits of the doctrine of abusive collateral attack

Avison v Harold Bell Infields & Co (A Firm) [2025] EWHC 1787 (Ch) 21 Jul 2025

This was an attempt to strike out a professional negligence claim against solicitors on the basis, inter alia, that it was an abusive collateral attack on an earlier decision. The application failed, illustrating the fairly narrow boundaries of the doctrine.

The background was an agreement the claimants made with friend, Mr White, and his business partner Ms Emmanuel, for a short term loan of £210,000 at 40% interest, secured by a legal charge over a flat owned by Ms Emmanuel. The defendant solicitors, HBI, acted for them in relation to the loan.

The loan was not repaid by the due date and litigation ensued in which Ms Emmanuel, claiming to have been unaware of the loan and charge, sought a declaration that her signatures on the loan and charge were forged, notwithstanding that, on HBI's advice, they had been witnessed by a retired solicitor. Her claim was rejected by both the trial judge and on appeal, on the basis that she had not proved that she had not signed the documents.

The claimants eventually recovered £250,000 from Ms Emmanuel in settlement, in exchange for removing the charge on her flat. They also sued Mr White and won, but were only awarded 8.5% interest, not the 40% originally agreed, because the loan lacked a clause for post-default interest. Furthermore, when the claimants came to enforce it turned out that Mr White's matrimonial home was held on trust for his wife, and the claimants' challenge to the validity of the relevant trust deed failed.

The claimants alleged that HBI should have included a default interest clause in the loan agreement and taken further steps to verify the borrowers' ID and signatures. Their case was that had these steps been taken, enforcement of the loan against the flat would have been straightforward and they would have recovered the principal and default interest.

HBI argued that the claim was an abusive collateral attack on the court's decisions in the earlier litigation, since the question of whether Ms Emmanual in fact signed the loan and charge had already been adjudicated upon, and could not be proved either way.

The court held that the claim did not involve an abusive collateral attack on the earlier decision and would not bring the administration of justice into disrepute. The issue of what would have happened if the claimants had had "cast iron evidence" that Ms Emmanuel had signed the documentation did not involve re-running the issues tried in the earlier litigation. There was also an alternative counterfactual, which was that there was indeed an identity fraud, which if discovered would have led to the loan not being made.

The case shows how very fine the line can be between a factual case which amounts to an abusive collateral attack and one which does not. In *Laing v Taylor Walton* [2007] EWCA Civ 1146, the basis for striking out the claim was that it involved inviting the court to find that, absent the solicitor's alleged negligence in recording the terms of an agreement, the earlier court would have found that those terms were as alleged by the claimant, when in fact it had held that the terms were as alleged by the counterparty. That was an abusive collateral attack because the very question before the earlier court was what the terms of the agreement were, and the judge had specifically considered and rejected Mr Laing's case that the written terms did not reflect the agreement. *Avison* suggests that the position might have been different if there had been no written record and the judge had decided the case on the basis that Mr Laing had not discharged the burden of proof.

A separate, interesting point arose as to whether mitigation losses must be foreseeable and/or within the scope of the defendant's duty in order to be recoverable. Master McQuail

held that there was no such requirement – the sole question was whether it was reasonable to incur such costs, which was a matter for the trial.

Costs and Procedure

Solicitor-Client Costs - *Holcroft v Thorneycroft Solicitors Limited* [2024] EWHC 1473 (KB)

On 24 June 2025 the Court of Appeal allowed an appeal against Mr Justice Eyre's decision (and the decision of the District Judge at first instance) that a personal injury claimant who had accepted a Defendant's offer, in circumstances where he was told by his solicitors that the damages he received would be subject to a deduction for the solicitor's costs, was prevented from seeking a Solicitors Act 1974 assessment of his solicitors' costs. The appeal was allowed by consent on the papers and without hearing oral argument. The Court of Appeal, noted the Supreme Court's decision in Menzies v Oakwood Solicitors Limited [2024] UKSC 34 which postdated Eyre J's judgment, allowed the appeal and set aside the orders below, with the Respondent solicitor paying costs. There is no detailed judgment.

Non-Party Costs Orders "likely" in unsuccessful credit hire litigation

***Tescher v DAML & AXA v Spectra* [2025] EWCA Civ 733**

The conjoined appeals raised similar factual scenarios. A road traffic accident occurred between the defendant and the claimant. The claimant brought a claim for personal injury and credit hire. The claims did not succeed. The claimant was directed to pay the defendant's costs, not to be enforced without permission of the court pursuant to the Qualified One Way Costs Shifting regime ("QOCS"). The defendants made an application for a non-party costs order against the credit hire organisations, DAML and Spectra. The application against DAML was dismissed at first instance. The application against Spectra was initially allowed, with Spectra being ordered to pay 65% of the Defendant's costs. This was overturned on appeal by HHJ Gargan.

Birss LJ held that courts should adopt a two-step process when considering non-party costs orders in credit hire claims. The first step is to ask whether in the circumstances a non-party costs order of some kind against the credit hire company should be made. The second step is to decide on the amount of costs.

The deferral arrangements in both cases, coupled with the allegation of impecuniosity, combined to make litigation (or its settlement) the only realistic means by which the credit hire company will be paid for the hire. Hence the credit hire agreement, for which the credit hire company is responsible, is a fundamental cause of the legal costs incurred by the defendant. That is enough to satisfy the requirement at the first stage of the exercise that there be a causative link, though not in a strict 'but for' sense, between the particular

conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered [70].

Consequently, absent some reason why not, when a claimant has been ordered to pay the costs and QOCS applies, a non-party costs order against the credit hire company is now "likely" to be made - the "real party in all but name" test was considered to be satisfied.

As to the just order to make, Birss LJ identified three "obvious possibilities":

- an order for all the costs of the litigation;
- an apportionment based on the sizes of the credit hire claim and the PI claim; and
- an award of the extra costs attributable to the credit hire as compared to the litigation without it.

When the credit hire claim is several times larger than the PI claim (as in both DAML and Spectra), an order for all the costs of the litigation would be "likely, absent some special feature" [77].

Birss LJ found, for the reasons identified above, that DAML was the real beneficiary of the claim for credit hire charges and had tacit control over the litigation. The causation and control aspects of the test to engage the costs jurisdiction were satisfied. There were no other special circumstances which might suggest no order should be made at the first stage. Given that DAML's credit hire charges were several times larger than the damages for personal injury, a non-party costs order was made for DAML to pay all the claimant's costs. The DDJ's original order requiring Spectra to pay 65% of the costs was restored. The credit hire companies were liable for the Defendant's costs.

The credit companies have lodged an application for permission to appeal to the Supreme Court.

Who should bear the costs if a claim is drastically amended to avoid strike out?

Niprose Investments Ltd v Vincents Solicitors Ltd **[2025] EWHC 2084 (Ch)**

The court determined costs arising from an interim application in a professional negligence claim for strike out or reverse summary judgment. At the hearing of the application the claimants made an informal application to amend, and the court adjourned the application to allow that to occur. At a second hearing, the court allowed many of the amendments, and allowed the case to proceed. The claimants argued that as the application had ultimately not succeeded, they were the successful party and the costs of the hearings should follow the event.

Rejecting that submission, HHJ Hodge KC held that the starting point when a party has only defeated a strike-out or summary judgment application because of substantial amendments to its case in the face of that application, the starting point is that the that party should pay

the costs of the application to strike out – in line with his own recent decision in June this year in *Bellhouse v Zurich Insurance Plc* [2025] EWHC 1551 (Comm). He ordered the claimant to pay 77% of the Defendant's costs up until the date 14 days after the amended particulars of claim were received (the reduction reflecting the fact that to a limited extent, the original claim survived). Thereafter the claimants recovered 90% of their costs, on the basis that the amendment application was largely successful and the second hearing could have been avoided.

Freezing orders: partial discharge and the payment of legal fees

***Gable Insurance AG v Dewsall & Ors*, [2025] EWCA Civ 884**

The Court of Appeal decided issues arising from the imposition of a freezing order in proceedings to recover over £19 million allegedly misappropriated from an insolvent company by its former directors. The initial worldwide freezing order obtained without notice had been partially discharged on the return hearing. The key points in relation to the freezing injunction jurisdiction were:

- The court is entitled to "carve up" a freezing order and continue the domestic element whilst discharging the worldwide element: it was an integral part of consideration of a worldwide freezing order whether there were sufficient domestic assets to make the more draconian remedy of a worldwide order unnecessary;
- An undertaking to deal with the sale proceeds of a property "consistent with" standard freezing order exceptions, did not override the four-stage test in *Marino v FM Capital Partners Ltd* [2016] EWCA Civ 1301. There was an arguable proprietary claim to the property, and the expenses should in the first instance be met from the sale of jewellery belonging to the respondent which was not the subject of a tracing claim.
- It was not correct to classify Mrs Dewsall as a "non cause of action defendant" because there was a pleaded claim against her to trace substantial sums into the purchase of a property of which she claimed to be beneficial owner. In ant event, Mrs Dewsall and her husband (the principal defendant) had pursued a deliberate strategy of mingling their assets in order to obscure the ownership position. In those circumstances it was open to the court to take a broader view.

Economic torts and financial misconduct: novel causes of action applied to familiar situations

***Vanquis Bank Limited v TMS Legal Limited* [2025] EWHC 1599 (KB)**

While an interlocutory hearing and not a trial, this is the first time where the tort of causing loss by unlawful means has been tested in court in the context of a claim by a lender against a firm of solicitors for the effect of having to deal with large numbers of allegedly ill-founded claims. The judgment could have significant implications for the volume claims management market, whether CMCs or law firms.

Rejecting TMS's application to strike out the claim and/or for summary judgment, Jay J accepted that "*the facts of this case are novel*" but stated that it had been brought based "*on the application of well-established principles to a new factual pattern*":

- The alleged breaches of contractual, fiduciary, and regulatory duties to its clients could constitute "unlawful means"
- It was arguable that TMS's actions interfered with Vanquis's economic relationships with its customers.
- Vanquis had a plausible case that TMS acted with the requisite intent, as its economic loss "*was a virtually certain consequence of TMS's actions and TMS knew this to be the case*"; this would depend on witness evidence at trial.
- It was "*fairly obvious that Vanquis may well have sustained the types of loss it has pleaded*"; assessing the loss was likely to require expert evidence at trial

For further discussion of the decision, see this case note by Simon Wilton KC and Simon Howarth KC

***Hopcraft v Close Brothers Ltd; Wrench v FirstRand Bank Ltd; Johnson v FirstRand Bank Ltd* [2025] UKSC 33**

By contrast, the claims based on the torts of bribery and dishonest assistance in breach of fiduciary duty failed in the Supreme Court in this well-publicised motor finance secret commissions litigation.

Customers who had purchased cars of finance brought claims against the lenders, seeking rescission of the finance contracts and/or monetary remedies on the basis that the dealer in each case had introduced the customer to the lender and received an undisclosed commission.

The Supreme Court held that: (i) for a claim in the tort of bribery to succeed, the recipient of the putative bribe must owe fiduciary duties; (ii) for a fiduciary duty to exist, "there must be the assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other's affairs" (100); (iii) that test was not satisfied in relation to the car dealers; and (iv) the claims in bribery therefore failed. The absence of any fiduciary duty was also fatal to the claims for dishonest assistance in a breach of fiduciary duty. For more details, see this case note by Jake Coleman.

Alice Nash
Amy Chapman
Hailsham Chambers

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.