

David Berkley KC

Year of Call: 1979
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Commercial

David Berkley KC's practice covers commercial and commercial/chancery litigation, including banking and finance litigation. His focus is on complex disputes and major trial work, and he regularly appears in the High Court and the Court of Appeal in contentious security and receivership issues, civil fraud trials, insolvency, and company law.

David also has significant experience in international commercial litigation and arbitration, frequently acting in cross-border disputes involving foreign law elements, multinational parties, and international enforcement issues. He is regularly instructed in arbitration proceedings, and has acted in matters involving complex jurisdictional and conflict of law issues.

His advisory and advocacy work spans commercial company law matters, including shareholder disputes, breach of directors' duties, and derivative claims. He has acted in high-value and multi-jurisdictional joint venture disputes, particularly those involving international commercial enterprises, infrastructure projects, and cross-border investment agreements.

He frequently advises and acts on behalf of professional clients in disputes relating to partnerships, restrictive covenants, confidentiality, and trade secrets—most notably within the professional practice of solicitors and accountants.

Most recently, David has been recognised for his work in advising and acting for businesses seeking redress for the mis-selling of Interest Rate Hedging Products via the FCA/FSA Review process and in litigation before the High Court. He has extensive experience dealing with the professional negligence issues that commonly arise from such disputes, particularly those connected to the provision of financial and investment services.

Reported cases:

Courage Shipping Co v OCM Maritime Nile LLC [2022] EWCA Civ 1091
On the proper construction of a charterparty, the owners of two vessels had been entitled to repossess the vessels upon an event of default without giving notice to the charterers of the aggregate amount to be paid upon termination. Further, in the circumstances, the charterers were not entitled to relief from forfeiture.

Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) v Bosworth [2021] EWCA Civ 687
In claims brought against a de facto CEO and de facto CFO of companies in a group, a jurisdictional challenge brought by the Swiss-domiciled defendants was dismissed where it was found that they had a non-negligible influence over the companies so that they were not in a relationship of subordination and were accordingly not employees for the purposes of the Lugano Convention 2007 art.18(1). Therefore, art.20(1) did not operate to oust the jurisdiction of England and Wales.

Rockliffe Hall Ltd v Travelers Insurance Co Ltd [2021] EWHC 412 (Comm)
Business interruption cover provided by an insurer for loss resulting from an outbreak of "Infectious Disease" did not cover COVID-19 related losses. The policy had defined "Infectious Disease" by reference to a closed and exhaustive list of 34 diseases which did not include COVID-19. The listed disease, "Plague", referred to a specific disease rather than a more general term for any infectious disease with a high mortality rate, epidemic or pandemic, and so did not encompass

COVID-19.

Alta Trading UK Ltd v Bosworth [2020] EWHC 2757 (Comm)
The claimants had a good arguable case that there was not a relationship of subordination, and therefore not an employment relationship, between a group of companies and their former chief executive and chief financial officers for the purposes of a challenge to the English court's jurisdiction.

Target Rich International Ltd v Forex Capital Markets Ltd [2020] EWHC 1544 (Comm)
Financial regulation; Banking and finance. Breach of contract; Conduct of business sourcebooks; Damages; Force majeure; Foreign exchange; Implied terms; Incorporation; Negligence; Rules

Bhattacharya v Omni Capital Partners Ltd [2020] EWHC 1644 (Ch)
A claim under the Financial Services and Markets Act 2000 Pt II s.28(7) for repayment of monies under a loan agreement was a claim for recovery of money arising only under that statute, and was accordingly subject to a six-year limitation period under the Limitation Act 1980 s.9, despite a claim also being made for a declaration that the loan was unenforceable. The repayment claim was time barred under s.9 as the payments had been made more than six years before proceedings were issued.

Sharp v Blank [2019] EWHC 3096 (Ch)
The defendant directors of Lloyds TSB Group Plc were not in breach of duty in recommending that shareholders should approve the acquisition of HBOS Plc during the developing financial crisis in 2008; the circular sent to shareholders before they voted to approve the transaction should have disclosed the existence of certain funding arrangements made available to HBOS by Lloyds and the Bank of England but the failure to disclose those arrangements was not causative, since the shareholders would have approved the transaction if there had been a fair presentation of those arrangements in the circular.

Parmar and another v Barclays Bank plc [2018] EWHC 1027 (Ch)
Swap agreement – Interest rate swap agreement. Although the claimants had established that there had been breaches of certain of the Conduct of Business Sourcebook (COBS) rules, no loss had been sustained by them as a result. Therefore, the Chancery Division, dismissed the claimants' claim, under s 138D of the Financial Services and Markets Act 2000, for damages for alleged breaches of the COBS rules.

Wardman and others v GSD Law Ltd [2017] EWCA Civ 2144
Costs — Detailed assessment — Solicitor's misconduct — Paying parties alleging that receiving parties' legal representative had engaged in unreasonable or improper conduct during detailed assessment proceedings — District judge upholding allegations and disallowing costs after three-day hearing — Whether jurisdiction to disallow costs summary — Whether district judge should have declined to entertain allegations — Whether three-day hearing disproportionate — Whether guidance as to wasted costs procedure to be applied — CPRr 44.11

Bailey and another company v Barclays Bank plc [2014] EWHC 2882 (QB)
Practice – Striking out. The claimant, B, had arranged a loan with the defendant bank. He subsequently sought to transfer the loan from himself to a company that he controlled. B and the company brought proceedings against the bank for, among other things, misrepresentation. In the course of proceedings, the bank sought to strike out the claim, and the claimants sought permission to amend the particulars of claim. The Queen's Bench Division held that the application to amend would be dismissed, and judgment would be given for the bank.

Pourghazi v Kamyab [2014] Lexis Citation 155
Misrepresentation – Deceit. The claimant brought a claim against the defendant, alleging that he had been induced into lending him money in respect of the purchase of a leasehold penthouse in London and into signing a declaration of trust in respect of it, in circumstances where the defendant had not disclosed that a bank had appointed receivers in connection with the property. The Chancery Division set aside the declaration of trust, ruling that the misrepresentations alleged had been proved.

Lombard-Knight and another v Rainstorm Pictures Inc [2014] EWCA Civ 356
Arbitration – Award – Enforcement – Application to enforce award – Claimant successful in arbitration proceedings in California – Claimant obtaining enforcement order in High Court – Defendants applying to set aside order – Judge finding

claimant failing to comply with procedural requirements for applying to enforce award – Judge finding defendants' submissions unsustainable – Judge making new enforcement order – Defendants appealing and claimant cross-appealing – Whether judge erring in finding procedural irregularity in claimant's application – Whether judge erring in finding defendants having had notice of arbitral proceedings – Arbitration Act 1996, s 102(1)(b).

Green and another v Royal Bank of Scotland [2013] EWCA Civ 1197

Bank – Duty of care. The claimants issued proceedings claiming that the defendant bank had 'mis-sold' them an interest rate swap by giving inadequate disclosure of break costs, contrary to its duty under the Code of Business Rules then in existence, and to warn that break costs could be substantial and to explain clearly and fairly the true potential magnitude of those costs. The Court of Appeal, Civil Division, upheld a decision that the bank had not owed the claimants a common law duty of care which had involved taking reasonable care to ensure that they had understood the nature of the risks involved in entering into the swap transaction.

Ahmad v Secret Garden (Cheshire) Ltd [2013] EWCA Civ 1005

Contract – Rectification – Written contract – Appellant lessor of property entering into tenancy with respondent company – Parties going through standard form of business lease (LS2), agreeing to amend it to reflect particular terms agreed – Parties signing written agreement for lease on those terms (Lease 1) – Parties subsequently signing lease in form LS2 not containing amendments shown in Lease 1 (Lease 2) – Respondent going into possession but having difficulties paying rent – Appellant taking proceedings for possession of property – Respondent contending Lease 2 ought to be rectified as not setting out full terms agreed by parties – Judge holding parties both mistaken as to effect of terms of Lease 2 and mistakenly believing would take effect in combination with Lease 1 – Judge holding Lease 2 accordingly being executed under mistake – Appellant appealing – Whether evidence from which judge finding common mistake meeting requirement for outward expression of accord – Whether judge ought to have exercised discretion to refuse to order rectification.

Re SED Essex Ltd Revenue and Customs Commissioners v SED Essex Ltd [2013] EWHC 1583 (Ch)

Company – Winding up – Fraudulent trading – Revenue and Customs Commissioners (the Revenue) seeking compulsory winding-up order regarding respondent company – Court appointing provisional liquidators – Company opposing winding-up order and seeking to discharge order appointing provisional liquidators – Whether winding-up order to continue – Whether provisional liquidators to remain appointed.

Rehman and another v Jones Lang Lasalle Ltd [2013] EWHC 1339 (QB)

Limitation of action – Accrual of cause of action. The claimants issued proceedings against the defendant for negligent property valuations. The judge dismissed the defendant's application for summary judgment or strike out of the claim. The defendant appealed on the basis that the claim was statute-barred. The Queen's Bench Division, in allowing the appeal, held that the claimants had acquired the requisite knowledge to issue proceedings and could not begin to justify the period of two years during which they apparently did nothing.

Connell Property Holdings Ltd and another v Mutch (trading as Southey Building Services) and another [2012] EWCA Civ 1589

Costs – Order for costs – Discretion – Second claimant succeeding partially in claim against defendant – Defendant succeeding on counterclaim – Judge setting off damages payable to defendant under counterclaim against damages awarded to second claimant – Claimant being overall successful party – Judge ordering defendant to pay second claimant's costs of claim and ordering second claimant to pay defendant's costs of counterclaim – Second claimant appealing – Second claimant submitting judge being required to order defendant to pay proportion of second claimant's overall costs – Whether judge erring – CPR Pt 44.

Revenue and Customs Prosecution Office v Backhouse [2012] EWCA Civ 1000

Sentence – Confiscation order – Receivership order – Defendant owning equal share in aircraft – Joint owner pleading guilty to laundering – Judge making confiscation order of joint owner's assets – Judge appointing enforcement receiver to take possession of and deal with assets of joint owner – Defendant agreeing to extinguish joint owner's liabilities in regard to aircraft – Receiver seeking order joint owner making tainted gift to defendant – Judge finding no commercial sense in joint owner giving up interest in aircraft – Judge making order against defendant – Defendant appealing – Whether judge erring – Criminal Justice Act 1988, ss 74, 102.

Revenue and Customs Prosecutions Office v Johnson and another [2011] EWHC 1950 (Admin)

Sentence – Confiscation order – Proceeds of crime – Defendant pleading guilty to laundering £6.25 million – Judge making confiscation order for over £26 million – Judge appointing enforcement receiver to take possession of and deal with assets of defendant – Aircraft specifically excluded from list of assets receiver might sell – Respondent beneficially owning aircraft – Whether respondent having assets to which receiver entitled for satisfaction of confiscation order – Criminal Justice Act 1988, Pt VI.

Hooper and another v Oates and another [2010] EWCA Civ 1346
Contract – Repudiation – Rescission – Seller of property serving rescission notice in response to alleged breach of contract by defendant – Claimant erring in calculation of dates for service of notice – Notice being served early – Buyer contending early notice amounting to repudiatory breach – Judge finding sellers not repudiating contract – Whether judge erring.

Hameed v Central Manchester University Hospitals NHS Foundation Trust [2010] EWHC 2009 (QB)
Employment – Wrongful dismissal – Declaration – Employee dismissed following investigation and disciplinary hearing into claimant's conduct – Employee bringing proceedings seeking declaration that purported dismissal in breach of her contract of employment – Whether employer in breach of its contractual obligations to employee.

Sternlight v Barclays Bank and other cases [2010] EWHC 1865 (QB)
Consumer credit – Agreement – Form and content of agreement – Term stating manner in which amount to be repaid – Regulated agreement – Claimants contending rate of interest set out in regulated agreements misstated with effect agreements 'irredeemably unenforceable' – Whether misstatement – Consumer Credit Act 1974, ss 61, 65, 127 – Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, Sch 6, para 4.

Saddique v Sadiq and another Court of Appeal, Civil Division (judgment delivered extempore)
Practice – Striking out – Abuse of process – Claimant appointed as receiver of missing husband's assets – Claimant seeking to bring action in her name in respect of husbands assets – Defendant seeking to strike out claim as abuse of process and on ground that claimant as receiver having no authority to bring claim – Case struck out on ground that claimant lacking authority – Claimant appealing – Whether judge erring – Whether order entitling claimant to bring claim – Whether proceedings could have been saved – CPR 17.9.

Southern Pacific Personal Loans Ltd v Walker and another [2009] EWCA Civ 1218
Consumer credit – Agreement – Enforcement – Amount of credit – Interest on charge for credit – Parties entering into fixed sum credit agreement – Total amount financed comprising of loaned amount plus charge for credit stated in agreement to be 'broker administration fee' – Statutory meaning of 'credit' and 'charge for credit' – Calculation of amount of credit – Whether prohibition of interest on broker administration fee – Whether agreement between parties enforceable – Consumer Credit Act 1974, s 9.

Articles

Two of 3PB's specialist commercial litigation barristers, David Berkley QC, 3PB's Head of Chambers and Neil Fawcett have reviewed business insurance claims arising from the current Coronavirus pandemic. Their review points out that some insurance companies deliberately sought to exclude respiratory diseases from their policy following the outbreak of SARS in 2003; and recommends that businesses should conduct a detailed examination of their business interruption policy wording.

View Article

Recommendations

"Has a diverse practice which encompasses commercial and chancery litigation. He also has extensive experience with banking and insolvency matters and entertainment law disputes."

Chambers UK 2019/Chancery

Strengths: "A calm, collected and measured barrister, he is an excellent orator and he fights his client's corner."

Chambers UK 2018/Chancery

'David Berkley QC has more than 20 years' experience in chancery work. He is known for commercial property disputes, employment, professional negligence and regulatory law.

Strengths: "A very nice chap; he is a very eloquent speaker with good advocacy skills."'

Chambers UK 2017/Chancery

'David Berkley QC Has a strong commercial and chancery practice. He is experienced in company and commercial work as well as banking and insolvency matters. He also handles landlord and tenant and partnerships disputes and is an accredited mediator.'

Chambers UK 2016/Chancery

'An absolute master, in cross-examination and an indescribably approachable silk. Very strong analytical skills and an ability to isolate the legal issues very quickly and efficiently.'

Legal 500 2021/Chancery, Probate and Tax/Leading Silks/Tier 1/Leading Silks

'Excellent advocate, orator and communicator. Formidable in court with the ability to quickly capture an audience and the attention of the judge. Calmness under fire. Ability to digest large volume of material, identify the key issues and its application to the facts and law.'

Legal 500 2021/Commercial Litigation/Leading Silks/Tier 1/Leading Silks

'His technical knowledge, expertise and approach are exemplary, and he is an extremely effective advocate.'

Legal 500 2020/commercial, banking, insolvency and chancery law – Leading Silks

'Noted for his expertise in directors' disqualification matters.'

Legal 500 2018/19/commercial, banking, insolvency and chancery law – Leading Silks.

'His technical knowledge is exemplary.'

Legal 500 2017/commercial, banking, insolvency and chancery law – Leading Silks.

'Highly experienced in banking and commercial litigation.'

Legal 500 2016/commercial, banking, insolvency and chancery law – Leading Silks.

"David is an excellent mediation advocate and team leader. "

Mark Mattison, Mediator

"David is an excellent public speaker and advocate for the causes with which he is associated."

Dr Yaakar Wise, retired academic

Academic qualifications

- LLB (Hons), University of Manchester
- BVC, College of Law

Professional qualifications & appointments

- 2000 - Appointed Deputy District Judge
- 2001 - Appointed Recorder (Civil)
- 2007 - Appointed Honorary Teaching Fellow, Manchester Metropolitan University
- Qualified mediator (College of Law accredited)

Professional bodies

- Professional Negligence Bar Association
- Northern Circuit Commercial Bar Association (Chairman)
- Northern Chancery Bar Association