factors. This is illustrated by *Edgeworth Construction Ltd v ND Lea and Associates Ltd*.[205] The claimant successfully tendered to build a section of highway in British Columbia. The claimant lost money on the project, allegedly due to errors in the specifications and construction drawings. The construction contract excluded any liability on the part of the employer (the province) in respect of representations in the tender documents. The Canadian Supreme Court declined to strike out the claimant's claim against the engineering firm which had prepared the tender documents, including the specifications and construction drawings. The court held that the claim fell directly within the *Hedley Byrne* principle. The defendants had provided information in the tender package for use by a definable group of persons. The claimant reasonably relied upon that information in preparing its bid. The contract between the claimant and the province, which protected the province from liability, was not inconsistent with a duty of care on the part of the engineers towards the claimants. At a superficial level, it may be said that this decision is contrary to *Pacific Associates Inc v Baxter*,[206] decided by the English Court of Appeal. In reality, however, the appellate courts were applying the same legal principles in both cases, but the circumstances and contractual matrices were different.[207] The court did, however, strike out the claim against individual engineers who had fixed their seals to the design documents.[208]

2–073 Like other appellate courts, the Canadian Supreme Court has had to consider the question of tortious liability for defects in buildings. In *Winnipeg Condominium Corp v Bird Construction Co*,[209] the defendant constructed an apartment building, which the claimant subsequently acquired. Defects in the cladding emerged, and in order to avoid accidents the claimant carried out remedial works at substantial cost. The court declined to strike out the claim. In coming to this conclusion the court declined to follow the specific decisions of the House of Lords in *D&F Estates Ltd v Church Commissioners for England*[210] and *Murphy v Brentwood DC*.[211] The court held that policy considerations militated in favour of imposing a duty of care. The classification of the claim as economic loss carried less weight than it would in England, especially since the building defect before rectification was a source of danger. In *Ingles v City of Toronto*,[212] the Canadian Supreme Court held that a local authority which inspected a building's underpinnings owed a duty of care to the owner of the building, applying the *Anns* test.

2–074 In *Cooper v Hobart*[213] the Supreme Court of Canada gave an authoritative restatement of the *Anns* test as it is applied in Canada. The first stage involves

[205] (1993) 107 D.L.R. (4th) 169. However, where the facts of a case fall within an established category, the Canadian courts will still consider whether there are policy considerations which tell against a finding of a duty of care.
[206] [1990] 1 Q.B. 993; see further para.9–087, below.
[207] In the English case the claimant contractors had more extensive remedies available against the employers and on the facts there was no assumption of responsibility by the engineers towards the claimants.
[208] This aspect of the decision is discussed further at para.2–103, below.
[209] (1995) 121 D.L.R. (4th) 193.
[210] [1989] A.C. 177.
[211] [1991] 1 A.C. 398.
[212] (2000) 183 D.L.R. (4th) 193.
[213] (2001) 206 D.L.R. (4th) 193, discussed by Neyers, "Distilling Duty: The Supreme Court of Canada Amends Anns" (2002) 118 L.Q.R. 221.

two questions: (1) Was the harm that occurred the reasonably foreseeable consequence of the defendant's act? (2) Are there reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognised here? The first part focuses primarily on the specific relationship between the parties. At the second stage of the test wider policy considerations fall to be considered, such as "the effect of recognising a duty of care on other legal obligations, the legal system and society more generally". This is very similar in effect to the threefold test laid down by the House of Lords in *Smith v Eric S Bush*[214] and *Caparo Industries Plc v Dickman*.[215] The Supreme Court explained that proximity was generally used to characterise the type of relationship in which a duty of care may arise and that such relationships were usually identified by categories. The factors needed to satisfy the requirement of proximity are, however, "diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic".

It is now clear that the modified *Anns* test applied in Canada is very close to the threefold test, albeit that its application can give rise to different results reflecting differing policy considerations and statutory provisions. That the first stage is not limited to reasonable forseeability, but includes consideration of the specific relationship between the parties proximity, was made clear by Iacobucci J giving the judgment of the Supreme Court of Canada in *Odhavji Estate v Woodhouse*.[216] There he explained that to establish a duty of care the following had to be shown: **2–075**

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and
3. that there exist no policy reasons to negative or otherwise restrict that duty.[217]

The recognition of reasonable foreseeability and proximity as separate questions was confirmed in *Childs v Desormeaux*,[218] where McLachlin CJ, with whom other members of the Supreme Court agreed, said[219]:

> "Some cases speak of foreseeability being an element of proximity where 'proximity' is used in the sense of establishing a relationship sufficient to give rise to a duty of care: see, e.g. *Kamloops*. *Odhavji*, by contrast, sees foreseeability and proximity as separate elements at the first stage; 'proximity' is here used in the narrower sense of features of

[214] [1990] 1 A.C. 831.
[215] [1990] 2 A.C. 605.
[216] (2003) 233 D.L.R. (4th) 193.
[217] The recent decision of the Supreme Court of Canada in *R. v Imperial Tobacco Canada Ltd* 2011 SCC 42; (2011) 335 D.L.R. (4th) 513 illustrates the operation of this stage of the test.
[218] (2006) 266 D.L.R. (4th) 641.
[219] ibid. at [12].

2–078 The marked decline in the fortunes of "proximity" as a useful test continued in the decision of the High Court of Australia in *Perre v Apand Pty Ltd.*[232] The defendant sold potato seeds to a farmer in South Australia, who planted them. The resulting potato crop was infected with bacterial wilt. The claimants were neighbouring farmers who were unable to export their crops to Western Australia, which banned the entry of potatoes grown within 20 miles of an outbreak of bacterial wilt. They suffered financial loss as a result. The loss suffered was accepted by the defendant to have been reasonably foreseeable and the defendant in fact knew that persons such as the claimants would suffer such loss in the circumstances. It was held that the defendant owed a duty of care to the claimants in respect of their losses. In reaching that conclusion the seven members of the court addressed the question of the appropriate approach to novel cases. There was no unanimity of approach, however. McHugh J, who had long been sceptical as to the value of proximity as a guide,[233] said:

> " . . . since the fall of proximity, the court has not made any authoritative statement as to what is to be the correct approach for determining the duty of care question. Perhaps none is possible. At all events, the differing views of the members of this court in the present case suggest that the search for a unifying element may be a long one."[234]

He went on to ask:

> " . . . where does one find a conceptual framework that will promote predictability and continuity and at the same time facilitate change in the law when it is needed? I think that the existing legal materials already contain part of the answer. We have the established categories, a considerable body of case law and the useful concept of reasonably foreseeability. If a case falls outside an established category, but the defendant should reasonably have foreseen that its conduct would cause harm to the plaintiff, we have only to ask whether the reasons that called for or denied a duty in other (usually similar) cases require the imposition of a duty in the instant case. No doubt that may sometimes mean that, whether or not a duty is imposed at a particular time, will depend on the extent to which the case law has progressed to that time. But that is the way of the common law, the judges preferring to go 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science'.[235] It is not an approach that appeals to grand theorists who prefer to decide cases by general principles applicable to all cases. But in an area of law such as awarding damages for negligently inflicting economic loss, which is still developing and which has been recently cast aside from

were Dawson J at (1995–1997) 188 C.L.R. 159 at 177–178, Toohey J at 188–189, McHugh J at 210–211 and Gummow J at 237–239. As an example of the views of Brennan CJ, Kirby J cited *Bryan v Maloney* (1995) 182 C.L.R. 609 at 653. Kirby J explained what he meant in the passage quoted in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61 at [60]. The decision in *Pyrenees* is discussed at (1998) 114 L.Q.R. 377 per Lunney.

[232] [1999] HCA 36; (1999) 198 C.L.R. 180. See further Witting, "The Three-stage Test Abandoned in Australia—or Not" (2002) 118 L.Q.R. 214.

[233] See his dissenting judgment in *Hill v Van Erp* (1995–1997) 188 C.L.R. 159 at 210–211.

[234] [1999] HCA 36; (1999) 198 C.L.R. 180 at [76]. See also per Gaudron J at [25], per Kirby J at [282] and per Hayne J at [330]–[335].

[235] Lord Wright, "The Study of Law" (1938) 54 L.Q.R. 185 at 196.

> any unifying principle, there is no alternative to a cautious development of the law on a case by case basis."[236]

Gummow J saw the absence of a "simple formula which can mask the necessity for examination of the particular facts" as a benefit, allowing the development of a coherent body of precedent against which the facts of particular cases can be judged, not by "the imposition of a fixed system of categories", but identifying relevant "salient features" and considering whether, allowing for the operation of appropriate "control mechanisms", the relationship gave rise to a duty of care.[237]

2–079 In *Sullivan v Moody*,[238] the High Court of Australia held that medical practitioners and others investigating allegations of child abuse did not owe a duty of care in tort to the relations of the children. They also held that the threefold test did not apply in Australia.[239] It is now clear that "proximity" has ceased to be the test in Australia.[240] More recently, in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[241] the High Court of Australia has identified "vulnerability" as an important requirement, its significance having emerged from the decisions in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad*[242] and *Perre v Apand Pty Ltd.*[243] "Vulnerability" refers to the injured party's inability to protect himself from the defendant's carelessness, either entirely or so that any resulting loss would fall on the defendant.[244] However, this is not put forward as a universal test. Australia appears to have abandoned any single, simple "test" and to be applying an incremental approach while still seeking to identify guiding principles.

(ix) *Analysis*

2–080 **The problem.** If the only claims before the courts were in respect of personal injuries caused by swallowing snails lurking in opaque ginger beer bottles then the law would have been settled by *Donoghue v Stevenson.*[245] There would be no need for the courts to search for principles upon which to base their decisions in

[236] (1999) HCA 36; (1999) 198 C.L.R. 180 at [29]–[30]. See further McHugh J's judgment in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999) 167 A.L.R. 1 at [78].

[237] ibid. at [201]–[202]. Gummow J's reference to "salient features" was taken from the judgment of Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 C.L.R. 529 at 576–577.

[238] [2001] HCA 59; (2001) 183 A.L.R. 404.

[239] Although Kirby J supported it in *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [229]–[244].

[240] See also *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 C.L.R. 515 at [18] in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ. Indeed, so firm is the rejection of "proximity" that in *Imbree v McNeilly* [2008] HCA 40 the High Court of Australia overturned its earlier decision in *Cook v Cook* [1986] HCA 73; (1986) 162 C.L.R. 376, which has been based upon "proximity", observing that it was based upon "reasoning that does not accord with subsequent decisions of this Court denying the utility of that concept as a determinant of duty".

[241] [2004] HCA 16; [2005] B.L.R. 92.

[242] (1976) 136 C.L.R. 529.

[243] [1999] HCA 36; (1999) 198 C.L.R. 180.

[244] [2004] HCA 16 at [23] in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ, [80] in the judgment of McHugh J, [168] in the judgment of Kirby J and [222] in the judgment of Callinan J.

[245] [1932] A.C. 562.

justified if A is not to be required to compensate B for having inflicted it, that is not the case where the damage suffered does not involve personal injury or damage to goods or other property.[269]

4. In the latter case (which covers both "pure economic loss"[270] and the failure to confer a benefit), the law of tort recognises both the difficulties in imposing a potentially wide liability on A[271] and that it may be entirely legitimate and consistent with public policy for A to cause "pure economic loss"[272] or to fail to confer a benefit.

5. Whatever the nature of the damage, a duty of care should be found where, and only where, it is reasonable for A to be liable to compensate B for having negligently caused the damage in question.[273]

[269] See, e.g. *Murphy v Brentwood DC* [1991] 1 A.C. 398 at 487B–48C per Lord Oliver:

"The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that this occurrence could be foreseen."

But see the comment of Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 N.Z.L.R. 282 and 296:

"The first concern of the law is naturally personal safety. Injury to the person is a kind of damage in a class of its own. Or at least most people would, I think, say so. On the other hand, a plaintiff awarded damages for harm to property is being compensated essentially for economic loss. It would be a crude system of law that drew a vital distinction for this purpose between tangible and intangible property interests"

[270] "Pure economic loss" now includes damage to a building or chattel caused by an inherent defect if A has supplied that building or chattel to B.

[271] See Cardozo CJ in *Ultramares Corp v Touche* (1931) 174 N.E. 441; and in *Wagner v International Railway Co* (1921) 232 N.Y. 176.

[272] See, e.g. Lord Reid in *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004 at 1027B:

"For example, causing economic loss is a different matter; for one thing, it is often caused by deliberate action. Competition involves traders being entitled to damage their rivals' interests by promoting their own, and there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours."

See also *Martel Building Ltd v The Queen* (2000) 196 D.L.R. (4th) 1 at [62]–[67] (discussed in para.2–069, fn.200, above).

[273] See, e.g. Lord Reid in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 at 482 ("The law ought so far as possible to reflect the standards of the reasonable man . . . ").

In *Frost v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 at 495B, when considering whether to recognise a duty of care to protect from psychiatric harm in the absence of physical injury (an area of law in which the courts adopt a more restrictive approach akin to that adopted to cases of pure economic loss), Lord Steyn referred to "the man on the Underground". In *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 at 82B–82C, Lord Steyn conducted a notional poll of commuters on the Underground when considering whether the parents of an unwanted but healthy child should recover damages for the cost of the child's upbringing. (However, care is needed when adopting this approach: the High Court of Australia disagreed with the result of Lord Steyn's poll: see *Catanach v Melchior* [2003] HCA 38.)

See also *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [6] per Gleeson CJ: "At the centre of the law of negligence is the concept of reasonableness."

Similar views were expressed by Tipping J giving the judgment of the New Zealand Court of Appeal in *Att-Gen v Carter* [2003] 2 N.Z.L.R. 160 at [30]:

"The outcome of a duty of care issue should not depend on what analytical method is employed. The ultimate enquiry is whether it is fair, just and reasonable to require the defendant to take reasonable care to avoid causing the plaintiff loss or damage of the kind for which compensation is being sought."

It is not suggested that these underlying principles provide a mechanism for deciding whether a duty of care is owed in a novel situation. They do, however, provide some assistance in understanding decisions on particular facts and in identifying which facts were important.

The last of the underlying principles identified, namely that a duty of care should be imposed where it is reasonable for A to be liable to compensate B for having negligently caused the damage in question, can be criticised for being hopelessly vague and for inviting individual judges to decide particular cases according to their personal assessment of the reasonable outcome.[274] However, in this context reasonableness is not assessed by the judge solely on the basis of his own, personal criteria. Rather, existing authority is to be seen as representing "the cumulative experience of the judiciary of the actual consequences of lack of care in particular circumstances".[275] Reasonableness may underlie a decision that a manufacturer should owe a duty of care to a consumer who suffers personal injury as a result of a latent defect caused by the manufacturer's negligence,[276] and may be more explicitly stated as a factor in cases of negligent misstatement, where the reasonableness of the claimant's reliance will be relevant in determining whether he was owed a duty of care.[277]

2–086

[274] See, e.g. *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 C.L.R. 180 at [80] per McHugh J:

"Almost everyone would agree that courts should not impose a duty of care on a person unless it is fair, just and reasonable to do so. But attractive as concepts of fairness and justice may be in appellate courts, in law reform commissions, in the academy and among legislators, in many cases they are of little use, if they are of any use at all, to the practitioners and trial judges who must apply the law to concrete facts arising from real life activities. While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that 'each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind.' "

Donaldson v Beckett (1774) 2 Brown 129 per Lord Camden cited in "The Judge and Case Law" in Devlin, *The Judge* (1979) at 181. Lord Devlin was surely right when he said ("The Judge and Case Law" in Devlin, *The Judge* (1979) at 181):

"For a judge to decide fairly and convincingly every case that comes before him in the light only of his own sense of justice, he would have to be a superman. I doubt if there have ever been more than a handful of men on the bench who could do it, though doubtless there are slightly more who think that they could."

In *Sullivan v Moody* [2001] HCA 59; (2001) 183 A.L.R. 403 the High Court of Australia expressed reservations about the "fair, just and reasonable" element of the three-stage test, saying at [49]:

"The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

The Court went on to quote from the speech of Lord Diplock in *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004.

[275] *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004 at 1058 per Lord Diplock. Lord Diplock was discussing the judicial approach to questions of public policy when deciding whether a duty of care was owed, but the principle is the same.

See also *D v East Berkshire Community NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373 at [100] per Lord Rodger.

[276] *Donoghue v Stevenson* [1932] A.C. 562; see also para.2–033, above.

[277] See, e.g. para.17–074, below. See also *Att-Gen v Carter* [2003] 2 N.Z.L.R. 160 at [26] per Tipping J, giving the judgment of the New Zealand Court of Appeal.

1. Actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness).
2. Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action.
3. Actions based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it.
4. Misfeasance in public office, i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the claimant or in the knowledge that the conduct is unlawful.

In this section some brief consideration will be given to the first class and then the vexed question of the circumstances in which the existence or exercise of a statutory power or duty gives rise to a common law duty of care (the third class) will be addressed. The fourth class, misfeasance in public office, is beyond the scope of this book.[318] Before doing so, however, the second class needs to be explained.

2–095 **Careless exercise of a statutory duty.** Where Parliament has authorised an authority to carry out a particular act, the fact that carrying it out involves what would otherwise be a tortious act (e.g. nuisance) does not render the authority liable in damages: the authority has a complete defence to a claim—it is not wrongful to carry out an act which Parliament has authorised.[319] However, Parliament is not taken to have authorised the authority to carry out the act carelessly, so that if the authority has done the act carelessly, so as to cause damage, it has no defence based upon statutory authority. It follows that Lord Browne-Wilkinson's second class is concerned with the negation of a defence, rather than the recognition of a duty of care or other tortious claim.[320] The fact that a statutory power is exercised carelessly does not of itself give rise to a cause of action in tort. The claimant has to show that the circumstances were such that the person exercising the power owed him a duty of care when exercising it.[321]

2–096 **Breach of statutory duty simpliciter (Lord Browne-Wilkinson's first class).** Breach of statutory duty only gives rise to a private law cause of action if, on the true construction of the statute, the duty was imposed in order to protect a limited class of the public and Parliament intended to confer on members of that class a private right of action for breach of the duty.[322] Where there is an express provision in the statute, this principle is easy to apply.[323] It is more difficult to apply where there is no express provision. The most important factors

[318] See *Clerk & Lindsell on Torts*, 21st edn, paras 14–111 to 14–121; and *Three Rivers DC v Governor and Company of the Bank of England (No.3)* [2003] 2 A.C. 1.
[319] See, e.g. *Allen v Gulf Oil Refining Ltd* [1981] A.C. 1001.
[320] See *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at 732C–733F, explaining *Geddis v Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430.
[321] ibid. at 734H–735A.
[322] ibid. at 731D–731E.
[323] Examples are given in para.9–11 of *Clerk & Lindsell on Torts*, 21st edn.

in determining whether Parliament intended there to be a private right of action are:

1. Whether the provision was designed to protect a limited class of individuals.
2. Whether the statute provides for any other sanction for breach of the duty.
3. Whether the claimant has alternative remedies.

Of these, the first is the most important, with less weight being attached to the absence of other sanction or remedy. A broad analysis of the statute is required.[324] Analysis of the considerable body of authority as to the application of these factors is beyond the scope of this book.[325]

2–097 **Common law duty of care arising either from the imposition of a statutory duty or from the performance of it.** The courts have not found an easy answer to the question when the imposition of a statutory duty or the performance of it should give rise to a common law duty of care. There is a reluctance to recognise the possibility of claims for negligent policy decisions, although there is also a recognition that the distinction between policy and operational questions is not always easy to make or useful in practice. The result has been a tendency to find that the natural persons through whom authorities discharge their statutory functions themselves owe common law duties of care, for breach of which their employees are vicariously liable. So, an education authority does not itself owe a common law duty to pupils to assess their educational needs, but the educational psychologist who makes the assessments is under a common law duty to them to carry out the assessments with reasonable skill and care.[326] In the same way, a fire authority owes no duty of care to property owners in its area, but if its employees attend a fire, they owe a common law duty of care to exercise reasonable skill and care not to create some new danger.[327] This distinction may have arisen because different considerations apply to claims based on alleged common law duties said to arise solely from the existence of some broad public law duty and cases in which public authorities have chosen to enter into relationships or to accept responsibilities which give rise to a common law duty of care.[328] However, in each case, it is still necessary to show that the specific employee of the public authority has so conducted himself as to give a duty of care to the particular claimant.

[324] *Phelps v Hillingdon LBC* [2001] 2 A.C. 619 at 652D–652G per Lord Slynn.
[325] See *Clerk & Lindsell on Torts*, 21st edn, paras 9–12 to 9–42.
[326] *Phelps v Hillingdon LBC* [2001] 2 A.C. 619. This distinction appears clearly from the decision of the Court of Appeal in *Carty v Croydon LBC* [2005] EWCA Civ 19; [2005] 1 W.L.R. 2312. There it was held that the mere fact that an education authority officer failed to make an assessment in accordance with the applicable statutory requirements was not actionable in tort, but that, once the officer entered into a relationship with or assumed responsibility towards a child, then a duty of care could arise.
[327] *Capital and Counties Plc v Hampshire CC* [1997] Q.B. 1004.
[328] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057 per Lord Hoffmann at [38]. See also *Smeaton v Equifax Plc* [2013] EWCA Civ 108; [2013] 2 All E.R. 959 at [73] per Tomlinson LJ.

"Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that it absurd. The nature of the fiduciary relation must be such that it justifies the interference."[515]

2–145 So, in each case it is important to establish the extent of the trust, for that will define the extent to which equity will intervene.[516] The trust and confidence which gives rise to fiduciary obligations is not, or need not, be emotional. For example, a director owes fiduciary obligations to his company. In this sense it is to be contrasted with the confidence which is the basis for the equitable doctrine of undue influence. It is based upon reliance, but not the same sort of reliance which may underlie a tortious duty of care.[517] Nor is it simply reliance on another party to a contract to perform his obligations under it.[518] Rather it is the fact that

[515] In *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74, Lord Mustill, giving the opinion of the Privy Council, said at 98A–98B:

"To describe someone as a fiduciary, without more, is meaningless. As Frankfurter J said in *SEC v Chenery Corp* (1943) 318 U.S. 80 at 885–886:

'To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?' "

See also *Maguire v Makaronis* (1997) 188 C.L.R. 449 at 464, where Brennan CJ and Gaudron, McHugh and Gummow JJ said:

" . . . to say that the appellants stood as fiduciaries to the respondents calls for the ascertainment of the particular obligations owed to the respondents and consideration of what acts and omissions amounted to failure to discharge those obligations."

See also *Brandeis (Brokers) Ltd v Black* [2001] 2 All E.R. (Comm) 980 at [40], per Toulson J: "Fiduciaries are not all required, like the victims of Procrustes, to lie on a bed of the same length." Toulson J then referred to the speech of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 206.

[516] So, while usually a company director owes a fiduciary duty to the company to promote its interests, each case must be looked at on its facts. In *Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2002] 2 B.C.L.C. 201 the company had ceased to pay the director and had excluded him from its management. The Court of Appeal held that he was not in breach of fiduciary duty when he set up his own company in the same area of business. Brooke LJ, with whom Jonathan Parker J agreed, said at [75]: "the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made."

[517] e.g. an engineer asked to design foundations may be relied upon by the building owner, but the engineer will not owe any fiduciary obligations as to the adequacy of his design.

[518] *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 at 98C–98G. See further *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26; [2007] 3 N.Z.L.R. 169 at [31]:

"It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require cooperation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed.

the principal so relies on the fiduciary as to leave the principal vulnerable to any disloyalty by the fiduciary and so reliant on his good faith.[519] It follows that a commercial relationship at arm's length, with both parties on an equal footing, is unlikely to give rise to fiduciary obligations[520] and that a person may be subject to fiduciary obligations in relation to some activities but not others.[521]

The significance of the retainer. When considering the extent of a professional person's fiduciary obligations, the scope and terms of any retainer (together with the scope of any tortious duty of care) need to be considered. In particular, it is necessary to ascertain what a professional person has been retained to do and the terms upon which he has agreed to do it in order to establish whether and to what extent he is in a position of trust.[522] If, for example, **2–146**

Partners are a classic example of parties in that situation. Their position is different from that of parties to a contract who may have to cooperate but are doing so for their separate advantages."

See also *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40; [2007] 3 N.Z.L.R. 192 at [19]–[21].

[519] This sentence was cited with approval by Tomlinson LJ, with whom the other members of the Court of Appeal agreed, in *McWilliam v Norton Finance (UK) Ltd (t/a Norton Finance (In Liquidation))* [2015] EWCA Civ 186; [2015] P.N.L.R. 22 at [46]. In that case the vulnerability of the claimants, even though the defendant was not offering to advise them, resulted in a finding that there was a fiduciary relationship. The relationship between the parties had the necessary element of reliance. See also, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41 at 142 per Dawson J:

"There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other . . . From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position."

It follows that the directors of a company which is a fiduciary may themselves be subject to fiduciary obligations if there is the requisite kind of reliance or trust and confidence in them personally: see *JD Wetherspoon Plc v Van de Berg & Co Ltd* [2007] EWHC 1044 (Ch); [2007] P.N.L.R. 28 (Lewison J), applying *Satnam Investments Ltd v Dunlop Hayward Ltd* [1999] 3 All E.R. 652 CA. See also *Ratiu v Conway* [2005] EWCA Civ 1302; [2006] 1 All E.R. 571.

[520] (1984) 156 C.L.R. 41 at 170 per Gibbs CJ. See also *Halton International Inc (Holdings) SARL v Guernroy Ltd* [2005] EWHC 1968 (Ch); [2006] 1 B.C.L.C. 78, Patten J and *Dresna Pty Ltd v Linknarf Management Services Pty* [2006] FCAFC 193; (2006) 237 A.L.R. 687 where the Federal Court of Australia held that an arrangement between vendor and purchaser of a lease of a supermarket to pursue litigation to obtain the consent of the landlord to the assignment did not give rise to any fiduciary obligation. For a helpful review of the authorities as to whether and when one party to a commercial joint venture will be under fiduciary obligations to another, see the judgment of Lloyd LJ in *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910; [2014] 1 B.C.L.C. 545 at [34]–[59].

[521] *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All E.R. 1222 (PC), applied in *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd* [2011] EWHC 1515 (TCC), Ramsey J.

[522] "Even in the case of a solicitor client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances . . . Whether the relationship derives from retainer, less formal arrangement or self-appointment, it must be examined to see what duties are thereby imposed on the fiduciary and the scope and ambit of those duties.": New South Wales Court of Appeal in *Beach Petroleum NL v Kennedy* [1999] NSWCA 408 (reported (1999) 48 N.S.W.L.R. 1) at [188] and [192] (pp.45–46 of the report).

even if it was, s.39 of the Banking Act 1987 could nevertheless require its disclosure, Millett J turned to consider the issue of confidence. He found that the public interest in the effective regulation and supervision of authorised banking institutions outweighed the public interest in maintaining the confidence in the information.[663]

2–189 If disclosure of confidential information is not wrongful because it is in the public interest, it may be that the information was never confidential (in the sense that the recipient of the information should know that he should keep the information confidential). As Toulson LJ said in *Napier v Pressdram Ltd*[664]:

> "For a duty of confidentiality to be owed (other than under a contract or statute), the information in question must be of a nature and obtained in circumstances such that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential. As Cross J observed in *Printers and Finishers Ltd v Holloway* [1965] RPC 239, page 256, the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person. Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential."

Toulson LJ went on to hold that the making of a complaint to the Law Society about a solicitor and the Law Society's investigation of that complaint were not confidential as between the complainant, the solicitor who was the subject of the complaint and the Law Society. The Law Society was performing a public function.[665]

2–190 **Disclosure required by law.** It is no misuse of confidential information to disclose it if that disclosure is required by law. So, for example, disclosure of

[663] See also *W v Edgell* [1990] Ch. 359 CA per Scott J (disclosure of psychiatric report to mental health review tribunal justified and overrode the duty of confidence owed by a doctor to his patient); and *Re a Company's Application* [1989] Ch. 477 per Scott J (disclosure to FIMBRA and the Inland Revenue by former employee of FIMBRA member of member's alleged breaches of FIMBRA rules and tax irregularities permitted). These cases are discussed in Toulson and Phipps, op. cit., at paras 6–024 to 6–047.

The decision of the Court of Appeal in *H (a healthcare worker) v Associated Newspapers Ltd* [2002] EWCA Civ 195; [2002] Lloyd's Rep. Med. 210 illustrates the fine balance that has to be struck between confidentiality (in particular the information imparted in confidence by a healthcare worker to his employer that he was HIV positive) and the public interest and freedom of the press. A solicitor who knows from confidential information obtained from his client that his client might lack mental capacity might be justified in making an application to the Court of Protection, but not in disclosing that information to another solicitor retained by the client on another matter: *Marsh v Sofaer* [2003] EWHC 3334 (Ch); [2004] P.N.L.R. 24, Morritt VC.

[664] [2009] EWCA Civ 443; [2010] 1 W.L.R. 934 at [42]. The other members of the Court of Appeal agreed with Toulson LJ. This decision was followed by Eady J in *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB); [2009] 2 E.M.L.R. 22.

[665] However, if intrinsically confidential information were provided during the course of a complaint and its investigation, it would retain its confidentiality: [2009] EWCA Civ 443; [2010] 1 W.L.R. 934 at [56].

confidential and even privileged documents may be required by statute.[666] Confidential documents may have to be disclosed in litigation.[667]

Detriment. It is sometimes suggested that a claimant must also establish that he has suffered or will suffer detriment as a result of a breach of confidence.[668] There are powerful arguments that he need not.[669] In any event, the answer will lie in the nature of the confidential interest which the recipient is bound to preserve and in the remedy being sought. For example, where the confidential information concerns the claimant's health or personal life, a claim for an injunction to restrain unauthorised disclosure could be allowed even though the claimant might not be able to show that he would suffer financial detriment were the information to be publicised. However, once the information had been made public then, unless there were a claim for an account of profits, he would have no obvious remedy unless he could show actual damage.[670] There is a danger in this area of descending into semantics.[671] 2–191

[666] See, e.g. *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] B.C.L.C. 583, where Millett J held that s.37 of the Banking Act 1987 empowered the Bank of England to require production of privileged, confidential documents. See also *R. (Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office* [2004] EWCA Civ 1494; [2005] W.L.R. 1302.

[667] See, e.g. *Robertson v Canadian Imperial Bank of Commerce* [1994] 1 W.L.R. 1493 PC. See also *Barclays Bank Plc (t/a Barclaycard) v Taylor* [1989] 1 W.L.R. 1066 CA (banks not in breach of contractual duty of confidentiality in complying with and not challenging access orders under Police and Criminal Evidence Act 1984).

[668] See, e.g. *Att-Gen v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109 at 270F per Lord Griffiths. On this topic generally see Toulson and Phipps, op. cit., paras 3–162 to 3–167.

[669] See, e.g. the judgment of Gummow J in *Smith Kline and French Laboratories (Australia) Ltd v Department of Community Services* (1990) A.L.R. 87 at 126:

> "The basis of the equitable jurisdiction to protect obligations of confidence lies, as the present case illustrates, in an obligation of conscience arising from the circumstances in or through which the information, the subject of the obligation, was communicated or obtained: *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No.2)* (1984) 156 C.L.R. 414 at 438. The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff. The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss. To look into a related field, when has equity said that the only breaches of trust to be restrained are those that would prove detrimental to the beneficiaries?"

Once it is appreciated that to be confidential the information must be of significance to the claimant, the need to show detriment would appear to be superfluous or readily fulfilled.

[670] *Att-Gen v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109 at 255H–256A per Lord Keith, who was not of the view that detriment should have to be shown.

[671] ibid. at 281H–282B per Lord Goff:

> "I would also, like Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] R.P.C. 41 at 48, wish to keep open the question whether detriment to the plaintiff is an essential ingredient of an action for breach of confidence. Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case: but this may not always be necessary . . . In the present case the point is immaterial, since it is established that in cases of Government secrets the Crown has to establish not only that the information is confidential, but also that publication would be to its 'detriment' in the sense that the public interest requires that it should not be published. That the word 'detriment' should be extended so far as to include such a case perhaps indicates that everything depends upon how wide a meaning can be given to the word 'detriment' in this context."

The remedy is compensatory, not punitive, so that there is no power to make an exemplary award.[68]

(ii) *Equitable Compensation for Breach of Confidence*[69]

3–018 There is jurisdiction under s.50 of the Senior Courts Act 1981 (as there was, historically, under Lord Cairns' Act 1858) to grant damages in lieu of an injunction. This has been used to justify awards of damages for breach of confidence. However, it could not justify an award of damages where a grant of an injunction would not be ordered—most obviously when the confidential information had already been disclosed.[70] The English courts have awarded damages for breach of confidence.[71]

3–019 Once it is appreciated that there is an equitable obligation of confidence,[72] then the availability of equitable compensation in appropriate cases resolves this problem. Such compensation should be awarded for actual loss and damage, but there is no reason in principle why it should not compensate the claimant for distress and inconvenience.[73]

(c) *Account of Profits*

3–020 An account of profits is the appropriate remedy where a fiduciary has made an unauthorised profit by breaching his fiduciary obligations[74] or where profit has been made from a breach of confidence.[75] A defaulting fiduciary cannot rely upon the fact that the principal would not or might not have realised the profit himself.[76] Where the claim is for misuse of confidential information, it is a matter for the Court whether to order an account of profits rather than to make an award of damages.[77]

[68] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10.
[69] See Toulson and Phipps, *Confidentiality*, 3rd edn (Sweet & Maxwell, 2012), paras 9–037 to 9–052.
[70] *Malone v Metropolitan Police Commissioner* [1979] Ch. 344 at 360A–360C per Megarry VC.
[71] *Seager v Copydex Ltd (No.2)* [1969] 1 W.L.R. 809. Damages were awarded on the basis of the value of the information, after which the information would belong to the defendant.
[72] See para.2–177.
[73] cf. *Farley v Skinner (No.2)* [2001] UKHL 49; [2002] 2 A.C. 732.
[74] See, e.g. *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134n at 149F per Lord Russell of Killowen. In *Walsh v Shanahan* [2013] EWCA Civ 411; [2013] 2 P. & C.R. DG7 at [37], Rimer LJ stated that the ordinary remedy against a fiduciary who made profits in breach of his duty of loyalty was an account of profits and referred to his discussion of the authorities in his judgment in *O'Donnell v Shanahan and Another* [2009] EWCA Civ 751; [2009] 2 B.C.L.C. 666 at [51] ff.
[75] *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1963] R.P.C. 45 (claim was made both in equity and in contract); *Att-Gen v Guardian Newspapers Ltd* [1990] 1 A.C. 109.
[76] *Chirnside v Fay* [2006] NZSC 68; [2007] 1 N.Z.L.R. 433, following, among other cases, *Murad v Al-Saraj* [2005] EWCA Civ 959; [2005] W.T.L.R. 1573.
[77] As Rimer LJ said in *Walsh v Shanahan* [2013] EWCA Civ 411; [2013] 2 P. & C.R. DG7 at [64]: "The objective in any case is to identify the appropriate remedy for the circumstances of the wrongdoing—to make the remedy fit the tort." On the facts the trial judge had been entitled to make an award of damages: the information used by the defendants was limited and they had used it in a venture which had involved risk on their part and from which the claimant had withdrawn (ibid. at [70]). See also the decision of Sales J in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch); [2010] Bus. L.R. D141 and MVF 3 *APS v Bestnet Europe Ltd* [2016] EWCA Civ 541.

(d) *Injunction*

3–021 An injunction—both interim and final—can be used to restrain a breach or threatened breach of confidence. In such cases it is essential that the injunction be unambiguous and that it extend only to information which is truly confidential.[78]

5. INTEREST

(a) *Interest on Damages under the Senior Courts Act 1981*

(i) *General*

3–022 The court has a discretion to award simple interest on any damages awarded to a claimant and will generally do so.[79] The discretion extends to both the rate of interest awarded and the period for which it should run, commencing with the date when the cause of action arose and ending with the date of the judgment.[80] In the purely commercial context (i.e. most claims against insurance brokers, auditors, underwriting agents, etc.) commercial rates of interest are awarded and no further discussion is called for here.

(ii) *Interest on Damages for Inconvenience and Discomfort*

3–023 In respect of general damages for inconvenience and discomfort, interest at two per cent will generally[81] be awarded from the date of the inconvenience to trial, applying the principles applicable to the award of interest on general damages in personal injury actions.

(iii) *Interest on Damages for Pecuniary Losses in Solicitors' and Surveyors' Negligence Actions*

3–024 Interest is awarded to compensate the claimant for being deprived of his damages for a period of time, not as compensation for the damage done to him[82] or as a

[78] See Toulson and Phipps, *Confidentiality*, 3rd edn (Sweet & Maxwell, 2012), paras 9–001 to 9–006.
[79] Senior Courts Act 1981 s.35A empowers the court to award interest on sums paid before judgment. However, this power does not extend to sums recovered by the claimant before the commencement of proceedings: see *IM Properties Plc v Cape & Dalgleish* [1999] Q.B. 297. In that case the claimants claimed against their auditors losses flowing from negligent audits. They had recovered part of the losses from their former chief executive before issuing the writ. The Court of Appeal held that no interest could be awarded in respect of that part of the loss.
[80] Senior Courts Act 1981 s.35A(1). In *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627, the House of Lords rejected the (ingenious) argument that there was a distinction between the date when a cause of action accrued and the date when it "arose" within the meaning of s.35A of the Senior Courts Act 1981: see 1638B.
[81] Such interest was awarded in *Heatley v William H Brown Ltd* [1992] 1 E.G.L.R. 289, 297. Occasionally such interest has not been awarded, but no reasons have been given: *Wilson v Baxter Payne & Lepper* [1985] 1 E.G.L.R. 141.
[82] *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] A.C. 429 at 437 per Lord Herschell LC. And see the dicta of Lord Denning MR in *Jefford v Gee* [1970] 2 Q.B. 130 at 146.

Metallising Co Ltd.[458] The trial judge has attributed delay on the part of the claimant's solicitors to the claimant. Buxton LJ said that, unless, as a matter of law a claimant was bound by and bore responsibility for his solicitor's actions, such attribution was not right. On the evidence, the claimant had done what any man his position might have been expected to have done, namely gone to apparently efficient and responsible solicitors and left them to get on with it. He was not persuaded that each case should be considered on its own facts, holding that the court was speaking more generally and saying that there was certainly no rule of law to visit the faults of the lawyers on the claimant.[459] Finally, in *Steeds v Peverel Management Services*,[460] Sir Christopher Slade (giving the judgment of the Court of Appeal) concluded that the above authorities demonstrated that fault on the part of the claimant's solicitors was not to be attributed to the claimant personally. This was not to say, however, that the existence of a claim by the claimant against the solicitors was irrelevant—it was a factor in weighing the prejudice suffered by the claimant if the discretion under s.33 were not exercised.[461]

5–126 **The relevance of s.33 to professional negligence litigation.** The principal relevance of s.33 of the Limitation Act 1980 to professional negligence is therefore twofold. First, it will sometimes enable solicitors who have failed to issue a writ in time to escape the consequences of their own negligence. In such a situation it is not uncommon for the solicitors' insurers to finance the claimant's application under s.33.[462] Secondly, it will sometimes enable patients (or their personal representatives) to begin clinical negligence actions after the expiry of the normal limitation period.[463] In such cases the court will apply the same general principles in exercising its discretion as were discussed in the previous paragraphs. However, the fact that the action is one for professional negligence may be an additional factor in the defendant's favour.

(f) *Fraud or Concealment*

5–127 Section 32(1) of the Limitation Act 1980 provides that where:

> "(a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant[464] the period of limitation shall not begin to run until the plaintiff has discovered the fraud [or] concealment . . . or could with reasonable diligence have discovered it."[465]

[458] [2000] Lloyd's Rep. Med. 247.
[459] ibid. at [26].
[460] [2001] EWCA Civ 419.
[461] See also *Martin v Royal Free Hospital NHS Trust* [2005] EWHC 531 (QB) at [50]–[51] per Hodge J.
[462] See para.11–339, below.
[463] See, e.g. *Hills v Potter* [1984] 1 W.L.R. 641 at 653–654.
[464] The claimant is entitled to rely on s.32(1)(b), even where he is making a claim for fraud: see *UBAF Ltd v European American Banking Corp* [1984] Q.B. 713 at 727.
[465] The parts relating to mistakes have been omitted from the quotation, as they are not specifically relevant to professional negligence actions.

Section 32(2) provides:

> "For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

This form of wording appeared for the first time in s.7 of the Limitation (Amendment) Act 1980, amending s.26 of the 1939 Act.[466] Section 7 was based on (although not identical to) the recommendations of the Law Reform Committee in its 21st Report.[467] The Law Reform Committee reviewed cases in which the then s.26 had been considered[468] and concluded that the provision should be reformulated so as to incorporate the feature of unconscionability but to "reproduce in a more intelligible form the construction placed on that section by the courts".[469]

5–128 **Effect of deliberate concealment some time after breach.** In *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*,[470] the House of Lords held by a bare majority that s.32(1)(b) operates to postpone the start of the limitation period even where the deliberate concealment occurs some time after accrual of the cause of action. When time starts to run again, the claimant will have the full limitation period, not just the balance that was left at the time of the deliberate concealment.[471]

5–129 **"Any fact relevant to the right of action".** The claimant may only invoke s.32(1)(b) where the defendant has deliberately[472] concealed "any fact relevant to the right of action". "Action" is defined broadly in s.38(1) of the Act. By virtue of s.38(9) references in s.32 to a right of action include references to a cause of action. The meaning of "any fact relevant to the right of action" was considered

[466] Consolidated by the Limitation Act 1980.
[467] Final Report on Limitation of Actions, Cmnd.6923 (1977). Note that the Committee deliberately did not make any reference to the likelihood of the defendant's act remaining undiscoverable for a substantial period, or at all. See para.2.25 of the 21st Report.
[468] *Kitchen v Royal Air Force Assoc* [1958] 1 W.L.R. 563; *Clark v Woor* [1965] 1 W.L.R. 650; *Applegate v Moss* [1971] 1 Q.B. 406; *King v Victor Parsons & Co* [1973] 1 W.L.R. 29.
[469] See the Final Report, para.2.22. Given the nature of the 1980 Act, however, pre–1980 legislation and authorities should not be relied on in construing s.32, unless there is ambiguity in the wording: see the speeches of Lords Keith and Browne-Wilkinson and in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] A.C. 102 at 140E and 144E–144G respectively, cf. per Lord Lloyd at 146D. See also *Cave v Robinson Jarvis & Rolfe (A Firm)* [2002] UKHL 18; [2003] 1 A.C. 384 at [58] per Lord Scott (but see the approach of Lord Millett in the same case at [19]–[23]: three other members of the House of Lords, agreed with Lord Scott, only two with Lord Millett).
[470] [1996] 1 A.C. 102.
[471] However, as held by the Court of Appeal in *Ezekiel v Lehrer* [2002] EWCA Civ 16; [2002] Lloyd's Rep. P.N. 260. Once a claimant is aware of the relevant facts, a subsequent attempt to conceal them from him did not allow the claimant to invoke s.32. The genie is not deemed to have been put back in the bottle.
[472] The reason why a defendant deliberately concealed a fact relevant to the right of action is irrelevant; what matters is whether he did so deliberately: see *Williams v Fanshaw Porter Hazelhurst (A Firm)* [2004] EWCA Civ 157; [2004] 1 W.L.R. 3185.

where that theory is not supported by the evidence of any of the expert witnesses.[40]

6–007 The second function of the expert witness is to assist the court in deciding whether the acts or omissions of the defendant constituted negligence. He will recount the current state of knowledge at the material time and the standards ordinarily observed in his profession, including any relevant general and approved practice or differing schools of thought. Expert evidence that a reasonably competent member of the defendant's profession would not have committed the act or omission in question is generally necessary before the court will find that he was negligent. Thus in *Sansom v Metcalfe Hambleton and Co*[41] Butler-Sloss LJ said[42]:

> " . . . a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard."

[40] In the clinical negligence case *McLean v Weir* (1977) 3 C.C.L.T. 87 in the British Columbia Supreme Court, Gould J summarised the position in a manner which, it is submitted, is equally applicable in England (at 101):

> "It is true that the court may accept in whole or in part or reject in whole or in part the evidence of any witness on the respective grounds of credibility or plausibility, or a combination of both. But in technical matters, unlike in lay matters within the traditional intellectual competence of the court, it cannot substitute its own medical opinion for that of qualified experts. The court has no status whatsoever to come to a medical conclusion contrary to unanimous medical evidence before it even if it wanted to, which is not the situation in this case. If the medical evidence is equivocal, the court may elect which of the theories advanced it accepts. If only two medical theories are advanced, the court may elect between the two or reject them both; it cannot adopt a third theory of its own, no matter how plausible such might be to the court."

In principle, a court or tribunal may reject uncontroverted expert evidence, or the common opinion of the experts of all parties, on an issue within the relevant scope of expertise. However, if this is to be done, then specific and adequate justification should be given. See *Al-Jedda v Secretary of State for the Home Department* [2012] EWCA Civ 358 at [102]–[107]; *Perkins v McIver* [2012] EWCA Civ 735 at [27]–[31]. There are some categories of case where the court can more readily take a middle position between experts, or adopt its own approach after considering expert evidence. In the valuers' negligence case of *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (A Firm)* [2013] 1 EGLR 119, Gross LJ said (at [43]):

> "It is as well to emphasise that a Judge is never bound by expert evidence (even, though that does not arise here, undisputed expert evidence). While a Judge must have a reasoned or rational basis for a decision—on issues of quantum as on other issues—the Judge is in no way confined to the figures contended for by the experts. This is manifestly so in a typical valuation case where the figure arrived at by the Judge may well lie somewhere in between those advanced by the rival experts. Moreover, having regard to the true nature of quantum disputes and their history as jury questions, a Judge will sometimes find himself needing to do the best he can".

[41] [1998] P.N.L.R. 542. The defendant surveyor's appeal from a finding that he had negligently conducted a survey was allowed on the basis that the only relevant expert evidence called by the claimant had been from a structural engineer. See also *Worboys v Acme Investments* (1977) 4 B.L.R. 133 at 139; *Investors in Industry v South Bedfordshire DC* [1986] 1 All E.R. 787. However, it is not always essential that the expert witness practises in precisely the same discipline as the professional who is said to have breached his duty. In *Cooperative Group Ltd v John Allen Associates Ltd* [2010] EWHC 2300 (TCC), Ramsey J declined to rule the evidence of a geotechnical engineer irrelevant in a claim against civil and structural engineers; he held that the difference in discipline went merely to analysis of the expert's evidence and the weight to be attached to it. In the Privy Council case of *Caribbean Steel Co Ltd v Price Waterhouse (A Firm)* [2013] P.N.L.R. 27, the Board upheld an appellate decision that a trial judge had been wrong to find accountants negligent on a question of share valuation on a supposed "common sense" basis and without carefully scrutinising the evidence of the firm's expert (who was the only qualified accountant called as an expert in the case). The Court of Appeal of Jamaica had founded its reasoning on the passage from the *Sansom* case.

[42] ibid. at 549.

The evidence of a professional accused of negligence as to why he believes that his conduct did not fall below the standard of reasonable care and skill is admissible, but the fact that his evidence lacks the objectivity of an independent expert may reduce the weight given to it.[43] The usual practice is to allow each party no more than one expert witness in each relevant discipline. However, a professional defendant will typically deploy and rely upon his own expertise and experience when defending the allegations against him. If he has a high degree of expertise, this might be thought unfair to the claimant. On the unusual facts of *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust*,[44] two consultant obstetricians involved in the case, as well as an independent expert obstetrician, were to give evidence for the defence. The court permitted the claimant to call two experts in the same field so as to redress the balance, since the claim was of a high value and the range of experience of each party's cohort of witnesses could be wide. However, such permission will be granted only in exceptional cases. It was refused in *Beaumont v Ministry of Defence*,[45] although the claim was substantial and the clinician alleged to have been negligent was eminent and experienced as an expert witness.

(b) *Cases Where Expert Evidence is not Required*

6–008 In two categories of cases, supportive expert evidence is not necessary for a finding of negligence. The first category is solicitors' negligence cases. Expert evidence is rarely admitted upon the question whether a solicitor has discharged his duty of skill and care. The rationale appears to be that the courts themselves possess the necessary professional expertise to decide the question. In *Midland Bank v Hett, Stubbs & Kemp*,[46] Oliver J criticised the practice of calling solicitors to give evidence as to what they would have done in a particular situation and doubted that such evidence was admissible.[47] This dictum was approved and applied by the Court of Appeal in *Bown v Gould & Swayne*,[48] in which the Court

[43] *DN v Greenwich LBC* [2004] EWCA Civ 1659. For an example, see *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC), where Jackson J held that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based on his own expertise. See also *Kirkham v Euro Exide Corp* [2007] C.P. Rep. 19 at [16]–[20], where Smith LJ said that a professional witness of fact may give evidence as to what he would have advised in given circumstances, without permission for expert evidence being required.

[44] [2003] EWCA Civ 1284.

[45] [2009] EWHC 1258 (QB). See also *Actavis Group PTC v Actavis UK Ltd* [2016] EWHC 1476 (Pat) at [15], where the Patents Court explained its aversion to duplicative expert evidence: the value of expert evidence lies in the reasoning given rather than the opinions themselves and therefore "adding more eminent persons who hold the same opinion does not help."

[46] [1979] Ch. 384 at 402.

[47] ibid. This passage is quoted in full and discussed further in para.11–149, below.

[48] [1996] P.N.L.R. 130. An attempt to extend this exclusionary principle to expert evidence of quantity surveyors specialising in dispute resolution failed in the case of *Wattret v Thomas Sands Consulting Ltd* [2016] P.N.L.R. 15.

undertaken by persons who are also qualified as quantity surveyors.[19]

9–007 **Planning consultants.** In *Middle Level Commissioners v Atkins Ltd*[20] and in *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd*[21] the court accepted that there was not an established profession of "planning consultant" (notwithstanding the existence of the Royal Town Planners Institute, a chartered institute which seeks to maintain professional standards among planners).

(b) *The Mechanics of a Claim against Construction Professionals*

9–008 **The Pre-Action Protocol.** Anyone who is contemplating making or defending a claim against a construction professional must bear in mind the Pre-Action Protocol for Construction and Engineering Disputes.[22] It applies to "all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors)".[23] It is thought that the reference to architects, engineers and quantity surveyors is not exclusive, so that claims for professional negligence against other construction professionals, such as building surveyors or project managers, should be treated as subject to the protocol. If proceedings are then commenced, the court will be able to treat the standards set in the protocol as the normal reasonable approach to pre-action conduct.[24] This is significant, because the court will take into account compliance or non-compliance with the protocol when giving directions for the management of subsequent proceedings and when making costs orders.[25] In particular, a party which fails to comply may be ordered to pay all or part of the other party's costs of later proceedings, which may be on the indemnity basis.[26] A successful claimant who has failed to comply with the protocol may recover interest for a

[19] In *William Clark Partnership Ltd v Dock St PCT Ltd* [2015] EWHC 2923 (TCC), a claim for unpaid professional fees made by quantity surveyors and project management was met by a (largely unsuccessful) counterclaim alleging breach in the claimant's advice to its client during the pre-construction and the construction phases of its development.

[20] [2012] EWHC 2884 (TCC).

[21] [2013] EWHC 1191 (TCC).

[22] Pursuant to the Civil Procedure Rules Practice Direction—Pre-Action Conduct.

[23] Protocol para.1.1. The protocol does not apply to certain types of claim, which are described in para.1.2. Those exceptions include a claim in which an application for summary judgment under Pt 24 of the Civil Procedure Rules will be made and a claim to enforce the decision of an adjudicator to whom a dispute has been referred under s.108 of the Housing Grants, Construction and Regeneration Act 1996. In *Cundall Johnson and Partners LLP v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC), Jackson J held that a disputed claim for professional fees made by a firm of consulting engineers was within the scope of the protocol.

[24] Protocol para.1.4. Since the parties must consider the Protocol in the context of the overriding objective that cases are to be determined justly, they must not use it as a weapon or tactic and must co-operate in its implementation: *Higginson Securities (Developments) Ltd v Hodson* [2012] EWHC 1052 (TCC). In *Amec Foster Wheeler Group Ltd v Morgan Sindall Professional Services Ltd* [2015] EWHC 2012 (TCC) it was held that the Protocol does not apply to a CPR Pt 8 claim for the production of documents but that, even if it did, the defendant was seeking to use it as a tactical device.

[25] CPR Practice Direction—Protocols para.4.1. The Pre-Action Protocol for Construction and Engineering Disputes requires the parties to attend a without prejudice meeting, which commonly takes the form of a mediation. A party's late withdrawal from a mediation was penalised in costs in *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC).

[26] CPR Practice Direction—Protocols para.4.6(2) and (3).

shorter period or at a lower rate than he otherwise would; conversely, an unsuccessful defendant who did not comply may be ordered to pay interest at a higher rate.[27] The pre-action protocol applies equally to claims made under Pt 20 of the Civil Procedure Rules.[28]

9–009 **The Technology and Construction Court.** Many cases which include claims of professional negligence against construction professionals are brought in the Technology and Construction Court (TCC),[29] which is a division of the High Court of Justice. Proceedings in the TCC are specialist proceedings governed by Pt 60 of the Civil Procedure Rules. Accordingly, the Civil Procedure Rules apply to proceedings in the TCC only subject to the provisions of Pt 60 and the Practice Direction—Technology and Construction Court. The Practice Direction also includes Forms to be used in drafting orders made at case management conferences and pre-trial reviews in the TCC and are designed to take into account the special nature of the issues in TCC cases, which are typically both complex and technical.[30] Users of the TCC should also consult the *Technology and Construction Court Guide*.[31]

9–010 **Arbitration.** It is not uncommon for the appointments of construction professionals to contain provisions compelling the parties to refer disputes to arbitration. Arbitration offers advantages in that it is confidential. A substantial advantage commonly perceived by construction professionals is that this means

[27] CPR Practice Direction—Protocols para.4.6(4) and (5).

[28] In *Daejan Investments Ltd v The Park West Club Ltd* [2003] EWHC 2872 (TCC), the claimant on a claim made under CPR Pt 20 was penalised by an adverse costs order for its failure to follow the protocol before issuing the claim. See also *Alfred McAlpine Ltd v SIAC Construction Ltd* [2005] EWHC 3139 (TCC), where the Court refused to grant a stay of existing proceedings to allow the protocol procedure to be followed in relation to a new Pt 20 defendant but made clear that any consequent financial loss suffered by the new party would be compensated by an adverse costs order against the Pt 20 claimant at the end of the case. An action was stayed pending completion of the protocol procedures in *Cundall Johnson and Partners LLP v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC), but a stay was refused in *Orange Personal Communications Services Ltd v Hoare Lea* [2008] EWHC 223 (TCC). In *TJ Brent v Black & Veatch Consulting Ltd* [2008] EWHC 1497 (TCC), Akenhead J rejected the argument that a claimant had failed to comply with the pre-action protocol and so refused the defendant's application for costs; the judge suggested obiter that such an application could not succeed without evidence that there was a realistic prospect that settlement would have been achieved had there been compliance with the protocol.

[29] Formerly known as the Official Referees' Court. For guidance on the procedure and criteria for transferring cases to (and within) the TCC, see *Collins v Drumgold* [2008] EWHC 584 (TCC); *Neath Port Talbot CBC v Currie & Brown Project Management Ltd* [2008] EWHC 1508 (TCC); *Tai Ping Carpets UK Ltd v Aurora Heathrow T5 Ltd* [2009] EWHC 2305 (TCC); *Natl Amusements (UK) Ltd v White City (Shepherd's Bush) Ltd Partnership* [2009] EWHC 2524 (TCC); *Iouri Chliaifchtein V Donald Jessop* [2015] EWHC 3167 (TCC); and the *Technology and Construction Court Guide*, para.3.6. The new practice of the TCC as regards allocation of cases between County Courts, High Court centres outside London which have designated TCC judges and the High Court in London is described and explained in the judgment of Akenhead J in *West Country Renovations Ltd v McDowell* [2012] EWHC 307 (TCC).

[30] And as such, may give rise to special problems on appeal on questions of fact: see *Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd* [2005] EWCA Civ 894 and *Ove Arup & Partners International Ltd v Mirant Asia-Pacific Construction (Hong Kong) Ltd (No.2)* [2005] EWCA Civ 1585.

[31] The 2nd edn of the TCC Guide was revised with effect from 1 October 2010. The current edition of the TCC Guide is the 3rd revision of the 2nd edn, effective from 3 March 2014.

9–061 **Damage to other property.** Although it might be possible for the law to impose a duty of care only in respect of personal injuries, it is generally accepted that a construction professional will owe a duty not to cause physical damage to property other than that in respect of which he is engaged. Thus in *North West Water Authority v Binnie Partners*,[149] there was no argument that the defendant engineers who had been found liable for the personal injury caused to the claimants in *Eckersley v Binnie Partners*[150] owed a different duty to the water authority in respect of damage suffered to its property. Drake J found that there was no practical difference between the issues that the defendant wished to raise in the second case from those that it had raised in the first case. In *Nitrigin Eireann Teoranta v Inco Alloys Ltd*,[151] May J, on the hearing of preliminary issues, found that no cause of action had arisen when a pipe supplied by specialist pipe-makers to a building owner cracked and was repaired as the cost of repair amounted to irrecoverable economic loss. However he found the pipe-makers liable for the losses caused by a subsequent explosion when the pipe cracked again a year later causing damage to the surrounding plant, on the basis that such damage amounted to damage to other property and was recoverable. His finding was based on the assumption that it was reasonable for the claimant not to discover (and thus repair) the cause of cracking when it first occurred. In the light of *Targett*, this finding appears correct. However the judge's further statement obiter[152] that even if the claimant ought reasonably to have diagnosed the cause of the cracking on the first occasion, this would not have affected the accrual of a cause of action on the second, appears inconsistent with the reasoning in *Targett*.

9–062 Where the defective construction causes damage to other parts of the same property, the damage is unlikely to be characterised as damage to "other property".[153] In *Bellefield Computer Services Ltd v E Turner & Sons Ltd*,[154] the subsequent purchaser of a diary processing plant claimed damages in tort against the builder of the plant for damage caused when fire spread from the storage area to the rest of the plant. The storage area was designed to be separated from the rest of the plant by an internal fire-stop compartment wall. The builder had failed to construct the wall to full height, with the result that fire was able to pass over the top of the wall. On a trial of preliminary issues, Bell J held that the builder owed a duty of care to the claimant in respect of damage to his plant, equipment, stock and other chattels in the areas of the building outside the storage area. The principle discussed in this section applied: damage to those items was a foreseeable result of the builder's failure properly to construct the wall and they were property distinct from the building itself. By contrast, the judge held that no duty

structural engineers' advice as to the safety of the building and the engineers had carried out proper investigations before giving that advice. The collapse of the building was not foreseeable upon the information reasonably available to them.

[149] (1989) 30 Con. L.R. 136. For a further example, see *Offer-Hoar v Larkstore Ltd* [2005] EWHC 2742, where the developer and a geo-technical engineer involved in the development of a site were held to owe a duty of care to the owners of neighbouring properties damaged as a result of excavations at the site. There was no appeal on this point: [2006] EWCA Civ 1079.

[150] (1988) 18 Con. L.R. 1.

[151] [1992] 1 W.L.R. 498.

[152] ibid. at 506.

[153] See also the discussion of the "complex structure theory" at paras 9–070 to 9–072, below.

[154] [2000] B.L.R. 97 CA.

of care was owed in relation to damage to the fabric of the building outside the storage area, and losses consequential upon such damage. The Court of Appeal upheld the judge's decision on all points. The claimant argued that the damage caused to the fabric of the building outside the storage area was physical damage rather than economic loss, because the defective wall itself did not cause any damage in the way that defective foundations cause cracking in the structures which they support. The wall merely created a situation in which the fire was able to cause more damage than it otherwise would. The Court of Appeal rejected this argument, approving this statement from the judgment of Bell J[155]:

> " . . . there is no conceptual or qualitative difference (and certainly none which I feel able to formulate) between the case of defective foundations which fail to cope with shrinkage or heave in the subsoil and to support the building, resulting in cracked walls and pipes, and the case of a defective roof which fails to cope with and to keep out water, and the case of the defective fire stop wall which fails to cope with and to contain fire which goes on to injure other parts of the building. If the resulting injury to the fabric of the building itself is to be seen as purely economic loss in the first two of those cases, it must, in my view, be seen as economic loss in the third."

The court also rejected as artificial the claimant's argument that the parts of the dairy which were separated from the storage area by the defective wall should be regarded as "other property" because those parts were put to different uses.

9–063 As noted above, the House of Lords confirmed in *Murphy v Brentwood DC*[156] that a builder owes to a subsequent occupier of a property which he has built a duty of care in tort to avoid causing personal injury or damage to other property of the occupier. The question whether a construction professional owes the same duty to a subsequent occupier arose for decision in *Baxall Securities Ltd v Sheard Walshaw Partnership*.[157] The defendants were architects who had been engaged by a developer for the design and construction of a warehouse. The claimant was a lessee of the warehouse and used it to store electrical goods. Due to the inability of the siphonic roof drainage system to cope with rainfall, rainwater flooded through the roof of the warehouse on two occasions, damaging the claimant's goods. The claimant sued in tort, alleging that the defendants had negligently failed to see that adequate overflows were installed and to design a roof drainage system which was able to cope with the rainfall levels which ought to have been anticipated. The defendants argued that they owed no duty of care in tort to the claimant because it was a subsequent occupier. Alternatively, they argued that no such duty arose in relation to the lack of overflows because the claimant ought reasonably to have discovered that defect before taking the lease.

9–064 Judge Bowsher QC held that since, following *Murphy*, a builder owes a duty of care to avoid physical damage to a subsequent occupier in appropriate circumstances, there was no reason why an architect should not owe the same duty in appropriate circumstances. However, the reasoning deployed in *Donoghue v Stevenson* and in *Murphy* meant that there would be no duty where there

[155] [2000] B.L.R. 97 at 108.

[156] [1991] 1 A.C. 398.

[157] [2001] P.N.L.R. 256. Such a duty had been held to exist by Judge Lewis QC in *Tesco v Norman Hitchcox Partnership* (1998) 56 Con. L.R. 42, but the judge preferred to consider the matter afresh and from first principles.

different results depending upon whether one is dealing with low-value residential property, at one end of the spectrum, or a commercial property transaction at the other.

10–079 **Residential property.** *Stevenson v Nationwide Building Society*[274] was the first reported English case illustrating the effect of disclaimer clauses contained in a mortgage application form in respect of a valuation carried out upon the society's instructions but intended to be shown to the mortgage advance applicant. The claimant, who was an estate agent, sought an advance of £42,750 from the defendant building society. The defendant instructed a valuer employed by it to report upon the property. A copy of his report was provided to the claimant. The claimant was granted the requested advance and purchased the property. A month later part of the floor collapsed. The property had a number of structural defects which the valuer had not observed. The judge[275] held that the valuer had failed to exercise reasonable care and skill and that the society would have been vicariously liable for the valuer if liable. However, the mortgage application form contained a clause in the following terms:

> "no responsibility is implied or accepted by the society or its valuer for either the value or condition of the property by reason of such inspection and report."

The judge held that this was a notice effecting a valid disclaimer that was reasonable under the Act:

> "When I bear in mind that the person affected by the disclaimer is someone well familiar with such disclaimers and with the possibility of obtaining a survey, and also familiar with the difference between a building society valuation and a survey and the different costs, it seems to me perfectly reasonable to allow the building society, in effect, to say to him that if he chooses the cheaper alternative he must accept that the society will not be responsible for the content to him."[276]

It is suggested that two facts were important to the resolution of the case. First, the claimant was an estate agent, a professional working in the precise area where his complaint lay. Secondly, the property was not a modest house at the lower end of the market. The claimant was buying a relatively expensive property, comprising two shops, a maisonette and a flat. There was to some extent an element of commercial dealing about the transaction.

10–080 The House of Lords considered in *Smith v Bush*[277] the application of the Unfair Contract Terms Act 1977 to mortgage valuations in the context of lower-value residential property transactions.[278] In both of the cases before the House, the valuers[279] had sought to exclude their liability to the purchasers of the properties. In both, the purchasers had paid an "inspection fee" to the relevant lender, who in turn had instructed the valuer. Their Lordships concluded that the Unfair Contract Terms Act 1977 applied to clauses or notices that sought to exclude a

[274] [1984] 2 E.G.L.R. 165.
[275] Mr J Wilmers QC sitting as a deputy High Court judge.
[276] [1984] 2 E.G.L.R. 165 at 170.
[277] [1990] 1 A.C. 831.
[278] For the facts of this case see para.10–032, above.
[279] In the *Harris v Wyre Forest DC* case, the valuer was in fact an employee of the lender.

duty, as well as to clauses or notices that sought to exclude liability. The valuers' argument that the disclaimers were reasonable was rejected. Lord Templeman said[280]:

> "The valuer is a professional man who offers his services for reward. He is paid for those services. The valuer knows that 90 per cent of purchasers in fact rely on a mortgage valuation and do not commission their own survey. There is great pressure on a purchaser to rely on the mortgage valuation. Many purchasers cannot afford a second valuation. If a purchaser obtains a second valuation the sale may go off and then both valuation fees will be wasted. Moreover, he knows that mortgagees, such as building societies and the council . . . are trustworthy and that they appoint careful and competent valuers and he trusts the professional man so appointed. Finally the valuer knows full well that failure on his part to exercise reasonable skill and care may be disastrous to the purchaser."

Lord Griffiths agreed that it would not be fair and reasonable for the surveyor to be permitted to exclude liability in the circumstances of the case.[281] He relied upon the fact that the purchasers had no effective power to object to the clause, that they were likely to be under considerable financial pressure without the money to pay twice for the same service, that the work in question was at the lower end of the surveyor's field of professional expertise, that the losses could more easily be borne by the valuers, who would be insured, and that the purchasers had provided or contributed towards the valuers' fees.[282] In the context of this last point, he said that the situation was "not far removed from that of a direct contract between the surveyor and the purchaser."[283]

10–081 Following *Smith v Bush*, the courts have sought to establish the circumstances in which liability can be disclaimed. *Beaton v Nationwide Building Society*[284] was another case involving the valuation of a modest property. A disclaimer notice within the meaning of s.11(3) of the 1977 Act was set out on the mortgage application form, the offer of advance and the copy of the valuation report provided to the claimants. The notices that the claimants accepted they had read included:

> "No responsibility is implied or accepted by the Society or its valuer for either the value or condition of the property by reason of the inspection and report. The Society does not undertake to give advice as to the value or condition of the property and accepts no liability for any such advice that may be given. The inspection carried out by the Society's valuer was not a structural survey and there may be defects which such a survey would reveal."

It was submitted that there were two specific matters which made it fair and reasonable for the defendant to rely upon the disclaimers. First, the claimants were advised by their own solicitors to have a structural survey carried out and made a positive decision not to have such a survey. The judge[285] noted that the

[280] [1990] 1 A.C. 831 at 852.
[281] [1990] 1 A.C. 831 at 852, 859.
[282] At 858–859.
[283] At 859.
[284] [1991] 2 E.G.L.R. 145.
[285] Mr Neil Butterfield QC, sitting as a deputy High Court judge.

(b) if the valuation method were appropriate, the date for such valuation. The judge considered that he was bound by the majority of the Court of Appeal in *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*[748] to hold that the valuation method of assessing loss was appropriate *unless* there were circumstances which showed that it would be inappropriate to award such damages in relation to the overriding compensatory rule. He came to the conclusion that there were no such special features with the consequence that the valuation method should be applied. He went on to hold that there was nothing which required him to depart from the usual rule that damages should be assessed as at the date of breach. It is suggested that this may represent an over-mechanistic approach to the assessment of damages: if a claimant successfully establishes that a turnover rent should have been contended for, this will probably be because the conventional assessment of rent (that is the value of the land) is too difficult accurately to assess and turnover rent is likely to be more satisfactory to both parties. The claimant would, accordingly, have shared in the reward of an increase in turnover. It will be the defendant's negligence which has denied this reward. In such circumstances it would appear inappropriate for the court to shut its eyes to the fact that, had the defendant not been negligent, the rewards would, in fact, have been great. If the court had stepped back and asked itself the question "What has the claimant really lost" it is suggested that the answer would have been that the claimant lost the opportunity to share in the rents which were actually achieved. The difference in the two approaches can be seen from Jack J's subsequent judgment,[749] where he stated that the claimants' valuation of the relevant land at the date of breach with the hypothetical rental provisions totalled between £3.3 million to £3.9 million whilst the defendant's valuation of the same land with the same provisions was £327,500 to £432,500.

10–216 The measure of damages resulting from an alleged under-valuation of property in the context of divorce proceedings was discussed in the Scottish case of *Shenkin v DM Hall Son*.[750] The pursuer obtained a valuation from the defenders of certain property he owned, advising the valuers that their report was needed for the purposes of his divorce settlement, and CGT. The property was valued by them at £115,000 and subsequently, as part of an overall divorce settlement, the pursuer transferred the property outright to his wife. When the pursuer's liability to CGT was finally determined, he discovered that the property was in fact worth £174,000 at the date of the defenders' valuation. The pursuer claimed that if he had been aware of the true value of the property, he would not have transferred the same to his wife and would have incurred no liability to CGT, or as part of the overall divorce settlement, he would have retained £60,000 of assets elsewhere. The pursuer claimed the £60,000 from the defenders, who sought to defeat the claim prior to trial by arguing that the underlying assumption was that the same divorce settlement would have been reached had the property been valued at £174,000, and that such an assumption was prima facie erroneous, in any event under Scots law.[751] Lord Osborne rejected the argument, deciding that

[748] [1987] 1 W.L.R. 916.
[749] [2007] EWHC 2641 (QB).
[750] unreported 23 January 1996, Lord Osborne.
[751] See Family Law (Scotland) Act 1985 ss.8–10.

it was open to the pursuer to try and quantify his loss at trial on the basis that the same settlement would have been achieved, as a question of fact.

(vi) *Other Work*

10–217 **Breach of warranty.** In the unlikely event that a surveyor expressly warrants the accuracy of his valuation of property,[752] the measure of damage is the difference between the situation the claimant is in, having relied upon the valuation, and the situation the claimant would have been in, had the warranted valuation been true. Property market movements subsequent to the warranted valuation may be taken into account in determining what position the claimant would have been in at any particular time, for example, in a lender's case, when the mortgaged property was in fact sold. If a valuation is warranted, it may well have a profound effect on the quantum of damages recoverable from the surveyor.

10–218 **Rent reviews.** Surveyors are frequently instructed to act for their clients in negotiations and arbitrations arising out of periodic rent reviews. There is no simple measure of damage, the factual circumstances being capable of considerable variation. In *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co*,[753] a solicitors' negligence action arising out of advice given in respect of an underlease with an unusual rent review clause, the Court of Appeal rejected the argument that the court was bound to apply the diminution in value rule, and instead held that on the facts, the costs of extrication from the situation in which the claimant company found itself as a consequence of the negligent advice were recoverable. In *Rajdev v Becketts*,[754] the defendant surveyors negligently failed to make representations on behalf of the claimant shopkeeper to an independent surveyor appointed by the president of the RICS to determine the rent of the shop. During negotiations the landlord had proposed an annual rental of £7,000, the claimant £4,600. The independent surveyor fixed a rent of £9,250. At trial the judge held that the proper open market rent at the review date was £7,000, and that the difference in value between a lease with a rent of £9,250, and one with a rent of £7,000, was £8,100. This was the sum awarded to the claimant in damages, a claim for additional sums in respect of a reduction in the value of the business carried on at the shop being rejected as containing elements of double recovery.[755]

10–219 The complications that can arise from applying the restitutio principle to rent review cases is well illustrated by *Knight v Lawrence*.[756] This involved a negligent failure by a receiver to serve trigger notices in respect of the rent reviews for a number of tenanted properties. When the properties came to be sold by the mortgagees the prices realised were less than they would have been had

[752] Such a situation is only likely to occur where a surveyor provides his valuation on a standard form of report provided by, e.g. a finance company and the form contains an express warranty.
[753] [1987] 1 W.L.R. 916. For further analysis, see para.11–289, below.
[754] [1989] 2 E.G.L.R. 144.
[755] The calculation of damages resulting from the negligent conduct of rent reviews was also considered in *Corfield v DS Bosher & Co* [1992] 1 E.G.L.R. 163; and *CIL Securities Ltd v Briant Champion Long* [1993] 2 E.G.L.R. 164.
[756] [1991] 1 E.G.L.R. 143.

more than the consequences of the information as to value being wrong, matters unrelated to such a loss, for example, imprudent lending practices, should be considered negligence that has contributed to the loss at all. The second is whether any deduction should be applied to the entire loss suffered by the lender or only to such damages for which the valuer is found liable. Following the decision of the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd*,[843] the law appears to be that any negligence which contributes to the decision to lend can be considered to be contributory negligence, but that any reduction will be applied to the lender's total loss. In that case, the defendants negligently valued a property for £1.5m in 1990, when its true value was £1m. The overvaluation was therefore £500,000. The claimant lent the borrower £1.05m. The property was sold in 1993 for £435,000. The claimant sought to recover its overall loss of £680,174 in damages from the valuers. Jacob J held that the claimant was responsible for £40,000 of its loss because of a failure to mitigate the same, and had been a total of 20% contributorily negligent in two respects: first, in lending 70% of a loan to value ratio on a loan over £1m; and secondly for failing to require the borrower properly to complete the mortgage application form. After further argument, Jacob J rejected the argument that the two forms of contributory negligence should be treated differently, because one impinged on the duty of the valuer to provide the correct valuation, whereas the other did not. The contributory negligence of 20% was applied across the board and judgment for £489,398 plus interest was given. On appeal,[844] Morritt LJ concluded that the lender's overall loss was suffered partly as a result of its own fault and partly as a result of the fault of the valuers. The claim against the valuers, although limited in accordance with *SAAMCO* was nonetheless a claim "in respect of" the overall loss suffered by the lender for it was an element in or ingredient of that loss. On that basis, the court was entitled to apportion the damages in respect of the claim by reference to the lender's share of responsibility for the overall loss. However, the Court of Appeal allowed the defendants' appeal and applied the 20% deduction to the over-valuation of £500,000, rather than to the overall loss with the result that damages of £400,000 were awarded.

10–240 The House of Lords, by a majority of 4:1, allowed the lender's appeal. Lord Hobhouse concluded[845] that the totality of the claimants' loss was partly caused by the defendant's fault and therefore the case came within the scope of s.1(1) of the Law Reform (Contributory Negligence) Act 1945. The court then had to form a view as to what was just and reasonable having regard to the claimant's share in the responsibility for the damage and to reduce the claimant's recoverable damages accordingly. Lord Hobhouse concluded that the reduction of 20% should be applied to the total loss (by then adjusted to £611,748) to give a figure of £489,398. That sum was below the over-valuation of £500,000 and therefore in accordance with *SAAMCO* it was not just and equitable to make any further reduction. The House of Lords concluded that to apply the percentage reduction to the amount of the overvaluation would give rise to "unacceptable results".[846]

[843] [2000] 2 A.C. 190.
[844] [1998] Ch. 466.
[845] [2000] 2 A.C. 190 at 211A.
[846] See per Lord Hobhouse at 211G and Lord Millett at 214H.

The House of Lords criticised the methodology adopted by the trial judge and the reasoning adopted by the Court of Appeal, stating that the latter had "in effect" applied the same deduction twice over.[847]

10–241 **The percentage reduction.** The appropriate reduction for proved contributory negligence is, inevitably, a matter which will vary from case to case. It is possible only to give examples of reductions which have been made by reference to the facts of particular cases. In general criticisms tend to fall under the following heads: (a) lending too much as a proportion of valuation; (b) failing properly to consider a valuation; (c) failing to make sufficient enquiries as to the status of a borrower; (d) failing to ascertain the purposes for which the loan was required; (e) failing to pick up on warning signs apparent from the transaction. In *Arab Bank v John D Wood*,[848] the Court of Appeal considered that the trial judge should reassess the issue of contributory negligence in the light of the lender's successful appeal on primary liability. It considered that the judge should consider issues arising from the facts: (1) that proper consideration had not been given as to how the loan was to be serviced and repaid at the end of its relatively short term; and (2) that the lender had not looked below the "bottom line" at the note of caution being sounded as to the valuation. On the facts, the court rejected a suggestion that the lender had been substantially at fault in failing to enquire as to the reasons for an apparent discrepancy between the purchase price and the valuation. Phillips J in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* at first instance[849] assessed contributory negligence by the bank at 30%, on the grounds that the bank should have sought and obtained explanations for the substantial differences between the purchase prices of the properties and the reported values:

> "a prudent bank would have required a specific and convincing explanation for the disparity in each case before relying on the property as the sole source of repayment of a loan of 90 per cent of the valuation."

10–242 In *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd*,[850] a commercial property was sold for £23.5m but after exchange of contracts was valued at £30.5m. The claimant finance company then lent £21m to the purchaser. The loan, although only 70% of the valuation, was 90% of the sale price. Judge Fawcus, sitting as a judge of the High Court, held the claimants to be 20% to blame for proceeding without satisfying themselves as to the reliability of the valuation. In *South Australian Asset Management Corp v York Montague Ltd*,[851] May J held the bank negligent (i) in failing to reassess the risk classification of the proposed loan as rigorously as the bank's own procedures required, (ii) in failing to insist upon direct instructions from the bank to the valuer, as the bank's lending policy required, and (iii) in causing or permitting a muddle to develop as

[847] Note that Lord Millett envisaged that a deduction *might* be appropriate to the over-valuation, as well as to the overall loss, where the lender's negligence has caused or contributed directly to the overvaluation: [2000] 2 A.C 190 at 215B-C.
[848] [2000] 1 W.L.R. 857 (CA); [2000] Lloyd's Rep. P.N. 173 at 204–206.
[849] [1994] 2 E.G.L.R. 108 at 137.
[850] [1994] 2 E.G.L.R. 143.
[851] [1995] 2 E.G.L.R. 219.

irrelevant that the undertaking is given without the authority of the client, although if the recipient knows this then the court's attitude to enforcing it may be affected.[363] A solicitor will not be able to rely on a defence of limitation,[364] or lack of consideration,[365] or the absence of writing with respect to a contract for land.[366] Undertakings to secure the discharge of existing mortgages extended to any sum required for that purpose at the time redemption was sought, and the Court would not impose a lower figure merely because a mortgagee might at the date of undertaking or breach have accepted a lesser amount.[367] In contrast, the position with respect to illegality would appear to be exactly the same as in a common law action. In *Rooks Rider v Steel*,[368] the defendant solicitors gave an undertaking to the plaintiff solicitors to pay their proper fees and disbursements in connection with a loan agreement. Unknown to either solicitors, the plaintiff's client intended to use the loan agreement to obtain money fraudulently, although the loan was in fact not made. Knox J applied the normal principle that, in relation to an agreement tainted by illegality, a third party is only affected if he has notice of the illegality, and the judge held that the undertaking should be enforced.

11–075 **Discretion.** In tension with the absolute nature of the enforcement of undertakings described above, the courts do retain a discretion whether or not to enforce them when exercising their supervisory power. This provides a good reason for the old rule that the full facts must be before the court.[369] In *Udall v Capri Lighting Ltd*,[370] Balcombe LJ considered that while the fact that the undertaking was for a third party to act, or that there was a defence to an action at law, would not preclude the summary enforcement of an undertaking, they would be factors which the court may take into account when exercising its discretion.[371] Similarly, Kerr LJ stated that an undertaking that a third party will do or refrain from doing something may affect the manner in which the court exercises its power,[372] as may any difficulties with legal professional privilege.[373] However, he considered that an order for enforcement would normally be made as a matter of course.[374] The exercise of the court's discretion is illustrated by

[363] *John Fox v Bannister King & Rigbeys* [1988] Q.B. 925 at 929A–929B per Nicholls LJ; cf. *The Gertrude* [1927] W.N. 265.
[364] *Bray v Stuart A West & Co* [1989] N.L.J.R. 753. The judge disapproved of the obiter dictum of Farwell J in *Re Kerly, Son and Verden* [1901] 1 Ch. 467 (also apparently disapproved by Rigby LJ at 477), it is submitted correctly, on the basis of *Re Grey* [1892] 2 Q.B. 440, a case concerning the summary jurisdiction over solicitors which was not concerned with undertakings. However, the court has a discretionary power to strike out the claim for delay, see *Taylor v Ribby Hall Leisure Ltd* [1998] 1 W.L.R. 400 summarised in para.11–076, below.
[365] This is implicit in *Goldman v Abbott* [1989] 48 E.G. 51 at 80 col.1 at F. The rule is long established, see *Re Hilliard Ex p. Smith* (1845) 2 Dowl. L. 919.
[366] *Udall v Capri Lighting Ltd* [1988] Q.B. 907 at 912C–912E per Balcombe LJ.
[367] *Angel Solicitors v Jenkins O'Dowd & Barth* [2009] EWHC 46 (Ch); [2009] 1 W.L.R. 1220.
[368] [1994] 1 W.L.R. 818.
[369] *Gilbert v Cooper* (1848) 17 L.J. Ch. 265.
[370] [1988] Q.B. 907.
[371] ibid. at 917G.
[372] ibid. at 919D–919E.
[373] ibid. at 924D–924E.
[374] ibid. at 923F per Kerr LJ. The contrasting dicta by Megaw LJ in *Silver and Drake v Baines* [1971] 1 Q.B. 396 at 405B–405E suggesting a general discretion whether to enforce summarily are probably only applicable in the context of difficulties of proof.

three cases, two of which are summarised in the next paragraph and the third of which is *Damodaran v Choe Kuan Him*.[375] In that case, a solicitor acting for a purchaser gave the vendor an undertaking to pay over the purchase moneys on registration of transfer. There was (ultimately successful) litigation by a claimant against the vendor claiming an interest in the land, so that a *lis pendens* was entered on the register, as the solicitor knew when giving the undertaking. The Privy Council held that neither the existence of the suit, nor the protection of the interests of the claimant, nor the possibility of the purchaser suing the vendor for breach of contract, were valid grounds to exercise a discretion to order payment of the sums into court rather than to the vendor.

Effect of delay. Two cases concerned with the exercise of the discretion consider the issue of delay. In *Bray v Stuart A West & Co*,[376] the vendor's solicitors undertook to the purchasers of land to discharge all subsisting charges. On completion in 1979 they did not discharge a local land charge that related to expenditure under the Public Health Act 1936. The local authority demanded payment only in 1987. Warner J held that there was no limitation defence to a summary motion to enforce an undertaking pursuant to the court's supervisory power. However, the judge considered that lapse of time was a factor that the court should have regard to in the exercise of its discretion. In that case, the purchaser was blameless and the solicitors careless, and the judge made an order in favour of the purchaser.[377] Contrast *Taylor v Ribby Hall Leisure Ltd*,[378] where the undertaking was given in June 1989 and the plaintiffs suspected a breach in March 1990 but did not apply to the court until May 1995. The judge struck out the claim because there was inordinate and inexcusable delay that had seriously prejudiced the solicitor, and because no damage flowed from the breach of undertaking. The Court of Appeal considered that there was a discretionary power to strike out proceedings for contempt or which involved the court's supervisory power, and while it was generally preferable to make submissions on the effect of delay at the substantive hearing rather than by applying to strike out the claim, the court did not interfere with the judge's exercise of his discretion. **11–076**

Impossibility and compensation. If the solicitor's undertaking is no longer capable of being carried out, then the court has a discretion whether to compensate the recipient. In *Udall v Capri Lighting Ltd*,[379] the defendant's solicitors gave an undertaking during the course of litigation to the plaintiff's solicitors that the defendant's directors would provide security for its liabilities by creating **11–077**

[375] [1980] A.C. 497.
[376] [1989] N.L.J.R. 753.
[377] cf. *The Ring* [1931] P. 58, Bateson J, where solicitors undertook to accept service of a writ. The delay in issuing the writ was irrelevant, although it was only nine months. In the similar case of *Re Kerly, Son and Verden* [1901] 1 Ch. 467 at 477, Stirling LJ considered that a delay of 18 months should be taken into account, but was not sufficient to prevent enforcement.
[378] [1998] 1 W.L.R. 400.
[379] [1988] Q.B. 907. In *Bentley v Gaisford* [1997] Q.B. 627, a solicitor had unwittingly broken an undertaking preserving the previous solicitor's lien by photocopying documents. The Court of Appeal refused to order compensation as the conduct was not inexcusable and was insufficient to merit reproof.

applicable to them,[48] the usual disciplinary consequences may follow. In addition, they may incur statutory liability for damages under s.138D of FSMA.[49] In some cases, financial promotion may also constitute a "regulated activity" in breach of the general prohibition.[50]

14–010 **Territorial scope.** Unlike the general prohibition, the financial promotion restriction is not expressed by reference to promotion "in the United Kingdom", although the Treasury has power by Order to limit the restriction territorially.[51] A distinction needs to be drawn between what may be termed "inward" and "outward" communications, i.e. communications originating from outside and inside the UK respectively. In the case of the former, the restriction only applies if it is "capable of having effect in the United Kingdom".[52] This is hardly a significant limitation of itself (electronic communications even from outside the UK would be caught by the restriction), but the Treasury has imposed further limitations.[53] As for "outward" communications from the UK, these are all prima facie caught, although again the Treasury has provided otherwise in limited circumstances.[54]

(d) *Authorised Persons*

14–011 There are a number of categories of authorised persons[55] (called "firms" in the FCA's Handbook) but there are two main categories. The first consists of domestic concerns authorised by virtue of having obtained a "Part IVA permission"[56] from the regulators to carry on one or more regulated activity/ies. The second consists of undertakings authorised in other EEA Member States and entitled to exercise their "single European passport" so as to establish branches in, or to provide cross-border services into, the UK.[57] This second category of "incoming firms" is, in accordance with the UK's EU obligations, granted automatic authorisation for the purposes of FSMA. The latter category comprises two types of such firms, "EEA firms"[58] and "Treaty firms".[59] They are subject to regulation as "authorised persons" by the regulators when they operate in the

[48] Made under FSMA s.137R. For such rules, see para.14–026, below.
[49] See paras 14–080 to 14–082 and 14–109, below.
[50] In particular "advising" and/or "arranging" (see para.14–025, below).
[51] FSMA s.21(5) (general power) and s.21(5), (6)(b)-(d) (inward communications). The relevant limiting provisions are in the FPO, see para.14–027, below.
[52] FSMA s.21(3). But note s.21(7) (power of Treasury to repeal subs.(3)).
[53] Under FSMA s.21(5), (6)(b)-(d). See FPO arts 12(b), 20B and arts 30–33 ("overseas communicators").
[54] Under FSMA s.21(5). See FPO art.12.
[55] Listed in FSMA s.31.
[56] FSMA s.31(1)(a) and s.40(4).
[57] FSMA. s.31(1)(b) and Sch.3.
[58] Defined in FSMA s.425(1)(a) and Sch.3 (essentially firms exercising their "passport" under single market financial services directives, i.e. the Banking Consolidation Directive, the Insurance Directives (and Reinsurance and Insurance Mediation Directives) and the Markets in Financial Investments Directive (MIFID, replacing the Investment Services Directive) (see further FSMA Sch.3)). The branches of the Icelandic banks in the UK that failed in late 2008 were taking UK deposits in exercise of their "single European passport".
[59] Defined in FSMA. s.425(2)(b) and Sch.4 (essentially firms exercising their rights under the EU Treaty).

UK, but in a manner that is consistent with EU law which provides for a division of responsibility between "home" (i.e. another EEA Member State) and "host" (UK) regulators.[60]

Part IVA permission. Part IVA of FSMA[61] contains elaborate provisions relating to the grant of "Part IVA permission" to domestic concerns to carry on regulated activities. The regulators are given a very wide discretion, especially in relation to the scope and terms of any permission they grant.[62] They may impose limitations[63] and requirements[64] as to how a person is, or is not, to act. Importantly, the regulators must ensure that the person concerned will satisfy and will continue to satisfy the "threshold conditions" in Sch.6 in relation to a regulated activity.[65] Of central importance are the requirements that the person concerned has adequate resources and is suitable (i.e. fit and proper). **14–012**

(e) *Approved Persons, etc.*

FSMA introduced an additional layer of regulation by way of the "approved person" regime.[66] Thus key persons within a business that is authorised (either those persons with significant managerial control or those dealing with customers or their property) had to be "approved" and hence to some extent regulated by the regulator. The approved person regime acquired greater importance in the wake of criticisms of senior management in the banking sector during the 2008 financial crisis, with the approval of some persons being withdrawn. Accordingly provisions to amend the regime was made by the Financial Services Act 2012, the Financial Services (Banking Reform) Act 2013 and the Bank of England and Financial Services Act 2016, so as essentially to increase the control over the management of authorised persons[67] and key employees. These provisions include a new "Senior Managers & Certification Regime" (SM&CR) which entails the application of "rules of conduct" not only to approved persons (a new "Senior Managers Regime" (SMR)) but also to other key employees (a new "Certification Regime" (CR) operated by authorised firms).[68] **14–013**

[60] Similarly, UK authorised firms are also able to exercise their single European passport throughout the EEA and special provision is made for this in FSMA s.37 and Sch.3 Pt III.
[61] ss.55A–55Z4.
[62] FSMA s.42.
[63] FSMA s.42(7).
[64] FSMA s.43. This may include an "assets requirement" (s.48(4)) entailing the freezing of assets or their transfer to a trustee.
[65] FSMA. s.41 and Sch.6, as amended. See also the "COND" Module of the FCA Handbook (para.14–038, below).
[66] FSMA ss.59–71.
[67] The 2016 Act enables the extension of the regime beyond "SIFIs" (systemically important financial institutions) to all authorised persons.
[68] See the FCA and PRA Consultation Papers, FCA CP14/13 and PRA 14/14: *Strengthening accountability in banking: a new regulatory framework for individuals* (July 2014). The provisions are in the new FSMA ss.64A–64C, added by the 2013 Act. The rules made under s.64A are in the COCON module of the FCA Handbook (see below para.14–038). But breach of these "rules" are not actionable under FSMA s.138D (as to that section, see para.14–080 below).

provider into a funeral plan contract[163]; (21) activities in relation to regulated credit agreements[164]; (22) activities in relation to regulated hire agreements[165]; (23) entering into a regulated mortgage contract or administering the same[166]; (24) entering into a regulated home reversion plan (HRP) or administering the same[167]; (25) entering into a regulated home purchase plan (HPP) or administering the same[168]; (26) entering into a regulated sale and rent back agreement (SRA) or administering the same[169]; (27) activities of reclaim funds in meeting repayment claims and managing dormant account money[170]; (28) activities in relation to specified benchmarks[171]; and (29) agreeing to carry on certain specified activities.[172] Each of such activities is defined in considerable detail in the RAO and it is essential to have regard to the definitions including any applicable exclusions.[173]

(b) *Financial Promotion*

14–026 The financial promotion restriction prohibits a person, "in the course of business",[174] from communicating an invitation or an inducement to engage in investment activity, unless he is an authorised person or in circumstances where the content of the communication has been approved by an authorised person.[175] The restriction is therefore very wide and covers not only advertising but also all other forms of promotion. The term "engaging in investment activity" is defined by reference to other terms, "controlled activity" and "controlled investment".[176] The definition of these terms, together with the circumstances in which the prohibition is disapplied (and other matters), is left to be detailed by Treasury order.

[163] RAO Ch.XIV art.59; it is subject to the exclusions in arts 60, 60A and 72A.
[164] RAO Ch.XIVA arts.60B–60M.
[165] RAO Ch.XIVB arts.60N–60S.
[166] RAO Ch.XV art.61; it is subject to the exclusions in arts 62–63A, 66, 72 and 72A. This chapter was extensively amended as a result of the Mortgage Credit Directive (Directive 2014/17).
[167] RAO Ch.XVA art.63B, added by SI 2006/2383. Article 63B(2) is subject to the exclusions in arts 63C–63D. The whole of art.63B is subject to the exclusions in, 66, 72 and 72A.
[168] RAO Ch.XVB art.63F, added by SI 2006/2383. Article 63F(2) is subject to the exclusions in arts 63G–63I. The whole of art.63F is subject to the exclusions in, 66, 72 and 72A.
[169] RAO Ch.XVC art.63J, added by SI 2009/1342. Article 63J(2) is subject to the exclusions in arts 63–63L. The whole of art.63J is subject to the exclusions in, 66, 72 and 72A.
[170] RAO Ch.XVD art.63N, added by SI 2009/1389. There are no exclusions.
[171] RAO Ch.XVE arts 63O–63R.
[172] RAO Ch.XVI art.64; it is subject to the exclusions in arts 5, 9B, 10, 25D, 51, 52, 63N, 65, 72 and 72A.
[173] See the FCA's "Perimeter Guidance" (the PERG part of its Regulatory Guides at the end of its Handbook: see para.14–046, below).
[174] This phrase should be contrasted with the narrower term "by way of business" used in the "general prohibition" in s.19: see paras 14–007 and 14–008, above.
[175] FSMA s.21. See further paras 14–009 and 14–010, above. See *FSA v Fox Hayes* [2009] EWCA Civ 76: successful appeal by FSA against the Financial Services and Market Tribunal (FISMAT, see para.14–004, above, now replaced by the Upper Tribunal) ruling on whether approvals of advertisements by authorised persons contravened the FSA Handbook (COBS Module) (now FCA COBS Module, see para.14–055, below).
[176] ibid. s.21(8).

The FPO. The current order made is the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005[177] (the FPO). The provisions of the FPO are extensive. The definitions of "controlled activities" and "controlled investments" are similar to, but do not coincide with, the definitions of "regulated activities" and "specified investments" in the RAO[178] and hence the scope of the "general prohibition" and the "financial promotion restriction" are similar but not coextensive. There are also definitions relating to different kinds of communications. "Real-time communications" are distinguished from "non-real-time communications", with "real-time communications" being subdivided into "solicited" and "unsolicited" communications. There is a wide range of "exemptions" (some qualified) in respect of the promotion restriction, including by reference to the context of the promotion, the nature of the relevant investments and the categories of persons by whom and to whom the promotion is made. **14–027**

(c) *Investment*

Investment is widely defined in FSMA to include "any asset, right or interest" in the context of regulated activities[179] and financial promotion,[180] but detailed definitions of "specified investment" (the term used in relation to regulated activities) and "controlled investment" (the term used in relation to financial promotion) is left to subordinate legislation.[181] The relevant orders relating to each of those matters contain detailed definitions of the kind of investments to which they relate. In the context of regulated activities,[182] the RAO[183] contains detailed definitions of investments of a "specified kind". In the context of financial promotion,[184] the FPO[185] contains detailed definitions of "controlled investments". The definitions in the two orders generally correspond, but not precisely. The RAO and the FPO contain relevant definitions of the following kinds of investments: (1) deposits[186]; (2) electronic money[187]; (3) rights under a contract of insurance[188]; (4) shares[189]; (5) instruments creating or acknowledging indebtedness[190]; (6) 'alternative finance investment bonds' (covering the Sharia compliant bonds or "sukuk")[191]; (7) government and public bonds[192]; (8) warrants and other instruments entitling the holder to subscribe for any of the last **14–028**

[177] SI 2005/1529, as amended, made under FSMA s.21(15), replacing the original order (SI 2001/1335).
[178] See para.14–024, above.
[179] FSMA s.22(4).
[180] FSMA s.21(14).
[181] FSMA ss.22(5) and 21(15) and see the RAO and FPO respectively.
[182] See FSMA s.22 and Sch.2 Pt II.
[183] See para.14–024, above.
[184] See FSMA s.21 especially subss.(9), (10) and (11), and Sch.2 Pt II.
[185] See para.14–027, above.
[186] RAO Pt III art.74; FPO art.4(2) and Sch.1 para.12.
[187] RAO art.74A; no equivalent in FPO.
[188] RAO art.75; FPO art.4(2) and Sch.1 para.13.
[189] RAO art.76; FPO art.4(2) and Sch.1 para.14.
[190] RAO art.77; FPO art.4(2) and Sch.1 para.15.
[191] RAO art.77A; FPO art.4(2) and Sch.1 para.15A.
[192] RAO art.78; FPO art.4(2) and Sch.1 para.16.

14–045 **Handbook Guides.** This contains guides for particular types of firms

Reference Code	Title
EMOS	Energy Markets Participants
OMPS	Oil Markets Participants
SERVE	Service companies
BENCH	General guidance on Benchmark Submission and Administration

14–046 **Regulatory Guides.** This contains guides to particular regulatory topics within the Handbook.

Reference Code	Title
COLLG	Collective Investment Scheme Information Guide
EG	The Enforcement Guide
FC	Financial Crime: a guide for firms
PERG	The Perimeter Guidance Manual
RPPD	The Responsibilities of Providers and Distributors for the Fair Treatment of Customers
UNFCOG	The Unfair Contract Terms Regulatory Guide

14–047 Each sourcebook follows a similar structure. Each comprises: (1) a contents page; (2) a schedule of transitional provisions (if any); (3) the main text, with any annexes or appendices; and (4) schedules of requirements and supplementary information.[246] Of the schedules to each sourcebook, the fifth is important in identifying the extent to which the rules in the sourcebook attract the right of action granted under s.138D of FSMA for contravention of certain rules.[247]

(ii) *Glossary*

14–048 This is a compendium of definitions of defined terms used in the various sourcebooks in the FCA Handbook. Defined terms are highlighted in the text. The definition of each defined term is readily accessible in the online version of the Handbook via a hypertext link to the Glossary. The definitions of defined terms are critical to understanding the rules and other provisions within the FCA

[246] The schedules relate to: (1) any record-keeping requirements; (2) any notification requirements; (3) fees and other required payments; (4) powers exercised; (5) rights of action for damages; and (6) rules that can be waived.
[247] Considered further in paras 14–080 to 14–082, below.

Handbook. Many are complex and long. It is beyond the scope of this chapter to deal with the definitions: the Glossary itself is a book.

14–049 Certain defined terms, albeit not their full definitions, bear mention. A "firm" is defined, generally, as an "authorised person".[248] A "client" is generally defined as a "person" to whom a "firm" provides, intends to provide or has provided a service in the course of carrying on a, "regulated activity".[249] There are two types of "client": a "customer" and an "eligible counterparty". Sub-species of "customer" are a "retail customer" and a "professional customer". These definitions enable calibration of the regulatory regime to the level of protection deemed appropriate to different categories of client.

(iii) *Rules*

14–050 The main text of each sourcebook or manual is sub-divided into chapters, sections and paragraphs. Each paragraph is accorded a regulatory status. "R" is used to denote a general or specialised rule made under FSMA[250] and other powers, other than an evidential rule. The legal effect of such a rule will vary according to the power under which it is made and depending on the language used in the rule. Contravention may render a firm liable to enforcement action[251] and/or an action for damages.[252] "D" is used to indicate a direction or requirement given under various powers conferred by FSMA. Directions and requirements are binding on the persons or categories of persons to whom they are addressed. "P" is used to indicate a statement of principle for approved persons.[253] "E" is used to identify an evidential provision.[254] Such a provision does not bind in its own right but instead relates to some other binding rule. Where it is so stated in the Handbook, compliance or non-compliance with an evidential provision may be relied upon as "tending to establish compliance" with or "tending to establish contravention" of the rule to which it relates. Evidential provisions thus create rebuttable presumptions of compliance with or contravention of the binding rules to which they refer. "E" is also used in relation to provisions of the Code of Practice for Approved Persons.[255]

(iv) *Guidance*

14–051 "G" is used to indicate guidance given by the FCA. Guidance may be given for many purposes.[256] It is mainly used in the FCA Handbook to explain the

[248] But not a "professional firm" unless it is an "authorised professional firm".
[249] Or in the case of "MiFID or equivalent third country business" (as to which, see below), an "ancillary service" (as defined). For "regulated activity", see para.14–023, above.
[250] See as to general rules, FSMA s.137A (general rule-making power) and s.137T (general supplementary matters) and as to specific rules, see in particular, s.137O (threshold condition code), s.137P (control of information rules), s.137Q (price stabilising rules), s.137R (financial promotion rules), s.137R (financial promotion rules: directions given by the FCA).
[251] See para.14–004, above.
[252] See paras 14–080 to 14–082, below.
[253] Made under FSMA ss.64(A) and 64(B). See further para.14–054, below. As to approved persons, see para.14–013, above.
[254] See FSMA s.138C. Contravention of such rules do not give rise to the consequences set out in the Act for other rule breaches.
[255] See the APER 3 module.
[256] See FSMA s.139A. Note FSMA 139B.