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Welcome to the latest edition of “Commercially Minded”.

Welcome to the latest edition of “Commercially Minded”. This issue starts with the latest insights from the sharp end of professional negligence litigation. Elsewhere we share some thoughts on what we feel in-house counsel need to know about litigation insurance; we also answer your questions on arranging a litigation insurance scheme with delegated authority. Just click on the image or gold colour heading below and you'll go straight to that article. Enjoy reading our views; if you'd like to share yours, please get in touch with our team - contact details are on page 9.



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Professional Negligence - Tales of Woe and Other Thoughts

By Matthew Pascall, Senior Underwriting Manager

A cynic might say that lawyers and insurers profit from human frailty. From time to time, both when I was in practice and since I have been an underwriter, I have been prepared to admit that the cynic might be right.

On just about every working day since April 1985 I have encountered human misfortune and, along the way, a few knaves, and fools.

Woe - How Much? Why it's Important to Get Quantum Right

Professional negligence rests as much on human misfortune as any other area of law. The challenge for the professional negligence practitioner is to find a way to compensate their client for the misfortune that brought the client to the practitioner in the first place.

Occasionally we are asked to insure a case where our client has been poorly served by a careless and often foolish defendant. But identifying the loss and degree of misfortune one can genuinely attribute to the defendant's negligence is often far from clear. The solicitor may well have focused on breach but given less thought to causation and loss.

The poor client has undoubtedly suffered some misfortune but how can that be compensated for in damages?

For Temple as a litigation insurance provider, the question of loss is important in a unique way. Many of our clients cannot pursue their professional negligence claims without the cover we offer. Our premiums are, of course, 'deferred and contingent' - nothing has to be paid when the policy is taken out and the client only pays *if* and *when* they win. But if they win, they have to pay. The only likely source of the funds with which to pay the premium will be the damages they recover.

So, when we calculate the premium at the outset, it is essential we know what the client is genuinely likely to recover by way of damages. We do appreciate this can be very difficult early in the life of a case, but we do turn away cases

where there appears to have been no real effort to get at least some reasonable range of damages. In a loss of chance case, the need to get this right and to focus on the issue at the outset is essential because it can be complex and require much careful thought.

However we calculate the premium, it has to be reasonable in the light of the damages the client might receive. Additionally, it has to be affordable but also provide a commercial return to us. If the unexpected happens - and we know it does in litigation - and the client recovers much less than we had all originally anticipated, we do take a pragmatic view when the time comes to ask for payment.

A Variety of Misfortunes

- We are sometimes asked if there are areas of law we don't insure - In terms of professional negligence, the short answer is no. The cases have to be good, with reasonable prospects of success, but there are no 'no go areas'.
- We have started to insure more Scottish cases. In doing so we have come to recognise how much the law of tort owes to delict.
- Amongst the most challenging cases are those involving advice given by professionals at the time of the sale or promotion of financial products.
- We have also recently insured several successful claims arising out of poor advice concerning tax schemes. These are complex cases and need the support of good solicitors with extensive experience in conducting cases of this kind.

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Working with Professional Negligence Lawyers and the PNLA

Litigation insurance works best for the client when the insurance provider and the lawyer work in partnership and have confidence in each other. In our experience good lawyers get good outcomes for their clients and for Temple as the insurer. Knowing that a firm has the right experience and a good track record running professional negligence cases will often lead us to say 'yes' to a case and offer insurance where we might otherwise have declined it.

Where an individual is a member of the PNLA, that helps enormously. It shows a commitment to excellence and a recognition of the importance of staying on top of this developing and ever-changing area of law.

Temple is able to offer PNLA members heavily discounted premiums for professional negligence cases.

Are we the good guys?
To the cynic who says we profit through the misfortune of others, the true answer is this: the clients we insure and who our solicitor colleagues represent have been the victims of someone's negligence, lack of care and, sometimes, dishonesty.

If the cynic was the in the same position, what would they want?
They would want their legitimate claim pursued fearlessly and would expect no more but no less than fair compensation for the losses suffered. That person would also want protection against the financial cost of losing the case, which we would happily provide.

To find out more about litigation with disbursement funding for your professional negligence cases please call me on 01483 514428 or email matthew.pascall@temple-legal.co.uk.



What In-House Counsel Need to Know About Litigation Insurance

By Matthew Pascall, Senior Underwriting Manager

At Temple we think a few minutes spent by in-house counsel getting to know about Litigation/ATE insurance may well reap rewards in the long run. Managing risk is at the heart of the work carried out by most in-house lawyers and litigation insurance is all about managing risk.

I suspect that any lawyer having to meet the demands and complex needs of their single client, who also happens to be their employer, will not have given much thought to litigation insurance. They may well feel that the solicitors they engage to provide external advice and support can be left to fret about such things and give the appropriate advice.

Businesses avoid litigation for good reason - it's time consuming, expensive and a distraction. The job of in-house counsel is usually to keep their employer as far away from a courtroom as possible. But sometimes litigation cannot be avoided. A claim has to be pursued or defended.

Once the stage is reached where litigation cannot be avoided, the need to manage the associated risks becomes paramount. Pursuing a good claim always carries a contingent risk of paying adverse costs and the need to write off the cost of disbursements incurred in the course of the litigation.

These are contingent liabilities, but how should these be treated in a set of accounts?

- **Litigation insurance offers a company the chance to manage these risks** and crystallise the contingent liabilities. Subject to its terms, a litigation insurance policy eliminates the risk of having to pay any adverse costs and being unable to recover own disbursements if a case is lost.
- **At a stroke, the contingent liability disappears.** The premium, only payable at the conclusion of the case and only if the insured is successful, is easy to calculate. You will always know what you will have to pay and know you won't have to pay any adverse costs.

For companies that are struggling and might face an application for security for costs, we can provide a solution. Standard litigation insurance policies are generally not accepted as a means of providing security. However, in some cases Temple can strip out from our policies key exclusion clauses by way of an endorsement reducing our scope to refuse a claim. The courts accept policies in this form as security.

Please call our Commercial team on 01483 577877 if you'd like to find out more; do note that our case assessment service is free of charge and without obligation. For more information, download our [guide to litigation insurance for in-house counsel](#). Do mention litigation insurance to your external solicitors and counsel and ask them to call us for a discussion on any case you may become involved.



Construction dispute success enforcing adjudicator's award

Temple has developed new ATE/litigation insurance cover specifically designed to assist insolvent referring parties seeking adjudication on a construction dispute and the subsequent enforcement of any adjudicator's award.

The interlinked insurance policies provide indemnities for the adjudicator's fees, adverse costs, the insured's disbursements relating to any enforcement proceedings and the final determination proceedings.

Two cases that we insured last year - Balfour Beatty Civil Engineering Ltd v Astec Projects Limited (In Liquidation) [2020] 796 (TCC) and Styles Wood Ltd v GE CIF Trustees [2020] EWHC 2694 (TCC) - were the subject of detailed scrutiny by the opponents' counsel and two High Court judges. The policies were found to be fit for purpose in providing security for the opponent's costs and integral in securing a successful outcome for the insured.

In another case Temple insured earlier this year, the policyholder was successful in obtaining payment of an adjudicator's award. This was, literally, at the door of the court where the hearing of the application for summary judgment was due to take place.

Commenting on what undoubtedly will be of interest to construction lawyers and insolvency practitioners, Senior Underwriter Nicholas Ellor said, "We're confident this is a unique product in the market; one that has been tested at the sharp end of a dispute and found to be 'combat-ready'. As a result, we are now receiving numerous enquiries from insolvency practitioners and solicitors acting for them."

Solicitors acting for the insured in Styles & Wood v GE CIF Trustees expressed their deep gratitude. This was for Temple's speed of response, professionalism and flexibility in addressing concerns as to specific clauses in the insurance policies; in addition, Temple personally attending the hearing of the summary judgment application.

Temple's accommodating approach to the case and subject matter led Neil Armstrong (the partner at Myersons acting for Styles & Wood Ltd) to say, "Temple's involvement was crucial in securing a highly successful outcome for our client."

The Underwriting Perspective: Construction disputes; 'It's Like 3D Chess'.



By Matthew Pascall, Senior Underwriting Manager

You may well have read previously about the insurance we can provide to enable [insolvent building sub-contractors pursue adjudications](#). It's worth pointing out that we're also here for solvent builders and anyone else caught up in construction litigation.

Construction litigation can sometimes seem like 3D chess - breach, causation and cost of rectification argued in different ways by multiple opponents, each with their own experts and often with counterclaims and claims against each other for contributions. Valiant attempts to simplify matters in a Scott Schedule seem to fall apart when the parties each end up with slightly different versions of the same Schedule!

At Temple, we're happy to dig our way into these cases, get to grips with them and offer insurance. Policies can be adapted to suit both claimants and defendants. Disbursement funding can help meet the cost of experts and is covered by our insurance should a claim fail.

To find out more about this cover and how Temple Legal Protection's legal expenses insurance products can help to support and develop your business, please contact Matthew Pascall on 01483 514428 or email matthew.pascall@temple-legal.co.uk.



All under one roof

Litigation insurance and disbursement funding

A Temple Litigation Insurance policy comes with a fully deferred and contingent premium as standard. Your client is also eligible for Temple disbursement funding, also fully deferred and contingent - helping you maximise your valuable fee income and the cashflow of your client.

There's just one application form, the same easy-to-use administration system, your own dedicated scheme manager and a low interest rate of just 10%.

For a free, no-obligation discussion of your litigation requirements please call us on **01483 577877** or email commercialate@temple-legal.co.uk

Temple Legal Protection and Temple Funding are authorised and regulated by the Financial Conduct Authority

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Resolution Strategies and Mandatory Mediation

By Terry Renouf, Renouf Mediation

As we emerge from lockdown restrictions litigators should carefully note a speech on 26th March 2021 [1] by the new Master of the Rolls, Geoffrey Vos at Hull University. In this speech he built on recent judicial thinking that parties want a resolution of their dispute rather than an expensive and, until judgment, uncertain adjudication.

He explored how he intends to ensure that parties find those resolutions and how Courts will assist them to do so. His starting point is that he believes “that almost every dispute has a sweet spot when it is amenable to consensual resolution.”

Alternative Dispute Resolution (“ADR”) in its various forms provides the mechanisms to achieve that but he believes that “Alternative” is a misnomer. His aim as the Head of Civil Justice is to ensure that “Dispute Resolution [becomes] an integrated process in which the parties feel that there is a *continuing drive [writer’s italics]* to help them find the best way to reach a satisfactory solution.”

It seems clear that the Master of the Rolls will build on *Lomax v Lomax* [2] (Court of Appeal), a case that just pre-dates the pandemic. It determined that a Judge may order parties to participate in Judicial Early Neutral Evaluation (JENE). Whilst that case does not determine whether a Court can order a mediation there are a couple of points worthy of note.

- Firstly, in the preface to the 2020 edition of the White Book, Vos anticipated that “there may well be significant developments in the CPR’s approach to settlement.”
- Secondly, he has instructed and expects the Civil Justice Council to report to him “shortly” on cases where mandatory mediation is appropriate.

Clearly change is afoot.

There have also been numerous cases where both Claimants and Defendants have been subject to significant costs sanctions for unreasonable failures to mediate (See *BXB v Watchtower*, *DSN v Blackpool* and *Wales v CBRE & Aviva*).

Covid lockdown has also meant that, as well as Court hearings, mediation too has moved online offering a flexibility to clients that a physical mediation does not. Parties are no longer limited by geography and the need to convene in one venue on one day.

- There is more pre-mediation contact and preparation by the mediator and the parties: this itself is much more efficient as the “other” side is not waiting for another conversation to conclude.
- The parties are not limited to the mediation “day” itself: a mediation can be split into shorter sessions that can be quickly re-convened with attendees who need to be there as opposed to attending “just in case”.

Are you ready for the new environment?

As we emerge from lockdown many questions arise, including-

- Which of the various dispute resolution options are best for your client and for your case?
- What are the non-financial factors that are preventing resolution?
- Are Part 36 offers going to be sufficient?
- Can you say you have made every effort to find the “sweet spot” identified by the Master of the Rolls?
- Have the parameters around unreasonable refusal to mediate changed?
- Is your case going to be subject to mandatory mediation?

What is clear is that the Courts will look favourably on and assist parties seeking resolution and the option of online mediation hastened by Covid will provide the opportunity to achieve earlier and better settlements. Prior to their next Case Management Conference, lawyers will have to ensure that they have settlement strategies fit for the post-pandemic litigation environment.

[1] The Relationship between Formal and Informal Justice, Geoffrey Vos MR, Hull University 26 March 2021

[2] *Lomax v Lomax* [2019]EWCA Civ 1467

If you would like to discuss mediation in relation to a commercial dispute, please contact Matthew Pascall on 01483 514428 or by email to matthew.pascall@temple-legal.co.uk



Insurance Insights: A Litigation Insurance Scheme with Delegated Authority.

What is it and why it matters

By Andy Lyal, Senior Business Development Manager

This article seeks to address some assumptions and questions put to me on a regular basis and also explain some of the terminology used when discussing litigation/ATE insurance, commercial dispute resolution clients and cases.

Whether talking to a firm for the first time about litigation insurance or having a review/catch up with an established Temple partner firm I often explain the benefit of giving them delegated authority (i.e. the ability) to place their client's cases on cover straightaway, under a Temple litigation insurance scheme.

The ability to purchase litigation insurance directly for your client and 'cut out the middleman' should be considered at regular intervals because it can prove invaluable for both you and your clients.

It works so easily. The delegated authority criteria for your litigation insurance scheme will be agreed with you. You would then assess the merits of a case and, if it reaches the criteria required, be able to immediately put the case on cover via the Temple Online Policy system (TOPS).

Common observations and questions that arise during this process include:

- **'We like talking directly to the underwriter about a case'** We encourage you to talk to us - regardless of whether it is a one-off proposal or via your delegated authority litigation insurance scheme. [Our underwriting team](#) are here to help and include a former barrister and solicitor.
- **'What if the case falls outside of the prescribed criteria of the scheme?'** You can contact the underwriter directly and ask for it to be put on cover, but outside of the scheme.

- **'Will the client be financially better off?'** Yes, litigation insurance scheme premium rates are usually cheaper.
- **'Will the client still have access to your disbursement funding if we have a litigation insurance scheme?'** Yes, and you also have delegated authority for this. Temple disbursement funding is also operated via the same 'TOPS' online system.
- **'Is the online system simple to operate?'** Yes, even I can operate 'TOPS', and I'm a complete simpleton when it comes to IT.
- **'I would be concerned about making a mistake when placing a case on cover.'** This is quite understandable but there is no need to worry; you put the case onto 'TOPS' and we will be able to provide support for any questions you may have.

Other questions and observations I am often also asked are -

- **'We have done our due diligence and examination of the market and decided that a litigation insurance scheme with delegated authority is the best offering for our client, but do we need to review annually?'** Rightly so, and as a matter of good practice we work with you to review your partnership with Temple each year. This to make sure that the scheme is working in the interests of your client and what the alternatives are each year.
- **'Is it true that litigation insurance and disbursement funding are only available with a Conditional Fee Agreement?'** A Conditional Fee Agreement for commercial dispute is not a requirement with Temple. We regularly insure cases funded by traditional retainers as commercial litigators often prefer a more conventional fee payment.
- **'I thought that litigation insurance schemes were only for personal injury and clinical negligence cases'** A litigation insurance scheme with delegated authority works very well for those areas of law but are just as suitable for commercial dispute cases. Some of our partner firms have a general scheme that covers all of their commercial cases, whilst others have a scheme for a particular specialisation.

We look to tailor each scheme to suit the nuances of your caseload and requirements as the practitioner.

[Our commercial litigation expertise](#) includes insolvency, professional negligence, financial litigation, defamation and media, contested trusts and probate, construction, property litigation and public law cases.

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You will see that certain themes develop when considering a delegated authority litigation insurance scheme. Also, an individual case may not be viable for your client or us here at Temple if submitted individually because of its low value. However, if you have a higher volume of lower value/ commoditised cases a litigation insurance scheme for processing these is often a solution.

Let's talk numbers - how many cases would we need to consider a litigation insurance scheme with delegated authority? If you were looking to submit a litigation insurance proposal form say once a month that would be a starting point. However, our experience is that with this facility available you will attract more clients. This includes solicitors with a lower volume of cases or a niche/ specialisation but attracted by the fact that there is no gap in the service they provide waiting for an insurer or broker to come back to you with a decision.

If you would like to discuss a litigation insurance scheme with delegated authority, please contact me directly via email to andy.lyalle@temple-legal.co.uk or call 07936 903767



Really quite interesting? What's caught our eye recently

Below are links to some topical articles on commercial litigation and ADR that have caught our eye in the last three months.

[Damages Based Agreements \(DBAs\) clarification and guidance from the Court of Appeal](#) - This helpful Law Gazette article summarises the recent decision of the Court of Appeal in *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, which provided much-needed clarity and reassurance for solicitors acting under DBAs. At Temple we are seeing more cases run by solicitors acting under DBAs. They work well alongside ATE insurance and provide clients with an additional means of taking cases forward. Following the decision in *Zuberi*, we anticipate seeing more of these cases.

[Government review of Public Law and Judicial Review](#) - Monidipa Fouzder in the Law Society Gazette has provided this interesting survey of the government's submissions to the Independent Review of Administrative Law, established in July last year to examine Judicial Reviews and recommend appropriate reforms. It does little to comfort those public lawyers who see a real threat to the effectiveness of Judicial Review posed by this relatively new initiative by the government.

[Terminating construction contracts](#) - Practitioners will be familiar with the call from a client proudly announcing that they have just given the builders their marching orders! Construction practitioners and the public will find Sarah Evans' helpful article on the 'PBC Today' website essential reading when deciding whether to terminate a construction contract - the lesson is, inevitably, take care and prepare your ground.

[Insolvent builders and adjudications](#) - Another from the 'PBC Today' website; Temple is leading the way in providing a bespoke litigation/ATE insurance solution for insolvent sub-contractors engaging in construction adjudications. This article explains the background and key developments in this interesting area of construction law.

Nice to see you again! Getting back to face-to-face

In addition to the excitement of three of the home nation's football teams' participation in the 'Euros', there are starting to be interesting events and conferences to look forward to in the autumn - with a number of these are planning to permit physical attendance at them.

Here at Temple we will have participated in the Guildford Legal walk on 30 June which is raising awareness and funds for The London Legal Support Trust. Hospitality-focused events we are hosting include attending some of 'The Hundred' cricket matches - these of course depending on are subject to any lockdown restrictions.

In the meantime enjoy the weather, the football, the barbeques and we look forward to meeting with you in the near future. For further information on The London Legal Support Trust please visit <https://londonlegalsupporttrust.org.uk>



COMMERCIAL MIND

A solicitor update on litigation insurance and funding from Temple Legal Protection

temple
legal protection

Location Challenge met - at the double.



By Lisa Fricker, Solicitor Services Manager

Over the late May Bank Holiday weekend, Temple's staff participated in a location challenge to raise funds for one of our chosen charities this year, the Queen Elizabeth Foundation. The challenge was for staff to cover the distance between our office in Bristol and the Temple head office in Guildford - which equated to a 110-mile trip.

A number of our staff participated in the event over the three-day period and nearly double the number of miles required was completed. This involved a number of activities, such as walking (some of our staff's dogs got extra-long walks for the weekend), running and sailing - to name a few.

The funds raised from this challenge will go towards much needed equipment to ensure that the charity can keep supporting disabled people of all ages to increase their independence and live the life they choose.

For more details on the work of the Queen Elizabeth Foundation, please visit their website www.qef.org.uk

Contacts:

Matthew Pascall

Senior Underwriting Manager

Matthew was called to the Bar in 1984 and before leaving to join Temple was a Legal 500 Tier 1 barrister. He leads the commercial litigation insurance team and his wide-ranging knowledge experience of the commercial legal sector is invaluable to our client firms.

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Andy Lyalle

Senior Business Development Manager

Andy has 25 years' experience in the legal services sector, working in technical and managerial roles. Based in our Bristol office, Andy works predominantly with the Commercial team, meeting with existing and potential clients nationwide and is always ready to discuss your litigation insurance and disbursement funding requirements.

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Amy Edgington

Underwriting Support Manager

Amy provides underwriting support for the Commercial team as well as managing our underwriting assistants. Committed to providing the highest levels of service, her role includes the swift and efficient creation of quotes, issuance of policies and fielding of enquiries.

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Nicholas Ellor

Senior Underwriter

Nicholas has twenty years' experience working as a solicitor on both contentious and non-contentious company commercial and corporate matters. Having been a practitioner, he is fully aware of the pressure and time constraints a commercial litigator has to operate under.

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Don't just take our word for it

Chris Adams from Gosschalks had this to say "Both we and the client highly valued Temple's speed of response to requests made throughout the action. They were instrumental in us achieving an excellent settlement at the door of the court." In addition, Matthew Kelly from Freeths shared his thoughts on our service "After lengthy and heavily contested litigation, settlement was ultimately achieved at mediation. Temple's direct, pragmatic and commercial approach was much appreciated by us and the client."

[Click here](#) to read more testimonials.



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