[2020] EWHC 1948 (Ch)

Case No: PT-2019-LDS-000143

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN LEEDS
PROPERTY TRUSTS AND PROBATE (Ch)

The Court House
Oxford Row
Leeds LS1 3BG

Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

THE GUIDE DOGS FOR THE BLIND ASSOCIATION (1)

YORKSHIRE CANCER RESEARCH (FORMERLY YORKSHIRE CANCER RESEARCH CAMPAIGN) (2)

BRITISH HEART FOUNDATION (3)

THE NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY (4)

Claimants

- and –

LINDA MARY BOX (1)

JULIAN SANDERSON GILL (2)

DIXON COLES AND GILL (3)

HDI GLOBAL SPECIALTY SE (FORMERLY INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE (4)

Defendants

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\- -

Mr Alexander Learmonth for the Claimants
Mr Michael Pooles QC for the 4th defendant
No attendance or representation on behalf of the 1st 2nd and 3rd defendants.

Hearing date: 6 July 2020
Date draft circulated to the Parties: 8 July 2020
Date handed down: 21 July 2020
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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.

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JUDGMENT

Introduction

1. Linda Box and Julian Gill, respectively the first and second defendants, were solicitors and partners in the third defendant firm of solicitors, Dixon Coles and Gill (the Firm). The fourth defendant, HDI Global Specialty SE (the Insurer) are their professional indemnity Insurer.

2. Over the course of a number of years Mrs Box stole a very significant amount of money from the client account of the Firm. That is not in dispute. She was ultimately and inevitably struck off the roll of solicitors and in 2017 was sentenced to 7 years imprisonment with a further 8 years if she failed to repay the sum of £2.452 million.

3. Mr Gill was unaware of her criminal activities. There is no suggestion that he acted dishonestly in the course of the business of the Firm. The Firm entered into a partnership voluntary arrangement on 7 June 2016.

4. This claim is one of 2 that have been brought by various claimants, all of whom are charities, who contend that they have sustained loss by virtue of Mrs Box's criminal activities. This particular case centres on the allegation that Mrs Box, in her capacity as a co-executor of the estate of Mr Ernest Scholefield deceased, appropriated monies payable by his will to the various claimant charities. It has been called in the documents generated by the case the "Scholefield Claim".

5. The claim is brought against Mrs Box and her co-executor, Mr Gill and is also brought against the Firm on the basis that it was retained by the executors as the solicitors for the purpose of the administration of Mr Scholefield's estate and it is vicariously liable for losses sustained by these particular beneficiaries as a result of the fraudulent administration of the estate by Mrs Box.

6. In addition, the Scholefield Claim is brought directly against the Insurer. It is asserted by the claimant that a direct cause of action has arisen between the claimants and the Insurer by virtue of the provisions of the Third Party (Rights against Insurers) Act 1930.

7. A defence has been filed by Mr Gill and the Firm in which liability is denied. A defence has also been filed by the Insurer by which it admits that, if Mr Scholefield's estate suffered loss by reason of theft by Mrs Box, then the Firm is vicariously liable for such loss. It is not admitted, however, that such a loss has in fact been incurred by the claimants in this case.

8. The Insurer asserts that Mrs Box's modus operandi was a process known as "teeming and lading" by which monies are transferred to and from the Firm's client account ledgers, presumably in much the same way as a Ponzi scheme operates. A characteristic of a Ponzi scheme is that some innocent parties dealing with the wrongdoer suffer no loss because monies that the wrongdoer has misappropriated from them is replenished by money misappropriated from the funds of other innocent parties.

9. The Insurer's defence however more particularly centres on 2 specific assertions. First, that its liability in respect of any claims on the policy has been exhausted. Mr Alexander Learmonth, counsel for the claimants in the application that I am required to determine, puts it succinctly in paragraph 7 of the skeleton argument. He paraphrases the defence as an assertion that:

> "*There is a single limit of indemnity cover which is applicable to all the claims against the Firm (the minimum allowed of £2 million) and that it has already paid out that limit in full, such that it cannot be liable for any other claims.*"

This has become known as the "Aggregation Point".

10. The second line of defence contained in the Insurer's defence is contained in paragraph 17 of the defence wherein it is denied that the 1930 Act entitles the claimants to bring any claim against the Insurer prior to having obtained a judgment against its insured, that is the first to third defendants.

11. The Aggregation Point arises in the second case against the defendants to which I have already briefly referred. In the course of this hearing that has been referred to as the Bishop's Claim. That is because it is a claim brought by the Bishop of Leeds on behalf of various Church of England organisations and charities who assert that they have been suffered significant loss by Mrs Box's criminal activities in her professional capacity.

12. As with the Scholefield Claim, the Bishop's Claim has been brought not only against the Firm but also against the Insurer on the basis that the claimants are entitled to sue the Insurer directly under the 1930 Act or the successor to that Act namely the Third Parties (Rights against Insurers) Act 2010. In paragraph 24 of the Particulars of Claim in the Bishop's Claim it is pleaded that:

> *"The claimants will be entitled to be subrogated to (the Firm's) rights against the Insurer by virtue of the third Parties (Rights against Insurers) Act 1930 subject to judgment being obtained against (the Firm) as claimed herein or agreement by (the Firm) that it is liable."*

13. In its defence to the Bishop's Claim the Insurer admits that. The defence to the action brought by the Bishop essentially centres on the Aggregation Point.

14. In the Bishop's Claim an application has been made for summary judgment against the Firm and, at the same hearing, the Bishop has sought summary judgment against the Insurer for a declaration to the effect that the Insurer is not entitled to aggregate the claims made by the Bishop with claims made by other clients of the Firm.

15. It does not appear to be in dispute that the claimants in the Bishop's Claim propose to seek the declaration consequent upon them having obtained the judgment that they seek against the Firm. In the application with which I am dealing the Insurer is represented by Mr Michael Pooles QC. At paragraph 5 of his skeleton argument he specifically makes the point that the Bishop's application against the Insurer is for summary judgment *consequential* upon the judgment which the Bishop seeks against the Firm. That application has been listed for hearing in September.

16. In this Scholefield Claim there is no application for summary judgment against the Firm or the individual partners. There is however an application for a declaration on a summary basis to the effect that the Insurer is not entitled to rely on the Aggregation Point in the Scholefield Claim. That too has been listed to be heard alongside the Bishop's application since it raises similar issues.

17. However, a preliminary issue has arisen for determination. It arises because the Insurer does not accept that the court has the jurisdiction to make the declaration in the Scholefield Claim that the claimant seeks. The Insurer draws a distinction between

the manner in which the Bishop's Claim has been approached by the claimants in that case and the approach in this, the Scholefield Claim.

18. The Insurer argues that, quite properly, the claimants in the Bishop's Claim acknowledge that they can only proceed against the Insurer directly for their declaration or otherwise where the liability of the Firm and/or its partners to the claimants has been established.

19. That is indeed what appears to be the purport of paragraph 24 of the Particulars of Claim in the Bishop's Claim which, as has been seen, asserts that;

> *"The claimants will be entitled to be subrogated to (the Firm's) rights against the Insurer by virtue of the Third Parties (Rights against Insurers) Act 1930* ***subject to judgment being obtained against (the Firm) as claimed here in or agreement by (the Firm) that it is liable****. (My emphasis)"*

20. In this Scholefield Claim the claimants seek a declaration independent of a judgment against the Firm (or the partners) and independent of any agreement as to liability. Mr Pooles argues that the court has no jurisdiction to make such an order independent of any finding of liability or agreement as to liability.

21. This ultimately prompted the claimants to make an application on 4 May 2020 for a declaration to the effect that the court has jurisdiction to make a declaration on the Aggregation Point. It is this preliminary point which now falls for determination.

22. If I conclude that the court does have jurisdiction then the Aggregation Point insofar as it affects the claimants in the Scholefield Claim will continue for determination alongside the determination of that point in the Bishop's Claim (assuming that liability against the insured in the Bishop's Claim is established). If I do not accept that the court has jurisdiction then, inevitably, the application in the Scholefield Claim for a declaration cannot proceed in its current form.

23. As I have said, in the application before me on the 6 July Mr Learmonth of counsel represented the claimants and Mr Pooles QC, the Insurer. I am grateful to both for their very helpful skeleton arguments and submissions.

The arguments

24. Mr Learmonth essentially raises 3 arguments in support of his contention that the court does have jurisdiction to make a declaration on the Aggregation Point. However, before I turn to them I should make it clear that it is now agreed that the relevant statutory provisions here are those of the 1930 Act. The 1930 Act was superseded by the Third Parties (Rights against Insurers) Act 2010 which came into effect on 1 August 2016. The matters with which I am concerned however predate the coming into effect of the 2010 legislation and it is common ground therefore that this claim is governed by the 1930 Act.

The First Argument

25. Mr Learmonth's first argument, summarised in paragraph 2.1 of his skeleton argument, is that the claimants have stepped into the shoes of the Firm and that they

can claim the same right of indemnity that the firm can claim. This contention arises from the effect of Section 1 of the 1930 Act.

26. That provides as follows (so far as material):

> ***1.— Rights of third parties against insurers on bankruptcy &c. of the insured.***
>
> *Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—*
>
> *(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or*
>
> …
>
> *if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.*
>
> …
>
> *(4) Upon a transfer under subsection (1) … of this section, the insurer shall, subject to the provisions of section 3 of this Act, be under the same liability to the third party as he would have been under to the insured, but—*
>
> *(a) if the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and*
>
> *(b) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.*

27. It is not in dispute that the effect of s1 is to create a statutory assignment, in favour of the wronged party (the third party), of the rights that the wrongdoer has against its insurer pursuant to the wrongdoer's policy of insurance with its insurers. By virtue of the statutory assignment the third party stands in the shoes of the insured and can bring the same claims against the insurer as the insured could.

28. Of course this only applies in respect of an individual or partnership in circumstances where the criterion in s1(1)(a) is met, namely that there has been an insolvency event affecting the insured but there is no dispute that there has been such an event in this case bearing in mind that the Firm has entered into a partnership voluntary arrangement.

29. The discussion in this case focused on the second criterion for the statutory assignment which provides that, in order for the statutory assignment to take effect, the insured must have incurred a liability to the third party.

30. The Insurer's position is that this criterion has not been met and will not be met until either it is agreed that the Firm and/or Mr Gill are liable to the claimants or there is a judgment against either or both of them in favour of the claimants. Only at that stage, it is argued, will the statutory assignment crystallise.

31. Mr Learmonth argues that the Act does not require a judgment or an agreement as to liability. He prays in aid the *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363. He argues that that is clear authority of the proposition that any judgment merely confirms the existence of a liability but the liability itself arises as soon as there is a coincidence between breach and the suffering of damage as a result of that breach.

32. He refers me to the judgment of Lord Denning MR at 373F:

> *"So far as the liability of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident when negligence and damage coincide".*

33. He further refers me to the observations of Harman LJ in the same case at 376D:

> *"I accept the views suggested in* Hood[1] *that the rights, whatever they may be, arise at the time when the wrongdoing is committed, if there is wrongdoing*".

34. Mr Learmonth then took me to *Redman v Zürich Insurance Plc* [2017] EWHC 1919 paragraph 23 and which Turner J observed:

> "*liability is incurred when the cause of action is complete and not when the claimant's rights against the wrongdoer are thereafter crystallised whether by judgment or otherwise".*

35. Mr Learmonth argues that it is not disputed that the claimants suffered a loss by reason of Mrs Box's criminality and that therefore, on general principles, the claimants have acquired the rights against the Insurer that were possessed by the Firm.

36. He argues that it was open to the Firm to seek a declaration against the Insurer that they (the Firm) are covered for these claims and the Aggregation Point lacks merit and that if the Firm has that right then, by virtue of the Act, the claimants have it.

37. Mr Pooles argues that this is a misunderstanding of the effect of Act. He points out that in the Post Office case, despite the passages to which Mr Learmonth refers, the claimants failed to establish that they were the statutory assignees of the insured's rights under its insurance policy. And, he argues, this case is no different.

38. Why did the claimants fail in the Post Office case? First, like Mr Learmonth, Mr Pooles draws my attention to the remarks of Lord Denning at 373F but asks me to

[1] Hoods Trustee's Case [1928] 1 Ch 793

read on from the passage cited by Mr Learmonth. Immediately after the learned judge's observations to the effect that liability of the insured to the injured person arises at the time of the accident, the judge stated that:

> *"the rights of the insured person against the insurers do not arise at that time."*

39. As to when those rights arise, Lord Denning concluded, at page 374B, that the third party cannot sue the insurers except in such circumstances as the insured himself could have sued the insurers and that the insured would not be in that position until its liability to the wronged party has been established.

40. He draws my attention to page 373G and 374A where Lord Denning MR states that:

> *"It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist either by judgment of the court or by an award in arbitration or by agreement. Until that is done the right to an indemnity does not arise. I agree with the statement of Devlin J in West Wake Price and Co v Ching [1957] 1 WLR 45, 49. "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"*

41. Mr Learmonth argues, and I quote predominantly from 27 of his skeleton argument, that the claimant failed in the Post Office case because in that case the wrongdoer's policy exposed the insurer to liability only to pay "as compensation" in respect of loss or damage to property and so the sum owed to the Post Office needed to be determined by the court before the insurer was liable to the insured for anything.

42. He argues that in this case there is clearly a liability which has already arisen. He argues that essentially the Insurer does not dispute that the insured is liable to the claimants.

43. As it happens, the insured parties themselves do dispute liability to the claimants. That is clear from their defence. Leaving that to one side however, Mr Pooles argues the Insurer has not admitted that the deceased's estate (or the claimants) suffered a loss. Paragraph 10 of the defence, to which Mr Learmonth refers ostensibly in support of his argument, merely acknowledges that **<u>if</u>** the deceased's estate has suffered loss, the Firm is vicariously liable for it. I have already observed that in a Ponzi scheme such as this where there is teeming and lading, not all the innocent parties suffer a loss.

44. More fundamentally though, Mr Pooles argues that the policy of insurance in this case merely provides a right of indemnity, as was the position in the Post Office case and that the right to an indemnity can only arise once the liability of the indemnified is ascertained. At present, he argues, there is nothing to indemnify.

Conclusion as to first argument

45. In my judgment it is not open to the claimants to take advantage of the 1930 Act on the basis that there is an incurred liability arising from the Firm to the claimant. It seems clear on the basis of the Post Office case that the provisions of the Act do not kick in until that liability is ascertained. That is the view shared by all 3 Court of Appeal judges in that case.

46. I accept that the Act provides that the assignment of the insured's rights to the third party take effect when the insured has incurred liabilities to the third party. But it is important to keep in mind what the effect of that is. It is merely to assign to the third party the insured's rights under its contract of insurance. As Harman LJ said at page 376F in the Post Office case:

> "*the right assigned to the post office by the statute must be coupled with the rest of the particular rights and obligations which make up the contract of insurance. You cannot pick out one bit – pick out the plums and leave the duff behind. Therefore I think that as Potters (the wrongdoer) could not sue, so their statutory assignees the post office, cannot sue until the amount has been ascertained and quantified*".

47. Since the insurance is a contract of indemnity it is difficult to see that the Firm or Mr Gill would be able to sue the Insurer until the liability of the Firm or Mr Gill has actually been established. The claimants can have no more extensive rights.

48. Mr Learmonth argues that in accordance with the policy of insurance there has been a claim against the Insurer. The contract of indemnity is merely to indemnify against a claim which is, after all, no more than an assertion of the right to damages. I accept that a claim is no more than an assertion of the right to damages but I do not think that this answers the fundamental issue which is that the distinction has to be drawn between the liability that the insured has to the third party and the rights that the insured has against its own insurers which is what the third party acquires under the Act. I go back to what Lord Denning himself said at 373F to the effect that the liability of the insured to the third party arises when there is a conjunction between breach and damage but "*the rights of the insured person against the insurer do not arise at that time".*

49. There is an additional point relating to the effect of the 2010 Act. Mr Pooles prays in aid a consideration of the 2010 Act which superseded the 1930 Act when considering the effect of the 1930 Act.

50. Section 1 the 2010 Act essentially reiterates the provisions in the 1930 Act by giving a third party rights against a wrongdoer's insurers but the 2010 Act specifically states, in s1(3), that the third parties rights include the right to bring proceedings to enforce the insured's rights against the insurer without having to establish that the insured is liable to the third party.

51. He argues that the rationale of the 2010 Act was that the 1930 Act was unsatisfactory precisely because it required the third party to establish by court action or arbitration or agreement that the liability of the insured to the third party had been incurred before it could take action against the insurer.

52. It is argued that the changes introduced by the 2010 Act would not have been necessary had the 1930 Act been open to the construction for which the claimants contend. He argues therefore that there is a powerful implication that, prior to the coming into effect of the 2010 Act, there was no power for a third party to sue the Insurer until the insured's liability to the third party had been established.

53. Mr Pooles's argument that, if the claimants' contention was correct, then this provision in the 2010 Act is entirely otiose is a powerful one. I shall deal with it further in the consideration of Mr Learmonth's second limb argument but before I do so it occurs to me that there is another characteristic of the 2010 Act which militates against Mr Learmonth's contention that, for the purposes of the 1930 Act, liability has been incurred by the Firm.

54. As with the 1930 Act, the 2010 Act provides that the liability of the insured to the third party is incurred when the liability is established. Unlike the 1930 Act however, the 2010 Act establishes by s1(4) when that liability is established. S1(4) provides as follows:

> *For the purposes of this Act, a liability is established only if its existence and amount are established and for that purpose, "establish" means establish-*
>
> *(a) by virtue of the declaration under section 2……*
>
> *(b) by a judgment or decree*
>
> *(c) by an award in arbitral proceedings or by an arbitration, or*
>
> *(d) by an enforceable agreement*.

55. It seems clear that the 2010 Act was designed to enhance the rights of the third party as against an insurer. If s1 of that Act requires the third party to establish one of the steps referred to in s1(4) I ask myself rhetorically whether realistically it can be argued that the 1930 Act demanded less of the third party.

56. I also remind myself, albeit this is by no means determinative but it is at least of interest, that the claimants in the Bishop's Claim seem to have resigned themselves to the obligation to obtain a judgment against the insured. As I have said, that is clear from paragraph 24 of the Particulars of Claim in the Bishop's Claim and the fact that they seek a judgment against the Firm in their summary judgment application.

57. It is also interesting, albeit once again by no means determinative, that the claimants' solicitor, Ms Campbell-White in her first witness statement at paragraph 7 states as follows:

> *"the Insurer is the Firms professional indemnity insurer for the relevant period pursuant to the Policy. Subject to any exclusion or limit in the Policy, it will be liable to indemnify the other defendants against their liability to the claimant's, and will be directly liable to the claimants* ***once the other defendants' liability to the claimants has been established by agreement or judgment*** (my emphasis)……"

58. Mr Pooles suggests that this analysis by the claimants' solicitor is in itself not consistent with the argument now proffered on the claimants' behalf. Rather it is consistent with the Insurer's analysis.

The Second Argument

59. I now turn to Mr Learmonth's second argument which is proffered should his first argument fail. This argument is based on the proposition set out in paragraph 32 of his skeleton argument that the crucial feature of the claimants' summary judgment application is not an application for a money judgment but for the declaration sought at paragraph (3) of the prayer to the Particulars of Claim. That is a declaration against the Insured as to the first to third defendants' liability.

60. The argument is essentially that the Firm would be entitled to seek a declaration as to whether it is covered for further claims over and above the £2m that the Insurer has paid and thus the claimants are entitled to the same relief.

61. Once again Mr Learmonth takes me to the Post Office case and, in particular page 374C, in which Lord Denning MR states:

> "*In some circumstances the insured might sue earlier for a declaration for example if the insured company were repudiating the policy for some reason. But where the policy is admittedly good the insured cannot sue for an indemnity until his own liability to the third person is ascertained"*

62. Lord Denning's observations are to the effect that *the insured* might sue earlier. But Mr Learmonth's contention is that if the insured has that right then, pursuant to the 1930 Act, so does the third party, once the insured has been subjected to an insolvency event.

63. It is right that as a result of the coming into effect of the 2010 Act it is indeed the position that a third party can seek a declaration as to an insurer's potential liability. S2 of the 2010 Act states:

> *(1) This section applies where a person (P)-*
>
> *(a) claims to have rights under a contract of insurance by virtue of the transfer under section 1, but*
>
> *(b) has not yet established the insured's liability which is insured under that contract.*
>
> *(2) P may bring proceedings against the insurer for either or both of the following-*
>
> *(a) a declaration as to the insured's liability to P;*
>
> *(b) a declaration* as to the *insurers potential liability to P*

64. That is the position under the 2010 Act but the question is, is that the position under the 1930 Act?

65. Mr Pooles argues that there is no jurisprudence to support such a pre-emptive step in the context of the 1930 Act even by the insured, much less the third party, other than this obiter comment by Lord Denning. He points out that that that proposition gained no support from the other Lords Justices who gave judgment in the Post Office case.

66. Furthermore, he argues that even Lord Denning appears to accept that there was not an unconditional right to bring this pre-emptive claim for a declaration. It only arose in "some circumstances". The example that he gave was where the insurer was repudiating the policy for some reason.

67. I observe that this is not a case where the Insurer is repudiating the policy, at least as regards the Firm and Mr Gill. This is a case where the insurer is simply saying that it has met its obligations under the policy.

68. Mr Pooles argues that leaving that on one side, even if there are circumstances in which the insured might sue earlier for a declaration and that thus, by extension, there are circumstances in which the third party may sue the insurer for the declaration, this is not one of those "circumstances".

69. He argues in paragraph 11 of his skeleton argument that "*such circumstances would not in any event encompass an issue of aggregation as aggregation is highly fact sensitive and broad-spectrum declarations are rarely, if ever, appropriate*".

70. Furthermore, he argues that a further rationale of the 2010 Act was that, as well as the other shortcomings identified above, the 1930 Act was unsatisfactory precisely because there was no provision in it for a third party to take action against an insurer for declaratory relief on policy coverage prior to the establishment of liability by the insured to the third party.

71. It is argued that that right is created by the 2010 Act. If the right had already existed either pursuant to the 1930 Act or common law or a combination of the two then this provision in the 2010 Act would have also been unnecessary. Mr Pooles argues therefore that there is a further powerful implication that, prior to the coming into effect of the 2010 Act, there was no power for a third party to seek a declaration as to the insurance coverage of the insured.

72. Mr Learmonth argues that in making specific provision enabling the third party to make a pre-emptive claim for a declaration merely means that the 2010 Act has given statutory recognition to the position that already existed at common law. Mr Pooles argues that the effect of the 2010 Act was to change the law.

Conclusion as to second argument

73. Despite the powerful way in which Mr Learmonth advances his case I am not persuaded that there is scope under the 1930 Act for the claimant to bring this application for declaratory relief.

74. There is the obvious point that Mr Learmonth's contention depends on the statutory assignment having taken effect since that is what gives the third party the locus standi to apply for a declaration. But here, as I have concluded in my consideration of the

first argument, there is not yet the ascertained liability to the third party that the Act requires. Without that there is not yet an assignment of the insured's rights.

75. Additionally, I am exercised by the fact that the only authority that Mr Learmonth is able to rely on is an obiter observation. There is no doubt that it is an obiter observation from a very respected source but nonetheless it is quite clearly obiter and it did not appear to have the support of Lord Denning's brother judges in that case.

76. Additionally, I have not been referred to any case either prior to or subsequent to the Post Office case where a third party has applied for, much less obtained, declaratory relief on the basis of an insurer's potential liability.

77. Furthermore, I do regard it as important that the 2010 Act contains these extra provisions which specifically enable a third party to bring proceedings for a declaration where the liability of the insured is not established. I am persuaded that the 2010 Act introduced a change in the law and did not merely codify an existing position. I reach that conclusion because of the dearth of evidence to suggest that the position for which Mr Learmonth contends was the existing position and the unlikelihood that Parliament will have devoted time to new legislative provisions which were unnecessary because the mischief those provisions is aimed at does not exist.

78. Finally, lest it be thought that I have overlooked it, I have had regard to Mr Learmonth's contention that the Insurer appears to have conceded that the claimants have a cause of action against it for a declaration because they not apply to strike out the claimants' claim against it.

79. I do not think that it is incumbent upon a party to make an application to strike out a claim on an interlocutory basis- and I note that this defence has been presaged in paragraph 17 of the Insurer defence. Accordingly, I do not think that the absence of an application hitherto by the Insurer to strike out affects the issue.

80. I should say, for completeness, that I am less convinced that the Aggregation Point is very fact sensitive in the context of the specific issues to be ventilated about it which arise out of the defence in this case. I deal with that below in connection with the third argument.

The third argument

81. I now turn therefore to the third limb of Mr Learmonth's arguments which is that even if the jurisdiction to make a declaration on the Aggregation Point is not permissible under the 1930 Act, the court still has an inherent jurisdiction at its discretion to make the declaration sought.

82. He points out that the court's power to make declarations is not confined to circumstances where there is a present cause of action between the parties. He draws attention to CPR 40.20 which provides that "*the court may make binding declarations whether or not any other remedy is claimed.*"

83. He argues that the court jurisdiction to grant declaratory relief is free standing and the discretion is a wide one.

84. I have been referred to a number of cases in which the court has considered its jurisdiction to make declarations. The first in time is *Gouriet v Union of Post Office Workers* [1978] AC 501.

85. In that case Lord Diplock stated:

> "*…. a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally upon the happening of an event.*
>
> *….. the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation for it and not those of anyone else*".

86. It seems clear that the jurisdiction has developed somewhat since that case. *In Rolls-Royce plc v Unite the Union* [2009] EWCA civ 387 at paragraph 86 Aikens LJ set out a summary of the principles that he considered were to be derived from earlier cases. He stated thus;

> *(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must in general be a real and present dispute between the parties before the court as to the existence or extent of a legal rights between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must in general be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration provided that it is directly affected by the issue.*
>
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish even on "private law" cases. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
>
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected either before it will have the arguments put before the court.*

> (7) *In all cases assuming that other tests are satisfied the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."*

87. In *Milebush v Tameside MBC* [2011] EWCA Civ 270 Moore-Bick LJ at paragraph 87 thought that paragraph 2 of the guidance of Aikens LJ in *Rolls-Royce* was expressed somewhat too narrowly and at paragraph 88 he states that:

> *"In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grants declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings*."

In other words, that the court has jurisdiction to make a declaration in relation to prospective as well as existing legal rights.

88. In *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) David Richards J (as he then was) recognised, at paragraph 23, that "*it is widely acknowledged that the circumstances in which the court will be prepared to make a declaration have broadened since the decision of the House of Lords in* Gouriet". And at paragraph 25, having considered the guidance given in *Rolls-Royce* he noted that:

> "*…there is nothing in these general statements (of Aikens LJ) requiring an actual or imminent infringement of a legal right before a declaration will be made. The willingness of the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties suggests that the court jurisdiction is not so tightly constrained*"

89. *Pavledes* concerned the appropriateness of a declaration as to the existence or otherwise of a right to light. The defendants proposed to erect a development to which his neighbour, the claimants, objected on the basis that it would infringe their rights to light.

90. By the time that the case came before the judge the defendants had abandoned their proposal to undertake the development but the claimants continued to pursue their claim for a declaration that the development would, if ever built, infringe their right to light.

91. In my opinion, the fundamental question that David Richards J (as he then was) asked himself is that set out in paragraph 48 of the judgment. He asked himself "*would it be just and would it serve a useful purpose to grant declaratory relief?*"

92. In the particular circumstances of that case he decided that it would. The defendants had not undertaken never to pursue the development and they had only decided not to do so for "*the foreseeable future*" and on the basis of a rebuttable assumption that a technical analysis carried out by the claimant's surveyor was accurate.

93. The learned judge considered that this did not constitute an unconditional acceptance of the claimant's position and that a declaration was appropriate to give finality to the

parties. In those circumstances not only would a consideration of an application for a declaration be just, it would also serve a useful purpose.

94. Mr Learmonth argues that a declaration in this case would certainly be just and serve a useful purpose. The utility of the declaration is set out at length in Ms Campbell-White's witness statements and is summarised by Mr Learmonth from paragraph 9 of his skeleton argument. Essentially a declaration as to whether the Insurer is right or wrong as regards its Aggregation Point will fundamentally inform the way in which this action progresses if indeed it progresses at all.

95. As Mr Learmonth says at paragraph 10 to 12 of his skeleton;

> "10 *If the Insurer is right about this (The Aggregation Point), that is the end of the charities' case against it; it can be dropped from the proceedings, it need not be represented at trial and much cost will be saved….*
>
> *11 If however the Insurer is wrong, and the charities' claim has its own limit of indemnity under its policy, this will be more than enough to compensate the charities in full. Mr Gill and the Firm will be safe to drop their own opposition to the claims and rely on their insurance policy. The charities are confident that they and the Insurer will then be able easily to agree quantum and settle the claim between them without further troubling the court, as has happened with the claims falling within the single indemnity limit.*
>
> *12 There is thus enormous advantage to all parties in having the Aggregation Point decided as early as possible."*

96. Mr Learmonth argues that in the circumstances the declaration as to the extent of insurance cover is highly material to the parties' rights and that the outcome of such an application is likely to be conducive to the efficient case management of the litigation. He reminds me of the overriding objective which, in the quest for dealing with cases justly and at proportionate cost, requires the court has to have regard to saving expense and dealing with cases in ways which are proportionate, expeditious and fair.

97. Mr Pooles argues that it would be an impermissible use of the court's discretion to assume jurisdiction to make the declaration sought. First, he questions the assumptions made by Mr Learmonth in paragraph 11 of his skeleton argument which I quote above regarding the intentions of Mr Gill and the Firm if it turns out that the Insurer's position is not sustained. He suggests that that is no more than speculative. He argues that there is no sound basis for concluding that any declaration will impact on the merits of the substantive underlying claim and how that is prosecuted.

98. Additionally, he takes issue with Mr Learmonth's assertion, contained in paragraph 30 of his skeleton argument, that it would be open to the Insurers to go off on a frolic of their own and deal with and settle these claims with little if any reference to their insured.

99. In the result, he challenges Mr Learmonth's assertion that a declaration is appropriate because it would accord with the overriding objective.

100. In any event, he argues that this application does not meet the second principle enunciated by Aikens LJ in *Rolls-Royce* because there are no legal rights between them. It has to be conceded that the rationale for my rejection of the claimants' first two arguments is that currently there are indeed no legal rights between them and the Insured because the statutory assignment has not crystallised.

101. It seems to me that there is however some difficulty in Mr Pooles's reliance on the second principle enunciated by Aikens LJ bearing in mind that he does qualify his guidance by observing that the claimant does not need to have a present cause of action against the defendant. In this case of course the claimants will have a cause of action against the Insurer but only if it is established that the insured is liable to the claimants.

102. Mr Pooles argues that Moore-Bick LJ in *Milebush* was actually in the minority and that any consideration of *Milebush* for the purpose of determination of this particular application must focus on what was said by Mummery LJ on behalf of the majority. That, no doubt, is true but I agree with Mr Learmonth that, in the context of the circumstances when the court can exercise its jurisdiction to grant a declaration, the majority view as expressed by Mummery LJ cannot be said to be at particular variance with that of Moore – Bick LJ.

103. I have in mind paragraph 44 where Mummery LJ agrees that "*the discretion to grant a declaration now covers a wide range of cases. The authorities show how it may be granted in private law proceedings about the disputed construction of a document affecting the claimant, even though the claimant was not a party to it*."

104. In any event, it is not clear to me that what Moore-Bick LJ says in paragraph 88 of *Milebush* and which I set out at paragraph 87 above adds greatly to the second principle enunciated by Aikens LJ in *Rolls-Royce* to the effect that the claimant need not have a present cause of action.

105. Even if I am wrong in that, as I understand *Milebush*, the majority rejected jurisdiction to make a declaration on the narrow basis that the proper forum for that particular dispute was the Administrative Court (see judgment paragraph 49).

106. Additionally, Mr Pooles argues that it would not be an appropriate exercise of discretion to grant a declaration where there is an Act in place which manifestly does not provide scope for the obtaining of a declaration. The 1930 Act bestows certain rights upon the third party but it does not bestow the right to seek a declaration in respect of a potential liability – in contradistinction to the 2010 Act. He argues that there can be no jurisdiction for the court to step in to provide a remedy that the Act has eschewed.

107. Finally, Mr Pooles argues that, if there is scope for a declaration in respect of future rights, it cannot properly be exercised in situations other than where the issue is a binary one. He points out that in *Pavledes* it was simply a question as to whether or not a right to light existed.

108. I recognise that there are two areas that distinguish *Pavledes* from this instant case. First, it was a dispute as to whether, at that time, a right to light existed (whereas in this instant case the rights upon which the claimants intend to rely have, in my judgment, not yet accrued). Secondly, it was a binary namely whether or not there was a right to light.

109. In this instant case Mr Pooles argues that the issue is not binary. The issues of aggregation are fact sensitive and a declaration could be no more than a declaration in the abstract. I have already made reference to his contention about the fact sensitive of the Aggregation Point. I deal with it at paragraph 69 above that remind myself of the conclusions reached in paragraph 80 above.

110. Mr Pooles develops his point about the abstract nature of any declaration in paragraph 18 of his skeleton argument wherein he contends;

> "*The practical difficulties of the abstract declaration are further reinforced when one considers how the process might occur. In other words it could well be that an insurer might be entitled to repudiate by reason of pre-insolvency conduct on the part of the insured. Such exchanges would of course be highly confidential and might involve issues of legal privilege and waiver thereof. It is difficult to see how a court could justly determine such an issue in circumstances in which the legal vesting of the insured's rights and obligations in the claimant had yet to occur. Likewise, issues of aggregation will involve access to material in the practice records beyond the affairs of the estate giving rise to the present action*."

Conclusions as to the third argument

111. I must concede that I have experienced more difficulty in reaching a conclusion in respect of this argument than with the first two arguments.

112. In the end however, I have concluded that the court does have jurisdiction to entertain the claimants' application for a declaration.

113. I reach that conclusion because I am satisfied that the application meets all the relevant principles set out in the guidance in *Rolls-Royce*. I say that because:

a. As regards (2), there is a real and present dispute between the claimant and the Insurer even though the claimant does not yet have a cause of action against the Insurer.

b. As regards (3), I accept Mr Learmonth's assertion that the parties are likely to be affected by the court's determination. It would be unrealistic in my view to conclude that the conduct of this litigation going forward will not be altered by a declaration either in favour or against the Insurer's contention on the Aggregation Point.

c. Principle (4) in Aikens LJ's list of principles seems to me to be particularly apposite. It makes clear that it is not fatal to the claimants in the context of an application for a declaration that the claimants are not parties to the relevant

contract of insurance. The fact is that I am satisfied that the claimants are affected by the issues raised by the Insurer.

d. It seems to me that principles (5) and (6) can be put on one side (although I shall briefly revisit (5) at paragraph 116 below).

e. That brings me to principle (7). I am satisfied that a declaration is an effective way of resolving the issue which has been raised namely the merit of the Aggregation Point.

   I accept that there are other options, the most obvious of which is to adopt the procedure adopted by the claimants in the Bishop's Claim and seek judgment against the insured before seeking their declaration against the Insurer in respect of the Aggregation Point. However, the principles do not suggest that there is no jurisdiction to make a declaration just because there are other options open to the claimant.

114. I also have firmly in mind the important question that David Richards J asked himself which I set out in paragraph 91 above. Would it be just and serve a useful purpose to grant declaratory relief?

115. In my judgment it would serve a useful purpose to consider the application for a declaration on the Aggregation Point. I accept that some of the consequences of a declaration suggested by Mr Learmonth and to which I have referred in paragraph 95 above may be speculative but I have no doubt that the determination of the Aggregation Point will be useful in determining the future direction of this litigation. Indeed, it is hard to understand why the Insurer itself might not be, at the very least, curious to know what the court makes of its Aggregation Point so that it can give consideration as to whether it is necessary to tailor its approach to this litigation.

116. I should add that it does not seem to me that there needs to be a finding of liability by Mr Gill and/or the Firm is a prerequisite to a consideration of the merits of the Aggregation Point. I cannot see any reason why the Aggregation Point cannot be considered as a discrete point on the basis that the arguments marshalled by the Insurer in its defence relating to the Aggregation Point are fairly self-contained. Insofar as it is argued that the declaration may be academic if Mr Gill and the Firm are not liable, I remind myself that Aikens LJ principle (5) does not exclude an academic question and that in *Pavledes* at paragraph 25 David Richards J recognised the willingness of the court in appropriate cases to make declarations which were academic. I refer to paragraph 88 above

117. The Insurer's arguments on aggregation are set out in paragraph 14 of the defence. They are simply that, first, all the claims fall to be aggregated under the policy "*because they formed one claim for replacement of the monies in excess of the indemnity missing from client account*". Secondly, it is argued that they fall to be aggregated because the activities of Mrs Box "*amounted to one extended course of dishonest conduct amounting to one series of related acts or omissions"*.

118. I am not persuaded that a declaration as to the Aggregation Point will be some sort of abstract declaration or that issues of confidentiality or privilege are particularly

brought to bear. It seems to me that what the court is being asked to do in September is to consider whether the Insurer's exposure is limited to the £2 million already paid or is not. Apart from anything else, that might well be a binary point.

119. But even if I am wrong about that, I note the defence raised by the Insurer in respect of its Aggregation Point in the Bishop's Claim (paragraphs 27 to 29 of the Insurer's defence to that claim). It is essentially the same aggregation point as is made in this case, yet it is not suggested that the Bishop is precluded from at least making his application for a declaration. Of course I accept that there may be unique nuances in this case such as those identified by Mr Pooles in his submissions, but it still seems to me that the important question that David Richards J asked himself still invites an answer in the affirmative in this case - for the reasons already given.

120. I also think that it is important to remind myself that I am not being asked at this stage to consider whether a declaration ought to be made. I am simply being asked to consider whether the court has jurisdiction to make a declaration. Just because a declaration in the terms sought by the claimants might be inappropriate does not, in my view, mean the court does not have the jurisdiction to consider whether to make it. It is also right to keep in mind that the application for the declaration is made by the claimants to the effect that the Insurer is not entitled to aggregate. They must therefore establish their case for a declaration in this case, as in the Bishop's case, on the evidence.

121. Mr Pooles's contention that I summarise in paragraph 106 above that the court should not accept jurisdiction in circumstances where the 1930 Act does not provide scope for a declaration has a superficial attraction. But in my view a closer analysis does not lead me to conclude that the court does not have jurisdiction to make a declaration in an appropriate case.

122. The 1930 Act does not specifically preclude an application for a pre-emptive declaration. If it did, I think that would be the end of the matter, but it does not. I have found that the Act itself does not permit such a pre-emptive application but that does not mean that such an application is not permissible under any circumstances and by a different route - in this case the court's inherent jurisdiction. In short, in my judgment, the Act does not prohibit a pre-emptive application for a declaration, it simply does not give the third party an entitlement to apply for such a declaration.

Summary

123. In the circumstances I am satisfied that the court has jurisdiction to make a declaration in respect of the Aggregation Point and I propose to make a declaration to that effect.

124. The result, as I understand it, is that as well as the Aggregation Point being considered in the context of the Bishop's Claim in September, it will also be considered in the context of this claim.

Final remarks

125. Finally, once again I wish to express my gratitude to counsel for the manner in which this interesting issue has been presented.

HH Judge Saffman