Neutral Citation Number: [2022] EWHC 182 (Comm)

Case No: CL-2020-000460

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2022

Before :

The Hon. Mr Justice Butcher
Between :

DOORWAY CAPITAL LIMITED	**Claimant**
- and -	
AMERICAN INTERNATIONAL GROUP UK LIMITED	**Defendant**

- -
- -

Nik Yeo (instructed by **Simpson Millar LLP**) for the **Claimant**
Clare Dixon QC (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing date: 18 January 2022
Further written submissions 26, 27 January 2022
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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 BUTCHER

MR JUSTICE BUTCHER:

1. This is an application by the Defendant ('AIG') for summary judgment against or the strike out of the Claimant's ('DCL's) claim against it.

2. That claim is brought pursuant to the Third Parties (Rights Against Insurers) Act 2010 ('the 2010 Act'). DCL claims to be entitled to claim against AIG as the statutory assignee of rights of an incorporated firm of solicitors, Seth Lovis & Co Solicitors Ltd ('SL'), which was covered by professional indemnity insurance issued by AIG for, at least, the year 1 October 2018 to 30 September 2019. SL went into administration on 11 March 2019.

The background to the claim

3. DCL is a business which provides capital to law firms. One firm to which it provided capital was SL.

The Receivables Funding Agreement

4. On 25 April 2016, DCL and SL entered into a Receivables Funding Agreement (or 'RFA'). The RFA named SL as the 'Client'. By clause B of the RFA it was provided that:

> 'This is a receivables funding facility to provide the Client with working capital and proceeds to repay certain existing borrowing which sets out the terms upon which [DCL] will purchase the Client's Receivables….'

5. The RFA provided that SL would sell and DCL would purchase SL's 'Receivables'. These were defined as:

> 'Any monetary claim on or obligation of an Obligor … present, future or contingent together with all Related Rights and any entitlement of the Client to be paid as a result of a settlement agreement, Tomlin order or other court order for costs.'

> 'Obligor' was defined as:

> 'A debtor of the Client under the Client's Terms of Business and including in addition where a Khans Notice has been issued, a defendant liable to pay the Client the Notified Value of costs either (a) summarily assessed by a court, (b) recoverable under a bill of costs or invoice or (c) comprising fixed recoverable costs.'

6. Under clause 2.2 of the Terms and Conditions of the RFA:

> 'The Client agrees to sell and [DCL] agrees to purchase with full title guarantee every and all Notified Receivables together with their Related Rights. Each Notified Receivable together with their Related Rights will vest absolutely in [DCL] and be assigned to [DCL] automatically upon Notification on the Commencement Date or on its creation following the Commencement Date.'

> It was further provided by clause 2.3 that DCL was not obliged to reassign a Notified Receivable to SL.

Thus, under clauses 2.2 and 2.3 DCL was to obtain absolute ownership of Notified Receivables and Related Rights, and DCL did not simply take a security interest in those Receivables and Related Rights.

7. By clause 4.3 of the RFA, SL was required to use certain software, called 'E3', provided by DCL. SL could, but was not obliged to, upload onto E3 details of Receivables owing to it, by way of Notification to DCL. As part of the process of Notification, SL had to give a value to the Receivable, and by clause 13.1.5 of the RFA warranted that it 'reasonably believe[d] that the Receivable [would] be recovered in full without enforcement'. It was the Receivables so notified that were automatically assigned to DCL, upon their being uploaded into E3.

8. In payment for these assignments, DCL then made certain funds available to SL. Specifically:

   (1) E3 calculated an amount called the 'Availability', being 75% of the total notified value of Receivables uploaded to E3, capped at the total agreed facility limit (which was originally £1 million, later increased to £1.5 million).

   (2) The 'Availability' was reduced by the E3 software to the extent that there was an excess concentration of Notified Receivables to any one debtor above 10%, and to the extent of any previously notified Receivables being outstanding for more than 180 days (increased to 240 days) from the date of invoicing or serving a bill of costs.

   (3) SL was then entitled to call on DCL to pay to it amounts up to the then 'Availability' less amounts owing by SL to DCL at that time (being the balance on the 'E3 client account').

9. The E3 client account was debited with amounts of 'Availability' paid by DCL to SL, and was further debited with certain fees and charges payable to DCL. These included a 'Service Charge' for 'services' provided by DCL to SL 'including access to E3 and assisting [SL] with the reconciliation of [SL's] records with [DCL's] records'. The Service Charge was payable throughout the term of the RFA. (Clauses 7 and 8 of the RFA). The E3 client account was credited with Remittances paid to DCL's Nominated Account.

10. Clause 11 of the RFA bore the heading 'Collection of Notified Receivables' and contained, amongst others, the following provisions:

    '11.1 [DCL] appoints [SL] as its agent to collect Notified Receivables and enforce Related Rights only. [SL] will be responsible for all costs incurred in the collection of Receivables and enforcement of Related Rights.

    11.2 [SL] will conduct its duties as [DCL's] agent efficiently and in good faith and in accordance with [DCL's] instructions from time to time.

    …

    11.6 Except as otherwise provided by the SRA's Code of Conduct, [SL] must ensure that Obligors pay all Remittances into its own client account. Upon receipt of a

Remittance, [SL] shall promptly pay an amount representing the value of that Remittance into the Nominated Account'

11.7 If a Remittance is paid into an account other than [SL's] own client account or the Nominated Account, the receiving bank is hereby authorised by [SL] to transfer the Remittance to the Nominated Account.'

11. Of significance were the terms of clause 12 of the RFA which was headed 'Trusts'. They were as follows:

'12.1 [SL] will hold all Remittances in its client account on trust for [DCL] and, subject to the SRA's Code of Conduct, separate from [SL's] own monies.

12.2. Clauses 11.6 and 11.7 will not apply to Remittances tendered solely in payment of Non-notifiable Receivables …

12.3 If for any reason any Notified Receivable and its Related Rights are not transferred to [DCL] by the Agreement, [SL] will hold the Receivable and its Related Rights on trust for [DCL].'

12. By clause 13 of the RFA, it was provided that the inclusion of a Receivable in a Notification was a representation and warranty by SL to DCL that, inter alia, SL 'reasonably believes that the Receivable will be recovered in full without enforcement.' (13.1.5).

SL's alleged liability to DCL

13. DCL's Particulars of Claim plead that SL was liable to it on the following basis:

(1) That DCL was at all material times a 'quasi-client' of SL, as a result of DCL's having appointed SL as its agent to collect Receivables;

(2) That, 'in the premises' SL owed DCL various fiduciary duties;

(3) That between late 2017 and late 2018 SL received into its client account Remittances in an aggregate amount of £2,079,755.58;

(4) That SL only transferred a small part of these Remittances (£394,000) into the Nominated Account;

(5) That, in breach of trust and/or fiduciary duty, the balance of the relevant Remittances (£1,685,355.58) had not been transferred by SL.

AIG did not dispute, for the purposes of this application, that SL had owed DCL fiduciary duties, or any of the matters in (3) to (5).

14. Shortly before the hearing, DCL issued an application to amend its Particulars of Claim to add a plea that, in breach of trust and/or fiduciary duty, SL had transferred some of the relevant Remittances from its client account to third party creditors of SL. That amendment was not consented to, nor made at this stage, but the parties agreed that this application should proceed on the basis that it was to be assumed that there

was an arguable case that part of the relevant Remittances had been transferred by SL from its client account to third party creditors in breach of trust and/or fiduciary duty.

The Policy

15. SL, as it was required to do, maintained professional indemnity insurance. Relevantly it was insured for the period 1 October 2018 to 30 September 2019 by AIG under a UK Solicitors' Professional Liability 2018 policy, No. 0034014369 ('the Policy').

16. The Policy contained the following provisions of relevance:

(1) In the insuring clauses, clause 1 under the heading 'Civil liability'

'The *Insurer* [ie AIG] will indemnify an *Insured* against civil liability to the extent that it arises from *Private Legal Practice* in connection with the *Insured Firm's Practice*, provided that a *Claim* in respect of such liability:

a) is first made against an *Insured* during the *Policy Period*; or

b) is made against an *Insured* during or after the *Policy Period* and arises from *Circumstances* first notified to the *Insurer* during the *Policy Period.*'

(2) Amongst the Exclusions was an exclusion headed 'Debts and Trading liabilities', which was in these terms:

'The *Insurer* will have no liability to indemnify an *Insured* in respect of, or in any way relating to, any *Claim*, *Circumstances* … or related *Defence Costs* arising out of, based upon or attributable to, or related in any way to any of the following exclusions.

… [83] The *Insurer* will have no liability to indemnify an *Insured* in relation to any:

a) trading or personal debt of an *Insured*;

b) legal liability assumed or accepted by an *Insured* under any contract or agreement for the supply to, or use by, the *Insured* of goods or services in the course of the *Insured Firm's Practice*; or

c) guarantee, indemnity or undertaking by any *Insured* in connection with the provision of finance, property, assistance or other benefit or advantage directly or indirectly to that *Insured*.'

(3) The Definitions in the Policy of most relevance were as follows:

'**Practice**

means the whole or such part of the *Private Practice* of an *Insured Firm* as is carried on from one or more offices in England and Wales.

…

Private Practice:

a) in relation to a *Insured Firm* which is a *Licensed Body* means its *Regulated Activities*; and

b) subject to paragraph a) of this definition, in relation to all *Insured Firms* includes without limitation all the professional services provided by the Insured *Firm* including acting as a personal representative, trustee, attorney, notary, insolvency practitioner or in any other role in conjunction with a *Practice*, and includes services provided pro bono publico.

…

Private Legal Practice

means the provision of services in private *Practice* as a solicitor … including, without limitation:

a) the provision of such services in England, Wales or anywhere in the world, whether alone or with other lawyers in a *Partnership* permitted to practise in England and Wales by rule 12 of the Solicitors' Code of Conduct 2007 or by the *SRA* Practice Framework Rules 2011, a *Recognised Body* or a *Licensed Body* (in respect of its *Regulated Activities*); and

b) the provision of such services as a *Secondee* of the *Insured Firm*; and

c) any *Insured* acting as a personal representative, trustee, attorney, notary, insolvency practitioner, or in any other role in conjunction with a *Practice*; and

d) the provision of such services by any *Employee*; and

e) the provision of such services pro bono publico.'

Regulated Activity

means:

a) any *Reserved Legal Activity;*

b) any other *Legal Activity; and*

c) any other activity in respect of which a *Licensed Body* is regulated pursuant to Part 5 of the [Legal Services Act 2007].

…

Reserved Legal Activity

has the meaning given in section 12 of the [Legal Services Act 2007], and includes the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths, as defined in Schedule 2 of the [Legal Services Act 2007].'

17. By paragraph 4 of Schedule 2 to the Legal Services Act 2007, the 'conduct of litigation' includes (as (c)) 'the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)'.

DCL's claim against AIG

18. DCL's claim against AIG in this action can be summarised as follows:

(1) that SL was liable to it for breach of trust and/or fiduciary duty for the breaches which I have already set out above;

(2) that upon SL's entry into administration, SL became a 'relevant person' within the meaning of s. 1 of the 2010 Act, and SL's rights under the Policy were transferred to and vested in DCL pursuant to s. 1(2) of the 2010 Act;

(3) that, accordingly, AIG is liable to DCL for the amounts for which SL was liable to DCL.

19. More particularly, DCL contends that there is cover because:

(1) SL held the relevant Remittances as trustee, and also had as a trustee a fiduciary duty to transfer the sums to the Nominated Account, and not to transfer them to others, and was liable for breaches of those obligations;

(2) This was liability which arose from 'Private Legal Practice' as defined in the Policy, because it arose from (c), SL's 'acting as a … trustee';

(3) Further or alternatively, it was a liability which arose as part of the conduct of litigation, or from the performance of an ancillary function in relation to proceedings, and thus from a Reserved Legal Activity, which was part of SL's Private Legal Practice.

AIG's application

20. For the purposes of this application, AIG does not contest that SL was in breach of its obligations under the RFA or that DCL has suffered loss as a result. What AIG contends is that DCL has no realistic prospect of success in its claim that the liability which it alleges SL was under to it falls within the insuring clause of the Policy; or alternatively, if it does, that it is not excluded by the Debts and Trading Liabilities exclusion.

21. More specifically, AIG contends:

(1) That the obligations of SL to DCL upon which DCL relies resulted entirely from the RFA;

(2) That the relevant obligations, which were to hold Remittances on trust, to transfer them to the Nominated Account, and not to transfer them away to third parties, were the result of clause 12 of the RFA;

(3) That DCL was not a 'quasi-client' of SL; if anything, SL was a client of DCL;

(4) That while SL had acted as a trustee, pursuant to clause 12 of the RFA, it was not providing a 'professional service' thereby, or performing a 'role in conjunction with a Practice', and thus any liability as a trustee did not qualify as liability arising from Private Legal Practice;

(5) That SL's liability did not arise from the conduct of litigation, or any ancillary function in relation to proceedings, and accordingly, again, it was not liability which arose from Private Legal Practice;

(6) In the alternative, liability under the Policy was excluded by sub-paragraph (b) of the Debts and Trading Liabilities exclusion.

Principles applicable to summary judgment

22. The principles applicable to an application for summary judgment, by claimant or defendant, are well-known. The question in the present case is whether the claim has a real prospect of success. One of the relevant principles, as articulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339, (para. 15(vii)) was as follows:

'… it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it … If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.'

Analysis

The Insuring provisions

23. The necessary starting point, and almost the finishing point, on this application is the construction of this Policy. The proper approach of the court in relation to questions of contractual construction was summarised by Lord Hodge in Wood v Capita Insurance Services Ltd [2017] UKSC 24 in the well-known passage at paragraphs 10-13.

24. I start with DCL's primary argument that SL's liability was that of the Insured under the Policy 'acting as a … trustee'. As part of that argument, DCL contends that (c) of the definition of 'Private Legal Practice' is not qualified by the opening words 'the provision of services in private *Practice*'; and further that the concluding words of (c), 'in conjunction with a *Practice*', qualify only 'any other role' and not the other roles set out in (c).

Private Legal Practice

25. I do not consider that DCL is correct in its argument that (c) is not qualified by the opening words of the definition. The essential definition of Private Legal Practice is 'the provision of services in private *Practice* as a solicitor'. What then follow are instances of what is included within the concept of 'services in private *Practice* as a solicitor' but are not intended to define as constituting Private Legal Practice matters which are not provided by way of such services.

26. DCL contended that it could be seen that sub-clause (c) was intended not to be circumscribed by whether the roles referred to were or were not performed as part of the 'provision of services in private *Practice*' from the fact that it, unlike the other sub-paragraphs, does not commence with the words 'the provision of such services'. I do not think that that is the correct construction. Sub-paragraph (c) has the appearance of having been formulated as it was to make the drafting less clumsy; but its formulation does not alter the fact that it is one of the matters included within the class of 'services in private *Practice*'. The occurrence of the words 'the provision of such services' in the other sub-paragraphs is actually, in my view, supportive of the point that all the matters referred to in the sub-clauses are intended to be 'such services'. It would be surprising, and the context makes it strained, if sub-clause (c) is read as including matters which go outside the type of matters referred to in all the other sub-clauses to embrace matters which are not the 'provision of services in private *Practice*' at all.

27. The construction which I favour and have outlined above is consistent with the construction put on a similarly worded clause in Zurich Professional Ltd v Brown [2010] EWHC 3300 (Ch). It may be noted that there, no reliance was placed on the concluding words of the sub-clause (c) which appeared in that case, and which do not appear in the Policy in this case. Sir William Blackburne's decision proceeds on the basis that the fact that the solicitor had been acting in a capacity which fell within one of the categories identified in sub-clause (c), namely as a personal representative (which in that case would have fallen within the words 'executor … or other personal appointment'), was not sufficient to mean that liability arising from his actions arose from Private Legal Practice. This was because, for that to be the case, it was necessary that he should have been 'provi[ding] services in private practice as a solicitor'. That was referred to by Sir William Blackburne as a condition which needed to be fulfilled (paragraph 25).

28. As to the second element of DCL's argument, the words 'in conjunction with a *Practice*' are most naturally read as qualifying 'any other role'. However, the use of the phrase, 'any **other** role' indicates that all the roles which have already been referred to are, and are intended to be covered only if they are, ones 'in conjunction with a *Practice*.' That would be satisfied if, as I consider to be the case, those roles are covered only insofar as the Insured, in performing them, has 'provided services in private *Practice*'.

29. If it is right that (c) of the definition of Private Legal Practice is subject to the opening words, then that means both that the Insured will be covered only for acting as a trustee when providing a service, but also that the Insured, to be covered, must provide that service 'in private *Practice* as a solicitor'. It might be wondered whether the word 'private' there was intended to be capitalised and italicised. The Court will not lightly infer a mistake, however, and the definition makes sense without inferring a mistake here. Indeed, it makes little difference whether 'private' is read as it is or as

if the opening words were read as referring to 'Private Practice', because the definition of 'Practice' is in terms of the whole or part of the 'Private Practice' of the Insured; and that takes the reader, in any event, to the definition of 'Private Practice'.

Private Practice

30. In relation to the definition of 'Private Practice', DCL submitted that sub-clause (b) is to be read as meaning that Private Practice includes (a) all the professional services provided by the Insured Firm, (b) acting as a personal representative … trustee… , or in any other role in conjunction with a *Practice*, and (c) services provided pro bono publico. AIG by contrast submitted that the clause was to be read as saying that Private Practice includes (a) all the professional services provided by the Insured, which category (ie the category of professional services) includes acting as a personal representative … trustee … or in other role in conjunction with a *Practice*, and (b) services provided pro bono publico.

31. AIG's reading is, in my judgment, the correct one. That is the meaning indicated by the punctuation, and by the use of the word 'including' (and not for example ', includes') between 'Insured *Firm*' and 'acting as…'. This reading is also supported by an analogy with the definition of Private Legal Practice, which should be read, as I have set out above, with (c) as some of the instances in which an Insured may provide services in private *Practice*.

32. In relation to this definition, as with the definition of Private Legal Practice, there was also an issue as to whether the words 'in conjunction with a *Practice*' qualify all the foregoing roles or only the words 'any other role'. My view in relation to those words as they appear in the definition of Private Practice is the same as in relation to the same words as they appear in the definition of Private Legal Practice.

Cover for liability 'as a trustee'?

33. In my judgment the liability which SL was under as a trustee was not of such a kind as to have been covered by the Policy. This is because it did not, in my view, arise from the provision of services in private Practice by SL. SL was not providing services as a trustee to a client, or in connection with services provided to a client. DCL was not SL's client, and it is no accident that in the RFA SL is referred to as DCL's client. SL was to hold sums on trust for DCL, not as part of or incidentally to a service provided in private Practice, but as part of a mechanism to secure the repayment of amounts which, pursuant to a commercial agreement, DCL advanced to SL for the purposes of its business.

34. Nor in my view, to the extent that it is relevant, was DCL a 'quasi-client' of SL. This is a concept utilised in this area by Lord Toulson JSC in his judgment in Impact Funding Solutions Ltd v Barrington Services Ltd [2016] UKSC 57, [2017] AC 73, at [42] where he said:

'What sort of liabilities are commonly understood as professional liabilities of solicitors or, in Lord Diplock's language, what is the sector of the public that makes use of their services? First, and most obviously, there are the liabilities which solicitors may incur to their clients as a result of their professional retainer. Secondly, in connection with acting for their clients, they may give undertakings to third parties.

> "As officers of the court solicitors are expected to abide by undertakings given by them professionally, and if they do not do so they may be called upon summarily to make good their defaults": *John Fox v Bannister, King & Rigbeys (Note)* [1988] QB 925, 928, per Nicholls LJ."

That is plainly a form of professional liability. Exceptionally, there are also other cases where a solicitor has been held liable as a "quasi-client", as in *White v Jones* [1995] 2 AC 207 (the disappointed beneficiary under a will). …'

35. In the present case, as I have said, the liability of SL to DCL was not a liability to a client as a result of a professional retainer. Nor was it a liability under an undertaking given by solicitors in connection with acting for clients. The category of 'quasi-client' identified by Lord Toulson, and exemplified by White v Jones, is in my judgment intended to refer to the category of exceptional cases in which a solicitor, acting in a professional capacity, and who fails to take reasonable care in doing what (s)he was engaged to do in that capacity, may be liable to someone who has not retained the solicitor, but who is foreseeably affected by the ill performance of what the solicitor was engaged to do. It is a category intended to be of persons who fall just short of being clients of the solicitor's professional services. DCL does not fall into such a category here.

36. Mr Yeo, in his careful and well-structured submissions on behalf of DCL, emphasised that one aspect of SL had to do, pursuant to the RFA, was to determine that in its reasonable belief the Notified Value of Notified Receivables was payable to it as a matter of law and would be recovered in full without enforcement. This, he argued, involved the application of professional judgment in relation to the assessment of obligations which would arise in the course of the solicitor's practice, including sums arising under costs awards and settlements. I do not consider that this argument is correct or at least does not support DCL's argument as to cover. Quite apart from the fact that DCL has not alleged that SL was in breach of its obligations in relation to valuation, the requirement that SL should value what it considered to be recoverable is, in my view, not accurately or helpfully described as the provision of a professional service. I consider that it is most appropriately described as a part of the mechanism of operating the RFA. As explained by Mr Din in paragraph 14 of his witness statement, the effect of receipts by the law firm not amounting to at least 97% of the aggregate value which it had attributed to the Notified Receivables over a rolling three month period, was that DCL had the right, which it almost invariably exercised, to offer the law firm a lower price for purchasing any further Receivables.

37. Mr Yeo also emphasised in his submissions that it was an essential element of the trust relationship that SL was obliged to keep the Remittances, until paid to DCL, in its *client account*. That, Mr Yeo submitted, showed that the arrangement had as a central plank the utilisation of an account which is itself central to a solicitor's practice. I do not consider that the fact that SL's client account was used for the receipt of the Remittances determines that the liability which SL had to DCL arose from the provision of a service in private practice. That must depend on the use to which the client account was put and whether the liability arising was from the provision of services in private practice as a solicitor. That the use of a solicitor's client account as a vehicle for the receipt and distribution of money does not, without more involve the solicitor providing a service as a solicitor is, furthermore, supported by the decision of the Ontario Superior Court of Justice, affirmed by the Court of

Appeal for Ontario in Cassells Brock & Blackwell LP v LawPro (2006) 80 OR (3d) 570, 2007 ONCA122; and, by reference to that authority, by *Cannon & McGurk: Professional Indemnity Insurance* (2nd ed), 9.69.

Did the liability arise from the conduct of litigation?

38. Nor do I accept that what SL did and was required to do in accordance with clause 12 of the RFA and the trustee relationship which it imposed was part of the conduct of litigation. The potentially relevant litigation was SL's client's claim against a tortfeasor or other defendant for compensation (for example for personal injury or for misselling). Once the Remittances had been received into SL's client account, however, what was done with them was not part of that litigation (which, in any event, in most cases, would have already concluded). As Mr Yeo accepted, subject to the assignment to DCL, the relevant monies were at that point, vis-à-vis its client, SL's: ie they were not the client's money. What SL did with such amounts was not part of the conduct of litigation on behalf of the client. Nor in my view can it be said to have been ancillary to those proceedings. While the sums would not have been received by SL but for the proceedings, the holding of those sums after receipt was not for any purpose concerned with the prosecution of those proceedings, and was not analogous to entering appearances to actions, which is the example of an ancillary function given in para. 4 of Schedule 2 of the Legal Services Act 2007.

Sutherland and Impact Funding

39. Finally on the issue of whether there was cover under the insuring clause, I should refer to the fact that each side addressed arguments as to the support which it said could be gained by a comparison between the present case and another case involving questions of cover in respect of funding arrangements. In the case of AIG, reliance was placed on the decision in Sutherland Professional Funding Ltd v Bakewells [2011] EWHC 2658 (QB); for DCL, on the first instance decision of HHJ Waksman QC (as he then was) in Impact Funding Solutions Ltd v Barrington Support Services Ltd [2013] EWHC 4005 (QB). I did not find the comparisons with the facts of those cases of particular assistance in relation to whether there was cover under the insuring clauses of the Policy, as the nature of the liability in question in those cases was different from the present. In particular, I considered that there were material differences between the present case and the liability which was at issue in Impact Funding. In that case, the feature which was critical to HHJ Waksman QC's decision on coverage was that the relevant liability of the solicitors arose from breaches of clauses 6 and/or 13 of the Funding Agreement in that case, which were 'precisely the same breaches of duty as would have been owed by a solicitor to his client' (paragraph 37).

40. For these reasons, I conclude that there is no cover under the Policy for the claim, because it did not arise from Private Legal Practice in connection with SL's Practice.

Is exclusion 83(b) applicable?

41. The conclusion which I have reached in relation to the ambit of cover under the Policy makes it unnecessary for me to decide whether, if there had been prima facie cover for SL's liability to DCL, it would have been excluded by reason of exclusion 83(b). Given that the point was argued, however, I will express my views on it.

42. Exclusion 83 is set out above, and, to reiterate, sub-clause (b) was in these terms:

> 'The *Insurer* will have no liability to indemnify an *Insured* in relation to any:
>
> …
>
> b) legal liability assumed or accepted by an *Insured* under any contract or agreement for the supply to, or use by, the *Insured* of goods or services in the course of the *Insured Firm's Practice*'

43. The proper approach to the construction of exclusion clauses in contracts of insurance in general, and an exclusion clause very similar to the present in relation to a solicitors' professional indemnity insurance in particular, were the subject of the judgments in *Impact Funding Solutions v Barrington Services* in the Supreme Court.

44. Lord Hodge JSC said, at [7]:

> 'The extent of AIG's liability is a matter of contract and is ascertained by reading together the statement of cover and the exclusions in the policy. An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly. The judgment of Carnwath LJ in *Tektrol Ltd (formerly Atto Power Controls Ltd) v International Insurance Co of Hanover Ltd* [2006] 1 All ER (Comm) 780, to which counsel for Impact referred, is an example of that approach. But the general doctrine, to which counsel also referred, that exemption clauses should be construed narrowly, has no application to the relevant exclusion in this policy. An exemption clause, to which that doctrine applies, excludes or limits a legal liability which arises by operation of law, such as liability for negligence or liability in contract arising by implication of law: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 850, per Lord Diplock. The relevant exclusion clause in this policy is not of that nature. The extent of the cover in the policy is therefore ascertained by construction of all its relevant terms without recourse to a doctrine relating to exemption clauses.'

45. Lord Toulson said this:

> '[35] The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole with due regard to its purpose.
> …
>
> [41] There are two points to highlight about the nature and purpose of the policy. One is that the relevant terms replicate the minimum terms of the cover which [the firm of solicitors] was required to maintain under the Solicitors' Indemnity Insurance Rules 2009. As the House of Lords recognised in *Swain v The Law Society* [1983] 1 AC 598, 610, the paramount purpose of The Law Society being given statutory power to require solicitors to maintain insurance cover against professional liability was "the protection of that section of the public that makes use of the services of solicitors"

(Lord Diplock). The second, and related point, is that the policy describes itself as a professional liability policy. These matters are important when considering its scope.

…

[43] In laying down the minimum terms of professional liability cover required to be maintained by solicitors, it would have been possible for the drafting committee to have attempted to structure them by defining in positive terms the scope of a solicitor's professional liability for which indemnity cover was required, but it opted to delineate the liability against which solicitors should be required to maintain cover for public protection by a process of elimination, which involved combining an insuring clause far broader than any ordinary understanding of a solicitor's professional liability with a list of exclusions. It is important to recognise that list for what it is, namely an attempt to identify the types of liability against which solicitors are not required by law to be covered by way of professional liability insurance.

…

[45] This brings me to the second point, which is the meaning of the language of clause 6.6. The Court of Appeal approached the clause by saying that it was necessary to stand back from it and consider its essential purpose. I do not disagree, but I would make two further comments. First, the "essential purpose" of the clause has to be seen in the context of the essential purpose of the policy, as to which I have expressed my view. Secondly, there is substance in AIG's complaint that the court omitted to grapple with the language of the clause.

[46] … Barrington and Impact made a commercial agreement as principals for their mutual benefit, as well as for the benefit of Barrington's clients. Impact was not a client or quasi-client of Barrington, and the promise by Barrington which led to the judgment obtained by Impact was part of the commercial bargain struck by them. It did not resemble a solicitor's professional undertaking as ordinarily understood, and it falls aptly within the description of a "trading liability" which the minimum terms were not intended to cover.'

46. Applying the approach to construction indicated in Impact Funding to the words of exclusion 83(b), I consider that that the liability of SL to DCL was excluded by that clause. There can be no real doubt that the RFA was a 'contract or agreement for the supply to, or use by, the *Insured* of goods or services in the course of the *Insured Firm's Practice*'. The RFA provided a service, namely a facility to provide working capital, for the purposes of SL's practice.

47. DCL's principal submission was that, even if the RFA was such a contract or agreement, SL's liability to DCL did not arise 'under' that contract or agreement, but under and by virtue of its fiduciary and trust duties, which were independent of any contractual obligations. I do not accept this argument. The liability which SL was under arose from having entered into the RFA, including clause 12. Its liability as a trustee / fiduciary in respect of Remittances can, I think, be said to be a liability 'assumed or accepted' under the RFA. 'Accepted', used in addition to 'assumed', indicates that a wider category of obligations is embraced than ones which would have no existence other than by reason of the entry into of the agreement. Equally, the clause refers to a 'contract or agreement', which envisages that the relevant

arrangement may not have all the attributes of a contract. This supports the conclusion that the exclusion was not designed to apply only to causes of action framed in contract.

48. Similarly with the arrangement which was the subject of Impact Funding, the relevant liability which SL was under as trustee or fiduciary was in reality a part of a commercial bargain struck between SL and DCL, which was not the type of liability which solicitors' professional liability insurance was principally designed to indemnify against, and was, in Lord Toulson's words, a 'trading liability'.

49. Accordingly, had it been necessary to do so, I would have decided that exclusion 83(b) was applicable to exclude cover in this case.

Conclusion

50. On the basis of the undisputed facts I consider, for the reasons I have set out, that DCL's claim has no realistic prospect of success. There is no other reason for a trial of this action. In the circumstances I will accede to AIG's application for summary judgment.