Neutral Citation Number: [2022] EWHC 2589 (Comm)

Case No: CL-2021-000582

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2022

Before :

MR JUSTICE FOXTON

- -

Between :

ROYAL & SUN ALLIANCE INSURANCE LIMITED & OTHERS	**Claimant / Arbitration Respondent**
- and -	
TUGHANS (a firm)	**Defendants / Arbitration Claimants**

- -
- -

Ben Hubble KC and **Brendan McGurk** (instructed by **DAC Beachcroft LLP**) for the **Claimant (and Arbitration Respondent)**
Richard Coleman KC and **Nathalie Koh** (instructed by **Fenchurch Law Limited**) for the **Defendant (and Arbitration Claimant)**

Hearing dates: 27 and 28 July 2022
Further Submissions: 22 August, 2 and 7 September 2022
Draft judgment to parties: 13 September 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 14 October 2022 at 10:00am.

Mr Justice Foxton :

1. This is the hearing of three challenges brought by the Arbitration Respondent (**RSA**) to the Final Arbitration Award (**the Award**) of 7 September 2021 in which the Arbitrator declared that RSA was obliged to indemnify the Arbitration Claimants (**Tughans**) in respect of certain losses and liabilities.

2. RSA has brought a "triple crown" of Arbitration Act 1996 (**the 1996 Act**) challenges to the Award. It is said that:

   i) the Arbitrator acted in excess of jurisdiction for the purposes of s.67 of the 1996 Act;

   ii) the Arbitrator's decision to grant the declaration in issue involved a serious irregularity under ss.68(2)(a), (b) and/or (c) of the 1996 Act which has caused RSA substantial injustice; and

   iii) the Arbitrator's decision involved an error of law (which is challenged under s.69 of the 1996 Act, permission to bring such a challenge having been granted by Henshaw J).

THE BACKGROUND

3. The arbitration between the parties took place at a point in time at which there have been no factual findings in any form of proceedings (criminal or civil) as to the underlying events, but where allegations had been made in proceedings against Tughans, and Tughans wished to ascertain its insurance coverage position in relation to those allegations. The section which follows does not, therefore, involve any factual findings as the conduct or state of mind of any individual, but sets out the assumed background against which the issues raised in the arbitration fell to be determined. What actually happened, and the state of mind with which relevant individuals acted, will be a matter for determination in other proceedings. Nothing in this judgment is in any way intended to pre-judge or influence that determination.

4. The origins of the dispute lie in a transaction entered into by the National Asset Management Agency (**NAMA**), a "bad bank" established in December 2009 by the Eire government to acquire and manage impaired loans held by participating Irish banks and any associated security. NAMA was assisted in its work in relation to transactions involving banks in Northern Ireland by a Northern Ireland Advisory Committee (**NIAC**). Over the period from 13 May 2010 to 7 November 2013, Mr Frank Cushnahan was a member of the NIAC.

5. NAMA decided to sell that part of its portfolio which involved Northern Irish property loans (**the NI Loan Book**), an endeavour which became known as "Project Eagle". Mr Ian Coulter, then managing partner of Tughans (a firm of solicitors operating in Belfast) and chairman of the Confederation of British Industry, Northern Ireland, was interested in facilitating such a sale, and he appears to have contacted Mr Tuvi Keinan about the project. Mr Keinan was a partner in Brown Rudnick LLP (**BRUK**), a law firm established as an English limited liability partnership, which was an affiliate of the US law firm Brown Rudnick LLP (incorporated under the laws of the Commonwealth of

Massachusetts). Mr Keinan had contacts in the USA with interests who were thought to be potential purchasers of the NI Loan Book.

6. Mr Keinan initially introduced a US investment management firm called Pacific Investment Management Company (**PIMCO**) as a potential purchaser. PIMCO established a special purpose vehicle called Bravo SPV as its proposed purchasing entity. An engagement letter between Bravo SPV and BRUK dated 26 September 2013 provided as follows:

> "As you are aware, under the terms of the Engagement it is proposed that we will pay you a success fee of up to €16m … in connection with the introductory services associated with the transaction. The success fee will only be payable upon our successful completion of the Transaction".

The engagement letter indicated that the success fee would be split three ways, between BRUK, Tughans and Mr Cushnahan.

7. On 13 March 2014, PIMCO withdrew from the proposed acquisition (it is said because it had discovered a proposed payment to Mr Cushnahan, although I make no finding on this issue: see [3] above). However, Mr Coulter and Mr Keinan identified another potential buyer, US private equity interests operating through a Delaware company, a Delaware limited partnership and a Netherlands holding company, and who I shall refer to as **Cerberus**.

8. On 23 March 2014, BRUK sent the terms of a proposed engagement letter to Cerberus. The letter referred to BRUK providing "services to Cerberus on an exclusive basis in connection with" its acquisition of the NI Loan Book through a subsidiary referred to as "Newco", those services to include "assisting in connection with the Transaction and reviewing documents as requested by Cerberus". The engagement letter continued:

> "In the event that Newco consummates the Transaction, Brown Rudnick will be entitled to a success fee of £15,000,000 … ('the Success Fee') … Brown Rudnick agrees that you shall only be obligated to pay the Success Fee to Brown Rudnick upon successful completion of the Transaction and not under any other circumstances (including any default by you hereunder).
>
> It is acknowledged and agreed that upon receipt of the Success Fee, if any, Brown Rudnick shall pay fifty percent (50%) of the Success Fee to Tughans, a Northern Ireland law firm (subject to Brown Rudnick and Tughans bearing their proportionate share of any taxes) in respect of services rendered by Tughans in connection with the consummation of the Transaction by Newco. Brown Rudnick acknowledges and agrees that (1) prior to the payment of the Success Fee, if any, Brown Rudnick shall obtain and provide to Cerberus a written certification from Tughans containing the same representations and warranties set forth in this letter under the section entitled 'Representations and Warranties' in form and substance reasonably acceptable to Cerberus (the 'Tughans Letter') and (2) Brown Rudnick may not make any payment of the Success Fee, if any, to Tughans prior to confirmation by Cerberus in writing that the Tughans letter is acceptable".

9. The "Representations and Warranties" section provided:

"Brown Rudnick represents and warrants the following:

1. Brown Rudnick is aware of and familiar with the provisions of the U.S. Foreign Corrupt Practices Act, as amended, and its purposes, and any other anti-corruption law applicable in a jurisdiction in which it or any party hereto may have conducted, or will conduct business, including but not limited to the UK Bribery Act of 2010, as amended and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, as amended (hereinafter "Applicable Anti-Corruption Laws") and have not, directly or indirectly, violated any Applicable Anti-Corruption Law. Without limitation of the generality of the foregoing, none of Brown Rudnick or any of its partners, directors, officers, employees or agents has made or will make, directly or indirectly, any payment, loan or gift (or any offer, promise or authorisation of any such payment, loan or gift), of any money or anything of value to or for the use of any Government Official under circumstances in which any of them knows or has reason to know that all or any portion of such money or thing of value has been or will be offered, given or promised, directly or indirectly, to any Government Official, for the purpose of inducing the Government Official to do any act or make any decision in its official capacity (including a decision to fail to perform his or its official function) or use its influence with a government or instrumentality thereof in order to affect any act or decisions of such government or instrumentality or to assist Cerberus and/or its affiliates in obtaining or retaining any business;

2 Neither Brown Rudnick nor any of its partners, directors, officers, employees or agents providing services pursuant to this letter is a Government Official or has a family relationship with any Government Official in the jurisdictions in which it will conduct business pursuant to this engagement, except as disclosed to, and agreed to in writing by, Cerberus. Brown Rudnick will advise Cerberus promptly to the extent any such family relationship arises during the term of the engagement, and Brown Rudnick and each of our partners, directors, officers, employees or agents will provide adequate assurances, whether in the form of a certification, a formal recusal by the relevant family member or otherwise, to satisfy Cerberus that no violation of Applicable Anti-Corruption Laws will arise as a result of such family relationship. Should in any instance Cerberus determine, reasonably and in good faith, that Brown Rudnick or any of our partners, directors, officers, employees or agents have failed to provide adequate assurances that a particular family relationship with a Government Official will not violate the applicable Anti-Corruption Laws, Cerberus reserves the right to terminate the engagement immediately and refuse to pay the Success Fee, if any; and

3 For all purposes and at all times, Brown Rudnick is not and will not be in violation of any applicable conflict of interest law by acting for, and accepting the Success Fee, if any, from Cerberus.

Brown Rudnick agrees that it will, at the request of Cerberus, certify the continuing accuracy of the representations and warranties set forth in this section. Brown Rudnick further agrees that should it learn of information regarding any

> possible violation of Applicable Anti-Corruption Laws in connection with services provided for in this letter, Brown Rudnick will immediately advise Cerberus of such knowledge or suspicion."

10. At 06.13 am on 24 March 2014, Mr Keinan sent Mr Coulter a copy of the draft engagement letter, which Cerberus had by then "fully signed off on", asking "Are you ok with it as far as Tughans obligations are concerned? Please can you confirm. I would like to sign it on behalf of BR[UK] this morning and get Cerber[us] to countersign". Mr Coulter replied at 08.10am saying, "these terms are confirmed". The letter of engagement (**the BRUK Letter of Engagement**) appears to have been signed by BRUK and Cerberus later that day.

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

12. The transaction with Cerberus closed on 20 June 2014 (**the Cerberus Transaction**). At that point, no engagement letter had as yet been entered into between BRUK and Tughans. On 13 August, Mr Keinan wrote to Mr Coulter asking him to sign a letter of engagement to be dated 8 July 2014, and to issue an invoice for Tughans' share of the Success Fee dated 13 August 2014. Mr Coulter sent through a signed letter of engagement (**the Tughans Letter of Engagement**) later that day.

13. The Tughans Letter of Engagement provided:

> "We have agreed to provide strategic advice to you on an exclusive basis in connection with the Transaction (as defined in [the BRUK Letter of Engagement]).
>
> …
>
> Success Fee
>
> The firm's fees on this engagement shall, unless otherwise agreed with you, be as specified within [the BRUK Letter of Engagement] under the heading 'Success Fee' and be subject to the same conditions as set out under such heading, mutatis mutandis.
>
> ….
>
> We hereby acknowledge that you shall not be obligated to pay the Tughans' Fee [50% of the Success Fee provided for in the BRUK Letter of Engagement] unless (1) the Transaction has successfully completed and (2) you have received the Success Fee from Your Client in cleared funds. You shall not be obligated to pay the Tughans' fee in any other circumstances.

> We further acknowledge and agree that payment of the Tughans' fee is also dependent on (1) us providing the representations and warranties set forth in this letter …. and (2) prior receipt by you from Your Client in writing that this letter is acceptable to them acting reasonably."

14. The "Representations and Warranties" section of the of Tughans Letter of Engagement were essentially in the same terms as those set out at [9] above, save that references to BRUK were replaced by references to Tughans, references to Cerberus replaced by references to "you and/or your client" and the reference to the Success Fee replaced by a reference to the amount to be paid to Tughans.

15. On 15 August 2014, BRUK paid £7.5m plus VAT (£9m in total) to a Tughans' account with Danske Bank which it has been alleged was not their ordinary office account (**the Tughans Fee**). On 19 August 2014, it is alleged that Mr Coulter told his partner at Tughans that he had generated a fee of £1.5m on a highly confidential transaction relating to the purchase of loans from NAMA. On 15 September 2014, it is alleged that Mr Coulter arranged for the transfer of £7.2m of the £9m (an amount equivalent to the £6m which Mr Coulter had not revealed to his partners and 20% VAT) out of the Danske Bank account to an account in the name of a company registered in the Isle of Man which it is alleged that Mr Coulter had established.

16. Between 24 and 26 November 2014, it is alleged that Mr Coulter told the other partners in a series of meetings about the full amount of the Tughans Fee and the fact that a significant amount had been paid into the bank account of the Isle of Man company. Following those meetings, on 1 December 2014, £6m of the transferred amount was returned to the same Tughans' account from which it had originally been transferred (the remainder following on 26 February 2015).

17. Mr Coulter resigned from Tughans on 9 January 2015. On 28 January 2015, Tughans made a report in respect of Mr Coulter's conduct to the Law Society of Northern Ireland (**LSNI**), who commenced an investigation.

18. On 9 February 2015, Tughans notified the events relating to the firm's involvement in the Cerberus Transaction to RSA as a "circumstance" under Tughans' Master Policy of Insurance (**the Policy**) which had incepted on 1 November 2014.

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

20. On 3 November 2017, BRUK sent a letter of claim to Tughans. That letter of claim alleged as follows:

    i) The statements made by Mr Coulter on 24 March 2014 (see [10] above), 3 April 2014 (see [11] above) and orally to similar effect on a number of occasions were false and fraudulent, because Mr Coulter intended to transfer part of the Tughans Fee to Mr Cushnahan.

ii) BRUK had entered into the Tughans Letter of Engagement, and paid Tughans the Tughans Fee, in reliance on those representations.

iii) As a result, BRUK had suffered substantial losses, including losses incurred in dealing with investigations into the matter by various authorities.

iv) BRUK had claims against Tughans of various kinds, including for damages and/or rescission of the Tughans Letter of Engagement for fraudulent misrepresentation; for breach of fiduciary duty; for liability to account for the Tughans Fee as a constructive trustee; and in unjust enrichment arising from receipt of the Tughans Fee in breach of fiduciary duty.

v) It was noted that the Tughans Fee remained identifiable in the relevant Tughans' bank account.

vi) It was stated that BRUK intended to claim damages for all the loss it had suffered, which included the amount of the Tughans Fee and the costs incurred by BRUK in dealing with the various investigations.

vii) By way of "next steps" it was stated that "[BRUK] requires Tughans to compensate it for its losses. As a preliminary step [viz to such compensation] Tughans should repay to [BRUK] the Tughans Fee with further losses and costs to be agreed".

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

22. On 9 March 2018, RSA informed Tughans that it was reserving its rights in relation to cover under the Policy. That letter identified a number of issues which RSA was considering, including whether the claims arising from Tughans' involvement in the Project Eagle transaction and the Tughans Letter of Engagement met the Policy requirement that they were "in respect of any civil liability ... incurred in connection with the Practice carried on by or on behalf of the Solicitor" (**the Solicitors' Practice Issue**).

23. On 3 May 2018, RSA informed Tughans that it had reached a provisional decision to decline cover on the basis of the Solicitors' Practice Issue.

24. On 19 December 2018, RSA communicated its formal decision to decline cover on the basis of the Solicitors' Practice Issue, but also stated:

> "Further and in any event, the simple reality here is that Tughans (who retained the Success Fee) have not and could not suffer a loss such as would give rise to a right of indemnity from Insurers. It is axiomatic that a contract of insurance is a contract of indemnity and indemnity only. Here, Tughans cannot be said to have suffered a loss and so it is not entitled to an indemnity … In reaching that view, Insurers have regard to the following factors:

8.1. First, the Success Fee of £7.5m + VAT was only obtained (assuming the claim to be true) consequent upon Mr Coulter's fraudulent representation; it is money that the Firm should never have received had Mr Coulter acted honestly;

8.2. Second, the Success Fee is out of all proportion to the time value of any work actually done;

8.3. Third, Tughans itself was completely unaware of the Success Fee until after it was received by (and/or returned to) the Firm;

8.4. Fourth, Tughans had reason at the time it became aware of the Success Fee to be concerned that Mr Coulter was acting dishonestly in respect of it and/or in respect of its dissemination;

8.5. Fifth, it was in such circumstances that Tughans elected to retain the Success Fee rather than to return the fee."

25. Tughans did not provide a substantive response to that letter until 30 July 2020. In the interim there were a number of developments so far as the claims against Tughans were concerned.

26. Cerberus and BRUK entered into a settlement on 13 May 2019 which involved BRUK and its insurer ERSIC taking an assignment of Cerberus' claims against Tughans.

27. ERSIC issued proceedings against Tughans in the High Court of Northern Ireland on 13 March 2020 claiming damages for loss and damage caused by:

i) fraudulent and/or negligent misrepresentation, misstatement or deceit, or under the Northern Ireland equivalent of the Misrepresentation Act 1967;

ii) breach of fiduciary or contractual duties owed to BRUK; and/or

iii) negligence;

alternatively a contribution under the Civil Liability (Contribution) Act 1978. Those proceedings were later discontinued.

28. On 20 March 2020, BRUK issued proceedings against Tughans in the High Court of Northern Ireland in essentially the same terms.

29. On 5 June 2020, ERSIC sent a pre-action protocol letter to Tughans summarising the claim as advanced in its Writ of Summons. That letter included a section headed "Quantum" which stated:

> "You will be in receipt of a letter from [BRUK] as to the extent of their losses but we understand that these will include:
>
> - the [Tughans' Fee], being £7.5m;
> - [BRUK]'s costs incurred in relation to the civil and criminal investigations;
> - [BRUK]'s costs incurred in relation to Cerberus's complaints;

- Lost profits, as a result of the diversion of BR's fee earners from other clients' work.

For its part, [ERSIC] is not seeking recovery of the relevant part of the success fee from Tughans but it is seeking full compensation in respect of the amounts that it has paid out as set out above – for all intents and purposes, this equates to the $10m sum insured (which will undoubtedly be exhausted)".

30. On the same date, BRUK sent its pre-action protocol letter to Tughans summarising the claims it was bringing against Tughans, both in its own right and as Cerberus' assignee. A section headed "Nature of Relief Claimed" provided:

"5.1 In summary, Brown Rudnick seeks damages for losses suffered by reason of the matters set out above.

5.2 The entirety of these losses are not yet quantifiable, particularly in light of the ongoing investigations. However, these losses will include but are not limited to:-

5.2.1 The Tughans' Fee;

5.2.2 Brown Rudnick's legal costs in relation to all criminal and civil investigations in relation to Project Eagle;

5.2.3 Brown Rudnick's legal costs and/or damages in relation to any civil action brought by Cerberus and/or any other party arising out of Tughans' misconduct;

5.2.4 Brown Rudnick's loss of revenue as a consequence of both time spent on the investigations and actions;

5.2.5 Damages and/or rescission of the Tughans Letter arising from the fraudulent misrepresentations that induced Brown Rudnick to enter into the transaction; and

5.2.6 Tughans owed Brown Rudnick a fiduciary duty and acted in breach of that duty by receiving the Tughans' Fee having fraudulently misrepresented the position to Brown Rudnick. Consequently, a declaration that Tughans now holds the funds on constructive trust for Brown Rudnick, having been unjustly enriched by receiving them in breach of fiduciary duty.

5.3 Cerberus also requires compensation for losses suffered as a result of the matters set out above. In reliance upon the representations and warranties detailed in this letter, Cerberus authorised Brown Rudnick to make payment to Tughans, and thereby suffered the following loss and damage:-

5.3.1 Payment of the Success Fee;

5.3.2 Substantial costs in dealing with the various criminal and civil investigations; and

5.3.3 Loss of revenue or the lost chance of revenue to include that consequent upon the fact that Cerberus has had to divert its employees from remunerative work and/or the opportunity of such work.

For all of the reasons above, we require Tughans to compensate Brown Rudnick for its losses, and as assignee of Cerberus for the losses suffered by Cerberus."

31. On 30 July 2020, Tughans sent their response to RSA's decision to decline cover (in the form of a letter from their solicitors, Fenchurch Law: **the Fenchurch Letter**). The Fenchurch Letter challenged RSA's position on the Solicitors' Practice Issue, and also asserted that RSA was estopped, as a result of its interactions with Tughans, from taking that coverage point. The legal authorities relevant to the Solicitors' Practice Issue, and their application to the facts of the case, were considered at length. So far as the "no loss" point is concerned, the letter stated:

"32. The BR Claim is for damages. This is illustrated not least by the fact that its own insurers are pursuing a subrogated claim.

33. We note that the letter of Declinature observes that Tughans cannot seek an indemnity in respect of the so called "success fee". That is not in dispute. Tughans recognises that, if a Court were to conclude that it received a payment of a fee because of a misrepresentation, it could not seek an indemnity to cover a loss of a fee to which Tughans was never entitled. The indemnity which Tughans does seek, however, is for the remaining partners who are now facing a claim for loss and damage sustained by BR as a result of that alleged misrepresentation of IC.

…

53 We consider Tughans is entitled to an indemnity under the Policy to cover:
a) Legal costs in defending the claims against it; and
b) Any loss and damage established by BR or ERSIC.

54. Tughans does not seek an indemnity for the fee paid by BR. It is recognised that, if the Court concludes that Tughans was never entitled to a fee because of IC's misrepresentation, then the fee will be recovered by BR. Tughans does not ask its insurers to insure Tughan's own professional fee."

32. There were also communications between Tughans' insurance brokers and RSA, including at a virtual meeting at which reference appears to have been to the possibility of arbitration being commenced under the Policy. Following that meeting, on 8 October 2020, Tughans' brokers emailed RSA (**the First Email**) expressing the hope that matters could be resolved without the parties becoming involved in a lengthy and costly arbitration. The email addressed the Tughans Fee in the following terms:

"As you are aware, the insured is seeking an indemnity from Insurers for any alleged loss and damage suffered by [BRUK] (and ERSIC) as a result of the alleged actions of Ian Coulter, including legal costs for defending the claims against the Insured, this included the Success Fee in the sum of £7.5m.

> However, the Insured has confirmed that it will no longer be seeking an indemnity from Insurers for the Success Fee paid by [BRUK] for the work undertaken by Ian Coulter, as explained at paragraph 54 of Fenchurch Law letter to DAC Beachcroft dated 30 July 2020.
>
> We have sought clarity from the Insured on this point, and whilst the Insured reasonably believes it is entitled to the Success Fee paid by [BRUK], it accepts that the Insurers are not expected to cover that element of the claim in the event it is found that the Insured should not have received the Success Fee. Therefore the Insured does not expect Insurers to reimburse them for the costs of the Success Fees if they have to return it to Brown Rudnick (less the VAT element already paid to HMRC).
>
> The insured accepts that they will have to cover that element of the claim themselves, subject to the approval of the NCA and the Law Society to which the monies are being held to order (and the VAT obligations). The Insured is only asking Insurers to cover the costs and damages being sought by [BRUK]. We hope that this change in position will offer Insurers some element of comfort and be reconsidered before Arbitration Proceedings are commenced".

33. On 22 October 2020, Tughans' brokers sent RSA a further email (**the Second Email**) following a further conversation between the brokers and Tughans. The Second Email addressed the Tughans Fee in the following terms:

> "The Success Fee
>
> As set out in my email dated 8 October 2020 the Insured is seeking an indemnity from Insurers for any alleged loss and damage suffered by [BRUK] (and ERSIC) as a result of the alleged actions of Ian Coulter. As explained, the Insured has confirmed that it will no longer be seeking an indemnity from Insurers for the Success Fee paid by [BRUK] for the work undertaken by Ian Coulter, as explained at paragraph 54 of the Fenchurch Law Letter to DAC Beachcroft dated 30 July 2020. The Insured is only requesting that Insurers cover the costs and damages being sought by [BRUK].
>
> We had hoped that this change in position would offer the Insurers some element of comfort and could be reconsidered before Arbitration Proceedings are commenced".

34. On 2 November 2020, Tughans issued a Notice of Arbitration against RSA. This provided:

> "6 The Claimant is facing two sets of proceedings in the High Court of Northern Ireland brought by (i) Brown Rudnick LLP ('BR') via Writ 2020 No. 31285 and (ii) Executive Risk Speciality Insurance Company via Writ 2020 No. 28264 (collectively, 'the Proceedings').
>
> 7. The Claimant contends that, save for any liability on its part to return any fees which it has received from BR, the Respondents are obliged to indemnify it for (a) any liability arising from the claims made in the

Proceedings, (b) its costs of defending the Proceedings, and (c) its costs of bringing any third party proceedings.

8. The Respondents dispute that contention, on the grounds that any liability which the Claimant may incur by virtue of the Proceedings was not incurred in connection with the business of practising as solicitors. (The Respondents have also reserved the right to decline indemnity on other, as yet unspecified, grounds.)"

35. Correspondence followed in which the terms of the Arbitrator's appointment were agreed. This involved agreement as to the identity of the Arbitrator and for the arbitration to be conducted on the basis of the arbitration rules of the Insurance and Reinsurance Arbitration Society (**the ARIAS Rules**).

i) Article 4.1 of the ARIAS Rules provides for arbitration under the Rules to be commenced by the service of a written Notice of Arbitration specifying "a brief outline of the nature of the dispute referred to arbitration and specifying the type of relief sought." It is to be noted that the ARIAS Rules envisage that the Notice of Arbitration will be brief and general in terms, and that it draws a distinction between the dispute referred and the relief sought.

ii) Article 14.1.1 includes as one of the arbitral tribunal's "additional powers" the power to determine "whether any, and if so what, form of written statements setting out the issues in dispute and the position of the Parties in respect of those issues are to be supplied, and the extent to which such statements can be later amended."

36. BRUK filed its Statement of Claim in the Northern Ireland proceedings on 19 November 2020:

i) That pleading, perhaps with an eye to the issues which might arise if it became necessary to look to Tughans' professional indemnity insurance for recovery, adopted a much more compensation-focussed approach to the claims advanced and relief sought.

ii) Damages were claimed in fraudulent and negligent misrepresentation and deceit, for breach of contract and negligence, and equitable compensation for breach of fiduciary duty.

iii) The Success Fee and the Tughans Fee were claimed as heads of loss suffered by Cerberus and BRUK respectively, but there was no reference to any liability on Tughans' part as constructive trustees or in unjust enrichment, nor to rescission.

iv) The causation issues raised by the claims relating to the Success Fee and the Tughans Fee were not expanded on at any length.

a) So far as the claims assigned by Cerberus are concerned, it is not clear whether damages are being claimed on a "no transaction" basis, and, if so, whether there were any benefits which needed to be brought into account (e.g. arising from the conclusion of the Cerberus Transaction).

b) So far as BRUK's own claims are concerned, it is not clear what the counterfactual basis for the damages claim is, and whether BRUK would have been entitled to retain its share of the Success Fee in that counterfactual scenario.

c) In respect of both sets of claims, it is not clear what BRUK's position is as to whether the Success Fee and the Tughans Fee were legally payable absent any rescission of the relevant Letter of Engagement.

37. The pleadings in the arbitration were filed after the service of that Statement of Claim. I deal with the relevant passages in the pleadings and opening and closing submissions in the arbitration below.

38. A four day merits hearing took place from 17 May 2021. On 5 July 2021, the Arbitrator handed down a Partial Final Award addressing the Solicitors' Practice Issue and Tughans' argument that RSA was estopped from denying coverage. The Arbitrator upheld Tughans' case on the Solicitors' Practice Issue (although he would not have upheld the estoppel claim). In the course of addressing the submissions the parties had made on the Solicitors' Practice Issue, he made the following findings (references being to paragraphs in the Partial Final Award):

i) He was not sure that the issue of whether Mr Coulter had intended to share the Tughans Fee with Mr Cushnahan "adds much to [RSA's] case. Either way this was a fee due and payable to Tughans for work done" ([19]).

ii) "Strategic advice, facilitation of necessary political contacts, intelligence gathering and oversight thereof, and deal structuring are all sufficiently solicitorial, and were all carried out here by [Mr Coulter]" ([29]).

iii) "Services were to be provided and were provided by those two law firms" – BRUK and Tughans – "to clients" ([31]).

iv) He found it "difficult to understand [RSA's] argument that the success fee did not [i]nure to the benefit of Tughans" – an argument advanced by RSA as one reason why Mr Coulter's involvement in Project Eagle was not solicitorial in nature – because "it plainly did" ([33]).

39. The Arbitrator appears to have envisaged that the Partial Final Award would determine the substantive issues in the arbitration, leaving only what are sometimes referred to as "consequential" matters outstanding. At [48]-[49] he stated:

> "Accordingly, I decide the main issue in this arbitration in favour of the Claimants, Tughans. But I dismiss the estoppel argument. I will receive written submissions from both parties as to the form of the relief to be granted in the final award. I will also receive submissions, hopefully brief, as to costs. In providing details as to the quantum of costs, I would invite both parties to separate the costs relating to the main issue from those relating to the estoppel plea".

40. However, the submissions on the form of relief and costs which followed revealed a significant dispute between the parties, developed over detailed written submissions, as to whether Tughans were entitled to a declaration that RSA was obliged to indemnify

them in respect of any liability to pay damages to BRUK to the extent of the Tughans Fee and/or a declaration that RSA was obliged to indemnify Tughans in respect of any liability to BRUK for the Tughans Fee even if established on some other legal basis. After receipt of the first round of submissions (which were exchanged on 23 July 2021), from which the extent of the disagreement between the parties was apparent, the Arbitrator ordered the exchange of a second round of submissions on 4 August 2021. One of the points taken by RSA in its submissions was the contention that no claim for an indemnity in respect of the Tughans Fee had been advanced in the Arbitration (an objection which Tughans now accepts was sufficient to satisfy the requirement of s.73(1) of the 1996 Act to make "either forthwith, or within such time as is allowed by the arbitration agreement" any objection that the Arbitrator lacked jurisdiction, that the proceedings had been improperly conducted and/or that there had been "any other irregularity affecting the proceedings").

41. It will be necessary to return to the arguments made in those post-Partial Final Award submissions in due course. In those submissions, the parties advanced essentially the same arguments as those advanced over the two-day hearing before me.

42. The Arbitrator delivered the Award on 7 September 2021. The issues relating to the Tughans Fee were addressed at [6] to [9]:

> "As for the Success Fee, the parties' positions are starkly different. The Respondents argue that my award should strip out any mention of any form of liability relating to the Success Fee. The Claimant seeks a specific declaration that there should be indemnity 'in respect of any claim for the repayment of the Success fee'. I do not agree with either of these positions.
>
> There is, firstly, no basis for stripping out the Success Fee from the general declaration. BR claims loss from the payment of the Fee and if that is part of their loss, so be it. There is no legal basis for removing that element of loss, because the Claimant has made a 'gain' by receipt of the Fee. Support for the Claimant's position is afforded by the decision of Vinelott J in *The Mortgage Corporation v Solicitors' Indemnity Fund* [1998] PNLR 73. Indemnity is due to the Claimant from the claims for damages or equitable compensation which BR, ERSIC or Cerberus may allege. I see no reason to qualify that indemnity.
>
> But I see no basis for the positive declaration which the Claimant seeks, for the reasons fully set out by the Respondents in their Reply Submissions. Whether or not the Fee 'inures' for the benefit of the Claimant is irrelevant. That was part of the argument as to why the activity of earning the fee came within the scope of Tughans' work as solicitors. The Claimant has set its face against a claim for a general declaration as to recovery of the Success Fee, and it would be quite wrong to allow a change of course now. I should add that there is no claim for restitution by BR, nor any likelihood of one. If such a claim were to be added for tactical reasons it would plainly be a subsidiary claim, and would fall to be treated for the purposes of the insurance in accordance with the principal, compensatory claim. See Mustill J in *Rigby v Sun Alliance and London Insurers Ltd* 1980] 1 Ll Rep 359 at 364.
>
> I therefore make no specific order in relation to the Success Fee. In so far as this is part of the BR claim , as an element of loss which BR proves that it has suffered,

that will be covered by the indemnity in respect of the BR and other claims. If not, then there is no principle by which I am satisfied that a purely restitutionary claim, were it to be made and pursued, would come within the indemnity".

43. The effect of that decision was that RSA was held liable to indemnify Tughans in respect of any award of damages made against Tughans in respect of the Tughans Fee but not in respect of any liability in restitution for the Tughans Fee, both because Tughans had "set their face" against such a claim and because, as a matter of principle, such a claim would not come within the obligation to indemnify in any event. The Arbitrator recognised that his refusal to grant that second declaration would be a matter of limited comfort to RSA, because there was no such claim, no likelihood of one, and even if one was introduced it would fall to be treated for the purposes of the Policy in the same way as the "principal compensatory claim" in any event.

44. To allow for Tughans' failure on the estoppel issue, he awarded Tughans 80% of their costs, and made a costs order in RSA's favour for its estoppel costs in the amount of just under £104,000. He ordered RSA to pay 75% of the Arbitrator's costs, and Tughans to pay the remaining 25%.

45. At paragraph 17A of the Award, the Arbitrator made two declarations:

> "(1) All claims for loss and damage brought by [BRUK], Cerberus and/or ERSIC against the Claimants in respect of the matters set out in paragraphs 16-17 of the Partial Final Award arise 'in connection with the Practice carried on by or on behalf of the Solicitor'".
>
> (2) "[RSA and the other insurers] are, subject to the application of any other terms and conditions of both the Primary and Excess Layer Policy Wording, liable to indemnify the Claimant in respect of:
>
> (a) All claims brought by [BRUK], Cerberus, and/or ERSIC as referred to in paragraph (1) above.
>
> (b) All costs incurred by the Claimant in defence of the proceedings commenced by [BRUK] on 20th March 2020.
>
> (c) All costs incurred by [Tughans] in defence of the proceedings commenced by ERSIC on 13th March 2020".

46. RSA then brought its challenges under the 1996 Act to those determinations, to the extent that they declare that it is liable to indemnify Tughans in respect of the Tughans Fee (**the Disputed Declarations**).

THE ISSUES IN OVERVIEW

47. Against this background, the essence of RSA's case is as follows:

> i) The issue of whether RSA was obliged to indemnify Tughans in respect of damages in the amount of the Tughans Fee was never referred to the Arbitrator, who, accordingly, did not have jurisdiction to determine it.

ii) Even if the matters submitted to the Arbitrator were capable of extending to a claim for an indemnity in respect of any liability on Tughans' part to pay damages in the amount of the Tughans Fee, Tughans never brought such a claim in the Arbitration, such that it was not necessary for RSA to advance arguments in response to it, and it was therefore a serious irregularity for the Arbitrator to grant Tughans relief in the form in which he did.

iii) In any event, the Arbitrator's conclusion that the Policy was capable of providing an indemnity in respect of Tughans' liability in damages in the amount of the Tughans Fee was wrong in law.

THE JURISDICTION CHALLENGE

Introduction

48. By virtue of ss.67 and 82 of the 1996 Act, challenges to an arbitral tribunal's substantive jurisdiction must fall within one of the three sub-paragraphs of s.30(1) of the 1996 Act. RSA relies on s.30(1)(c):

> "what matters have been submitted to arbitration in accordance with the arbitration agreement".

49. It is common ground that the starting point for the analysis in this case is the meaning of the words "save for any liability on its part to return any fees which it has received from [BRUK]" in the Notice of Arbitration set out at [34] above (**the NOA Proviso**) and whether, construed objectively and in the context of the prior exchanges between the parties, they are a reference to:

i) liability to BRUK in the amount of the Tughans Fee, whether advanced by way of a damages claim, in restitution or otherwise (as RSA contends) – which I shall refer to as a **Tughans Fee Damages Claim**; or only

ii) liability in restitution to restore the Tughans Fee to BRUK (as Tughans contend) which I shall refer to as a **Tughans Fee Restitution Claim**.

If that argument is resolved in Tughans' favour, that is the end of RSA's s.67 challenge.

50. If it is resolved in RSA's favour, two further issues arise:

i) First, whether the effect of the NOA Proviso was to deprive the Arbitrator of jurisdiction in respect of the Tughans Fee Damages Claim, or whether it simply had the effect that Tughans were not, at that point, advancing such a claim (so as to require them to obtain whatever procedural permissions were necessary should they later wish to do so).

ii) Second, even if the Arbitrator did not have jurisdiction over the Tughans Fee Damages Claim when the Arbitration was commenced, did the parties expand the scope of the reference to arbitration through the pleadings and submissions exchanged in the period up to the delivery of the Partial Final Award.

The meaning of the NOA Proviso

51. It was common ground that ascertaining the meaning of the NOA Proviso involves an objective exercise of construction of the NOA, and that in undertaking that task I am entitled to have regard (as in the case of any exercise of documentary construction, whether of a contract or a unilateral communication such as a notice) to the factual background to the NOA, and the previous communications between the parties relating to the dispute (*Russell on Arbitration* (24th), [5-028]).

52. I have set out the exchanges which led up to the NOA at some length above, because in my view, the answer to this issue emerges with indisputable clarity from them: the NOA Proviso was not limited to the Tughans Fee Restitution Claim, but extended to the Tughans Fee Damages Claim.

53. First, BRUK or its lawyers had throughout identified the amount of the Tughans Fee as a head of damage for which compensation was sought:

    i) This was the case in BRUK's letter of 3 November 2017 ([20]), and it is noteworthy that, having stated that Tughans were required to compensate BRUK for its losses, BRUK stated that Tughans should as a preliminary step repay the Tughans Fee. The reference to "repay" was not intended to connote some form of unjust enrichment claim, but was a practical way of referring to the fact that BRUK were claiming compensation including the amount of the Tughans Fee, the Tughans Fee was (or was thought to be) sitting in Tughans' bank account, and the obvious thing for Tughans to do was to reduce BRUK's loss by paying it back.

    ii) This was also the case in the proceedings commenced by ERSIC and BRUK in the High Court of Northern Ireland ([27] and [28]), neither of which included a claim for a remedy other than damages or contribution.

    iii) The Pre-Action Protocol letter sent by ERSIC after those proceedings had been issued described the Tughans Fee as part of BRUK's "loss", under the heading "Quantum" ([29]).

    iv) The Pre-Action Protocol Letter sent by BRUK ([30]) went wider than that (referring to a claim for rescission of the Tughans Letter of Engagement, pursuant to a constructive trust and to Tughans having been unjustly enriched). However, not only did it clearly refer to claims to recover the amount of the Tughans Fee as damages, but it concluded by stating "for all of the reasons above, we require Tughans to compensate Brown Rudnick for its losses, and as assignee of Cerberus for the losses suffered by Cerberus."

54. Second, by 19 December 2018 ([24]), it was clear that RSA was taking the general point that Tughans had not suffered an indemnifiable loss because the Tughans Fee had only been obtained as a result of Mr Coulter's alleged fraudulent misrepresentation and therefore was money "that the Firm should never have received had Mr Coulter acted honestly". Given the express reference to fraudulent misrepresentation, this was clearly not a concern limited to a claim in restitution, and there is nothing else in the 19 December 2018 letter or the surrounding circumstances to suggest otherwise. The Fenchurch Letter and the First and Second Emails were sent to address the point raised by RSA and must be read in that context.

55. So far as the Fenchurch Letter itself is concerned,

i) It described the BRUK claim as one "for damages" (at [32] of the Letter) and the passages which follow must be read in the light of that characterisation.

ii) The statement "we note that the letter of Declinature observes that Tughans cannot seek an indemnity in respect of the so called 'success fee'. That is not in dispute" was wholly general, and there is nothing to suggest that it was limited to a restitutionary claim (nor would a paragraph couched in those terms have offered any prospect of assuaging the concern RSA has expressed on this topic). Further, the statement "Tughans recognises that, if a Court were to conclude that it received a payment of a fee *because of a misrepresentation*, it could not seek an indemnity to cover a loss of a fee to which Tughans was never entitled" makes more sense if the statement embraces recovery of the Tughans Fee as damages, because a misrepresentation would not be an element of a restitutionary claim.

iii) Read in context, the statement that "We consider Tughans is entitled to an indemnity under the Policy to cover: … any loss and damage established by BR[UK] or ERSIC" is clearly a reference to those elements of the damages claim (which were very significant) which relates to matters other than the loss represented by the payment of the Tughans Fee then (largely at least) sitting in Tughans' bank account.

56. The First Email is to very similar effect ([32]):

i) It referred to BRUK's claim to the Tughans Fee as one for damages ("As you are aware, the insured is seeking an indemnity from Insurers for any alleged loss and damage suffered by [BRUK] (and ERSIC) … as a result of the alleged actions of Ian Coulter, including … the Success Fee in the sum of £7.5m").

ii) The statement that "the Insured has confirmed that it will no longer be seeking an indemnity from Insurers for the Success Fee paid by [BRUK] for the work undertaken by Ian Coulter" can only have been understood as including the recovery of that amount as damages, as referred to in the preceding sentence.

iii) The statement that Tughans accepted that "the Insurers are not expected to cover that element of the claim in the event it is found that the Insured should not have received the Success Fee" allows for the fact that Tughans' position was that no misrepresentation had been made, and is not to be interpreted as what would have been a very coded attempt to confine the scope of Tughans' concession to a restitutionary claim.

iv) The statement "the insured accepts that they will have to cover that element of the claim themselves …" and "is only asking Insurers to cover the costs and damages being sought by [BRUK]" was clearly communicating that, to the extent that the amount received remained available to Tughans to meet that part of BRUK's claims, no indemnity would be sought from RSA.

v) Finally, it is important to note that the statement as to Tughans' position on the Tughans Fee was intended to avoid the need for an arbitration to be commenced.

Had the statement not taken the Tughans Fee off the table, but simply removed the speculative possibility of Tughans seeking an indemnity for a restitutionary claim to the Tughans Fee off the table, while leaving the much more prominent and likely claim for damages in the same amount "in play", it could not have been presented in these terms.

vi) Those points are also true of the Second Email ([33]).

57. Against that background, if Tughans had intended the NOA Proviso to have a different effect to the position they had taken in the pre-arbitration correspondence, it was incumbent on them to make that clear. If they did not do so, the natural understanding of any reader of the NOA would be that the NOA Proviso was intended to reflect the position Tughans had already adopted in correspondence, rather than to "walk back" from that position to something altogether less significant.

58. Turning to the NOA itself, I am satisfied that the reference to Tughans' "liability … to return any fees" had the same meaning as in the earlier correspondence: a reference to the use of the amount received to meet that part of ERSIC and BRUK's claims (however formulated). That conclusion is not only supported by the context I have referred to, but also by paragraph 8 of the NOA which, when summarising RSA's position, refers only to the Solicitors' Practice Issue and not the wider challenge to any indemnity in respect of the Tughans Fee which had been articulated in the 18 December 2018 letter (see [24] and [34]). That is because that issue was understood to have been taken off the table by the position which Tughans had taken in the Fenchurch Letter and the First and Second Emails, and which was reflected by the NOA Proviso.

Did the NOA Proviso limit the Arbitrator's substantive jurisdiction?

59. In this case the s.30(1)(c) dispute is not as to whether Tughans Fee Damages Issue would fall within the arbitration agreement in the Policy (it is common ground that it would), but whether it formed part of the particular submission to the Arbitrator.

60. It is worth briefly considering the consequences which follow when one party to an arbitration seeks to add a new claim which falls within the arbitration agreement into an existing reference, only to be met with the response that it does not fall within the scope of the dispute as originally referred and the arbitral tribunal does not have jurisdiction to determine it. If the objection is valid, the result might well be that, however closely related the factual or legal enquiry arising from the new claim might be to the matters already in issue, it could not be determined as part of the same hearing, necessitating the matter being determined at a separate hearing, perhaps before a different tribunal. It would also mean that the decision of an arbitral tribunal to admit such a later claim would be capable of being revisited by the court under s.67 of the 1996 Act.

61. Those outcomes – which, in broad terms at least, are inimical to the fair and efficient disposal of disputes and the principle of limited curial intervention – tell against an overly strict interpretation of what the scope of an arbitral reference is. I was referred by Mr Coleman KC, for Tughans (who did not appear in the proceedings before the arbitrator), to the following passage from *Merkin and Flannery on the Arbitration Act 1996* (2nd), [30.12.3]:

> "As discussed above, the issue as to whether a claim falls within the ambit of the arbitration agreement is a jurisdictional issue. But is an issue as to whether a claim (usually a later claim) falls within the scope of the existing arbitration also not a jurisdictional dispute? It is thought that there is indeed another jurisdictional category, which concerns not so much whether a matter that *has* been submitted falls within the scope of the reference. It may be that a new claim, introduced late on in the reference, falls fairly and squarely within the scope of the arbitration clause but outside the scope of the reference. Does the party facing the claim have a right to ask the tribunal to debar the claim, and a further right to challenge the decision before the court, if the tribunal disagrees? On a strict wording of the provision, it would seem not, but in practice such a mater is treated as giving rise to a jurisdictional issue.
>
> In any arbitration, the claims before the tribunal (and therefore the scope of the reference) ought to be (but perhaps not always are) ascertainable early on: either in the notice of arbitration; or (for most institutional arbitrations) in the Request, when read together with the Answer (ICC) or Response (LCIA) or (for ad hoc arbitrations especially) in the pleadings, or first exchange of written submissions or memorials.
>
> …
>
> Claimants would therefore be well advised to ensure that the notice of arbitration (or request, if institutional) is drafted in the widest possible terms and contains an express reservation of rights in respect of other relief, in order to maximise the chances of not having to commence a fresh arbitration for a new claim, which would be the obvious consequence of being shut out in the existing reference (assuming there would be no limitation issues). In other words, the less detail, the better, because an unsuspecting claimant may find that it has been fettered by its own document, should it ever want to enlarge the scope of the arbitration …
>
> In most cases, modern commercial tribunals are more likely to take a purposive approach (which we encourage)."

62. When discussing this issue, *Merkin and Flannery* express doubt as to the strictness of the approach adopted by Colman J in *Westland Helicopters Ltd v Al-Hejailan* [2004] 2 Lloyd's Rep 523, [47]-[49], a decision on which RSA placed reliance before me. As with all of the many contributions by Colman J to arbitration law, the decision merits careful analysis. By virtue of s.49 of the 1996 Act, an arbitral tribunal has power to award interest, unless the parties agree otherwise. In that case, at the opening day of the arbitral hearing, the claimant's counsel had disclaimed a claim for interest. However, an award of interest was included in the arbitrator's award, which the respondent then sought to challenge. Colman J addressed that challenge in the following terms:

> "47 Section 49 of the 1996 Act provides that the parties are free to agree on the powers of the tribunal as regards the award of interest and that, unless otherwise agreed, the provisions of that section are to apply …
>
> 48 The jurisdiction of an arbitrator in relation to any particular claim for a money award, whether in debt or damages, depends upon whether such claim falls within the jurisdictional scope of the agreement to arbitrate and,

> where an arbitration has already been commenced, whether the claim in question falls within the scope of the reference. Once the jurisdiction of the arbitrator has been engaged by the reference to him of a particular dispute or group or class of disputes, which fall within his jurisdiction as pre-defined by the agreement to arbitrate, his jurisdiction is further confined by the scope of the reference and he cannot make an award in relation to a claim which is not within that scope unless all parties agreed that the scope should be widened sufficiently to include it.
>
> 49 When on the opening day of the hearing before Sir Michael Kerr counsel for the Respondent informed the arbitrator that the Respondent made no claim for interest, the effect was to curtail the scope of the reference to exclude a claim for interest and to do so on whatever basis the claim was put, whether in contract for a success fee or on a quantum meruit. The reference of a dispute involving a claim for a monetary award would ordinarily include a claim for interest on the amount of any award. That claim would be part of the dispute which had been referred. Its withdrawal would thus confine the reference to a resolution of the dispute as to the capital amount of the debt or damages claimed. It follows that thereafter the jurisdiction of the arbitrator to award interest could arise in that arbitration only if the scope of the reference in that arbitration were widened to include a claim for interest. *If a claimant having once abandoned one part of his claim subsequently sought to reinstate it, he could do so only by consent of the opposing party or, without such consent, by permission from the arbitrator. In the latter case, considerations of justice and fairness to the opposite party might well arise."*

(emphasis added).

63. It will be noted that Colman J was considering the exercise of a power (the power to award interest) which was conferred on the arbitrator by the arbitration agreement (there having been no "agreement otherwise" for the purposes of s.49(1) of the 1996 Act), but the exercise of which was then disclaimed. On its face, therefore, the challenge would appear to have fallen more naturally into s.68(2)(b) ("the tribunal exceeding its powers") than s.67. Further, it is clear from the italicised passage in [49] that Colman J envisaged that the arbitrator could have allowed the re-assertion of the claim for interest, even if the respondent did not consent to it, through the exercise of the procedural power to permit an amendment or re-assertion of a disclaimed case if it was fair and appropriate to do so. That is not redolent of a jurisdictional challenge properly so-called, because only the consent of the parties could expand the tribunal's jurisdiction, and the arbitrator could no more enlarge their jurisdiction by a procedural ruling than they could finally determine their own jurisdiction under s.30(1) of the 1996 Act.

64. Pulling these threads together, I am satisfied in this case that the NOA Proviso did not curtail the jurisdiction of the Arbitrator for s.67 purposes, albeit it did have the effect that either RSA's consent or the Arbitrator's permission was required to permit Tughans to seek relief of the disclaimed kind from the Arbitrator (with the attendant possibility that "considerations or justice and fairness" might lead the Arbitrator to refuse that permission):

i) The ambit of the NOA Proviso was very narrow. It concerned a matter arising from the same factual background as the relief which was sought, and related to the same cause of action (an indemnity under the Policy in respect of liability to BRUK and ERSIC). Given that extensive overlap, it is more natural to treat the NOA Proviso as disclaiming a claim for relief to a particular extent, rather than confining the "dispute" referred to arbitration. If, for example, a Notice of Arbitration referred a breach of contract claim to arbitration, and disclaimed relief by way of specific performance, that restriction is unlikely to have the effect that a claim for such relief could not thereafter be asserted in the arbitration with the arbitral tribunal's permission.

ii) That conclusion is reinforced by the fact that the Arbitrator was appointed on the basis of the ARIAS Rules, which envisage that the Notice of Arbitration will only describe the dispute referred to in arbitration in brief and "outline" terms, and give the Arbitrator permission to permit amendment of the statements of case.

iii) The conclusion is also consistent with the purposive approach for which *Merkin and Flannery* contends, and with decisions which suggest that the identification of the "dispute" for the purposes of determining what has been referred to arbitration should be approached "in broad terms" by looking at "the essential claim" (*Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC), [55](b)] and [55]) and by adopting a "broad and flexible approach" (*Sonact Group Limited v Premuda SpA (The Four Island)* [2018] EWHC 3820 (Comm), [23]).

65. That is sufficient to resolve the s.67 challenge to the Disputed Declarations in Tughans' favour. However, given their relevance to RSA's s.68 challenge, it is necessary to go on to consider Tughans' alternative case that, if the NOA Proviso had the effect of limiting the Arbitrator's jurisdiction to grant relief for the Tughans Fee Damages Claim, the parties implicitly enlarged the Arbitrator's jurisdiction to encompass that issue through the pleadings and memorials which were exchanged in the Arbitration.

Alternatively, did the parties subsequently include a claim for indemnity in respect of the Tughans Fee Damages Claim within the scope of the reference to the Arbitrator?

66. There was no dispute that the parties to an arbitration reference may enlarge the scope of the reference through the terms of the pleadings or memorials exchanged, or the defence or defences put forward, where the parties then proceed (objectively) on the basis that the issues thus raised form part of the reference: *Merkin and Flannery on the Arbitration Act 1996* (2nd), [30.12.3]; *Westland Helicopters Ltd v Al-Hejailan,* [51]-[56] and *Cantillon,* [55(d)].

67. Tughans argue that this is what happened here. To assess this claim, it is necessary to review the history of the arbitration between the NOA and the Partial Final Award. In doing so, it is important to remember that, by this point, BRUK had served its Statement of Claim in the proceedings against Tughans in the High Court of Northern Ireland, which only brought a damages claim in respect of the Tughans Fee, and no claim in unjust enrichment or on the basis of a constructive trust. That makes Tughans' argument more challenging than when considering the position at the stage of the NOA.

68. Paragraphs 109 to 113 of Tughans' Particulars of Claim in the Arbitration provided as follows:

> "109. Further and in the alternative, if it is established that IC was engaged in any dishonest, fraudulent, criminal or malicious act or omission, then this was neither condoned nor accepted or within the knowledge of the Claimants. The Claimants are therefore entitled to be indemnified in respect of the acts and omissions of IC even if they were otherwise unlawful.
>
> 110 The Claimants are entitled to an indemnity in respect of civil liability incurred in connection with the Practice. The claims intimated against the Claimants are:
>
> a) a claim for damages in respect of loss and damage incurred by Cerberus, now assigned to BR;
>
> b) a subrogated claim by ERSIC for loss and damage incurred by BR;
>
> c) a claim by BR for return of the Success Fee.
>
> 111 The Respondents have wrongfully refused to indemnify the Claimants in respect of the said claims. The Claimants are entitled to an indemnity in respect of the claims set out at sub-paragraphs (a) and (b) immediately above, on the grounds that:
>
> a) Any liability, arising from a claim for damages for loss and damage sustained by BR and/or Cerberus, is a liability which occurred as a result of the acts or omissions of IC while engaged in connection with the business of and/or as a solicitor.
>
> b) Pursuant to the terms of the Policies, then, if and insofar as IC was acting as a solicitor, the Claimants are entitled to an indemnity in respect of his actions.
>
> 112 The Claimants make no claim for an indemnity in respect of the Success Fee in so far as this can be recovered by the Claimants and lawfully paid or repaid in light of the BR or ERSIC claims, noting that:
>
> a) The Success Fee was paid to IC to the account of Tughans in the total sum of £7.5m plus VAT.
>
> b) The VAT element has been paid to HMRC in accordance with Tughans' obligations to account for VAT received.
>
> c) The fee was paid and received as a fee for services rendered by Tughans. The Claimants each have satisfied such income tax as falls due on the Success Fee.
>
> d) The balance of the Success Fee amounting (as at January 2021) to £4.088m is held by Tughans in a nominated account.

e) The NCA has required Tughans to give an undertaking that that sum will not be released pending the conclusion of its criminal investigation.

113 Insofar as the Claimants are unable to repay the Success Fee (should they be so required) from the money held, either because it is retained pursuant to the Proceeds of Crime Act 2002 or otherwise is unavailable either in whole or in part, then the Claimants are entitled to an indemnity in respect of the civil liability incurred because:

a) The liability accrues to the Claimants as a result of the acts or omissions of IC while acting as a solicitor.

b) The Claimants cannot recover the VAT or Income Tax liabilities in respect of the Success Fee.

c) The Claimants have incurred that liability to make a payment to BR or ERSIC as a result of the claim or alleged claims made by them against IC being a civil liability within the terms of the Policies."

69. Pausing there, given the terms on which BRUK and ERSIC were now known to be advancing their claims (see [27] and [28]) I do not accept that paragraph 110(c) of the Particulars of Claim is to be understood as limited to a restitutionary claim for the Tughans Fee. Rather, as had previously been the case in correspondence, the expression "return of the Success Fee" was being used to reflect the fact that, to the extent Tughans still had the funds representing the Tughans Fee available to them, those funds could be used to meet that part of BRUK's claim referable to the Tughans Fee.

70. Nor can I accept that paragraphs 111 and 112 of the Particulars Claim are to be read as only disclaiming an indemnity in respect of any restitutionary claim to the Tughans Fee. That would have been wholly unreal:

i) No such claim was being advanced against Tughans.

ii) The qualification now introduced to Tughans' position – that its agreement not to seek an indemnity in respect of the Tughans Fee did not apply to the extent that the Tughans Fee was either no longer available to Tughans as a means of meeting their liabilities (because tax and VAT had been paid) or ceased to be so available in the future (by reason of the undertaking to the NCA) (**the Qualified Claim**) – is one which is not obviously limited in its application to a restitutionary claim (or, indeed, apposite to such a claim).

iii) The terms in which the Qualified Claim is advanced in paragraph 113 are wholly general, relating to "an indemnity in respect of the civil liability incurred" being a liability incurred to BRUK or ERSIC "as a result of the claim or alleged claims made by them" (which, as noted above, were at that stage confined to claims in damages).

71. Tughans also rely on paragraph 133, which appears under a heading "the Relief which the Claimants seek", and which provides:

"The Claimants seek the following relief:

(i) A determination and declaration that the Respondents are liable to indemnify the Claimants in respect of the claims by BR and ERSIC in accordance with the Policies to include:

a) All claims for loss and damage asserted by BR, Cerberus and ERSIC to include the costs of any claims pursued against the Claimants".

72. However, those general words fall to be read in the light of the preceding paragraphs, and such general language appearing in an essentially summary section of the Particulars of Claim and read against the background of the NOA Proviso, cannot have the effect of including a claim for the relief which has been disclaimed, save to the extent of the Qualified Claim. That conclusion is reinforced by the declaration sought at paragraphs 133(iv) of the Particulars of Claim which specifically address the Tughans Fee, and does so *only* by reference to the Qualified Claim:

"A determination and declaration that the Claimants' civil liability to BR, Cerberus and/or ERSIC includes such portion (or all) of the Success Fee received by the Claimants which cannot be repaid from the monies held by the Claimants, on the basis that:

a) The Claimants do not retain control over the balance of the Success Fee and are not permitted to refund all or any of the monies by the NCA or the Law Society of Northern Ireland or any other lawful authority.

b) Insofar as the Claimants are in a position to refund the balance of the Success Fee, the Claimants are entitled to an indemnity in respect of any portion of the Success Fee which cannot be repaid on the grounds it has been discharged to pay VAT or tax liabilities which cannot now be recovered."

73. RSA served its Defence and Counterclaim on 19 February 2021. This made it clear that it remained RSA's understanding that Tughans were not seeking an indemnity in respect of the Tughans Fee Damages Claim, save (now) to the extent of the Qualified Claim, but did not take issue with Tughans' entitlement to seek relief in the Arbitration to the extent of the Qualified Claim (and, as Mr Hubble KC recognises, thereby accepted that it was now open to Tughans to seek relief on that basis in the Arbitration). Thus:

i) Paragraph 97(c), pleading back to paragraph 109 of the Particulars of Claim, stated:

"In the event that the Claimants attempt to seek any indemnity in respect of the Success Fee itself or damages reflecting it, the Respondents reserve the right to contend that the later retention of the Success Fee by Tughans amounted to condoning dishonesty by IC for the purposes of the Policy; the Respondents do not advance such a case now as, so it understands, the Claimants do not seek indemnity in respect of the Success Fee or damages reflecting it".

This was a reference to Insurance Clause 1 of the Policy which provided that:

> "no indemnity will be given … a) to any individual committing or condoning any dishonest fraudulent criminal or malicious act or omission; b) to any partnership or incorporated practice or limited liability partnership in respect of any dishonest fraudulent criminal or malicious act or omission committed or condoned by all of its Partners directors officers or members".

ii) Had it been Tughans' position at that time that they were seeking an indemnity in respect of damages reflecting the Tughans Fee, then in the face of paragraph 97(c), Tughans could not but have asserted the contrary in clear and unequivocal terms in response. As will be seen shortly, it did not do so.

iii) Paragraphs 100 (responding to paragraph 112) and 101 (responding to paragraph 113) pleaded to the new Qualified Claim.

iv) Paragraph 100(a) pleaded "it is noted that the Claimants make no claim to indemnity in respect of the Success Fee". As with paragraph 97(c), this was a paragraph with which Tughans needed to take issue in clear terms if it was their position that they were entitled to an indemnity in respect of the Tughans Fee Damages Claim going beyond the Qualified Claim.

v) Paragraphs 100(c) to (f) required Tughans to prove the factual basis for the Qualified Claim, and pleaded that the cause of any loss occasioned by the payments of VAT and tax was Tughans' decision to retain the Tughans Fee.

vi) Paragraph 101 pleaded that the basis of the Qualified Claim was hypothetical because Tughans did retain the Tughans Fee (something inconsistent with any understanding that a non-contingent indemnity claim in respect of the Tughans Fee was also being pursued) with the result that Tughans "have suffered no relevant insurable loss". In addition, it advanced various reasons why the Qualified Claim could not succeed in any event (including the Solicitors' Practice Issue and a suggestion that the Tughans Fee was "tainted by illegality").

74. Tughans placed particular reliance on the relief sought by RSA in its counterclaim. Paragraph 125 provided:

> "The Respondents seek a declaration and determination that the Claimants are not entitled to indemnity from the Respondents in respect of or referrable to:
>
> a. Any civil liability or defence costs arising from the claims brought by BR and ERSIC;
>
> b. Any costs and expenses (own or adverse) incurred by the Claimants in the claim against IC and VD; and/or
>
> c. The Success Fee."

75. However, I accept Mr Hubble KC's submission that, read in context, this was a response to the Qualified Claim, not an attempt to put in issue a claim which the Defence and

Counterclaim had recorded that RSA did not understand Tughans to be advancing. In any event, if (as I have held), Tughans were not themselves advancing a claim for an indemnity in respect of the Tughans Fee which went wider than the Qualified Claim, I do not accept that RSA's own claim for a negative declaration could widen the relief which the Arbitrator could award to Tughans. I gave Mr Coleman KC the example of an arbitration claimant seeking damages in tort who had expressly disclaimed a claim in contract, to be met by a defendant seeking a declaration that it was not liable to the claimant in contract or tort. Mr Coleman KC accepted that this scenario would not permit the arbitrator to make an award of damages for breach of contract in the claimant's favour when none had been asserted. In my view, the present case is no different.

76. Tughans served their reply on 3 March 2021:

i) In response to paragraph 97 (and therefore paragraph 97(c)), they pleaded:

> "As to Paragraph 97, the Respondents cannot properly assert that any retention of the Success Fee by Tughans was 'condoning dishonesty' by IC. The dishonesty by IC was seeking to put the Success Fee beyond the reach of the Claimants. The Success Fee inured to the benefit of Tughans and was paid to Tughans. IC acted dishonestly vis-à-vis the Claimants by seeking to remove the Success Fee to the Morley account. The recovery and the retention of the Success Fee by the Claimants do not condone any act of dishonesty: it does no more than restore the fee to its rightful place. In respect of the claims by BR and ERSIC, those remain as claims based on breaches set out in the pleaded cases. The remedies which the Claimant seeks against the Respondents are set out clearly in the Particulars of Claim."

ii) It will be apparent that there was no attempt to challenge RSA's understanding that Tughans were not seeking any indemnity in respect of the Tughans Fee or damages reflecting it beyond the Qualified Claim advanced in the Particulars of Claim.

iii) Tughans did not plead at all to paragraph 100(a) (which had noted "the Claimants make no claim to indemnity in respect of the Success Fee").

iv) In responding to paragraph 101, Tughans pleaded at paragraph 48(c) as follows:

> "The claims made by BR and ERSIC and the costs of defending them all fall within the Policy. Such claims are clearly distinct from a claim to the return of the Success Fee."

While that paragraph is not as clear as it might be, in context it is best understood as referring to the claims by BRUK and ERSIC other than in relation to the Tughans Fee, and the costs of defending those proceedings, and making the point that those were recoverable whatever the position might be in relation to the Tughans Fee.

77. There was no attempt by Tughans in their written opening submissions to support a claim for an indemnity in respect of the Tughans Fees Damages Claim beyond the

Qualified Claim. RSA's written opening advanced the argument that Tughans had not suffered an insured loss ([199] to [204] of the opening). However, the argument advanced in those paragraphs was of relevance to the Qualified Claim and, crucially, it was that claim which RSA made it clear it was addressing in the final two paragraphs:

> "203. The Claimants' decision to pay VAT and income tax on the Success Fee in order to secure a profit cost to which they were never entitled does not change the position; rather, it makes it worse for the Claimants: those VAT and income tax costs are costs that the Claimants willingly opted to incur in order to secure the unjustified windfall. Those payments to the Revenue therefore cannot, if the same is sought to be alleged, constitute any separate heads of insured loss to which they are entitled to an indemnity.
>
> 204. The Claimants appear to accept the above analysis: see paragraph 112 of the Particulars of Claim where they disclaim an indemnity in respect of the Success Fee. However, the Claimants add the qualification "in so far as this can be recovered by the Claimants and lawfully paid or repaid in the light of the BR and ERSIC claims" and then seek an indemnity, at paragraph 113 of the Particulars of Claim, if the Claimants are unable to repay the Success Fee because it is retained pursuant to the Proceeds of Crime Act 2002. Such qualification makes no sense. First, the reasoning in the paragraphs above would still equally apply: the Claimants have suffered no insured loss. Second, any inability to return the Success Fee only arises because of Tughans' own decision to retain the Success Fee (i.e. to make a profit from it). Third, the only other parties that could theoretically be entitled to the Success Fee are BR and Cerberus and they (via the alleged assignment from Cerberus to BR) are parties to the claim against Tughans; so no such qualification would ever arise as any restriction on Tughans' ability to release the Success Fee can only exist for the benefit of Cerberus and/or BR."

78. There was no suggestion by Tughans at the hearing before the Arbitrator that they did not "accept the above analysis", or that their claim in relation to the Tughans Fee was not limited to the Qualified Claim.

79. Tughans' written closing at paragraphs 170 to 176 dealt with the issue of the Tughans Fee as follows:

> "170 As regard the proposition that there was no "insured loss" as alleged in the Respondents' skeleton from §192, this is a novel argument to advance to justify a complete declinature of liability in which the BR Statement of Claim actually pleads a loss of well over £30million.
>
> 171 One might understand the Respondents' argument, if the only issue at stake [was] the success fee. The argument now developed, is that the BR loss flows from the decision of IC to divert the success fee to Morley (Respondents' skeleton §197) or the Respondents' failure to return the success fee.
>
> 172 This is an argument which completely ignores the 'civil liability' as pleaded in the Statement of Claim. It is not asserted by BR that the loss was caused

> because IC tried to steal a portion of a professional fee from his partners. The claim advanced is that in the course of his role as a solicitor instructed to act (and acting upon) the Project Eagle loan sale, IC was asked to confirm that the fee would not be shared with a current or former member of NAMA.
>
> 173 It was this alleged misrepresentation which forms the basis of the liability. The diversion of part of the professional fee to Morley did not offend the assurance given. The liability arises because BR alleges (and will have to prove) that the representations given by IC on Tughans's behalf were either false or were given in breach of duty or, indeed, may even have been fraudulent.
>
> 174 The Claimants are the innocent partners and if IC was guilty of fraud which caused loss to a client of the firm and/or others, then the Master Policy extends to indemnify the "innocent partners".
>
> 175 The further feature of this case, however, is that the success fee has, by reason of the actions of IC, been placed beyond the control of Tughans. If BR obtains a judgment against Tughans, then this will be for loss and damage (ie civil liability) arising from the actions of IC for which Tughans is responsible.
>
> 176 The Respondents are not claiming a right to a success fee to which they are not otherwise entitled. They are claiming an indemnity for loss flowing from the civil liability created by the actions of IC. If BR established that the fee should never have been paid because of the fraud of IC, then the fee is 'lost' to the Respondents to meet the liability which arises. The indemnity principle does not provide any defence to the Respondents insofar as the Claimants would then suffer a loss, and it is to be noted that the losses/damages claimed at para 61 of the BR statement of claim extend far beyond the fee."

80. Those paragraphs appeared to be drawing a distinction between the Tughans Fee and other heads of loss (at [171]), and to rely on the factual premise of the Qualified Claim ([175]). That was reinforced by the terms of [176], which linked the claim to an indemnity in respect of the Tughans Fee squarely to a scenario in which the proceeds of the Tughans Fee ceased to be available to Tughans to meet that liability ("if BR establishes that the fee should never have been paid, then the fee is 'lost' to [Tughans] *to meet the liability which arises*", the indemnity principle providing RSA with no defence "*insofar as the Claimants would* ***then*** *suffer loss"*).There was nothing here therefore which made it clear that Tughans were now asserting a right to indemnity in respect of the Tughans Fee Damages Claim beyond the Qualified Claim.

81. In the course of RSA's oral closing submissions, it made its position clear once again:

> "MR HUBBLE: In correspondence prior to the Particulars of Claim, the position of the claimants had been that they were not seeking claims with indemnity in respect of the success fee because it's not an insured loss. There is a qualification

> to that in the Particulars of Claim, and there is just a hint of it still in my learned friend's written closing submissions, which is the idea that even if there is an order that they should be told to return the success fee, if they can't do that because of the undertakings so they have to give some other money or pay some other damages instead, that other payment or damages does fall within the terms of the policy. It's worth being very clear, we say that simply makes no sense at all. You can't convert the claim for the success fee, which is not an insured loss, into an insured loss by saying because it's subject to undertakings to benefit presumably the very person who's bringing the claim, because that's why the undertakings exist presumably is to protect the money which is otherwise due to Brown Rudnick or Cerberus, but Brown Rudnick as Cerberus' assignee. The whole thing is circular.
>
> THE ARBITRATOR: There is a circularity, I understand that".

82. There was no objection by Tughans to that summary of their position.

83. I have set out the relevant materials at some length because in my view, it is absolutely clear from their terms that neither Tughans nor RSA ever raised the issue of whether Tughans were entitled to an indemnity in respect of the Tughans Fee Damages claim in the Arbitration, save to the extent of the Qualified Claim. The attempt to argue the contrary, and to suggest that each unhelpful paragraph was "confused", or "not as clear as it might be"' was wholly unpersuasive.

84. The result is that the first occasion on which Tughans sought to raise a request for an indemnity in respect of the Tughans Fee Damages Claim extending beyond the Qualified Claim in the Arbitration was in their "Submissions on the Form of Relief & Costs" served on 22 July 2021 after the Partial Final Award.

THE CHALLENGE UNDER S.68 OF THE 1996 ACT

85. Section 68 of the 1996 Act provides:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award …
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties ...

(f) uncertainty or ambiguity as to the effect of the award."

86. I have reluctantly come to the conclusion that the Arbitrator's decision to grant the Disputed Declarations in circumstances in which:

i) Tughans had expressly disclaimed any application for relief in respect of the Tughans Fee Damages Claim save on the basis of the Qualified Claim;

ii) the merits hearing had been conducted by both parties on that basis; and

iii) RSA had made it clear in its Defence and Counterclaim that there were alternative arguments it reserved the right to put forward had the point been advanced;

involved a serious irregularity. The decision involved a failure to allow RSA a reasonable opportunity to present its case and/or deal with Tughans' case as newly formulated for the purposes of s.33(1)(a) and s.68(2)(a) of the 1996 Act and a failure to conduct the proceedings in accordance with the procedure agreed by the parties (namely by reference to the matters in issue as defined in the statements of case and submissions served before the merits hearing).

87. While the Arbitrator gave concise consideration to whether Tughans' could, as a matter of law, claim an indemnity for the Tughans Fee Damages Claim, he does not appear to have given consideration to the issue of whether, having regard to what Colman J referred to in *Westland Helicopters* as "considerations of justice and fairness to the opposite party", it was appropriate to permit Tughans to raise that issue at that late stage. In particular, there was no attempt in the Award to address RSA's arguments that Tughans had consistently disclaimed such a claim with the exception of the Qualified Claim, and to consider whether RSA would or might have acted differently in preparations for and at the merits hearing had Tughans sought to advance such a claim.

88. I accept RSA's submission that the opportunity to serve written submissions in the period between the Partial Award and the Award on this topic (when addressing issues as to the form of relief and other consequential issues) did not adequately address these issues. In particular, it did not give RSA the opportunity to advance any factual arguments as the effect of the other Tughans' partners' decision to retain the Tughans Fee which RSA had stated in its Defence and Counterclaim would be a course it might wish to pursue were Tughans to raise such an argument.

89. However, before relief can be obtained under s.68, it is necessary for the serious irregularity in question to have caused "substantial injustice". Substantial injustice is generally established by demonstrating a sufficiently realistic possibility of a different outcome in the arbitration had the serious irregularity not occurred, it being sufficient for this purpose that the outcome "might well have been different", without it being necessary to show that the outcome would "necessarily or even probably have been different" (see the summary of the principles given by Lords Hamblen and Burrows in *RAV Bahamas Ltd and another v Therapy Beach Club Incorporated* [2021] UKPC 8, [34]-[35]).

90. There are also cases in which there is no substantial injustice not because it is clear that the outcome of the impugned award would have been the same, but because it remains

open to the applicant to raise the argument which it says it did not get a fair opportunity to present on another occasion. This was the position in *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749 (TCC), in which Ramsey J held on the facts of that case that the ability to revisit the impugned determination in a further arbitration would have been sufficient to cure any substantial injustice:

> "170 At paragraph 362 of the Award, the Arbitrator held that he was granting the extension of time under Clause 31.7 and not Clause 31.6 of the Connect Contract. As dealt with in argument, the effect of the Award being an interim extension of time under Clause 31.7 is that the extent of the extension of time can be reviewed and revised in a further arbitration when the relevant extension of time is determined, not on an interim, but on a final basis. Thus whilst arguments may be made as to the effect of other findings by the Arbitrator, the question of the length of the extension of time which is "fair and reasonable in the circumstances" is not something which has finally been determined by this Arbitration.
>
> 171. If I had come to the conclusion that there was an irregularity in this case, I consider that any injustice arising from the length of the extension of time could be cured by the process which is laid down under the Connect Contract and I would not have been minded to find that there was substantial injustice. There will, of course, be the need for a financial adjustment but this has to be viewed in the context of necessary accounting forming part of the long running relationship between the parties. In the circumstances, I do not consider that an irregularity in the determination of an extension of time by this arbitrator would give rise to substantial injustice."

91. Where the serious irregularity arises in relation to the arbitral tribunal's treatment of a point of law (e.g. allowing one party an insufficient opportunity to present its legal argument or to respond to the other party's legal argument), but the court has granted leave to appeal under s.69 of the 1996 Act, the de novo hearing before the court will generally be sufficient to "cure" any substantial injustice. In particular, the court is highly unlikely to be receptive to the argument that the loss of the opportunity to obtain a different outcome from the arbitrator which did not meet the threshold for a s.69 challenge is capable of amounting to substantial injustice (*Sunrock Aircraft v Scandinavia Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882, [36]-[42]).

92. RSA's case as to the substantive injustice which it said it had suffered was explained in its Arbitration Claim Form as follows:

> "Although the Respondents' position is that the Claimants have no entitlement in law to an indemnity for the Success Fee, the Respondents would (in the manner described at paragraph 46 of Mr Miller's witness statement) have necessarily changed and/or considered changing their approach to these proceedings to meet that case in the event that they were wrong. The Respondents have been deprived of the opportunity to take any of those steps and affording the Respondents a short period of time merely to make representations on that non-pleaded entitlement is no cure for the substantial unfairness to which the Arbitrator's approach gave rise".

93. The relevant paragraph of Mr Miller's witness statement provides as follows:

> "Had the Claimants pleaded and sought to prove a case to the effect that they could keep a Success Fee …. and the Insurers should provide an indemnity in order that they might retain that Fee, the Respondents would have done (at least) some of the following:
>
> (a) Considered seeking to have that point struck out, or dealt with as a preliminary point of law;
>
> (b) Considered seeking to resist any attempt to introduce the issue into the scope of the arbitration on the basis that it was too late and/or that the Claimants were estopped from pursuing such a claim and/or that it would be abusive to seek to pursue that claim on a preliminary basis even if the application to amend the scope of the arbitration/pleadings, had been permitted;
>
> (c) Had the matter been introduced as - and remained - a pleaded issue in the case, the Respondents would likely have taken some or all of the following steps:
>
> i. Pleaded a case resisting the same;
>
> ii. Explored the likely implications were the Success Fee found to have been procured through criminal means, including the consequential impact that the Proceeds of Crime Act 2002 would have on the Claimants, the status of the Success Fee and the undertakings in relation to the same, while the monies remained in the Claimants' hands;
>
> iii. Cross-examined the Claimants' Mr Brown about the POCA implications for the Claimants (as equity partners in a law firm) in seeking an indemnity from Insurers whilst also intending to retain the Success Fee if and to the extent it was found to be the proceeds of crime;
>
> iv. Considered whether to lead evidence as to previous insurer practice and treatment of policy claims seeking indemnification of fees to which an insured was never entitled, as distinct from fees which insureds were in principle entitled to but were required to pay damages to third parties reflecting the same.
>
> But the Respondents were not able to take any of those steps since the issue was not one in the case and not one that they were ever required to meet until after the final trial of the dispute."

94. At the hearing, the matters said to amount to "substantial injustice" which were the focus of submission were (i) the inability to advance the legal objections to the Tughans Fee Damages Claim in an appropriate manner; and (ii) the loss of the opportunity to raise the argument that, even if RSA's legal objection was wrong, Tughans were not entitled to an indemnity under the terms of the Policy in any event because the other

partners had condoned the dishonesty alleged against Mr Coulter through their decision not to return the Tughans Fee. So far as those two matters are concerned:

i) Mr Hubble KC accepted that the full hearing of the legal arguments before the court on the s.69 application was sufficient to cure any substantial injustice which would otherwise have followed from (i).

ii) With some encouragement from the court, Mr Coleman KC accepted that the effect of the words "subject to the application of any other terms and conditions of both the Primary and Excess Layer Policy Wording" in the Disputed Declarations ([45]) left the condonation argument open to RSA in the event that Tughans were found liable to BRUK. Mr Hubble KC accepted that, on that basis, there would be no substantial injustice in relation to (ii) either.

95. I was initially attracted to the view that the consequence of the matters in [94] above was that the s.68 challenge should fail, because there had been no substantial injustice which had not been cured by a subsequent, or the opportunity for a further, hearing. However, on further reflection I do not think that matters are quite so straightforward. That is because that outcome would pay no regard to what, on the face of things, was a legitimate litigation expectation on RSA's part of being able to present its factual case, and challenge Tughans' witnesses, at a single hearing (Tughans having called evidence from Mr Patrick Brown, the current managing partner of Tughans at the merits hearing which preceded the Partial Final Award). Had Tughans applied after the Partial Final Award for permission to seek a declaration that they were entitled to an indemnity in respect of the Tughans Fee on an unrestricted basis (rather than solely on the basis of the Qualified Claim), the Arbitrator would have needed to take that interest into account when deciding what course to follow. However , I accept that that consideration need not have been determinative when ruling on any application by Tughans to pursue their claim for indemnity in relation to the Tughans Fee on an unqualified basis. In particular:

i) The legal argument which would have been raised by RSA in response had in any event been raised in response to the Qualified Claim.

ii) The Qualified Claim would have to be determined in any event, but the factual premise of that claim had yet to be established, because the extent to which the benefit of the Tughans Fee would be available to the insured partners, and the reasons for any shortfall, would not be known for some time.

iii) RSA does not appear to be alleging that there was a serious irregularity because the factual arguments raised by RSA in response to the Qualified Claim – as to the effect of Tughans' conduct in accounting to HMRC in respect of the Tughans Fee or giving undertakings in relation to the Tughans Fee – were not determined by the Arbitrator in the Award. It was expressly confirmed before me that those points, to the extent they arise, would fall to be determined at a subsequent arbitral hearing.

iv) On what is now the agreed effect of the Disputed Declarations, it would have remained open to RSA to raise the condonation argument at a future hearing which, to the extent it followed the resolution of the proceedings brought by BRUK against Tughans, might well take place when the underlying events are clearer and when the current uncertainties in relation to the damages claimed by

BRUK and the basis for those claims (see [36](iv]) above) are likely to have been clarified.

96. In circumstances in which the effect of my conclusion on the s.68 application is that it will, in any event, be necessary for the Arbitrator to rule on the Qualified Claim, I have decided that the appropriate course in this case is to remit the Award to the Arbitrator under s.68(3)(a) of the 1996 Act solely for the purpose of:

i) determining whether, and if so on what terms, it should be open to Tughans to pursue their indemnity claim in relation to the Tughans Fee on an unqualified basis; and

ii) (to the extent this remains a live issue in the light of the Arbitrator's decision in (i) above and the court's conclusion on the s.69 application below) to decide what relief to grant in respect of the Qualified Claim, including whether there should be further argument on that issue.

THE APPEAL UNDER S.69 OF THE 1996 ACT

The point of law in outline

97. RSA's appeal under s.69 of the 1996 Act is not dependent on the outcome of the remission (or indeed the success of the s.68 application), because it arises on the Qualified Claim which RSA accepts formed part of the Arbitration.

98. In the Arbitration Claim Form, RSA identified the point of law which arises in this case as follows:

> "The Arbitrator's decision declaring that the Respondents were entitled to a full indemnity in relation to the Success Fee (including in relation to not only those sums retained as profit costs but those elements of the Fee paid by the Respondents as income tax and VAT thereon) is obviously wrong in law and raises a point of general public importance as to the limits of indemnities that may be claimed under a policy of professional indemnity insurance. That is a question of law in that the Claimants contend that policies of professional indemnity are not intended to, and do not in fact, provide cover that would entitle an insured to be indemnified for the loss of a sum to which they were never entitled, there being no 'loss' and thus no 'insured loss' at all."

99. In the argument as it developed, it is possible to identify various strands in RSA's s.69 challenge:

i) If BRUK establishes liability against Tughans, it will follow that Tughans never became entitled to the Tughans Fee and so can suffer no loss in having to return it.

ii) It is not the purpose of a professional indemnity insurance policy to pay solicitors a sum representing profit costs to which they were never entitled.

iii) Granting Tughans an indemnity in respect of the Tughans Fee would violate the principle of indemnity.

100. RSA's argument was advanced as a general proposition of law, by reference to the nature of indemnity insurance, rather than in reliance on any particular wording in the Policy. However, it is helpful to keep the terms of the Policy well in mind. Clause 1 provides:

> "Insurance Clauses
>
> 1. Civil Liability
>
> The Insurers will indemnify the Insured in respect of claims or alleged claims made against the Insured and notified to the Brokers (subject to Special Condition 4) during the Period of Insurance specified in the Schedule in respect of any civil liability (including liability for claimant's costs and expenses) incurred in connection with the Practice carried on by or on behalf of the Solicitor or any Predecessor provided that no indemnity will be given
>
> a) to any individual committing or condoning any dishonest fraudulent criminal or malicious act or omission
>
> b) to any partnership or incorporated practice or limited liability partnership in respect of any dishonest fraudulent criminal or malicious act or omission committed or condoned by all of its Partners directors officers or members."

Discussion

The Indemnity Principle

101. It is well-established that a policy of indemnity insurance entitles the insured to recover its actual loss, but not more than its actual loss (*MacGillivray on Insurance Law (*15th), [28-002] and *Castellain v Preston (*1883) 11 QBD 380, 386). Generally, there is little difficulty in meeting the requirement of loss in a liability policy. As Devlin J noted in *West Wake Price & Co v Ching* [1957] 1 WLR 45, 49 when dealing with a claim for damages for negligence and fraud:

> "the assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss. If judgment were given against them for the sum claimed, they would have undoubtedly have sustained a loss".

102. It is not difficult to conceive of forms of liability to which a professional indemnity policy would not ordinarily be expected to respond: for example, where a firm of solicitors fails to pay rent for their office and judgment is entered for the arrears, or where a firm charges for work which has not in fact been done and judgment is entered for the amount of the over-charge. Policy provisions will often specifically address scenarios of these kinds. For example the Policy in this case excluded "any claim arising out of or in connection with any trading debt incurred by the Insured or the Firm or any business managed by or carried on by the Insured or the Firm" and liability insurance policies frequently exclude "loss resulting from any Claim for legal liability assumed by the Assured under the specific terms, conditions or warranties of any contract, unless such liability would nevertheless have attached by law in the absence of such term,

condition or warranty." Further, the insuring clause in professional indemnity policies is sometimes qualified by providing that "the term Damages shall not include or mean future profits, restitution, disgorgement of unjust enrichment or profits by an Insured, or the costs of an Insured to comply with orders granting injunctive or equitable relief" or the "return or offset of fees, charges, or commissions for goods or services already provided or contracted to be provided".

103. However, it is possible to find statements which rely on the indemnity principle in this context as a reason why a professional indemnity policy will never provide cover for a restitutionary claim:

i) In *Axa Insurance UK plc v Thermonex Ltd* [2012] EWHC B10 (Merc), in a policy covering "liability for injury or damage", claims had been brought against the insured for damages and restitution. The nature of the restitutionary claim – which appears to have been brought under Irish law – is unclear, but may have been a claim for benefits derived by the insured from breach of contract (it being alleged that the insured had "made an unjustified gain … in that they have not provided the design and system which they were obliged to provide or failed to carry out their obligations under the warranties"). At [66], HHJ Simon Brown QC held:

> "Restitutionary claims cannot be within the scope of the cover provided by the PL [public liability] section. Restitution is concerned with the reversal of a gain not with compensating a claimant for its loss. In my judgment, even if Thermonex did have any liability to Gem to make restitution, it would not be legally liable to pay damage".

ii) The editors of *Colinvaux's Law of Insurance* (13th), [21-030] observe:

> "A liability policy will not cover restitutionary claims. The essence of such a claim is that the insured is in possession of money which does not belong to him. Accordingly a restitutionary claim is inconsistent with the notion that the assured has suffered any loss. On this basis, it might be thought that a claim by the assured for loss of professional fees is not one covered by a liability policy".

That passage relies on a statement made outside the insurance context by Lord Phillips in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391, [5]:

> "True it is that S & R are now subject to a paper liability to the Komercni Banka of over $94m, but common sense would suggest that this is not really a loss that they have suffered. They started with nothing and their alleged losses are sums that they acquired by fraud and then paid away as part of the same fraudulent transaction. If a person starts with nothing and never legitimately acquires anything he cannot realistically be said to have suffered any loss."

Claims Against Solicitors to Recover Fees Charged

104. The suggestion by the editors of *Colinvaux's Law of Insurance* in this context that "it might be thought that a claim by the assured for loss of professional fees is not one

covered by a liability policy" ([103(ii)]) requires further consideration. The only authority touching on this issue to which I was referred was the decision in *The Mortgage Corporation v The Solicitors Indemnity Fund Ltd* [1998] PNLR 73. In that case, C's house had been charged to secure debts owed both by C personally, and by the law firm of B & Co of which C was a partner, to a bank. The plaintiffs provided secured refinancing of C's debt. However B & Co, who acted in the refinance transaction, negligently failed to register the plaintiffs' charge, with the result that the bank was able to obtain priority over the plaintiffs by registering its charge over the house. When C defaulted on his debts, the house was sold, and the bank was able to use the proceeds of sale to pay off the amounts owed to it by C and B & Co. The issue which then arose was whether the loss suffered by B & Co, and for which it could seek an indemnity under the insurance provided by the Solicitors' Indemnity Fund, was represented by the amount of its liability to the plaintiffs, or whether the benefits which B & Co had obtained through the reduction of its own debt to the bank had to be brought into account.

105. At p.79, Sir John Vinelott held that B & Co's right to an indemnity under its policy:

> "extends to any loss incurred arising directly from any claim against the firm founded on negligence attributable to the firm. The language [of the policy] points to the amount of a claim for damages established against the firm, not to the ultimate consequences to the firm of its liability under the judgment after taking into account other transactions entered into by the firm."

106. It will be apparent that the principal issue in that case was a rather different one to that which arises here – whether a benefit derived by the insured and arising from the transaction which had given rise to its liability was to be brought into account in determining whether it had suffered an insured loss and in what amount (i.e. an issue in the insurance context akin to that which arises in assessing contractual damages by reference to the principle in *British Westinghouse Electric and Manufacturing v Underground Electric Railways Co of London Ltd* [1912] AC 673 and discussed by Adam Kramer KC, *The Law of Contract Damages* (3rd), [15-110]-[15-118])). However, in the course of reaching that conclusion, Sir John Vinelott made two observations (on p.80) which are of relevance to the present dispute, namely that if the contrary view had prevailed:

i) "in the case of almost any transaction giving rise to a liability in negligence, a claim by the client against the Fund would be reduced by the benefit to the solicitor of any related fees he would be entitled to charge and retain"; and

ii) "it would severely limit the protection afforded by the [Solicitors' Indemnity Fund] to members of the public who resort to solicitors for advice" (relying in that context on the important public policy underlying the compulsory insurance regime for solicitors of protecting solicitors' clients as well as solicitors themselves, as set out by Lord Brightman in *Swain v Law Society* [1983] 1 AC 598, 618).

107. Mr Hubble KC accepted – rightly in my view – that where a solicitor who has performed work negligently is sued for damages which include wasted fees paid by the client, the solicitor's liability in respect of the wasted fees would ordinarily be capable of constituting loss for the purposes of a professional indemnity policy. Notwithstanding

the traditional description of a solicitor's fees as "profit cost", the solicitor will have committed the time necessary to earn the fees, and also foregone the opportunity to use that time for the purposes of earning fees on other work. In my view, the conclusion that a payment of damages in the amount of fees charged by the solicitor constitutes a loss to the solicitor reflects the fact that the solicitor had accrued a contractual right to the fees by doing that which had to be done under the contract of retainer to earn them.

108. Particularly in a litigation context, the mechanisms by which solicitors earn fees can be very much more complicated than simply the application of hourly rates to work done. For example, a solicitor may be entitled to charge an uplift over and above an agreed hourly rate in the event that the action succeeds. In such an eventuality, if the solicitor had negligently advised that a particular (unsuccessful application) be made in the context of ultimately successful litigation, and was then sued by the client for the fees paid (including uplift) in respect of the application, I do not accept that the solicitor's right to an indemnity under their professional indemnity policy would be limited to the fixed element of the fee. Nor am I persuaded that the result would be any different in a case in which the solicitor's remuneration was entirely contingent in nature (for example, where it was conditional on obtaining judgment, but the solicitor had negligently advised the client as to the enforceability of a judgment in the only jurisdiction in which the defendant had assets).

109. In short, in each of these scenarios, I am satisfied that if the solicitor has done what is necessary as a matter of contract to accrue a right to the fee, an award of damages in the amount of the fee payable will ordinarily constitute a loss for the purposes of a professional indemnity policy. In my view, that is the correct analysis conceptually, as well as being consistent with the public policy of providing a measure of protection to the solicitor's client (who will be "out of pocket" whatever the basis on which solicitor accrued the right to payment) which was identified as a relevant factor in construing a policy of professional indemnity insurance of this kind in *The Mortgage Corporation* case ([106(ii)]).

Claims Against A Solicitor to Recover Amounts Paid Which Never Became Due

110. What of the position where a solicitor receives a sum of money to which it had no contractual right in the first place? The question of whether, and if so in what circumstances, an insured can obtain an indemnity under a professional indemnity policy in respect of the insured's liability to restore sums paid to it by third parties is a complex one, which has been the subject of extensive case law and commentary in the United States. Judge Richard Posner, sitting in the Seventh Circuit Court of Appeals in *Level 3 Communications Inc v Federal Ins Co* 272 F3d 908, 910-911 (7th Cir 2001), observed of the claim brought under a D&O policy in that case:

> "An insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it had stolen, even if a more polite word than 'stolen' is used to characterize the claim for the property's return".

However, that conclusion has been criticised, and the law in many US states would appear to have moved more recently in the other direction (see, for example, Christopher French, "The Insurability of Claims for Restitution" 18:3 University of Pennsylvania Journal of Business Law 599).

111. By contrast, there has been relatively little discussion of this issue in an English law context. Sometimes, the wording of the professional indemnity policy may provide assistance. As noted above, the policy in *Thermonex* only covered "liability for injury or damage" ([103(i)]), and the policy in issue in another of the decisions to which I was referred (*Sutherland Professional Funding Ltd v Bakewells* [2011] EWHC 2658, (QB)) required a claim for "civil compensation or civil damages". In one of the Australian decisions in which this point arose, *Kyriackou v ACE Insurance Ltd* [2013] VSCA 150, [52] , the policy defined "loss" as "the aggregate of all amounts payable by the Insured or ACE as civil compensation or civil damages in respect of a Claim". It was that language which proved crucial in Harper JA's analysis:

> "Aggrieved persons may have claims of various kinds – for example, in restitution, or debt, or damages – or some combination of these (the terms 'damages' and 'compensation' are synonymous). But a claim for damages requires a breach of a duty or obligation and would therefore exclude claims for restitution or debt. Thus, in the present case the available evidence suggests that, if any claims were to be made by aggrieved investors, they would likely be for the return of borrowed funds, or to enforce contractual rights – in other words, for restitution of money had and received, or for a debt due or payable under contract – neither of which would constitute payment of compensation or damages. Such claims fall outside the insuring clause (clause 1.1) of the professional indemnity policy with which these proceedings are concerned."

112. Similarly, I note that the Minimum Terms and Conditions of Professional Indemnity Insurance of the Solicitors Regulatory Authority (of England and Wales) define the scope of cover, inter alia, by reference to the requirement for "a claim in respect of such liability", with "claim" being defined as "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".

113. In this case, the Policy provides for an indemnity "in respect of claims … in respect of any civil liability", with no definition of the term "claim". However, the definition of "Self Insured Amount" which appears in the Policy is "the total amount payable by the Insured in respect of each and every claim made against the Insured for all damages and claimants costs and expenses", which suggests that the Policy principally has liability for damages in mind. I am not persuaded that the particular language of the Policy compels any different conclusion to that adopted in the materials considered in [103] and [111] above. Having to return a sum of money paid to the insured to which the insured never had any legal entitlement is not, in my view, an indemnifiable loss under a professional indemnity policy in the absence of clear language to that effect. Nor am I persuaded that the use to which the insured puts those funds between receipt and judgment alters the analysis. It is the ascertainment of the liability by settlement, judgment or award which creates the indemnifiable loss in third party insurance cover. As *MacGillivray on Insurance Law* notes at [28-002]:

> "The common law doctrine was that nothing less than payment would suffice as proof of loss. Equity, however, accepted that a loss was suffered once the fact and extent of the liability of the party seeking to enforce the indemnity has been ascertained in proceedings or otherwise".

114. By contrast, on Tughans' analysis it is the paying away or commitment of the received funds elsewhere which is the key event determining whether or not there has been a loss. Further, Tughans' approach would involve a series of fine judgments more suited to the law of unjust enrichment than the law of insurance as to what steps subsequent to the receipt of the unearned payment were sufficient to generate an indemnifiable loss. It is possible to conceive of circumstances in which partnership profits are declared, distributed and disbursed on holidays, fine wines, tasteless art or charitable donations, or used to make investments whose value fluctuated over time. The need, on this approach, to address issues such as subjective devaluation, subjective revaluation and surviving value in an insurance law contract is a strong sign that the argument has ventured down the wrong path.

115. Nor can I accept that, in such a scenario, a different outcome would follow merely because the underlying complainant, perhaps with an eye to the insurance position, had chosen to advance a claim for damages without alleging that the amount paid had never in fact been due in the first place (see *West Wake Price & Co v Ching* [1957] 1 WLR 45,48, 53-54).

Was the Tughans Fee Due as a Matter of Contract?

116. On the face of the Tughans Letter of Engagement, in order for the Tughans Fee to fall due as a debt, the following matters had to take place:

    i) The Transaction had to be successfully completed.

    ii) BRUK had to receive the Success Fee from Cerberus in cleared funds.

    iii) Tughans had to "provid[e] the representations and warranties set forth in this letter".

    iv) Cerberus had to confirm to BRUK that the terms of the Tughans Letter of Engagement were acceptable to it.

117. Having initially appeared to accept in the course of argument that all of the conditions to Tughans' ability to sue for the Tughans Fee as a debt had been satisfied, Mr Hubble KC clarified RSA's position in reply that it was contending that the condition at [116(iii)] – that Tughans had provided the representations and warranties set out in the Tughans Letter of Engagement – would not be satisfied if Tughans had provided the representations, but the representations were untrue, which would be the case if BRUK established the allegations it was advancing against Tughans.

Is it Open to RSA to Assert that the Tughans Fee Was Not Due as a Matter of Contract?

118. There was a dispute as to whether it was open to RSA to advance this argument. The Arbitrator had found the Tughans Fee was payable when addressing the Solicitors' Practice Issue, and Tughans argued that "the interpretation of the engagement letter … is not the question of law raised in [RSA's] claim form … or in the application for permission to appeal".

The position in the Arbitration

119. It is clearly a threshold requirement for an appeal under s.69 of the 1996 Act that the question of law "arises out of an award". It is implicit in s.69(3)(b) that the issue of law must be one which the tribunal was asked to determine.

120. In this case, the issue of whether or not the Tughans Fee was contractually due was of obvious relevance to the Qualified Claim which RSA accepts was in issue in the arbitration. Paragraph 199 of RSA's written opening in the Arbitration stated:

> "If [BRUK's] pleaded allegations are correct, and the Success Fee was only obtained consequent upon IC's fraudulent representation that he would not disburse the monies contrary to his assurance, then neither IC nor Tughans ever had an entitlement to the Success Fee in the first place, *compliance with that assurance being a pre-condition to IC becoming entitled to the fee, and retain the fee (and where that failure to comply with a condition entitling a person to remuneration is not an insured peril, in contrast to a breach of duty owed to the client thereby causing the client loss: the failure to comply with the condition simply meant that IC never accrued an entitlement to obtain and keep any gain(s))*".

(emphasis added).

121. That paragraph does, in my determination, squarely take the point that the Tughans Fee never fell due contractually, albeit without any analysis of the relevant provisions of the Tughans Letter of Engagement. It assumes that if Mr Coulter made the untruthful representation alleged, the Tughans Fee never became due.

122. Thereafter, the question of whether the contractual pre-conditions to accruing the Tughans Fee were satisfied does not appear to have been directly addressed by either party. The Arbitrator found in the Partial Award that "this was a fee due and payable to Tughans for work done", but this observation was made in the context of the Solicitors' Practice issue rather than as a result of an analysis of the terms of the Tughans Letter of Engagement.

123. When the issue surfaced again in the course of the submissions made following the Partial Award, RSA submitted that the Tughans Fee was "never due to them at all" (paragraph 19 of the Respondents' submissions of 23 July 2021). Tughans responded to RSA's argument that "the Success Fee was never due to Tughans" by suggesting that "where there is a claim for compensation it cannot be said that the Success Fee was 'never due to Tughans at all'" (paragraphs 18 to 20 of Tughans' submissions of 4 August 2021). Its case appears to have been that all that mattered in these circumstances was the way in which BRUK had formulated its case, which was not on the basis that the Tughans Fee had never become payable. RSA's response of the same date referred to "the fee, by definition, never having been due". Neither party directed submissions to the terms of the Tughans Letter of Engagement in answering that question. In those circumstances, it is scarcely surprising that the Arbitrator did not do so either.

124. In summary, I am satisfied that this issue of whether the Tughans Fee ever became due contractually was raised before the Arbitrator, albeit never in terms which directly addressed the terms of the Tughans Letter of Indemnity.

The scope of the grant of permission to appeal

125. Turning to RSA's application for permission to appeal, that raised the issue of law of whether an insured could obtain an indemnity for a loss to which it was never entitled. However, it rather assumed that there was no entitlement in this case, rather than identifying this as an issue to be determined in the appeal. The supporting skeleton argument referred to the fact that if Mr Coulter had acted dishonestly, as BRUK was contending, then "the Success Fee would never have been due to Tughans in the first place" and "Tughans never had a lawful entitlement to the Success Fee". It suggested that the effect of the Arbitrator's declaration was that if the Tughans Fee "is found in the Underlying Proceedings never to have been due, the Claimants will nevertheless be entitled to keep and distribute that fee while the Respondents will still be required to provide an indemnity in respect of the same."

126. Tughans' skeleton argument resisting permission to appeal took the point that even if the Tughans Letter of Engagement was found to have been induced by a fraudulent misrepresentation, this did not mean it was void (implicitly contending that, on the terms of that contract, the Tughans Fee was due).

127. Henshaw J, giving permission to appeal, identified the issue of law raised by the appeal as "the proposition that a professional indemnity insurance covers a claim for repayment of a professional fee on the ground that the firm received the fee as a result of fraudulent or negligent misrepresentation or otherwise improperly". Given that formulation, he had no cause to consider the issue of whether the Tughans Fee ever fell due as a matter of contract, still less whether a dispute as to the construction of the Tughans Letter of Engagement in this context would have met the test for granting leave to appeal under s.69 of the 1996 Act.

128. However, in the amended Respondents' Notice, for which I gave permission at the start of the hearing, Tughans appear to have accepted that one issue which arose on the appeal was whether Tughans were entitled to the Tughans Fee, because, in the event that the court determined that the Tughans Success Fee never became due, Tughans advanced an alternative argument that they were entitled to an indemnity under the Policy in any event. Further, it was Tughans who, for the first time, directly raised the issue of construction of the Tughans Letter of Engagement in their skeleton for the hearing, arguing that:

> "The payment was conditional on representations and warranties being provided (see the contract terms ….) It was not conditional on those representations and warranties being true. The success fee was the price paid for services rendered, not for warranties and representations. If the warranties and representations were untrue, then contractual remedies were available subject to the usual limitations".

Conclusion

129. The position is a little untidy, but against the background summarised above, I have come to the following conclusions:

i) In the arbitration, RSA squarely took the point that (on BRUK's allegations) a pre-condition to the payment of the Tughans Fee had not been satisfied.

ii) Implicit in the issue of law for which RSA sought and obtained permission to appeal was the question of whether Tughans ever did become entitled, as a

matter of debt, to the Tughans Fee. The argument on the appeal would have been wholly artificial if that issue (which, for understandable reasons, BRUK has not raised in the Northern Ireland proceedings) was not determined.

iii) I am satisfied that the issue of Tughans' contractual entitlement to the Tughans Success Fee is one which Tughans anticipated and were ready to meet at the hearing, and which it itself advanced as part of its case.

iv) The issue raises a short question of construction of a document, albeit that exercise of construction is being undertaken for the first time in the context of the appeal hearing.

v) In these circumstances, I am willing to grant RSA permission to advance this argument (following the course adopted by Eder J in *Parbulk II A/S v Heritage Maritime Ltd SA* [2011] EWHC 2917, [15]-[16], and endorsed by Hamblen J in *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [20]-[22]).

The Position on the Merits

130. In a supplemental note filed with the court's permission after the hearing, RSA relied upon a number of authorities in support of its contention that the Tughans Fee never became due contractually. Those authorities established, not surprisingly, that where a contract imposes a pre-condition to a particular obligation arising, that condition must be fulfilled or performed, but that does not answer the anterior question of *what* the condition is, in order to establish what constitutes "fulfilment" or "performance".

131. One of the cases to which RSA referred does bear directly on the issue at hand: *Collidge v Freeport Plc* [2008] IRLR 697. In that case, the claimant had been the chief executive officer of the defendant but was suspected of wrongdoing. To avoid an investigation while he was suspended from his duties, it was agreed that he would resign, with the firm agreeing to pay him a substantial compensation amount "subject to and conditional upon the terms set out below". By clause 7, Mr Collidge gave various warranties as a "strict condition of this agreement" including "that there are no circumstances of which [he was] aware or of which [he] ought to have been aware which would constitute a repudiatory breach on [his] part of [his] contract of employment which would entitle or have entitled the company to terminate [his] employment without notice". The company claimed that this warranty had not been complied with, and that it was not obliged to make the compensation payment to Mr Collidge. One argument raised by Mr Collidge in response was that the pre-condition to payment had been satisfied by the provision, rather than the truth, of the warranty. Unsurprisingly, that argument failed:

i) The combined effect of the words "subject to and conditional upon the terms set out below", and the provision that the warranties were "a strict condition of this agreement" made it clear that the obligation to pay was subject to the truth of the warranted state of affairs ([10]).

ii) That conclusion was put beyond doubt by the context of the agreement. The company had been investigating matters which would have permitted it to dismiss Mr Collidge without any significant payment, and the effect of the

condition was effectively to preserve that entitlement while the investigation continued ([11]).

132. It is, of course, possible for an agreement to adopt either approach to the imposition of pre-conditions to payment, and the question of which was adopted in this case is ultimately a matter of interpreting the Tughans Letter of Engagement in context.

133. I have found the arguments on this issue finely balanced, but have ultimately concluded that this was not a case in which a pre-condition to payment of the Tughans Fee of the truth of warranties and representations was imposed:

i) It is not the natural meaning of the words "providing the representations and warranties set for in [the Tughans Letter of Engagement]". Those words are more naturally understood as imposing a condition precedent that Tughans would provide BRUK with the legal protections which warranties and representations in the requested terms would bring.

ii) While the Tughans Letter of Engagement was signed after the relevant work had been done, it was written in forward-looking terms, and matched the terms of the BRUK Letter of Engagement which was entered into on a forward-looking basis. Given that Mr Coulter had already provided his confirmation to BRUK approving the representations and warranties before BRUK entered into the BRUK Letter of Engagement (with the Tughans Letter of Engagement formalising the position) and with the BRUK and Tughans Letters of Engagement being "back-to-back", I am satisfied that the documents are intended to have the same meaning in this context.

iii) On RSA's construction, both BRUK and Tughans would have been deprived of any right to remuneration, no matter what work had been done, if either BRUK or Tughans (in the case of BRUK Letter of Engagement) or Tughans (in the case of the Tughans Letter of Engagement):

a) were not familiar with the provisions of the relevant anti-corruption legislation;

b) had unwittingly "directly or indirectly" violated some element of that legislation, notwithstanding the potentially broad reach of legislation of that kind;

c) had allocated a member of staff to the engagement who (unbeknown to the principals) had a family relationship with a Northern Ireland government official;

d) were in a position of conflict of interest (such that BRUK would lose its entitlement to remuneration because of a conflict of interest on Tughans' part);

even if the statements in question had not induced Cerberus/BRUK to enter into the relevant Letter of Engagement and the breach of the representations and/or warranties had not caused Cerberus/BRUK any loss.

iv) There is other language which is inconsistent with the truth of each of the matters contained in the representations and warranties being a pre-condition to any right of payment. Thus:

a) If BRUK/Tughans became aware of a member of staff having a family relationship with a government official, there was an obligation to notify Cerberus and to comply with Cerberus' reasonable requirements. However, on RSA's construction, that relationship would itself be sufficient to deprive BRUK and/or Tughans of their right to payment, whether reported to Ceberus and/or BRUK or not and even if the measures then requested by Cerberus and/or BRUK were subsequently complied with.

b) The remedy provided to Cerberus / BRUK if it determined reasonably and in good faith that the assurances offered were not sufficient is an option (or right) to terminate the relevant Letter of Engagement and (then) to refuse payment. That appears to pre-suppose that Cerberus could chose not to do so, and that absent such a termination, the relevant Letter of Engagement (with the payment right it created) would stand. Neither state of affairs is consistent with the effect of such a family relationship being that BRUK/Tughans would without more have no right to payment.

v) The commercial context is clearly very different to *Collidge*, in which a significant payment was being made to terminate Mr Collidge's employment on a consensual basis, when if the representations and warranties were untrue, the company was entitled to dismiss him on a summary basis and without the payment of substantial compensation.

134. Mr Hubble KC's alternative argument was that, if the allegations made by BRUK were true, then the Tughans Letter of Engagement and/or the payment of the Tughans Fee had been procured by fraudulent or negligent misrepresentations for which Tughans were responsible, but for which the Tughans Fee would never have been paid (or indeed been payable). However, BRUK has not purported to rescind the Tughans Letter of Engagement, with the result that the contractual rights arising thereunder remain. As Millett J noted in *Lonrho plc v Fayed and others (No 2)* [1992] 1 WLR 1, 11-12:

> "A contract obtained by a fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so the representor is not a constructive trustee of the property transferred and no fiduciary relationship exists between him and representee".

While Mr Hubble KC argued that, for the purposes of determining whether or not Tughans were entitled to an indemnity in respect of BRUK's claims under a professional indemnity policy, it should not matter whether or not BRUK chose to rescind the Tughans Letter of Engagement (assuming such a course was open) or affirmed it and claimed damages, the legal consequences of those two inconsistent courses of action are very different. That is the case not only with regard to the impact on Tughans' contractual right to the Tughans Fee, but in other respects as well. If it had been open to BRUK to rescind the Tughans Letter of Engagement and they had done so, the issue would have arisen as to whether Tughans were entitled to an allowance for

the services performed (*Chitty on Contracts* (34th) [9-136]-[9-137]). Having affirmed the Tughans Letter of Engagement, BRUK's claim for damages raises the issues of counterfactual analysis briefly referred to at [35(iv]). The differences between the two courses are far from the technicality which Mr Hubble KC's submissions assumed.

135. Mr Hubble KC's submission can be tested by taking the example of a solicitor who (negligently or fraudulently) misrepresents the firm's expertise, leading the client to embark on unsuccessful litigation which it would otherwise have refrained from. If the firm was subsequently ordered to pay the client damages in the amount of the fees paid to the firm, I do not believe the misrepresentation would have the effect of depriving the firm (and, in the event that it sought to recover on a derivative basis, the client) of a right to indemnity under the firm's professional indemnity policy.

136. By way of a revised formulation, Mr Hubble KC submitted that the position was different when, as would be the case here on BRUK's allegations, the client had taken the decision to pay the fee as a direct result of a fraudulent statement by the solicitor. Modifying the example in the preceding paragraph, Mr Hubble KC argued that there could be no indemnity in such a case if, before paying the bill, the client had asked the solicitor "are you sure your firm has experience in this type of litigation?" and the solicitor had dishonestly replied affirmatively, inducing the client to discharge the firm's invoice. However, that refinement to the example has no impact on the solicitor's contractual right to the payment for so long as the contract of retainer subsists, and I do not accept that it has any effect on the solicitor's entitlement to an indemnity if sued for damages in the amount of the fees paid to it.

137. While it would appear that I have found this issue more challenging than the Arbitrator, I have ultimately come to the same conclusion: a claim for damages against Tughans in the amount of the Tughans Fee to which it had acquired a contractual right under a subsisting contract constitutes a loss to Tughans for which they are entitled, if the other pre-requisites to cover are established, to an indemnity under the Policy. Any hesitation in reaching that conclusion stemmed in part from the size of the Tughans Fee, the unusual nature of the transaction and the obscure nature of the services being provided by the firm. However, RSA deployed all of those factors in support of its argument on the Solicitors' Practice Issue. That argument was rejected, and the Arbitrator found that "strategic advice, facilitation of necessary political contacts, intelligence gathering and the oversight thereof, and deal structuring … were all carried out here". There has (understandably) been no attempt to challenge the Arbitrator's conclusion.

CONCLUSION

138. For the reasons set out above:

i) RSA's application under s.67 of the 1996 Act fails.

ii) RSA's application under s.68 of the 1996 Act succeeds, and I will remit the Award to the Arbitrator on the basis set out in [96] above.

iii) RSA's appeal under s.69 of the 1996 Act fails.