[2020] EWHC 2809 (Ch)

Case No: E30LS587

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
BUSINESS LIST (CHD)

Before :

HIS HONOUR JUDGE SAFFMAN SITTING AS A JUDGE OF THE HIGH COURT

- -

BETWEEN :

THE RIGHT REVEREND, NICHOLAS BAINES, LORD BISHOP OF LEEDS (1) **LEEDS DIOCESAN BOARD OF FINANCE (2)**	**Claimants**
- AND –	
DIXON COLES AND GILL (A FIRM) (1) **LINDA MARY BOX (2)** **HDI GLOBAL SPECIALTY SE (3)**	**Defendants**

Mr David Halpern QC for the claimants (instructed by Lupton Fawcett LLP)
Mr Thomas Dumont QC for the 1st defendant (instructed by Browne Jacobson LLP)
Mr Michael Pooles QC for the 3rd defendant (instructed by DWF Law LLP)
The second defendant did not appear

PT-2019-LDS-000143

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

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 (A FIRM) (3)
HDI GLOBAL SPECIALTY SE (FORMERLY INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE (4)

Defendants

- -
- -

Mr Alexander Learmonth for the claimants (instructed by Wilsons LLP)
The 2nd and 3rd Defendants were litigants in person
Mr Michael Pooles QC for 4th defendant (instructed by DWF LLP)
The first defendant did not appear

Hearing date: 29, 30 September and 1 and 2 October 2020
Date draft circulated to the Parties 22 October 2020
Date handed down 28 October 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.

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

JUDGMENT

Introduction

1. Until the beginning of January 2016, the long-established and well-respected Wakefield solicitors firm of Dixon Coles and Gill (DCG) had 3 equity partners, Mrs Linda Box, Mr Julian Gill and Mrs Julia Wilding. On Christmas Eve 2015 Mr Gill, no doubt to his horror, discovered evidence that Mrs Box had dishonestly made unauthorised payments from client account. She was confronted by Mr Gill and Mrs Wilding and acknowledged her defalcations and she was promptly expelled from the partnership at the beginning of January 2016 and reported to the police.

2. Initially it seems that the wholly innocent partners, Mr Gill and Mrs Wilding, were under the impression that the misappropriation of client monies was confined to the tens of thousands of pounds. In fact, it soon transpired that her dishonest misappropriation of client monies had been going on for years and the sum total of her misappropriations ran into the millions of pounds.

3. In March 2017 she pleaded guilty to 12 offences of dishonesty comprising offences of theft, fraud and forgery involving the misappropriation of a little over £4 million. She was sentenced to a term of imprisonment of 7 years.

4. As a result of her dishonesty not only did she create victims of clients of the firm and others who relied upon her integrity, but she also created victims out of Mr Gill and Mrs Wilding and no doubt all the employees of DCG because, at the end of January 2016 the firm, which had been established some 200 years previously, was obliged to close. In April of that year the Solicitors Regulation Authority (SRA) intervened through their agents, Messrs Gordons, and took away all DCG's files and accounting records. In June 2016 DCG entered into a Partnership Voluntary Arrangement.

5. Sad as the closure of their firm is, that is not the only consequence of Mrs Box's dishonesty that Mr Gill and Mrs Wilding have to confront. They currently face 2 separate claims brought by parties who assert that they have been significantly financially disadvantaged by Mrs Box's defalcations and who look to Mr Gill and Mrs Wilding, as Mrs Box's erstwhile partners, to make good their losses. The applications with which I have to deal arise in those 2 separate claims.

6. Rule 2.1 of the SRA Indemnity Insurance Rules 2013 requires all solicitors to carry professional indemnity insurance which accords with the SRA Minimum Terms and Conditions of Professional Indemnity Insurance (MTC). I shall deal with the terms of the MTC in much greater detail below but for introductory purposes I need only recount that one of the terms of the MTC is that the sum insured for any one claim must be at least £2 million. Another clause in the MTC (known as the Aggregation Clause) provides that, when considering what may be regarded as one claim for the purpose of the limit of indemnity, certain claims can be aggregated and be treated as one.

7. DCG had their cover with HDI Global Specialty SE (HDI). The policy provided merely for the minimum permissible cover of £2 million and it also contained an aggregation clause. Mr Gill and Mrs Wilding, as they were entitled to do as innocent partners, claimed under the policy for HDI to remedy the breach of the SRA accounting rules and make good the deficiency in client account caused by Mrs Box's defalcations and thus, essentially, for indemnity in respect of any liability that they may have to those adversely financially affected by her conduct.

8. It is anticipated I think that misappropriations will significantly exceed £2 million. If the misappropriations are one claim then HDI's obligations will be satisfied as and when they have paid £2 million and any balance must be met, so far as possible, by Mr Gill and Mrs Wilding personally in so far as they are found to be liable for Mrs Box's defalcations. It is the assertion of HDI that, notwithstanding that Mrs Box misappropriated funds from different parties, this is all one claim and that thus its liability is confined to £2 million.

9. If, however, the claims by each party are separate claims, as Mr Gill and Mrs Wilding assert, then each attracts its own £2 million indemnity limit. The personal exposure therefore of Mr Gill and Mrs Wilding in those circumstances would be considerably attenuated.

The current applications

10. The current position is that proceedings have been instituted against DCG, Linda Box and HDI by the Right Reverend, the Lord Bishop of Leeds (the Bishop) and the Leeds Diocesan Board of Finance (LDBF). These claimants assert that all the equity partners in DCG are liable as partners and trustees for Mrs Box's misappropriations of their funds and, in that capacity, are liable to account for misappropriated monies had and received by DCG and also monies that have not been received by DCG but were received and misappropriated by Mrs Box in the course of the business of the firm and with DCG's apparent authority deriving from her position as a partner in that firm.

11. One of the applications before me, dated October 2019, is an application by the Bishop and LDBF for summary judgment for an account from the former partners in DCG as trustees. In addition, there is an application for an interim payment and, further, for a declaration that HDI is not permitted to aggregate the claims of the Bishop with those of LDBF or indeed with the claims of other victims of Mrs Box's misconduct.

12. A second application before me arises out of proceedings instituted by 4 charities (the Scholefield claimants) who were residuary beneficiaries pursuant to the Will of Mr Ernest Scholefield dated 15 July 2005. The Will appointed Mrs Box and Mr Gill as executors of the estate and, in that capacity, they retained DCG to act on their behalf following the death of Mr Scholefield in September 2007. The actual administration of the estate was carried out solely by Mrs Box.

13. It is asserted that, in fact, the residuary estate to which the Scholefield claimants were entitled as residuary beneficiaries amounted to £660,952.78 but, because Mrs Box misappropriated monies belonging to the estate, the aggregate amount paid to them was only £206,723. They therefore claim the difference of £454,229.78 plus interest and they look to Mr Gill for that in his capacity as executor and Mr Gill and Mrs Wilding on the basis that, as partners in the firm instructed by the executors, they are fixed with liability for their defaulting partner.

14. This second application is the Scholefield claimants' application for summary judgment for a declaration in the same terms as that sought by the Bishop and LDBF namely that HDI is not entitled to aggregate the Scholefield claimants' claims with the claims of other clients or entities entitled to bring a claim against DCG or its former partners.

15. The respective claims by the Bishop and LDBF on the one hand and the Scholefield claimants on the other have not been formally consolidated but, because of the obvious common features, they have been case managed together and all the parties agreed that the respective applications for summary judgment should be heard together.

16. The basis upon which HDI have been brought into the proceedings for the purpose of seeking declarations is to be found in the *Third Parties (Rights against Insurers) Act* 1930. Consideration was given to this legislation in my judgment in the Scholefield claimants' action handed down on 21 July 2020 the citation for which is [2020] EWHC 1948 (Ch).

17. For the reasons contained in that judgment I concluded that the court had jurisdiction to make the declarations sought by the Scholefield claimants notwithstanding that there would not be a judgment against the defendants at the time when the declaration was sought.

18. It will be noted that the Bishop and LDBF seek summary judgment which would, if granted, at least to the extent that an order is made for an interim payment, engage the provisions of the 1930 Act but, on the authority of my decision in the Scholefield claimants case, they seek a declaration whether or not their current summary application results in liability being incurred by the defendants.

19. The Bishop and LDBF are represented by Mr David Halpern QC. The Scholefield claimants are represented by Mr Alexander Learmonth of counsel. Mr Gill and Mrs Wilding are represented by Mr Thomas Dumont QC in respect of the application against them for an account and interim payment but they are not represented on the question of the declaration in respect of aggregation. In that respect they are litigants in person. Their interests however in this context wholly coincide with those of the Bishop, LDBF and the Scholefield claimants and Mr Gill and Mrs Wilding had nothing to add other than to adopt the submissions made by Mr Halpern QC and Mr

Learmonth in that connection. Mr Michael Pooles QC appears for HDI. I am grateful to all counsel for their very skilful presentation of their respective cases and extremely helpful skeleton arguments.

The test for summary judgment

20. The grounds for summary judgment are set out in CPR 24.2. They are so familiar that it is probably unnecessary to recite them but for completeness CPR 24.2 states:

> *24.2 The court may give summary judgment against the claimant or defendant on the whole of the claim or on a particular issue if –*
>
> (a) *it considers that –*
>
> *(i) the claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that the defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at trial.*

21. The test to be applied on an application for summary judgment is a well established one upon which I also trust it is not necessary to overly dwell. The court's approach has been summarised by Lewison J, as he then was, in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. It was stated that:

> *…….The court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91 ;*
>
> *ii A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> *iii In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> *iv This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> *v However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even*

where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii On the other hand 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. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. 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: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

22. In this case there are issues which are fact sensitive. It is conceded by the claimants in both applications that, for the purpose of summary judgment in these applications, I must approach this matter on the basis that the facts are as the defendants assert them to be. It cannot be said that there is "*no real substance in factual assertions made (by the defendants)"* such as to dismiss them on the basis set out in *iv)* above.

23. The White Book paragraph 24.2.5 makes it clear that the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial but, if an applicant does adduce credible evidence in support of its application, the respondent then becomes subject to the evidential burden of establishing some realistic prospect of success. But that evidential burden is not an onerous one. All a respondent essentially has to establish is that its case is not false, fanciful or imaginary and is simply better than merely arguable.

24. Where, however, the question is whether summary judgment should be granted where the relief sought is a declaration the court's approach is more nuanced. Indeed, the approach the court should take in those circumstances was recently considered in *Abaidildinov and London Infrastructure Ltd v Amin* [2020] EWHC 2192 (Ch). Mr Robin Vos sitting as a judge of the Chancery Division closely analysed the earlier decision of Neuberger J, as he then was, in *Financial Services Authority v Rourke* [2001] EWHC 704 (Ch) and concluded, at paragraph 49 that:

> "49 *The reference to the "claim or issue" in CPR 24.2(a)(ii) must therefore in my view refer to the underlying facts or matters to which the declaration relates and not to the question as to whether, as a matter of*

discretion, the court should make the declaration once it is satisfied in relation to those underlying facts or matters."

In paragraphs 47 and 48 the judge had this to say:

> "47 "…..*whether or not the underlying facts or matters relevant to the declarations are made out is the key issue as far as summary judgment is concerned. If the defendant has a real prospect of successfully defending the points put forward by the claimant in support of the declarations summary judgment should not be granted.*
>
> *48 However, once it is established that the defendant has no real prospect of mounting a successful defence in respect of those facts or matters, it is unlikely to be in accordance with the overriding objective to require a full trial in order to decide whether the court should exercise its discretion to make the declarations which have been sought*"

25. In this case therefore, as Mr Pooles conceded, I must approach the question of a declaration on ordinary principles. It is not appropriate to decline to make a declaration simply because the defendants have a real prospect of successfully resisting it at trial. Once the conclusion has been reached that there is no real prospect of successfully challenging the facts or matters upon which the applicant relies in support of his application for a declaration, then the declaration should be granted at this, summary, stage if the reasons for doing so outweigh the reasons for not doing so.

26. I should add that in this case Mr Gill and Mrs Wilding raise a limitation defence. It is arguable I suppose that a limitation defence invites the court to make a declaration as to whether a claim is statute barred. However, Mr Halpern concedes that, for the purpose of an application for summary judgment, all that Mr Gill and Mrs Wilding need to establish is that their limitation point has a real prospect of success and thus simply satisfies the relatively undemanding criteria necessary to avoid summary judgment.

The factual matrix

27. DCG appears to have had a long association with the Church. At all material times before April 2014 DCG acted as solicitors for the Bishop of Wakefield and the Wakefield Diocesan Board of Finance.

28. For many years until 2005 Mrs Box was the Registrar of the Diocese of Wakefield. The duties of a Registrar are currently set out in schedule 2 of SI 2019/1187, *The Legal Officers (Annual Fees) Order* 2019. I am told that these duties have not altered significantly and were basically the same during Mrs Box's tenure as Registrar. Essentially, as Mr Halpern puts it in paragraph 39 of his skeleton argument, they amount to being the in-house lawyer to the Diocese. It is a fact, and apparently was then, that only qualified solicitors or barristers who are communicants of the Church can act as Registrars.

29. In 2005 Mrs Box became Chancellor of the Diocese of Southwell and Nottingham and was thus obliged to relinquish the office of Registrar which was assumed by Mr Gill and Mrs Wilding. It seems that their respective roles were displayed on the firm's note paper, Mr Halpern suggests as a "selling point". Under the name of each of the equity partners they are described as Chancellor or Diocesan Registrar, as applicable.

30. In 2013/2014 there was a reorganisation within the Church of England as a result of which the assets and rights of the Bishop of Wakefield and the Wakefield Diocesan Boards were vested in the Bishop of Leeds and LDBF. From 20 April 2014 property and trusts formerly in the name of the Bishop of Wakefield and any Wakefield Diocesan Board became vested in the Bishop of Leeds and the corresponding Leeds Diocesan Board. Mr Gill and Mrs Wilding then became joint registrars of the Diocese of Leeds along with Mr Peter Foskett, a partner of Lupton Fawcett who act for the Bishop and LDBF in this application.

31. When Mr Gill discovered a defalcation in the client account in Christmas 2015, in addition to reporting it to his insurance broker, he and Mrs Wilding commissioned accountants to investigate the extent of Mrs Box's wrongdoing. It appears that he also reported this to Mr Foskett because he attended at the offices of DCG in January 2016 and removed a quantity of papers amongst which were found some particularly incriminating ones so far as Mrs Box was concerned.

32. These included a red ledger in Mrs Box's handwriting entitled "*The Bishop of Wakefield Fund*" (the Red Ledger). This has been analysed by the solicitors for the Bishop and LDBF who assert that it contains at least £523,587.02 worth of transactions apparently for the benefit of the Bishop and/or LDBF but which they do not recognise.

33. The documents removed by Mr Foskett also included a list of sums held for the Bishop of Wakefield as at 31 December 1999 with the Churches, Charities and Local Authority's Investment Management Ltd (CCLA). That document records 8 funds, details of which appear in a further document headed "*Total number of charitable donations made to clergy from trust funds at the disposal of the Bishop of Wakefield for the past 3 years (1997, 1998, 1999)".* The total amount recorded as invested with CCLA is £982,638.85. There appears to be no record of what has happened to this money other than £188,820 which the Bishop accepts has been received by him. The fact appears to be that Mrs Box nefariously appropriated it for her own purposes.

34. There has also been revealed a DCG ledger entitled "*Bishops Trust BIS 0071*" which, it is said, contains wholly spurious entries and which does not appear to refer to any transaction in respect of which Mrs Box or DCG were specifically instructed. This account records transactions totalling about £1.2 million some of which are apparently also recorded in the Red Ledger. When double-counting and other necessary adjustments are made Mr Halpern argues that the amount in respect of which Mr Gill and Mrs Wilding are obliged to account for the criminal activities of Mrs Box revealed by this ledger is just short of £760,000.

35. At this point I should record that there is a specific issue in relation to a payment of over £1.126 million recorded in this ledger as having been paid into client account on

6 February 2014. It is recorded as having come from the investment company, St James's Place. For the purpose of an account Mr Gill and Mrs Wilding do not accept that that money was ever money belonging to the Bishop. Mr Dumont suggests that it is much more likely that this is money stolen from somebody else which was simply laundered through this ledger account. He points out that the Bishop has not produced any written evidence to prove that such a sum was invested with St James's Place and suggests that investment with such a company would not accord with the Church's investment profile and values.

36. Furthermore, and moving on from BIS 0071, an in-depth analysis of DCG's ledgers relating to conveyancing transactions where Mrs Box was instructed in her capacity as a partner in the firm reveal a considerable number of payments out ostensibly to or on behalf of LDBF but which it does not recognise. There is a significant claim in respect of these payments.

37. So far as the Bishop and the LDBF are concerned these documents evidence systematic and long-term theft of Church funds by Mrs Box.

38. Paragraph 10 of the Re-Re-Amended Particulars of Claim refers to those documents (and indeed others which are not relevant to this application) and forms the basis of the claim by the Bishop and LDBF as it is currently pleaded. The sum total of transactions revealed by these documents amounts to about £2.5 million.

39. What all those documents appear to reveal is that some funds were stolen by Mrs Box from the Bishop or LDBF (as successors to the Wakefield diocese) which did not go through DCG's client account while others did.

40. One of the issues in this case is the extent to which Mrs Box indulged in teeming and lading. Teeming and lading is defined more fully in paragraph 252 below but briefly it is the process by which monies are moved around between bank accounts or ledgers to hide the fraudulent removal or use of those funds. Mr Pooles argues that in this case the evidence would suggest that teeming and lading operating through DCG's client account was extensive and that, if it is not necessarily the case now, the evidence in support of that analysis may well follow. He argues that this is important in the context of establishing what is a "claim" for the purpose of insurance cover. Mr Halpern, and Mr Learmonth on behalf of the Scholefield claimants, suggest that it is irrelevant to the question of what amounts to a claim but in any event both assert that teeming and lading was not extensive at all.

41. Mr Gill and Mrs Wilding argue that they have no knowledge of Mrs Box's involvement in the Bishop of Wakefield's Fund recorded in the Red Ledger. They deny that Mrs Box's involvement was with their authority or in the ordinary course of the firm's business.

42. They point out that Mrs Box was a close friend of Bishop Nigel, the Bishop of Wakefield until 2002 and subsequently Bishop Stephen who was installed in 2002. They contend that she administered this fund on that, personal, basis. Insofar as some money may have been channelled through client account, this was simply a money-laundering exercise to facilitate Mrs Box's frolic of her own.

43. I should add that it was the Bishops who seem to have given Mrs Box the sole authority to sign cheques in respect of this fund. I have been referred to a letter dated 15 December 1995 from Mrs Box to Bishop Nigel which suggests that the Bishop is the trustee of these funds but, conveniently, the nature of the trust was such that the Bishop was under "*no legal duty to divulge the accounts to anyone*".

The claim for an account by DCG and an interim payment

44. I remind myself that it is only Mr Halpern on behalf of the Bishop and LDBF who at this stage seeks an account against, and an interim payment from, the former partners in DCG. In paragraph 13 of his skeleton argument Mr Halpern summarises the basis of his claim. He describes it as in essence being very simple:

> *"DCG at one time held very substantial assets belonging to (the Bishop and LDBF). A large part of those assets has been stolen by Mrs Box. DCG is liable to account as trustee of these assets. Accordingly (the Bishop and LDBF) are entitled to summary judgment for accounts and enquiries pursuant to CPR r25.1 (1)(o) and 24PD 6."*

45. The contention is that Mr Gill and Mrs Wilding are trustees by virtue of their position as equity partners in the firm and on that basis are liable for money which went through their client account and for other losses sustained by Mrs Box's wrongful acts.

46. As Mr Halpern's skeleton argument makes clear, the claim is based on the footing of wilful default. Thus, it is grounded on the allegation of misconduct. It is by means of a claim on the footing of wilful default that a trustee is obliged to account for a passive breach of trust namely an omission to do something which, as a prudent trustee, he ought to have done as well as an active breach of trust where the beneficiaries look to a trustee because the trustee has done something which he ought not to have done. In short, an account on the footing of wilful default seeks to charge the trustee not only with assets actually received but also with assets which he has not received but which he would have received but for his breach of duty. Accordingly, it gives rise to a power to surcharge the errant trustee with items that they would have received but for their wilful default.

47. Sections 9 to 13 of Partnership Act 1890 provide:

> *9. Every partner in a firm is liable jointly with the other partners … for all debts and obligations of the firm incurred while he is a partner.*
> *10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.*
> *11. In the following cases; namely—*

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

Provided as follows:—

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."

48. Mr Halpern asserts that all 3 equity partners have a direct liability insofar as money passed through the client account of the firm because any money passing through the client account is held on trust for the client to whom it belongs. He also prays in aid in this context s11(b) which makes the firm liable to make good losses for monies received by it which are misapplied by one or more of the partners and s9 which fixes every partner in the firm with liability for all the debts and obligations of the firm.

49. As I have said, it is common ground that some money misappropriated by Mrs Box did not pass through the firm's client account but he argues that, in receiving that money, Mrs Box was acting within the scope of her apparent authority when she misapplied it and thus, by virtue of s11(a) the firm is liable to make good the loss and, as above, s9 fixes the innocent partners with those liabilities.

50. The provisions of s10 impose an obligation on innocent partners to make good any losses caused by the wrongful act or omission of any other partner acting in the ordinary course of the business of the firm or with the authority of his co-partners. Furthermore, in respect of both scenarios, the liability of each partner is joint and several by virtue of the provisions of s12 which provides that each partner's liability shall be joint and several where that liability arises under sections 10 or 11.

51. Whilst sections 9 to 12 fix the partners with a liability for the conduct of co-partners, s13 is a limiting provision which absolves a partner in specific circumstances from liability for misappropriations by a trustee who happens, incidentally, to be a partner.

52. Through Mr Dumont, Mr Gill and Mrs Wilding accept that, subject to a limitation defence, they have a duty to account in respect of monies that may have been misappropriated by Mrs Box in the course of conveyancing transactions carried out by Mrs Box on behalf of the Bishop and/or LDBF or their predecessors, because, as Mr

Dumont puts it at paragraph 36 of his skeleton argument "*conveyancing was, of course, four-square within the firm's business".*

53. Accordingly, Mr Gill and Mrs Wilding do not dispute an obligation to account for monies misappropriated as a result of conveyancing transactions on behalf of Mr Halpern's clients where the claim is not statute barred. They accept, as indeed it seems to me they must, that such transactions were in the ordinary course of the firm's business and that accordingly they are fixed with liability as partners and as trustees of money passing through the client account.

54. One such transaction concerns a conveyance in relation to Thornhill Lees, Dewsbury where it is acknowledged that £33,062.38 is presently unaccounted for. Another is All Souls, Hayley Hill Sunday School where it is acknowledged that there is presently £188,014.61 unaccounted for. However, they resist any application for an interim payment on the basis that the documents are so unreliable that it not appropriate to make any order for interim payment until there has been a detailed account.

55. They deny any liability in respect of all misappropriations other than those connected to sufficiently recent conveyancing transactions on the grounds not only that certainly in relation to some they are statute barred but also because Mrs Box's conduct was not in the ordinary course of the firm's business and nor was it authorised by them.

56. In *Dubai Aluminium Co Limited v Salaam* [2003] 2 AC 366 the House of Lords had occasion to consider the position of partners in the context of what was taken, for the purposes of the hearing, to be the dishonest conduct of one partner in a firm of solicitors.

57. The case is important in the context of the consideration of when a solicitor is acting in the ordinary course of business, the phrase utilised in s10 of the Act and Mr Halpern relies on it for that purpose. At paragraph 110 Lord Millett had some observations on the interrelationship between these various sections cited above which it is worthwhile repeating.

He explained:

> "*Section 9 is not concerned with the liability of the firm at all but with the liability of the individual partners. It provides that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he was a partner. Section 12 makes every partner jointly and severally liable for loss for which the firm was liable under sections 10 and 11. Where section 10 makes the firm vicariously liable for loss caused by a partner's wrongdoing, therefore, section 9 makes the liability the joint liability of the individual partners. Sections 11 and 13 are not concerned with wrongdoing or with vicarious liability but with the original liability of the firm to account for receipts. … Section 11 deals with money which is properly received by the firm in the ordinary course of its business and is afterwards misappropriated by one of the partners. The firm is not vicariously liable for the misappropriation; it is liable to account for the money it received, and cannot plead the partner's wrongdoing as an excuse for its failure to do so.*

> *Section 13 deals with money which is misappropriated by a trustee who happens to be a partner and who in breach of trust or fiduciary duty afterwards pays it to his firm or otherwise improperly employs it in the partnership business. The innocent partners are not vicariously liable for the misappropriation, which will have occurred outside the ordinary course of the firm's business. But they are liable to restore the money if the requirements of the general law of knowing receipt are satisfied*."

58. As I have said, Mr Halpern relies on section 10 in the context not least of monies misappropriated by Mrs Box which did not go through the firm's client account[1] but in order to do so he must of course ultimately establish that Mrs Box's wrongful acts occurred when she was acting in the ordinary course of the firm's business or with the authority of her co-partners. It is in this context that *Dubai Aluminium* is particularly apposite.

59. At first blush one might think that it can never be part of the ordinary course of the business of a firm of solicitors to misappropriate monies but that is not what *Dubai Aluminium* says. In that case it was held that a solicitor would have been acting[2] in his capacity as a partner and in the ordinary course of the firm's business when he dishonestly assisted in the perpetration of a fraudulent scheme by drafting various agreements necessary to the fraud.

60. As Lord Nicholls said at paragraph 19:

> *"Partners do not usually agree with each other to commit wrongful acts. Partners are not normally authorised to engage in wrongful conduct. Indeed, if vicarious liability of a firm for acts done by a partner acting in the ordinary course of the business of the firm were confined to acts authorised in every particular, the reach of vicariously liability would be short indeed. Especially would this be so with dishonesty and other intentional wrongdoing, as distinct from negligence*."

61. Accordingly, Lord Nicholls was of the opinion, expressed in paragraph 21, that:

> *"whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did*."

And at paragraph 23:

> *"If, then, authority is not the touchstone, what is?..... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm…… the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business……"*

[1] In this connection he also relies of course on s11a

[2] I say "would have been acting" because the matter was decided on assumed facts

62. What does the phrase "*fairly and properly*" mean? As Lord Nicholls points out at paragraph 24, phrases such as that betoken a value judgment by the court. The conclusion (as to whether an act is done within the ordinary course of business) is a conclusion of law based on primary facts rather than a simple question of fact.

63. But what degree of connection between the act of the errant partner and those authorised by the firm would be sufficiently close to prompt the conclusion that the act is in the ordinary course of business? In other words, at what point does an errant act become characterised as work-related rather than personal?

64. At paragraph 31 Lord Nicholls approves the judgment of Henn Collins MR in *Hamlyn v John Houston and Co* [1903] 1 KB 81 in which it was said that:

> "*If it was within the scope of Houston's authority to obtain the information by legitimate means, then for the purpose of vicarious liability it was within the scope of his authority to obtain by illegitimate means and the firm was liable accordingly*"

65. In that case one aspect of the business of the defendant firm was to obtain, by lawful means, information about its competitors' activities. Houston, a partner in the defendant firm, obtained confidential information on Hamlyn by bribing one of their employees. He had no express authority to do that but nonetheless the firm was held liable.

66. However, Lord Nicholls made it clear that there are limits on this broad principle. A distinction is to be drawn between those situations where an employee or partner took an unlawful step for the purpose of furthering the business of the firm and one where the partner is engaged only in furthering his own interests. In that latter case then:

> "*… The mere fact that the act was of a kind the employee (or in this case partner) was authorised to do will not of itself fasten liability on the employer (or in this case co-partners*)[3]."

67. Applying those principles in *Dubai Aluminium* Lord Nicholls, in a judgment with which the other members of the House of Lords agreed, held that a firm was liable for the acts of one of its partners whose dishonest assistance helped to facilitate the fraud.

68. As Lord Nicholls pointed out at paragraph 36:

> "*Drafting agreements of this nature for a proper purpose would be within the ordinary course of the firm's business. Drafting these particular agreements is to be regarded as an act done within the ordinary course of the firm's business even though they were drafted for a dishonest purpose. These acts were so closely connected with the acts Mr Amhurst (the solicitor taken to have been dishonest for the purposes of the case) was authorised to do that, for the purpose of the liability of the firm, they may fairly and properly be*

[3] The words in parenthesis are mine

regarded as done by him while acting in the ordinary course of the firm's business."

69. Lord Millett in the same case thought (at paragraph 113) that the issue could be reduced to an analysis of whether the acts of the dishonest solicitor "*are legally capable of being performed by a solicitor acting in the ordinary course of his firm's business."* Similarly, at paragraph 122 he explained that[4] "*the vicarious liability of an employer (and thus a co-partner) does not depend upon the employee's (the errant partner) authority to do the particular act which constitutes the wrong. It is sufficient if the employee (errant partner) is authorised to do acts of the kind in question.*"

70. However, Lord Millett made it clear that that principle is not by any means immutable. At paragraph 125 he stated[5]:

> "*The question of whether the employee (errant partner) was acting in the course of his employment (in the ordinary course of business) or was engaged on a frolic of his own is not necessarily determined by the fact that he was merely doing work of the kind he was employed to do. Even in such a case the employee (partner) may step outside the limits of his employment (the ordinary course of business of the partnership).*

And at paragraph 130 he had this to say:

> "*In the present case the principal participants in the fraud needed a solicitor to draw the agreements which were to be the instrument of carrying out their scheme. They instructed Mr Amhurst, a partner in Amhurst's; and he is to be assumed to have carried out his instructions "in his role as a solicitor of the firm", that is to say he was not moonlighting but acting in the course of the firm's business. Drawing such agreements honestly and for a proper purpose would plainly be in the ordinary course of the firm's business. By drawing them dishonestly for an improper purpose and for his own benefit or for the benefit of his confederates, the court might, on an overall assessment of the evidence at trial, have concluded that Mr Amhurst had sufficiently departed from the ordinary course of the firm's business to defeat Dubal's claim against Amhurst's. He would have been engaged on a frolic of his own and not acting in his role as a partner of the firm. But such a conclusion would not have been inevitable; deliberate and dishonest conduct committed by a partner for his own soul benefit is legally capable of being in the ordinary course of the business of the firm.*"

The underlining above is mine. It emphasises an observation upon which Mr Dumont relies.

71. Lord Millett in *Dubai Aluminium* also considered the extent to which acting as a trustee is acting in the course of a solicitor's business. He had regard to the case of *Mara v Browne* [1896] 1 Ch 199. The Court of Appeal in that case had concluded that

[4] As before the words in parenthesis are my addition to reflect the issues in this instant application

[5] As above

it was not within the scope of the implied authority of a partner in a solicitor's business that he should so act as to make himself a constructive trustee and thereby subject his partners to the same liability as was assumed by a trustee in those circumstances. So far, so good so far as Mr Gill and Mrs Wilding are concerned.

72. But, while Lord Millett did not demur from that conclusion, he was clear that it all depended on what was meant by a "constructive trustee". His position was that he agreed with the observations of the Court of Appeal in *Mara* where the meaning of constructive trustee is confined to a de facto trustee who had taken upon himself the custody and administration of property on behalf of others. In that sense Lord Millett recognised that such a person, as a de facto trustee, is actually a trustee. They are, to use his words at paragraph 138, "*true trustees and fully subject to fiduciary obligations".*

73. This is to be contrasted with a different kind of constructive trustee namely a person who has wrongfully taken possession in his own right and was thus liable to be declared a trustee by a court of equity. This sort of constructive trustee does not assume the position of trustee like that of a de facto trustee. As was said in paragraph 141 *"if he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant".*

74. Calling such a person a trustee is actually a misnomer. It is, to cite paragraph 142, merely the creation by the court to meet the wrongdoing alleged. It is "*nothing more than a formula for equitable relief".* Such a person is in reality not accountable as a constructive trustee at all but is simply accountable in equity. Lord Millett had this to say at paragraph 143:

> *"The distinction between the two kinds of constructive trustee is of critical importance in the present context. If, as I think, it is still not within the ordinary scope of a solicitor's practice to act as a trustee of an express trust, it is obviously not within the scope of such a practice voluntarily to assume the obligations of a trustee and so incur liability as a de facto trustee…… But given that a solicitor may be guilty of deliberate and dishonest conduct while acting within the ordinary scope of his practice, there is no conceivable reason why his firm should not thereby incur vicarious liability for loss caused by the conduct (of an errant partner) for which that partner is accountable in equity."*

75. Mr Halpern argues that Mrs Box is quite clearly one of these second type of constructive trustees that is, not in fact a trustee at all but merely a person who is accountable in equity for her actions. The sentence which I cite above to the effect that "*if he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant"* is clearly one upon which he relies in support of that contention.

76. Accordingly, he prays in aid the opinion of Lord Millett expressed in the final sentence in paragraph 74 above in support of his contention that Mr Gill and Mrs Wilding are liable for Mrs Box's misconduct. He does however draw my attention to the point made by Lord Millett at paragraph 155 to the effect that their liability is

vicarious, it is not a direct liability. Mr Gill and Mrs Wilding are liable even though they are personally innocent because their partner, Mrs Box, is guilty.

77. Bringing all these threads together Mr Halpern suggests that in order to obtain an order for account he must establish that the Bishop's funds were received in the ordinary course of business or were held out as such or were held by Mrs Box as a constructive trustee of the second type identified by Lord Millett.

78. He points out that Mrs Box carried out her functions from DCG's offices. All the documents on which the claimants rely were found at DCG's offices. That Mrs Box performed her office of Registrar as part of the practice of DCG, as did Mr Gill and Mrs Wilding. That the firm's stationery proudly represented that Mrs Box was Registrar and subsequently an ecclesiastical Chancellor and indeed that Mr Gill and Mrs Wilding were Registrars. And, so far as is relevant, it was her status as a solicitor which enabled Mrs Box to become and remain a Registrar.

79. On the issue of an account and indeed an interim payment, Mr Halpern does not dispute that there is a paucity of documents to establish precisely what has been stolen from his clients, in other words, what has become of these Church funds. In order to meet any contention that this should preclude an order for an account or an interim payment Mr Halpern argues that there is a presumption that the missing information is as favourable to the claimants and as unfavourable to DCG as possible given that it is DCG's breach of duty which has led to the information not being available.

80. As was said in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20 at paragraph 38:

> *"Insofar as the defendant may have destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court can make presumptions in favour of the claimant. The point is illustrated by the case of Armory v Delamirie (1721) 1 Str 505 where a chimney sweep's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant returned only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated, and Pratt CJ directed the jury*
> *"that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages.""*

81. That principle had been adopted in *Keefe v The Isle of Man Steam Packet Company Ltd* [2010] EWCA Civ 683. This was a noise-induced hearing loss claim brought by a claimant who had worked on the defendant's ships. It was dismissed at first instance because there was no engineering evidence of noise levels on the ships in which Mr Keefe served during his employment with the defendants. There was, however, an obligation on the defendants to take measurements of noise levels to ensure they did not exceed levels which were dangerous. The defendants were in breach of that duty.

82. At paragraph 19 Longmore LJ stated that:

"*If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not in fact excessive. In such circumstances the court should judge a claimant's evidence benevolently and a defendant's evidence critically*."

83. Mr Halpern relies on this case to make good his point that the principle in *Armory v Delamirie* does not just apply to fraud but also negligence. The principle is therefore not diluted merely because Mr Gill and Mrs Wilding have not acted dishonestly. *Gulati v MGN Ltd* [2017] QB 149 is another example of the application of the principles in *Armory* insofar as it is doubted. Mr Halpern prays this case in aid of his assertion that these principles extend to applications for an account.

84. I should say however that it is right to observe that in that case it was pointed out by Arden LJ at paragraph 107 that the principle in *Armory* is not inflexible: "*for example, if it was clear that a finding about the diamond's real value could be made from other evidence*".

85. Mr Dumont however argues that Mr Gill and Mrs Wilding have clearly established a real prospect of successfully defending the claim against them based, as it is, on their position as trustees and partners to say nothing of the limitation defence to which I shall come shortly.

86. He neatly gives an overview of their defence in paragraph 9 of his skeleton argument in which he says:

Overview of the First Defendant's (i.e. Mr Gill & Mrs Wilding's) Defence

a. As trustees for money going through the client account:

i. Very little Bishop's/Diocesan money (relatively speaking) passed through the DCG client account in the Red Ledger claim and the BIS0071.

1. In so far as it did in the Red Ledger, estimated to be in the region of £84,000, Mr Gill & Mrs Wilding were not liable for Ms Box's acts. She was laundering the money through the firm.

2. In so far as it did in the BIS0071 ledger, in the apparent sum of £20,151.68, it is outbalanced by a sum of £200,000 or sums totalling more than £600,000, passing in the other direction, back to the Bishop of Wakefield Fund

ii. Conveyancing monies of some £221,076.99 need to be accounted for, but given the lack of clarity (and sums which were paid out of the BIS0071 to the Claimants) no interim payment should be made.

iii. The remaining conveyancing monies are subject to a limitation defence.

b. As partners under ss. 10 & 11 Partnership Act 1890: neither s10 nor s11 apply to the Red Ledger/BIS0071/CCLA because Mrs Box's acts were not within the course or ordinary course of the firm's business.

The Red Ledger

87. Mr Dumont argues that the fact that Mrs Box was a diocesan registrar is neither here nor there. In fact, she ceased to occupy this office in 2005 and it is no part of a registrar's duties in any event to administer trust funds on behalf of the diocese.

88. He argues that there is a real prospect of establishing that, with regard to this ledger, Mrs Box's conduct was not conduct in the course of the firm's business. Even more importantly, in acting as a signatory on the Bishop of Wakefield's bank account (which actually enabled her to misappropriate these funds) she was not acting in that capacity.

89. He argues that it can make no difference that the Red Ledger was found in her office. He points out that often personal papers or other personal effects are kept by professionals in their office. He points out that in *Kooragang v Investments Pty Ltd v Richardson and Wrench Ltd* (1982) AC 462 and employee was using the firm's stationery. At paragraph 127 of his judgment in *Dubai Aluminium* Lord Millett refers to this case in which a firm was held not to be liable for the negligent valuations of one of their employees who was moonlighting when he gave the valuation. At paragraph 127 he says that:

> *"Unless the use by the valuer of the defendant's stationery in that case was enough to tip the scale, which it clearly was not, it merely amounted to a false representation that he was giving the valuation on their behalf*".

90. If using the firm's stationery is not determinative the rhetorical question to be asked is how much less so can it be determinative, or even very relevant, that an incriminating document was found in Mrs Box's office at DCG?

91. Furthermore, argues Mr Dumont, the fact that the stationery makes reference to Mrs Box's status as the diocesan registrar means nothing. It is an office held within the Church of England and as Mr Halpern concedes, it is akin to being an in-house solicitor. Mr Dumont argues that that is in-house to the Church of England, not in-house to DCG.

92. Additionally, even if she paid her retainer into the firm, that does not mean that she was acting in the course of the firm's business. It is, says Mr Dumont, perfectly reasonable to argue that the retainer is simply to compensate the firm for the fact that, when she is working on Church of England business, Mrs Box is not fee earning for the firm. Nor, he argues, can it make a difference that it is a prerequisite of acting as the diocesan registrar that one is a solicitor or barrister. The same is true for judicial appointment but that does not mean that a partner who is a recorder is acting in the ordinary course of business of the firm of which he is a partner when he is sitting on the Bench.

93. Further as regards the Red Ledger, Mr Dumont makes the point, in paragraph 16 of his skeleton argument:

"….*the Red Ledger is manifestly a diocesan Ledger. It was kept in manuscript, in a separate ledger book. It does not record monies held at all by DCG. It appears to record funds held in, received into and paid out of, the Bishop of Wakefield Fund bank account at Barclays and other accounts such as the Diocesan Central Board of Finance. These were not funds held by Mrs Box or DCG for the Bishop/diocese but funds held by the Bishop/diocese itself."*

94. He reminds me that the evidence is that Mrs Box was a close friend of both Bishop Nigel and Bishop Stephen. Indeed, as regards Bishop Nigel he and Mrs Box and their respective spouses went out together to dinner and on breaks to Edinburgh and Dorset. Mr Dumont argues that it is clear that she was implicitly trusted with the administration of this fund, not specifically as a partner in DCG but in her own, personal, capacity. He asserts that it is manifestly arguable that when she raided this fund she was not acting as a solicitor in the course of business but on a frolic of her own. In short, it is at least sufficiently arguable to meet the requirements of CPR24 that what she was doing was personal rather than work related.

95. Even to the extent that she paid sums from the Red Ledger into DCG he argues that there is a real prospect of it being established that that was not in the ordinary course of the firm's business nor indeed received by the firm in the course of its business, nor indeed authorised by the firm. It was paid into DCG's bank account not in consequence of any underlying transaction but merely to launder the money she was stealing from the Bishop or the other diocesan entities. As he says in his skeleton argument paragraph 19:

> *"using the client account to launder stolen money where the firm is not acting on any underlying transaction, is not in the ordinary course, or in the course, of the firm's business."*

96. On the issue of apparent authority which, it will be recalled, is a basis upon which a partner can be fixed with liability under both section 10 and section 11(a) Partnership Act 1890, Mr Dumont argues that in writing cheques for her benefit Mrs Box had actual authority but it was the authority of the Bishop, not DCG.

97. Nor, it is argued, can it be said that she has authority from DCG to receive money into client account. In order to pay money into client account there has to be an underlying transaction on behalf of the client. The Solicitors Accounts Rules 2011 rule 14.5 makes that clear. Rule 14.5 states:

> *"You must not provide banking facilities through a client account. Payments into, and transfers or withdrawals from, a client account must be in respect of instructions relating to an underlying transaction (and the funds arising therefrom) or to a service forming part of your normal regulated activities*"

Conclusion as to Red Ledger

98. I am satisfied that Mr Dumont has discharged the evidential burden of establishing a real prospect of successfully defending the claim in respect of this ledger on the basis that there are sufficiently arguable issues revolving around ordinary course of

business and apparent authority. That is not to say that at trial that defence will succeed. However even if success is improbable that is not enough for summary judgment. The test is simply that the defence is better than merely arguable.

99. While Mr Halpern's submissions to the effect that Mrs Box's dealings recorded in the Red Ledger were authorised or in the ordinary course of business are powerful, nevertheless I am satisfied that Mr Dumont's counter to them are sufficiently strong to frustrate a claim for summary judgment for an account. I recognise that the claim is founded on the footing of wilful default and that requires a breach of duty by the trustees to have been established.

100. In reaching my conclusion I take into account in particular the observations of their Lordships in *Dubai Aluminium.* I have in mind paragraph 125 of that judgment to which I refer in paragraph 70 above to the effect that even if the wrongful conduct occurs in the course of doing work of the kind that the employee or partner was expected to do nevertheless an employee or partner may still step outside the limits of his employment or outside the limits of ordinary course of business and be treated on the basis that his conduct is a frolic of his own.

101. I also have regard to paragraph 130 of *Dubai Aluminium* where Lord Millett expressly recognises that somebody in the position of Mr Amhurst in that case or Mrs Box in this case could have sufficiently departed from the ordinary course of the firm's business to defeat a claim against partners. It is difficult to see how, if that may apply to Mr Amhurst, it is not sufficiently arguable that it applies in respect of Mrs Box.

102. True it is that if Mrs Box is held to be a constructive trustee of the second type envisaged by Lord Millett in *Dubai Aluminium* then Mr Gill and Mrs Wilding may well be accountable. That is clear from that part of his judgment that I reproduce at paragraph 74 above. But that question may depend on questions such as the extent to which Mrs Box has taken upon herself the custody and administration of property belonging to the Church and recorded in this ledger and thus becoming a de facto trustee. I have in mind here the matters which I consider at paragraph 72 above. It would not be appropriate to discount the possibility that there are factual issues which may affect the question of the liability of Mr Gill and Mrs Wilding if that is to be based upon Mrs Box, rather than being a de facto trustee, being instead a constructive trustee of the second type described by Lord Millett.

103. In the light of that finding obviously questions of an interim payment do not arise.

BIS0071

104. Many of the arguments marshalled by Mr Dumont in respect of the Red Ledger are deployed by him in connection with this account. The major difference of course is that BIS0071 is a DCG ledger. It is to be distinguished on that basis from the manuscript scribblings of Mrs Box in the Red Ledger.

105. In his skeleton argument at paragraph 33 Mr Dumont argues that, even in connection with this ledger, Mr Gill and Mrs Wilding can rely on the fact that the Partnership Act does not fix co-partners with liability for acts done by another partner which are outside the scope of apparent authority or outside the scope of the ordinary course of the firm's business.

106. The argument is that this ledger did not reflect any genuine underlying transactions whatsoever. It was merely a means to raid Mr Halpern's clients' money. Accordingly, Mr Dumont argues that there is a real prospect of successfully arguing that the use of this account was simply outside the ordinary course of the firm's business and nor can it be said that it was authorised, not least because it is directly contrary to the provisions of rule 14.5 of the Solicitors Accounts Rules.

107. Mr Pooles's submissions were of course predominantly directed towards the Aggregation Issue but, in the context of the application for summary judgment, he urged upon me the fact sensitivity relating to questions as to how the monies that ultimately ended up in this account, and indeed elsewhere, came into the hands of Mrs Box and that thus the matter did not lend itself to summary judgment. I have of course considered that but it seems to me that what matters here is not how the monies came to be in client account or Mrs Box's status when she received these monies and paid them into client account, but the fact that they were then misappropriated while in client account.

108. Accordingly, I have considerably more difficulty in reaching the conclusion that Mr Gill and Mrs Wilding have a defence with a real prospect of success in relation to the taking of an account in respect of this ledger.

109. It is hard to argue that setting up a client account ledger and transacting through it is outside the ordinary course of business of a solicitor. Indeed, such steps are integral to the running of a solicitors' firm. I do not see how it can be realistically argued that the fact that no transactions going through this ledger are genuine renders what would otherwise be an account in the ordinary course of business (and for which co-partners would be responsible) into a ledger for which they are not responsible. That would mean that where there is total abuse of client account through the medium of a client account ledger co-partners would be absolved from liability but not where some of the transactions in the ledger were genuine. It would be odd indeed if that was the law.

110. It cannot even be said that the ledger is in the name of a wholly made-up client. The name "Bishop's Trust" at the very least, bears a relationship to genuine clients of the firm. Indeed, the ledger card itself refers to the client as being an "existing client".

111. Furthermore, I do not see that it is realistically arguable that setting up and transacting through a client account ledger is outside the apparent authority of a partner. Solicitors do it, and are indeed expected to do it, every day. True it is that in this case it was for dishonest purposes but it is difficult to see any realistic basis for concluding that setting up and transacting through a client ledger is not sufficiently closely connected with the acts that the partner is authorised to do so as to make it an

act in the ordinary course of business. I have in mind here the use of the phrase "closely connected" to which I refer in paragraphs 61 and 68 above.

112. I do not overlook Mr Dumont's consideration of BIS0071 in his skeleton argument from paragraph 27 and indeed his oral submissions but they centre predominantly on what can be gleaned from this ledger in terms of the extent to which Church funds have been raided as opposed to the funds of other clients. In my judgment those issues are not in themselves a reason not to order an account. After all, the whole purpose of an account is to clarify the numbers.

113. Accordingly, I am satisfied that the Bishop and LDBF are entitled to summary judgment for an account in respect of this ledger because there is no real prospect of the court at trial concluding otherwise, but I am not satisfied that it is appropriate to order an interim payment.

114. First, there is the issue to which I refer above concerning the provenance of the £1.126 million that came from St James's Place. Mr Halpern's clients have produced no evidence that this money was ever theirs and, it is argued, it is equally possible that it belonged to somebody else.

115. Various scenarios have been speculated. Who is to say, argues Mr Dumont, that it was not stolen from the estate of a deceased client and just laundered through BIS0071? It is suggested that executors or beneficiaries of such a deceased person would have been likely to make it known if over £1 million had been misappropriated from the deceased's estate. But that would only be the case if they knew about it. Those interested in the administration of a will for example may well be aware of a loss of £1 million if the estate was expected by the personal representatives or the beneficiaries to be quite sizeable but estate accounts produced by Mrs Box showed it to be modest. But if a deceased was a multimillionaire in any event those interested in the administration of his estate may not know that it was worth say £10 million rather than the £9 million that Mrs Box may have them believe.

116. If that £1.126 million is put on one side then the transactions going through BIS0071 amount to only £53,000 odd but it appears that £633,159.37 has been debited from that ledger and ostensibly credited to the benefit of the Wakefield Diocese in one form or other. In short, if the money from St James's Place was not initially a Church investment then Mr Halpern's clients may have been overpaid.

117. Mr Halpern relies on the principle in *Armory*, but, as Mr Dumont points out, it is arguable that it does not apply, certainly at this stage. That principle arose on the basis that it was impossible to ascertain the quality of the gem that had initially occupied the socket in the ring. But that is not analogous to this situation where forensic accounting may well throw some light on the extent of the misappropriations[6].

CCLA

[6] Although I recognise that even HDI's advisers entertain some pessimism about the prospect of a fully accurate picture ever emerging (see paragraph 245 below)

118. In my judgment CCLA is much more akin to the Red Ledger than it is to BIS-0071. The financial transactions that are recorded are simply recorded on pieces of paper kept, it appears, by Mrs Box. They are not financial transactions in respect of which a client ledger was opened. They are different from the Red Ledger only in the sense that they are typed rather than manuscript and look a little more professional but that cannot be reason for making a meaningful distinction between the Red Ledger and the CCLA accounts.

119. For the same reason therefore that I decline to give summary judgment for an account in respect of the Red Ledger I decline to give summary judgment for an account in respect of this. As with the Red Ledger, it is sufficiently arguable for Part 24 purposes that monies that Mrs Box passed through the CCLA account were not passed through in the ordinary course of the firm's business or with the apparent authority of her co-partners.

The conveyancing claims

120. I allude to these in paragraph 36 above. Mr Dumont readily accepts that proceeds from sales of land belonging to LDBF in the sum of £221,076.99 in respect of which Mrs Box was instructed to act as a partner in DCG needs to be accounted for. He says as much in paragraph 9ii of his skeleton argument which I have reproduced above at paragraph 86.

121. The claim of the LDBF in respect of conveyancing claims relates however to 8 separate conveyancing transactions in which it is contended that monies belonging to LDBF have been siphoned away. The £221,076.99 in respect of which Mr Dumont concedes an account is appropriate relate to only 2 of those transactions, Thornhill Lees and All Souls, Hayley Hill Sunday School. In respect of those 2 properties however he resists Mr Halpern's application for an interim payment on the basis that there is serious lack of clarity as to what, if anything, has been misappropriated and that, in the circumstances, it is just to await the outcome of the account.

122. Of the remainder, Mr Halpern pursues his claim for an account in respect of 2 but has withdrawn his claim for an interim payment in respect of them. These relate to the sale of St Luke's C of E First School and Moorend C of E First School. Of the remaining 4 namely the sales of Headfield School, Ackworth Glebe, St Peters Car Park and 2 Kirkgate Lane South Hiendley, Mr Dumont raises a limitation defence.

123. It follows therefore that it is appropriate to accede to Mr Halpern's application for an account in respect of the proceeds of sale of Thornhill Lees, All Souls, St Luke's and Moorend. The issue is simply whether I should order an interim payment in respect of those 2 transactions in respect of which it is still pursued, namely Thornhill Lees and All Souls and indeed whether I should order an account and an interim payment in respect of any of the 4 transactions subject to the limitation defence if I conclude that that defence has no real prospect of success.

The Limitation Defence

124. The claim form was issued on 25 September 2018. Mr Gill and Mrs Wilding argue that any claim for money misappropriated before 25 September 2012 is therefore statute barred.

125. As a primary point I record that Mr Dumont made clear that the limitation defence essentially arises only in respect of some of the conveyancing transactions namely, as I have said, the sales involving Headfield School, Ackworth Glebe, St Peter's Car Park and 2 Kirkgate which all concluded before that date. A small number of the Red Ledger transactions may have occurred before 25 September 2012 but he accepts that almost all occurred within the limitation period. Neither is it suggested that limitation applies to the BIS 0071 or CCLA

126. Remedies for breach of trust fall within s21 Limitation Act 1980 which provides:

> "*(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –*
>
> *(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by him and converted to his use. …*
>
> *(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.*
>
> *For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the property until the interest fell into possession."*

127. Section 23 Limitation Act 1980 provides that:

> "*An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account*".

128. It is clear from s23 that there is no separate limitation period in respect of the remedy of an account; instead, the limitation period is determined by the underlying cause of action.

129. Mr Halpern relies on s21(1)(a). He argues that Mr Gill and Mrs Wilding were "party or privy" to the fraudulent breach of trust perpetrated by Mrs Box because the Partnership Act fixes them with liability notwithstanding their personal innocence.

This is of course a reference back to the provisions of sections 9 to 12 to which I have already referred.

130. He also prays in aid *Lewin on Trusts* 20th edition paragraph 50–009 to the effect that:

> *"An action against an innocent trustee liable for the fraud of his co-trustee, though not a party or privy to it is not within section 21(1)(a) and accordingly can be barred by lapse of time. The same applies where the fraud is that of the trustee's solicitor or other agent. But an action against a trustee based on the fraud of the trustee's employee or partner (my emphasis) seems to be within the section*."

131. The authorities that both *Lewin on Trusts* and Mr Halpern cite in support of the contention that co-partners fall within the ambit of s21(1)(a) as being "party or privy" so that no limitation period applies are *Blair v Bromley* (1847) 2 Ph 354 and *Moore v Knight* [1891] 1 Ch 547.

132. Mr Dumont's first point was that *Moore v Knight* is actually not support for the proposition that the editors of *Lewin* have suggested in paragraph 50–009. It was a case dealing with misrepresentations, it was not an action for breach of trust. It is simply not a decision on the liability of innocent partners outside the 6 year limitation period.

133. In fact, Mr Halpern was constrained to agree with Mr Dumont that *Moore v Knight* might not be the appropriate authority but nonetheless his firm position was that the principle enunciated by *Lewin* was correct even if they prayed in aid the wrong authority to support it.

134. Of course, *Lewin* also cited *Blair v Bromley* in support of the proposition that an action against a trustee based on the fraud of the trustee's partner seems to be within the parameters of section 21(1)(a). I was not provided with a copy of this judgment but Sterling J refers to it quite extensively in *Moore v Knight.* At page 555 he said:

> *"….. Money came into the hands of the firm of Messrs Bromley without fraud and that one of the firm afterwards committed a fraud in respect of it, but made misrepresentations (some of which were attributable to the firm) which prevented the fraud from being discovered until the period fixed by the Statute of Limitations had expired. It was held that the innocent partner was deprived of the benefit of the statute by those representations which bound him as a partner. The decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts…."*

135. It is true that the whole essence of Mr Halpern's argument is that Mr Gill and Mrs Wilding are not able to claim the protection of the Limitation Act because they are deemed, pursuant to s21(1)(a) to be "party or privy" to the fraudulent act of Mrs Box by reason of their partnership status. It is also true that the Partnership Act only fixes them with liability for acts done in the ordinary course of business or within

the scope of apparent authority. However, it is not arguable that in undertaking the conveyancing transactions on behalf of LDBF Mrs Box was not acting within the scope of the ordinary business of the firm or within the scope of her apparent authority. Indeed, in respect of those conveyancing matters to which there is no question of the Limitation Act providing a defence, Mr Dumont accepts that Mr Halpern's clients are entitled to an account.

136. In the circumstances it does seem to me that there is no limitation period but the question is, is it sufficiently arguable for the purposes of Rule 24 that there is? Despite the somewhat low threshold, I have been unable to conclude that it is in the context of the conveyancing transactions which are so obviously within the scope of a solicitors' business and authority.

137. I do not see a realistic basis for arguing that Mr Gill and Mrs Wilding are not party or privy to the fraud where the Partnership Act fixes them with a direct liability in respect of Mrs Box's fraud. I accept that in one very obvious sense they are not party or privy because they knew nothing about the fraud but the fact is that the Partnership Act deems them to have been party or privy in the context of actions undertaken by the errant partner in the ordinary course of business or within the scope of apparent authority – as the conveyancing transactions quite obviously were.

138. I also observe, for what it is worth, that that conclusion does indeed accord with the views of the editors of *Lewin*, a much respected textbook on trust law – even if, as seems to be conceded, the editors appear to have taken the wrong route to the right conclusion.

139. I should say that if I am wrong and that, by virtue of the provisions of s21(3), the limitation period is actually 6 years, there is provision for extension under s32(1)(a) or (b). Section 32 states:

> "*32(1) [W]here in the case of any action for which a period of limitation is prescribed by this Act, either –*
>
> *(a) the action is based on the fraud of the defendant;*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) relief from the consequences of a mistake*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
>
> *References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*
>
> *(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered*

for some time amounts to deliberate concealment of the facts involved in that breach of duty."

140. Mr Halpern argues that the final sentence of s32(1) makes it clear that the subsection is applicable since the claim is based on the fraud of Mr Gill's and Mrs Wilding's partner. He argues that it does not lie in their mouths to assert that his clients should have discovered the fraud sooner given that Mr Gill and Mrs Wilding, who owed regulatory and fiduciary duties, failed to do so.

141. I acknowledge that it would be arguable that LDBF could, with reasonable diligence have discovered the fraud which was being perpetrated on it. Mr Dumont relies on the fact that if anybody at LDBF had bothered to take even the slightest critical look at completion statements and the like that may well have led to a train of enquiry revealing that Mrs Box was up to no good. Instead it seems that LDBF's misplaced trust in her was so all-encompassing that no critical consideration at all was adopted with regard to these transactions. As Mr Gill put it in his witness statement of 18 August 2020 paragraph 40:

"*what strikes me as astonishing about these claims is that the diocese was so lackadaisical about receiving the net proceeds of these transactions from Mrs Box, or asking her to account for them. I can understand that Mrs Box was a highly trusted figure, but I cannot understand what the function of the Diocesan Secretary (effectively the CEO of the diocese) and his staff is, if not to receive these proceeds of sale after each transaction concluded".*

142. Had I concluded that the claims were statute barred I would have concluded that it was arguable that Mr Halpern's clients could with reasonable diligence have discovered the fraud and that an extension of time was not appropriate. However, that argument does not arise in circumstances where, as I have concluded, there is no real prospect of establishing a limitation period in any event.

143. The conclusion is that it is appropriate to order an account in respect of Thornhill Lees, All Souls, Headfield School, Ackworth Glebe, St Peter's Car Park and Kirkgate. The next question therefore is whether it is appropriate to order an interim payment pending the accounts.

144. I should perhaps add that, had it been the case that the limitation issue extended to heads of claim other than the conveyancing transactions then the same principles would inevitably have applied. Thus, it would have been arguable that Mr Gill and Mrs Wilding could have taken advantage, so far as it would have been relevant, of the Limitation Act in respect of the Red Ledger and CCLA (on the basis that it is arguable that they were not privy or party to those transactions) but not in respect of BIS 0071.

Interim payment

145. The conditions to be satisfied and the matters to be taken into account on an application for an interim payment are set out in CPR rule 25.7. It is unnecessary to reproduce the whole rule.

146. As I understand it, in respect of those matters where an account is ordered Mr Dumont does not suggest that the conditions necessary to make an order for interim payment have not been met. Rule 25.7 (4) provides that "*the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment".*

The Red Ledger

147. In the light of my conclusion that a defence in relation to the Red Ledger is sufficiently arguable an interim payment is obviously not appropriate.

BIS0071

148. I do not regard it as appropriate to order an interim payment in respect of this account bearing in mind the matters to which I refer in paragraphs 112 to 117 above.

CCLA

149. In the light of my conclusion that a defence in relation to CCLA is sufficiently arguable an interim payment is obviously not appropriate.

The conveyancing transactions

150. In his skeleton argument Mr Halpern spends a good deal of time on his analysis of losses and the interim payment that should be made in respect of them. The first point to make is that in respect of all matters for which he seeks an interim payment he relies heavily on the principle in *Armory* essentially to the effect that any doubt should be resolved in favour of his clients.

Thornhill Lees

151. DCG's account ledger card shows £60,000 as having been credited to this account on 25 September 2014. The contention is that it was withdrawn in its entirety in transfers that LDBF do not recognise.

152. Mr Gill accepts that £33,062.38 of that initial credit of £60,000 is unaccounted for and he further accepts the need for an account. £60,000 is the amount that LDBF seeks by way of interim payment pending the account.

All Souls

153. No ledger has been found for this particular transaction but papers found among DCG's papers show that DCG acted for the diocese in the sale of this property and that the proceeds, net of costs and repayment of a loan, amounted to £188,014.61. There is a completion statement in the bundle which bears that figure. The contention of LDBF is that that sum has never been accounted for. This is a sum in respect of which Mr Halpern seeks an interim payment.

154. Mr Gill in his witness statement has managed to tie up with this transaction some correspondence with the Wakefield Diocesan Secretary, the Leeds Diocese and the Charity Commission which he says makes it difficult to establish whether in fact a good deal or all of this money may not have been genuinely paid away on behalf of the client. He argues therefore against an interim payment "*given the uncertainty about what happened and when.*"

Headfield School

155. £150,000 is shown as credited on a DCG ledger on 24 February 2012. The position of LDBF is that this was reduced to nil over the period to 21 December 2012 as result of debits which it does not recognise as legitimate save for £15,937.04 which it is acknowledged could be legitimate. The claim for interim payment therefore is in the sum of £134,062.96 in respect of which it is alleged there is no satisfactory explanation.

Ackworth Glebe

156. Papers found at DCG's office show a sale of this land for £274,850. It seems that further payments were made to DCG pursuant to an overage agreement with the purchaser with the result that the total amount received in respect of the sale of this land was £512,872.66.

157. A DCG ledger appears to show this money coming into DCG in 7 tranches. The only amount that the diocese appears to have received is £84,267.37. No other payments out are considered to be justified other than perhaps £8243.88 in respect of costs. That would bring the amount claimed down to £420,361.41.

158. A witness statement from Mr Andrew Bogle in support of the application for summary judgment and interim payment contends that that is indeed the amount in respect of which such interim payment is sought. In Mr Halpern's skeleton argument however, he limits it to £393,936.49. This is because it is recognised that one of the 7 tranches of payments amounting to £26,424.92 might not have been money to which the diocese was entitled.

159. Mr Gill does not formally challenge these figures. His challenge to interim payment in respect of this transaction is based upon the Limitation Act defence and the general unreliability, and lack of clarity, in respect of any figures produced by Mrs Box.

St Peter's Car Park

160. £30,000 was paid into client account on 30 May 2008. It is contended that that entire sum has been withdrawn in stages and none of the withdrawals are recognised as genuine. Once again, Mr Gill does not challenge the numbers. The defence is confined solely to limitation and the point he makes about the general unreliability, and lack of clarity, in respect of the figures bearing in mind the dishonest source from which they emanate.

2 Kirkgate

161. £249,999.99 was paid into client account by 2 tranches on 15 February 2011 and 17 March 2011. It is accepted that £150,763.75 was paid to the diocese in March 2011 and it is also accepted that other payments may be genuine but even when those are deducted that still leaves the unexplained absence of £68,539.31. That is therefore the amount claimed by way of interim payment.

162. Once again Mr Gill's challenge to this on his behalf and that of Mrs Wilding is confined to the limitation defence – and of course his challenge to the general reliability and lack of clarity in respect of the figures.

163. One of the features concerning lack of clarity on which Mr Dumont relies revolves around BIS0071. He argues of course that there may have been a considerable overpayment on this account which may counterbalance underpayments elsewhere. It is, he asserts another reason why it is appropriate to have the account before making any order in relation to payments. In addition, some payments have been made to the Bishop and/or LDBF under the Proceeds of Crime procedure. He argues that it is not clear to what extent these payments have been factored into the claim for interim payment or how they affect the cap on payments permitted under Rule 25.7(4).

164. Finally, he makes the point that the unreliability of the accounts and the risk of making an order for interim payment is amply demonstrated by the very fact that the claim for interim payment has come down so considerably over the months. It was apparently £2.8 million in July of this year but after further analysis that reduced by over £1 million. I have in mind here paragraph 21 of Mr Pooles's skeleton argument:

> "*It is also relevant to note, for the purposes of considering any summary disposal the difference between the sum of £2,823,121.51 sought by way of interim payment in Mr Bogle's third witness statement as a sum "likely to be awarded, and effectively advanced as late as July of this year subject only to the reduction due to a compensation order and the figure which appears in his sixth witness statement which is £1,592,377.90…."*

165. Clearly LDBF and their advisers have done some very comprehensive and impressive work in trying to identify defalcations at the expense of LDBF but I do have some sympathy with Mr Dumont's assertion that they have been obliged to base their conclusions on documents generated by a wholly dishonest person. That does mean that there is inevitably a lack of clarity and reliability which makes it difficult to draw any reliable conclusions about what the ultimate figure is likely to be on final judgment. I am conscious of course that I am only permitted to order a reasonable proportion of the likely amount of a final judgment.

166. For the purpose of considering an interim payment, albeit that they are separate claimants, subject to what I say below, I intend to treat the Bishop and the LDBF as one entity. In my view that would be more reflective of the way the case

for an interim payment was presented and defended. In addition, in my view that approach would be the fairer one in order that consideration can be given, as a whole, to putative losses suffered by the Church. I do, however, recognise that I have not heard submissions on that approach. If Mr Halpern is minded to argue that it is not appropriate then I accept that that approach may need to be revisited. Accordingly my order should make it clear that a refusal of an interim payment at this stage shall not act as a bar to the Bishop and/or LDBF making a further application for an interim payment on the basis that treating the Bishop and the LDBF as one entity for the purpose of interim payment is inappropriate.

167. However, on the basis that treating them as one for this purpose is not inappropriate, I have concluded that it is not just to make an order for an interim payment. I reach that conclusion first, because I am concerned about whether the £1.126 million that I first refer to in paragraph 35 above was ever the Bishop's money. The points that Mr Dumont has made on this question are sufficient to cast some doubt on that, but the overriding consideration in this connection is that, if it was, one might have expected the Bishop to produce some evidence to that effect. It is, after all, a very significant sum for any organisation including, I would venture to suggest, the Church. One would have thought that there would be some record of it having been given to St James's Place but even if any record has been lost or has succumbed to the damaging effect of a damp cellar then I am at a loss to understand why something was not obtainable from St James's Place. Issues of confidentiality do not arise. I would have thought that all that was needed was for St James's Place to be asked by the Bishop for a record of all funds that have been under their management on behalf of the Bishop.

168. If that money was never the Bishop's then, as I say in paragraph 116 above, that puts as much as £580,000 of the Bishop's claim in doubt. I appreciate that the losses thought to have been incurred in the conveyancing transactions may exceed that but of course those losses are not incontrovertible. Over the months LDBF's initial assertions of loss has been gradually eroded by counter-arguments. I refer to this in paragraph 164 above. Once again, I remind myself that an interim payment should not exceed a reasonable proportion of the likely amount of a final judgment. In my view, it is insufficiently clear what the likely amount of that final judgment will be. On that basis assessing a reasonable proportion of it becomes a forlorn task. I should say that in reaching this conclusion I have not lost sight of the principle in *Armory* upon which Mr Halpern relies. However, I remind myself of the observations of Arden LJ in *Keefe* to which I refer in paragraph 84 above. I acknowledge that there may well be difficulties in getting to the bottom of the extent of the thefts[7] but it may well be that there is scope for more accuracy than there is at present.

The Aggregation Issue

169. With regard to this issue Mr Halpern and Mr Learmonth have joined forces to present a united attack on Mr Pooles's assertion on behalf of HDI that, for the purpose of the limit of indemnity under the firm's professional indemnity

[7] See footnote 6 above

insurance, HDI is entitled to aggregate all the claims by all the firm's clients who have sustained loss by virtue of Mrs Box's dishonesty. As Mr Halpern puts it in paragraph 60 of the skeleton argument:

> *"The claimants seek a declaration against (HDI) that it is not entitled to aggregate the claims of the Bishop with those of (LDBF) nor (still more significantly) the claims of both claimants with those of other victims of Box's frauds."*

170. Rule 2.1 of the SRA Indemnity Insurance Rules 2013 require all solicitors to have professional indemnity insurance which accords with the SRA Minimum Terms and Conditions of Professional Indemnity Insurance (MTC).

171. Paragraph 4.12 of the MTC states that:

> *The insurance must provide that:*
> *(a) the insurance is to be construed or rectified so as to comply with the requirements of these MTC…. and*
> (b) *any provision which is inconsistent with MTC… is to be severed or rectified to comply*"

172. The firm's policy and the terms of the MTC appear to accord the one with the other but in any event, insofar as there is a difference, the wording in MTC trumps that of the policy. In the first instance decision in *AIG Europe Ltd v Woodman* [2015} EWHC 2398 (Comm), Teare J noted a distinction in the policy that he had to construe and the terms of the MTC and thus he focused specifically on the terms of the MTC. That case went to the Supreme Court but neither in the Court of Appeal nor the Supreme Court was that approach challenged.

173. The MTC provide, so far as relevant, as follows[8]:

> "1. Scope of cover
>
> 1.1 Civil liability
>
> Subject to the limits in clause 2, the insurance must indemnify each *insured* against civil liability to the extent that it arises from *private legal practice* in connection with the *insured firm's practice*, provided that a *claim* in respect of such liability:
>
> (a) is first made against an *insured* during the *period of insurance*; or
>
> (b) is made against an *insured* during or after the *period of insurance* and arising from *circumstances* first notified to the *insurer* during the *period of insurance*.
>
> 2. Limit of insurance cover
>
> 2.1 Any one claim

[8] the words in italics are italicised because they are defined in the Glossary to the SRA Handbook.

The *sum insured* for any one *claim* (exclusive of *defence costs*) must be … at least £2 million.

2.5 One claim

The insurance may provide that, when considering what may be regarded as one *claim* for the purposes of the limits contemplated by clauses 2.1 and 2.3:

(a) all *claims* against any one or more *insured* arising from:

(i) one act or omission;

(ii) one series of related acts or omissions;

(iii) the same act or omission in a series of related matters or transactions;

(iv) similar acts or omissions in a series of related matters or transactions

and

(b) all *claims* against one or more *insured* arising from one matter or transaction will be regarded as one *claim*."

174. The glossary defines a "claim" as follows so far as is relevant:

> *"Claim means a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages. For these purposes, an obligation on an insured firm and/or any insured to remedy a breach of the SRA Accounts Rules, or any rules which replace them in whole or in part, shall be treated as a claim, and the obligation to remedy such breach shall be treated as a civil liability for the purposes of clause 1 of the MTC, whether or not any person makes a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages as a result of such breach ……"*

175. It will be seen that the definition of "claim" includes *"an obligation on an insured firm and/or any insured to remedy a breach of the SRA Accounts Rules."*

SRA Accounts Rules 2011, Rule 7 states:

7.1 Any breach of the rules must be remedied promptly upon discovery. This includes the replacement of any money improperly withheld or withdrawn from a client account.

7.2 In a private practice the duty to remedy breaches rests not only on the person causing the breach, but also on all the principals in the firm. This duty extends to replacing missing client money from the principal's own resources, even if the money has been misappropriated by an employee or another principal, and whether or not a claim is subsequently made on the firms insurance or the Compensation Fund.

176. It is not in dispute that the issue as to whether HDI are entitled to treat the claims by clients (and others to whom the firm had a duty of care) who have sustained loss as a result of Mrs Box's dishonesty as "one claim" requires that the MTC be construed in accordance with ordinary principles of construction. It is HDI's case that a proper construction of the MTC and the glossary enables claims for indemnity in respect of defalcations caused by Mrs Box to be treated as one claim in respect of which there is one limit of indemnity of £2 million. Mr Halpern's and Mr Learmonth's clients together with Mr Gill and Mrs Wilding argue that the claims by each separate client are separate claims, each of which has the benefit of indemnity cover of £2 million.

177. HDI's case is put on the basis that the claims against the firm arise from one act or omission and thus falls within the definition in MTC 2.5(a)(i) as being "one claim", alternatively, they are one series of related acts or omissions and thus are deemed to be "one claim" pursuant to MTC 2.5(a)(ii).

178. I have mentioned the necessity to construe the meaning of "one claim" in the MTC in accordance with ordinary principles. Because this clause has the capacity not only to operate against the interests of an insured firm of solicitors but also in its favour[9] it is right to approach construction without any predisposition towards either a broad or a narrow construction. I have already referred to *AIG* at first instance, the point is made in the Supreme Court in that case by Lord Toulson ([2017] UKSC 18 at paragraph 25) where Lord Toulson stated:

> *There was some debate about whether the question of the application of the aggregation clause was to be viewed from the perspective of the investors (the firm's clients) or the solicitors. The answer is that the application of the clause is to be judged not by looking at the transactions exclusively from the viewpoint of one party or another, but objectively taking the transactions in the round*."

179. Mr Halpern and Mr Learmonth pray in aid the fact that clearly the MTC are the result of the need to ensure protection of the public and that is the matrix upon which construction must be based. Mr Halpern referred me to specific sections of the MTC which, he argues, clearly demonstrate that. In particular he drew attention to clause 4.1 by which an insurer is precluded from avoiding or repudiating the insurance on any ground whatsoever and clause 4.12 which is the clause by which the terms of the MTC trump any inconsistent terms in any policy document.

180. Mr Pooles argues that the MTC was always intended to strike a balance between consumer protection and considerations relating to the cost and availability

[9] A professional indemnity insurance policy usually has a deductible (often called the excess) whereby the solicitor is obliged to meet a proportion of any claim. If a claim is one claim there is simply one deductible. That of course favours the solicitor but only so far as the claim does not exceed the minimum cover. If it is a number of claims then there is a deductible for each claim. That disadvantages the solicitor unless, as here, the liability arising out of the deductibles is less than the amount by which the claims exceed the limit of indemnity.

of professional indemnity insurance. He cites paragraph 14 of the opinion of Lord Toulson in *AIG* which says precisely that.

181. Mr Pooles emphasises that the MTC came about when the regulatory decision was made to cease insuring solicitors through the Solicitors Indemnity Fund, which had operated essentially on a mutual basis, and to leave it to solicitors to obtain their own insurance in the commercial insurance market. Once that decision was made the minimum terms and conditions had to give some protection to insurers if they were to be persuaded to provide cover at a cost affordable to the profession.

182. He cites an example of the balance that it has been necessary to achieve in the fact that insurers are not obliged to cover dishonest solicitors for losses caused by their dishonest acts. This is why there is no liability to indemnify Mrs Box in respect of claims caused by her dishonesty. Indeed, if she had been a sole practitioner none of the claimants would have had any claim against the insurers at all. They would have had to look to the SRA Compensation Fund.

183. I was referred to the case of *Swain v Law Society* [1983] 1 AC 598 as authority of the proposition that the MTC is there to protect the public. At paragraph 1 of the judgment of Lord Toulson in *AIG* he explained that the Law Society's power to make rules requiring solicitors to maintain professional indemnity insurance and specifying the terms on which indemnity is to be available was a power intended to be for the protection of the public as well as the premium paying solicitor.

184. Nevertheless, I am satisfied that the question of construction of what is meant by one claim has to be undertaken on a neutral, objective, basis taking matters in the round. That approach needs no more justification than to recognise that it is wholly in accordance with Lord Toulson's unequivocal opinion to which I refer in paragraph 178 above. I am also satisfied that the process of construction requires equal weight to be given to the definition of "claim" in the Glossary and the wording in the MTC itself. This was a proposition contended by Mr Pooles from which neither Mr Halpern nor Mr Learmonth demurred and indeed it seems to me that there would have been no basis upon which they could have done so.

185. Mr Halpern at paragraph 70 of his skeleton argument argues that the correct approach to the question of aggregation is to consider 3 issues:

(i) What is the meaning of "Claim"?
(ii) To what extent does the MTC clause 2.5 give an extended meaning to "one Claim"?
(iii)Is the meaning further extended the definition of "Claim" in the Glossary?

In his oral submissions he added that further consideration needs to be given to the question of what difference teeming and lading makes to the overall situation As I have said, he and Mr Learmonth argue that it makes no difference. I should add, for completeness, that Mr Pooles bases his argument in favour of aggregation on MTC clause 2.5 (a)(i) and/or (ii). He does not now pray in aid limbs (iii), (iv) or (b)

A claim

186. The starting point must be the definition of "claim" in the Glossary. As can be seen, the glossary sets out a meaning and also deems the word to include a further meaning. It means *"a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages"* but it is also deemed to include "*an obligation on an insured firm and/or any insured to remedy a breach of the SRA accounting rules……*"

187. In *West Wake Price & Co v Ching* [1957] 1 WLR 45 Devlin J had occasion to consider the meaning of "claim". That case concerned the issue of whether a policy which provided indemnity in respect of the claim arising out of negligence covered conduct which was dishonest.

At page 55 Devlin J had this to say:

> *"I think that the primary meaning of the word "claim" whether used in a popular sense or in a strict legal sense – is such as to attract it to the object that is claimed and it is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based."*

At page 57 he observed that:

> *"If you say of the claim against a defendant that it is for £100 you have said all that is necessary to identify it is a claim; but if you say of it that it is for fraud or negligence you have not distinguished it from a charge or allegation. In particular, if you identify a claim as something that has to be paid…… it must be something that is capable of separate payment: you cannot pay a cause of action. It follows, I think; that if there is only one object claimed by one person then there is only one claim, however many may be the grounds or the causes of action which can be raised in support of it: likewise, where several claims are each dependent on the same cause of action (as, for example where one cause of action leads to alternative claims for an injunction, damages or an account or other different forms of relief), there remains only one cause of action however many claims it may give rise to. "*

Mr Halpern and indeed Mr Learmonth argue that this can only mean that, if one has separate clients each with a claim, each has a separate claim.

188. Mr Halpern then comes to *Haydon v Lo & Lo* [1997] 1 WLR 198. That was a Privy Council case which raises the question of the meaning of the words "*any one claim*" in a policy of professional indemnity insurance. The claims arose out of the fraudulent activities of a senior clerk, Mr Yim, employed in the probate department of the defendant firm of solicitors who practised in Hong Kong. Between 1987 and 1989 by 43 separate thefts Yim defrauded the estate of a Mr Tang of some HK $50 million. Each theft was for less than HK$5 million. The solicitors had primary insurance cover of HK$5 million but they also had top up cover in respect of claims above that amount.

189. If each of the 43 separate thefts constituted a separate claim within the meaning of the policy then, since none of the individual thefts reached the limit of the primary insurer's liability of HK$5 million, the top up insurers would escape liability altogether. If it were one claim then the top up insurers would be liable for HK $45 million.

190. It is right to note that between July and September 1989, Yim also stole shares belonging to the estate of another client, Mr Tso. They were worth HK$11 million and the thefts occurred on 31 separate occasions by the theft of 31 different parcels of shares.

191. The case before the Privy Council related to both matters and how the firm's insurance cover operated in respect of them. The issues in respect of both claims were essentially the same and the dispute was between the primary and top up insurers as to whether or not to aggregate all the thefts from the Tang estate and separately to aggregate all the thefts of the Tso shares.

192. The point is made forcefully by Mr Halpern and Mr Learmonth that there was never any suggestion that the thefts from the two estates should be aggregated but Mr Pooles argues that we do not know what the aggregating clause was in the solicitors indemnity policy and since everything turns on a construction of the wording in the policy, nothing can be gleaned from the fact that in that case there was no suggestion that the thefts from these two clients fell to be aggregated and treated as one claim.

193. In any event, the Privy Council held that there was only one claim by the Tang Estates against the solicitors, not 43, and one claim by the Tso estate, not 31. In that sense of course the result of this case does not favour Mr Halpern, Mr Learmonth or Mr Gill and Mrs Wilding, but each case is dependent on the specific wording of the policy and the facts in issue and it is relied on by them for its general propositions and, in particular, the fact that the reasoning is clearly based on the conclusion that in each case there was only one claim by each client for restitution of the loss caused by Yim's dishonest conduct. As Lord Lloyd who gave the only judgment in that case remarks at page 207F "*the (Tso) estate commenced 14 separate sets of proceedings but in reality they all rested on the single claim by the estate to recover the loss resulting from Yim's dishonesty"*. The point that is being made is that I am not concerned with a single claim by the estate but by claims made by different claimants. As Mr Halpern puts it in paragraph 74 of the skeleton argument:

> *"It may be that all claims of any one claimant are to be aggregated as they were in Haydon v Lo & Lo but each claimant's claim is a separate claim from those of other claimants. Hence the Bishop's claim is different from LDBF and it is even more obvious that their claims are different from those of other victims."*

194. Mr Pooles points out that the outcome of that case does not favour the claimants or DCG but he argues that in any event there is not much to be gained

from it. It did not really concern aggregation in the sense with which we are concerned with it.

195. The point repeated by Mr Halpern and Mr Learmonth is that it is obvious, and indeed accords with common sense that, to use the wording in the Glossary, here there are demands for civil compensation or the assertion of rights by different clients and that each is accordingly its own claim.

196. The Glossary however is not just concerned with demands or assertions of rights. As I have said, it also contains a deeming provision which treats as a claim an obligation on an insured firm to remedy a breach of the SRA accounts rules. An issue in this case is to what extent the extended meaning of a "claim" provided by the deeming provision, when considered with clause 2.5(a)(i), makes this one claim?

Claims arising from one act or omission

197. By virtue of the provisions of MTC 2.5(a)(i), all claims against any one or more insured arising from one act or omission are treated as one claim. Mr Pooles argues that all client losses are caused by the various thefts by Mrs Box either from client account or money which ought to have gone into client account but was diverted by her. The firm was under an obligation under rule 7.1 of the SRA Accounts Rules to reconstitute client account promptly on discovery. That was a single, indivisible, obligation. The glossary makes compliance with that obligation a single "claim". It arises from one act or omission, namely Mrs Box's dishonest conduct.

198. Mr Halpern argues that treating breaches of rule 7 as a single act or omission is wholly contrary to what the Solicitors Accounts Rules are intended to achieve which is the protection of client money. Rule 1.1 says as much when it states:

> "*The purpose of these rules is to keep client money safe. This aim must always be borne in mind in the application of these rules.*"

Mr Halpern argues that rule 7 is complementary to this object. As he says in paragraph 95 of his skeleton argument:

> "*If the solicitor was required to reconstitute the client account out of its own funds and could not recover from his insurer until the client had made a claim this would not assist in achieving that aim, because many solicitors would be unable to comply. Hence the purpose of rule 7 is to accelerate the reconstitution of the client account."*

Of course, that is subject to the qualification that the reconstitution of client account by the insurer is limited to the limit of indemnity.

199. But, Mr Halpern argues, one does not really need to consider the objectives of the Solicitors Accounts Rules. All one needs to do is look at the wording of a claim in the Glossary definition. That refers to an obligation on an insured firm to remedy

a breach of the SRA Accounts Rules…. and the obligation to remedy such breach shall be treated as a civil liability….." (The underlining is mine). He argues that the use of the singular, indefinite article can only mean that each breach is a separate breach. As he says in paragraph 98 of his skeleton argument,

> "*The plain meaning is that the withdrawal from client account of any one client gives rise to an obligation to remedy that breach. The purpose of the deeming provision in the definition of "claim" is to accelerate the liability to reconstitute client account, not to turn breaches in relation to a multitude of clients into a single act or omission".*

200. In any event, he argues, Mrs Box's dishonesty is not an "act or omission". Dishonesty is a state of mind. It might be the motivation for an act or omission but it is not the act or omission itself. In this case the acts were the thefts from clients. There was not one theft from clients but numerous thefts from disparate clients. He argues under those circumstances that 2.5 (a)(i) cannot possibly apply.

201. Mr Learmonth obviously adopts the same position. He expresses it succinctly in paragraph 16 of his skeleton argument where he says that

> "*if a single breach of the Solicitors Accounts Rules gives rise to a single obligation to remedy the breach … so multiple breaches of the Rules, such as those committed by Mrs Box, give rise to multiple obligations to remedy those breaches and multiple claims*."

202. He argues that that interpretation is supported by policy and the purpose behind the MTC of providing consumer protection (and indeed he asserts that the extended definition of "claim" was introduced to give better protection for clients' funds).

203. He further observes that HDI itself has not treated these claims in a way consistent with its own proposition. As he says paragraph 18 of his skeleton argument, if HDI considered that there was a single obligation on the firm to restore the client account then one would have expected the insurer to have simply replenished client account to the limit of its indemnity. What it actually did however was to pay out individual claims up to the limit of this indemnity. He further makes the point to which I have alluded above that, in fact, not all misappropriated money went through the client account; some was converted to Mrs Box's use well before reaching that destination.

204. Mr Pooles simply argues that the obligation to make good the client account is a single obligation giving rise to a single claim. The one act or omission is the thefts from client account. It does not matter that the thefts take place over a period of time. It does not prevent them from being treated as a single act. In paragraph 30 of his skeleton argument he argues that "*an individual engages in a single act when he builds a house. That may involve a number of individual steps but at the end of the day there was one act intended."*

205. He argues that the point that Mr Learmonth makes which I have summarised in paragraph 201 above betrays a misunderstanding of the decision in *West Wake.* He reminds me of what Devlin J had to say at page 57 of his judgment and which I reproduce paragraph 187 above. Here, he says that there has been a fundamental breach of the Accounts Rules. To characterise these as simply a series of sub-breaches is wrong. One must concentrate on the totality and the single obligation not to breach the Accounts Rules.

206. As for Mr Learmonth's argument that in fact HDI have met claims in a manner inconsistent with their contention as to the single claim, he argues that this has only arisen because practicalities demanded it because DCG's client account ceased to exist when the firm closed down or, if not then, when it suffered an intervention.

207. As regards the argument that not all monies went through client account but were misappropriated before they ever reached it, his argument is that it takes Mr Learmonth nowhere because the obligation is to ensure that monies which ought to be paid into client account are paid into client account. The rule does not just cover monies which are misappropriated from client account. Further, he reminds me that the MTC is not just about consumer protection. It is the product of discussions between the profession and insurers resulting in terms with which they can both live.

208. Despite Mr Pooles's powerful arguments I really cannot accept that these are claims arising from one act or omission. I think Mr Pooles put it best himself in his analogy about the house builder. On any basis it is difficult to see how the actions of Mrs Box, perpetrated over a number of years can be seen to be one act. It is right that, with regard to building a house, several steps may be intended to result in that one act of building a house but this situation is much more analogous to the building of a whole housing estate. If I may put it thus, the acts intended to build 1 Acacia Avenue cannot sensibly be seen as acts intended to build 2 Acacia Avenue. The building of each house is a different act. There may be a single intention to build a housing estate in the same way that Mrs Box may have had the single intention of stealing as much money as possible but each house, and each theft, must, in my judgment, be a different act although they may be taken with a view to accomplishing one ultimate objective.

209. Similarly, I am firmly of the view that each misappropriation is a separate breach of rule 7. It is instructive that rule 7.2 itself talks of breaches. To my mind this is demonstrative of the view that multiple misappropriations constitute multiple breaches.

210. As Mr Pooles himself suggested, the real focus of these applications for a declaration focuses on 2.5(a)(ii). In other words, are Mrs Box's misappropriations claims arising from one series of related acts or omissions*?* It is to that question that I now turn.

Claims arising from one series of related acts or omissions

211. I should say that the arguments before me did not really focus at all on the meaning of "*series*". In paragraph 32 of his skeleton argument Mr Pooles reproduces the definition of "*series*" in the Oxford English Dictionary. It is defined as "*a number of discrete events or acts following one another in succession of the time."* I was referred to *A G v Cohen* [1937] 1 KB 478 at 489 where it was discussed in a different context and it was said by Greene LJ:

> "*the word "series" must be read in its context which is part of a larger transaction or series of transactions. The expression "part of the series" suggests, to my mind that by a "series" is meant something of which can be said there is some integral relationship between its parts. It does not I think, convey the idea that all is required is that the transaction should be one of a number of transactions related to one another in time or space or both."*

Mr Learmonth takes from this that the presence of the word "series" serves to intensify the sense in which the acts or omissions must be related. I have to say however that that was not really developed during the course of oral submissions.

212. The real issue with which I have to grapple and upon which counsel concentrated is the nature and effect of the words "related acts or omissions". The starting point in respect of this issue is *Lloyds TSB General Insurance Holdings Limited v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43. It was a claim against a bank for damages for the mis-selling of personal pension schemes. There were approximately 22,000 claims but no single claim exceeded £35,000. However, the total amount claimed was about £125 million. The bank carried insurance but the deductible was £1 million. If the claims were treated as one, aggregated, claim the bank would be exposed to one deductible of £1 million and the insurer would be liable for £124 million. If each claim was a separate claim then, since each claim was less than £1 million the insurer would avoid any liability and the whole £125 million of claims would have to be met by the bank from its own resources. In that case therefore, unlike the present case, the insured was arguing in favour of aggregation. The finding of the House of Lords was that the language of the aggregation clause, taken with the definition of "act or omission" as set out in clause (iii)(g) of the insurance policy, meant that these claims could not be aggregated for the purpose of insurance cover.

213. The insurance clause in the policy between the insured and the insurers stated that the policy provided an indemnity in respect of the bank's legal liability to third parties for any third-party claim which meets the following requirements: -

> *Any third-party claim must:*
> *(i) ……*
> *(ii) ……..*
> (iii)…… (g) "*be for financial loss caused by a breach on the part of the Assured…… of the provisions of the Financial Services Act 1986 (including without limitation any rules or regulations made by any Regulatory Authority or any Self-Regulatory Organisation pursuant to the provisions of the Act)….in respect of which civil liability arises on the part of the Assured."*

The aggregation clause stated that:

> *If a series of claims shall result from a single act or omission (or related series of acts or omissions) all such third party claims shall be considered to be a single third party claim for the purposes of the application of the Deductible".*

214. It will be seen that the wording in the aggregation clause is similar to, but not identical to, the combined wording of MTC 2.5 (a) (i) and (ii). The phrase "*shall result from*" is used instead of "*arising from"* (difference 1) and the word "*related*" appears before the word "*series*" rather than after it (difference 2). In addition, the reference to related series of acts or omissions appears in parenthesis in a clause ostensibly dealing with single acts or omissions.

215. In paragraph 36 of his skeleton argument Mr Pooles argues that there is a significant difference between the MTC wording and the wording of the relevant policy in *Lloyds TSB*. However, I do not think that Mr Pooles suggests that there is a material difference between the wording of the clause in *Lloyds TSB* and that in the MTC arising from differences 1 and 2 but he argues that at least one member of the House of Lords in *Lloyds TSB* did regard the existence of the parenthesis as important in the context of the construction of the meaning of the bank's policy of insurance.[10]

216. At first instance Moore-Bick J described the purpose of an aggregation clause as "*to enable two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor of some kind*.". Lord Hoffmann approved of that description. The issue for the House of Lords was a determination of the precise nature of the act or omission which, for the purpose of aggregation, the aggregation clause treated as a unifying factor. As Lord Hoffmann put it in paragraph 17:

> *"the choice of language by which the parties designate the unifying factor in an aggregation clause is thus of critical importance…….*".

217. In that case the Bank were arguing that the act or omission which gave rise to the third party claim for financial loss was their breach of LAUTRO rules requiring the provision of proper training to their employees and giving best advice. It was argued that that was one act or omission or at the very least a series of acts or omissions within the meaning of the aggregation clause. Lord Hoffmann did not agree. He took the view that the absence of a training or monitoring scheme was legally irrelevant to the civil liability of the bank upon which the right to indemnity depended.

218. This is because an absence of training did not of itself give rise to a cause of action attracting civil liability (which was the contingency giving rise to a claim). For example, the untrained pensions adviser may, rather by luck than judgment, give suitable advice, even best advice, even though he has not had the necessary

[10] A view shared by Longmore LJ in *AIG* in the Court of Appeal [2016] EWCA Civ 367 paragraph 23

training. In such a situation there is no loss and so no civil liability arises. The unifying factor found in *Lloyds TSB* case was therefore an act or omission which constituted a cause of action. As Lord Hoffmann stated in paragraph 23:

> "*The language of the aggregation clause, read with the definition of "act or omission" shows that the insurers were not willing to accept as a unifying factor a common cause more remote than the act or omission which actually constituted the cause of action. An act or omission could qualify as a unifying factor in respect of more than one loss only if it gave rise to civil liability in respect of both losses. In the present case, the act or omission which gave rise to the civil liability in respect of each claim (failure to give best advice to that investor) was different from the acts or omissions giving rise to the other claims*."

219. Mr Halpern and Mr Learmonth rely on this on the basis that each claimant for whom they act has a separate cause of action, separate and distinct from the cause of action of each of the other claimants.

220. As I have said, Mr Pooles, on the other hand, relies on the fact that the opinion of Lord Hoffmann makes it clear that he was very much influenced by the fact that the phrase "*or related series of acts or omissions*" appears in parenthesis. Indeed, in paragraph 25 he states:

> *"…. The parties started by choosing a very narrow unifying factor: not an underlying cause, not any event or even any act or omission but only and specifically an act or omission which gives rise to the civil liability in question. Having chosen this as the opening and, one must assume, primary concept to act as unifying factor, they have then, by a parenthesis produced a clause in which the unifying factor is as broad as one could possibly wish. It is sufficient that all the claims have a common underlying cause or (on the view of Longmore LJ) the breaches of duty are the same, which I take to mean sufficiently similar. In my opinion this construction is allowing the tail to what the dog. I do not think that it is reasonable to understand the parties is having intended the parenthesis to stand the rest of the clause on its head."*

221. Mr Halpern's and Mr Learmonth's position is that Lord Hoffmann's conclusion expressed in paragraph 29 that in that case each of the claims made against the bank "*did not arise from a single act or omission. Nor did each of them arise from a related series of acts or omissions. Each arose from a separate contravention of rule 3.4 (4) (a) (of the LAUTRO Rules)"* would have been the same if the reference to series of acts or omissions had not been parenthesis but would have been in a separate sub clause. It was not dependent upon the existence of brackets but was dependent on an analysis of what the relevant clauses treated as the unifying factor.

222. Mr Halpern argues that the heart of Lord Hoffmann's reasoning is contained in paragraph 27:

"In the present case, the only unifying factor which the clause itself provides for describing the acts or omissions in the parenthesis as "related" and a "series" is that they "result" in a series of third-party claims. In other words, the unifying element is a common causal relationship. But that common causal relationship is, so to speak downstream of the acts and omissions within the parenthesis. They must have resulted in each of the claims. This obviously does not mean that it is enough that one act should have resulted in one claim and another act in another claim. That provides no common causal relationship. It can only mean that the acts or events form a related series if they together resulted in each of the claims[11]*. In this way, the parentheses plays a proper subordinate role of covering the case in which liability under each of the aggregated claims cannot be attributed to a single act or omission but can be attributed to the same acts or omissions acting in combination."*

223. Of course, Mr Pooles points out that clearly Lord Hoffmann took the view that the words in parenthesis had a subordinate role to be construed so as not to "*stand the rest of the clause on its head*". In the MTC clause 2.5(a)(ii) is not subordinate to (a)(i). All the subclauses (i) to (iv) carry equal weight.

224. Lord Hobhouse in *Lloyds TSB* reached the same conclusion as Lord Hoffmann and did so without reference to the parentheses at all. He identified, in paragraph 43, that:

> "*The essential factor in every case has to be that the breach – act or omission – caused the third-party financial loss. There is thus no "single act or omission": there were as many acts and omissions as there were third-party claims. Similarly, if there is to be a related series of acts and omissions, that description has to be true of the 22,000 claims notwithstanding that each claimant will have been different, each financial loss will have been different and the actual failure to give the best advice will have been on the part of many different employees of the relevant difference assureds."*
>
> And at paragraph 46, where Lord Hobhouse is concerned with a "*related series of acts or omissions*" he states that:
>
> "*the claims still have to result from something done or omitted as between the relevant consultant and the relevant third party".*

225. At paragraph 47 Lord Hobhouse summarises the bank's argument and concludes that it was asserting that "*the underlying cause of all the cases of mis-selling was the same – the failure to take the steps required by the code to guard against mis-selling. The requisite steps and the failure to take them were either the same in every case or very similar*." However, so far as he was concerned this was not enough to make them a related series of acts or omissions because "*it looks at not what caused the financial loss to the third party, the subject of the third party*

[11] I underline this merely because in *AIG* to which I shall come Lord Toulson, at paragraph 15, saw that as the nub of Lord Hoffmann's judgment.

claim, but at the underlying situation which gave rise to the conduct of the consultant vis-a-vis the third party".

226. That underlying situation is, to use Lord Hoffmann's expression, "*upstream*" of the relevant acts and omissions. The proximate cause of the claims in respect of each claimant is the bad advice that the claimant has received. The fact that the salesman has not been trained is not the relevant consideration. The proximate cause of each of the claims was the bad advice per se. In short the unifying factor, i.e. that the salesman were inadequately trained is not the unifying factor that the policy requires for aggregation, it is a unifying factor which is upstream of that.

227. Mr Pooles argues that the importance attributed to a cause of action in *Lloyds TSB* is not applicable in this case where the policy does not indemnify against causes of action but against "*claims*". Mr Pooles placed particular emphasis on the headnote and what it has to say about the holding in *Lloyds TSB*. It specifically makes clear that the language of the aggregation clause, read with the definition of act or omission in clause (iii)(g) of the policy, indicated that the insurers in that case had not been willing to accept as a unifying factor a common cause more remote than the act or omission which had actually constituted the cause of action but in this case it is not the same. The trigger here is "claims" as defined in the Glossary, not causes of action. He points out that the definition of claims with which we are concerned is much wider than the definition which brought into play the right of indemnity in *Lloyds TSB*. He draws attention to the limited scope of clause (iii)(g) which was relevant in that case. He argues that the thefts and dishonesty of Mrs Box are, on a proper construction of the MTC, the factor unifying these acts.

228. It seems that the outcome of *Lloyds TSB* was a matter of a good deal of concern to professional indemnity insurers. In that case insurers had succeeded in establishing that each claim was a separate claim such that the deductible was never exceeded and thus they had no liability. However professional indemnity insurers are more concerned not so much with deductibles (where the insured would wish to aggregate) but with the limit of liability under a policy (where it would be the insurers who would wish to aggregate).

229. Because the MTC at that stage provided that "*insurance may provide that all claims against any one or more insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one claim*" and because this obviously bore a similarity with the clause in *Lloyds TSB* the insurers sought an amendment to the MTC. As the *Law Society Gazette* put it on 27 January 2005:

> *"Clause 2.5 follows the standard commercial market wording and was settled as part of the negotiations with the commercial insurers when drawing up the MTC. The principal difference between the SIF wording and the MTC wording is the introduction of the words "or from a series of related acts". The qualifying insurers had assumed that the wording of clause 2.5 would enable them to treat as one claim multiple claims arising not only from a series of related acts but also from a series of similar acts. The House of*

Lords decision in the case of Lloyds TSB General Insurance Holdings Limited and others v Lloyds Bank Group Insurance Co Ltd has established that the qualifying insurers' assumption was wrong."

230. An amendment was negotiated to produce the MTC with which I am concerned. It will be seen that the amendment separated the original clause which, in one sentence, dealt with an act or omission and a series of related acts and omissions. These are respectively 2.5(a)(i) and (ii). It also added[12] clauses (iii) and (iv) and b). The purpose, so far as insurers were concerned, was to provide greater scope to aggregate claims.

231. In *AIG* the Supreme Court had occasion once again to consider aggregation, this time specifically in the context of the MTC as it is currently drafted.

232. In that case a property development company instructed a firm of solicitors to devise a scheme for private investors to finance the development of 2 holiday resorts, one in Turkey and the other in Morocco. The solicitors released investors' funds to the developer prematurely. There were 3 sets of investors in this case. Those who invested in the Turkish resort, those who invested in the Moroccan resort and some crossover investors who subsequently transferred their investment in Turkey to the Moroccan investment.

233. Proceedings were brought against the solicitors by the investors in both schemes. The insurer sought a declaration that all the investors' claims were one claim on the basis of a true interpretation of the MTC. That is that the claims of the Turkish investors should be aggregated with those of the Moroccan investors and that the individual claims of all investors in each group should be aggregated.

234. In fact, the claim was on the basis that they arose from similar acts or omissions in a series of related matters or transactions. It was thus a claim requiring the construction of 2.5(a)(iv) but it has been cited to me at length in this case as being relevant. In *AIG* of course the insured wanted the court to conclude that the claims ought not to be aggregated. In *Lloyds TSB* the insured wanted the opposite.

235. At paragraph 18 Lord Toulson discusses the limitation to aggregation on the basis that the setting of the acts or omissions giving rise to the claim had to be that they were in a series of related matters or transactions. He stated:

> "*Looking at the matter broadly, it is easy to see the reason for such a limitation. If insurers were permitted to aggregate or claims arising from repeated similar negligent acts or omissions arising in different settings, the scope for aggregation would be so wide as to be almost limitless. By requiring that the acts or omissions should have been in a series of related transactions the scope for aggregation is confined to circumstances in which there is a real connection between the transactions in which they occurred rather than merely a similarity in the type of act or omission*."

[12] Mr Pooles characterises it not as an addition but more a recasting made out of an abundance of caution. I observe however that Lord Toulson in AIG at paragraph 16 describes subclauses (iii) and (iv) as additions.

236. At paragraph 22 Lord Toulson considers the use of the word "related". A word which quite obviously figures in clause 2.5 (a)(ii) with which I am concerned. I accept however that he was considering "related" in the context of acts or omissions related to matters or transactions and I am simply concerned with related acts or omissions. Nevertheless his observation that "*use of the word "related" implies that there must be some interconnection between the matters or transactions*", by which he meant "*that they must in some way fit together*" is, it seems to me, transferable to the context of 2.5(a)(ii). The series of acts or omissions has to have the necessary "*interconnection*" and must accordingly "*fit together".*

237. I also remind myself, figuratively in parenthesis (although I attach no legal significance to these particular figurative brackets) that in the same paragraph Lord Toulson observes that determining whether transactions are related is acutely fact sensitive. One of Mr Pooles's overriding submissions is that this matter is also fact sensitive and a declaration would not be appropriate at this stage for that reason.

238. However, going back to the interconnection, at paragraph 24 Lord Toulson had this to say:

> "24 T*he transactions entered into by the (Turkish investors) were connected in significant ways and likewise the transactions entered into by the (Moroccan investors). The members of each group were investing in a common development, for which the monies advanced by them were intended, in combination, to provide the developers with the necessary capital. Notwithstanding individual variations they were all participants in what was in overall terms a standard scheme. They were co-beneficiaries under a common trust*"

and at paragraphs 26 and 27:

> *"26 Viewed objectively the connecting factors identified above drive me to the firm conclusion that the claims of each group of investors arise from acts or omissions in a series of related transactions. The transactions are fitted together in that they shared the common underlying objective of the execution of a particular development project, and they also fitted together legally through the trusts under which the investors were co-beneficiaries.*
>
> *27 The case for aggregating the claims of the Turkish investors with those of the Moroccan investors is much weaker. They bear a striking similarity but that is not enough. Once again the proper starting point is to identify the relevant matters or transactions. On the basis of that characterisation of the transactions it is difficult to see in what way the transactions entered into by the members of the Turkish investors group were related to the transactions entered into by the members of the Moroccan group of investors……. Although the development companies were related, being members of the Midas group and the legal structure of the developments projects was similar, the development projects were separate and unconnected. There are related to different sites and the different groups of investors were protected by different*

deeds of trust over different assets. Accordingly, on the facts as they currently appear, the insurers have no right to aggregate the claims of the Turkish investors with those of the Moroccan investors."

239. Mr Halpern and Mr Learmonth argue that each of the claims in this case are as different from each other as those of the Turkish investors were different from those of the Moroccan investors. In short that there is not an adequate "*fit*" to make the dishonest acts of Mrs Box in respect of any one of the claimants related to her dishonest acts in relation to any of the other claimants. There is simply not the necessary "*interconnection*".

240. Mr Halpern accepts that his case in respect of that is weaker in respect of the Bishop and the LDBF. In other words, that the argument that the claims in respect of the Bishop and LDBF on the one hand and the Scholefield claimants on the other are not claims arising from a series of related acts or omissions is much stronger than the claim that the Bishop's claim and the claim of LDBF do not arise from a series of related acts or omissions. While he asserts that the Bishop's claim and the claim of LDBF are separate claims he concedes that, to quote his oral submissions "*there are arguments to the contrary*".

241. Mr Learmonth on behalf of the Scholefield claimants obviously adopts all that Mr Halpern says but he has some additional points to make. The first addresses what I said at paragraph 237 above namely Mr Pooles's point about the criticality of establishing the facts before one considers making a declaration about whether a claim is one claim or not. Mr Learmonth argues that his clients' claims are very straightforward and no amount of evidence is going to change them. As he puts it in paragraph 3 of his skeleton argument, his clients were entitled to Mr Scholefield's residuary estate. They should have received £660,952.78 to share between them but they only got £206,723.00. He argues that the claim is not dependent upon what happened to the difference or why it was not paid. Mr Pooles argues that this is a misunderstanding of the issues. What matters is what caused these beneficiaries to receive less than that to which they were entitled. The answer is that it was Mrs Box's ongoing related thefts.

242. I remind myself of what I have said in paragraph 40 above and that a particular matter which Mr Pooles says is relevant to the question of whether the claims are one claim or not relates to the modus operandi of Mrs Box and, in particular, HDI's contention that she was involved in extensive teeming and lading which touched on a great many of her misappropriations and the way that she perpetrated them. He argues that if there has been significant teeming and lading such as to provide a common link between her thefts then this greatly supports the contention that these claims arise out of one series of related acts or omissions because her modus operandi involving teeming and lading was a "unifying factor". As I have said, both Mr Learmonth and Mr Halpern argue that it is irrelevant and the extent of her teeming and lading does not affect the issue. These are not a series of related acts or omissions, they say, whatever the extent of the teeming and lading. I shall come to this further below.

243. Another point made by Mr Learmonth is that set out in paragraph 45 of his skeleton argument to the effect that the acid test to determine whether different matters form a series of related matters for the purpose of aggregation is:

> *"whether any one client can plead a complete claim against the firm without referring to another act, matter or transaction from which a different claim arises. No investor in* AIG *could plead its claim without mentioning the overall development and the other investors in that development, though they had no need to mention the other development. But none of the Lloyds bank investors had to mention any other to make good their claim so no aggregation was allowed".*

244. Mr Learmonth asks me to take account of what the actual effect of Mr Pooles's submissions would actually be. It would essentially lead to limitless aggregation in cases where a dishonest solicitor in a firm where the other partners were honest had embarked on a course of action of theft from clients. He argues that that would be absurd.

245. He also argues that far from there being any compelling argument why this matter must go to trial, there is a compelling argument that it should not. To carry out a fully accurate and total analysis of all Mrs Box's defalcations would not only be expensive but probably impossible. That is not just his view, it is the view of HDI's own solicitors. At paragraph 42 of the second witness statement of Jovana Vasiljevic she states:

> *"Mr Fletcher concluded that, in order to undertake the exercise of assessing the loss with accuracy, each and every contaminated ledger to the file would need to be reviewed and this exercise would take a considerable period of time and could prove expensive. In the event there seems every reason to conclude that Mrs Box's dishonesty was conducted over such a period of time that such a total review is in fact impossible".*

246. Mr Pooles argues that *AIG* is not on point. It was a case concerning the construction of clause 2.5(a)(iv) and concerned the question of whether matters or transactions were related. We are only concerned with whether acts or omissions are related. The question is, "is there a sufficiently unifying factor between those acts or omissions?"

247. He emphasises the fact sensitivity of any question relating to identifying whether there is a unifying factor that provides the necessary connection to make acts and omissions "related" but he argues, at paragraph 40 of his skeleton argument, that the conduct of Mrs Box was quite clearly a series of related acts, "*the relationship being adequately created by her ongoing determination to raid the firm's client account".* He referred me to the indictment in the criminal proceedings. That, he argues, clearly demonstrates that her dishonesty was a series of related acts because they were all part of the same fraud. He argues that the claims all arise out of these related acts of dishonesty and thus fall squarely within MTC 2.5(a)(ii) if they do not fall within 2.5(a)(i).

248. He prays in aid expert evidence in the form of a preliminary report from Baker Tilly as showing that the overarching connection between Mrs Box's dishonest acts was the teeming and lading which she perpetrated. As he puts it in paragraph 40 of his skeleton argument:

> "*Mrs Box was not suddenly deciding on a given day that she would embark on a new course of dishonest conduct. She had, a long time ago, clearly determined to treat the contents of the client account as her own and covered her tracks from time to time as she considered necessary. This amounts to an adequate unifying factor within the terms of the aggregation clause consistent with the limit of indemnity and the deemed claim provision (contained in the Glossary)".*

249. I should add that I acknowledge that Mr Pooles does not assert that teeming and lading is a free standing ground for aggregation. What he does say however is that it clearly evidences the relationship between Mrs Box's acts of dishonesty.

250. Mr Pooles once again emphasises the need to construe the clause objectively and not from the standpoint of either insured or insurer. He recognises that Mr Gill and Mrs Wilding are deserving of sympathy but that the situation in which they find themselves is not HDI's fault. It was open to DCG to take out more insurance cover than the minimum, it was the choice of the partners, including Mr Gill and Mrs Wilding not to do so.

Teeming and lading

251. For the sake of completeness, I recognise that Mr Halpern and Mr Learmonth take a pleading point on the issue of whether teeming and lading has been brought into play by HDI on the issue of 2.5(a)(i) or (ii). Mr Pooles says the point is a bad one. Either way it does not strike me as appropriate to consider the matter on a pleading point. The parties want an answer to the aggregation point and no doubt considerable sums of money have been invested in putting the question before the court. It seems to me to be much more in accord with the overriding objective to grasp the nettle and deal with the question of how teeming and lading affects matters.

252. I have already referred to the Baker Tilly report. That identifies 3 ways in which Mrs Box used teeming and lading to hide her misappropriations. For the purpose of the report, teeming and lading is defined as:

> (*a) the use of multiple bank accounts or ledgers to hide the fraudulent removal or use of funds in said accounts or ledgers especially by making accounting entries which appear to move funds from one account to another to disguise the true position; and*
> *(b) fraudulent activity that is deliberately concealed by manipulating the timing of the movement of funds between accounts or the removal of funds completely from all the accounts so that it is difficult to recognise or trace the misappropriation in any single account or ledger*."

253. The 3 methods identified as having been used by Mrs Box are:

(i) Replacing misappropriated funds from one DCG client ledger with amounts from another client ledger or other fund Mrs Box administered.

(ii) Misappropriating funds from probate estates and obscuring deficits caused by such misappropriations by paying money directly to beneficiaries of the affected ledger from an unconnected client ledger.

(iii) When monies are received by DCG instead of crediting funds to the client ledger that the funds relate to crediting it instead to a different client ledger in order to conceal a shortfall due to earlier fraudulent activity in the client ledger that has been credited.

254. It seems that the report does not identify teeming and lading on a wholesale basis but Mr Pooles's position is that this is merely a preliminary report and it may well be that it did in fact take place on a vast scale.

255. It seems to me that I must consider what effect teeming and lading has on the relationship between Mrs Box's dishonest acts on the basis that teeming and lading was indeed very extensive. That, for the purpose of these applications, is the position adopted by HDI and it is appropriate to consider the matter on that basis since this is an application for a declaration on a summary basis.

256. As I have said, Mr Halpern and Mr Learmonth argue that extensive teeming the lading would make no difference and would not create the necessary unifying factor. They urged me to have at the forefront of my mind the wording of clause 2.5 of the MTC and the definition of "claim" in the Glossary.

257. They argue that the bottom line is that each client (or estate in which DCG acted) sustained its own separate loss, each act that plundered money from them was a wholly different act from the act which plundered money from other entities. They were not related by a unifying factor. It does not matter how Mrs Box went about these acts of plunder; what simply matters is that she committed these separate, disparate acts of theft. She did not indulge in teeming and lading for its own sake, she indulged in it in order to conceal her thefts. The teeming and lading therefore was purely incidental to the acts.

258. As I have said, Mr Pooles's position is that teeming and lading is a factor uniting the acts of dishonesty. It was not incidental to the acts, it was the manner in which the acts themselves were perpetrated.

259. I have to say that I do not accept that the way that Mrs Box concealed her nefarious activities can provide a unifying factor. Teeming and lading are not the acts that have to be related for the purpose of aggregation. What has to be related for the purpose of aggregation are the thefts themselves. Those, in my view, are the relevant acts. Teeming and lading was simply a way of concealing the thefts.

260. I should add that if teeming and lading provided a unifying factor which would be absent but for teeming and lading this could well produce an absurd result. For example, it is clear that Mrs Box's extensive teeming and lading (assuming it was extensive) would suggest that she was a fairly sophisticated thief

who had a system for covering her tracks. However, suppose that she was not a sophisticated thief but was rather simply an opportunist who stole from her clients when the opportunity to do so arose. Suppose she had no system and that she took no steps to cover her tracks. Suppose for example that she simply hoped that her thefts would survive an audit or awkward questions from clients or did not care one way or another as long as she had the money there and then to fund her extravagant lifestyle. It would be absurd if the thefts by Mrs Box the opportunist lacking subtlety were not amenable to aggregation but thefts by the sophisticated Mrs Box were. That absurd position is avoided if the question of whether aggregation is possible depends on the relationship, if any, between the acts of theft per se.

Conclusion as to a series of related acts

261. So, bringing the threads together, were the acts of theft one series of related acts? I remind myself that in answering this question it is not enough that HDI has a case that satisfies the test necessary to avoid summary judgment. On the authority of *Abaidildinov* to which I have referred in paragraph 24 above, this question has to be decided on balance.

262. I have concluded that the thefts from Mr Halpern's clients and from Mr Learmonth's do not have a sufficient interconnection or unifying factor with any other claims to bring them within MTC 2.5(a)(ii) even if there was wholesale teeming and lading.

263. I accept that the language of this aggregation clause, when coupled with the glossary definition of claim, may not equate "claim" with cause of action and that the scope for aggregation by virtue of the MTC is wider than it was in *Lloyds TSB* but, notwithstanding that, I do not think that it permits aggregation of the Bishop's Claim and the claim of LDBF on the one hand with those of the Scholefield claimants on the other, or of the claims of either party with claims of other clients whose claims have already been satisfied. [13]

264. In my view a unifying factor which is sufficient to unite these acts of theft for aggregation purposes is simply not present in this case. By reference to the comments of Lord Hobhouse which I recount at paragraph 225 above, what caused the financial losses to the two sets of claimants in this case were separate thefts from each of them.

[13] I should add that, after the draft of this judgment was circulated, Mr Pooles wished me to add the phrase "*whose claims have already been satisfied*" on the basis that the court could not anticipate what might emerge which may provide a unifying factor sufficient to unite those, as yet unsatisfied claims, with the claims of either party. Despite Mr Halpern's and Mr Learmonth's submissions that the additional phrase is not necessary, I am prepared to make the addition that Mr Pooles suggests because the point he makes cannot be discounted and these are fact sensitive matters. However, I think it would be remiss of me not to say that, on the basis of the conclusions I have expressed in this judgment, I cannot envisage, certainly at this stage, any unifying factor which is likely to be sufficient to permit aggregation of the claims of these parties with the unsatisfied claims of any other clients.

265. It was not Mrs Box's dishonesty which was the proximate cause of their loss. I agree with what Mr Halpern says in this connection which I recount at paragraph 200 above. Dishonesty is not an act, it is a state of mind. What caused these claimants' losses were the individual thefts from them. True it is that these were motivated by dishonesty but it is the "acts" that matter, not the motivation for the "acts". These acts resulted in different losses to different clients. There cannot, in my view, be said to be a single loss because I am satisfied that the acts of theft were not related on a proper construction of MTC 2.5(a)(ii).

266. Furthermore, I simply do not see that there is sufficient "interconnection" between the acts, to use the words of Lord Toulson in *AIG* to which I refer in paragraph 236 above. I do not see that the thefts from the Bishop and from LDBF "*fit together*" with the thefts from the Scholefield claimants save that they were all committed by the same person and perhaps concealed by the same process, factors which, in my judgment, are not enough.

267. I am much exercised by the observations of Lord Toulson at paragraph 27 of his judgment which I reproduce at paragraph 238 above. In the same way as he found it difficult to conclude that the transactions entered into by the Turkish investors were related to the transactions entered into by the Moroccan investors it is, to my mind, equally difficult to conclude that the thefts from the Bishop and LDBF are related to the thefts from the Scholefield claimants. They were, to use Lord Toulson's words "*separate and unconnected"*, a conclusion that Lord Toulson reached in *AIG* despite the fact that the development companies were related and the legal structure of the development projects was similar. I am conscious that Lord Toulson was considering matters and transactions and their relationship but, as I mention in paragraph 236 above, I have no doubt that what he says there is transferable to the question of the relationship between different acts and omissions.

268. I remind myself of the test that Mr Learmonth promulgates and which I set out at paragraph 243 above. It seems to me that it has much to commend it. It is clearly consistent with the decision in *AIG* to the effect that the claims of the Turkish and Moroccan investors did not lend themselves to aggregation but the claims of the investors in each cohort would. It also fits comfortably with the decision in *Lloyds TSB.*

269. I readily accept that a connection is a fact-sensitive matter. That is made quite clear in both *Lloyds TSB* and in *AIG*. I recognise of course the strength in Mr Pooles's submission that there is a necessity to find facts before consideration can be given to the relationship between the acts. I have in mind here the observations of Lewison LJ in the *Easy Air* case to which I refer in paragraph 21 above, in particular guidance number *vi* where he remarks that "*the court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*."

270. However is also important to bear in mind what is said in the guidance paragraph *vii* about the need to grasp the nettle and not to simply allow a case to go

to trial because something may turn up which would have a bearing on the question of construction.

271. In my view, it is simply unrealistic to conclude that there is any basis upon which evidence can produce a sufficiently unifying connection between the thefts from the Bishop and LDBF on the one hand and the Scholefield claimants on the other, or with thefts from other clients whose claims have already been satisfied.[14] If, as I have concluded, wholesale teeming and lading does not do it, it is unrealistic to think that any other evidence might. I also observe that *AIG* was a preliminary issue.

272. Accordingly, I propose to declare that it is not open to HDI to aggregate the claims of Mr Halpern's clients with those of Mr Learmonth's, or either of those with any claims of any other of the firm's clients arising out of Mrs Box's thefts whose claims have already been satisfied[15].

273. That does not answer the question as to whether it is open to HDI to aggregate the claims of the Bishop with those of LDBF, or indeed whether it is open to HDI to aggregate the claims of the Scholefield claimants with each other. That issue appears not to have been addressed in skeleton arguments and my notes suggest that it did not figure materially in the oral submissions. If the parties seek a declaration in relation to that issue then that might require further submissions. However, I notice that so far as Mr Halpern's clients are concerned, Mr Halpern has already accepted that there are arguments contrary to his submissions (see paragraph 240 above). So far as the Scholefield claimants are concerned, I venture to suggest that, since their claims, even when aggregated, fall well within the limit of indemnity, whether they are open to aggregation as one claim or not is of only academic interest.

Final Remarks

Once again, I wish to express my gratitude to all counsel for their very able assistance in this matter.

HH Judge Saffman

[14] But see footnote 13

[15] But see footnote 13