Neutral Citation Number: [2025] EWHC 278 (Comm)

Claim No: LM-2023-000077

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 February 2025

Before :

RECORDER JANET BIGNELL KC
Sitting as a Judge of the High Court

- -

Between :

ROGER LEGGETT & 40 OTHERS	**Claimant**
- and -	
AMERICAN INTERNATIONAL GROUP UK LIMITED	**Defendant**

- -
- -

Mr Dale Timson (instructed by **Orazio Grosso)** for the **Claimants**
Mr Carl Troman (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 21, 22, 23 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 12/02/25 by circulation to the parties' representatives by e-mail and by release to the National Archives.

Recorder Janet Bignell KC:

1. This was the trial of a preliminary issue as to whether, in essence, the Defendant professional indemnity insurer ("AIG") is liable to provide an indemnity in relation to the judgments on liability and damages which the 41 Claimants have obtained against their former solicitors, Giambrone Law LLP (In Liquidation) ("the LLP"), in Claim No. BQ-2015-00459 ("the Primary Proceedings"). AIG provided professional indemnity insurance to the LLP under AIG UK Limited Solicitors Professional Liability Policy Number 34018065 ("the Policy") in respect of certain claims first made against the LLP in the period 1 October 2008 to 30 September 2015.

2. In addition to the LLP, the Policy also provided insurance cover for certain claims made against Giambrone & Law ("the Firm"), and its former partners, including Mr Giambrone. Both the Firm and the LLP were manifestations of Mr Giambrone's legal practice from time to time. For the purposes of the Policy, the Firm is the "Prior Practice" and the LLP is the "Successor Practice".

3. The Primary Proceedings were originally commenced by the Claimants against the Firm as the First Defendant, the LLP as the Second Defendant and Mr Giambrone as the Third Defendant in May 2016. Almost all the Claimants initially retained the Firm to act for them in 2007 and early 2008 in their proposed purchases of off-plan apartments in the Jewel of the Sea development in Calabria, Italy. Following the incorporation of the LLP, all the Claimants retained the LLP from about April 2008 onwards.

4. The Particulars of Claim in the Primary Proceedings alleged at paragraph 11 that:

   "by reason of the Defendants breach of contract of retainer and/or negligence and/or misrepresentation, deceit and deliberate concealment … the Claimants have suffered loss and damage".

   The particulars of loss and damage were set out in an attached Schedule of Loss.

5. Materially, the Claimants' claims against the Firm and Mr Giambrone were struck out by Master McCloud as a result of the Claimants' failure to comply with service provisions. Judgment in default of acknowledgment of service was entered by Master McCloud against the LLP on liability on 22 December 2017.

6. Mr Justice Fordham's subsequent judgment on the assessment of damages payable by the LLP in the Primary Proceedings is reported as Roger Leggett and 42 Others v Giambrone Law LLP (In Liquidation) [2020] EWHC 724 (QB) ("the Judgment"). Fordham J assessed the damages recoverable by the Claimants against the LLP in the total sums of €3,467,489.74 and £39,850.23 and $4,594.65. The damages were made up of sums assessed in respect of each individual Claimant or group of Claimants for their lost deposits; expenditure on trips; Italian legal costs; reservation fees; lost rent and loan interest, as set out in the Schedule to the Order dated 26 March 2020 ("the Order").

7. The LLP entered liquidation on 12 January 2011. Its Liquidators have no assets to meet the damages payable under the Order.

8. By a Letter of Claim dated 29 April 2020 the Claimants then solicitors, Saracens Solicitors Ltd, wrote to AIG requiring it to make payment of the damages assessed by

Fordham J and to engage in the process of agreeing costs. AIG's solicitors, Kennedys Law LLP, replied substantively on 14 May 2020 and declined the claim for indemnity.

9. On 4 March 2021 the Claimants issued this Part 8 Claim against AIG for indemnity under the Policy. In paragraph 6 of the Details of Claim they state that the Primary Proceedings:

   "arose out of the negligence and breach of contract by [the LLP] in relation to 23 separate investments … in the Jewel of the Sea."

   And at paragraph 7:

   "the right of the [LLP] to be indemnified under the Policy was transferred to and vested in the Claimants, who are accordingly entitled to recover from the Defendant the judgment sums and costs resulting from the proceedings before Mr Justice Fordham."

10. The remedy sought by the Claimants in paragraph 11 of the Details of Claim is a declaration that AIG is bound to honour the Policy and to satisfy the individual judgments in the Primary Proceedings. In the Prayer, the Claimants seek a declaration that AIG is liable to satisfy the Judgment for damages and costs and interest ordered by Fordham J in the Primary Proceedings and that the costs be provided for.

11. The Claimants' witness statements in support of its Part 8 Claim are in substantively identical form and comprise 4 short paragraphs. Consistently with the Claim Form, each of the Claimants claims to recover from AIG the damages they were respectively awarded by Fordham J. In paragraph 3 of each statement, "to prove [their] claim", they rely upon the Judgment, Master McCloud's judgment in default, the content of the Claim Form, the Particulars of Claim and the Policy.

12. Under the Third Parties (Rights against Insurers) Act 1930 ("the 1930 Act"), the Claimants are entitled to enforce any right of indemnity which the LLP had against AIG in respect of the judgments which the Claimants obtained against the LLP. However, the Claimants' rights against AIG are only as good as the LLP's rights would have been against AIG. If AIG had a defence to any claim which might have been made by the LLP, AIG is entitled to rely on that defence against the Claimants.

13. AIG defends the Claim on the primary basis that it has no liability to provide any indemnity under the Policy in respect of the Judgment and Order the Claimants have obtained against the LLP. Its secondary case is, if (contrary to its primary position), AIG is, in principle, liable to provide an indemnity in relation to the Claimants' judgments against the LLP, the limit of liability under the Policy of £3m has been completely eroded. That is, already paid out to third parties such that there is nothing left to be paid to the Claimants (AIG's "Aggregation Defence").

14. The first limb of AIG's primary defence is that the central finding made by Fordham J in the Judgment at [13], and by Foskett J in the earlier case of Various Claimants v (1) Giambrone & Law (A Firm) (2) Giambrone Law LLP (In Liquidation) (3) Allessandra Bellanca (4) Anna Cinzia D'Arpa (5) Gabrielle Giambrone (6) Cristina Poncibo [2015] EWHC 1946 (QB), [2015] EWHC 3315 (QB) ("Various Claimants") at [455]-[456]), that the contractual liabilities of the Firm arising out of breaches of duty by the Firm were transferred to and borne by the LLP was wrong as a matter of law. The second limb is that, even if that finding were correct, then the liabilities of the LLP transferred from the

Firm arose from that transfer and not from the LLP's performance of or failure to perform any legal services within the meaning of Policy, such that they are still not covered by the Policy. Accordingly, the Policy does not respond to the Claim because of the transition of the practice of the Firm to the LLP on 7 April 2008 and the Claimant's failure to obtain judgments in the Primary Proceedings against the Firm.

15. By Order dated 19 September 2023, HHJ Stephen Davies sitting as a High Court Judge ordered that the Claimants' entitlement to indemnity, being the subject of the Points of Claim, Points of Defence and Amended Points of Reply, should be tried as a preliminary issue. The directions included directions for disclosure and that no party had permission to rely on witness statements or written evidence unless either or both parties made an application for permission to rely on witness evidence by 28 November 2023.

The Issues

16. It is fair to say, taken as a whole, that the statements of case are rather diffuse and, in some respects, appear to be at cross purposes. The Claimants and AIG rely on different sections of Fordham J's Judgment and read the Judgment in different ways. The Claimants' new Counsel, Mr Timson, and AIG's Counsel, Mr Troman, identified different issues in their sequential written opening submissions as arising for determination.

17. The questions relevant to the determination of the preliminary issue which Mr Timson identified in his written opening submissions dated 8 October 2024 were:

    i) What is the effect of Master McCloud's Default Judgment Order, Fordham J's Judgment and Fordham J's Order?

    ii) Does the Policy respond to the Default Judgment Order, Fordham J's Judgment and Fordham J's Order?

    iii) Should AIG be entitled to challenge Fordham J's Judgment?

    iv) Does AIG's challenge to Fordham J's Judgment make any difference?

18. The questions Mr Troman identified and addressed in his written opening submissions dated 15 October 2024 were:

    i) Whether AIG is bound by the judgments the Claimants have obtained against the LLP?

    ii) Whether, if AIG is not bound by the judgments the Claimants have obtained against the LLP, those judgments were wrongly obtained because Fordham J's finding that liabilities of the Firm were transferred to the LLP was wrong as a matter of law?

    iii) Whether, if AIG is bound by the judgments the Claimants have obtained against the LLP and if those judgments were correctly obtained on the basis that liabilities of the LLP were transferred from the Firm, those liabilities arose from

that transfer rather than from the LLP's performance or failure to perform legal services within the meaning of the Policy?

iv) Whether the fact that the LLP is the "Successor Practice" to the Firm is of any assistance to the Claimants?

v) Whether, and if so to what extent, the basis upon which the LLP was held liable to the Claimants was not solely wrongdoing on the part of the Firm, liability for which was transferred to the LLP?

To an extent, the parties' oral submissions spanned separate numbered issues and related to more than one question identified. As a result, the fact that I have attempted to follow Counsels' overall scheme in this judgment does not mean matters set out under one heading are not also relevant to another.

19. Mr Troman identified that Mr Timson's written opening included an additional issue unmentioned in the Points of Claim or Amended Reply and not, therefore, the subject of the preliminary issue directed. That was framed as follows: that if AIG is correct that the judgments obtained against the LLP do not fall within the scope of the cover permitted by the Policy, then the Policy fails to comply with the SRA's Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales ("the Minimum Terms"), the clauses of which oblige AIG to indemnify them. Mr Troman said this was not an issue for the court to consider as it was not pleaded, but it was wholly unmeritorious in any event for the reasons he set out.

20. Furthermore, it became apparent that there was an unpleaded factual disagreement between the parties as to whether or not 6 of the Claimants had in fact paid their deposits to the LLP, rather than the Firm, as Mr Timson contended in his written opening. During the course of the hearing, the parties ultimately agreed, in this regard, that I should review a number of additional witness statements and exhibits dating from the Primary Proceedings which were not initially placed before me. Counsel were given the opportunity to make submissions as to the effect of the evidence in these statements in order for me to make findings. The relevant witness statements and exhibits had previously been disclosed by the Claimants to AIG on 16 November 2023 in accordance with the directions for this hearing; and had formed part of the bundles before Fordham J.

The Background

21. Before turning to the issues identified for decision, it is necessary for me to refer rather more fully to the background to the Primary Proceedings at this point. Specifically, the earlier judgments of Foskett J in Various Claimants. Mr Timson and Mr Troman each relied upon passages of Foskett J's judgment and consequential judgments in support of their submissions.

22. It is also necessary for me to explain the nature of, and course taken by, the Primary Proceedings themselves. Again, Mr Timson and Mr Troman each place different emphasis on various aspects of Fordham J's Judgment.

23. In the Primary Proceedings, Fordham J commenced his Judgment as follows:

> "1. This case is about "off-plan" apartments which the 43 claimants agreed to pre-purchase in a proposed development known as the "Jewel of the Sea" in the province of Calabria, southern Italy. Each claimant engaged a manifestation of the legal practice of Avvocato Gabriele Giambrone ("Mr Giambrone") and each seeks to recover losses from the entity Giambrone Law LLP (in Liquidation) ("the LLP"). The story of the case from the claimants' perspective, can I think be encapsulated as follows. Having set out on a quest for an overseas apartment complex development, as a solid investment opportunity to secure a solid investment return, they found themselves entangled in an irretrievably flawed and doomed project. The lawyers owing important duties to them, and on whom they relied from the start of their investing, knowingly and consciously failed to protect their interests, as a consequence of which they have sustained significant losses. The development seriously breached planning, environmental and other legal requirements. Criminal and confiscation proceedings ensued. All of the claimants sunk significant investments into the development. Only Mrs Mahoney ever got title to a finished apartment, and her evidence explains how that apartment is "now in the middle of a derelict, abandoned and unmaintained place" so "my investment has been destroyed."

24. Fordham J explained at [7], that the Primary Proceedings were a sequel to the "Jewel in the Sea" damages claims in Various Claimants; unsuccessfully appealed to the Court of Appeal: [2017] EWCA Civ 1193; [2018] PNLR 2. Foskett J had considered claims in damages against six defendants including the Firm, the LLP and Mr Giambrone arising out of substantially the same facts on behalf of another group of claimants represented by different firms of solicitors.

25. In Various Claimants Foskett J had examined a number of "exemplar" Jewel of the Sea transactions: twelve out of more than one hundred cases then outstanding. He was asked to determine ninety "generic" issues deduced from the parties' statements of case and set out in the Schedule to his judgment. In circumstances where many of the claimants had initially retained the Firm at dates prior to the incorporation of the LLP and the transition of the Firm's business to the LLP, the generic issues included the scope of the Firm's and the LLP's retainers by the claimants. Other issues related to contractual and tortious duties of care; the nature of the fiduciary duties owed to the claimants; conflicts of interest; due diligence; the terms of the trust on which the Firm / the LLP held the claimants' deposits against their purchases; the terms relating to the payment out of the deposits; guarantees; planning permission; tourist designation; advice not to proceed; and to what, if any, duties in tort, contract and/or fiduciary duty these matters gave rise. The issue of the causation of loss in individual cases, on the assumption that a relevant breach of duty was established, was deliberately excluded: [10], [419], [476].

26. During the 18 day trial before Foskett J, the Firm and the former partners in the Firm were represented. The witnesses Foskett J heard included Mr Giambrone. Although the LLP was represented by the same counsel as the Firm until shortly before trial, AIG withdrew the LLP's cover and the LLP was not ultimately represented at trial: [77].

27. Foskett J recorded that "almost every issue" raised on behalf of the claimants was "hotly contested": [9]. To the extent that it was possible for Foskett J to reach conclusions of fact as to the way in which the chronological history of events unfolded, his judgment set out those findings: [14].

28. Foskett J's findings in respect of the various manifestations of Mr Giambrone's legal practice and the transition from the Firm to the LLP in April 2008, at [44]-[51], were:

> "Avvocato Giambrone's "firms"
>
> 44. Avvocato Giambrone became an Italian "Avvocato" on 27 January 2005. Giambrone & Law, his first "firm", began in April 2005. At the time he entered into a "co-operation agreement" with Cristina Poncibo, another Italian Avvocato, and they both registered as Registered European Lawyers ("RELs") with the Law Society of England and Wales.
>
> 45. … Giambrone & Law was the first vehicle by which Avvocato Giambrone and those with whom he worked operated both in England and elsewhere. The status that he and Cristina Poncibo had as RELs enabled the firm to practice in England.
>
> 46. Discussion about the practice becoming an LLP had been ongoing since about 2006, but it was not until April 2008 that this became a reality and it is accepted that there was a transfer of the business of the previous partnership to the LLP on or about 6 April 2008. The way the matter was put to all clients of Giambrone & Law was in a letter dated 7 April 2008 the substance of which was in these terms:
>
>> "We are writing to inform you of an important development within Giambrone & Law: with effect from today, the Firm will begin trading as a Limited Liability Partnership ("LLP") under the name "Giambrone Law LLP". This form of legal entity was introduced in 2000 and was designed to enable partnerships to expand without individual partners having to put their personal assets at risk. Such risks were considered unfair in a modern economy. Members of the LLP will be the existing Partners of Giambrone & Law, based in London and in Italy …
>>
>> With regard to the way we work, and our staff, nothing changes. At this stage there is nothing for you to do, however we will be issuing new engagement letters in due course to reflect the new LLP status. We will try to make this exercise as straightforward as possible, but thank you in advance for your patience in dealing with this transition.
>>
>> Giambrone & Law has grown remarkably since its inception and the conversion to LLP is an exciting time for the Practice. The Firm will now comprise Giambrone Law LLP and its associate offices, …
>>
>> Today, Giambrone Law LLP is a progressive and expanding legal practice…
>>
>> We would like to take this opportunity in thanking you for doing business with us and look forward to continuing our relationship in the future. Should you have any queries regarding our conversion to LLP please do not hesitate to bring them to the attention of your usual contact with the Firm."
>
> 47. The underlying partnership agreement was not referred to in that letter, but the "Members Agreement" dated 6 April 2008 records the initial capital of the LLP as totalling just over £4.955 million which was "to be provided by the Members in the ratios detailed [in the Agreement] within six months of the incorporation of the LLP together with such further sums as shall be determined by the Members as being required for the purposes of the LLP". According to the Agreement, the capital was to be provided as to just under £4.6 million by Avvocato Giambrone (90%) and just under £248,000 (5%) by each of

> Allessandra Bellanca and Cinzia D'Arpa. The initial capital of the LLP said to form the initial assets of the LLP consisted of tangible assets of £50,000 in Italy and £110,000 in England, goodwill of £187,575 in Italy and £4,312,242 in England and work in progress of £455,624. Set against those figures were outstanding debts of just over £160,000, yielding the figure of just over £4,955 million …
>
> 48. The major proportion of this figure (over 85%) appears to be attributable to "goodwill". I do not know to what extent the LLP ever became fully capitalised, but it ceased to practise in April 2009 and at some stage subsequently went into liquidation. In fact Avvocato Giambrone has not practised in England since 2009 when restrictions were placed on his Practising Certificate. …
>
> 49. …
>
> 50. Whilst there is no dispute that there was a transfer of the business of the previous partnership to the LLP in April 2008 (see paragraph 46 above), issues arise about the extent to which, for example, any liabilities of Giambrone & Law were passed to the LLP and, if so, the legal and practical effect. To the extent that they arise, they will be dealt with later, but it will be appreciated that some claimants will see their claims as against Giambrone & Law and some against the LLP. For present purposes it is simply necessary to understand the different entities involved.
>
> 51. For convenience, however, I will frequently refer in this judgment to "the firm" or "the practice" simply as a shorthand or generic expression for whatever manifestation of Avvocato Giambrone's legal practice was involved at the time. To the extent that any changes in its identity are relevant to the disputes in this case, I will deal with those matters more specifically as appropriate."

29. Generic issues 3-6 related expressly to the transition of the business from the Firm to the LLP:

> "3. Was there a transfer of [the Firm's] business to [the LLP] on or about 6.04.08?
>
> 4. What was the effect, if any of D having sent to C its circular letter regarding the LLP on or about 6 April 2008, and C having thereafter proceeded to instruct the LLP? Did that result in any assignments or novations of [the Firm's] retainers with C to [the LLP]?
>
> 5. What were the terms of any such assignments or novations?
>
> 6. (a) Was or should [the LLP] have been aware of what [the Firm] had done or not done by reason, inter alia, of comprising the same lawyers.
>
> (b) If so, was [the LLP] under any obligation to rectify mistakes and omissions by [the Firm]?"

30. Foskett J held:

> "The legal effect of the transfer of the Giambrone & Law's business to the LLP
>
> 452. Issues 3-6 raise the relevant questions. As previously indicated, I have not been assisted by any submissions by or on behalf of the LLP although until

shortly before the commencement of the trial Mr Flenley and Mr Carpenter, instructed by RPC, were representing the LLP. That did not impede Mr Flenley (perhaps because I did not notice at the time until I was reminded about it after the event) from cross examining Mrs O'Connor, who was a client of the LLP and only a client of the LLP, at some length.
453. At all events, the answer to issue 3 is plainly 'yes'.
454. Equally, I do not think there can be any dispute that the transfer of the business to the LLP gave rise to an implied novation (or a novation by conduct) that the LLP would provide the remaining services that Giambrone & Law had been retained to provide to each of the claimants who chose to continue with the LLP. All of the exemplar claimants did. The transfer did not transfer any existing liability to the claimants for breach of duty to the LLP or release Giambrone & Law from those liabilities as, it seems, Avvocato Giambrone had at one stage argued in correspondence.
455. The claimants' pleaded case is, in short, that the LLP was under an obligation to perform any unperformed obligations of Giambrone & Law, which included correcting prior breaches of duty, and "to act faithfully and in the best interests of the [relevant claimant] in doing so, and to advise and act with reasonable skill and care". It is further alleged that any liability of Giambrone & Law to a claimant in contract arising out of any breach of duty or want of care that had occurred before the transfer would be transferred to and borne by the LLP and that the LLP would indemnify the claimant in respect of any loss caused by any breach of duty or want of care (of any kind) by Giambrone & Law committed before the transfer.
456. I see nothing in principle that is wrong with that case and I accept it. It follows that issues 3-6 can be answered accordingly."

31. Generic issue 90 was:

"Assuming C prove liability and causation:

(1) What heads of damage are they entitled to recover in principle? Without prejudice to the generality of that issue do those heads include:
 i. The loss of their Deposits – on the basis that the developments and/or properties they contracted to purchase have not been completed, but the vendors/developers have not and / or are unable to refund the Deposits and the Guarantees are ineffective;
 ii. The loss of their preliminary deposits / 'accontos';
 iii. Wasted expenditure incurred in visits to Italy;
 iv. Additional costs and interest incurred through the borrowing of monies to raise the funds to pay the Deposits;
 v. Additional Italian legal costs incurred in relation to the contract.

(2) To what remedies are the C's entitled in principle including without prejudice to the generality of that issue:
 i. Equitable compensation for breach of trust or fiduciary duty;
 ii. An order for specific performance requiring GL LLP to comply with any obligations under Rule 7(1) of the SAR 1998;
 iii. …
 iv. An order that G&L / GL LLP do account for the Deposits;
 v. …

Interest …"

32. Foskett J answered Issue 90 as follows:

> "463. I can deal with these quite shortly because some, in my view, cannot properly be determined until the individual cases are considered if that scenario becomes necessary.
> 464. However, I am in no doubt that the deposits can be recovered if it is established in an individual case that but for the breaches of duty the deposit would not have been paid out. The deposit for this purpose would only include the Acconto if either the Acconto was paid after material advice from the firm had been given or the Acconto was refundable and the individual claimant would have been able to recover it but for reliance on the firm's advice.
> 465. Expenditure incurred on trips to Italy reasonably undertaken to check on progress and/or to consult either the firm or others about what was happening after the firm had been consulted would *prima facie* be recoverable, particularly if it related to seeking advice about what to do and / or how to extricate a claimant from a contract. Reasonably incuured [sic] legal costs for this purpose would also prima facie be recoverable.
> 466. I agree with Mr Flenley that I cannot really make any generic finding on claims for additional costs and interest incurred through borrowing to raise funds to pay the deposits.
> 467. There is no dispute that the claimants would be entitled to equitable compensation for any breach of trust or breach of fiduciary established.
> 468. I am unable to see the claim for specific performance of the LLP's obligations under rule 7 (1) of the SAR as other than academic and thus express no view upon it. Equally, an order for an account relating to the deposits is, in effect, covered by any damages claim for breach of duty and / or any claim for equitable compensation for the breach of trust and breach of fiduciary duty established by paying out the deposits when they should not have been paid out.
> 469. Interest on any award is covered by section 35A of the Senior Courts Act 1981. I do not consider that I can make any generic finding other than to observe that it is usually awarded.
> 470. It is agreed, as I understand it, that any compensation should be paid in the currency in which the loss was incurred."

33. After Foskett J circulated his judgment in draft he was invited by the parties to deliver a supplemental judgment relating purely to the breach of trust arguments advanced. This supplemental judgment was handed down as Appendix 3 to the Various Claimants judgment. The original intention had been that after the trial of the generic issues there would be a second trial of all other issues in the litigation. In the event, the claimants relied upon the breach of trust findings in Foskett J's supplemental judgment to make applications for summary judgment without any need for a further trial on individual issues of causation.

34. Foskett J's judgment on the applications for summary judgment is reported at [2015] EWHC 3315 (QB). In granting summary judgment he said:

> "6. … The purpose of the summary judgment applications is self-evidently to try to short circuit one area where, it is argued, further disputation is

> unnecessary in all but a very few cases (which are excluded from the current applications). …
>
> 8. The area where it is said on behalf of virtually all the claimants that there is no real prospect of defending the issue is in respect of the consequences of my findings concerning breach of trust. …
>
> 12. It seems to be common ground (and indeed I am part of the consensus on this issue) that I reached a clear conclusion in paragraph 9 of the Supplemental Judgment that where monies were paid out when there was no compliant guarantee in place (which was the situation in every case), then the firm was liable to restore the trust fund to the position it would have been in if it had performed its obligation under the trust, namely, not to pay out the deposit unless there was a compliant guarantee. …
>
> 13. The net effect of that conclusion, subject to the argument to which I will turn below, is that any claimant whose deposit was paid away when there was no compliant guarantee in place would be entitled, as a matter of law, to an order that requires the relevant manifestation of Avvocato Giambrone's legal practice to repay the sum or sums paid away …
>
> 17. … The whole basis of the case advanced by the Claimants in this regard, whether expressed as a breach of trust or as a breach of some other duty, was that had they known that the guarantees were non-compliant they would not have proceeded with the purchase at all or would only have proceeded if more satisfactory terms had been negotiated. If they had not proceeded at all, no deposits would have been paid over and no losses would have occurred. That they were paid out certainly represented a breach of trust, but also constituted a breach of contract and/or tortious duty. … it was not necessary to demonstrate that an individual Claimant would not have proceeded with a purchase where breach of trust was relied upon, whereas that would be necessary if breach of contract or breach of a tortious duty was the cause of action relied upon. …
>
> 19. … As I have said, the claim based on breach of trust does not require evidence in any particular claimant's case that he or she would not have proceeded with the purchase if possessed of knowledge that no compliant guarantee was in place".

35. Foskett J held that the majority of the claimants should recover as equitable compensation for breach of trust the full amount of the deposit they had paid to the relevant entity. I have not seen a copy of the order itself, but upon the basis of the finding made by Foskett J at [13] above, it appears that individual orders were made against either the Firm or the LLP depending which entity had paid away the relevant claimant's deposit: [44].

36. The Firm sought permission to appeal on seven grounds. None related to the relevant paragraphs of Foskett J's first judgment. Permission to appeal was granted on five grounds. The Court of Appeal unanimously dismissed the appeal.

The Particulars of Claim in the Primary Proceedings

37. The Particulars of Claim in the Primary Proceedings were pleaded in a composite form against the Firm, the LLP and Mr Giambrone. By way of example, the facts relating to the Defendants' respective retainers by the Claimants were set out without any individual particularisation:

"1. The Defendants are each of them the manifestations of the legal practice of the Third Defendant namely Avvocato Gabriele Giambrone the First and Second Defendants were registered with the Law Society as practicing [sic] firms of solicitors, with premises in London.

2. This claim arises from the proposed purchase of apartments by the individual Claimants in a prospective development near the coastal resort of Brancaleone, in the province of Reggio Calabria, Italy, the development was called the "Jewel of the Sea" ("JOTS"). The purchases were made "off plan", the properties had not been built at the time the Claimants committed themselves to the transactions. Those commitments were made in or about 2007, 2008 and 2009 the Claimants were each of them led to believe by the Defendants or their agents that JOTS would be completed by the summer 2010 and some remaining part by the summer of 2010. In the event JOTS was never completed as a result of which each Claimant has suffered a financial loss.

3. …

4. …

5. The Defendants in one or other of the various manifestations of the legal practice of the Third Defendant purporting to act as an independent legal advisor with a special knowledge of Italian "off plan" developments of this kind were instructed to act for each Claimant engaged to act in the proposed purchase.

6. There were express and/or implied terms of the agreements that the Defendant would exercise the care, skill and diligence to be expected of reasonably competent solicitor with the professed expertise in the Italian off-plan market. In the letter of retainer the Defendants expressly represented to the Claimants the following:

> "We would routinely carry out enquires [sic] to ensure that there are no liens, encumbrance's [sic], and rights of way in favour of third parties and that the land is legally registered with the urban registry, and furthermore, that the valid planning permission is in place for the project to go ahead."

In the premises this representation was relied upon by the Claimants and further was a specific warranty and became a term of the contract of retainer between the Claimants and the Defendants.

7. In particular the express and/or implied terms of the agreements included terms that the Defendants were:

a. To carry out proper and adequate due diligence of the development and report on the same.
b. To advise in relation to any particular local conditions and in particular the prevalence of organised crime ("mafia") involvement in such developments and the risks the involvement of such criminality might have on the development and the security of the Claimant's investments (in particular their deposits).
c. To advise in relation to the planning law applicable to such developments and the JOTS in particular.
d. As a consequence to advise on the serious planning permission restrictions imposed on the geographic area where most of the JOTS ought to be built.
e. To advise from refraining to enter into a binding Preliminary Sale Agreement until such a time when all requisitions had been satisfactory [sic] addressed by the developer and a complete and satisfactory due diligence had been carried out.

f. To report and advise on the progress of the development and any reasons for lack of the same.
g. To advise in relation to such matters as insurance bonds and their validity and in particular the form of bond offered by the developer to the Claimants.
h. To hold the Claimants' deposits on trust until such time as a legally enforceable ie Italian law compliant insurance bond was in place.
i. To advise that the deposit was unusually high at 50%. That if the development failed the money would be lost.
j. To advise any steps that could have been taken to either mitigate the deposit or to protect the same, for example negotiating a lower commission, staging the payment of the commission ensuring the commission was held in an escrow account.
k. To advise on the commission being paid to the promoter of the development and in particular that the commission being paid on this development was unusually high and excessive.
l. To ensure that the contracts were drafted so far as was reasonably practicable in the interests of the Claimants.
m. To inform the Claimants of any matter which might reasonably have a bearing on the Claimants' decision to purchase in the JOTS development.
n. To comply with the Solicitors Account Rules 1998 and / or the Code of Conduct of Solicitors.
o. In all the circumstances including the absence of a compliant insurance bond, the absence of valid or binding planning permission, the risk of mafia involvement, the excessive commission being charged and that the deposit was not staged in any way, to have advised the Claimants that this was a high risky investment which it would be but wise to avoid."

38. By way of further or alternative claim, the Claimants pleaded the Defendants owed them a series of fiduciary duties (paragraph 8). Again, these are advanced in a composite form:

"a. to act in good faith;
b. not to place themselves in a position where their own interests or the interests of others might conflict with those of the Claimants;
c. not to act for any third person without the informed consent of the Claimants;
d. to act at all times in the best interests of the Claimants and not to prefer the interests of the Defendants, the vendor or developer or any other party over those of the Claimants;
e. a duty not to put themselves in a position where a conflict of interest or duty might arise between the Claimants and any third party;
f. in the event a conflict arose between the interests of the Claimants and the interests of the Defendants, the vendor or developer, so to advise the Claimant or to decline to act further for the Claimant and/or vendor or developer.
g. A duty not to make an undisclosed profit from their relationship with the vendor or developer."

39. At paragraph 9, the facts the Claimants pleaded relating to the non-completion of the development, and the collapse of the project, were: the fact that valid planning

permissions for the development were never granted; that the building work was interrupted by order issued by the planning authority in July 2008; that an order of seizure was issued in around December 2013 and enforced in around January 2014 by the Criminal Court of Reggio Calabria; and a request of confiscation of the development was filed by the Director for Public Prosecution on 13 January 2016 before the criminal Court of Locri. As a consequence, they alleged their deposits were lost and they suffered further financial losses.

40. The issue of breach was pleaded as follows:

> "10. The Defendants were in breach of their retainer, negligent, guilty of misrepresentation and deceit.
>
> PARTICULARS
>
> a. The Defendants were in breach of the representation and warranty in paragraph 6 above in that:
>   i. at all material times they knew or ought to have known that whilst the developer / vendor RDV was in the process of acquiring the planning permissions to be granted by the local municipality of Brancaleone no such lawful planning permission could have been granted nor was it in the event granted.
>   ii. despite that knowledge actual or implied the Defendants misled the Claimants' [sic] in that the Defendants sent to each of them a Report on Title which did not cover at all the investigation on the planning permissions and yet recommended that the Claimants were to enter into the Preliminary Sale Agreements.
>   iii. as a part of the retainer the Defendants were required to carry out due diligence on the planning permissions and report to the Claimants on the same providing professional advice on amongst other things the relevance of the absence of planning permission whether there were any adverse legal issues attached to the said planning permissions apparently in place and the degree of the risk attached to those legal issues, such advice to be provided before the Claimants committed themselves to the preliminary sale agreements.
>   iv. in carrying out the due diligence the Defendants know [sic] or ought to have known that it was necessary to investigate the apparent planning permissions that had been granted by the Municipality of Brancaleone to RDV had the Defendants done so they would have discovered that the permissions were in "deroga al piano regulatore generali" (in contravention with the general planning zoning) therefore in contravention with Italian planning law.
>   v. failed to explain the risks to the development in the absence of such contraventions including the serious risk that the permissions could be revoked and declared void.
>   vi. therefore, failed to advise the Claimants on the extremely serious issues attached to the planning permissions.
>   vii. in the premises failed to report to the Claimants that the development did not possess valid or secure planning permission and to provide an advice on the consequent risks.

viii. contrary to the various attendant risks advised the Claimants to enter into the Preliminary Sale Agreements and advised them to pay the substantial down-payment.

ix. contrary to the facts that were or should have been known to the Defendants stated to the Claimants that "… I will confirm that, at the outset, the planning certificates were in place and that the revocation of the building permissions by the Regional Government in Calabria, was contrary to law…"

x. further or in the alternative the Defendants [sic] misrepresentations were deliberate and involved concealing the true facts from the Claimants.

b. At all material times the Defendants knew or ought to have known that after the signature of the Preliminary Sale Agreements by the Claimants, RDV filed an application before the local municipality of Brancaleone on 13 June 2008 notifying their intention to suspend all building works as they had found out that the planning permissions were not valid. The Defendants failed to inform the Claimants of this fact and failed to warn them of the attendant consequences for the development and their investment. It will be submitted that this was a deliberate concealment.

c. At all material times the Defendants knew or ought to have known that on the 31st July 2008, RDV had applied for a new planning permission therefore were aware that between June 2008 and January 2011 the work on the site was interrupted. The Defendant failed to inform the Claimants of this fact and failed to warn them of the attendant consequences for the development and their investment. It will be submitted that this was a deliberate concealment.

d. On the contrary the Defendants stated in a letter dated 19 January 2009 that the reason for the delay in construction was that: "the current adverse weather conditions that have affected the Calabria Region over the last few months may delay the completion of the development by a few months but we are not in a position to provide you with a further update on the constructions work at this date: we are seeking written confirmation by the developer of these potential delay and, as we understand it, the likely new completion of the complex is likely to be by early 2010." It will be submitted that this was a deliberate concealment of the true facts.

e. When in March 2013 it became public that Mr Cuppari had been arrested and that the entire JOTS site had been seized by order of the Criminal Court of Reggio Calabria failed to report to the Claimants on these crucial facts.

f. Following the arrest of Mr Cuppari and the seizure of the entire site of JOTS failed also to advise the Claimants on their opportunity to file an application before the Criminal Courts of Reggio Calabria and before the Criminal Court of Locri for compensation in the event that the person's prosecuted were convicted.

g. At all material times the Defendants knew or should have known that the protective bonds issued by the vendor in favour of the purchases namely the Claimants did not comply with the requirements of Italian law and as such were of no value. It will be submitted that this was a deliberate concealment.

h. Failed to warn the Claimants of the Defendants close relationship which could be construed as one of undisclosed agent and principle [sic] between the Defendants and the promotor [sic], the developer and / or the builders of JOTS.
i. Failed to warn the Claimants of the risk of mafia involvement in the JOTS development and the attendant risks.
j. Failed in general to provide any or any adequate advice as required by paragraph 7 b), c), d), e), f), g), h), i), j), k) or m) set out above.
k. In the premises, the Defendants were in breach of their fiduciary duties as set out in paragraph 8 above."

41. Loss and damage was pleaded as follows:

> "11. In the premises by reason of the Defendants' breach of contract of retainer and / or negligence and or misrepresentation, deceit and deliberate concealment as stated above, the Claimants have suffered loss and damage.
>
> PARTICULARS OF LOSS AND DAMAGE
> See attached Schedule of Loss.
>
> 12. The Claimants are entitled to and claim interest on such damages as are awarded pursuant statute.
> AND THE CLAIMANTS CLAIM
> (1) Damages
> (2) An account of any secret profit it may be found that the Defendant has made
> (3) Interest as aforesaid.

42. I note that the way in which loss and damage pleaded was not linked back to the alleged breaches of fiduciary duty.

43. The Schedule of Loss set out the "Particulars of Loss and Damage" claimed by each of the named Claimants as part of a couple or individually. For example, in the case of the First and Second Claimants, Mr and Mrs Leggett:

> (1) their deposits in the amount of €206,743.00;
> (2) the loss of the use of that money;
> (3) additional costs and interest incurred through the borrowing of monies in the amount so far of €18,000 for interests and €19,200 for life insurance premium attached to the mortgage to raise the funds to pay the Deposits;
> (4) additional Italian legal costs incurred in relation to the contract in the amount so far of €17,000;
> (5) damage to credit rating;
> (6) wasted expenditure incurred in visits to Italy in the amount of €2,200."

44. In circumstances where relevant events took place at dates when individual Claimants retained the Firm rather than the LLP, and/or after the Firm had ceased to practise, and/or after the LLP ceased to practise and/or entered liquidation, the Particulars of Claim did not, therefore, identify which elements of each Claimants' claim for loss and damages were to be attributed to each of the three Defendants if considered independently. As a consequence, they did not set out details of the underlying cause of action in each relevant

regard, or any specific steps that it was alleged the LLP should have undertaken to remedy any prior breaches by the LLP.

45. The Claimants applied for judgment in default of acknowledgment of service against each of the Firm, the LLP and Mr Giambrone by Application dated 14 December 2016. The Application was contested on behalf of the Firm and Mr Giambrone. In a Witness Statement dated 9 February 2017 made by Aimee Talbot, a Solicitor employed by Reynolds Porter Chamberlain LLP ("RPC") and filed on behalf of the Firm and Mr Giambrone, Ms Talbot explained RPC acted for the former partners who acted in partnership as the Firm and for AIG, their professional indemnity insurers, in relation to the defence of the Primary Proceedings (para. 2.1). She said RPC did not act for the LLP (para. 2.4).

46. Ms Talbot recognised that the Claimants' claims were brought on very similar grounds to the claims tried by Mr Justice Foskett in Various Claimants. She referred to the fact a large number of generic issues had been tried in those proceedings (para. 4.10). She said her clients had not prepared a defence to the Primary Proceedings because they were confident that there had not been good service on them. However, if the claims were allowed to proceed they intended to defend the claims on their merits (para. 5.1). She said the judgment in Various Claimants did not bind the Claimants; that Foskett J's judgment was (then) under appeal to the Court of Appeal on 27 and 28 June 2017; and:

> "Even if that judgment is upheld by the Court of Appeal and my clients take the view that it is not worth re-arguing Mr Justice Foskett's findings in these claims, it does not follow that the Claimants will automatically be entitled to damages. They will need to prove that their claims are not time-barred and that the breaches caused the loss claimed."

47. At the hearing of the Claimants' Application on 13 November 2017 the Firm and Mr Giambrone were represented by RPC and Counsel. There was no attendance on behalf of the LLP. Master McCloud found that the Primary Proceedings were not validly served upon the Firm and Mr Giambrone. She was satisfied the LLP had notice of the Application.

48. By Order dated 22 December 2017 Master McCloud dismissed the Claimants' Application for judgment in default of acknowledgment of service against the Firm and Mr Giambrone and struck out the Claimants' claims against them. The Master ordered the Claimants to pay the Firm's and Mr Giambrone's costs summarily assessed at £22,584. The Master entered judgment in default of acknowledgement of service against the LLP with damages to be assessed. She ordered that the LLP was to pay the Claimants' costs up to and including 13 November 2017, to be assessed if not agreed

49. At a hearing on 27 March 2018 Master McCloud gave directions in respect of the Claimants' damages claim. The Order dated 11 April 2018 recites that Counsel appeared for the Claimants. The LLP did not appear and was not represented. The directions made included that the parties were to give to each other standard disclosure of documents by list and category; all parties were to serve on each other witness statements of all witnesses on whom they intended to rely; the Claimants had permission to rely on the written evidence of an expert accountant on the issue of the loss suffered by each of the Claimants, including consequential losses; the Defendant could put written questions to the expert; the Claimants were to provide an updated Schedule of Loss; in the event of

challenge, the Defendant was to send an updated Counter Schedule of Loss to the Claimants. The estimated length of trial was one day.

50. The LLP's Liquidators did not file a Defence, skeleton argument, expert evidence or any substantive response in accordance with the Directions.

51. The witness statements prepared by the Claimants for the purposes of the assessment of damages hearing were apparently in a very similar form. By way of example, Mrs Beagan's statement dated 31 May 2019 explained how she signed a letter of retainer with the Firm, and was subsequently advised to enter a Preliminary Sale Agreement with the developer, and that she relied entirely on the Report on Title when she paid her deposit on 19 November 2007. The Report "showed no sort of legal issues whatever" (para. 22). She said she was not made aware of the reasons why the construction works were suspended by the developer in June 2008 (para. 24). She was not told criminal proceedings were instituted in 2013 (para. 33). She said she had been advised the Firm should have advised her of the "serious issues attached to the planning permission" and "serious risks attached to the already assessable breaches of the planning regulations" in the Report on Title (para. 35). If she had been given that advice by the Firm, she would have refrained from entering the Preliminary Sale Agreement on 14 November 2007 and paying 50% of the deposit (para. 37). She was not aware of these matters until March 2013 (para. 36). She explained she had entered a mortgage and incurred costs, expenses and legal fees (paras. 38 and 39).

52. Mrs Beagan also referred to her receipt of the letter from the LLP around 7 April 2008 advising her the Firm had "changed into" the LLP. I interpose that this was an identical letter to that received by the claimants in Various Claimants and described by Foskett J at [46]. Mrs Beagan said she was never sent a new engagement letter (para. 41). At all times she understood she had been represented by the Firm and from April 2008 by the LLP:

> "as stated in the note sent … in April 2008 and of fundamental importance, under the terms of the letter of retainer dated 19th May 2007" (para. 44).

The losses and damages Mrs Beagan claimed were set out (para. 47-48).

53. It is immediately apparent that much of Mrs Beagan's witness statement was devoted to the actions of the Firm: her original retainer of the Firm; the breaches of the pleaded express and implied terms of retainer by the Firm, including in the Report on Title the Firm provided to her; her payment of her 50% deposit to the Firm and entry into the Preliminary Sale Contract as a result of her reliance upon the Firm's advice; and the mortgage she entered for those purposes prior to the incorporation of the LLP.

54. An expert report was prepared by Simone Tropea on behalf of the 41 Claimants. For the purposes of the report, Simone Tropea simply made reference to "the Lawyer", a term defined as the Firm "subsequently changed into" the LLP. The "Summary Background" recited that the relevant letters of retainer were specified in the Schedule of each Claimant's loss and exhibited to the witness statement of each Claimant, and that "the Lawyer" had served the Claimants a Preliminary Sales Agreement with the Report on Title:

> "which ought to have listed the severe issues connected with the planning permissions [dated 24 April 2007 and 8 June 2007]. The said Report on Title did not highlight the seriousness breaches of the planning regulations."

The existence of these particular "severe issues" pre-dated the incorporation of the LLP.

55. At 2.02, under the heading the Purpose of the Report, Simone Tropea said the Expert Report aimed to assess:

> "3. the opinion that [the Firm] and [the LLP] ought to have given to the Clients in the Reports on Title in relation to the planning permissions;
> 4. the value of the profits that the Claimants would have achieved out of the unit or apartment to be purchased should the Residential Complex would have been completed, and as consequences the loss for each group of them."

And at 2.03, issues including:

> "4. the possibility that the Claimants could have avoided the wrong investment;
> 5. the level of loss suffered by the Claimants."

56. Amongst other matters, Simone Tropea said they had examined the Report on Title each Claimant "received from the Respondent between 2007 and 2008" and established that no reference was made in it to the issues related to and connected with the contraventions of the planning permissions that had been acquired (page 8).

57. When the assessment of damages hearing took place before Fordham J on 3 and 5 March 2020 there was no appearance on behalf of the LLP or its Liquidators, and it was not represented. Fordham J's Judgment explains the approach he took to the conduct of the hearing:

> "3. In conducting the hearing and producing this judgment, efficiently and proportionately and in accordance with the overriding objective, I needed to rely on the industry and candour of the claimants' legal representatives. I received from them various aide memoire documents, on which it was necessary for me to rely, as good faith summaries of the underlying detailed documented claims. Using suggested illustrative cases, I was able at the hearing to drill down into the material, to test aspects as to the implications and reliability of what had been presented. I did this to an extent which I was satisfied was adequate and appropriate, to be able to arrive at findings of fact in which I could have confidence, applying the balance of probabilities standard. I did not second guess or interrogate every piece of information supplied to me, by pursuing each through a detailed comparison against underlying primary documents. The task involved an extended hearing, originally fixed with a time estimate pursuant to directions of the Court of one day, but which in the event required a further half a day and the submission of various schedules and corrections to existing schedules, at my request. If there had been a contested hearing, I would have been able to look to the parties collectively, to narrow the issues and agree detailed facts and figures. The non-participation by and on behalf of the Firm deprived me of that advantage. The liquidators were entitled not to participate

and assist the Court, but they could hardly then complain as to the nature of the exercise conducted in their absence and without their help.

4. The back cloth for this judgment is a judgment in default, entered in a pleaded case. Liability, in all its aspects and with all its consequences and implications, is established and does not fall to be reopened. By particulars of claim dated 29 January 2016 the 43 claimants had sued 3 defendants: the LLP, "Giambrone Law" ("the Firm", also known as Giambrone & Law) and Mr Giambrone himself … The claim in damages, following the judgment in default [against the LLP], is entirely uncontested.

5. … In circumstances where no point was being disputed by or on behalf of the LLP, Mr Coulter for the claimants described the hearing before me as a disposal hearing. … The term "disposal hearing" is used in paragraph 12.4 of CPR practice direction 26. At such a hearing I am empowered to decide the amounts payable in consequence of the order giving judgment in default, and to give judgment for those amounts. As the commentary in the White Book (2019 edition, paragraphs 12.4.4 and 12.7.5) explains, the judgment in default is conclusive on liability but damages still have to be proved and a defendant could raise any issue not inconsistent with the judgment. The authority cited is Lunnen v Singh [1999] CPLR 587, where Jonathan Parker J described as remaining open at the damages hearing "all questions going to quantification, including the question of causation in relation to the particular heads of loss claimed", and said: "the underlying principle is that on an assessment of damages all issues are open to a defendant saved to the extent that they are inconsistent with the earlier determination on the issue of liability".

6. Mr Coulter accepts that he needs to prove to my satisfaction that the losses claimed are recoverable and the correct extent of that recoverability, always bearing in mind that all and any points could have been contested by or on behalf of the LLP, had the liquidators wished to do so. So far as causation is concerned, Mr Coulter cited Galoo Limited v Bright Grahame Murray [1994] 1 WLR 1360 at 1374-1375 and invited me to apply a common sense, effective cause approach as indicated in that passage. I have done so. I am satisfied moreover that no distinction between different formulations of the causation test could or would have made a difference to my conclusions in this case.

7. … Mr Coulter accepted that the claimants in the Foskett J judgment [in Various Claimants] were in a materially identical position to those in the present case. Foskett J at paragraph 9 of his judgment referred to the various proceedings which had at that time being commenced, raising similar issues to those raised in the proceedings before him. In appendix 1 to his judgment, Foskett J listed 90 generic issues which had been raised in those proceedings. Anyone who wishes a fuller understanding of the underlying circumstances of the present case will benefit, as have I, from the detailed contents of the Foskett J judgment.

8. The framework for my task starts with the pleaded case, as found in the particulars of claim. It ranges far and wide and has far reaching implications. For the purposes of this judgment it is not necessary for me to set out or summarise the entirety of its contents, but I will indicate its nature.

i) The particulars of claim pleaded that each of the 3 defendants was a manifestation of the legal practice of Mr Giambrone and that each claimant had made a purchase commitment, instructing the defendants to act as independent legal adviser with specialist knowledge. The pleaded claim described a letter of

retainer including an express representation to the claimants by the defendants, that: "we would routinely carry out enquiries to ensure that there are no liens, encumbrances and rights-of-way in favour of third parties and that the land is legally registered with the urban registry, and furthermore, that the valid planning permission is in place for the project to go ahead".

ii) The claim alleged express and implied contract terms, of agreements between each claimant and the defendant or defendants, as well as fiduciary duties. The particulars described the non-completion of the development, in circumstances where it never had valid planning permissions, the circumstances leading to a police investigation, prosecution, order for seizure and application for confiscation. The pleaded claim was that the defendants acted in breach of their retainer, and negligently, and made misrepresentations, and committed the tort of deceit. The particulars of breach included the following: that at all material times the defendants knew or ought to have known that the development had and could obtain no lawful planning permission; that the defendants misled the claimants by sending each a report on title recommending entry into preliminary sale agreements; that the defendants failed to undertake due diligence; that they failed to report the problems with the development; that they advised the claimants to enter into the agreements and pay substantial deposits by way of down-payments; that they made deliberate misrepresentations concealing the true facts; and that they were in breach of their contractual obligations and their fiduciary duties.

iii) The particulars of claim pleaded that "by reason of the defendants' breach of contract of retainer and / or negligence and / or misrepresentation, deceit and deliberate concealment… the claimants have suffered loss and damage". Particulars of loss and damage describing the various heads of loss and damage pursued before me (updated for the hearing in the light of the expert report) were set out in the attached schedule of loss. Interest on recoverable damages was also claimed.

9. It was in the context of that pleaded case that the order was made on 13 November 2017 entering "judgment in default … against [the LLP] with damages to be assessed". The claimants stand vindicated, as to liability, as to each of the substantive claims which they made in the claim. The assessment of damages proceeds from that starting point.

10. In order for Mr Coulter to seek to prove the extent of the losses recoverable by each of the claimants, it was necessary to consider relevant elements of the claims against the backcloth of the evidence adduced before the court, including the expert report but also the witness statements of each claimant together with the exhibits to those statements. By taking an element of the claim by reference to typical facts I am able to give rulings accompanied by reasons, which can then readily and reliably be applied to the other equivalent claims made by other individual claimants. I have referred already to the reliance placed on documents prepared by the claimants' representatives. The circulation of this judgment in draft constituted a further stage for the claimants' representatives to satisfy themselves of the correctness of the various figures, matching up to the reasons which I have given, and alert me to any discrepancy or inaccuracy. So, I will turn to the various elements of the claimed losses. At the end of each relevant section I will include a paragraph setting out, by reference to the word "awarded", the amounts which I am satisfied – and find – are recoverable by each claimant by family name. Those paragraphs

cumulatively will produce the ultimate figures for a court order awarding damages."

58. Fordham J identified that "a first issue" for him to consider on the assessment of damages was the issue of the transition from the Firm to the LLP. He said:

> "Recovery from the LLP, in respect of breaches by the Firm
>
> 11. A first issue for me to consider arises out of the situation where a claimant purchaser had instructed the Firm (Giambrone & Law) and was only subsequently described as being represented by the LLP. This arises because the judgment in default is against the LLP, and not against the Firm. Does this impede the recovery of damages?
>
> 12. This scenario was exemplified in the submissions before me by taking the case of Mrs Beagan who purchased unit 40G. The evidence is, in essence as follows. Mrs Beagan relied on a development prospectus and confirmed a number of reservations signing a reservation form and paying reservation fees. Immediately after signing the reservation form, she received the retainer letter (19 March 2007) from the Firm, whose services she accepted. Several months later, relying on their advice and the Report on Title which the firm provided, Mrs Beagan entered into a preliminary sale agreement, transferring a further sum which (combined with the reservation fee) amounted to 50% of the purchase price for the unit. The reservation fees and 50% deposits are a uniform feature of the cases before me, and I will need to deal with them in due course. Completion and the deed of purchase were due to occur by 30 June 2009. On 7 April 2008 Mrs Beagan received a letter telling her that the Firm was "from today" to "begin trading as" the LLP, "continuing our relationship", which meant "nothing changes" as to "the way we work, and our staff". Her evidence is that from then she regarded herself as represented by the LLP.
>
> 13. I am satisfied that in such a scenario as this, the claimant is entitled to recover damages against the LLP, in respect of any breach of contract on the part of the Firm occurring in relation to the proposed purchase and preceding the 7 April 2008 letter. I am also satisfied that breach of contract, as embodied in the pleaded case and the judgment in default, is a sufficient basis for a judgment on each and any relevant legally recoverable loss arising out of the action and inaction of the Firm. At paragraphs 455 – 456 of his judgment in the Various Claimants case, Foskett J accepted that:
>
> > "any liability of Giambrone & Law to a claimant in contract arising out of any breach of duty or want of care that had occurred before the transfer would be transferred to and borne by the LLP and that the LLP would indemnify the claimant in respect of any loss caused by any breach of duty or want of care (of any kind) by Giambrone & Law committed before the transfer".
>
> That was a key part of Foskett J's ruling answering issues 3 – 6 in that case, and it was a ruling which remained intact following the unsuccessful appeal in that case. There is no reason why I should not, and every reason why I should, accept and apply the same conclusion. I do so."

59. Fordham J then turned to the Claimants' claim in respect of the deposits they had paid at [14]-[17]. In finding that the deposits (less their pre-paid reservation components) were recoverable from the LLP, he found as a fact that each claimant entered into the

preliminary sale agreement in reliance on the retainer with, and moreover in reliance on the Report on Title form, and in any event in reliance on the advice which was given by or failed to be given by, the Firm. He said the evidence was exemplified by the witness statement of Mrs Beagan. He was satisfied on the question of causation and found as a fact there was causation in every case. The deposits were "an intimate and integral part of the transaction on which the Firm was acting as adviser". No question of remoteness arose.

60. Fordham J's findings in awarding the deposits to the Claimants in the sums listed at [17] were expressly rooted in the adoption of a contractual analysis. He said at [14]:

> "Material breaches of contract on the part of the Firm were alleged in the particularised claim and embodied therefore in the judgment in default."

And at [15]:

> "The judgment of Foskett J (in an aspect scrutinised by the Court of Appeal) analysed the deposits generically as monies paid to the Firm and held by it on trust, such that those monies could not lawfully be paid on by the Firm absent suitable guarantees in relation to the development. That was part of the generic analysis, on the facts and arguments as they were advanced under the identified issues in that case. In my judgment, nothing in Foskett J's analysis casts doubt on the prospect that a breach of contract analysis could give rise to liability in respect of which the deposits paid in reliance on the Firm and its actions, inactions and advice would be recoverable. On the contrary, paragraph 464 of Foskett J judgment speaks in terms of deposits as recoverable "if it is established in an individual case that but for the breaches of duty the deposit would not have been paid out" and goes on to talk about refundability whether claimant is acting in "reliance on the Firm's advice".
>
> 16. In the present cases the pleaded case, and the liability embodied in the judgment in default, involved the contentions that claimants were each relying on the Firm and the Firm's advice (present and absent) in paying the balance of their deposits. In my judgment, in these circumstances where liability is the subject of a judgment, the recovery of the deposits straightforwardly follows. On this issue, I accept the submissions of Mr Coulter. I record that (here, as elsewhere in the analysis) no counter-argument has been advanced by or on behalf of the LLP and, if there is some argument or point to be made to the contrary, it has not been identified."

61. As set out in the Judgment, the Claimants' claims for damages in respect of their deposits were advanced solely in contract and relevant causation was established by reference to a breach of contract analysis of the Firm's actions, inactions and advice. This enabled the Claimants who had paid their deposit to the Firm to recover the entirety of the deposit they had lost on the basis that the deposit would never have been paid out at all but for the Firm's breaches of contract.

62. In analysing the claim for expenditure on trips to Italy at paragraphs [18]-[20], and making awards at [21], Fordham J carefully distinguished between expenditure that would have been incurred regardless of the Firm's advice and trips undertaken after the Firm should have been warning the Claimant against investing, and that would not have been undertaken had the client's interests been properly protected by the Firm. Fordham

J identified some errors in the expert report and updated Schedule of Loss which meant careful analysis, by item of loss, was called for.

63. In reviewing the claim for Italian legal costs at [22]-[26], Fordham found that any legal fees, including those paid by a purchaser to the Firm in respect of conveyancing matters, but which were subsequent to – or related to services provided subsequent to – the provision to a purchaser of the Report on Title, were legal fees recoverable in law. That was because the provision of the Report on Title was an act of contractual breach by the Firm. The logic of the claim, and the judgment, is that the Firm was at that stage in contractual breach in not advising a purchaser client of the "red flags" known to the Firm and concealed from the client.

64. As Fordham further explained at [25], it would be "an affront to justice" to make any deduction of an unidentifiable amount, reflective of sound legal advice:

> "from a firm directly interwoven with a development known and understood to be one on which a properly advised client would not embark".

65. The claims for reservation fees (the "acconto") were discussed at [27]-[40]. Fordham J's comments demonstrate his scrutiny of the relevant factual evidence. The expert's inclusion of the reservation fees within the deposits in the Expert Report did not assist in answering the relevant recoverability question. The picture presented in the evidence was not a uniform one. There were various variables, including as to the sequence of events and the passage of time, and as to what documents were signed by which Claimants. The non-participation by and on behalf of the LLP meant (as elsewhere) that contemporaneous documents which it could have contributed to the assessment of facts, and any points arising out of the facts and circumstances, had not been placed before the court.

66. Fordham J analysed such evidence as was available by groupings of Claimants based upon the content of the documentation and facts from time to time. He found at [31] that the date of the retainer was to be taken as the date of the retainer letter. He found that, from the date of the writing of the retainer letter, the Firm was holding itself out to the prospective purchaser as being the independent reliable due diligence legal firm that would promptly and properly communicate any known "red flag" regarding the development.

67. The first group of Claimants identified were found to be entitled to the refund of these reservation fees because the Firm's retainer preceded the payment of the reservation fee (I note here that Mr and Mrs O'Leary were placed in this group). The Firm was found to have failed to share the knowledge at the outset that the "development was fatally compromised and ought to be avoided": [32].

68. The second group, the third group (I note here that Mr and Mrs Darragh were placed in this group), and the fourth group of Claimants, were also entitled to recover for different reasons. In each case it was found that an independent legal adviser "acting compatibly with its duties, and protecting its client's position in the light of a development which it knew and could demonstrate to be fatally flawed and thus incapable of fulfilment, could and would have been able to secure the refund of the reservation fee": [33], [34], [35].

69. Fordham J was not satisfied, to the relevant civil standard, that a similar finding should be made in respect of the specific facts relating to the terms of the documents signed by the final group of Claimants (I note here this group includes Mr and Mrs Mitry, who signed a Real Estate Purchase document on 18 February 2008). This final group's claims were instead analysed by reference to loss of a chance. Fordham J was satisfied that there would have been a "high degree of likelihood that an independent legal adviser, apprised of the facts and acting skilfully and promptly to promote their client's interests, would have secured a repayment of these reservation fees". He found as a fact that in those circumstances this group of Claimants' claims succeeded as to two thirds of the reservation fees: [36]-[39].

70. The claims to lost rent were dealt with at [41]-[54]. Fordham J did not accept the way in which some of the materials, including some passages in the expert report, characterised this claimed loss. The claim was:

> "41. … a claim against lawyers, for failing to alert prospective purchasers to the fact that they ought to go nowhere near this development, in the light of fundamental legal impediments to its successful completion. What should have happened, if the lawyers had done their job – as the case is put in the particulars of claim and vindicated in the judgment in default – is that none of these claimants should have been entering into any preliminary sale agreement or committing any down-payment of deposit";
>
> "43. The way in which the claim to lost rent is properly characterised, and put by Mr Coulter is as follows. Had the claimants been alerted as they should have been to the fundamental problems with the development from the outset of the retainer, they could and would have looked for an alternative viable development in which to invest. Such alternative viable investment opportunities were available and would have been secured. Had that occurred, equivalent rental profits from an equivalent development in another location would have been obtained. That alternative outcome was denied to them by the actionable breaches for which the LLP is responsible under the judgment in default."

71. Fordham J emphasised at [49] that his findings were fact specific and case specific. On the particular facts and the evidence he was satisfied, and found as a fact, that:

> "the claimants' losses of the pursuit of alternative viable investment opportunities, arising from having sunk their deposits into these apartments, could reasonably be foreseen at the time of the retainer as likely to result if the contract was broken through a failure to warn against investing in this particular development."

He found that when the retainer letters were written to the Claimants it was known and foreseen that that the Claimants would each have sought to pursue an equivalent viable alternative, had they been properly protected and advised by the Firm.

72. Based on the evidence before him, Fordham J found each of the Claimants had lost a real and substantial chance of pursuing the alternative investment of their monies in an equivalent alternative development project in an equivalent timeframe and securing an equivalent rental income. The loss of the chance of that rental income was a direct,

natural and foreseeable consequence of breach of contract by the Firm: [50]. The percentage chances of each Claimant securing such an alternative were found to be 75%. As a result, they were each entitled to recover 75% of the rent they would have obtained. The rental figures set out in the Expert Report were accepted as reliable and appropriate here. The losses were found to have continued throughout the periods in relation to which they were claimed.

73. There were only nine claims relating to interest on loans taken out by individual Claimants to fund the deposit outlay: [55]-[60]. Fordham J said:

> "56. …I am satisfied … that the evidences amounts of interest payable on loans necessitated by the deposits are recoverable in law as damages in relation to the various actionable breaches – including the contractual claims – which are the subject of the pleading and the judgment in default. In particular I am satisfied that it was (and should have been) in the direct knowledge and contemplation of the Firm that their clients, embarking on these proposed purchases with the down-payment of 50% deposits, would be incurring not only the cost of the cash deposit but the cost of financing it. … The point is that loan arrangements and the burden of a loan, in the context of an unrealised asset, are fairly and reasonably to be considered as arising naturally from the breach of contract, by which the Firm failed to alert the prospective purchasers of the true nature of the development arrangements before the deposit was paid in reliance on the Firm for its independent, impartial and reliable legal advice."

74. At all material during the Primary Proceedings, the Claimants' solicitors sent materials relating to the Primary Proceedings to AIG. The Claimants did not apply for AIG to be joined to the Primary Proceedings. AIG did not itself apply to be joined.

What is the Effect of the Default Judgment, Fordham J's judgment and the Order?

75. It is a straightforward matter that Master McCloud's judgment in default and Fordham J's Judgment and Order together resolve the issues of liability and the quantum of damages as between the Claimants and the LLP. The LLP's Liquidators did not defend the Claim and the LLP was not represented at any of the hearings that took place. The LLP has not sought to set aside any of the Orders made against it.

76. As the Claimants point out, Master McCloud's Order followed the Claimants' Application and its consideration at a hearing. Once the Master struck out the claims against the Firm and Mr Giambrone, the Primary Proceedings were effectively pleaded against the LLP alone. The default judgement is conclusive as to the LLP's own liability to the Claimants in respect of (a) breach of contract; (b) the tort of deceit; (c) breach of duty in negligence; and (d) breach of fiduciary duty.

77. Contrary to the Claimants' overall stance, that is not the end of the matter, however. Fordham J's judgment contains a clear analysis of the nature of the matters which had been determined against the LLP as a result of the Master's Order and the nature of the separate matters which remained to be resolved as between the Claimants and the LLP at the assessment of damages hearing directed by the Master: see the Judgment, [2]-[8]. In particular, that "all issues going to quantification", including the question of causation and the recoverability of loss, in relation to the particular heads of loss identified and claimed by the Claimants were live matters which fell to be resolved at the assessment of

damages hearing in so far as they were not inconsistent with the earlier determination on liability.

78. I have not been shown the Claimants' Skeleton Argument or any transcript of the submissions made to Fordham J, however the pleading of the Particulars of Claim, and the nature of the evidence in the Primary Proceedings, render it somewhat unsurprising that the legal issue of the responsibility of the LLP for the consequences of the Firm's breaches of contract was naturally identified by Fordham J as the preliminary point for his decision on assessment. That issue plainly went directly to key issues of causation and recoverability of loss as between some or all of the Claimants and the LLP at that hearing.

79. As Mr Troman submitted, if the LLP had not been held liable for the Firm's breaches of contract it would have been necessary for Fordham J to conduct the assessment by identifying which of the Claimants' losses were based upon which pleaded breach of duty. However, once Fordham J had determined that the contractual liabilities of the Firm transferred to the LLP that exercise became immaterial as between the Claimants and the LLP for the purposes of the Judgment. It was unnecessary for Fordham J to consider further whether a pleaded breach and a specific claimed loss married up for the purposes of the assessment of damages against the LLP. Regardless of the identity of the entity that had actually caused the Claimants to suffer the loss claimed that loss was recoverable in contract by the Claimants from the LLP.

80. Subject to Fordham J's preliminary findings, the Judgment proceeds in classic professional negligence style by identifying the losses recoverable through considering on the basis of the evidence what breaches of duty caused what losses. The findings made on "typical facts" were that the Firm had failed to give adequate advice in the Reports on Title and generally and that, as a result of its breaches of contract, the Claimants suffered loss and damage because they acted in reliance on its advice. These losses were held to be recoverable from the LLP as a result of the finding.

81. The Claimants' entitlement to damages against the LLP, and the quantum of such damages, were not assessed on any alternative basis. A matter I return to below in answer to the final question identified by Mr Troman.

Were the deposits paid by 6 of the Claimants paid to the LLP and not the Firm?

82. Although this issue has only been separately identified late in the day, it is sensible for me to address it before turning to the basis upon which AIG defends the Claim. It is not clear on the face of the Judgment whether or not the Claimants' summaries produced for the purposes of the assessment of damages hearing did or did not indicate whether the deposits paid by Mr and Mrs Darragh, Mr and Mrs Mitry and Mr and Mrs O'Leary were paid to the LLP and not to the Firm, as now contended.

83. Fordham J specifically recorded his reliance upon the factual summaries provided by the Claimants' Counsel. He also noted Counsel had been asked to check the facts were correctly recorded when a draft was circulated. Fundamentally, however, Fordham J made very clear at the outset of his Judgment that in addressing the claimed heads of loss he had proceeded by taking an element of the claim "by reference to typical facts", so that he could give rulings accompanied by reasons, which could then "readily and reliably be applied to the other equivalent claims made by other individual claimants." As a

result, in so far as reliable evidence demonstrates that the "typical facts" described by reference to the Firm were applicable to the LLP instead in any given Claimant's case (for example, the provision of a Report on Title by the LLP and not the Firm), Fordham J intended that the rulings made were to be applied to the equivalent claims made by the relevant Claimants. Accordingly, if, for example, an individual Claimant did not retain the Firm before it retained the LLP, all relevant references to the Firm should be read as references to the LLP instead.

84. In summary, the evidence as to the identity of the payee of the deposits which I draw from the relevant witness statements is as follows.

85. Mr and Mrs Darragh initially retained the Firm. The first invoice that was sent to them by the LLP is dated 7 May 2008 and related to "legal advice in relation to the purchase of a new property in Italy, including due diligence, inspection of title deeds and planning documents, drafting / inspecting the Preliminary Contract" on 22 February 2008. That advice was provided before the LLP was incorporated. The invoice requested payment to "Giambrone Law" (Receiver's Swift Address BARC GB 51).

86. The Report on Title and Preliminary Sale Agreement provided to Mr and Mrs Darragh was dated 28 April 2008. That was after the Firm ceased to act and was replaced by the LLP. An Allied Irish Bank International Payment Application Form completed by Mr and Mrs Darragh was stamped on 15 May 2008 and arranged for the transfer of their 50% deposit of €43,450. The receiver's name, completed by hand, was "Giambrone Law" (Receiver's Swift address BARC GB 22). The Preliminary Sale Agreement Mr and Mrs Darragh then signed was dated 30 May 2008. Subsequently, a second Allied Irish Bank International Payment Application Form was stamped on 9 June 2008 for the transfer of £232.25. The receiver's name was completed by hand as "Giambrone Law LLP" (Receiver's Swift address BARC GB 22).

87. Mr and Mrs Mitry initially retained the Firm. The letter of retainer from the Firm was dated 17 March 2008. The first invoice they received from the LLP was dated 7 May 2008 and related to "legal advice in relation to the purchase of a new property in Italy, including due diligence, inspection of title deeds and planning documents, drafting / inspecting the Preliminary Contract" on 22 February 2008. Again, that was before the LLP was incorporated. The invoice requested payment to "Giambrone Law" (Receiver's Swift Address BARC GB 51).

88. The Report on Title and Preliminary Sale Agreement received by Mr and Mrs Mitry was dated 28 April 2008. That was after the Firm ceased to act and the LLP was incorporated. The Preliminary Sale Agreement was then completed by Mr and Mrs Mitry following receipt of the Report on Title with the 50% deposit to be paid in the sum of €47,950. Mr and Mrs Mitry say they paid this to "Giambrone & Law". The letter of 26 August 2008 from the LLP to Mr and Mrs Mitry which was exhibited to their statements confirms (i) receipt by the LLP of a bank loan guarantee issued in Mr and Mrs Mitry's favour and (ii) the LLP's signature of the bank loan guarantee on their behalf to confirm acceptance of its terms and conditions and (iii) "transfer of the deposit to the Vendor accordingly". This letter enclosed a copy of the final page of the Preliminary Sale Agreement signed by the building company, with a copy of the bank loan guarantee. The bank loan funded the deposit paid.

89. Mr and Mrs O'Leary did not retain the Firm at all. The letter of retainer was sent to them by the LLP and dated 4 June 2008. An invoice from the LLP dated 9 July 2008 was stated to be for the legal advice it had provided to them on 4 June 2008 in relation to the purchase of a new property in Italy, including due diligence, inspection of title deeds and planning documents, drafting / inspecting the Preliminary Contract. The invoice requested payment to a Bank in Italy (Receiver's Swift Address PASC-). The Report on Title and Preliminary Sale Agreement was provided to them by the LLP 4 June 2008. A Bank Payment Authorisation Form was stamped by the Bank on 16 July 2008 and arranged for the transfer of the 50% deposit of €42,950. The receiver's name was completed by hand as the LLP, "Giambrone & Law", (Receiver's Swift address BARC GB 22).

90. AIG challenges these Claimants' claims in full. Mr Troman says this evidence is inadequate to conclude that these individuals paid their deposits to the LLP. He says they should have done better. I disagree. On the balance of probabilities, I find that the evidence adduced in the Primary Proceedings is sufficient to conclude that the lost deposits of these 6 Claimants were paid to and /or received by the LLP at dates after the Firm had ceased to act on 7 April 2008. Read in context, I consider that the evidence in the case of Mr and Mrs Darragh and Mr and Mrs O'Leary supports the conclusion that the LLP's Bank's Swift address was "BARC 22". This was the account into which each of these deposits was paid. In the case of Mr and Mrs Mitry, the contemporaneous correspondence from the LLP records that it was the LLP which transferred the bank loan funded deposit to the Vendor on completion of the Preliminary Sale Agreement by the Vendor.

91. My specific findings that it was the LLP, rather than the Firm, which provided the relevant Report on Title to these Claimants, and received their deposits, are not in any way incompatible with Fordham J's findings on legal causation. These Claimants were entitled to recover their deposits from the LLP in the sums assessed. For the purposes of this Preliminary Issue, none of the broader challenges advanced by AIG apply to these Claimants and their deposits. My factual conclusions are relevant to the determination of the final issue identified by Mr Troman.

Is AIG bound by the judgments the Claimants have obtained against the LLP? Should AIG be entitled to challenge Fordham J's Judgment?

92. It is common ground between the parties that a judgment as between a third party claimant and an insured is generally not binding on the insurer as to whether the insured was under a liability, or if so what the basis of the liability was. It is open to the insurer to contest a claim under the policy on the ground that the true position regarding the insured's legal liability was other than as determined in the judgment or agreement. Absent any special agreement or issue estoppel, the insurer and insured are entitled to have that issue determined, as between them, by the court seised of the claim under the insurance policy: MacGillivray on Insurance Law (15th ed) at 28-006; Omega Proteins Ltd v Aspen Insurance UK Limited [2011] Lloyd's Rep I.R. 183; Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Limited [2013] EWHC 349 (Comm) at [65].

93. In Omega Proteins Ltd v Aspen Insurance UK Limited [2011] Lloyd's Rep I.R. 183 at [49], Christopher Clarke J explained in eight propositions the correct overall approach to be taken in a claim against insurers such as this one. Propositions (4) to (8) are material at this point:

i) the insured must establish that it has suffered a loss which is covered by one of the perils insured against;

ii) that may be done by showing a judgment against the insured;

iii) the loss must be within the scope of the cover provided by the policy;

iv) as a matter of practicality, the judgment may settle the question as to whether the loss is covered by the policy because the insurers accept it as showing a basis of liability which is within the scope of the cover;

v) but the judgment is not determinative of whether or not the loss is covered by the policy (assuming the insurer is not a party and that there is no agreement for the insurer to be bound);

vi) it is therefore open to the insurers to dispute that the insured was in fact liable, or that it was liable on the basis specified in the judgment; or to show that the true basis of the insured's liability fell within an exception under the policy;

vii) thus, an insured against whom a claim is made in negligence, which is the subject of a judgment, may find that his insurer seeks to show that in reality the claim was for fraud or something else which was not covered, or excluded by the policy; and

viii) similarly, an insured who is held liable in fraud (which the policy does not cover) may be able to establish, in a dispute with his insurers, that, whatever the judge found, he was not in fact fraudulent, but only negligent and that he was entitled to cover under the policy on that account.

94. Although unable to point to any special agreement or form of engagement with the Primary Proceedings against the LLP, Mr Timson submits that AIG should be bound by the Judgment because it should be regarded as privy to the Primary Proceedings. He says this is sufficient to prohibit a challenge to the Judgment here. Mr Timson relied specifically upon the dicta of Peter MacDonald Eggars QC sitting as a Deputy High Court Judge in Crowden v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm) at [112]. The Deputy Judge said:

> "there are two situations, however, which occur to me in which the insurer might be bound by the judgment obtained by the third party claimant against the insured, namely where (1) the insurance policy contains an express or perhaps an implied term requiring the insurer to be bound by the judgment and (2) where the insurer is a party or otherwise privy to the proceedings which resulted in the judgment."

95. Mr Timson submits that AIG falls to be treated as "otherwise privy" to the Primary Proceedings, and bound by them, because:

i) the LLP was represented by solicitors and counsel funded by AIG until shortly before the trial in Various Claimants, when they withdrew;

ii) in Foskett J's subsequent costs judgment in Various Claimants v Giambrone & Law (a firm) and others [2019] EWHC 34 (QB), [2019] 4 WLR 7, he said that AIG had spent millions on defence costs:

> "during a period when the professional advice from the solicitors conducting the litigation for the Defendants was that the claims would be "extremely difficult to defend", the prospects of success never subsequently being put definitively higher than 35%: the defence was much more likely to fail than to succeed";

iii) AIG was fully aware of the proceedings in Various Claimants and the Primary Proceedings from the outset. AIG was served with the relevant documents at all stages of the Claimants' claim including the pre-action letter, the Claim Form and Particulars, the Application for judgment in default, the default judgment order, the interim orders, the Claimants' disclosure, the Claimants' witness statements, expert report and notice of the trial date.

iv) the Primary Proceedings took place at a time when the LLP was in liquidation and it was known to AIG that the LLP would not be representing itself. There was no risk to the AIG of becoming embroiled in proceedings where its insured was present and where there may need to be conflicting defences;

v) given the amount of time, costs and importantly, court resources that these proceedings, and the proceedings involving other claimants, has already taken, and given the ease with which AIG could have participated in the Primary Proceedings before the Master or Fordham J, and the limited challenge it is making now, it would be unconscionable and plainly not in accordance with the overriding objective to allow AIG to raise the point now;

vi) AIG provided no basis in fact or law for the assertion that Fordham J or Foskett J were wrong in respect of the finding as to the transfer of contractual liability prior to production of its written opening submissions. Pursuant to Omega Proteins at [49(6)] it is for AIG "to dispute that the insured was in fact liable, or that it was liable on the basis specified in the judgement; or to show that the true basis of his liability fell within an exception";

vii) the case law which supports the proposition AIG can challenge the findings does not involve the liability of solicitors, which must be viewed and treated differently, and therefore distinguished, in the context of the heightened regulation in respect of relationships between solicitors and their consumer customers.

96. In my judgment, whether separately or in combination, these are not good reasons why the court should depart in this Claim from the general rule that an insurer is not bound by any findings against its insured, and that an insurer can challenge whether the insured had any liability at all, and the basis upon which it was held the insured was liable. I am not persuaded by the matters relied upon by Mr Timson to this end.

97. The Various Claimants case did not involve these Claimants. However, even within the context of that litigation, Foskett J specifically drew attention to the fact the LLP was unrepresented and referred to the separate nature of any claim that may later be brought

by the claimants against AIG: [71]-[78] and [445]. Foskett J recorded that AIG's withdrawal of funding from the LLP in circumstances where the claims against the Firm and the individual defendants continued to be funded meant:

> "78. The net effect of this position is that, to the extent that submissions have been made on behalf of the claimants about the potential liability of the LLP for any of the matters raised in these proceedings, no arguments on behalf of the LLP have been made."

And:

> "445. It is recognised, however, that the insurers are not parties to these proceedings and, strictly speaking, could not be bound by any finding I make, but the suggestion is that it would be unlikely that insurers would want to re-litigate precisely the same issues on precisely the same evidence as has been before me."

98. When referring to the weakness of the "Defendants'" cases funded by AIG, and making a third party costs order against AIG in Various Claimants v Giambrone & Law (a firm) and others (as cited above), Foskett J passed no specific comment in respect of the LLP and/or the LLP's potential defences to the claims in contract. Foskett J repeated that AIG's involvement in the litigation did not serve to remove AIG's ability, in principle, to challenge his findings within the context of proceedings under the 1930 Act to dispute that their insured was liable at all based on the court's findings. He reminds the reader that:

> "6. … However, in principle, where (as here) the third party would be relying upon the findings made by a court, the insurer would not necessarily be bound by those findings: *Omega Proteins v Aspen Insurance [2011] Lloyd's Report IR 183* and *Enterprise Oil Limited v Strand Insurance Co Limited [2006] 1 Lloyd's Rep 500.* It remains open to the insurers to dispute that the insured was liable, either at all or as based on the court's findings, and/or to demonstrate that the liability fell within an exception to the policy."

99. Indeed, Foskett J also set out the terms of a settlement offer which had been made to the claimants to compromise the litigation in Various Claimants: [8]-[9]. This provides a very practical illustration of both the degree of AIG's active engagement with that different claim, and AIG's care to reserve its own rights within the scope of the 1930 Act mechanism to seek to establish that either the Firm or the LLP was not liable in respect of one or more of the claimants' claims and / or to prove the basis upon which the liability arose or an additional basis on which liability arose.

100. Prior to the issue of the Primary Proceedings AIG informed the Claimants' solicitors that it considered it was entitled to rely upon its Aggregation Defence to defend any claim under the Policy. As Mr Troman put it, AIG did not hide an argument that it had up its sleeve based on the coverage provided by the Policy prior to its solicitors' receipt of the Judgment. It was only when AIG saw the Judgment that it identified the Claimants' failure to obtain a judgment against the Firm resulted in a separate problem for the Claimants in claiming any indemnity under the Policy. Thereafter, AIG's stance was one of non-engagement.

101. Turning to the course of the Primary Proceedings themselves, the LLP was not represented at any stage. In making his own findings on loss and damage, Fordham J recorded that he had heard no submissions on the LLP's behalf.

102. Accordingly, in my judgment, the Claimants' contemporaneous actions in sending copies of all the documents in the Primary Proceedings to AIG, as the LLP's insurer, is not sufficient to render it "otherwise privy" to the findings in the Primary Proceedings. That is even if such classification otherwise suffices, on different facts, to prevent a challenge by an insurer in accordance with general principle. The relevant facts in this case are that AIG simply did not engage with the claim against the LLP at all.

103. As such, the Claimants proceeded at some degree of risk as to whether or not AIG would challenge their intended claim under the Policy on a basis other than aggregation once findings on causation and loss were made. To guard against any possibility this could happen, it was open to the Claimants to join AIG to the Primary Proceedings before or after the claim against the Firm and Mr Giambrone was struck out, if they had chosen to do so. At all stages, the Claimants knew that the LLP was in liquidation and that AIG had not provided any assurance or guarantee of indemnity to them in respect of any liabilities on the part of the LLP following an assessment of loss and damage against the LLP in the Primary Proceedings. Whilst Mr Timson's third to fifth arguments criticise AIG, these same arguments can be re-directed to the approach adopted by the Claimants. Perhaps, all the more so, given it was the Claimants who initiated and shaped the Proceedings and who intended to bring a claim under the Policy.

104. It is to be expected that the Primary Proceedings would have taken a different procedural course if the striking out of the Claimants' claims against the Firm and Mr Giambrone had not removed the additional ability for the Claimants to pursue their pleaded claims against those parties. However, even prior to the date the Claimants obtained judgment in default against the LLP, the Claimants should have understood from the evidence that was served by RPC that the Firm, Mr Giambrone and AIG did not accept Foskett J's findings for the purposes of the Primary Proceedings.

105. I am unpersuaded by Mr Timson's submission that AIG should be prevented from challenging the Judgment now because AIG provided no basis in fact or law for its assertion in the Points of Defence that Fordham J and Foskett J were wrong. AIG's Points of Defence set out it considered Fordham J's judgment was wrong in law. The issue of the transfer of liabilities to the LLP was identified by AIG as the central issue at every stage of the Claim. It lies at the heart of the Judgment. Whilst matters of law are not generally required to be pleaded, in so far as the Claimants considered there was any such deficiency in the Points of Defence, it was open to the Claimants to seek further information by way of a formal request or in correspondence at any stage prior to receipt of AIG's written opening.

106. Mr Timson did not rely upon any authority to support his submission that separate rules in respect of an insurer's right to challenge findings against their insured apply in the case of claims brought under solicitors' policies of professional indemnity. He simply referred to the statutory background against which professional indemnity policies must be provided: see [140] below. I do not consider this background debars AIG from challenging the Judgment.

Does the challenge by AIG to the judgment make any difference? Whether, if AIG is not bound by the judgments the Claimants have obtained against the LLP, those judgments were wrongly obtained because Fordham J's finding that liabilities of the Firm were transferred to the LLP was wrong as a matter of law?

107. Against a background where AIG says the Claimants' Claim against it must fail immediately because there are no valid judgments in respect of which AIG can have any liability under the Policy to provide an indemnity, I turn to the question whether AIG's challenge to Fordham J's finding that the liabilities of the Firm were transferred to the LLP and that the LLP bears the liabilities of the Firm as a result, is or is not well-founded. The Claimants' case is that Fordham J's finding that the liabilities of the Firm were transferred to the LLP is compelling evidence of the LLP's liability for the reasons set out.

108. Mr Troman's starting point was that Fordham J's finding at [13] was reached in express reliance on Foskett J's judgment in Various Claimants at [454]-[456]. Mr Troman said Foskett J made two findings there. First, in Mr Troman's words, that the liabilities of the Firm were transferred to the LLP "by some operation of law merely as a result of the transition of the Firm to the LLP." A finding Mr Troman said was wrong as a matter of law. Second, that there was an agreement between the Firm and the LLP to transfer the liabilities of the Firm to the LLP.

109. Mr Troman advanced his case as follows in his opening written argument:

> "Plainly, there is no tri-partite agreement between any Claimants, the LLP and the Firm for the liabilities of the Firm to be transferred to and borne by the LLP. If there were such an agreement it would have been produced. As Foskett J identified in paragraph 454 of his judgment, the position is different in relation to future obligations. There is no difficulty in there being a novation whereby the LLP agreed to perform in the future the obligations which the Firm would have performed in the future. That is completely different from there being an agreement to transfer existing liabilities which Foskett J expressly found was contemplated by Mr Giambrone but never eventuated.
>
> The way found by Foskett J around the legal principle that liabilities are incapable of transfer (although not expressly mentioned by Fordham J) was to find that the LLP itself breached a duty owed to the Claimants to correct prior breaches of duty on the part of the Firm. However, Foskett J (and Fordham J) to the extent he accepted this reasoning) was wrong to accept the allegation by the claimants in Various Claimants that such a duty was owed by the LLP. There is simply no basis in law for any such duty. A solicitor or trustee who takes over acting for their predecessor does not owe any duty to correct the negligence, breaches of contract, breaches of trust (or any breaches of duty) of that predecessor. … Tellingly, Foskett J and Fordham J (and both the Claimants in this case and the Claimants in Various Claimants) refer to no authority for the proposition that such a duty can arise. It cannot. One searches in vain for any textbook, case or statute to mention, describe or establish such a principle, which is repugnant to common sense and actual practice.
>
> Accordingly, absent some agreement for the transfer of the liabilities of the Firm to the LLP (see question 3 below), the finding of Fordham J based on the holding of Foskett J that there was such a transfer is wrong in law and cannot provide any basis for an obligation upon AIG to provide an indemnity to the Claimants."

110. In oral submissions, Mr Troman said there is no authority that says liabilities can be moved from one party to another and that nothing appears to have been cited to Foskett J on the point. He was emphatic that although it is possible for one entity to provide an indemnity for the liabilities of another, it is not legally possible to "shift" liabilities from one to the other. He said Fordham J was shown and accepted the judgment of Foskett J without reference to any authorities supporting the possibility of transfer.

111. Mr Troman referred to Chitty on Contracts (35th ed) at para. 23-080:

> "Everybody has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the original contractor."

112. On the basis that AIG was correct that Fordham J was wrong to hold the Firm's liabilities were transferred to the LLP, Mr Troman said the key matter AIG wished to challenge was the LLP's liability to correct prior breaches of duty by the Firm. As he put it, there is a difference between a solicitor pointing out that something needs doing and informing a client that is the case and a duty to correct prior breaches of duty. In his words, such a duty would be "swingeing" and a form of "guarantee" that where "something has gone wrong in the past they must put it right", and there is also no authority for that.

113. In considering AIG's challenge to Fordham J's findings and his approval of Foskett J's analysis, I bear well in mind that neither Foskett J nor Fordham J, nor I, have had the benefit of hearing any submissions on the part of the LLP. That said, in circumstances where the LLP was represented until shortly before the trial commenced in Various Claimants, the generic issues extracted from the parties' statements of case included whether there had been an assignment or novation and, if so, upon what terms. At trial, the claimants, the Firm and the Partners continued to be represented before Foskett J. And, in determining generic issues 3 to 6, Foskett J drew on his detailed review of the factual evidence, including the evidence of the claimants, and the evidence of Mr Giambrone and the other Partners who had formed the LLP.

114. In the Primary Proceedings, Fordham J reviewed the evidence adduced by the Claimants, and the submissions advanced on behalf of the Claimants themselves.

115. On a detailed consideration of Foskett J's judgment and the Judgment, I do not agree with Mr Troman's characterisation of the findings made by Foskett J and/or Fordham J, or his criticisms of those findings. Whilst I do not know whether or not any authorities, and if so which, were cited to or relied upon before Foskett J or Fordham J, I consider Mr Troman's intense focus upon the word "transfer" is misplaced here when submitting that there is no legal basis or authority for the Judges' findings. I further consider that it is incorrect for Mr Troman to suggest there can have been no relevant form of tri-partite agreement on the basis that no written agreement has been adduced in evidence.

116. In my view, the use of the word "transfer" in respect of the liabilities described was not intended to be imbued with specific legal weight or meaning by Foskett J. As I read the judgment, "transfer" was simply used as a neutral factual description. It was a word that was used by the parties themselves in formulating the generic issues pending their appropriate legal classification. In legal terms, the important questions which fell to be

resolved by Foskett J were whether there had been an assignment or novation and, if so, upon what terms.

117. The answers did not only involve a review of the dealings between the Firm and the LLP. They necessarily involved a review of the tri-partite dealings between the Firm, the LLP and the claimants. As the passage from Chitty relied upon by Mr Troman makes clear, the burden of a contract can pass if the consent of the other party to the contract is obtained. The relevant evidence considered by Foskett J in this regard included the content and effect of the letter to the claimants of 7 April 2008 and the conduct of the claimants thereafter in retaining the LLP in place of the Firm.

118. As set out in the judgment, Foskett J found that the transfer took effect by way of implied novation or novation by conduct in the case of each of the exemplar claimants. As a result, he necessarily rejected the legal classification of the arrangements as an assignment. Foskett J then proceeded to establish the relevant contractual terms which applied on novation in the specific circumstances pertaining. Considered properly in context, the relevant paragraphs of Foskett J's judgment are wholly addressed to the precise framing of the questions set in generic issues 3 to 6, as set out at [29] above.

119. Foskett J held that the answer to issue 3 was "plainly, yes". There had been a transfer of the Firm's business to the LLP on or about 6 April 2008: [453]. I note that the 6 April 2008 was the date accepted by the parties in evidence as the date of the transfer of the business of the Firm to the LLP: [46]. It was also the date when the Firm's partnership terminated: [446]-[451]. On 7 April 2008 the claimants were sent a letter informing them the Firm was to begin trading as the LLP: [46]. These facts were all common to the Primary Proceedings before Fordham J.

120. In answering generic issue 4, Foskett J examined the effect of the letter of 7 April 2008 and the fact the claimants proceeded to instruct the LLP after receipt. He held that he did not think there could be any dispute that the transfer of the business to the LLP gave rise to an implied novation (or a novation by conduct) that the LLP would provide the remaining services that the Firm had been retained to provide to each of the claimants who chose to remain with the LLP. He found that all of the exemplar claimants chose to remain with the LLP: [454]. Again, facts which were common to the Primary Proceedings, and which are not disputed.

121. I have not myself seen a copy of Mr Giambrone's correspondence arguing that the transfer of the business transferred "any" existing liability to the claimants for breach of duty to the LLP, or released [the Firm] from those liabilities, as mentioned by Foskett J at [454]. It is, however, apparent from the judgment at [455] that Foskett J's finding at [454] that the transfer of the business from the Firm to the LLP did not transfer any existing liability to the claimants for "breach of duty" or "release [the Firm] from those liabilities" was directed to the Firm's pre-novation non-contractual liabilities. Foskett J's conclusions as to the contractual position are set out at [455]. This is demonstrated by Foskett J's own emphatic underlining of the words "in contract" there. Words quoted by Fordham J.

122. As drafted, generic issues 5 and 6 were directed to the relevant terms. Including whether the LLP should have been aware of what the Firm had done or not done "by reason, inter alia, of comprising the same lawyers". And, if so, whether the LLP was under any obligation to rectify mistakes and omissions by the Firm. Having identified at [454] that

the facts gave rise to an implied novation or novation by conduct, Foskett J found in favour of the Claimants' pleaded case on terms "in each respect": [455]-[456].

123. The terms he found included that the LLP was "under an obligation to perform any unperformed obligations" of the Firm to the relevant claimant, which "included correcting prior breaches of duty" and "to act faithfully and in the best interests of the [relevant claimant] in doing so and to advise and act with reasonable skill and care". As separately alleged in the claimants' claims, Foskett J found the terms also included that:

> "any liability of the Firm to a claimant in contract arising out of any breach of duty or want of care that occurred before the transfer would be transferred to and borne by the LLP and that the LLP would indemnify the claimant in respect of any loss caused by any breach of duty or want of care (of any kind) by the Firm committed before the transfer".

124. It is long established that contractual rights can be transferred by an assignment of those rights, but an assignment cannot transfer obligations: see recently, for example, the summary of the law contained in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48. It is therefore unsurprising that Foskett J's starting point was necessarily one of novation when the Firm had yet to complete its retainers at the date the LLP was incorporated and where its clients subsequently retained the LLP in the Firm's place. Contractual rights and obligations may be assumed by a third party where there is a novation. That is not by way of a legal transfer of rights and liabilities, but rather the discharge of the original contract and its replacement with a new contract. Typically, on the same terms but with a different counterparty.

125. Chitty on Contracts (35th. Ed.), describes the essential legal characteristics of novation at para. 23-089. Novation takes place where, there being a contract in existence, some new contract is substituted for it; the consideration mutually being the discharge of the old contract: Scarf v Jardine (1882) 7 App Cas 345, 351. A three party novation, consists of an agreement between A, B and C pursuant to which B's rights and obligations under an existing contract with A are assumed by C under a new contract with A: Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 2537 (TCC) at [85]. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: see, for example Rasbora Ltd v JCL Marine Ltd [1977] 1 Lloyd's Rep 645. Unless the parties have agreed otherwise consent may be express (whether oral or written) or may be inferred from conduct: see, for example, Evans v SMG Television Ltd [2003] EWHC 1423 (Ch) at 181; Seakom Ltd v Knowledgepool Group Ltd [2013] EWHC 4007 (Ch), Carr J at [147]; Credico Marketing Ltd v Lambert [2021] EWHC 1504 (QB) at [215]-[216]. Evidence of actions subsequent to the alleged novation are admissible to establish whether there has been a novation by conduct. Whether there has been consent is assessed objectively. It follows that the parties may not appreciate that their dealings have had the effect of novation, but this does not prevent the novation from being effective.

126. As regards the terms of a novation, novation need not be of an entire contract. Some obligations may be novated while others remain in place: Chitty, para. 23-096, Langston Group Corp v Cardiff City Football Club Ltd [2008] EWHC 535 (Ch) at [42]; analysis cited with approval in Musst Holdings Ltd v Astra Asset Management UK Limited [2023] EWCA Civ 128 at [60]. Any such analysis is necessarily fact specific.

127. Foskett J's judgment in Various Claimants contains a fact specific objective legal appraisal of the evidence. On the basis of that evidence, specifically the content of the letter of 7 April 2008 containing assurances as to the claimants' position following the cessation of the Firm's practice; the purpose of the transfer of the Firm's business to the LLP; and the individual claimants' decisions to continue to employ their lawyers under the umbrella of the LLP thereafter, he found the Firm's existing contractual liabilities were novated to the LLP (or novated by conduct). That is, that liability for the Firm's existing contractual breaches did not remain with the Firm. In addition, Foskett J held that the LLP was obliged to indemnify the claimants in respect of "any" of the Firm's pre-novation breaches of duty or wants of care.

128. In the Primary Proceedings, Fordham J made his findings by reference to the evidence of the terms of the identical letter received by Claimants such as Mrs Beagan on 7 April 2008 and the Claimants' decisions to retain the LLP thereafter. At [13] Fordham J stressed he was "satisfied that in such a scenario as this" the Claimants were entitled to recover damages against the LLP in contract in respect of any breach of contract on the part of the Firm preceding the 7 April 2008 letter. He found there was "every reason" why he should accept and apply the same conclusion as Foskett J that any liability of the Firm in contract arising out of any breach of duty or want of care (of any kind) by the Firm committed before the transfer was transferred to and borne by the LLP and the LLP would indemnify the Claimants in respect of any loss caused by any breach of duty or want of care the Firm committed before the transfer. A ruling which remained intact following the unsuccessful appeal in the Various Claimants case.

129. I echo Fordham J's words that in a scenario such as this one, there is no reason why I should not, and every reason why I should, accept and apply the same conclusion reached by Foskett J. Accordingly, I do not consider that Fordham J's finding was wrong in law. There was, and is, ample authority to support the potential to make such a finding.

130. No attempt was made to argue before me, or presumably before Foskett J, that the Firm's liability for its pre-contractual breaches could not have been intended to be novated to the LLP because the ability of the Firm's clients to claim an indemnity under the Firm's insurance may thereby be lost and/or not covered by the LLP's own new professional indemnity insurance policy (whatever the terms of its insurance may have been at that date). The Claim before me is advanced by the Claimants, who were parties to the relevant novations, on the basis that Fordham J's findings were, and are, correct.

131. I consider that Mr Troman's further submission that Foskett J was wrong to hold that the LLP was under a duty to correct prior breaches of duty by the Firm is incorrect, and also falls to be interpreted in context. Foskett J's finding was firmly planted in the very specific facts and circumstances of the novated contract which existed between these particular parties. As I read his judgment, the questions as to what steps the LLP may have been required to take to correct such prior breaches of duty in each regard, and as to what loss resulted from the LLP's own failure to take such steps, remained separate issues for determination. In the event, there was no further trial, however. Summary judgment was ordered awarding equitable compensation to individual claimants against the Firm or the LLP, as appropriate, based upon their own particular receipt and/or payment out of the sums each received direct from the relevant claimants.

132. For all these reasons, I consider that the first limb of AIG's primary defence that the Judgment was wrongly obtained fails.

Does the Policy respond to the Default Judgment, the Judgment and the Order?

133. As described in MacGillivray on Insurance Law (15th ed), para. 28-002, no obligation arises on the part of an insurer to pay a claim until the insured has suffered a loss. Accordingly, the insured's right to be indemnified under a liability insurance policy arises only once the insured's liability to the third party claimant is ascertained and determined by agreement, award or judgment and not upon the occurrence of the event which gives rise to a liability on the part of the insured to the third party.

134. Solicitors' professional indemnity policies, such as the Policy, do not indemnify solicitors in respect of all liabilities they may incur. The fact that a successful claim is made against the insured by a third party does not necessarily entail that the claim must fall within the scope of the insurance contract between the insurer and the insured. In every case, it is necessary to examine the wording of the policy to determine whether or not the insured's liability to the third party is properly the subject of the indemnity.

135. The Policy includes the following terms:

Item 1	*Policyholder*	Giambrone Law LLP
Item 2	*Policy Period*	From 01/10/2008 To 30/9/2009
Item 5.	*Professional Services*	*Legal Services*

"Cover
All cover under this policy is afforded solely with respect to *Claims* first made against any *Insured* during the *Policy Period* and reported to the *Insurer* as required by this policy."

"Professional Liability

The *Insurer* will pay on behalf of any *Insured* all *Loss* resulting from any *Claim* for any civil liability of any *Insured* which arises from the performance of or failure to perform *Legal Services*.

Defence

The Insurer has the right to defend any *Claim* which this policy may respond to under its Covers. The Insurer shall pay *Defence Costs* incurred in defending such *Claim*."

"**Definitions**:

Claim means any:

(i) demand for, or intimation of an intention to seek, compensation or *Damages* for a civil liability of any *Insured*

(ii) assertion of a right against any *Insured*

(iii) any obligation on any Insured to remedy a breach of the Solicitors' Accounts Rules 1998 …

(iv) any case accepted for review by the Legal Services Ombudsman, Legal Complaints Service, or any other regulatory authority which arises out of the performance of or failure to perform *Legal Services*

Damages means any amount that any *Insured* shall be legally liable to pay to a third party for all civil liabilities including but not limited to judgments or arbitral awards rendered against any *Insured*, or for settlements negotiated with

the consent of the *Insurer*. *Damages* also means any amount paid or payable resulting from any recommendation by the Legal Services Ombudsman, Legal Complaints Service, or any other regulatory authority which arises out of the performance or failure to perform *Legal Services*
Insured means:
(1) the *Policyholder* or any *Subsidiary*;
(2) any natural person, who is or has been a principal, partner, director or *Member* of the *Policyholder* or any *Subsidiary*;
(3) any *Employee*;
(4) any *Prior Practice* or *Successor Practice*;

but only when providing *Legal Services* in the foregoing capacities and
(5) any estate or legal representative of any Insured described in (2) and (3) of this definition.

Insurer means AIG UK Limited
Legal Services means the provision of services in private practice as a solicitor or registered European lawyer including:
(1) providing such services in England, Wales or anywhere in the world, whether alone or with other lawyers in a *Partnership*, or a *Recognised Body*;
(2) any person providing such services as an *Employee*;
(3) any Insured acting as an executor, trustee, attorney, notary, insolvency practitioner or other personal appointment

Legal Services does not include practising as an *Employee* of an employer other than a solicitor, a registered European lawyer, a *Partnership* or a *Recognised Body*.
Loss means *Damages* and *Defence Costs*. *Loss* shall not mean and this policy shall not cover any (1) fines or penalties; (2) first party loss or expense of an *Insured* (other than as *Loss*) or (3) any matters which may be deemed uninsurable under the law governing this policy or the jurisdiction in which a *Claim* is brought.
Minimum Terms and Conditions means the minimum terms and conditions required by the Solicitors' Indemnity Insurance Rules prevailing at the inception of the *Policy Period*
Policyholder means the entity or natural person specified as such in schedule.
Prior Practice means each practice to which the *Policyholder* is ultimately a ***Successor Practice*** by way of merger, acquisition, absorption or other transition.
Successor Practice means:
a practice identified in this definition as "B", where:
(a) "A" is the practice to which B succeeds;
(b) "A's owner" is the owner of A immediately prior to transition;
(c) "B's owner" is the owner of B immediately following transition; and
(d) "transition" means a merger, acquisition, absorption or other transition which results in A no longer being carried on as a discrete legal practice.

B is a *Successor Practice* to A where –
(i) B is or was held out, expressly or by implication, by B's owner as being the successor of A or as incorporating A, whether such holding out is contained in notepaper, business cards, form of electronic communications, publications, promotional material or otherwise, or is

contained in any statement or declaration by B's owner to any regulatory or taxation authority

….

(vi) (where A's owner was a *Partnership* and the majority of Principals of A's owner did not become *Principals* of the owner of another legal practice as a result of the transition) – one or more of the Principals of A's owner have become *Principals* of B's owner and -

(a) B is carried on under the same name as A or a name which substantially incorporates the name of A (or a substantial part of the name of A)

(b) B is carried on from the same premises as A;

(c) The owner of B acquired the goodwill and/or assets of A;

(d) The owner of B assumed the liabilities of A; and/or

(e) The majority of staff employed by A's owner became *Employees* of B's owner.

…

Wrongful Act means any act, error or omission which gives rise to a civil liability of any *Insured*.

"Exclusions

This policy shall not cover *Loss* in connection with any *Claim* or any loss:

Bodily/Psychological Injury

… other than *Psychological Injury* which arises from a breach of duty in the performance of or failure to perform *Legal Services*

Directors and Officers Liability

made against any *Insured* who is a natural person acting in their capacity as a director or officer of a body corporate (other than a *Recognised Body* or *Subsidiary*) however such exclusion shall not apply to any liability of:

(i) that person which arises from a breach of duty in the performance of *Legal Services*;

(ii) any other *Insured* against any vicarious or joint liability

Employment Breaches & Discrimination

…

Fines & Penalties

…

Fraud / Dishonesty

arising out of, based upon or attributable to a dishonest or fraudulent act or omission committed or condoned by an *Insured* except that no such dishonesty, act or omission will be imputed to:

(i) any other *Insured*; or

(ii) the body corporate unless:

a. in the case of a company it was committed or condoned by all directors of that company; or

b. in the case of *Limited Liability Partnership* it was committed or condoned by all *Members*.

Property Damage

arising out of, based upon or attributable to any *Property Damage* including property occupied and used by the *Insured* in connection with the *Insured's*

Legal Services, except liability for such damage, destruction or loss which arises from breach of duty in the performance of or failure to perform *Legal Services*.
Trade Debts
arising out of, based upon or attributable to any: (i) trading or personal debt incurred by an *Insured*; (ii) breach by any *Insured* of terms of any contract or arrangement for the supply to, or use by, any *Insured* of goods or services in the course of providing *Legal Services*; and (iii) guarantee, indemnity or undertaking by any *Insured* in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that *Insured*.
War / Terrorism
… This exclusion will not apply in respect of any *Loss* resulting from any *Claim* for any civil liability of any *Insured* which arises from a breach of duty in the performance of or failure to perform *Legal Services* or failure to discharge or fulfil any duty incidental to the provision of *Legal Services*."

"**Claims**
Claims Notification
The *Insured* shall give written notice to the *Insurer* of any *Claim* first made against any *Insured* as soon as practicable …"

"**Defence/ Settlement**
The *Insurer* does not assume any duty to defend."

"Minimum Terms and Conditions
"In any dispute in connection with the terms, conditions, exclusions or limitations of this policy it is agreed and understood that the *Minimum Terms and Conditions* will take precedence over any terms, conditions, exclusions or limitations contained herein."

"**Plurals, Headings and Titles**
The descriptions in the headings and titles of this policy are solely for reference and convenience and do not lend any meaning to this contract. Words and expressions in the singular shall include the plural and vice versa. In this policy, words in italic typeface have special meanings and are defined. Words that are not specifically defined in this policy have the meaning normally attributed to them."

136. The Claimants submit that on any plain reading of the Policy it clearly responds to Fordham J's Order. They say the Order meets the definition of "Damages" and therefore "Loss"; their Claim and the correspondence prior to it meet the definition of a "Claim", and the "Claim" clearly relates to the "Civil Liability" of the LLP which arises from the performance of or failure to perform "Legal Services".

137. On the basis that Fordham J's finding was held to be correct, as I so find, AIG says the Claim falls outside the scope of the LLP's cover, as the relevant "Insured", because the liabilities of the LLP "transferred from the Firm" arose from that "transfer", and not from the LLP's performance of or failure to perform any "Legal Services" within the meaning of Policy. It says the Policy would have responded to the Claim if the Firm was the subject of the Judgment for the damages awarded by reference to its breaches of contract.

Similarly, where the Firm committed breaches of trust by paying away the Claimants' deposits in the circumstances of these cases, the Firm was liable for that breach, and remained so liable for it after the LLP was incorporated; such that the Firm was liable to reconstitute the trust fund. However, the Policy does not respond to the Claim because of the Claimants' failure to obtain judgments in the Primary Proceedings against the Firm. As AIG puts it, the way in which the LLP came to be liable to the Claimants under the Judgment and Order is critical in order to understand whether the Policy indemnifies it in respect of that "Civil Liability".

138. Mr Troman says it is immediately apparent that the wording of the Policy does not cover the LLP in respect of liabilities arising from the LLP "taking over responsibility" for liabilities of some other person. Self-evidently, he submits, a "transfer" of a liability on the part of the Firm in respect of breaches on the part of the Firm in the Firms' performance of "Legal Services" to the LLP is not the same as the LLP incurring a direct liability to the Claimants as a result of breaches of duty by the LLP in its own performance of "Legal Services".

139. Mr Troman submits that it is relevant to look at the types of liabilities that are expressly excluded from cover. He says the exclusion concerning liabilities arising out of a "guarantee, indemnity or undertaking" is helpful in understanding the case. That shows the Policy is there to provide cover in respect of breaches of solicitors' duties when acting for and advising their clients, but is not there to provide cover when a solicitor guarantees the conduct of others or provides an indemnity in respect of the conduct of others.

140. The correct approach to interpretation, in a case such as this, is that described by Lord Hodge JSC (with whom Lord Mance, Lord Sumption and Lord Toulson JJSC agreed) in Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57; [2017] AC 73. Coincidentally, a case in which the issue at stake was the application of an identically worded AIG exclusion clause to different factual circumstances. Lord Hodge explained:

> "12. The Law Society in Appendix 1 of the 2009 Rules laid down the minimum terms and conditions of professional indemnity insurance for solicitors and registered European Lawyers in England and Wales ("the Minimum Terms"). The Minimum Terms defined the scope of cover, so far as relevant, in these terms: "The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with the Insured Firm's Practice …".
>
> 13. Clause 6 provided:
>
> "The insurance must not exclude or limit the liability of the Insurer except to the extent that any Claim or Related Defence Costs arise from the matters set out in this clause 6 …
>
> > 6.6 Any: (a) trading or personal debt of any Insured; or (b) breach by any Insured of the terms of any contract or arrangement for the supply to, or use by, any Insured of goods or services in the course of the Insured Firm's Practice; or (c) guarantee, indemnity or undertaking by any particular Insured in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that Insured."
>
> 14. The Policy provides that:

> "In any dispute in connection with the terms, conditions, exclusion or limitations it is agreed and understood that the Minimum Terms and Conditions will take precedence over any terms, conditions, exclusions or limitations contained herein."

15. But, as can be seen by comparing the texts in paras 8 and 10 above, the exclusion is substantially the same in the Policy and in the Minimum Terms and the minor differences in drafting are of no significance.

16. Lord Brightman in *Swain v The Law Society* [1983] 1 AC 598, 618 described the context of the statutory scheme of compulsory insurance:

> "In exercising its power under section 37 The Law Society is performing a public duty, a duty which is designed to benefit, not only solicitor-principals and their staff, but also solicitors' clients. The scheme is not only for the protection of the premium-paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and the mistakes of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the principal purpose of section 37 was to confer on The Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves.

17. Thomas J took the same view in *Kumar v AGF Insurance Ltd* [1999] 1 WLR 1747, 1752, where he said that one must approach the construction of this sort of professional indemnity policy against the regulatory background which aimed to make sure that protection was provided to the clients of solicitors. As a general rule, solicitors when performing work on behalf of their clients, owe no duty of care to third parties whose interests are affected by that work: *White v Jones* [1995] 2 AC 207, 256, per Lord Goff of Chieveley. It is, nonetheless, well known and not disputed in this case that the professional indemnity policy protected not only clients of the solicitors but also those third parties to whom solicitors have been held to owe duties of care in their performance of legal services and to whom they have incurred liability in negligence, such as those who have acted in reliance on negligent misstatements or beneficiaries disappointed as a result of negligence in the preparation or execution of a will. In addition, as Lord Toulson points out (para 42), solicitors' professional liability may include undertakings given to third parties in the course of acting for their clients.

18. A reader of the Policy ascertains the boundaries of AIG's liability by construing the broad statement of cover (para. 8 above) and also the broad exclusions (para. 10 above) in the context of the regulatory background. The exclusion in para. 10 above requires the reader to look to the category of the claim and, in this case, ask whether the claim or loss arises out of, is based upon, or is attributable to a breach by Barrington of a term or terms of a contract or arrangement for the supply of services to it in the course of its provision of legal services. Prima facie, if Impact's cause of action was a breach of a term of a contract or arrangement by which Impact supplied such services to Barrington, the clause would exclude cover, notwithstanding that Impact's loss could be said to have arisen from Barrington's failure to perform legal services for its clients. Two questions therefore arise: the first is whether the contract between Impact and Barrington was of such a nature; the second is whether it

> is necessary to imply a restriction into the relevant exclusion clause limiting its effect in order to make it consistent with the purpose of the policy."

141. Accordingly, the Policy must be interpreted in line with the principal purpose of insurance cover against professional liability, namely, the protection of that section of the public that makes use of the services of solicitors. The SRA Solicitors Insurance Rules do not positively define the scope of solicitors' professional liability, but instead delineate the liability against which they should be required to maintain cover by a process of elimination, which involves combining a very broad insuring clause with a list of exclusions, Impact Funding Solutions Ltd v Barrington Support Services Ltd at [34], [41], [43], [45] per Lord Toulson. Subject to this important consideration, the terms of the Policy, including any exclusions, are to be construed neutrally, i.e. without favouring either the insured or the insurer, applying the established principles of contractual construction: Axis Speciality Europe SE v Discovery Land Co LLC [2024] EWCA Civ 7, [2024] PNLR 16, per Andrews LJ at [10].

142. Taking the approach described, on the true interpretation of the wording of the Policy, I agree with AIG that the Policy does not respond to the entirety of the Claimants' Claim as pleaded (save in respect of Mr and Mrs Darragh, Mr and Mrs Mistry and Mr and Mrs O'Leary). That is, purely on the basis of the direct application of the Policy to Fordham J's Judgment following the judgment in default on liability. Throughout the Judgment, the foundation of Fordham J's findings on causation and loss was the Firm's liability to the Claimants as a result of the Firm's breach of the contractual terms pleaded and the LLP's own assumption of liability to the Claimants for the Firm's pre-existing breaches of contract.

143. But for Fordham J's finding as to the LLP's assumption of liability for the Firm's own breaches of contract, any such contractual claim could only have fallen to be made against the Firm: see, for example, Jenkins v JCP Solicitors Ltd [2019] EWHC 852 (QB); [2019] PNLR 21.

144. In accordance with public policy, the Cover provided under the Policy to each Insured is widely expressed to encompass all Loss resulting from any Claim for any civil liability of any Insured which arises from the performance of or failure to perform Legal Services in private practice as a solicitor. The separate legal entities covered under the LLP's Policy as Insured include each of the LLP as the Policy Holder (and Successor Practice) and the Firm and the Firm's partners as the Prior Practice.

145. Beyond that, the scope of the Cover provided on the face of the Policy, and the basic identity of the relevant Insured as an Insured for the purposes of a Claim under the Policy, are each expressly linked to the relevant entities' own individual performance of, or failure to perform, Legal Services in their capacity as a solicitor. This is at the heart of the wide-ranging cover provided. I do not, therefore, accept the submission that the Policy operates on a global basis, such that it suffices for the purposes of making a Claim against the LLP as Insured that the breaches relied upon are breaches committed by the Firm during the Firm's performance of, or failure to perform, Legal Services. Alternatively, that the very fact there was a transition from Firm to LLP has the effect that the LLP is to be treated as if it had itself performed, or failed to perform, the relevant Legal Services prior to the date of its own incorporation and, then, retainer.

146. Fundamentally, the course of the events which resulted in the Primary Proceedings is highly unusual. It is to be hoped that it is rare that a client's solicitors' decision to re-arrange its own legal business structure for the benefit of its business and partners takes place in such a way that it ultimately results in a tri-partite implied novation (or novation by conduct) between a firm, an LLP and the firm's existing clients. Further or alternatively, that where a relevant insurance policy contains wording such as the Policy, the novation takes place on terms that the firm's pre-existing liability to its former clients for its own contractual breaches does not remain with the original firm. That said, such terms would not ultimately have availed the Claimants, given the course of the Primary Proceedings.

147. Necessarily, it is of very considerable concern to me that such arrangements by solicitors, being arrangements in which members of the public were asked to participate in express reliance upon their professional advisers' assurance that the entirety of their existing interests remained protected, may have this result. That is, that clients intended to be protected through the availability of recourse to their solicitors' professional indemnity insurance instead find they are prejudiced by the removal of their pre-existing ability to seek an indemnity under the terms of a professional liability insurance policy such as the Policy. That is all the more so in the present case where the Firm originally stressed its insurance position to its clients on retainer: Various Claimants at [151].

148. AIG says that the true issue here is of the Claimants' own making. It failed to obtain a judgment against the Firm in respect of its breaches of contract. Mr Troman stated at the hearing that AIG would not have challenged a judgment against the Firm if it had been obtained.

149. However, the impact of the tri-partite novation was to discharge the contract of retainer entirely as between the Firm and the Claimants and to substitute a fresh contract of retainer as between the LLP and the Claimants. As a result, on the particular facts of this case, if the Primary Proceedings against the Firm had not been struck out, AIG could have relied upon the findings of Foskett J to assert that the Firm's pre-novation liabilities to the Claimants in contract were novated to the LLP, such that AIG was not bound to indemnify the Firm, and hence the relevant Claimants, under the Policy.

150. That said, the Primary Proceedings would very likely have proceeded differently if the entirety of the claims initiated against the Firm and Mr Giambrone on each of the causes of action advanced had not been struck out. Alternatively, if matters had proceeded differently for the purposes of the assessment of damages against the LLP in the Primary Proceedings. For example, if the Judgment and the Order had contained a separate assessment of the Claimants' loss and damage as a result of the LLP's other independent breaches of duty and / or contract following its retainer by the Claimants to perform Legal Services as a solicitor.

Whether the fact that the LLP is the Successor Practice to the Firm is of any assistance to the Claimants.

151. As Mr Troman put it, the "claims made" rather than "loss occurring" structure of professional indemnity insurance policies has a number of important effects. Relevant in this case, he says, is the fact that the composition of the practice of the insured professional current when a claim is made against them can be very different from the practice which undertook the work for the client which gives rise to the claim. He gave

the classic example of a traditional firm where some old partners have left and some new partners have joined between the events giving rise to the claim against the firm and the time is actually made against the firm. The policy in place when the claim is made steps in to indemnify the breaches of duty by those who committed them at the time of the events which occurred when the practice was differently made up.

152. As Mr Troman submitted, the coverage provided in respect of Prior Practices is simply a convenience designed to assist in circumstances where a breach of duty causes a loss, but before the claim has been brought there has been a reorganisation of the entity that provided the services. Accordingly, where a claim for negligence arises as a result of a Prior Practice's negligence that claim continues to lie against the Prior Practice and the Prior Practice is entitled to indemnity under the Successor Practice's insurance policy.

153. It is not, for example, unusual for partners newly joining a firm of professionals to give indemnities to old partners leaving the firm by which new partners agree to indemnify any liabilities of the former partners for breaches which occurred whilst they were partners. That, however, is a purely commercial matter between the partners not affecting either the legal liability of the old partners or the operation of the professional indemnity insurance policy. Whatever commercial arrangements which the new outgoing partners have made with new incoming partners does not concern the former client of the firm and does not provide any defence to that client's claim.

154. In summary, professional indemnity insurance "claims made" policies are structured in such a way that civil claims against the insured fall for cover even if the composition of the practice of the insured professional was entirely different when the facts giving rise to the civil claim against the insured occurred. However, the liable parties in law are unchanged.

155. In this case, the Minimum Terms required, and the Policy provides, that insurance is provided not only in relation to claims made against the LLP in respect of its provision of Legal Services but also cover in respect of claims made against a Prior Practice, that is the Firm, arising from its previous provision of Legal Services. I agree with AIG that the fact AIG is obliged to provide cover to the Prior Practice under the Successor Practice's Policy does not serve of itself to alter the requisite identification of the specific entity which is legally liable to the claimant as a consequence of its provision of the relevant Legal Services.

156. As a result, the fact that the LLP was the Successor Practice to the Firm does not render the LLP liable itself for any breaches of duty on the part of the Firm; entitle the Claimants to automatically bring a claim against the LLP in respect of liabilities of the Firm; or oblige AIG to provide any indemnity under the Policy in respect of any liabilities of the Firm transferred to the LLP. As explained above, if the Claimants had obtained judgments against the Firm, as an Insured Prior Practice, in respect of losses resulting from the performance by the Firm of Legal Services or the failure by the Firm to perform Legal Services, then those losses would have fallen to be indemnified under the Policy subject to its terms and conditions. The Claimants obtained no such judgments.

157. Notwithstanding that the LLP assumed liability in contract to each of the Claimants who suffered loss as a result of the Firm's pre-existing breaches of contract as a result of a tri-partite novation, this same analysis stands as regards the claim for indemnity against AIG under the Policy in my judgment. All the liable parties in law remained unchanged in

respect of their own liabilities to the Claimants for their own respective breaches of duty in tort and their breaches of trust. As we see in the various cases before Foskett J, the relevant claimants obtained judgments against the entity that was liable to them: the Firm or the LLP. Following its incorporation and instruction by the Claimants, and its own subsequent breaches of contract, the LLP became independently liable to the Claimants for those breaches.

158. I agree with AIG that the fact the Policy provides cover for both the Firm and for the LLP does not magically have the effect of transferring liability from one to the other in order to effect an indemnity for the LLP in respect of liabilities of the Firm.

The Minimum Terms

159. I have already mentioned the Minimum Terms made in accordance with the Solicitors Indemnity Insurance Rules 2008 ("2008 Rules"). Under the 2008 Rules made by the Law Society in exercise of statutory power under sections 31 and 37 of the Solicitors Act 1974, section 9 of the Administration of Justice Act 1985 and section 89(3) of the Courts and Legal Services Act 1990, solicitors in England and Wales were required to take out and maintain professional indemnity insurance. There was thus a scheme of compulsory professional indemnity insurance which Parliament had authorised. Appendix 1 of the 2008 Rules laid down the Minimum Terms and Conditions with which a Policy of Qualifying Insurance for solicitors and Registered European Lawyers in England and Wales was required to comply.

160. At the hearing, the Claimants belatedly sought to rely upon the inclusion of the Minimum Terms clause in the Policy to support a submission that, even if the Claim is not otherwise covered under the Policy, the Claim must be met in its entirety in accordance with the Minimum Terms. This issue was not pleaded as part of the Claimants' case, including by way of the Amended Reply. It was not, therefore, within the scope of the Preliminary Issue ordered. The issue was not identified by the Claimants in their Reply to the Further Information requested by AIG either.

161. Mr Troman submitted it is not for the court to embark upon the determination of unpleaded issues, but that, nevertheless, it is a bad point. I agree with Mr Troman that the Claimants' approach in taking this point at a very late stage in the Claim is to be deprecated. However, I take the view, against the relevant background of statutory regulation referred to above and the inclusion of the Minimum Terms clause in the Policy, that it would lend an artificiality to the determination of the Preliminary Issue now if the Claimants were debarred from taking the point raised. Prior to the inclusion of the issue in Mr Timson's opening submissions, the issue of non-compliance was raised, and debated, in solicitors' correspondence on 23 July 2024 and 29 August 2024. Mr Troman made submissions on the point in the written opening submissions on behalf of AIG (whilst noting the issue was not pleaded).

162. The Minimum Terms contain the following relevant definitions in paragraph 8.2:

> "Claim means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages ….".
> "Claimant means a person or entity which has made or may make a Claim including a Claim for contribution or indemnity"

"The Firm means the Firm (a) the Partnership (as constituted as at commencement of the period of Insurance or Recognised Body which, or sole practitioner who contracted with the Insurer to provide this insurance; and (b) the Partnership referred to in (a) as constituted from time to time, whether prior to or during the Period of Insurance"
"Firm's Practice means:

(a) the legal Practice carried on by the Firm as at the commencement of the Period of Insurance; and
(b) the continuous legal Practice preceding and succeeding the Practice referred to in paragraph (a) (irrespective of changes in ownership of the Practice or in the composition of any Partnership which owns or owned the Practice)."

"Insured means each person and entity named or described as a person to whom the Insurance extends and includes, without limitation those referred to in clause 1.3 and, in relation to Prior and Successor Practices respectively, those referred to in clauses 1.5 and 1.7"
"Prior Practice means each Practice to which the Firm's Practice is ultimately a Successor Practice by way of one or more mergers, acquisitions, absorptions or other transitions."
"Private Legal Practice" means the provision of services in private Practice as a solicitor or Registered European Lawyer including, without limitation:

(a) providing such services in England, Wales or anywhere in the world, whether alone or with other lawyers in a Partnership permitted for practice … "

"Successor Practice means a Practice identified in this definition as "B", where:

(a) "A" is the Practice to which B succeeds …"; and
(b) "A's owner" is the owner of A immediately prior to transition; and
(c) "B's owner" is the owner of B immediately following transition; and
(d) "transition" means merger, acquisition, absorption or other transition which results in A no longer being carried on as a discrete legal Practice.

B is a Successor Practice to A where:

(i) B is or was held out, expressly or by implication, by B's owner as being the successor of A or as incorporating A, whether such holding out is contained in …".

163. The Minimum Terms define the scope of cover, so far as relevant, in these terms:

"1.1 Civil Liability
The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with the Firm's Practice provided that a Claim in respect of such liability:

(c) is first made against an Insured during the Period of Insurance; or
(d) is made against an Insured during or after the Period of Insurance and arising from Circumstances first notified to the Insurer during the Period of Insurance."

"1.4 Prior Practice

The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with a Prior Practice, provided that a Claim in respect of such liability is first made against an Insured …"

"1.5 The Insured – Prior Practice
For the purposes of the cover contemplated by clause 1.4, the Insured must include
(a) each Partnership … who carried on the Prior Practice …"

"1.6 Successor Practice
The insurance must indemnify each Insured against civil liability to the extent that it arises from Private Legal Practice in connection with a Successor Practice to the Firm's Practice (where succession is as a result of one or more separate mergers, acquisitions, absorptions or other transitions), provided that a Claim in respect of such liability is first made against an Insured …".

"1.7 The Insured – Successor Practice
For the purposes of the cover contemplated by clause 1.6, the Insured must include:
(a) each Partnership or Recognised Body … who, carries on the Successor Practice during the Period of Insurance …".

"4.11 Minimum terms and conditions to prevail
The insurance must provide that:
(a) the insurance is to be construed or rectified so as to comply with the requirements of these minimum terms and conditions; and
(b) any provision which is inconsistent with these minimum terms and conditions is to be severed or rectified to comply.

164. Mr Timson says that to the extent that the Minimum Terms clause in the Policy fails to give full effect to clause 4.11 of the Minimum Terms, the combined effect of the Minimum Terms clause and clause 4.11 is that the wording of clause 4.11 prevails. He submits that the Firm was a Partnership carrying on Private Legal Practice and was a Prior Practice of the LLP, as those terms are defined in the Minimum Terms. Therefore, he says, by operation of the Minimum Terms clause in the Policy and /or clause 4.11 of the Minimum Terms, and in light of clauses 1.4, 1.5 and paragraph 8.2 of the Minimum Terms, liabilities transferred by the Firm to the LLP are covered by the Policy.

165. The Claimants submit that this reading is consistent with the decision of the High Court of Australia in Maxwell v Price [1960] 2 Lloyds Rep 155, as referred to in McGillivary on Insurance Law, 15th ed at 28-098. Mr Timson argues that upon reading the Policy in light of the Minimum Terms, it is clear the Minimum Terms open up the Policy to a wider scope than that drafted in the Policy. He says that is the effect of the SRA's regulation, which is in place to protect Claimants in their present position.

166. Mr Troman draws attention to the fact the definition of "Private Legal Practice" in the Minimum Terms is equivalent to the definition of "Legal Services" in the Policy. He submits that the Policy and the Minimum Terms say exactly the same thing. What

neither the Policy nor the Minimum Terms do is have the effect of making a Successor Practice liable for the breaches of a Prior Practice. He submits that the Minimum Terms delineate in the same way as the Policy the nature of the cover provided by reference to the claim made against the Insured. That claim must arise from the Insured's provision of services in "Private Legal Practice" as a solicitor. This same limiting factor is present in both clause 1.1 of the Minimum Terms and the definition of "Legal Services" in the Policy.

167. Whilst the headings used in the Minimum Terms and the Policy differ, that is not a difference of substance or a difference as to the extent of cover. Equally, the fact the word "performance" appears in the Policy and not in the Minimum Terms makes no difference to the true interpretation of the definition of "Private Legal Practice". The word is used synonymously with "provision". A word found in both the Policy and the Minimum Terms. Additionally, the Minimum Terms do not require, and the Policy also does not provide, see clause 6, for an Insurer to provide an indemnity where a solicitor has chosen to assume liabilities which have given rise to a claim in respect of services that it did not itself provide.

168. In my judgment, on comparison, the wording of the Policy and the Minimum Terms is substantially to the same effect. The minor differences in drafting are of no significance. The insurance must indemnify each Insured against Civil Liability to the extent that it arises from Private Legal Practice in connection with the Firm's Practice. I consider that the terms of the Policy accord with this requirement. The Policy does not stand to be rectified for non-compliance.

Whether, and if so to what extent, the basis upon which the LLP was held liable to the Claimants was not solely the wrongdoing on the part of the Firm, liability for which was transferred to the LLP?

169. At [75]-[81] above, I have set out my analysis of the judgment in default and the Judgment. Whilst the LLP was held liable to the Claimants as a result of the Judgment in default on liability, it was key to Fordham J's Judgment and Order that the damages assessed were awarded in respect of breaches of contract and, on the "typical facts", that the LLP was liable to the Claimants in the sum of the damages assessed because the Firm's pre-existing liability was novated to the LLP.

170. I have made specific findings on the evidence in respect of the deposits paid by the 6 Claimants at [82]-[91]. Similarly, on the specific facts applicable to a Claimant in any given case, if a finding that was made by Fordham J was the result of the LLP's (and not the Firm's) breach of contract in any given case, it was plainly intended that the finding made should translate to the LLP. Mr and Mrs O'Leary did not retain the Firm at any stage, for example.

171. On 4 March 2022, the court ordered that statements of case be served addressing AIG's primary case. The Claimants' Points of Claim, which were settled by the Claimants' previous Counsel, pleaded, in rather wider terms than the Details of Claim, that:

> "3. The pleaded case made allegations of breach of contract, negligence, misrepresentation and deceit against all three defendants including [the LLP]. The Claimants will rely on the judgment on liability and the pleaded case on

which it is based as incontrovertible evidence of what the Claimants say on this point.

4. For example, the Claimants draw attention to the warranties set out at paragraphs 6, 7, 8 and 9 of the particulars of claim …, the breaches of those warranties are particularised at paragraph 10 … and these breaches included breaches by [the LLP] alone, see, for example, paragraph 10d.

5. It was on the basis of these pleadings that the judgment on liability was entered and the assessment of damages made against [the LLP] …

7. At the hearing to assess damages Fordham J was not concerned with whether [the LLP] had separately caused damage but rather his concern was whether the Claimants were entitled to recover as against the then defendant [the LLP] for any damage that might have been caused by [the Firm]. …

8. If the Defendant [sic] primary case is based on a belief that there was a finding that the causation of the damage suffered by the Claimants was solely due to the wrongful actions of [the Firm] and unrelated to the wrongful actions of [the LLP] the Defendant are wrong. The fact is that the principle wrongful conduct in negligence, breach of contract and misrepresentation was committed by [the LLP] on and after 14th October 2008 …".

172. The Claimants are correct that the assessment of damages took place as a result of the default judgment. However, the damages assessed have been assessed on the basis of Fordham J's findings as set out in the Judgment. The Judgment upon which the Claimants rely contains no discussion of causation in negligence or as a result of breach of contract by the LLP or misrepresentation by the LLP on and after 14 October 2008. Including, as a result of the revocation of planning permission on 14 October 2008.

173. When AIG served its Points of Defence dated 31 March 2022, it pleaded at paragraph 23:

"The Basis for the Liability of the LLP to the Claimants …

c. [AIG] accepts that, in principle in respect of other elements of loss awarded by Fordham J [not the deposits], namely the legal fees awarded by paragraph 26 of his judgment, and subject to its secondary case on aggregation, it is liable to provide an indemnity under the Policy to the Claimants in respect of liabilities of the LLP to the Claimants resulting from the LLP's performance of, or failure to perform, "Legal Services" as defined by the Policy.

d. If and to the extent that any Claimant seeks from [AIG] an indemnity under the Policy in respect of a liability of the LLP resulting from the LLP's performance of, or failure to perform, "Legal Services" as defined by the Policy then the Claimant must specifically plead and prove the factual and legal basis for that liability. …

h. Any Claimant who contends that the LLP was liable to any Claimant as a result of the LLP's performance of, or failure to perform, "Legal Services" as defined by the Policy is hereby invited to particularise their case in that regard including, but not limited to, setting out: (1) the facts specific to that Claimant

> out of which the liability of the LLP is alleged to arise in terms of what the LLP did or did not do; and (2) the legal basis for the alleged liability of the LLP in terms of the Claimant's case as to the duties owed by the LLP, in what way they were breached and what loss they caused. In the absence of proper particulars of the liability of the LLP to any Claimant then any Claimant's assertion that the transfer to the LLP of the liabilities of the Firm was not the sole basis upon which they obtained judgement against the LLP falls to be dismissed."

174. AIG thereby extended a clear invitation, and opportunity, to each of the Claimants to properly plead, prove, and particularise any alternative factual and legal basis for entitlement to an indemnity under the Policy in respect of a liability of the LLP resulting from the LLP's performance of, or failure to perform, "Legal Services" as defined by the Policy. In so far as the Claimants, or any of the Claimants, considered that they had such a claim they failed to respond to this invitation.

175. Instead, in the Claimants' Reply dated 8 April 2022 and Amended Reply dated 3 October 2023, the Claimants simply chose to repeat in very general terms at paragraph 11, that Fordham J did not award damages for the paying away of the Claimants' deposits "solely because of the breach of contract by [the Firm]", and that the Claimants' pleaded case:

> "included claims for continuing and further breaches by the LLP which breaches caused or contributed to the loss reflected in the damages award".

176. At paragraph 15 of the Reply and Amended Reply, the Claimants pleaded their deposits were at "high risk" due to breaches of contract by the Firm:

> "b) but that high risk became an actual loss only after the Claimants were being represented by the LLP whose additional breaches of contract and negligence ensured that the Claimants position [sic] in terms of the deposits moved from high risk to irrecoverable. Doubtless, had the Firm not been in breach of contract all of the losses would have occurred in any event after the Claimants fell into the hands of the LLP due to the breaches of contract and negligence by the LLP. Alternatively, if the Firm had been in breach of contract but the LLP had acted properly the Claimants might have avoided the losses. But in the event both the Firm and LLP contributed in their turn to the causation of the losses to the Claimants.
>
> c) … In particular the Claimants point to the fact that crucially the LLP failed to warn the Claimants of the devastating consequences for the development of the passing of the two decrees … on 18 October 2008 …".

177. The latter reasoning was not reflected in Fordham J's findings in the Judgment. Indeed, if anything, the Claimants' Reply and Amended Reply suggest that it was accepted that all the Claimants had originally instructed the Firm and, hence, that their losses were properly attributable to the Firm. The 6 Claimants were not identified, and their separate claims were not pleaded. The individual Claimants' reliance upon the LLP and any relevant issues of causation and loss were wholly unparticularised.

178. A Case Management Conference was held on 19 September 2023. As mentioned above, the Preliminary Issue was framed as "the subject of the current Points of Claim, Points of Defence and Amended Points of Reply as a preliminary issue".

179. AIG served a Request for Further Information dated 11 October 2023 ("AIG's Request"). The Requests (set out below), focused upon the Judgment and the proper identification any claim that the Claimants sought to advance independent of the Firm's liability and the LLP's liability as a result of the novation.

180. When disclosure took place in accordance with the Order for Directions, the Claimants' first disclosure list dated 15 November 2023 included the bundles for the hearing before Fordham J; the revocation of the planning permissions dated 14 October 2008; and an extract from the Criminal Court of Appeal of Reggio Calabria's decision of 19 January 2018. The Claimants did not subsequently seek any permission in accordance with the Directions to rely upon any additional witness evidence that had not been placed before Fordham J or served already in the Claim.

181. The Claimants' Reply to AIG's Request was dated 11 December 2023.

182. As regards AIG's Request and the Claimants' Reply, at Request 1, focusing upon the Judgment and Order, AIG had asked the Claimants to:

> "set out with full particularity and by reference to both the statements of case advanced against the LLP and the relevant paragraphs of the judgment of Fordham J, the alleged breach or breaches of duty on the part of the LLP and the alleged failure to perform legal services on the part of the LLP which it is alleged resulted in damages awards in favour of the Claimants."

183. In their Reply, the Claimants' pleaded that they relied upon sub-paragraphs 7c, d, f, j, m, o and paragraph 9 of the Particulars of Claim in the Primary Proceedings and, "to the extent that any of the breaches pre-dated the transfer of liabilities to the LLP", said the LLP had a continuing duty to rectify breaches by the Firm. They pleaded:

> "In the Fordham J judgement, the Claimants say the judgement is a whole and is not to be taken piecemeal but will rely in particular to answer the request on paragraphs 1, 4, 9 and 11 to 17 and 27-60 inclusively."

The Claimants relied upon the fact the witness statements produced for the hearing before Fordham J contained an extract from the judgment of the Criminal Court in Calabria on 19 January 2018 which found that the planning permissions were revoked on 14 October 2008. They pleaded it was at this time:

> "that the most serious breach was committed by [the LLP] which caused the collapse of the investment of each of the Claimants".

184. In AIG's Request under paragraph 11(c) of the Points of Claim, AIG had asked the Claimants to identify by reference to the statement of case and the relevant paragraphs of the Judgment of Fordham J and the decision of Master McLeod, how and in what way the alleged representations by the LLP resulted in damages awards in favour of the Claimants. The Claimants replied that they relied upon paragraphs 6-8 of the Judgment.

185. In AIG's Request under paragraph 13 of the Points of Claim, the Claimants were asked to identify "with particularity, the sums the Defendant is invited to agree". The Claimants replied the "whole of the award", but if the LLP was:

> "liable only for damage caused after [7 April 2008]: the Claimants will say that they are entitled to: the return of the deposits, the return of the retention fees, the return of legal fees, travel costs and damages for the loss of a chance of an alternative investment. The LLP ought to have advised the Claimants on or about the 14 October 2008 to this effect by advising the Claimants to Immediately [sic] request the repudiation of the contract and the immediately [sic] return of the deposit. Since the LLP did not act in such a way in or around the 14 October 2008 each Claimant ought to be entitled to be refund the fees paid to the LLP and their predecessor for the negligent legal advised [sic] received. In the alternative, the Claimants will seek the loss of the chance of recovering those losses had the LLP as at the 7th April 2008 or subsequently, provided proper advice to the Claimants. In addition the Claimants will say that the LLP is liable for each fee paid and/or expense incurred from the 7th April 2008 onwards. (sic)"

186. In AIG's Request made under paragraph 14 of the Amended Reply, AIG requested that the Claimants identify by reference to the statements of case advanced against the LLP and the relevant paragraphs of the Judgment how and in what way the alleged failure on the part of the LLP to provide a warning resulted in damages awards in favour of the Claimants. The Claimants replied that the statement of claim and Judgment: "speak for themselves". They repeated their Reply to the first Request, and pleaded:

> "had the LLP warned the Claimants as soon as the Firm had transitioned into the LLP the Claimants could have taken steps to recover their money and avoided wasting more money. The judgment at paragraphs 1 to 10 and 27 to 60 is illustrative".

187. Accordingly, and notwithstanding the further opportunity afforded by AIG, the Claimants again failed to properly plead and particularise any alternative case on causation based upon the LLP's own failures.

188. Following the listing of the Preliminary Issue for trial, the PTR listed by the Court for 6 September 2024 was vacated by the parties with consent. The Claimants did not seek to apply to amend the Claim, or their statements of case, or apply for an extension of time to serve additional disclosure and witness statements to evidence any alternative case on causation, or apply to amend or adjourn the Preliminary Issue in order to re-frame the Claim or the Claimants' case on causation and loss and damage.

189. Notwithstanding this unpromising background, Mr Timson submits that if AIG wished to challenge any aspect of the Claimants' case as set out in the Particulars of Claim in the Primary Proceedings it was for AIG to plead and prove its challenge to do so. Mr Timson submits that instead all AIG did in its Points of Defence was to say Fordham J was wrong as a matter of law to find that liabilities of the Firm to the Claimants arising from breach of contract were transferred to and borne by the LLP. I do not agree with Mr Timson's reading of the Points of Defence. The submission also overlooks the fact that the relevant findings made as to causation are set out in the Judgment.

190. At the hearing, Mr Timson separately relied upon three particular examples which he said set out the LLP's own breaches. These matters were not pleaded by the Claimants in their Reply and Amended Reply or the Claimants' Reply to AIG's Request. They were:

(1) in relation to the issue of planning permission as:
   (a) on 17 June and 26 June 2008, the planning department gave notice suspending the building permits, and cancelled the permits in October 2008 (Various Claimants, para [204];
   (b) the LLP's update to the purchasers on 19 January 2009 did not mention the planning issues (Various Claimants, paras. [210]-[212]);
   (c) that letter was sent when the LLP was aware of the planning issues (Various Claimants at para [220]); and
   (d) it was not until 22 June 2009 that the LLP informed the purchasers of the issues regarding the planning permissions (Various Claimants at para. [254);

(2) in relation to commission as:
   (a) the LLP realised by April 2009 at the latest (but probably before) that the purchasers should have been told at the outset about the division as to commission (Various Claimants at [375]);
   (b) the LLP deliberately concealed that it had earlier knowledge of the levels of commission in its letter to the purchases dated 29 April 2009 (Various Claimants at [459]- [416]); and
   (c) it failed to tell the claimants that the level of commission was unusually high (Various Claimants at [368]);

(3) in relation to the deposits being held in trust until a legally enforceable insurance bond was in place:
   (a) prior to 6 April 2008, the Firm should have told the claimants that the guarantees did not comply with article 3.1 and that it was negligent not to have done so (Various Claimants [128]);
   (b) where monies were paid out when there was no compliant guarantee in place, the Firm was liable to restore the trust fund to the position it would have been in if it had performed its obligation under the trust, namely, not to pay out the deposit unless there was a compliant guarantee (Supplemental Judgment at [12]); and
   (c) the trust obligations of the Firm in light of the fiduciary duties to the claimants were continuing and those continuing obligations transferred to the LLP or alternatively were created upon the transfer.

191. Mr Troman rightly responded that the Points of Claim to which AIG had pleaded made no attempt to articulate the basis upon which the Claimants claimed the LLP was liable to them other than by way of transfer of liabilities. In the Reply and Amended Reply, the Claimants' sole allegation was that the LLP had breached its duties to the Claimants in failing upon the revocation of planning permission on 14 October 2008 to report that fact to the Claimants. A matter the Claimants failed to properly particularise or develop further in order to establish causation, in any event. The three matters identified by Mr Timson in his written opening introduced a further new and unpleaded case as to the liabilities of the LLP independent of the Firm. Mr Troman said the court should not entertain this, but it went nowhere anyway because none of this alleged wrongdoing was identified by Fordham J or held to have caused any loss to the Claimants.

192. As explained, for the purposes of the Claim, the basis of the LLP's liability to the Claimants as a result of the Primary Proceedings is a matter of considering not only whether the LLP breached duties owed to the Claimants, but also whether any such breaches of duty caused the Claimants to sustain any losses and, if so, what losses. As Fordham J stated at paragraph [6] of his Judgment in the Primary Proceedings, the

Claimants' Counsel needed to prove to the court's satisfaction that the losses claimed from the LLP were recoverable and, if so, the correct extent of that recoverability. As I have identified by reference to the detail of the Judgment, each of the findings that Fordham J made was a finding in contract; and a finding explained by reference to the operative facts and law as he found them to be. In my judgment, none of the specific matters identified by Mr Timson was pursued before Fordham J or the subject of the judge's own legal and evidential findings. The Claimants' own Reply to AIG's Request failed to properly link any alternative bases of claim (such as Mr Timson's reliance on the revocation of the planning permission on 14 October 2008), back to the findings made in the Judgment.

193. Whilst there may be reason for the Claimants to believe, subject to establishing relevant facts and law, that the LLP's additional liabilities in respect of further breaches of contract and / or independent breaches of duty also caused them to suffer loss and damage within the scope of a Claim against the LLP under the Policy, their pleaded reliance upon the Judgment and the Order is not sufficient for that purpose here. Furthermore, neither the Claimants nor the Defendant approached their preparation for this Preliminary Issue hearing, or made any submissions, on the basis this hearing fell to be conducted as a fresh assessment of damages exercise based upon each different cause of action pleaded in the Particulars of Claim in the Primary Proceedings. Indeed, as the Claimants' own Reply to AIG's Request had already identified, even if one or more of the alternative bases for the LLP's liability following its retainer was found to have caused each Claimant to suffer loss and damage within the scope of the Policy, any such loss and damage may very well have fallen to be quantified differently on the evidence. Specifically, for example, on a loss of a chance basis.

194. With the exception of those matters I have specifically identified, the basis upon which the relevant liability was identified and assessed in the Judgment was the wrongdoing of the Firm, the contractual liability for which was assumed by the LLP.

195. At the conclusion of Mr Timson's submissions in reply at the hearing, Mr Timson said, in the event that I found against the Claimants' Claim, that he would invite me to give directions for the Claimants to set out or plead a proper case against the LLP now. Mr Troman said that he would object to any such course of action at this very late stage, and particularly in circumstances where, as set out above, AIG had already afforded the Claimants every opportunity over a prolonged period of time to plead, prove and particularise the basis of any alternative claims to indemnity.

196. As matters stand, the question of any such directions does not fall for my decision as no formal application has been made to me by the Claimants and no draft order submitted. In addition, no consideration has apparently been given to the fact the LLP is not party to the Claim. Nevertheless, and prior to any consequentials hearing, Mr Timson has subsequently specifically requested that my judgment should contain a ruling on the invitation that he had made in submissions. I do not accede to that invitation. Each of the points that Mr Troman made by way of objection in submissions was well-made.

Conclusions

197. In conclusion, the first limb of AIG's primary defence fails because Fordham J's finding was not wrong as a matter of law.

198. As to the second limb of AIG's primary defence, and subject to the determination of AIG's Aggregation Defence:

   i) AIG is bound to indemnify the following 6 Claimants in respect of the amount of their deposits: Mr and Mrs Darragh; Mr and Mrs Mitry; Mr and Mrs O'Leary. And, subject to a chronological review of Fordham J's findings in respect of each of the other component sums awarded to them by way of damages, in respect of the sums properly attributable to the LLP's performance, or failure to perform, the relevant Legal Services (rather than the Firm), as intended by Fordham J. These Claimants are entitled to an appropriately worded declaration to that effect.

   ii) In so far as any of Fordham J's specific findings on the "typical facts" in respect of each of the other heads of loss and damage also properly falls to be construed, in the case of any individual Claimants, as a finding that was directly applicable to a breach of contract by the LLP (and not to a pre-existing breach by the Firm), AIG is bound to indemnify such Claimants in respect of the relevant sum or sums awarded by Fordham J. Subject to their identification by Counsel in accordance with the checks that Fordham J had directed in his Judgment, any such Claimants are entitled to an appropriately worded declaration to that effect.

   iii) Subject to the exceptions at i) and ii) above, AIG is not bound to indemnify the Claimants in respect of the total sums of the damages, interest and costs awarded by Fordham J under his Judgment and Order. The Policy does not respond to the Judgment against the LLP where the damages awarded to the individual Claimants were assessed by Fordham J as a consequence of the novation of the Firm's pre-existing liabilities for its breaches of contract to the LLP.

Post Script

199. When I circulated this judgment in draft on 16 January 2025 I invited the parties to agree an order for my approval and directed that there should be a consequentials hearing on the issue of the terms of the order and/or on costs, if those matters could not be agreed. Thereafter, the Claimants sought, and I gave, two extensions of time to the Claimants, deferring the date upon which this judgment would have been handed down. Having ultimately extended time to 31 January 2025 at 4pm at the Claimants' request, the Claimants failed to comply with that deadline. The Claimants did not seek any further extension of time.

200. As regards paragraph 198 ii) above, it is AIG's position, as set out in an email from Mr Troman dated 22 January 2025, that there are no Claimants entitled to such a declaration. Beyond the 6 Claimants identified at the hearing, the Claimants have not sought to identify any other Claimants who would be entitled to such a declaration. Accordingly, no such declaration will be made.

201. In my draft judgment I drew attention to the fact that no oral submissions had been made to me in respect of AIG's reference in the Points of Defence to the legal fees that were awarded at paragraph 26 of the Judgment. I invited clarification as to whether or not paragraph 23c of the Points of Defence amounted to a concession in that regard. Mr Troman has confirmed to me that the Defendant's position is set out at paragraph 63 of AIG's written opening and that no concession was made. It has always remained the

case that AIG relied upon Fordham J's finding at paragraph 26 of the Judgment. AIG says there is no basis upon which the LLP can have been independently liable for the relevant losses unless it produced the reports on title.

202. In response, Mr Timson sought to make submissions, for the first time, to the effect that a concession had been made and, indeed, a concession extending to any head of loss. Whilst the matter is now somewhat academic as the Claimants have not sought to identify any such relevant sums, I am satisfied that paragraph 23 of the Points of Defence contains no such concession.