Neutral Citation Number: [2024] EWHC 1893 (Ch)

Case No: CR-2023-BRS-000062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 24 July 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF BOSCOLO LIMITED (IN LIQUIDATION)
AMD IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) PAUL DAVID WOOD **(2) NEIL FRANK VINNICOMBE**	**Applicants**
- and -	
(1) DILIP DESAI **(2) PARESH SHAH**	**Respondents**

- -
- -

Suzanne Chalmers (instructed by **Thrings LLP**) for the **Applicants**
Joshua Munro (instructed by **Direct Access**) for the **Respondents**

Hearing dates: 16 May 2024

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 24 July 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by notice dated 15 June 2023 by the liquidators of Boscolo Ltd ("the company") for directions under section 112 of the Insolvency Act 1986. The respondents have brought proceedings against the company for professional negligence, but these are currently stayed. The present application concerns a sum of money amounting to about £246,000, currently held by the liquidators. This sum is derived from a payment of £250,000 made to the company by Royal and Sun Alliance Ltd ("RSA") on 19 August 2021 in connection with the claim made against the company by the respondents. The respondents, who have not yet established their claim, assert a proprietary interest in this money, most of which remains in the company's bank account.

Background

The parties

2. The background to the matter is as follows. The company carried on the business of interior design and project management. Mr Ravi Lakhaney was a director of the company and, from 6 April 2016, the sole Person with Significant Control. On 22 July 2015, the respondents by their then solicitors (Seddons) intimated their intention to make a claim against the company, in respect of alleged breach of a contract of architectural and interior design services relating to their residential apartment in Hampstead, London, which they purchased in April 2013. The contract with the company for these services had in fact been made a few days earlier than their purchase. However, it was only on 25 July 2018 that the respondents' new solicitors (Kennedys) sent a formal letter before claim. The company thereupon notified its professional indemnity insurers (Royal & Sun Alliance, hereafter "RSA").

The contract between the parties

3. The company used a Model Memorandum of Agreement, which by article 2 incorporated the British Institute of Interior Design Conditions. Mr Lakhaney signed it for the company. For the purposes of this application, it was accepted that this contract was entered into on behalf of the respondents. Articles 10, 11 and 14 of this Memorandum provided:

> "10. The Client and the Designer agree that, as referred to in clause 8.1 of the Conditions, no action or proceedings against the Designer arising out of or in connection with this Agreement shall be commenced after the period of ……….. [months/years] from completion of the Project or of the Services, which ever is the earlier. If no period is specified then the period shall be 6 years. It is also agreed that the same period shall apply in relation to the Designer's obligation to maintain professional Indemnity Insurance in accordance with clause 9.
>
> 11. The Client and the Designer have agreed that the Designer's limit of liability and the amount of professional Indemnity insurance to be provided in connection with this Agreement (as referred to in clauses 8.2.1 and 9.1) shall be the amount/s of £…………

[…]

14 The Designer is a member of BIID and so subject to their Code of Conduct in relation to complaints of unacceptable professional conduct or serious professional incompetence."

4. As to the British Institute of Interior Design Conditions incorporated into the contract, Conditions 8 and 9 relevantly provided:

"8 LIABILITIES AND INSURANCE

8.1 No action or proceedings arising out of or in connection with the Agreement, whether in contract, tort, statutory duty or otherwise, shall be commenced after the period specified in the Letter/Memorandum …

8.2 In any such action or proceedings:

8.2.1 The Designer's liability for loss or damage shall not exceed the lesser of the limit of liability specified in the Letter/Memorandum or the amount of the Designer's professional indemnity insurance …

[…]

9 PROFESSIONAL INDEMNITY INSURANCE

9.1 The Designer shall obtain professional indemnity Insurance in respect of the Services for not less than the amount stated in the Letter/Memorandum.

9.2 The Designer shall maintain such insurance until the expiry of the period stated in the Letter/Memorandum provided such Insurance remains available to the Designer on commercially reasonable rates and terms, failing which the Designer will inform the Client in order that the parties can discuss the best means of protecting their respective positions in the absence of such insurance.

9.3 The Designer shall produce on request, evidence that the insurance required under the Agreement is in place and is being maintained.

[…]"

In fact, as shown above, article 11 of the Memorandum of Agreement, referred to in Condition 9.1, was never completed so as to express an amount of insurance.

The insurance policy

5. The copies of the insurance policy, schedule and endorsements which were in evidence before me were for the period of the calendar year 2014. They were not specific to the particular contract with the respondents (who, so far as I can see, were not named or referred to anywhere in them), but appear to have extended to all the professional service contracts, whenever entered into by the company, where a claim was made to the company *in that year*.

6. Insurance Clause 1 of the policy provided that:

> "The Insurer will indemnify the Insured up to the Limit of Indemnity specified in the Schedule in respect of Claims first made against the Insured and notified to the Insurer during the Period of Insurance in respect of civil liability (including liability for claimant's costs and expenses) incurred in connection with the conduct of Professional Business.
>
> The Insurer will in addition pay Defence Costs incurred by the Insurer or by the Insured with the Insurer's written consent provided that the Insurer's liability for Defence Costs in relation to any Claim disposed of for an amount which exceeds the available Limit of Indemnity shall be limited to the proportion that the available Limit of Indemnity bears to the amount payable to dispose of such Claim".

7. The "Insured" was defined (by Definition Clause 12) as meaning the insured named in the schedule, that is, the company, and also partners or directors of the Insured (or member of an insured LLP), and (ii) at the Insured's request any employee of the Insured, or (in either case) their legal representative(s), in respect of civil liability incurred by such persons. Accordingly, it did not include the company's clients. "Claim" was defined by Definition Clause 7 to include (i) notification of intention to commence or of commencement of proceedings of any kind, and (ii) written communication asserting legal liability on the part of the Insured. "Professional Business" was defined by Definition Clause 20 to mean "professional services undertaken by or on behalf of the Insured or the Predecessors in connection with the Business defined in the Schedule. The Business defined in the schedule was "Interior Designer and Project Co-Ordination".

8. As shown by Insurance Clause 1 above, the insurance cover provided by the policy fell into two parts, indemnity and defence costs. The limit of the indemnity set out in the Schedule to the Policy was £250,000 for any one claim, in excess of £500. There was no *numerical* limit on defence costs, but, where a claim was disposed of for a sum exceeding the indemnity limit, defence costs were expressed to be limited to the proportion of those costs that the limit of indemnity bore to the total sum for which the claim was disposed of.

Events after claim notified

9. In the usual way, the policy provided (by Claims Condition 5) for the insurers to be able to take over and conduct the defence of any claim or proceedings against the company covered by the insurance. RSA nominated DAC Beachcroft LLP as solicitors to act on the company's behalf. On 4 March 2019, the respondents' claim was formally denied by DAC Beachcroft LLP. By that stage, at least, it is clear that the company was in financial difficulty. The company's (unaudited) balance sheet for 31 March 2018, approved by Mr Lakhaney on 28 December 2018, showed a deficit of total assets to current liabilities of nearly £300,000. Thereafter the parties' solicitors corresponded to exchange information, to clarify the intended claim, and indeed to explore the possibilities of negotiated settlement. The parties agreed a "standstill" agreement, which would expire on 8 October 2021.

10. On 19 August 2021, before any legal proceedings had been issued, RSA exercised its power under Claims Condition 7 of the policy to pay the Insured (*ie* the company) the limit of indemnity "in connection with" the claim against the company. Insurers also

relinquished control of the defence of the claim. The respondents sought to argue that the insurers were liable to the respondents for their legal costs so far incurred. RSA rejected any such liability. The company instructed Royds Withy King ("RWK") in place of DAC Beachcrofts. Part of the £250,000 paid by RSA to the company was paid to RWK on account of costs.

11. On 4 October 2021, the respondents issued proceedings against both the company and RSA, in the High Court, Chancery Division, in London. The claim against the company was made both in contract and in negligence, with a value of about £700,000. They claimed a trust over the balance of the insurance monies, and payment out to them. Alternatively they claimed the same sum in unjust enrichment, or as damages for breach of contract. Finally, they made a claim against RSA for intentionally procuring a breach of contract and/or knowing assistance in a breach of trust. Both the company and RSA filed acknowledgments of service intimating an intention to defend the claims. RSA also filed a formal defence.

Liquidation of the company

12. So far as concerns the company, however, matters took a different turn. On 26 October 2021, the company entered a creditors' voluntary liquidation, and the applicants in the present application were appointed as joint liquidators. It appears that the bank balance of £246,000, the remains of the insurance payment, is the only realisable asset. It also appears that the largest single creditor of the company is Mr Ravi Lakhaney himself, who is owed £250,000. In addition to the unliquidated claim of the respondents, there are also trade creditors of £34,870. On 6 December 2021, the claim was stayed by consent. There the matter rested until 12 April 2023, when the respondents applied to lift the stay. That application has not yet been heard, as on 19 May 2023 it was adjourned pending the determination of the present application. That present application was issued by the joint liquidators on 15 June 2023.

The application

13. The application is made under section 112 of the Insolvency Act 1986. This relevantly provides:

> "(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.
>
> (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just."

14. Thus, in *Re Pinnacle (Angelgate) Ltd* [2020] EWHC 141 (Ch), ICC Judge Jones gave directions to liquidators under this section in relation to distributions out of certain monies received by the company in relation to a residential building project where purchasers of apartments off-plan had paid deposits but the project had failed and had been sold for what it was worth. And in *Brittain v Michael Wilson & Partners Ltd* [2020] EWHC 3041 (Ch), ICC Judge Burton held that a liquidator, in a position to

distribute a dividend but finding himself faced with conflicting claims to it, could apply to the court for directions under this section. I am satisfied that the section confers power on the court to give directions to the liquidators in the present case.

15. On 24 August 2023 DJ Woodburn gave directions for the hearing of the application before me. His order made on that day (but sealed only on 7 September 2023) provided in part as follows:

> "**UPON** the Applicants' application for directions dated 15 June 2023 made under section 112 of the Insolvency Act 1986 and/or CPR 64.2
>
> **AND UPON** the Court noting that:
>
> […]
>
> (2) The Respondents assert a proprietary interest in the sum of £250,000 paid to the Company by Royal & Sun Alliance plc on 19 August 2021 ('the **Insurance Payment'**);
>
> […]
>
> (5) The Respondents have claimed entitlement to the Cash Fund, without deduction on the grounds that they have a proprietary interest in same;
>
> (6) The Applicants seek directions as to whether the Respondents had a proprietary interest in the insurance payment, whether they have a proprietary interest in the cash fund and, if so, as to the nature of that interest; and
>
> (7) The Applications seek directions as to whether, and if so to what extent and for what purpose they may use the Cash Fund (or any part thereof)
>
> […]
>
> **IT IS ORDERED THAT**:
>
> […]
>
> 2. At the hearing, the Court will determine the issues identified at paragraphs (2) and (5) above and will give directions as to the issues identified in paragraphs (6) and (7) above.
>
> […]
>
> 6. The Applicants are permitted to use up to £15,000 out of the Cash Fund to meet their reasonable costs and expenses (including disbursements) incurred in connection with the issue, hearing and determination of the Application. …
>
> […]"

16. The applicants are seeking directions from the court as to what they should or may do with the remaining bank balance. The respondents meanwhile seek to persuade me that they have a proprietary interest in it. Plainly, before I can give any directions to

the liquidators, I need to determine what interest, if any, the respondents have in the bank balance.

Submissions

The respondents

17. The respondents do not of course suggest that they were the insured party under the policy. But they do claim that, on the true construction of Condition 9 of the contract between them and the company, any insurance monies received by the company from insurers in respect of a claim by the respondents in relation to the services provided by the company are to be held by the company as agent or trustee for the respondents, and should be paid to them. In essence, they say, they are the beneficiaries of the policy in equity. If however Condition 9 does not already so provide, then a term should be implied to that effect, because otherwise the clause would lack all business efficacy.

18. In respect of the implication of terms, they rely on the advice of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] ICR 531, where Lord Hughes referred to the then recent decision of the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, and said:

> "7. … It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

19. Moreover, they say that the company's insolvency or other inability or unwillingness to pay a claim in respect of its services is precisely the risk against which Condition 9 was designed to protect the company's clients. Unlike the claimant in *Westdeutche landesbank Girozentrale v Islington LBC* [1996] AC 669, 683-84, the respondents were unwilling to take the risk of the company's insolvency. They say that the company agreed that they should be in a different position to the other creditors.

20. They rely on the Scottish case of *Cochran & Son v Leckie's Trustee* (1906) 8 F 975. In that case, hay received from Cochrane & Son for chopping by Leckie was insured by Leckie, whose contract note expressly stated that "All goods held in trust covered by insurance against fire". The hay was indeed destroyed by fire, and the insurer paid out its value. The company was found to be insolvent. It was held by the Inner House

of the Court of Session (functionally equivalent to our Court of Appeal) that the insurance monies belonged to the owner of the hay and not to the general body of creditors.

21. Alternatively, the respondents say that the insurance payment is subject to a constructive trust for the benefit of the respondents, on two distinct bases. The first is that it would be unconscionable for the company as the respondents' agent to assert a beneficial title to the money having regard to the circumstances of the company at the time of receipt. They say that the insurance monies are the product of the insurance which the company agreed with the respondents should be provided in order to protect them against the company's insolvency. It is therefore unconscionable for the company to assert beneficial ownership of the insurance monies.

22. They rely on *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179, SC, where Lord Sumption (with whom all the other judges agreed) said:

> "30. The exact circumstances in which a restitutionary proprietary claim may exist is a controversial question which has given rise to a considerable body of judicial comment and academic literature. For present purposes it is enough to point out that where money is paid with the intention of transferring the entire beneficial interest to the payee, the least that must be shown in order to establish a constructive trust is (i) that that intention was vitiated, for example because the money was paid as a result of a fundamental mistake or pursuant to a contract which has been rescinded, or (ii) that irrespective of the intentions of the payer, in the eyes of equity the money has come into the wrong hands, as where it represents the fruits of a fraud, theft or breach of trust or fiduciary duty against a third party. One or other of these is a necessary condition, although it may not be a sufficient one … "

The respondents say that, if the company retained the insurance monies or paid them to the general creditors, those monies would indeed have "come into the wrong hands".

23. The second basis for the imposition of a constructive trust is to prevent the unjust enrichment of the company. Mr Munro, for the respondents, referred me to *Goff and Jones on Unjust Enrichment*, 10th ed 2022, paragraphs [37-19] – [37-30]. He submitted that the company had indeed been unjustly enriched at the respondents' expense. The enrichment of the company (the payment to it by the insurer) was "at the expense of" the respondents, because the contractual protection for which they bargained had been extinguished. On the basis that the respondents had a claim in unjust enrichment against the company, the remedy should be a proprietary rather than a personal remedy because the company is insolvent, and the respondents did not bargain to take the risk of insolvency.

The liquidators

24. As to the first point taken by the respondents, the liquidators rely on *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, and *Hood's Trustees v Southern Union General Insurance Co of Australasia* [1928] Ch 793. In the *Harrington* case, the applicant obtained judgment against a taxi-cab company for damages for the negligent driving of its driver. Before the judgment could be executed, the company went into

liquidation. Thereafter the company's insurer paid the company under its liability policy in respect of the liability established. The Court of Appeal held that the applicant (who had applied in the liquidation) had no right at law or in equity to the insurance payment, which belonged beneficially to the company. All the members of the court were unhappy at the result, but held that it could not be avoided.

25. Lord Hanworth MR said:

> "The occasion of the loss in respect of which the insurance company has paid is that Mr. Chaplin suffered an accident in the street. But the reason why the insurance money is paid to the liquidator is that over a period of time the company, now represented by the liquidator, have made an independent contract of their own and paid their own money to the insurance company, so that, if and when a liability on their part arose, there should be paid to them a certain sum of money."

26. Atkin LJ (at 118), said:

> "Mr. Stable [counsel for the applicant], in his interesting and able argument, admitted that, apart from insolvency, the third party has no sort of right in equity against the insurance company under the policy. If that is so, that really seems to me to dispose of the case because I find it impossible to see how a special right, arising out of circumstances which ordinarily occur in cases of solvency, could come into existence merely because the assured happened to be in difficulties or financial weakness, or to become bankrupt or, if a company, to have a winding-up order made against it."

27. The same judge said later (at 124):

> "I notice … in this case, that the Commissioner of Police requires as a condition of the licence to a cab owner that he should have taken out a policy against third party risks in quite a large sum. It is quite obvious that that very reasonable and proper precaution is defeated in the very case in which it is intended to be of most use—namely, where the cab owner becomes insolvent—and indeed, as pointed out in argument, it would appear as though a person who is insured against risks and who has general creditors whom he is unable to satisfy, has only to go out in the street and to find the most expensive motor car or the most wealthy man he can to run down, and he will at once be provided with assets which will enable him to pay his general creditors quite a substantial dividend! That, however, is a result which is, perhaps, not very likely to happen, but which, in the present state of the law, cannot be avoided."

28. Lawrence LJ agreed with both judgments. I add only that the comments of Atkin LJ about the police licence condition for taxicab insurance were made at a time before the first introduction of compulsory third party risk motor insurance by the Road Traffic Act 1930, section 35. Until then, there was no obligation on motorists to take out and maintain third party risk motor insurance.

29. In the *Hood* case, the accident victim alleging negligent driving had commenced proceedings, but not yet recovered judgment, when the motorist was adjudicated bankrupt. The motorist purported to discharge the insurer from liability under the

policy on payment to him of a small sum. Thereafter the victim recovered judgment against the motorist for damages. The motorist was later adjudicated bankrupt for a second time. The two trustees in bankruptcy jointly claimed a declaration against the insurer that the insurer was liable to indemnify the motorist or themselves in respect of the defendant's liability to the accident victim. Both at first instance and on appeal the trustees succeeded. The motorist being already bankrupt had no power to compromise his claim against the insurer.

30. At first instance, Tomlin J said (at 804):

> "Caddy, the injured man, had no interest in the policy, he could make no claim under it, and he had no right legally to complain if the money paid by the insurance company under the policy to Hood was dealt with by Hood in some way other than payment of Hood's obligation to Caddy. Caddy could in no circumstances claim the money, and equally it seems clear that any right which Hood had under the policy against the defendant company was a right of property or a chose in action, and as such would vest in a trustee in bankruptcy. It seems to make no difference in principle, whether the person whose claim gives rise to a claim for indemnity, is able against the assured to claim a dividend in the bankruptcy of the assured, or whether his claim is not provable in that bankruptcy at all—that seems to make no difference."

31. The matter went on appeal, where Lord Hanworth MR said (at 808)

> "This appeal fails. … Once it is realized that the bankrupt, who had taken out his policy of insurance for his own purposes, was possessed of a chose in action, as in *In re Harrington Motor Co.*, then it is clear that it passes as part of the estate to his [first] trustee in bankruptcy. For my part, I am content to agree with Tomlin J.'s judgment in what he has said and in the conclusions which he has reached. … "

Lawrence and Russell LJJ agreed.

32. It was these and other similar cases that led to the enactment of the Third Party (Rights Against Insurers) Act 1930. In introducing the second reading in the House of Lords of the bill that became the Act, the Under-Secretary of State for India, the mathematician and philosopher Earl Russell, said (*Lords Hansard*, vol 77, col 436):

> "It has been held in Court to be the law that where a person has insured against an accident and a third party has recovered damages and would have those damages satisfied out of the insurance money, should the insurance money be paid to the insured person and should he go bankrupt before it reaches the person injured, then it becomes part of his general estate instead of being earmarked for the person who has been injured. The object of this Bill is to earmark it for that purpose."

This Act has now been replaced for the future by the Third Party (Rights Against Insurers) Act 2010, which came into force in 2016, and is in certain material respects different. It appears to be common ground that that legislation (in either version) does not apply in this case.

33. The liquidators say that the purported implied term is not so obvious as to go without saying. Nor is it required to fill a lacuna. Since policies are avoided and claims declined every day, there can be no implied intention that there must be an "effective" insurance policy, and certainly nothing is expressed to that effect. The policy simply "tops up" the insured's funds to cover claims, so that its ordinary business may not be interrupted by cash flow problems. Moreover, the court cannot simply assume that the parties would not have entered the contract together without the insurance, for they did not even insert the insurance limit into clause 11 of the Memorandum of Agreement. Nor does the suggested implied term take account of the express stipulation for the insurer to be able to release itself from the contract by paying out the limit of indemnity (thus avoiding any obligation thereafter to pay costs). The payment so made is *not* paid in acknowledgment of any liability of the insured, for that has not yet been, and may never be, established.

34. Even if such a term *were* to be implied, however, its breach would *prima facie* give rise only to a claim for damages. It would not of itself create a proprietary interest in the money paid by the insurer to the insured. If there were intended to be a trust of the payment, the question would arise as to how to identify the proportion of the payment in which the interest should subsist, since the liability if any of the insured would not as yet have been determined.

35. In relation to the second point, the liquidators say first of all that there was no agreement that any property be acquired for the benefit of the company and its clients. Nor was there any agreement that the respondents should have a proprietary interest in the policy or payments made thereunder, or that the company should obtain the payment it did. As a result, it is not unconscionable for the company to treat the payment as part of its general assets.

36. As to unjust enrichment, the liquidators say that none of the relevant conditions is satisfied. The respondents did not pay for the policy. The company did, and it got what it bargained for. Moreover, it is not possible to say who has been unjustly enriched without knowing whether the respondents' claim is good or bad. If it is bad, the respondents would be unjustly enriched, not the company. The payment was made in the ordinary way under the terms of the insurance policy, and the respondents have not been deprived of any benefit to which they were otherwise entitled.

Discussion

General

37. A professional indemnity insurance policy will generally be triggered by the notification of a third party claim to the insurer. And that is so in the present case: see Insurance Clause 1 and Definition Clause 7 of the policy. But that does not without more make any sum of money due and payable by the insurer to the insured. It is a contract of *indemnity*, so the insured must first suffer some loss against which it can be indemnified. For this kind of policy, that loss is the establishment of civil liability of the insured towards the third party: *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, CA. In the present case, no liability of the insured towards the third party has yet been established. Indeed, it may never be. The proceedings designed to do so have been commenced, but are currently stayed.

38. In considering this case, I start from the position that it is not impossible in English law for a professional indemnity insurance policy to be held by the insured for the benefit, in some form or another, of the client or clients of the insured. The insurer might grant the policy on such terms as to constitute the insured either an agent of, or a trustee for, such client or clients. In practice this would be unusual. It is more likely that the insurer grants a policy to the insured for the insured's own benefit, but, as with any chose in action, the insured may decide to create a trust of the benefit of all or some part of the policy for its client or clients. Or circumstances may arise in which, irrespective of the intention of the insured, the law imposes a constructive trust upon it for the benefit of the client. The question is whether either of those things has happened in the present case.

Intentions of the parties

39. The old motor insurance cases show that, at least in the absence of some specific agreement or declaration of trust to that effect, it was not so. The Third Parties (Rights against Insurers) Act 1930 was designed, as Earl Russell said, to earmark the insurance monies in certain cases. But what the Act throws into stark relief is what was the position *for those cases which the legislature did not consider should be amended*. To the extent that the legislation does *not* apply, there was and is no expressed legislative intention to change the earlier common law position. In essence, the liquidators' position is that this pre-existing legal position informs both the construction of Condition 9, and also the question whether a term should be implied to provide that the proceeds of the policy in respect of a particular claim be appropriated or earmarked to the satisfaction of the respondents' claim.

40. In the present case there is the contract between the company and its clients, the respondents. In that contract, the company undertakes to obtain and then to maintain professional indemnity insurance. That is not a feature of the motor insurance cases. The respondents naturally urge this circumstance as distinguishing those cases from the present. I do however note that, in the *Harrington* case, Atkin LJ specifically referred to the fact that the taxicab company was obliged by the terms of the police licence for taxicabs to insure against the risk of third-party liability. He even pointed out that "that very reasonable and proper precaution is defeated in the very case in which it is intended to be of most use—namely, where the cab owner becomes insolvent," but held that that made no difference.

41. I also note that the Code of Conduct of the British Institute of Interior Design which was in force at the relevant time provided (inter alia) that

> "D. Responsibility to the Institute and the interior design profession
>
> […]
>
> 2. Members shall carry appropriate insurance, to include Employers' Liability, Public Liability, Product Liability and Professional Indemnity. Members shall also, where appropriate, carry Directors' and Office Bearers' Insurance.
>
> […]"

I note further that this provision appears, not in the section of the Code headed "B. Responsibility to the client", but instead in the section headed "D. Responsibility to the Institute and the interior design profession". So there is no clear indication that this was intended to enure for the benefit of the clients. Indeed, the cross-heading suggests to the contrary.

42. The inclusion in the contract of an obligation on the company to have suitable professional indemnity insurance is explained as much by the Code of Conduct as by anything else. The insurance policy itself is not expressed to be for one project only, or for the benefit of a particular client or clients, or indeed for any clients. Instead it is a general policy for the company's work for all its clients on an ongoing (indeed, a "*claims made*") basis. There is no trace in the documents before me of any contemporaneous suggestion by the respondents that they were unwilling to take the ordinary risk of dealing with a person who later became insolvent. It was not even the respondents, so far as I can see, who first proposed that there should be insurance. Instead, the impetus came from the Code of Conduct, and appeared in the contract as a pre-printed clause in the company's standard form. Overall, I cannot construe the contract as requiring the company to obtain insurance in which, or in the proceeds of which, the clients will have a proprietary interest.

43. Nor do I consider that it is necessary to imply a term to that effect, either because it is so obvious that it goes without saying, or in order to give business efficacy to the contract. The fact that there is no case cited where such an argument has been successful strongly supports the view that it is not obvious. And the insurance makes business sense without the need to give clients specific interests in it. It is obviously beneficial *in itself* to a professional person to have indemnity insurance, because it means that claims can be dealt with by others (at no cost to the insured), leaving the professional free to get on with other client work, secure also in the knowledge that the insurer will pay any compensation that may be found due. Ordinary cashflow will remain unimpaired.

Constructive trust

44. I therefore turn to the second point, constructive trust. First of all, I do not consider that a payment made (under a contractual right to do so) by the insurer before liability is established in order to *discharge* its possible future liability to indemnify and pay costs is necessarily to be seen as the traceable exchange product of the contractual right of indemnity. As I have already observed, that right to indemnity depends on liability having first been established.

45. But, in any event, the insurance policy was not property which the parties agreed to acquire for their joint benefit (unlike in, say, *Pallant v Morgan* [1953] Ch 43). Indeed, and as is clear from the company's pre-contractual letter to the respondents of 4 April 2013, the policy was already in place before the contract was ever entered into. Nor was there any other property belonging to the respondents which came into the hands of the company and which the company undertook to insure (unlike, say, the hay in the *Leckie* case). The money paid to the company has not been paid to it by mistake, or through fraud, theft or breach of trust.

46. The phrase "reached the wrong hands" was not employed by Lord Sumption in the *Angove's Pty* case as some kind of general formula leading to equitable relief, but was

rather a reflection of a legal wrong having been the occasion of the payment itself. Accordingly, the money has not reached the wrong hands, but the right ones. It is not unconscionable for the company to assert a beneficial title to the payment. There is no justification for the imposition of a constructive trust on this basis in this case. It is fair to say that, by the time of the hearing, Mr Munro for the respondents was not pushing very hard on this aspect of the case.

47. Lastly, I turn to the question of a claim in unjust enrichment. In *Investment Trust Companies v HMRC* [2018] AC 275, SC, the question was whether the claimants had a claim in unjust enrichment against the defendants. Lord Reed (with whom all the other judges agreed) said:

> "24. In answering the question, both parties followed the approach adopted by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227, and asked: (a) Has the defendant been benefited, in the sense of being enriched? (b) Was the enrichment at the claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences?
>
> […]
>
> 40. … the adoption of the concept of unjust enrichment in the modern law, as a unifying principle underlying a number of different types of claim, does not provide the courts with a tabula rasa, entitling them to disregard or distinguish all authorities pre-dating *Lipkin Gorman* [*v Karpnale Ltd* [1991] 2 AC 548]. … Although judicial reasoning based on modern theories of unjust enrichment is in some respects relatively novel, there are centuries' worth of relevant authorities, whose value should not be underestimated. The wisdom of our predecessors is a valuable resource, and the doctrine of precedent continues to apply. The courts should not be reinventing the wheel.
>
> 41. … Lord Steyn's four questions [in *Banque Financière de la Cité*] are no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words 'at the expense of' do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute.
>
> 42. The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases. In carrying out that analysis, it is important to have at the forefront of one's mind the purpose of the law of unjust enrichment. As was recognised in *Menelaou* [*v Bank of Cyprus UK Ltd* [2016] AC 176] (para 23), it is designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted. That is why restitution is usually the appropriate remedy."

48. Accordingly, I approach the question of the respondents' claim in unjust enrichment through the four questions posed by Lord Steyn, but subject to the explanation of, and qualifications placed on, them by Lord Reed. In particular, I proceed on the basis that the four questions are merely signposts, and that in any event there must be a careful legal analysis of the situation.

49. The first question is whether the company can be said to have been enriched by the payment made by the insurer. Certainly the company had more money after the payment than before. But it also no longer had the benefit of the rights under the indemnity insurance policy. It gained something, but it lost something else. If the company had sold a fixed asset for its full market value, the company's balance sheet would remain the same after the sale as immediately before. The company would not have been enriched. It is only if the asset were sold at an *overvalue* that the company could ever be said to be enriched by the transaction.

50. In order to decide whether the company was enriched in the present case, one would need to know the value of the rights under the policy, as well as the payment in fact made, and deduct the one from the other, in order to show that the company gained in value from the transaction. The respondents have not done this. The only evidence before the court of the value of the rights under the policy is the value that the parties to the insurance contract themselves placed on it. In order for the insurer to buy itself out of its obligations, it had to pay the limit of indemnity. This is what it did. My conclusion on the evidence is that there was therefore no enrichment *at all*. The respondents' claim in unjust enrichment falls at the first hurdle.

51. But, even if there *were* an enrichment, it would certainly not have been obtained at the expense of the respondents. They did not contract with the insurer for the insurance, and neither did they pay for it. They have not suffered any relevant loss *as a result of* the payment by the insurer to the company. Any loss suffered by them was the result of a much earlier event, which they say amounted to a breach of contract or negligence by the company, for which there always was a potential legal remedy, which indeed they have started to pursue. (The respondents may also be said to have "lost" the fees that they paid the company to do the work. But in exchange for those fees they acquired their contractual rights against the company. So that in itself is not a loss at all.)

52. The respondents say that they have lost the protection of the insurance for which they bargained. As I have already held , this is not so as a matter of fact. And in any event (if it were factually correct) it would be more accurate to say that they *never received* the protection of the insurance for which they bargained. But even if they had bargained for but not received it, *prima facie* that would give rise to a claim for damages for breach of contract, not a claim in unjust enrichment to the value of the insurance payment.

53. Of course, a breach of contract does not automatically exclude the possibility of a complementary claim in unjust enrichment (see *eg Rowland v Divall* [1923] 2 KB 500, CA). However, the payment made here was not a payment which was made in satisfaction of any obligation to indemnify the company, for there was none. Instead, it was a contractual payment *to get out of* any future obligation to indemnify. The position for the respondents is the same as if the company entirely failed to arrange insurance in the first place. Put short, this was not a payment that the respondents

contracted to receive. To allow it to be claimed by way of unjust enrichment would give them more than they were expecting, and thus subvert the allocation of risk in the contract. The claim falls at the second hurdle too.

54. Thirdly, even if the company were enriched at the expense of the respondents, this was not *unjust*. The company bargained and paid for its own professional indemnity insurance policy before the respondents ever contracted with the company. The insurer had a contractual right to buy itself out of its insurance obligations, and the insurer (not the company) chose to exercise it. This is the working out of a commercial contract between the parties. Unless the contract is invalid or procured by undue influence, or is illegal, or suffers from some other relevant defect, it is impossible to see what could be unjust about its consequences. In my judgment, the unjust enrichment claim is wholly unarguable.

55. But, in case I am wrong in my conclusion that the respondents simply have no claim in unjust enrichment, I will go on to consider whether the remedy to be awarded on such a claim being established would be personal or proprietary. This is a controversial area, especially amongst unjust enrichment scholars. As a general proposition, however, I have some difficulty in seeing why, if property or trust law principles do not themselves result in a property or trust claim (and, at least in some cases, a proprietary remedy) for a claimant, *unjust enrichment* principles should do so instead. English private law divides rights into two kinds, personal and proprietary. They have different characteristics, and different effects. Many other rules (*eg* on formalities) depend on this distinction.

56. Policy reasons may well justify particular priority amongst creditors in the insolvency context (*eg* preferential and non-preferential creditors), but there is no reason to subvert property law principles to achieve that result. If insolvency law accords priority to those having property rights over those having personal rights, then that is the policy of the insolvency law. And insolvency law does not always grant that priority: see for example the rules on transactions at an undervalue, and those in fraud of creditors. But the policy should not be the tail to wag the dog, and turn rights that are otherwise personal into property rights, simply to achieve priority on insolvency: *cf* Atkin LJ in *Harrington*, cited at [25] above.

57. The respondents naturally contend for a proprietary remedy, in the form of a constructive trust. They say that they did not take the risk of the company's insolvency. But, as I have already observed, there is nothing in the documentation to support that assertion. On the material before me, I am not persuaded that that was so. People do business every day with professionals and tradespeople who are insured against third party risks. The only property which the respondents transferred to the company, namely the fees for the company's services, were self-evidently at the free disposal of the company. Nothing in the contract between the parties suggests otherwise. In my judgment there is nothing here even to point in the direction of a proprietary remedy for an unjust enrichment claim, let alone to justify it. If I had held that there were a valid unjust enrichment claim here, I would not have granted a proprietary remedy.

Directions to the liquidators

58. I therefore hold that the insurance payment belongs to the company beneficially. It is therefore subject to the usual insolvency framework, which gives the liquidators the powers to deal with it. There is no need for further directions to them. But I will indicate that, if I had held that the insurance payment was subject to a trust in favour of the respondents, I would have directed that the liquidators should have their legal costs of this application for directions out of it, accounting to the respondents simply for the balance. Those legal costs would if necessary be assessed on the indemnity basis, in accordance with the Trustee Act 2000, section 31, CPR rule 46.3 and PD 46 para 1. As to remuneration, it may be (but I have no need to decide, and am not now deciding) that the liquidators would have been entitled to an order under the jurisdiction recognised to exist in *Re Berkeley Applegate (Investment Consultants) Ltd (No 1)* [1989] Ch 32.

Conclusion

59. I hold that the insurance payment is not held for the benefit of the respondents, and belongs beneficially to the company. The need for other directions accordingly falls away. I should be grateful to receive a draft minute of order for approval, to give effect to this judgment.