[2015 Gib LR 181]

HOGG, DYMOND and OVERFINCH BESPOKE VEHICLES LIMITED (in Liquidation) v. WHITE (as Liquidator of LEMMA INSURANCE COMPANY LIMITED)

SUPREME COURT (Jack, J.): May 13th, 2015

Legal Profession—professional malpractice—breach of undertaking to transfer funds—undertaking to transfer purchase money from buyer to seller given in ordinary course of practitioner's business, to be satisfied out of fund in or reasonably expected to come into his control as part of normal work—assessed from outsider's perspective, practitioner must appear to be acting in ordinary course of business

Legal Profession—professional malpractice—breach of undertaking to transfer funds—if practitioner undertakes to transfer purchase money from buyer to seller without certain evidence that he will receive funds from buyer, undertaking must be dishonest unless practitioner's firm very large or sum modest

The applicants challenged the respondent's rejection of their proof of a claim against Lemma Europe Insurance Co. Ltd. submitted in the course of the liquidation of that company.

The first two applicants were the liquidators of the third applicant, Overfinch Bespoke Vehicles Ltd. Overfinch had been put into administration and its administrators had tried to sell it. Three parties placed bids to purchase it, the highest being made by Aalyas LLC. Contracts were exchanged on December 7th, 2010 and Aalyas's solicitors, Cox Roderick LLP, gave an unconditional undertaking to forward the purchase moneys to Overfinch within 72 hours. The undertaking was authorized by Mr. Cox, who was a member of the firm. Aalyas was unable to produce the money and Cox Roderick LLP was therefore unable to honour its undertaking. In consequence, the administrators sold to another bidder at a reduced price.

The English Solicitors Regulation Authority ("SRA") found that Cox Roderick LLP broke the SRA Code of Conduct by failing to comply with the undertaking, and the Solicitors Disciplinary Tribunal struck Mr. Cox off the roll of solicitors. Another member of Cox Roderick LLP, Ms. Black, was on trial with Mr. Cox, but it was unclear to the Tribunal whether she was a member of the firm at the time of the undertaking. The SRA held that there was no evidence to suggest that the firm's breach of the undertaking was deliberate or that it was given dishonestly.

The applicants sued Cox Roderick LLP in the English High Court for the losses they had sustained as a result of the firm's breach of its undertaking, and the court awarded damages of £645,601.98 plus interest and costs. The firm had professional indemnity insurance from Lemma Europe Insurance Co. Ltd. Overfinch sought and was granted a winding-up order against Cox Roderick LLP on August 9th, 2011, meaning that, if the firm had had a claim under the insurance to cover its liability to Overfinch, that claim passed to Overfinch under the Third Parties (Rights against Insurers) Act 1930.

Lemma was put into liquidation on January 24th, 2013 and the respondent was appointed as its liquidator. The applicants submitted a proof of a claim against Lemma in respect of Cox Roderick LLP's failure to honour its undertaking, but the respondent rejected that proof.

In order to make a claim under the professional indemnity insurance, the policy document required Overfinch to show that (a) the undertaking was given in the ordinary course of a solicitor's business; and (b) Mr. Cox did not act dishonestly in giving the undertaking; or (c) if Mr. Cox did act dishonestly, there was another member of Cox Roderick LLP at the time of the undertaking being given who had no knowledge of or involvement in the undertaking. Ms. Black was the only person who could have been a member of the firm at the time when the undertaking was given, and the crucial question under (c) was therefore whether Ms. Black was a member of the firm at that time.

The respondent submitted that Lemma was not obliged to cover Overfinch's losses due to Mr. Cox's dishonesty in giving the undertaking and the fact that the undertaking was not given as a normal part of the solicitor's business and rejected the applicants' proof of claim against Lemma on that basis. The applicants applied to reverse the respondent's decision to reject their proof of claim.

Held, allowing the application:

(1) The applicants could recover £645,601.98 in damages plus interest and costs from Lemma, as ordered by the English High Court, in respect of Cox Roderick LLP's breach of the undertaking under the firm's professional indemnity insurance. All the requirements for recovery set out in the policy document were satisfied: (a) the undertaking was given in the ordinary course of a solicitor's business; (b) Mr. Cox acted dishonestly in giving the undertaking; but (c) Ms. Black was a member of the firm at the time of the undertaking and had no knowledge of or involvement in it (para. 52).

(2) The relevant standard of proof was the ordinary civil standard, *i.e.* the balance of probabilities. The fact that dishonesty was alleged against Mr. Cox did not necessitate a higher standard of proof (para. 14).

(3) There were two sub-requirements which had to be satisfied for the applicants to show that the undertaking was given in the ordinary course of a solicitor's business: (a) a fund out of which the undertaking was to be

fulfilled must have been in the hands of or under the control of the firm, or there must have been a reasonable expectation that it would come into the firm's hands; and (b) the fund must have come into the hands of the firm in the course of some transaction which was itself the sort of work that solicitors undertook. These requirements had to be satisfied from the perspective of an outsider to the firm, *i.e.* Mr. Cox must have been ostensibly acting in the ordinary course of the firm's business. This was the case here in that the applicants, as external persons, were entitled to assume that Mr. Cox had made sufficient enquiries to satisfy himself that the money was definitely forthcoming, and it was routine for a solicitor acting for the purchaser of a business to give an undertaking to forward the purchase moneys (para. 16; para. 34; paras. 39–40).

(4) The relevant test for dishonesty was the ordinary standard of honest behaviour and Mr. Cox had acted dishonestly in giving the undertaking. He had hoped that the money would come through from Aalyas but this was not sufficient to permit him honestly to give the undertaking. The sum in respect of which the undertaking was given was vastly more than the firm could possibly have made available if the moneys had not been forthcoming from Aalyas. If the firm had been very large, or the sum in respect of which the undertaking was given had been more modest, then he would have been free to decide whether to take the risk of giving the undertaking when he did not have the funds from Aalyas, as he could have satisfied the undertaking out of the firm's own funds if Aalyas had failed to transfer the money. But given that the sum was very large and Cox Roderick LLP was a modestly sized firm, he could only have honestly given the undertaking if he had had cast-iron evidence that Aalyas would transfer the money, and he did not have such evidence. The undertaking therefore constituted a fraudulent misrepresentation. The SRA's determination that Mr. Cox did not act dishonestly was not conclusive (para. 17; paras. 41–45).

(5) However, Ms. Black was a member of Cox Roderick LLP at the time of the undertaking and she had no knowledge of or involvement in it. The applicants were therefore entitled to recover the losses caused by Cox Roderick LLP's breach of the undertaking from Lemma under the professional indemnity insurance and the applicants' proof of claim would be admitted in Lemma's liquidation (para. 49; para. 52).

Cases cited:

(1) *B, In re*, [2009] 1 A.C. 11; [2008] 3 W.L.R. 1; [2008] 4 All E.R. 1; [2008] 2 FLR 141; [2008] 2 F.C.R. 339; [2008] UKHL 35, followed.

(2) *Bank of Credit & Comm. Intl. S.A. (No. 6), In re*, *Mahfouz* v. *Morris*, [1994] 1 BCLC 450, referred to.

(3) *H, In re*, [1996] A.C. 563; [1996] 2 W.L.R. 8; [1996] 1 All E.R. 1; [1996] 1 FLR 80; [1996] 1 F.C.R. 509, applied.

(4) *Hollington* v. *F. Hewthorn & Co. Ltd.*, [1943] K.B. 587; [1943] 2 All E.R. 35, referred to.

(5) *Kentwood Constr. Ltd., In re*, [1960] 1 W.L.R. 646; [1960] 2 All E.R. 655 (Note), referred to.
(6) *Rogers* v. *Hoyle*, [2015] Q.B. 265; [2014] 3 W.L.R. 148; [2014] 3 All E.R. 550; [2014] C.P. Rep. 30; [2014] 1 C.L.C. 316; [2014] EWCA Civ 257, referred to.
(7) *Starglade Properties Ltd.* v. *Nash*, [2011] Lloyd's Rep. F.C. 102; [2011] 1 P. & C.R. DG17; [2010] EWCA Civ 1314, applied.
(8) *Trepca Mines Ltd., In re*, [1960] 1 W.L.R. 1273; [1960] 3 All E.R. 304 (Note), referred to.
(9) *Ultraframe (UK) Ltd.* v. *Fielding*, [2006] FSR 17; [2005] EWHC 1638 (Ch), applied.
(10) *United Bank of Kuwait* v. *Hammoud*, [1988] 1 W.L.R. 1051; [1988] 3 All E.R. 418, applied.

G. Maynard-Connor for the applicant;
E.J. Phillips for the respondent.

1 **JACK, J.:**

Background

The first two applicants are the liquidators of the third applicant ("Overfinch"). On April 26th, 2011, Overfinch obtained a judgment by default in the English High Court against a firm of English solicitors, Cox Roderick LLP. The amount of the judgment was £645,601.98 plus interest and costs. It was given for an alleged breach of a solicitor's undertaking given by Cox Roderick LLP to Overfinch on December 7th, 2010. The member of Cox Roderick LLP who authorized the undertaking was Mr. Miles Roderick Cox ("Mr. Cox"), who was struck off the roll of solicitors on November 5th, 2012.

2 Cox Roderick LLP had professional indemnity insurance issued by Lemma Europe Insurance Co. Ltd. ("Lemma"). Lemma is in liquidation and the respondent ("Mr. White") is its liquidator.

3 After Overfinch obtained its judgment against Cox Roderick LLP, Overfinch presented a winding-up petition against that firm in the English High Court. A winding-up order was made on August 9th, 2011. Accordingly, insofar as Cox Roderick LLP had had a claim to an indemnity under the professional indemnity insurance, that claim passed to Overfinch under the Third Parties (Rights against Insurers) Act 1930 (UK).

4 Lemma had been a general insurer with some reinsurance business. On August 1st, 2012, Gibraltar's Financial Services Commission (at Lemma's request) ordered that Lemma cease writing insurance and it entered run-off. This court made a provisional winding-up order against Lemma on September 28th, 2012 and on January 24th, 2013 a final winding-up

order was made. Mr. White was appointed first as provisional liquidator and then as liquidator of the company.

5 Lemma has assets of about £4.9m. in Gibraltar and £930,000 in the British Virgin Islands. Actual and contingent liabilities are estimated at £76.6m., so there is a very substantial deficit. Insurance creditors in the United Kingdom, such as potentially Overfinch, have, however, in some circumstances, a claim for compensation to be paid by the British Financial Services Compensation Scheme ("FSCS"). The FSCS will indemnify 90% of a claim in return for the assignment of the creditor's claim against the insolvent insurer. Whether or not Overfinch has such a claim is not a matter for this court and is irrelevant to the matters which I have to determine.

6 Overfinch's claim had been notified to Lemma in September 2011. After Mr. White's appointment, he instructed solicitors in England, Berrymans Lace Mawer, to advise on the claim. They, in turn, sought advice from Ms. Sian Mirchandani of counsel. An undated and unsigned advice from her, probably given in January 2013, has been exhibited by Mr. White. Her conclusions, so far as material, were that Lemma could decline cover by reason of Mr. Cox's dishonesty in giving the undertaking and that the undertaking was not given as a normal part of the solicitor's business.

7 There was subsequent correspondence between Clarion Solicitors Ltd. ("Clarion"), an English firm of solicitors acting for the applicants, and Mr. White. This culminated in Mr. White, on February 11th, 2015, formally rejecting the applicants' proof in the winding up. The applicants, on March 3rd, 2015, applied to this court under s.242(6) of the Companies Act 1930 and r.106 of the Companies (Winding-Up) Rules 1929 (repealed in the United Kingdom, but in force in Gibraltar in relation to the current liquidation) to reverse the liquidator's decision.

8 As a result of further arguments put forward by Clarion, Mr. White obtained a second advice from Ms. Ruth den Besten of counsel, which he also exhibits. Although her reasoning was slightly different, in her advice of April 14th, 2015, she reached the same conclusion as Ms. Mirchandani.

9 Mr. White's position in the current application is one of neutrality. Although he appeared by Mr. Phillips of counsel, he presented no argument in opposition to the application. Neither party suggested that the administrator of the Financial Services Compensation Fund be joined to the application.

The points for determination

10 There are three points for me to determine:

(a) Was the undertaking of December 7th, 2010 given in the ordinary course of a solicitor's business?

(b) Was Mr. Cox dishonest in giving it?

(c) Was Ms. Tracey Black ("Ms. Black") a member of Cox Roderick LLP on December 7th, 2010?

11 It is common ground that if the answer to (a) is no, the applicants' application fails, because the liability is not covered by the terms of the policy issued by Lemma. If the answer to (b) is yes, the application also fails, unless the answer to (c) is yes, in which case the application succeeds.

The law

12 In determining the facts, there is a paucity of documents. The original file of Cox Roderick LLP is not available; Mr. Cox has been struck off as a solicitor and has not given a witness statement. Neither party has applied for disclosure of documents. There are secondary insolvency proceedings in England in respect of Lemma and an order could have been sought in those proceedings against the solicitors who intervened into Cox Roderick LLP: *In re Bank of Credit & Comm. Intl. SA (No. 6), Mahfouz* v. *Morris* (2). However, this was not done. The only witness evidence of direct fact is from the solicitor from Clarion with conduct of the matter. Accordingly, I have to determine this matter on the basis of limited materials.

13 This led to Mr. Maynard-Connor making submissions on the burden of proof. However, it is not necessary for me to decide where the burden lies. I have to determine the case *de novo* on the basis of the evidence available: *In re Kentwood Constr. Ltd.* (5); *In re Trepca Mines Ltd.* (8). This I have been able to do without regard to the burden of proof.

14 So far as the standard of proof is concerned, this is the ordinary civil standard on balance of probabilities. This is so even though dishonesty is alleged against Mr. Cox. The House of Lords in one of its last judgments, *In re B* (1), clarified the standard of proof to be applied in relation to serious allegations. The allegations in that case were of child abuse, but the same principle applies to allegations of dishonesty. Lord Hoffmann said ([2009] 1 A.C. 11, at paras. 13–15):

> "13 . . . I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not . . .
>
> 14 Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said [in *In re H* (3) ([1996] A.C. at 586)] that—

> 'the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.'

15 I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator." [Emphasis in original.]

15 In *Ultraframe (UK) Ltd.* v. *Fielding* (9), Lewison, J. (as he then was) said ([2005] EWHC 1638 (Ch), at para. 9) that "the evidence required to establish the dishonest scheme alleged must be cogent." As Lord Nicholls said in *In re H* ([1996] A.C. at 586–587):

> "The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas, J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"

16 The test as to whether an undertaking was given by a solicitor in the course of a solicitor's business is set out in the judgment of Staughton, L.J. in *United Bank of Kuwait* v. *Hammoud* (10) ([1988] 1 W.L.R. at 1063):

> "For the court to enforce a solicitor's undertaking as such, it is an essential requirement that there be a promise made in his capacity as a solicitor . . . The evidence establishes that two requirements must be fulfilled before an undertaking is held to be within a solicitor's ordinary authority. First, in the case of an undertaking to pay money,

> a fund to draw on must be in the hands of, or under the control of, the firm; or at any rate there must be a reasonable expectation that it will come into the firm's hands. Solicitors are not in business to pledge their own credit on behalf of clients unless they are fairly confident that money will be available so that they can reimburse themselves. Secondly, the actual or expected fund must come into their hands in the course of some ulterior transaction which is itself the sort of work that solicitors undertake. It is not the ordinary business of solicitors to receive money or a promise from their client, in order that without more they can give an undertaking to a third party. Some other service must be involved."

17 What constitutes dishonesty was considered by the English Court of Appeal in *Starglade Properties Ltd.* v. *Nash* (7), which reviewed all the earlier authorities. Sir Andrew Morritt, C. held ([2010] EWCA Civ 1314, at para. 32):

> "The relevant standard . . . is the ordinary standard of honest behaviour. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest is irrelevant so also is it irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high. Ultimately, in civil proceedings, it is for the court to determine what that standard is and to apply it to the facts of the case."

The facts

18 Overfinch was a company specializing in customizing Range Rover motor cars. It got into financial difficulties and was placed into administration on November 11th, 2010 by the holders of a floating charge. The first applicant and Ms. Claire Foster ("Ms. Foster"), both of Wilson Field Ltd., were appointed as administrators. Ms. Foster has latterly been replaced by the second applicant, also of that firm. After the administration had served its purpose, Overfinch was placed into liquidation and the first and second applicants were appointed as liquidators.

19 The administrators, on their appointment, had an urgent need to sell the business, because there was very little cash with which to trade. A sale thus had to complete quickly. There were initially three interested parties: Aalyas LLC ("Aalyas"), CPP (Manufacturing) Ltd. ("CPP") and Autobrokers Ltd. ("Autobrokers"), who submitted bids between £1,025,000 and £2,000,000. (It is not entirely clear what the precise name of Aalyas was, but nothing turns on this. Equally, its place of incorporation is not clear: it may have been Abu Dhabi.) All the bids were subsequently varied, both up and down. The administrators, on Friday, December 3rd, 2010, required all three parties to put forward their best offers by 5 p.m. on Monday,

December 6th, 2010, accompanied by proof of funding, with a view to completion taking place by noon on Tuesday, December 7th, 2010.

20 The administrators were represented by Clarion. Ms. Alice Pratt ("Ms. Pratt"), then a senior associate, now a partner, had conduct of the matter. Aalyas was represented throughout by Cox Roderick LLP. Mr. Cox was the member with conduct of the matter. He was assisted by Mr. Stallard, an associate solicitor, who had most of the direct dealings with Ms. Pratt. The turnover of the firm at the time was about £65,000 p.a.

21 On November 26th, 2010, Mr. Cox emailed Ms. Pratt and said:

> "[W]e can confirm our client has instructed us that they have transmitted a sum in excess of their offer to our client account in readiness to proceed should their bid be successful. We await receipt of proof of transmission and shall forward the same as soon as [it is] to hand. Unfortunately, as our client is Middle Eastern based, our contact is limited today."

22 Ms. Pratt continued negotiation of the terms of the sale with all three bidders, although CPP had reduced its offer and was the administrators' last choice. Various issues, particularly around intellectual property rights, were discussed. On December 2nd, 2010, Mr. Stallard said: "With regard to our client's funding, we have been furnished with some tracking numbers that we have forwarded to our bankers. We will return to you as soon as we have received their confirmation." There is no evidence that any confirmation was received.

23 Later that day, Cox Roderick LLP gave a conditional undertaking "to forward to Messer's [*sic*] Clarion Solicitors the purchase price in the sum of £2,050,000 immediately upon receipt of our client's funds that we are instructed have been remitted from Abu Dhabi Commercial Bank." On Friday, December 3rd, 2010, Cox Roderick LLP said that "we understand that the purchase price in the sum of £2,050,000 has been remitted to our client account. However, due to a national holiday and yesterday being prayer day in the UAE, our client will not be able to confirm the requisite transfer details until Sunday, December 5th, 2010, when the banks reopen for business." Clarion repeated its insistence that proof of funds be available by 5 p.m. on Monday, December 6th, 2010.

24 On December 6th, 2010, Cox Roderick LLP gave an unconditional undertaking:

> "Upon receipt of the final agreed version of the travelling draft agreement, our client shall execute the same as soon as practicable. Following execution and formal exchange of the same, we, Cox Roderick LLP, undertake to forward the purchase price (£2,050,000.00) within seventy two (72) hours to formally complete this matter."

Ms. Pratt emailed back accepting the offer. She reminded Mr. Cox:

> "In the event that the purchase price is not received within 72 hours your client will be in breach of contract and you will be in breach of your undertaking. We are mindful that this is a substantial sum and wish to ensure that there is no misunderstanding of your client's position or the partners of Cox Roderick, all of whom would be liable for the unpaid purchase price."

25 That same day, Cox Roderick LLP had incorporated a new company, Overfinch (UK) Ltd., to be the corporate vehicle for the business which was to be acquired. There is no evidence that Cox Roderick LLP ever had any evidence that funds were being transferred to it. Rather, it seems probable that Mr. Inderpal Singh ("Mr. Singh"), who was in direct communication with Ms. Foster on behalf of Aalyas, was giving him reassurance in the same way he was giving Ms. Foster reassurance.

26 Contracts were exchanged on Tuesday, December 7th, 2010, with the price reduced to £1,897,000 because of an intellectual property issue. Due to the reduced sale price, Cox Roderick LLP gave a fresh unconditional undertaking:

> "Following formal exchange of the same between us, we, Cox Roderick LLP, undertake to forward the purchase price (£1,897,000.00) to your client account within seventy two (72) hours (normal UK banking hours permitting) to formally complete this matter."

27 Thereafter, Aalyas was unable to produce the money. Cox Roderick LLP was unable to honour its undertaking. In consequence, the administrators treated Aalyas as being in breach of contract. They accepted the repudiation and sold to Autobrokers at a reduced price.

28 Proceedings were issued in the Chancery Division of the English High Court in Action No. HC11C00551 against Cox Roderick LLP for the losses sustained. Master Bragge entered the default judgment on April 26th, 2011 for £645,601.98 with interest thereon at £137.44 *per diem* and costs to be assessed if not agreed. Subsequently, on August 9th, 2011, District Judge Saffman, sitting in the Leeds District Registry of the High Court, wound the company up on Overfinch's petition.

29 On June 22nd, 2011, an adjudicator authorized by the English Solicitors Regulation Authority ("SRA") determined that Cox Roderick LLP broke the Solicitors' Code of Conduct by failing to comply with the terms of the December 7th, 2010 undertaking. He rebuked the firm. The adjudicator noted that "there is no evidence to suggest that the breach of undertaking . . . was deliberate or that it was not given in good faith at the time it was given." It is unclear what evidence was before the adjudicator.

It may simply have been the bare letter of undertaking and Clarion's statement that the undertaking was not honoured.

30 On June 25th, 2011, the SRA intervened into Cox Roderick LLP. Disciplinary proceedings ensued before the Solicitors Disciplinary Tribunal. On November 5th, 2012, the Tribunal determined to strike Mr. Cox off the roll of solicitors. The only allegation expressly in respect of the purchase of Overfinch was Allegation 2.7 that Mr. Cox failed to provide Clarion with the details of the firm's professional indemnity policy. Allegation 2.3 was that he had wrongfully moved £880,000 standing to the credit of one client to that of Aalyas, but it is unclear when this occurred. The only date given in respect of Aalyas is in para. 31 of the decision relating to a smaller sum of £68,685 wrongly credited to Aalyas. There is no evidence that any of these moneys relate to the Overfinch transaction.

31 On trial with him was Ms. Black, who had been a member of Cox Roderick LLP. The Tribunal noted in para 11. that Ms. Black "left the Firm on or about 30 September 2010, although there was some uncertainty about the date on which her resignation from the Firm had taken effect." However, later, at para. 141.2, in contradiction to para. 11, it says that she had resigned in "at the earliest, November 2010." Even then, it was, the Tribunal said, unclear whether the resignation took effect (or purported to take effect) immediately. Documentation at Companies House in Cardiff shows that she remained a member of Cox Roderick LLP until January 4th, 2011, when she was replaced by a Mr. Wintle ("Mr. Wintle").

Ordinary course of a solicitor's business

32 The policy issued by Lemma provides that the "insurer will indemnify the insured against civil liability to the extent that it arises from private legal practice in connection with the firm's practice." "Private legal practice" is defined as being "the provision of services in private practice as a solicitor or registered European lawyer" and then there are various inclusions in the definition which I do not need to set out.

33 This definition, in my judgment, mirrors the passage I have quoted from Staughton, L.J. There is, however, a question as to whether "private legal practice" needs to be assessed from the point of view of an outsider, such as Ms. Pratt, or whether it needs to be considered from the point of view of an insider, such as Mr. Cox.

34 From an external point of view, the facts point, in my judgment, unequivocally towards the December 7th undertaking being given in the course of the ordinary solicitor's business of Cox Roderick LLP. It is routine for a solicitor acting for the purchaser of a business to give an undertaking to forward the purchase moneys. The second requirement in

the passage quoted from Staughton, L.J. is thus satisfied (*Hammoud* (10) ([1988] 1 W.L.R. at 1063)). So far as the first requirement is concerned, Ms. Pratt and the applicants were on notice that the money had not yet been received by the firm. However, they were entitled to assume that Mr. Cox had made sufficient enquiries to satisfy himself that the money was definitely on its way, so that all the requirements of *Hammoud* for a valid solicitor's undertaking were in place.

35 So far as the internal point of view is concerned, the matter is different. As Ms. Mirchandani said at para. 31 of her advice:

> "(a) There was a prolonged period leading up to the final undertaking relied upon by the company in which any reasonable solicitor in Mr. Cox's position would have become extremely sceptical that the promised funds would be forthcoming from his client.
>
> (b) If it is correct that Mr. Cox became involved some time before June 2010, a reasonable solicitor in his position would have known already by the time he exchanged on December 7th, 2010 that in six months his client had not put him in funds to be able to complete the transaction, despite evidence promises and commitments that funds had been 'put in the system.'
>
> (c) The company's solicitors from the start sought proof of funding and this was never provided."

36 There is no other evidence presented to me about Mr. Cox's earlier involvement, as set out in (b). Ms. Mirchandani appears to have had at least some instructions that there had been earlier, pre-administration discussions about purchasing the Overfinch business. Without knowing what these might have been, however, it is impossible to assess the extent to which Mr. Cox was on notice of possible impecuniosity at this early stage. If no contract to purchase the business was made, there would have been no call for Aalyas to transfer moneys to Cox Roderick LLP, so there would have been nothing to arouse Mr. Cox's suspicions of Aalyas's impecuniosity.

37 Points (a) and (c) are, in my judgment, valid. The client had given repeated assurances to Mr. Cox about moneys coming in. The assurances given on November 26th, 2010 were by the start of December shown to be false, because no sums did come in. There is no evidence that the tracker numbers mentioned in Mr. Stallard's email of December 2nd, 2010 had any reality. By December 7th, 2010, any reasonable solicitor would, in my judgment, have had serious doubts about whether the money was going to be forthcoming.

38 Accordingly, from an internal perspective, the giving of the undertaking would not, in my judgment, have been in the ordinary course of business. Mr. Cox could not have been "fairly confident that money

[would] be available so that they [could] reimburse themselves." He no doubt *hoped* that the money would be available. Mr. Maynard-Connor submitted that that showed Mr. Cox must have had "fair confidence." I disagree. A mere hope that the money was coming was not *of itself* sufficient to give him "fair confidence" that it would be.

39 This leads to the question as to whether it is the internal or the external perspective which is relevant to liability under the policy. Neither Ms. Mirchandani nor Ms. den Besten have considered this point. In my judgment, it is the external perspective which is relevant. Were it otherwise, the provisions of the policy to which I shall come in relation to dishonesty would be rendered nugatory. A solicitor acting dishonestly will always be acting outside the ordinary course of a solicitor's business. Yet the policy expressly provides for an indemnity, so long as there is one innocent partner or member of a limited liability partnership. It therefore follows that it is the facts *as known to Ms. Pratt* which are relevant.

40 Thus, in my judgment, so long as Mr. Cox was ostensibly acting in the ordinary course of Cox Roderick LLP's business, the undertaking was an ordinary solicitor's undertaking which falls within the terms of the policy issued by Lemma.

Dishonesty

41 Mr. Maynard-Connor submitted that Mr. Cox could not be guilty of dishonesty because he would have hoped that the money would come through. I disagree. As I have said, Mr. Cox probably did hope that the money would come through from Abu Dhabi. That, however, is not, in my judgment, sufficient to permit him to give the undertaking which his firm did give.

42 The sum in respect of which the undertaking was given was vastly more than the firm could possibly have met if the moneys were not forthcoming from the client. Even if there was only a small chance that the moneys would not come, that would put Cox Roderick LLP in breach of its undertaking.

43 This is, in my judgment, the key factor in considering dishonesty. If Cox Roderick LLP were a very large firm, or if the sum in respect of which the undertaking was given were more modest, then it would be a matter for the solicitor whether giving the undertaking when he was not in funds was a risk worth taking. Where the sum is so large and Cox Roderick LLP is such a modest firm, it is only if cast-iron evidence exists that the money is coming that the solicitor could properly give the undertaking. In the current case, there can have been no cast-iron evidence, because the money never came.

44 In my judgment, Mr. Cox made a representation that the purchase moneys would *with certainty* be paid within 72 hours of exchange of contracts. That was a false representation, because he can have had no belief at the time he made it that it was *certain* that the moneys would be paid. He must have known that that representation was false. He was simply taking a risk as to whether the moneys would be forthcoming or not. In these circumstances, Mr. Cox was, in my judgment, making a fraudulent misrepresentation. That was dishonest according to ordinary standards of honest behaviour.

45 I have considered whether the adjudicator's determination has any form of conclusiveness. In my judgment, it does not. The parties before the adjudicator were Cox Roderick LLP as defendant and the SRA as prosecutor. The parties to the current application are different. The adjudicator's decision is not binding on me: *Hollington* v. *F. Hewthorn & Co. Ltd.* (4), *Rogers* v. *Hoyle* (6). Moreover, as I have pointed out, it may well be that he had much less material than I have when he reached his determination.

46 So far as the Solicitors Disciplinary Tribunal is concerned, the SRA may well have taken the view that, since the breach of the undertaking had been the subject of a determination by the adjudicator, principles of double jeopardy would come into play. Even if that were wrong, however, the failure of the SRA to prosecute Mr. Cox in relation to the giving of the undertaking would not stop me from having to consider the matter myself on the basis of the evidence I have before me.

Ms. Black's membership of Cox Roderick LLP

47 The evidence on when Ms. Black's membership of Cox Roderick LLP ended is limited. It comprises essentially the passages cited from the Solicitors Disciplinary Tribunal decision and the fact that Ms. Black was shown as a member at Companies House until January 4th, 2011, when Mr. Wintle became a member. Counsel was unable to take me to a legislative provision that says that a limited liability partnership must have at least two members. It is right that to be incorporated there must initially be at least two members: Limited Liability Partnerships Act 2000 (UK), s.2(1)(a), but the Act makes provision for any member to retire, regardless of whether that would reduce the number of members below two.

48 Section 122(1)(e) of the Insolvency Act 1986 (UK) (as modified by the Limited Liability Partnerships Regulations 2001 (UK), reg. 5 and Schedule 3) provided that a limited liability partnership may be wound up by the court on the ground that it does not have at least two members, even if no other grounds for winding up the partnership existed. It is likely that most limited liability partnerships do try to ensure that they have two

members. If that is right, then Mr. Cox may have tried to ensure that there were always at least two members of Cox Roderick LLP.

49 The Solicitors Disciplinary Tribunal is itself equivocal as to the precise date of Ms. Black leaving the partnership. Moreover, there is a distinction to be drawn between Ms. Black continuing to work in the partnership and her resigning as a member. Only the latter will result in her ceasing to be a member. The best evidence, in my judgment, is the Companies House documentation. On balance of probability, I find that Ms. Black was a member on December 7th, 2010.

50 Neither Ms. Mirchandani nor Ms. den Besten consider this point, so their advice does not assist in relation to this matter.

51 There is a separate point on holding out as a result of the Companies House documentation continuing to show Ms. Black as a member. In the light of my finding of fact, I do not need to resolve this point.

Conclusion

52 I conclude that the undertaking of December 7th, 2010 was given in the course of the ordinary business of Cox Roderick LLP. Mr. Cox acted dishonestly in giving the undertaking, because he could not have been sure it would be honoured. However, Ms. Black was at the time still a member of the firm. There is no suggestion that she had any knowledge of, or involvement in, the giving of the undertaking by Mr. Cox on the firm's behalf. Accordingly, Lemma was not entitled to repudiate liability on the grounds relied upon.

53 It follows that I shall direct that the proof submitted by the applicants shall be admitted in the liquidation.

Orders accordingly.