



RICHARD PENFOLD

Best-laid plans

After leaving DLA Piper, Richard Penfold joined Heller Ehrman six weeks before it imploded. Now at Brown Rudnick, the lessons learned from his *annus horribilis* serve as a timely warning for want-away partners

MARK MCATEER

Reflecting on the worst year of his professional career, Richard Penfold doesn't feel he could have done much more to protect himself. 'I keep asking: "Were there questions I should have asked and didn't?";' he says. 'I have to say no. There wasn't anything more I could have done. Hindsight's a wonderful thing.'

This IP partner's tale of woe shows that foresight can be overrated too. In 1785,

Scottish poet Robert Burns famously observed the tendency for plans to go awry. 'The best-laid schemes o' mice an' men, gang aft agley,' he wrote. It's a sentiment Penfold would agree with wholeheartedly. In 2004 he made a lateral move that didn't work out. Then, in 2008, the same thing happened again, though for very different reasons.

The second was the sucker punch. After a year

of negotiations, he joined 125-year-old US law giant Heller Ehrman six weeks before the whole house of cards came crashing down. You might argue that for a considered and successful law firm partner to make that kind of switch is at best cavalier, at worst kamikaze; but if you think it could never happen to you, read on.

Now, as partner for IP at Brown Rudnick, 39-year-old Penfold is relaxed and smiling



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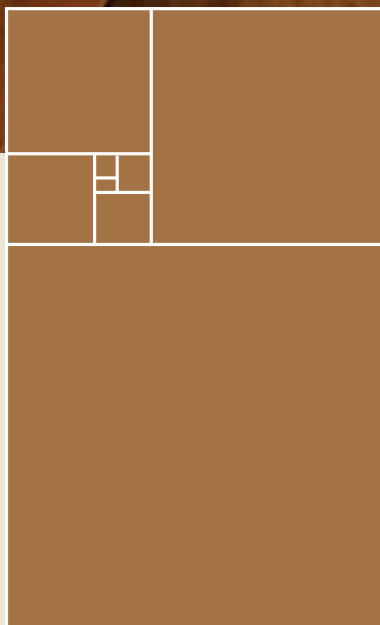
as he sits in the firm’s client meeting room drinking tea. But look closer, and you see a shadow under his eyes brought on by worry. ‘It got to one point where I wasn’t earning any money,’ he recalls. ‘I understood what my possible exposure could be – lose the house, lose everything.’

EARLY PROMISE

After training with Simpson Curtis (now Pinsent Masons) in

Leeds, Penfold left for London in June 1996, joining media and technology boutique Harbottle & Lewis. The firm was in its pomp, advising successful stars at the height of New Labour’s ‘Cool Britannia’. Clients such as Virgin were poster children for the entrepreneurial and energetic spirit of the time. Harbottle’s IP practice was home to such luminaries as Dinah Nissen, who later enjoyed a successful career at Freshfields

Bruckhaus Deringer, and Mark Owen, who remains head of IP at Harbottles. ‘I did all Virgin’s brand-protection work and did all the IP and image rights work for the Spice Girls when they were the biggest thing on earth,’ Penfold says. ‘It was fabulous.’ In 2002, the year he was made partner, Harbottles had one of its most successful years, reaching its highest ever position in the *LB100*: 96th place. But by 2003 the effects of the dotcom ►



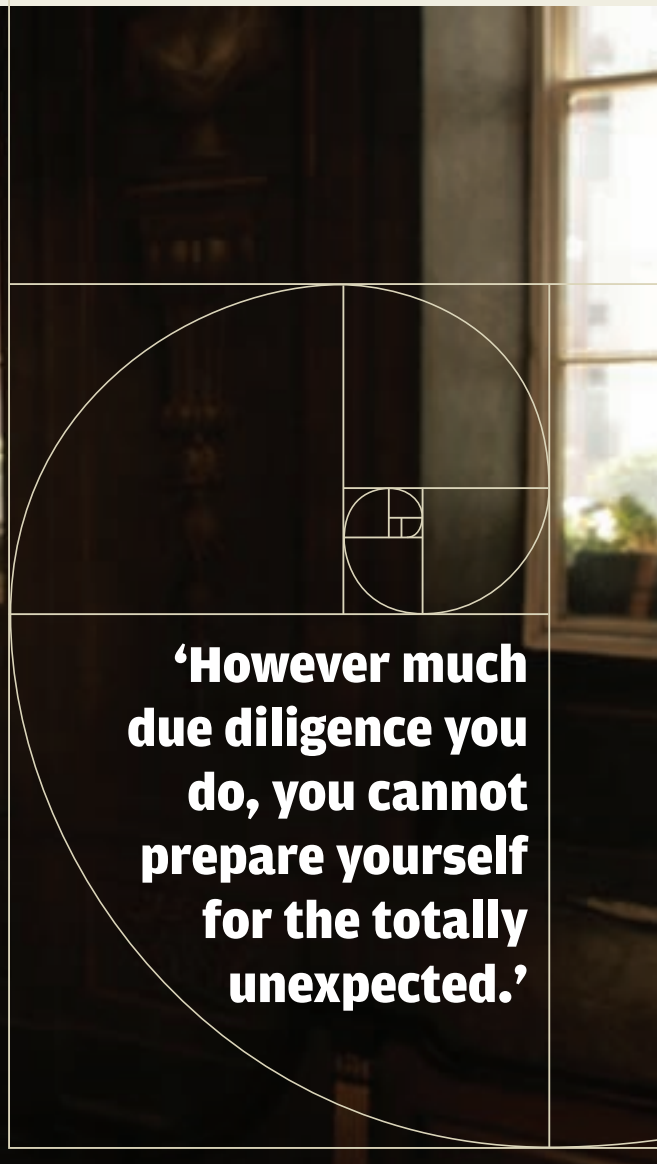
► crash were starting to bite. The firm had dropped out of the top 100 and was laying off fee-earners for the first time in its history. 'It's fair to say it did unsettle me,' Penfold recalls. 'I had just joined an equity partnership, and I was involved in making business decisions. What had become clear was that there had been this growth without any close scrutiny of what the growth was for, what the strategy was, and how the business was going to support that growth. To see the firm's turnover and profits going down was tough. I was a lot better off as a senior associate.'

He also became frustrated at its clients' tendency to move on to bigger firms as they evolved, which meant developing the IP practice became difficult. 'Harbottles had a lot of IP ability, and I was trying to push it onto a bigger platform, with larger, IP-only clients,' he says. 'A lot of them turned round and said: "You're a bit too niche for us", so it wasn't a big

enough platform for them. Having said that, I was happy; I was comfortable. A bit too comfortable, to be honest.'

So when DLA Piper's new UK head of IP Jeremy Dickerson approached him in April 2003 with the challenge of developing the firm's IP practice in London, Penfold was interested. But not overwhelmingly so. 'I wondered at the time why I would want to work for DLA, as it didn't have a great reputation at all,' he says. 'It was very much regarded as a big Northern firm with international aspirations, but it was primarily its reputation for being a very aggressive place that put me off.'

Meeting former Simpson Curtis colleagues who had gone to DLA, and who told him the reputation was undeserved, put those fears to bed, and the lure of helping to run a practice was irresistible. At the time, DLA was a growing firm, but its IP practice in London was a bit of a backwater, which was why Dickerson



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joined from Hammonds and wanted to build up strength in the City. 'I had helped build the practice at Harbottles, which is what I enjoyed doing,' Penfold recalls. 'I was young enough to be enthusiastic about it; experienced enough to make a real go of it.'

After taking the time to make the decision, and following ten weeks' gardening leave, Penfold joined the firm in April 2004; but his opportunity to nurture a nascent practice soon vanished. Later that year, news broke that Denton Wilde Sapte's highly vaunted media and IP team, led by Simon Levine, would be defecting to DLA in the largest ever group departure from a UK law firm. It's no exaggeration to say the move rocked the legal market. The results were dramatic, as DLA suddenly established itself as a market leader in media, IP and sport. 'I was taken on to mature the practice, and suddenly we were 22 partners and around 60 assistants overnight; it was almost a takeover,' Penfold says. 'I had wanted to go in and build, and that opportunity had gone.'

According to Penfold, he wasn't involved in a power struggle, and there was no ill feeling within the IP team, but it became clear early on that Levine would be leading the practice forward. 'Jeremy left shortly after that as Simon effectively came in as a sort of joint global head of practice, and there was no real need for a second UK head of IP,' he says. Dickerson left the firm at the end of 2005, joining Burges Salmon in 2006.

Penfold was left as one of six IP partners in DLA's 22-partner technology, media and communications (TMC) group. He soon became tired of what he describes as the 'narrow focus' of his work. 'I'd grown up doing contentious and non-contentious IP, the whole thing, which really spanned everything that DLA's practice did,' he recalls. 'The boundaries between the three component

parts of the TMC group were quite rigid, so it was very difficult to work across all three areas. I was doing contentious and non-contentious IP and it was difficult to become involved in things like sponsorship agreements, TV and video games-related work, as well as technology agreements. I think that was one reason why I realised DLA was not where I wanted to be.'

WASTED DILIGENCE

For his next – and most catastrophic – move, Penfold could hardly be charged with making a rash and poorly conceived decision. 'I didn't want to spend my whole life moving from firm to firm,' he says. 'My moves before had been strategic, and I had a plan. I decided that the only thing I would really move for would be to head an IP practice or part of an IP practice.'

Just such an opportunity came knocking. In February 2007, West Coast US firm Heller Ehrman opened its London office. In June that year, the firm approached Penfold to head up and build a UK IP practice. 'As a proposition, this doesn't come round very often,' Penfold says. 'There aren't many firms well-known for IP in their home territory that have no platform, no expertise, no business in the UK.'

He first met with Heller's London partners in August 2007, and the meetings went on from there. From a shortlist of five, the firm identified two partners to go forward with: Penfold and an unnamed female partner who subsequently dropped out, he says, for 'personal reasons'. Being a lone ranger suited Penfold and he flew out to New York and San Francisco in early 2008, meeting around 25 partners. 'London is a graveyard for many a US firm, but all the partners I met were very supportive,' he says. 'I liked the culture, and its reputation in the IP and technology spheres was fantastic.' More meetings

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followed. Finally, after speaking to the firm on and off for a year, Penfold decided to join at the beginning of June, finally arriving on 23 July.

Just before arriving at Heller, Penfold was hit with surprising news. The firm was in merger talks. 'The first I heard of any possible merger was the week before I started and saw headlines about a merger with Baker & McKenzie,' Penfold says. 'That surprised me because it had never been mentioned in any meetings I'd had prior to making the decision to join. What was becoming clear was that London was a satellite; it wasn't involved in a lot of these decisions.'

This was particularly bad news for Penfold. 'Baker & McKenzie wouldn't have worked for me,' he says. 'I'd left one of the world's largest law firms, so to then be part of another of the world's largest law firms would have completely defeated the purpose of the move. To be honest, it was the same for all the guys in London – it was not what they joined up to do.'

The talks stalled, saving Penfold a difficult decision as to whether he should move again. But this was merely a stay of execution. Worse was to follow when the firm collapsed entirely. By 15 September, Heller had sunk without trace (for more background on the demise of Heller, see our Global London survey, page 49).

AFTERMATH

The obvious question is whether the firm opened the books up for Penfold to examine during the year he was in negotiations. The firm was an LLP, with accounts in the UK and the US, and Penfold says he saw both. 'Back in 2007, there was nothing to suggest the firm was having financial difficulties,' he recalls. 'At the beginning of 2008, I became aware that there had been certain departures, but my understanding was that it had been part of a strategic overhaul to remove underperforming partners. Whether I was misled in some of

► the responses I was given, only time will tell. Even the partners in the London office that joined in March 2007 say they had no idea of what would actually happen.' Penfold says he understands that a former partner has already filed one claim over the collapse of the firm, and that he believes the truth will come out over the next three years.

Although the UK LLP had enjoyed a good start to the financial year and was very busy, one key issue was Penfold's confusion over the amount of debt the firm had on its books. When he asked about the firm's debt in the US, he says he was told the firm had low debt of around \$4m to \$5m. There was also a revolving \$5m overdraft facility with Citibank, used at the start of the year to cover the tax bill (common practice, he says), which was paid off by May/June each year. However, the London partners later discovered that the firm's overdraft was actually \$50m.

When asked if he was lied to, Penfold pauses for some time, reaching for the most lawyerly response. 'Let's say we weren't given the whole picture,' he declares. 'How that \$50m overdraft came about and when it came about, I've no idea. Ultimately, we may find out two or three years down the line. How it got from \$5m to \$50m I don't know. There's nothing I saw on the books – unless I didn't pay close enough attention – to suggest that there was a \$50m overdraft there.'

Then came the inevitable panic as Heller lawyers faced up to their potential financial exposure in the wake of the firm's collapse. 'I felt pretty battered about,' Penfold says, probably putting it mildly. 'To start with, the merger was definitely going to happen; then it didn't happen; then there was a Plan B, a standalone option; then it became clear there wasn't a standalone option. Citibank pulled the rug from under the firm. We had to put ourselves into voluntary

DOING YOUR HOMEWORK

According to Penfold, news of the state of Heller Ehrman's finances came out of nowhere. He felt he asked the right questions before joining. Nevertheless, it is telling that he also says he asked some 'pretty blunt' questions of the three firms that offered him positions after Heller imploded. He sees the benefits of such an approach, not worrying about putting noses out of joint. Hugh Kelly of Napier Scott Legal Search finds the suggestion that any US firm would be reticent on financial details surprising. 'In the majority of cases I deal with, there is no hidden information from the US parent to the London office – quite the opposite in fact. They are very open about firm's global finances and what debt provisions have been made on either a global and a London and/or European basis.' Nevertheless, with law firms' finances being squeezed, now is the time to be more hard-nosed than ever.

Morrison & Foerster partner Alistair Maughan, who has worked for three US law firms, says the aftermath of Heller Ehrman and Thelen Reid Brown Raysman & Steiner (which also dissolved at the end of last year) means that people are asking a lot more questions than before. 'This is not just lateral hires,' he says. 'Even senior associates and fixed-share partners taking equity are asking more questions. A lot more financial due diligence is needed than there was in my day [he left Shaw Pittman for MoFo in 2004]. While cultural fit is important, there is a need to ask more difficult questions in hard times.'

But Aaron Balfour of Hudson Legal says the veracity of questioning depends on how strong a position a candidate is in. 'The dynamic is shifted for partners operating in struggling practice areas and who are without portable, active clients; this is even more acutely the case for those partners who have been made redundant,' he says. 'While these are very uncertain times which necessitate caution, and while all partners will be concerned to do all they can to secure a perfect move, for many, needs must. A forensic analysis of a law firm's accounts is of less importance to all but the small percentage of partners who are moving on with a glittering portfolio of active clients.'

In Penfold's case, Heller was perfectly solvent on paper and there appeared to be no warning signs that a collapse was round the corner. However, no firm is immune to potential disaster: a few poor management decisions can bring the whole thing tumbling down, just as it did with Brobeck, Phleger & Harrison in 2003. The bottom line is this: if a firm clams up on requests for financial details, walk away.

'If a firm is cagey about its financials as the hiring process hits its stride and certainly by the time an offer is made, candidates are predictably wary and will often walk away in favour of those firms that are transparent enough to lay themselves open financially,' says Balfour.

Finally, a word on US firms' attitudes to their UK laterals. It sounds harsh, but if none of the bigshots from the US flies into London to meet with you while you're negotiating, it could be a sign the firm doesn't really give a hoot about London.

'Some individuals look favourably upon an expedited recruitment process to join their preferred US firm – particularly where the firm is already well known to them,' says Balfour. 'For the majority, a clearly demonstrated commitment to London, as told by Stateside management committee partners who have flown over from HQ, is always well received.'

But Balfour and others agree that the reverse can also be effective. 'I have a strong preference for people to go from London to the States rather than the other way round,' says Maughan. 'You need to get a handle on the interaction between London and the US by meeting as many partners as possible, particularly those outside your practice area and jurisdiction. You need to understand the reporting frequency to US, how the budget is maintained. Recruitment via video conferencing is tricky.'

dissolution or the bank would have put us into administration, which would have been a bloodbath, and this was all within the space of days. It was quite incredible.'

If there is a silver lining to all this, though, it's that the financial

sting could have been much worse. Penfold had a meeting scheduled with Citi on or around the date the firm collapsed to talk over loan options for him to pay in his partnership capital. Here, he finally had a lucky break, if not much of one. 'Fortunately, I hadn't paid my capital in. In theory, there's still a call on

it. I also have a tax bill to pay, in theory. Partners were not paid after the end of August, so we were working effectively unpaid for two months, trying to keep the business afloat. Although I had guaranteed payments for six months, I took one month's drawings. Now I'm an unsecured creditor along with many others. We'll see what we get out of it, but I don't think we'll get anything. I lost a lot more money than I ever would have earned at Heller.'

He describes his feelings at the time in dramatic terms. 'It got to a point where I could now understand it when you hear people saying that once you know you're going to die, you don't fear death anymore,' he says. 'I thought to myself: "Well... OK, if I have to start from scratch again, then I will. That's just the way it is."'

The UK LLP limped on for two months after the firm's decision to dissolve because the team that Penfold was part of, the venture law group (VLG), was hoping to move together to another firm. Other firms had come in for large chunks of Heller's UK practice, notably Orrick, Herrington &

Sutcliffe. But the offers weren't there, or if they were, they were with conditions that meant breaking up the team. 'If this had happened 18 months before, we would have been snapped up as a group without any problem. But it was just too much for people to bite off in the current climate,' he recalls. 'In late September there was one week which I now look

back on as truly terrible, as it was such a waste of time. The irony was that I had loads of work to do, so I was trying to deal with client work in the morning. Then we would have a beauty parade from

one or two firms in the afternoon, then we'd have dinner with one of them in the evening, and that happened for a week.'

After all that, the group ended up with one offer for the entire team that it accepted, only for it to be withdrawn the following day. Penfold won't disclose the firm, but says: 'We wouldn't have had to move very far.' (This doesn't narrow it down: Heller's London office was near St Paul's Churchyard, in a building shared with, among others, Morgan, Lewis & Bockius and Shepherd and Wedderburn. Eversheds is also nearby.) By the middle of October, it was clear that a group move wasn't going to happen.

SAFE HAVEN

In October, the group started breaking up, with individuals looking for jobs on their own. 'A couple of us said we should have started that from the beginning, but we honestly thought that because there was so much interest we would move as a team,' Penfold recalls. 'I'd bought into the VLG practice and I trusted them. I had no one else to trust at the time. The idea of starting again on my own, six weeks after I had joined on my own, was very difficult. But my hand was forced.'

He had more success going solo. Three firms offered him a position, and on Halloween he had to decide which to go for. After taking a year to join DLA and a year to join Heller Ehrman, he was deciding his future in a matter of days. At

the same time, the UK LLP was taking advice from its insolvency practitioner and was preparing to go into administration. 'I couldn't afford to carry on working and not earning; I didn't have the luxury of time,' Penfold says. 'It was great in that market to have three offers on the table. There were other firms that I spoke to that were keen to push things forward

but I told them I wasn't going to hang around on the off-chance they might make me an offer a few weeks hence. After spending a year talking to Heller and it all blowing up, it taught me that however much due diligence you do, you cannot prepare yourself for the totally unexpected.'

One of the offers was from Brown Rudnick and although Penfold says that it wasn't an easy decision, it is clear why the firm won through. Ten years old in London, although its financial performance is not eye-watering by Global 100 standards, this Boston-based firm shared \$750m in contingency fees from tobacco litigation ten years ago, and posted a healthy \$146.5m in revenue during 2008. Profits per equity partner were an extremely attractive \$865,000.

But twice bitten, doubly shy again. Penfold pulled no punches when it came to due diligence this time. 'At the first meetings, I asked some pretty blunt questions, which I think in normal circumstances they would have been very surprised about,' he admits, 'but once they knew my financial situation, they could understand it. I asked a lot of very detailed financial questions very early on, and to be fair, all three firms I spoke to were very open and understanding.'

Penfold recalls the managing director of Brown Rudnick's corporate department, Samuel Williams, coming over from the US to meet him. 'All the Brown Rudnick partners made themselves available to me. It was really impressive, and they worked very hard for me,' he says. 'After what I'd been through, they were very supportive.'

Intriguingly, it was the fact that Brown Rudnick's proposition was so similar to Heller Ehrman's that, 'despite the disaster that was', convinced Penfold to sign up. 'Again, the idea of heading up the UK IP practice of a firm that has a great IP practice in the States was very attractive to me,' he says.

LESSON LEARNED

Penfold joined Brown Rudnick in the middle of November last year, the day he and the other former UK partners of Heller Ehrman put the UK LLP into administration. He is now a salaried partner at Brown Rudnick, and says he is unlikely to take equity ever again. 'I wouldn't be able to now, even if I wanted to,' he explains, outlining that his own loss of earnings means he has no equity to raise, and his potential liabilities make him a bad loan prospect. Despite this, he seems to have finally achieved what he always wanted: freedom to build his own practice, roll his sleeves up and bring the clients in. He wears the look of a man who's just finished running a marathon in stout brogues. As the cliché goes, though, nothing in life that's worth having ever comes easily. **LB**

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