Neutral Citation Number: [2023] EWCA Civ 999

Case No: CA-2022-002296

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE FOXTON
[2022] EWHC 2589 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2023

Before :

LORD JUSTICE POPPLEWELL
LADY JUSTICE ANDREWS
and
LADY JUSTICE FALK

- -

Between :

(1) ROYAL AND SUN ALLIANCE INSURANCE LIMITED

(2) ZURICH INSURANCE PLC UK BRANCH

(3) ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE

(4) THE MEMBER(S) OF LLOYD'S SYNDICATE 2526 (AG DORE) FOR THE 2014 YEAR OF ACCOUNT

(5) THE MEMBER(S) OF LLOYD'S SYNDICATE 2001 (AMLIN) FOR THE 2014 YEAR OF ACCOUNT

(6) THE MEMBER(S) OF LLOYD'S SYNDICATE 2007 (NOVAE) FOR THE 2014 YEAR OF ACCOUNT

(7) AIG EUROPE LIMITED

(8) THE MEMBER(S) OF LLOYD'S SYNDICATE 1200 (ARGO INTERNATIONAL) FOR THE 2014 YEAR OF ACCOUNT

(9) XL INSURANCE COMPANY SE

Claimants/ Appellants

(10) CATLIN INSURANCE COMPANY (UK) LIMITED

(11) THE MEMBER(S) OF LLOYD'S SYNDICATE 1861 (AMTRUST) FOR THE 2014 YEAR OF ACCOUNT

- and -

TUGHANS
(a firm)

Defendants/ Respondents

- -
- -

Ben Hubble KC and **Brendan McGurk**
(instructed by **DAC Beachcroft LLP**) for the **Appellants**
Richard Coleman KC and **Nathalie Koh**
(instructed by **Fenchurch Law (UK) Limited**) for the **Respondents**

Hearing dates: 26 and 27 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00 am on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lord Justice Popplewell:

Introduction

1. This appeal raises an important issue as to the extent to which compulsory professional indemnity insurance ('PII') for solicitors provides cover for liabilities which include the firm's fees.

2. The appellants are insurers who subscribed to a PII policy ('the Policy') led by Royal and Sun Alliance Insurance Limited ('RSA') in favour of Tughans, a firm of solicitors practising in Belfast, at the relevant time as a general partnership under the law of Northern Ireland. I shall refer to the appellants as 'the Insurers'. The Policy, which was in standard terms required for all solicitors in Northern Ireland, was in favour of the partners, solicitors and employees of the firm.

3. Brown Rudnick LLP ('BR'), an English limited liability partnership affiliated to a US limited partnership with the same name, engaged Tughans to perform professional services, resulting in a claim against Tughans in the High Court of Northern Ireland. Tughans in turn commenced an arbitration against the Insurers under the Policy seeking declarations of an entitlement to indemnity in respect of such liabilities as might be found to be owed to BR. The arbitrator, Mr Michael Brindle KC, resolved the coverage issues in favour of Tughans and made a final award accordingly. The Insurers appealed on an issue of law pursuant to s. 69 of the Arbitration Act 1996 with leave granted by Henshaw J. The issue of law concerns the element of BR's damages claim which comprises the fee paid by BR to Tughans for the services. Foxton J ('the Judge') dismissed the appeal, granting leave to appeal to this court on one ground.

4. The respondents are referred to in the title to this action as "Tughans (a firm)" because that is how they were named in the title in the arbitration, and in the arbitration claim form. The description is, however, apt to mislead if the firm is treated as the relevant legal entity. The Policy named 22 solicitors as assured, who were the 12 equity partners and 10 salaried "partners". Only the former were partners under partnership law. The firm was not an assured under the Policy. The claimants in the arbitration were identified in the Particulars of Claim as 10 of the 12 equity partners of Tughans in 2014, who in law constituted the partnership, and each of whom is responsible for 100% of the partnership liabilities under sections 10 and 12 of the Partnership Act 1890 (the arbitration proceeding on the basis that partnership law is materially the same in Northern Ireland as in England and Wales). The Policy is a composite policy of insurance comprising a separate contract between each individual assured and the Insurers. It provides PII cover for the liability of each individual partner to BR, and it is the scope of the cover for that individual liability which is in issue in this appeal. Although it is convenient in this judgment to refer for the most part to Tughans, the firm, just as the parties did in their submissions, it is important for some aspects of the analysis to keep in mind that the relevant assureds are the individual partners. Nothing turns on the fact that the arbitration claim is brought on behalf of only 10 of the 12 equity partners; the other two comprise Mr Coulter, whose alleged fraud gave rise to the claim on the Policy; and one other who is no longer a partner.

The facts

5. The BR claims against Tughans have not yet come to trial. The arbitrator made some findings of fact, to which I shall refer, and some of the history is not in dispute, but that aside, the appeal falls to be decided on the basis of facts which are to be assumed to be true although they have not yet been determined. What actually happened, and the state of mind with which relevant individuals acted, will be matters to be decided in the Northern Irish proceedings. What follows is a recitation of the assumed facts on which the appeal proceeds, without intending to pre-judge that determination in due course.

6. Following the 2008 financial crash the Eire government established the National Asset Management Agency ('NAMA') in December 2009 as a 'bad bank' to acquire and manage impaired loans held by participating Irish banks and any associated security. In relation to transactions involving banks in Northern Ireland, NAMA was assisted in its work by a Northern Ireland Advisory Committee ('NIAC'). NAMA decided to sell that part of its portfolio which involved Northern Irish property loans ('the NI Loan Book'), an endeavour which became known as 'Project Eagle'.

7. Mr Ian Coulter, then managing partner of Tughans and Chairman of the Confederation of British Industry, Northern Ireland, was at the forefront of the idea of arranging a sale of the NI Loan Book, and had useful contacts with members of the Northern Ireland executive. He contacted Mr Tuvi Keinan, a partner of BR. Mr Keinan had no Northern Irish experience but had good contacts with potential purchasers of the NI Loan Book, mostly in the United States.

8. Mr Frank Cushnahan was a member of NIAC between 13 May 2010 and 7 November 2013. He is said to have been a well-known Northern Ireland businessman with a background in corporate finance and wide ranging knowledge and experience of the Northern Ireland property market; and to have been acting in 2011 and 2012 also as a financial consultant to approximately 50% by value of the Northern Irish debtors in the NI Loan Book. It is said that he had worked closely with Mr Coulter and that by 2012 was permitted to have his own room at Tughans from which he was able to conduct his own business interests.

9. Mr Keinan initially introduced a US investment management firm called Pacific Investment Management Company ('PIMCO') as a potential purchaser. PIMCO established a special purpose vehicle called Bravo SPV as its proposed purchasing entity. An engagement letter between Bravo SPV and BR dated 26 September 2013 provided that BR would be paid a fee of up to €16 million, payable upon successful completion of the transaction. The engagement letter indicated that the success fee would be split three ways, between BR, Tughans and Mr Cushnahan.

10. On 13 March 2014, PIMCO withdrew from the proposed acquisition, it is said because it had discovered a proposed payment to Mr Cushnahan. Mr Coulter and Mr Keinan immediately approached another potential buyer comprising a combination of US interests, Cerberus Capital Management LP ('Cerberus').

11. It is alleged by BR that at or around the time PIMCO withdrew, and thereafter, Mr Coulter gave oral assurances to Mr Keinan that Mr Cushnahan had not been involved in the provision of Tughans' services; that it was not intended or expected that he would be so involved thereafter; and that Tughans did not intend or expect to share Tughans' fee with him.

12. On 23 March 2014 BR sent the terms of a proposed engagement letter to Cerberus. The letter referred to BR providing services to Cerberus on an exclusive basis in connection with its acquisition of the NI Loan Book through a Cerberus special purpose vehicle. The engagement letter provided that BR would be entitled to a fee of £15 million upon successful completion of the purchase transaction ('the Success Fee'). It contained a section by which BR made various representations and warranties, the relevant one for present purposes being that BR would not promise or make any payments directly or indirectly to anyone in breach of applicable anti-corruption laws, nor promise or make such payment to, or for the use of, any government official. It also required BR to obtain and provide a written certification from Tughans containing the same representations and warranties; and provided that the Success Fee would not be payable unless and until Cerberus accepted the Tughans certification as acceptable. Mr Coulter confirmed to BR and Cerberus that Tughans accepted the terms, following which the BR/Cerberus letter of engagement was signed by BR and Cerberus later that day, 23 March 2014.

13. On 3 April 2014, NAMA accepted an offer from Cerberus to purchase the NI Loan Book for €1.6 billion. Cerberus had exchanges with NAMA that afternoon, in the course of which NAMA was informed that BR had sub-contracted part of their work to Tughans and that BR would share 50% of its Success Fee with Tughans. That prompted NAMA to seek confirmation from Cerberus that no part of the success fee would be paid to any current or former members of NIAC. Cerberus forwarded that request to BR and Tughans. Mr Coulter responded to Cerberus, and in copy to BR, providing the confirmation, and Mr Keinan provided a similar confirmation to Cerberus on behalf of BR.

14. The transaction with Cerberus closed on 20 June 2014 ('the Cerberus Transaction'). At that point, no engagement letter had yet been entered into between BR and Tughans. On 13 August 2014, Mr Keinan wrote to Mr Coulter asking him to sign a letter of engagement to be dated 8 July 2014, and to issue an invoice for Tughans' 50% share of the Success Fee. Mr Coulter duly sent through the letter of engagement, signed and backdated to 8 July 2014. That Tughans/BR letter of engagement ('the Retainer') provided for Tughans to receive £7.5m ('the Tughans Fee') on the same terms as applied to BR's entitlement to the Success Fee; and contained essentially the same warranties and representations given by Tughans to BR as had been given to Cerberus in the Cerberus/BR letter of engagement. Mr Coulter also sent Tughans' invoice for the Tughans Fee, as requested.

15. On 15 August 2014, BR paid the Tughans Fee of £7.5m plus VAT, £9m in total, to a Tughans account with Danske Bank which, it is suggested, was not its ordinary office account.

16. Up to this point none of the other partners at Tughans was aware of Mr Coulter's engagement on the project or of the Tughans Fee. Mr Coulter had not opened a file on the project at Tughans. On 19 August 2014, Mr Coulter told his partners that he had generated a fee of £1.5m on a highly confidential transaction relating to the purchase of loans from NAMA. On 15 September 2014 Mr Coulter arranged for the transfer of £7.2m of the £9m (an amount equivalent to the £6m which Mr Coulter had not revealed to his partners and VAT) out of the Danske Bank account to an account in the name of one of his own companies registered in the Isle of Man.

17. Matters then unravelled for Mr Coulter at Tughans. Between 24 and 26 November 2014, Mr Coulter told the other partners in a series of meetings about the full amount of the Tughans Fee and the fact that a significant amount had been paid into the bank account of

the Isle of Man company. Following those meetings, on 1 December 2014, £6m of the transferred amount was returned to the same Tughans account from which it had originally been transferred (the remainder following on 26 February 2015). Mr Coulter resigned from Tughans on 9 January 2015. On 28 January 2015, Tughans made a report in respect of Mr Coulter's conduct to the Law Society of Northern Ireland ('the LSNI'), who commenced an investigation.

18. On 9 February 2015, Tughans notified the events relating to the firm's involvement in the Cerberus Transaction to RSA as a "circumstance" under the Policy.

19. On 19 June 2015, the LSNI served a resolution on Tughans stating that it had resolved to intervene in its practice. That intervention was set aside by consent on 26 June 2015, on Tughans' undertaking not to deal with the Tughans Fee without giving 14 days' prior notice to the LSNI. On 28 January 2016, Tughans provided an undertaking required by the National Crime Agency ('the NCA') to the effect that the £7.5m in their bank account would not be distributed without giving 14 days' prior notice to the NCA, save to permit payment of tax which was due.

20. Tughans paid the VAT and income tax due on the Tughans Fee to HMRC. The balance of approximately £4 million remains in a Tughans office account, subject to the undertakings given to the LNSI and the NCA and, so Tughans contends, possible confiscation by the NCA.

21. There were criminal investigations by the NCA which resulted in criminal charges being brought against Mr Coulter and Mr Cushnahan. The trial of those charges has not yet taken place.

22. On 3 November 2017, BR sent a letter of claim to Tughans. It alleged that the statements made by Mr Coulter were false and fraudulent, because Mr Coulter intended to transfer part of the Tughans Fee to Mr Cushnahan. BR intimated claims against Tughans of various kinds, including for damages and/or rescission of the Retainer for fraudulent misrepresentation; for liability to account for the Tughans Fee as a constructive trustee; and in unjust enrichment arising from receipt of the Tughans Fee in breach of fiduciary duty. The damages claimed included the fee and the costs incurred by BR in dealing with the various investigations.

23. On 2 February 2018, solicitors acting for Tughans responded to that claim, denying that there had been any misrepresentations or dishonest statements by Mr Coulter which had led to the payment of the Tughans Fee or the conclusion of the Retainer; and alleging instead that, if there had been any improper conduct by Mr Coulter, it had involved an attempt by him to deprive Tughans of a lawfully earned fee by diverting it from the firm after receipt.

24. On 9 March 2018, RSA informed Tughans that the Insurers were reserving their rights in relation to cover under the Policy. That letter identified a number of issues which RSA was considering, including whether the claims arising from the Retainer and Tughans' involvement in the Project Eagle transaction met the Policy requirement that they be "in respect of any civil liability ... incurred in connection with the Practice carried on by or on behalf of the Solicitor". This came to be called 'the Solicitors' Practice Issue' in the arbitration, following the Insurers' declinature of cover on this ground, provisionally on 3 May 2018 and then by RSA's letter of 19 December 2018 conveying the formal decision.

The December 2018 letter additionally made the point that the Policy was a contract of indemnity which would only respond to a loss, and that any liability in respect of the Tughans Fee was not a loss because Tughans had received and retained it.

25. Tughans did not provide a substantive response to that letter until 30 July 2020. In the meantime there were a number of developments in relation to the claims against Tughans. Cerberus and BR entered into a settlement on 13 May 2019 which involved BR and its insurer, Executive Risk Speciality Insurance Company ('ERSIC'), taking an assignment of Cerberus' claims against Tughans. ERSIC issued proceedings against Tughans in the High Court of Northern Ireland on 13 March 2020 claiming damages for loss and damage caused by: fraudulent and/or negligent misrepresentation, misstatement or deceit, or under the Northern Ireland equivalent of the Misrepresentation Act 1967; breach of fiduciary or contractual duties owed to BR; and/or negligence; alternatively a contribution under the Civil Liability (Contribution) Act 1978. Those proceedings were later discontinued. On 20 March 2020, BR commenced proceedings against Tughans in the High Court of Northern Ireland by a writ in essentially the same terms.

26. On 30 July 2020, Tughans sent its response to the Insurers' decision to decline cover in the form of a letter from its solicitors, Fenchurch Law (UK) LLP. The letter challenged the Insurers' position on the Solicitors' Practice Issue, and also asserted that the Insurers were estopped, as a result of RSA's interactions with Tughans, from taking that coverage point. So far as the no loss point is concerned, the letter essentially accepted the Insurers' position, but on a slightly different basis from that advanced, namely: "Tughans recognises that, if a Court were to conclude that it received a payment of a fee because of a misrepresentation, it could not seek an indemnity to cover a loss of a fee to which Tughans was never entitled. The indemnity which Tughans does seek, however, is for the remaining partners who are now facing a claim for loss and damage sustained by BR as a result of that alleged misrepresentation of [Mr Coulter]…….. It is recognised that, if the Court concludes that Tughans was never entitled to a fee because of [Mr Coulter's] misrepresentation, then the fee will be recovered by BR. Tughans does not ask its insurers to insure Tughans' own professional fee." A similar stance was taken by Tughans on two further occasions in communications from its brokers to the Insurers.

27. On 2 November 2020, Tughans issued a notice of arbitration against the Insurers. This claimed a right to indemnity "save for any liability on [Tughans'] part to return any fees which it has received from BR".

28. BR filed its Statement of Claim in the Northern Ireland proceedings on 19 November 2020. The claim was made by BR as assignee of Cerberus' causes of action for Cerberus' losses, and additionally by BR on its own causes of action for its own losses.

    (1) For the assigned Cerberus claim, the losses claimed were the full £15m Success Fee; Cerberus' costs incurred in relation to criminal and civil investigations estimated to be in excess of £8.8 million; and lost profit resulting from the diversion of management time and the stigma resulting from Mr Coulter's behaviour. The Cerberus causes of action relied on were in tort for negligent or fraudulent misrepresentation. The representations were said to be false in that Mr Cushnahan had been involved in the provision of the services; Mr Coulter intended or expected that he would be so involved; and Mr Coulter intended or expected to share the Tughans Fee with him.

(2) For BR's own claim, the losses were the £7.5m Tughans Fee; BR's costs of criminal and civil investigations; loss of earnings resulting from BR's partners and other fee earners being diverted into dealing with the investigations and complaints; and a loss of chance claim in respect of loss of profitable business as a result of the stigma caused. The causes of action and conduct relied on went somewhat wider than for the Cerberus assigned claim. Amongst other things, the damages claim was also advanced in contract, in negligence and for breach of fiduciary duty; and the causes of action were said to arise not only from the conduct which made the misrepresentations untrue, but also from failures to inform BR of Mr Coulter's conduct timeously upon discovering it, and failure to have in place systems to prevent it. There was no claim for rescission of the Retainer; nor any restitutionary claim, whether in unjust enrichment or as constructive trustee of the Tughans Fee. As with the assigned Cerberus claim, it was advanced solely on a damages basis (and for equitable compensation insofar as advanced for breach of fiduciary duty), which involved affirming the Retainer.

29. The BR claims in the Northern Irish proceedings were stayed pending the conclusion of the criminal proceedings.

30. The Particulars of Claim in the arbitration sought a declaration of cover in relation to the BR claims identified in the latter's Statement of Claim, together with costs. In relation to the Tughans Fee element, the declaration sought was of an entitlement to indemnity in respect of that part paid away to HMRC in VAT and income tax; and of that part of the retained fee which could not be used to pay BR as a result of the undertakings to the LSNI and the NCA. This came to be known as 'the Qualified Claim'. In effect, therefore, Tughans withdrew the concessions made in correspondence and the notice of arbitration that it was not entitled to indemnity in respect of any part of its liability to BR which represented the Tughans Fee; but accepted that the Policy would not provide cover to the extent that the retained fee was available to satisfy BR's claim. The Particulars of Claim did not at this stage advance a claim for cover for the full amount of the Tughans Fee, irrespective of what had happened to it after receipt. That subsequently identified claim, which came to be known as the 'Unqualified Claim', was the claim ultimately upheld by the arbitrator, and the Judge.

31. A four day merits hearing took place before the arbitrator from 17 May 2021. On 5 July 2021, the arbitrator handed down a Partial Final Award addressing the Solicitors' Practice Issue and Tughans' argument that the Insurers were estopped from denying coverage. The arbitrator upheld Tughans' case on the Solicitors' Practice Issue, but would not have upheld the estoppel claim. In the course of addressing the submissions the parties had made on the Solicitors' Practice Issue, he made the following findings.

(1) He was not sure that the issue of whether Mr Coulter had intended to share the Tughans Fee with Mr Cushnahan "adds much to [the Insurers'] case. Either way this was a fee due and payable to Tughans for work done" ([19]). He found it "difficult to understand [the Insurers'] argument that the success fee did not [i]nure to the benefit of Tughans" – an argument advanced by the Insurers as one reason why Mr Coulter's involvement in Project Eagle was not solicitorial in nature – because "it plainly did" ([33]);

(2) The services provided by Mr Coulter included the following: dealing with ministers on the Northern Irish executive and shaping the kind of deal which could be acceptable to those ministers and to NAMA; helping Cerberus to analyse the portfolio, using his knowledge and understanding of the assets and the borrowers, not just from his time

spent during the PIMCO period but also from his close connections with many of the major borrowers in the portfolio; using his Northern Irish contacts and experience to further the Cerberus bid at the strategic level; deal structuring; and giving strategic advice, using political connections and coordinating information to BR/Cerberus regarding borrowers. It was this activity which the arbitrator held to be sufficiently solicitorial to fall within the Policy wording of work "in connection with the Practice carried on by or on behalf of the Solicitor" so as to decide the Solicitor's Practice Issue against the Insurers.

32. The arbitrator appears to have envisaged that the Partial Final Award would determine the substantive issues in the arbitration, leaving only what are sometimes referred to as "consequential" matters outstanding. However, the submissions on the form of relief and costs which followed revealed a significant dispute between the parties, developed over detailed written submissions, as to whether Tughans was entitled to a declaration that the Insurers were obliged to indemnify them in respect of any liability to BR to the extent of the Tughans Fee. At this stage Tughans' pursuit of the Unqualified Claim emerged.

33. After several rounds of submissions the arbitrator delivered the Final Award on 7 September 2021. The issues relating to the Tughans Fee were addressed at [6] to [9]. The reasons for upholding the Unqualified Claim appear from the critical passage at [7]:

> "There is, firstly, no basis for stripping out the [Tughans Fee] from the general declaration. BR claims loss from the payment of the Fee and if that is part of their loss, so be it. There is no legal basis for removing that element of loss, because the Claimant has made a 'gain' by receipt of the Fee. Support for the Claimant's position is afforded by the decision of Vinelott J in *The Mortgage Corporation v Solicitors' Indemnity Fund* [1998] PNLR 73. Indemnity is due to the Claimant from the claims for damages or equitable compensation which BR, ERSIC or Cerberus may allege. I see no reason to qualify that indemnity."

34. At paragraph 17A of the Final Award, the arbitrator made two declarations:

"(1) All claims for loss and damage brought by BR, Cerberus and/or ERSIC against the Claimant in respect of the matters set out in paragraphs 16-17 of the Partial Final Award arise 'in connection with the Practice carried on by or on behalf of the Solicitor'.

(2) [RSA and the other insurers] are, subject to the application of any other terms and conditions of both the Primary and Excess Layer Policy Wording, liable to indemnify the Claimant in respect of:

> (a) All claims brought by BR, Cerberus, and/or ERSIC as referred to in paragraph (1) above.
>
> (b) All costs incurred by the Claimant in defence of the proceedings commenced by BR on 20th March 2020.
>
> (c) All costs incurred by the Claimant in defence of the proceedings commenced by ERSIC on 13th March 2020."

35. Paragraph 1 of the declaration was not in quite such wide terms as sought by Tughans because it carved out from cover any liability for a restitutionary claim, although as the

arbitrator, and Judge, observed, this was of little comfort to the Insurers because BR's claim was not framed in restitution, and were a restitutionary claim to be added by BR it would be treated as ancillary to the compensatory claim.

36. The Insurers then brought challenges under the 1996 Act to the second declaration to the extent that it declares that they are liable to indemnify Tughans in respect of the Tughans Fee. They did so on three bases. There was a challenge under s. 67 of the Act to the arbitrator's jurisdiction to make the declaration, which was rejected. There was a challenge for serious procedural irregularity under s. 68 of the Act in relation to the way the Unqualified Claim emerged, which succeeded, resulting in a remission to the arbitrator. The injustice to the Insurers was held to be the loss of an opportunity to oppose an amendment to the Particulars of Claim to advance the Unqualified Claim as an alternative to the pleaded Qualified Claim. The third basis was an appeal on a point of law under s. 69 of the Act which gives rise to the issue on this appeal. The latter is not affected by the s. 67 and s. 68 challenges, although if on the remission the arbitrator concludes that the Unqualified Claim should be permitted, he will be bound to apply the decision of this court on whether it is right in law. I need say no more about the s.67 and s. 68 challenges.

The Judgment

37. The issue of law for which permission to appeal was granted by Henshaw J pursuant to s. 69 of the 1996 Act was identified in the arbitration claim form as being the Insurers' contention "that policies of professional indemnity are not intended to, and do not in fact, provide cover that would entitle an assured to be indemnified for the loss of a sum to which they were never entitled, there being no 'loss' and thus no 'insured loss' at all".

38. The Judge identified the Insurers' argument on the s. 69 challenge as being that if BR establishes liability against Tughans, it will follow that Tughans never became entitled to the Tughans Fee, and so can suffer no loss in having to return it; it is not the purpose of a professional indemnity insurance policy to pay solicitors a sum representing profit costs to which they were never entitled; and so granting Tughans cover in respect of the Tughans Fee would violate the principle of indemnity.

39. This argument was advanced by the Insurers before the Judge on two alternative bases. The first was that the fee had never become contractually due to Tughans by reason of the (assumed) untruth of the representations. The Judge rejected this argument on the grounds that as a matter of construction of the Retainer, the legal entitlement to the fee accrued upon the giving of the representations/warranties and the successful completion of the transaction, and was not conditional on the truth of the representations/warranties. From that conclusion there is no appeal. There was a dispute before the Judge, and before us, whether that had already been a finding of fact made by the arbitrator in paras [19] and [33] of the Partial Final Award quoted above. However since that was the Judge's own conclusion, from which there is no appeal, it is not a dispute which now matters.

40. The Insurers' alternative argument was that maintained before this court, the main thrust of which was that there was no entitlement to the fee "in substance". It was a fee to which Tughans should not have been entitled. Because the fee was procured by misrepresentation, Tughans had no right to retain it; and if it was obliged to return it, as part of a damages claim, it had not lost something to which as a matter of substance it was entitled, just as much as if the contract were avoided and it was obliged to return it or its value in a restitutionary claim. Any defeasible contractual right to the fee was a matter of empty legal

form, not substance. Tughans had not suffered a loss in the amount of the fee, and cover for that element of a damages claim would violate the indemnity principle. In his exposition of the argument in this court, Mr Hubble KC used various alternative expressions to convey the submission that there was no entitlement in substance, including that the entitlement was not meaningful, was narrow and defeasible, was not an entitlement in reality, that the fee was not properly received, and that there was no right to retain it even if there were a right to receive it.

41. The Judge rejected this alternative argument at [134] to [136]. In his characteristically careful and analytical judgment, he had earlier concluded at [109] that if a solicitor has done what is necessary as a matter of contract to accrue a right to a fee, an award of damages in the amount of the fee payable will ordinarily constitute a loss for the purposes of a professional indemnity policy. He had also concluded at [130]-[133] that the fee in this case was one which Tughans had contractually earned, and, when paid, was a sum which belonged in law and equity to Tughans.

42. At [134] the Judge observed that BR had not purported to rescind the Retainer, with the result that the contractual rights thereunder remain. He went on:

> 134. "….If it had been open to [BR] to rescind the Tughans Letter of Engagement and they had done so, the issue would have arisen as to whether Tughans were entitled to an allowance for the services performed (*Chitty on Contracts* (34th) [9-136]-[9-137]). Having affirmed the Tughans Letter of Engagement, [BR's] claim for damages raises the issues of counterfactual analysis briefly referred to at [35(iv]). The differences between the two courses are far from the technicality which Mr Hubble KC's submissions assumed.
>
> 135. Mr Hubble KC's submission can be tested by taking the example of a solicitor who (negligently or fraudulently) misrepresents the firm's expertise, leading the client to embark on unsuccessful litigation which it would otherwise have refrained from. If the firm was subsequently ordered to pay the client damages in the amount of the fees paid to the firm, I do not believe the misrepresentation would have the effect of depriving the firm (and, in the event that it sought to recover on a derivative basis, the client) of a right to indemnity under the firm's professional indemnity policy.
>
> 136. By way of a revised formulation, Mr Hubble KC submitted that the position was different when, as would be the case here on [BR's] allegations, the client had taken the decision to pay the fee as a direct result of a fraudulent statement by the solicitor. Modifying the example in the preceding paragraph, Mr Hubble KC argued that there could be no indemnity in such a case if, before paying the bill, the client had asked the solicitor "are you sure your firm has experience in this type of litigation?" and the solicitor had dishonestly replied affirmatively, inducing the client to discharge the firm's invoice. However, that refinement to the example has no impact on the solicitor's contractual right to the payment for so long as the contract of retainer subsists, and I do not accept that it has any effect on the solicitor's entitlement to an indemnity if sued for damages in the amount of the fees paid to it."

43. I agree with both the conclusion and the concise reasons given by the Judge. That would be sufficient to dismiss the appeal, but in deference to the arguments advanced before us, I

will address them in a little more detail. I must first deal with a jurisdictional objection advanced by the respondents.

The jurisdiction point

44. Mr Coleman KC submitted that it was not open to the Insurers to advance the "in substance" argument on this appeal because it did not arise out of the award and/or had not been an issue of law for which permission to appeal had been given, both being requirements of an appeal on a point of law by the terms of s. 69 of the 1996 Act.

45. The suggestion that the in substance point does not arise out of the Final Award is mistaken. The decision of the arbitrator, reflected in the declaration made in the Final Award, is that on the assumed facts the Insurers are liable to indemnify the assureds for the damages for which they are held liable, including the element of such damages representing the amount of the Tughans Fee. If the Insurers' in substance argument were correct, they would owe no such liability. The point therefore arises directly out of the award.

46. As to the suggestion that no permission has been granted, the position is a little more complex. I have already recited the formulation of the point of law in the arbitration claim form which was by reference to a fee "to which [Tughans] were never entitled". The origin of this formulation is in fact in Fenchurch Law's letter of 30 July 2020.

47. In his reasons for granting permission to appeal under s. 69 of the 1996 Act, Henshaw J treated the issue of law as being whether "a professional indemnity insurance covers a claim for repayment of a professional fee on the ground that the firm received the fee as a result of a fraudulent or negligent misrepresentation or otherwise improperly."

48. Before the Judge, Tughans did not take the jurisdictional point now taken: the in substance argument was advanced by the Insurers without objection, as an alternative to the argument on contractual entitlement, and was addressed on its merits. That was the argument for which the Judge granted permission to appeal to this court.

49. In *Sharp v Viterra* [2020] EWCA Civ 7 this court said at [80]:

> "As Hamblen J observed in *Cottonex Anstalt v Patriot Spinning Mills* [2014] EWHC 236 (Comm) [2014] 1 Lloyd's Rep 615, it is quite common for minor refinements to the question of law to be made at the appeal stage in the light of fuller argument and, on occasion, the court's own views. Provided the substance of the question of law remains the same, and the question to be determined remains within the spirit if not the letter of the leave granted, there is no need for any formal permission to amend: [20]-[22] following Eder J in *Parbulk II A/S v Heritage Maritime Ltd SA ("The Mahakam")* [2011] EWHC 2917 (Comm) [2012] 1 Lloyd's Rep 87 at [15]. The refinement he allowed in that case was to make clear that what was drafted as a question of law by reference to a notional contract term should be read as asking the question by reference to the particular contract terms which the parties had entered into."

50. I would hold that the in substance point is within the spirit if not the letter of the point of law which Henshaw J treated as that for which he was granting permission. His formulation was not confined to claims in respect of fees to which there was no contractual entitlement. It was clearly understood to encompass the in substance point before the Judge because the jurisdictional objection now identified was not taken at that stage, and the point was argued.

It was the argument for which the Judge gave permission to appeal to this court, and although Mr Coleman is correct in submitting that the grant of permission to this court cannot of itself confer jurisdiction to decide a point of law for which the permission required by s. 69 has not been given, the very fact that the Judge granted permission to appeal to this court is an indication that he regarded the point as within the scope of the permission granted by Henshaw J. In my view he was right to do so. There is therefore no need to amend the arbitration claim form to allow the point to be argued.

51. Alternatively, and had it been necessary to do so, I would have been prepared to grant permission to appeal on this point of law, and the necessary extensions of time, by amending the arbitration claim form to add the words "in substance" after the words "to which they were never entitled". It has been fully addressed in written and oral argument before us, as it was before the Judge, and raises a point of general importance, as the Judge recognised in granting permission to appeal on it. There would be no prejudice to the respondents in taking this course, as Mr Coleman fairly conceded.

The Policy wording

52. The Policy is in a form which the LSNI requires all solicitors practising in Northern Ireland to enter into pursuant to the Solicitors Indemnity Insurance Regulations 2014.

53. The insuring clause provides:

> "The Insurers will indemnify the Insured in respect of claims or alleged claims made against the Insured…..in respect of any civil liability (including liability for claimant's costs and expenses) incurred in connection with the Practice…provided that no indemnity will be given
>
> (a) to any individual committing or condoning any dishonest fraudulent criminal or malicious act….."

54. Three matters deserve emphasis. First, the insuring clause is expressed in very wide terms. It is in respect of claims or alleged claims for *any* civil liability. It does not draw any distinction between liability for damages in respect of fees and any other form of liability. This is consistent with the function of compulsory PII insurance for solicitors, an important aspect of which is for the protection of the public. As Lord Brightman observed in *Swain v The Law Society* [1983] AC 598 at p. 618, the purpose of the compulsory PII scheme for solicitors is not only for the protection of the premium-paying solicitor against the financial consequences of his own mistakes and those of his partners and staff, but also, more importantly, to secure that the solicitor is financially able to compensate the client for any liabilities found to be owed to the client.

55. Secondly, the exception makes clear that unless the claiming assured has themself committed or condoned fraud, the fact that it is the fraud of others which has given rise to liability is no bar to cover. That reflects both the inherent nature of this being a composite policy, which is a bundle of separate contracts in which the fraud of one assured does not affect the right of recovery of another (see *Arab Bank Plc v Zurich Insurance Co* [1999] 1 Lloyd's Rep 262 per Rix J at pp. 272, 277); and the need for protection of solicitors from the consequences of fraud by an employee or individual member of a firm, for which innocent partners will be vicariously liable to the client, as well as the protection of clients by means of derivative claims on the insurance. It is well known that such cases regularly

occur, and form a paradigm example of circumstances for which compulsory PII cover is required, and to which it responds.

56. The argument advanced by the Insurers in their skeleton argument included a contention that to allow cover in this case would be to enable the respondent partners to take advantage of their own fraud, in that although not implicated in Mr Coulter's conduct themselves, they have to adopt it as theirs in order to treat his conduct as solicitorial. This turns the nature of composite PII insurance on its head. One of its important purposes is to protect innocent solicitors from liability resulting from the fraud of others, and that is made clear by the Policy wording in this case.

57. Thirdly, one of the points which the Insurers may wish to argue in due course is that the partners "condoned" Mr Coulter's conduct so that exception (a) is engaged, contending that the Insurers were deprived of the opportunity to advance this argument as a result of the procedural irregularity. Nothing I say is intended to pre-judge whether such a point can be advanced or made good. If it can and is, there will be no cover under the Policy Wording. However, the Insurers' argument on the appeal is advanced on the assumption that exclusion (a) does not apply to the respondent partners, and that is the assumption on which I address the argument.

The indemnity principle

58. At the heart of Mr Hubble's submissions was his reliance on the indemnity principle, the nature of which is well established. In contrast to contingency policies which provide for payment of a sum on an occurrence, irrespective of loss, in indemnity insurance loss is an inherent aspect of cover. A policy of indemnity insurance is intended to indemnify an assured in respect of its actual loss, but not more than its actual loss: *Godin v London Assurance Co* (1758) 1 Burr 489, 492 (1758) ER 419, 420; *Castellain v Preston* (1883) 11 QBD 380, 386.

59. The principle is one of presumptive interpretation and is subject to the policy wording, which may clearly provide for recovery of either less or more than the actual loss. A common example of the former is a policy provision for an excess or "self-insured" amount which the assured must bear. An example of the latter is a "new for old" property insurance under which an assured is covered for the replacement value of goods notwithstanding that when lost or damaged the usual measure of loss, market value, is lower than the replacement cost. So too valued policies represent a departure from the indemnity principle by the parties agreeing the value of the subject matter insured, which may be more or less than its market value at the date of loss.

60. The starting point is that the Policy wording in this case is in wide terms covering any civil liability; and that an ascertained liability is generally regarded as a loss (without the need for prior payment to discharge it), both in the general law (see *Total Liban SAL v Vitol Energy SA* [1999] EWHC B1 (Comm), [1999] 2 Lloyd's Rep 700), and in liability insurance (see *West Wake Price & Co v Ching* [1957] 1 WLR 45, 49; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, 374, 378).

61. Against that background the indemnity principle does not assist the Insurers in this case for four reasons. The first is that a solicitor who has earned a fee, so as to be contractually entitled to it, does indeed suffer a loss if deprived of it by reason of a liability claim. This is because the fee has been earned, and consideration has been given by the solicitor by

providing the solicitorial services. The fee, if earned and due, represents the value of the services provided. If the amount of the fee has to be paid away to discharge a liability claim, the effect is that the solicitor has provided the services without remuneration. In being deprived of the fee, the solicitor has lost an equivalent amount because that is the value of the now unremunerated services which he has provided. This is so as a matter of principle, but is also readily apparent in practice from the fact that the provision of solicitorial services typically involve a cost. They will usually involve the expenditure of time and expertise of the fee earners and others, and the use of overheads necessarily incurred to enable their provision, for example expenditure on buildings and staff. The services are provided by using the firm's human and physical resources, which involves a real cost. If the services are unremunerated that cost represents a real loss. It may be very large. Suppose that the fee is earned by many fee earners working with unimpeachable skill and care for many years on a complex piece of litigation or transaction. The logic of the Insurer's argument is that the firm suffers no loss if the fees have to be foregone, by reason of a liability claim, because the retainer is procured by misrepresentation. The idea that in those circumstances the solicitor suffers no loss in being deprived of all its earned fees seems to me unreal.

62. Moreover if the solicitor is to be deprived of remuneration from the client, as a result of a liability claim, the solicitor has been deprived of the opportunity to use the firm's resources elsewhere, including, most obviously, for another client who would have paid for them. The lost fee is lost revenue both in itself and because of the lost opportunity to earn the revenue from others.

63. This point was made more succinctly by the Judge at [107], and in even more compressed form by the arbitrator at [7] of the Final Award. As the Judge observed, the unusual size and structure of the Tughans Fee in this case makes no difference to the argument of principle. It was a fee earned for services performed by Mr Coulter in an amount regarded by both parties to the Retainer as commensurate with the value of the services.

64. For the same reason, the Insurers' description of the effect of cover being to confer a "windfall" on Tughans is inapposite. If Tughans retain the fee or any part of it, it is because Mr Coulter provided the services for which it was the consideration and which contributed to the successful conclusion of the Cerberus transaction. If Tughans is liable to pay damages to BR in an amount which includes the fee, that is a loss irrespective of the receipt or retention of the earned fee. Tughans has provided the services, for which it was entitled to receive the Tughans Fee as remuneration, *and* suffered the loss of a liability which includes that amount. There is no inconsistency between the two and no windfall.

65. This is no less so if the entitlement to the fee is defeasible because the contract is voidable for misrepresentation, but has not been avoided. The services have still been provided. The loss is still suffered.

66. Moreover it is not right to describe an earned fee procured by a misrepresentation as one to which "in substance" the solicitor is not entitled or one it is not entitled to retain. Once it has been earned, the solicitor is entitled to it unless and until the contract is avoided. That may never happen. If there is no avoidance, the solicitor remains entitled to the fee, not merely as a matter of technical or formal legality, but as a matter of substance. It is the solicitor's property, to which the solicitor is legally and beneficially entitled, unless and until the contract of engagement is validly rescinded. None of Mr Hubble's various alternative formulations of the "in substance" entitlement can overcome this difficulty.

67. Indeed it may be the very provision of the services, by which the fee is contractually earned, which prevents the contractual right being defeated. A fully performed contract for services, which confers the benefit of the contractual services in a form which cannot be restored, may prevent rescission because restitutio in integrum is not possible: see *Boyd & Forrest v Glasgow & South Western Railway (No 3)* (1915) SC (HL) at 28, 37, 43.

68. Accordingly, to treat an earned fee whose payment is procured by a misrepresentation as equivalent "in substance" to an unearned fee to which the solicitor is never entitled is simply a false equiparation.

69. The second reason for rejecting Mr Hubble's argument is that it runs contrary to the public interest purpose of compulsory PII cover for solicitors identified in *Swain v The Law Society.* If the partnership and all the partners were insolvent, a client would not have this protection where it was seeking to recover damages which included the fee paid to the solicitor. In this case BR would be left without the derivative insurance rights which the scheme of compulsory PII insurance is intended to provide.

70. Thirdly, the ramifications of the Insurers' argument are inconsistent with the commercial and regulatory function of compulsory PII cover, which is to protect partners and employees from their own negligent mistakes and those of their fellow partners and employees, and from the fraud of those others, as well as its function of protecting clients. Suppose that Mr Coulter had absconded with the Tughans Fee (as might be thought to have been his intention as to £6m of it from his concealment of that element from the other partners and the transfer into the Isle of Man company account). On the Insurers' case there would be no cover. The Insurers' case does not depend upon the continued retention of the Tughans Fee or part of it. Suppose, to give another example, that an employee were responsible for the negligent misrepresentation in question, and were himself amongst those sued for damages which included the fee, in which as an employee he had no prospect of sharing. Again, on the Insurers' case, he would have no indemnity insurance against such liability. Another example is that given by the Judge at [135], quoted above. One could multiply such examples. If the Insurers' argument were right it would leave many surprising gaps in cover in circumstances for which the commercial and regulatory scheme of compulsory insurance, for the protection of both solicitors and their clients, would dictate that cover should exist. They reinforce the conclusion that the Insurers' case is wrong.

71. The fourth flaw in Mr Hubble's reliance on the indemnity principle is that it ignores the composite nature of the Policy and the fact that the claims are made under it by individual assureds. It treats any liability for the Tughans Fee element of the BR claim as irrecoverable irrespective of any beneficial receipt of the fee by any particular individual assured, with the consequence that they may be largely uninsured for their liabilities in respect of sums never beneficially received. Any individual partner is liable for the whole of the partnership liability to BR, and may not be able to recoup the balance from the other partners. But even if they can, any given partner will typically be entitled to only a proportion of any fee received by the firm (at best), depending on the internal profit sharing arrangements; and the larger the number of equity partners, the smaller generally the share. Moreover the fee is a gross receipt, whereas the benefit to an individual partner is only at best to a net profit share, which so far as the fee is concerned requires a deduction from the gross fee of taxes, other direct costs (e.g. travel, photocopying etc.) and indirect overheads. If Mr Hubble's argument be right, each partner may very well be left substantially uninsured. That is contrary to the protection intended to be provided by PII cover.

Restitution

72. Mr Hubble also argued that the indemnity principle precluded any cover for a liability for fees framed as a restitutionary claim; and that being so, liability for fees as part of a damages claim equally ought not to be covered, there being no reason for a distinction between the two.

73. The short answer is that even if the premise were correct, the conclusion would not follow because of the real differences between a restitutionary claim and a damages claim to which the Judge drew attention.

74. However, Mr Coleman also challenged the premise, namely that the indemnity principle precludes cover for a restitutionary claim for fees. He submitted that the insuring clause was wide enough to cover a restitutionary claim, extending as it did to *any* civil liability, and there was nothing in the indemnity principle which would preclude recovery. Although this point does not directly arise for decision on the appeal, because the BR claim is clearly a damages claim and not restitutionary, the Judge said something about it on which I would wish to comment.

75. The Judge addressed this issue in the section of the Judgment at [110]-[115] when considering the position where there were "claims against a solicitor to recover amounts which never became due." He referred to *Axa Insurance UK Plc v Thermonex* [2012] EWHC B10 (Merc) (HHJ Brown QC); *Sutherland Professional Funding v Bakewells* [2011] EWHC 2658 (QB) (HHJ Heggarty QC); and the Australian case of *Kyriackou v ACE Insurance Ltd* [2013] VSCA 150 at [20]. The Judge drew attention to the fact that the language of the insuring clauses in those cases was framed by reference to compensation or damages, as an explanation for their not covering a restitutionary claim. He also referred to a passage in *Colinvaux's law of Insurance* 13th edn. at [21-030]. At [113], the Judge treated the Policy wording in this case as equivalent to the wording of cover in the three cases identified, by reason of the terms of the Self Insured Amount definition. He concluded that "having to return a sum of money paid to the insured to which the insured never had any legal entitlement is not, in my view, an indemnifiable loss under a professional indemnity policy in the absence of clear language to that effect."

76. As is clear from the language and context of this passage in the Judgment, the Judge was addressing restitutionary claims where there was no entitlement to the fee because it had not been earned. He did not say that the indemnity principle precluded cover for a restitutionary claim for a fee which has been earned, and I can see no good reason for treating it as doing so, at least in the circumstances of the assumed facts of this case. Being deprived of such fee is a loss to the solicitor for the reasons I have explained, and none the less so when the deprivation arises from a liability for a claim framed in restitution, following rescission, as for a claim framed in damages.

77. I would not, however, readily accept that the indemnity principle dictates that in all cases where the solicitor faces liability on a restitutionary claim for money received but *not* earned as a fee, there is no cover for such a liability in the absence of clear language to that effect. If, for example, a solicitor receives money on account of fees, and an employee steals them from the client account, or negligently transfers them to a third party, before the work is done to earn the fee, a claim by the client for the money, advanced as a restitutionary claim, would seem to me to give rise to a liability which constitutes a loss; and would, moreover, appear to fall squarely within the intended scope of PII cover, and

be a necessary part of cover if the PII policy is to fulfil the public protection function of a compulsory insurance scheme. Of course all cover is subject to the particular policy wording. The wording in the insuring clause of the Policy in this case is very wide, and I am not currently persuaded, as it appears that the Judge was, that the definition of the Self Insured Amount would be sufficient to defeat cover in the example I have given. Mr Hubble was inclined to accept that at least in the form of PII cover required of solicitors practising in England and Wales, which is not identical to the Policy issued pursuant to regulations governing those practising in Northern Ireland, there would be cover in such circumstances; but, he submitted, that was because of a specific term in the compulsory English PII terms providing cover for liabilities arising from breaches of client account rules. What that illustrates, however, is that there is nothing in the indemnity principle itself which dictates that restitutionary claims for unearned fees cannot constitute a loss.

78. Since this aspect of the argument was not explored very fully before us, does not arise on the facts of the case, and on any view is not determinative of the outcome, I would prefer not to express concluded views on it, especially since it is not easy to anticipate all the different circumstances in which restitutionary claims might arise. I note that in *West Wake Price v Ching*, Devlin J took care to say at p. 47 that he was not deciding that claims for money had and received were necessarily outside the scope of the indemnity policy in that case, and appears to have left open the question as a matter of the policy wording in question, not because the indemnity principle might preclude it.

79. I do, however, consider that the premise for Mr Hubble's restitution based argument is unsound on the facts of this case, where the fee in question *has* been earned and become contractually due. There is, in my view, nothing in the indemnity principle which would preclude cover where such a claim is framed in unjust enrichment, following rescission, any more than when framed as a damages claim. Nor, in my view, is there anything in the Policy wording which would do so.

What if the Tughans Fee had not been paid?

80. Mr Hubble argued that the effect of the declaration of cover in this case was to treat the Policy as granting first party cover for unpaid fees, which are not the proper subject matter of compulsory PII policies and are excluded from the Policy by the usual trading debts exception. This, he submitted, followed from the anomalous consequences which turned upon the happenstance of whether the fee had or had not been paid in various posited examples. Just as it is not the function of PII cover to make a solicitor whole if its fees are not paid by the client, especially if the fee is procured by a fraudulent misrepresentation, the solicitor can be in no better position, it was submitted, if the misrepresentation led to the solicitor paying the fees, to the return of which the client had become entitled. If, for example, in this case BR had not paid the Tughans Fee, and Tughans had sued for it, Tughans would have been met with the BR damages claim, including the amount of the Tughans Fee. An equitable set-off would have been applied so that Tughans' claim for the fee would have failed and BR's damages claim would not have included any element of the fee. There would then have been no liability in respect of the fee to which the Policy would have responded. The extent of cover cannot be different, Mr Hubble submitted, merely because in this case BR did pay the Tughans Fee in the first place, in ignorance of the circumstances which made the Retainer voidable. If there is no cover, Tughans will be in the same position as it would have been in had it not received the fee in the first place.

81. I cannot accept this argument for two separate reasons. First it ignores the position of the individual partners under a composite policy. They will not be in the same position irrespective of whether or not the fee is received: they are worse off by reason of the fee having been paid because they each become liable for the whole of the fee element of the damages liability whilst each having a beneficial interest, at best, in only a proportion of the gross fee received by the firm.

82. Secondly, the argument appears to me unsound even if examined from the point of view of Tughans as an entity. It is true that in the posited example of the Tughans Fee being unpaid, the Insurers would not come under any liability for the Tughans Fee. That is because there would be no ascertained civil liability for it, and it would not fall within the insuring clause in the Policy wording. There would simply be no occurrence of an insured risk. It does not follow, however, that where there is such a liability as an insured risk, it does not constitute a loss. Nor does it turn the Policy into a first party policy or a policy against unpaid fees. Indeed it illustrates the opposite: where the fee is unpaid in the posited example the Policy does not respond; whereas, where there is a liability which includes the fee element, the Policy does respond because there is a liability and a loss, which is exactly what professional indemnity insurance is designed to cover.

83. Mr Hubble accepted that where a solicitor who has performed work negligently, for example missing a limitation period, is sued for damages which include wasted fees paid by the client, liability for the wasted fees element is capable of constituting a loss to which the Policy responds. Yet in that example there would be the same "anomaly" if the earned fees had not been paid: if sued for by the solicitor they would be set off against the damages claim, and no ascertained liability for them would arise. Mr Hubble's concession illustrates that this is not an anomaly. It is merely the result of the Policy being a form of liability insurance. In the one case there is a liability, in the other there is not. The imperative of public protection of clients in the event of solicitor insolvency simply does not arise if the client has not had to pay the fee or bear it.

The Respondents' Notice

84. The respondents had an alternative fall-back position that cover existed at least to the extent that any individual assured had not acquired an unencumbered beneficial entitlement to the retained Tughans Fee. This was a modified version of the Qualified Claim. It was advanced only if the court did not accept the primary case advanced. Since I have accepted that primary case, I need not address the point.

Conclusion

85. For these reasons I would dismiss the appeal.

Lady Justice Andrews:

86. I agree.

Lady Justice Falk:

87. I also agree.