LLR: Insurance & Reinsurance Plus

[2018] Vol. 1 **INSURANCE AND REINSURANCE PLUS** **7**

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

14 September; 19 October 2017

CROWDEN AND ANOTHER
v
QBE INSURANCE (EUROPE) LTD

[2017] EWHC 2597 (Comm)

Before Peter MacDonald EGGERS QC

Insurance (professional indemnity) – Exclusion for insolvency – Principles applicable to interpretation of insurance exclusions – Causation – Effect of assignment of rights to Financial Services Compensation Scheme – Third Parties (Rights Against Insurers) Act 1930 – Financial Services and Markets Act 2000.

This was a claim under the Third Parties (Rights Against Insurers) Act 1930 by Mr and Mrs Crowden, trustees of the Crowden Executive Pension Scheme, against QBE Insurance (Europe) Ltd, the professional indemnity insurers of Target Financial Management Ltd.

In 2005, on the advice of Target, the claimants invested £200,000 in the Keydata Bond under which the claimants were given a direct participating interest in an underlying bond issued by SLS Capital SA (SLS). On 2 June 2009 Keydata defaulted and entered administration on 8 June 2009. A claim was made by the claimants against the Financial Services Compensation Scheme (FSCS), established under the Financial Services and Markets Act 2000, on 24 November 2009, seeking to recover losses of £150,000. On 15 February 2011 the FSCS upheld the complaint in respect of Keydata. The FSCS found that the total compensable loss was £162,233.11. The FSCS's letter informed the claimants that they were accepting compensation in full and final settlement of the claim against the FSCS, and required the claimants to assign to the FSCS their rights against Target. On 16 August 2011 the FSCS and the claimants entered into a reassignment agreement under which the FSCS reassigned all rights that it had against Target on the basis that any sums recovered would first be applied to repay the FSCS plus interest.

In 2008 the claimants, on the advice of Target, invested £150,000 in the Meteor Plan under which the claimants acquired securities issued by Lehman Brothers Inc. On 15 September 2008 Lehman entered into Chapter 11 protection in the United States, as a result of which the claimants' interests were converted into unsecured participation in any distribution under the Chapter 11 process. Meteor was not involved in any insolvency process. The claimants claimed that they had suffered losses of approximately £50,000. The claimants made a complaint in respect of Meteor with the FSCS, but the complaint was not upheld and no compensation was paid to the claimants.

Target went into administration at the end of 2011 or the beginning of 2012. On 22 February 2012 the claimants made a complaint and application to the FSCS for compensation in respect of Target's advice on the Keydata Bond and the Meteor Plan. On 23 April 2013 the FSCS upheld the complaint against Target with respect to its advice as to Keydata and paid compensation of approximately £77,598.11. As before, the payment was in full and final settlement and the claimants' rights against Target were transferred to the FSCS. Target was wound up on 30 May 2013. The claimants did not receive compensation against Target for the Meteor Plan advice, although a future payment was possible.

The claimants commenced proceedings against Target and on 16 February 2015 obtained judgment in the sum of £197,698.05, plus interest. The claimants sought to enforce the judgment against QBE. The claim was resisted by QBE, and QBE sought summary judgment or strike-out on two grounds.

First, the policy excluded claims:

"arising out of or relating directly or indirectly to the insolvency or bankruptcy of the **Insured** or of any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the **Insured** has arranged directly or indirectly any insurances, investments or deposits ..."

QBE contended that this Insolvency Exclusion applied if the insolvency of Keydata or SLS (in respect of the Keydata Bond) or Lehman (in respect of the Meteor Plan) was a cause, even if not a proximate cause, of the relevant claim, liability or loss. The claimants contended that the

Insolvency Exclusion applied only if: (a) there had been a non-negligent act, error or omission giving rise to Target's liability; and/or (b) Target arranged an insurance, investment or deposit with the insolvent business, firm or company on its behalf and not on behalf of its customers; and/or (c) the relevant insolvency was a formal insolvency process, rather than an inability to pay debts as they fell due.

Secondly, Target had no liability to the claimants in respect of the Keydata Bond, because the claimants' rights had been assigned to the FSCS and there had been no relevant reassignment. There was no defence on that ground in respect of the Meteor Plan claim.

Held, by QBD (Comm Ct) (Peter MacDonald EGGERS QC) that the claim would be struck out by reason of the application of the Insolvency Exclusion.

(1) QBE bore no obligation of indemnity under the policy in respect of Target's liability to the claimants by reason of the Insolvency Exclusion. The claimants had no real prospect of succeeding in their claim against QBE.

(a) There was no dispute as to the principles of contractual interpretation (*see* para 56);

Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, *Rainy Sky SA v Kookmin Bank* [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619, *Wood v Capita Insurance Services Ltd* [2018] Lloyd's Rep Plus 13; [2017] 2 WLR 1095, applied.

(b) As regards insurance exclusions the court had to adopt an approach to which was sensitive to their purpose and place in the insurance contract. The court should not adopt principles of construction which were appropriate to exemption clauses, because insurance exclusions were designed to define the scope of cover which the insurance policy was intended to afford. To that end, the court should not automatically apply a contra proferentem approach to construction. That said, there might be occasions where there was a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions was to exclude all or most of the insurance cover which was intended to be provided. In that event, the court would be entitled to opt for the narrower construction not only by the application of the contra proferentem approach but also the approach that in the case of ambiguity the court could opt for the more commercially sensible construction (*see* para 65);

Rainy Sky SA v Kookmin Bank [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900, *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] Lloyd's Rep IR 60, applied; *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, *Blackburn Rovers Football & Athletic Club plc v Avon Insurance plc* [2005] Lloyd's Rep IR 447, considered; *Canada Steamship Lines Ltd v The King* [1952] 1 Lloyd's Rep 1; [1952] AC 192, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, *Dorset County Council v Southern Felt Roofing Co Ltd* (1990) 48 BLR 96, *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] 1 Lloyd's Rep 461, distinguished.

(c) The Insolvency Exclusion was not limited to non-negligent acts, errors or omissions.

(i) The language of the Insolvency Exclusion was relatively clear. According to its terms, the Insolvency Exclusion excluded from cover any claim, liability or loss "arising out of or relating directly or indirectly to the insolvency or bankruptcy" of Target or any business, firm or company with whom Target had arranged – directly or indirectly – any insurance, investment or deposit (*see* para 68).

(ii) The undeniable sense of the words was to emphasise that the causative effect of the relevant insolvency need not be as strong or efficient so as to constitute a proximate cause. The Insolvency Exclusion did not limit itself to a single causative link, such as "caused by" or "arising out of" but instead used two differently expressed causative links, namely "arising out of" and "relating ... to"; and the use of the words "directly or indirectly" plainly indicated that the causative link might be more remote than a proximate cause (*see* para 71);

Coxe v Employers' Liability Assurance Corporation Ltd [1916] 2 KB 629, applied; *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406, *Beazley Underwriting Ltd v The Travelers Companies Inc* [2012] Lloyd's Rep IR 78, *ARC Capital Partners Ltd v Brit UW Ltd* [2016] Lloyd's Rep IR 253, referred to.

(iii) There was no reason why the court should be predisposed to giving the Insolvency Exclusion a narrow construction merely because it is an insurance exclusion. Nevertheless, the Exclusion was potentially of wide effect and if there was any ambiguity the court should be alert to the commercial purport and effect of the exclusion in construing it. However, there was no genuine ambiguity (*see* paras 72 and 73).

(d) The Insolvency Exclusion was not limited to the insolvency of a business, firm or company with whom Target had arranged insurances, investments or deposits on its behalf rather than on behalf of customers.

(i) There was no indication that the Insolvency Exclusion was so limited: the word "arranged" carried with it the suggestion that Target was placing the insurance, investment or deposit on behalf of someone else, and this was principally a third party professional liability policy, albeit with first-party loss cover afforded by way of an extension (*see* para 77).

(ii) The court was entitled to take into account the Expiring Policy, being an antecedent agreement between the same parties, as an aid to construction of the present policy, and the court was entitled to assume that the parties were aware of the difference particularly where Target had been represented by a professional broker. The Expiring Policy replaced by the present policy differed in that the Insolvency Exclusion in the present policy was limited to insurances, investments and deposits which Target had "arranged", and did not extend to those insurances, investments and deposits as to which it had only advised, indicating that the main part of the Insolvency Exclusion embraced insurance, investments and deposits arranged by Target on behalf of its customers. That underlined the interpretation that there was no cover under the policy in respect of liability relating to investments which Target had arranged for its customers by reason of the insolvency of the relevant institution (*see* para 79);

HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] 2 Lloyd's Rep 161, *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511, *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2007] EWHC 145 (TCC), applied.

(e) The term "insolvency" did not refer to a formal insolvency process, such as a liquidation, rather than an inability to pay debts: the court would have regard to the ordinary business meaning of the words used, rather than a technical legal definition which would not be uppermost in the mind of the parties; there was no good reason why the exclusion should be limited only to such time as there was a formal insolvency process given that the mischief which was sought to be excluded was insolvency; the use of the word "bankruptcy" was used in the same general sense; and if it had been intended that the Insolvency Exclusion would apply only to formal insolvency processes, it was to be expected that the clause would have defined "insolvency" accordingly or at least refer to a "liquidation", an "administration and the like (*see* para 81);

Spinney's (1948) Ltd v Royal Insurance Co Ltd [1980] 1 Lloyd's Rep 406, applied.

(f) The Insolvency Exclusion applied on the facts of this case. The only cause of the loss associated with the Keydata Bond and Meteor Plan, and therefore the only cause of the resulting claim or liability, was the insolvency of Keydata and SLS (in respect of the Keydata Bond) and the insolvency of Lehman (in respect of the Meteor Plan). Indeed, those events precipitated the claimants' losses (*see* para 88).

(2) Although there was an assignment to the FSCS and a reassignment of the claimants' rights of action against Target in respect of the Keydata Bond in 2011, upon payment of further compensation by the FSCS in 2013 there was a further assignment by the claimants to the FSCS of their rights of action against Target. There were exchanges between the claimants and the FSCS as to a further reassignment, but there was no evidence that such a reassignment was ever executed (*see* paras 101, 107 and 111).

(3) The judgment against Target was not binding on QBE. It was well established that although a judgment of the court might operate to ascertain or establish an insured's liability for the purposes of a liability insurance policy, the liability insurer was still entitled to question whether or not there was in fact a liability on the part of the assured to the third-party claimant and whether the real basis of any liability fell within the scope of the cover afforded by the liability insurance policy. There was no term in the policy requiring QBE to be bound by the judgment and QBE had not been a party to the earlier proceedings (*see* paras 111 and 112);

AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd [2014] Lloyd's Rep IR 509, applied.

The following cases were referred to in the judgment:

ARC Capital Partners Ltd v Brit UW Ltd (QBD (Comm Ct)) [2016] EWHC 141 (Comm); [2016] Lloyd's Rep IR 253;

Arnold v Britton (SC) [2015] UKSC 36; [2015] AC 1619;

AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd (CA) [2013] EWCA Civ 1660; [2014] Lloyd's Rep IR 509;

Beazley Underwriting Ltd v The Travelers Companies Inc (QBD (Comm Ct)) [2011] EWHC 1520 (Comm); [2012] Lloyd's Rep IR 78;

Blackburn Rovers Football & Athletic Club Ltd v Avon Insurance plc (CA) [2005] EWCA Civ 423; [2005] Lloyd's Rep IR 447;

Canada Steamship Lines Ltd v The King (PC) [1952] 1 Lloyd's Rep 1; [1952] AC 192;

Chartbrook Ltd v Persimmon Homes Ltd (HL) [2009] UKHL 38; [2009] AC 1101;

Cornish v Accident Insurance Co Ltd (1889) 23 QBD 453;

Coxe v Employers' Liability Assurance Corporation Ltd [1916] 2 KB 629;

Dorset County Council v Southern Felt Roofing Co Ltd (CA) (1990) 48 BLR 96;

Easyair Ltd v Opal Telecom Ltd (Ch D) [2009] EWHC 339 (Ch);

Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc (Ch D) [2008] EWHC 1897 (Ch); [2009] Bus LR 465

HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co (CA) [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161;

Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (SC) [2016] UKSC 57; [2017] Lloyd's Rep IR 60;

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (QBD (TCC)) [2007] EWHC 145 (TCC);

Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd (CA) [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511;

Photo Production Ltd v Securicor Transport Ltd (HL) [1980] AC 827;
Rainy Sky SA v Kookmin Bank (SC) [2011] UKSC 50; [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900;
Spinney's (1948) Ltd v Royal Insurance Co Ltd (QBD (Comm Ct)) [1980] 1 Lloyd's Rep 406;
Stocznia Gdynia SA v Gearbulk Holdings Ltd (CA) [2009] EWCA Civ 75; [2009] 1 Lloyd's Rep 461;
TFL Management Services Ltd v Lloyds TSB Bank plc (CA) [2013] EWCA Civ 1415; [2014] 1 WLR 2006;
Wood v Capita Insurance Services Ltd (SC) [2017] UKSC 24; [2018] Lloyd's Rep Plus 13; [2017] 2 WLR 1095.

Donald Lilly, instructed by Edwin Coe LLP, for the claimants; Tony Singla, instructed by Plexus Law Ltd, for the defendant.

Thursday, 19 October 2017

JUDGMENT

Mr Peter MacDonald EGGERS QC:

Introduction

1. The claimants are the trustees of a self-administered pension scheme, the Crowden Executive Pension Scheme, and are the sole beneficiaries thereunder. The claimants engaged the services of a financial adviser, Target Financial Management Ltd ("Target"), to provide investment advice. The claimants commenced legal proceedings and obtained judgment against Target in respect of negligent investment advice given in respect of two financial instruments arranged by Target: (a) the Keydata Secure Income Bond ("the Keydata Bond") issued by Keydata Investment Ltd ("Keydata"); and (b) the Meteor Prime Growth Plan 5 ("the Meteor Plan") operated by Meteor Assets Management Ltd ("Meteor").

2. The defendant ("QBE") was Target's professional indemnity insurer and had issued a policy of professional liability insurance (no 011972/01/2009 and dated 19 February 2009) in favour of Target ("the Policy").

3. On 3 August 2016, the claimants commenced these proceedings against QBE claiming an indemnity under the Policy in respect of Target's liability to the claimants for negligent investment advice. The claimants' title to sue arises from the operation of the Third Parties (Rights Against Insurers) Act 1930, as Target entered into liquidation on 30 May 2013.

4. QBE applies for summary judgment dismissing the claim pursuant to CPR 24.2(a)(i) or an order striking out the claim on the ground that the claim form and the particulars of claim disclose no reasonable grounds for bringing the claim pursuant to CPR 3.4(2)(a). Other than the nature of the relief, Mr Tony Singla, acting on behalf of QBE, said that QBE's entitlement to either summary judgment or the striking out of the claim, if justified, arises on the same grounds.

5. The basis of QBE's application is that it is not liable to indemnify Target, and therefore the claimants, under the Policy for two reasons. First, there is a policy exclusion – an Insolvency Exclusion – by which QBE bears no liability under the Policy in respect of Target's liability to the claimants. Secondly, at the relevant times, the claimants were not possessed of the rights of action against Target, because they had been assigned to the Financial Services Compensation Scheme ("FSCS"), which had paid the claimants some compensation.

The Keydata Bond

6. In 2005 Target advised the claimants to invest in the Keydata Bond. The claimants invested £200,000 in the Keydata Bond. The Keydata Bond was issued by Keydata and gave the claimants a direct, participating interest in an underlying bond issued by SLS Capital SA ("SLS").

7. On 2 June 2009 Keydata defaulted and stopped paying the returns due. On 8 June 2009, Keydata entered into administration. As a result, the FSCS declared Keydata to be "in default". On 1 October 2009 the Luxembourg court ordered the liquidation and winding up of SLS.

8. The claimants claim that they suffered losses in the approximate sum of £150,000. As a result of their losses associated with this investment, on 24 November 2009, the claimants made a complaint and an application for compensation to the FSCS in respect of Keydata.

9. On 15 February 2011 the FSCS upheld the complaint in respect of Keydata and paid compensation to the claimants in the sum of £84,642.92. The FSCS found that the total compensatable loss was £162,233.11, but paid the lesser sum because of limits on the compensation recoverable from the FSCS. In its letter informing the claimants of its decision, the FSCS stated that: "Please note that, by accepting this payment, you are accepting compensation in full and final settlement of your claim for compensation to FSCS, and in discharge of FSCS's obligations to you. You will also transfer to FSCS your legal rights against the Firm [and third parties] in accordance with Section K of the Application Form". I refer to section K of the application form below.

10. Accordingly, as a condition of the payment of such compensation, there was an assignment of the claimant's rights against Target to the FSCS in respect of Keydata. However, the extent of such assignment is in issue.

11. On 16 August 2011 the FSCS and the claimants concluded a reassignment agreement under which such rights against Target as were assigned to the FSCS were assigned back to the claimants. Clause 1 of the reassignment agreement provided that: "FSCS reassigns absolutely to

the Claimant all rights claims and causes of action that it has against the party named in C above [Target] in respect of the Claim ('the Reassigned Rights')". Clause 5 of the reassignment agreement provided that: "The Claimant agrees that in respect of the Reassigned Rights *the proceeds of the claim shall first be applied to repay an amount equal to the Compensation Sum to FSCS* together with interest on the Compensation Sum from the date of receipt of the proceeds by the Claimant to the date of payment by the Claimant to FSCS ... The payment to FSCS shall be made after the deduction from the proceeds of the Claimant's reasonable legal costs incurred in pursuing a claim in respect of the Reassigned Rights". The phrase "Compensation Sum" is defined in the agreement to mean "the aggregate amount FSCS will pay or has paid to you in compensation in respect of your Claim".

12. In October 2011 the FSCS instituted proceedings against Target, and other defendants, including in respect of the claimants' claim relating to Keydata. However, by a notice of discontinuance, the FSCS discontinued those proceedings.

The Meteor Plan

13. In 2008 Target advised the claimants to invest in the Meteor Plan. The claimants invested £150,000 in the Meteor Plan. Under the Meteor Plan, the claimants acquired securities issued by Lehman Brothers Inc ("Lehman").

14. On 15 September 2008 Lehman entered into Chapter 11 protection in the United States, as a result of which the claimants' interests were converted into unsecured participation in any distribution under the Chapter 11 process. Meteor was not involved in any insolvency process. The claimants claim that they have suffered losses in the approximate sum of £50,000 in respect of this investment.

15. The claimants lodged a complaint in respect of Meteor with the FSCS, but the complaint was not upheld and no compensation has been paid to the claimants.

The claim against Target

16. At the end of 2011 or the beginning of 2012, Target entered into administration. On 30 May 2013 Target entered into liquidation.

17. On 22 February 2012 the claimants made their complaint and application for compensation in respect of Target to the FSCS. The application related to the Keydata Bond and the Meteor Plan. The claimants completed an application form which included their agreement to the terms of payment set out in section K of the form (discussed below), although one page of section K was omitted from the copy of the application form before the court.

18. On 13 June 2012 the FSCS declared Target to be "in default". On 23 April 2013 the FSCS upheld the complaint in respect of Target with respect to its advice as to Keydata and paid compensation to the claimants in the sum of approximately £77,598.11 (including interest of £14,779.53). In its letter informing the claimants of its decision, the FSCS stated that: "Please note that the compensation payment is in full and final settlement of your claim for compensation from FSCS, and in discharge of FSCS's obligations to you. Your rights against the firm and any relevant third parties are also transferred to FSCS".

19. On 24 April 2013 the first claimant wrote to the FSCS enquiring whether the claimants retained rights of action against Target. Later that day, the FSCS replied that: "The rights against IFA were used when you made the negligence claim against [Target]. Now that we are paying the Keydata element, your rights in respect of this portion pass to FSCS".

20. The claimants have not received compensation from the FSCS in respect of their complaint against Target relating to the Meteor Plan. This is confirmed by the witness statement of Mr David Greene dated 2 August 2017, made on behalf of the claimants, at para 18. Exhibited to Mr Greene's statement is a letter from the FSCS indicating that a payment might be made at some future time.

21. In May 2014 the claimants commenced proceedings against Target claiming damages for negligence in respect of the investment advice given in relation to the Keydata Bond and the Meteor Plan. The liquidators of Target decided not to defend the claim. On 27 June 2014 by a letter sent by the claimants' solicitors to QBE's solicitors, QBE was informed of these proceedings. During a case management conference on 8 August 2014, provision was made for allowing QBE to intervene in the proceedings or to take over the conduct of the defence. This direction was not made on the application of QBE. Indeed, earlier, on 16 July 2014, by a letter sent by their solicitors to the claimants' solicitors, QBE indicated that it declined to participate in the proceedings because it did not consider itself to be liable to indemnify Target under the Policy.

22. On 28 January 2015 the claimants' solicitors wrote to the FSCS referring to the proceedings against Target, with the intention to pursue Target's insurers (QBE). The claimants' solicitors stated that: "Our clients have received some compensation from FSCS. Our understanding is that our clients' claims or the relevant parts have passed to the FSCS. Accordingly, we would be grateful if the FSCS would agree to be added as a Claimant to the proceedings". On 29 January 2015 FSCS replied that it would not consent to be joined as a claimant to the proceedings, but added: "we would look at reassigning the claimants' rights against the firm, so that you can continue the litigation without further notice to FSCS. There would be a stipulation, if the reassignment was agreed, that the amount FSCS has paid to your clients as compensation must form part of their claim in the litigation, and that you must account to FSCS for any recovery made from the defendant".

23. Following further exchanges, on 2 February 2015 the FSCS wrote to the claimants' solicitors attaching a copy of the assignment that the claimants had signed and a copy of the

standard reassignment. The FSCS asked the claimants' solicitors whether they wished the FSCS to issue a reassignment for the claimants.

24. On 16 February 2015 the court entered judgment against Target in favour of the claimants in the sum of £197,698.05, plus interest.

25. By a letter dated 1 November 2016 to the FSCS, the claimants' solicitors referred to the judgment obtained against Target and requested the FSCS to "assign the rights [against Target] back to our client with immediate effect", and further stated that the FSCS was obliged to re-assign these rights pursuant to COMP 7.4.2R of the FCA Handbook. COMP 7.4.2R provides that: "If the FSCS decides not to pursue such recoveries and a claimant wishes to pursue those recoveries himself and so requests in writing, the FSCS must comply with that request and assign the rights back to the claimant". There is a similar provision in COMP 7.2.3R. That said, the copy of the FCA Handbook which had been exhibited to Mr Greene's witness statement was dated August 2017 and had undergone a number of amendments; it was unclear to me which provisions of the FSA/FCA Handbook at a particular time were relevant to this dispute.

26. No evidence has been adduced that a further reassignment was in fact effected.

The FSCS terms of compensation

27. The FSCS was established under Part XV of the Financial Services and Markets Act 2000. The operation of the FSCS as a scheme of compensation is set out in the FSCS website which was exhibited to the first witness statement of Mr Simon Beckwith dated 13 July 2017, served on behalf of QBE.

28. The FSCS operates when an authorised firm goes out of business and is considered by the FSCS to be unable, or likely to be unable, to pay claims made against it. The FSCS website states that: "This will generally be because the firm has stopped trading and has insufficient assets to meet claims, or is insolvent". In that event, the FSCS will declare the firm to be "in default". In the event of a declared default, customers may make claims for compensation under the FSCS.

29. The FSCS will review the claim and will award compensation if the customer's complaint (eg based on an allegation of negligence) is upheld. If the FSCS decides to pay compensation, it requires the claimant to agree to the terms of payment.

30. The FSCS website sets out the terms of payment in the following terms:

"Please note that under this agreement you agree to assign certain of your rights to FSCS. In the event FSCS decides not to pursue recoveries using those rights, then it will, if you request so in writing, reassign those rights back to you.

By accepting payment of the compensation offered by FSCS in respect of an investment firm ('the Firm') in FSCS 'default' as set out in the letter which you have received FSCS in relation to that Firm, you agree and acknowledge as follows ..."

31. There then follow a number of provisions which are set out in substantially the same terms in the application form for compensation filed by the applicant.

32. In signing and lodging its application for compensation to the FSCS, the claimants agreed to the terms of payment of compensation which were set out in section K of the application form. This is evident from the Declaration in section J of the application form signed by the claimants:

"I/we understand that FSCS will, on paying any compensation to me/us, take over my/our rights and claims against the Firm and against any other party in accordance with the terms of my/our agreement and acknowledgement contained in Section K of this document, and that thereafter I/we will be entitled only to the benefit of those rights and claims that may be specified in Section K."

33. Section K of the application form provided that:

"The losses arising as a result of protected business with the Firm ('the Claim').

If FSCS finds my claim eligible, sends me a compensation payment, and I do not return that payment as specified in the payment letter, I agree and acknowledge as follows:

1. I will accept the offer of compensation in full and final discharge and settlement of the obligations of FSCS, under the relevant rules and laws. I understand that any compensation is payable by FSCS to fulfil my entitlement to compensation from FSCS in respect of the Claim.

2. All my rights against the Firm in respect of the Claim will pass and be assigned to FSCS absolutely on payment of compensation (or any part of it)

3. All my rights against any other person which constitute a Third Party Claim as defined in paragraph 12 below will pass and be assigned to FSCS absolutely on payment of compensation (or any part of it).

4. On payment of compensation (or any part of it) I will no longer have the right to make any claim against the Firm or any other body in respect of the Claim or a Third Party Claim, and that the right to make any such claims will be vested in FSCS. I further acknowledge that any sums that would otherwise be payable to you in respect of the Claim ... or a Third Party Claim will be paid instead to FSCS.

5. I will not exercise any right or remedy that I may have or retain against the Firm or any other person arising out of, or in connection with, the Claim or any Third Party Claim ...

6. If I recover any money or assets in respect of the Claim or in respect of a Third Party Claim, I will immediately pay or transfer it or them to FSCS ...

10. FSCS will conduct all proceedings and settlement negotiations regarding claims assigned by me reasonably and with due regard to my interests as well as its own ...

11. I will give such further help or authority that FSCS from time to time may require to give full effect to its taking over all rights and claims under and for the purposes of this agreement. If any assignment in this document is ineffective in law to pass any rights or claim to FSCS, then FSCS will be entitled to benefit from those rights or claims, and will be entitled to the proceeds of the Claim or any Third Party Claim. All such proceeds will be paid to FSCS.

12. In this document, 'Third Party Claim' means any right, claim or cause of action that I have against any other person than the Firm or against any fund or property in the hands of any person except the Firm and arising out of the circumstances giving rise to the Claim or otherwise relating to the Claim, whether such claims shall arise in debt, breach of contract, tort, breach of trust or in any other way ..."

34. The assignment of rights of action to the FSCS is recognised in the FCA Handbook, COMP 7: "Assignment or subrogation of rights". COMP 7.1.3R provided that: "The FSCS may (and in some cases must) make an offer of compensation conditional on the assignment of rights to it by a claimant ...". Similarly, COMP 7.2.1R provided that: "The FSCS may make any payment of compensation to a claim in respect of any protected claim conditional on the claimant assigning the whole or any part of his rights against any one or more of the relevant person, any third party, or, where appropriate, a successor, to the FSCS on such terms as the FSCS thinks fit". COMP 7.2.2R provided that: "If a claimant assigns the whole or any part of his rights against any person to the FSCS as a condition of payment, the effect of this is that any sum payable in relation to the rights so assigned will be payable to the FSCS and not the claimant".

The claimants' claim against QBE

35. In August 2016 the claimants instituted proceedings against QBE, as Target's indemnity insurers, seeking relief directly against QBE pursuant to the Third Parties (Rights Against Insurers) Act 1930 by reason of the fact that Target's liability to the claimants had been established by the court's judgment dated 16 February 2015 and by reason of the fact that Target had been placed into liquidation.

36. By reason of the 1930 Act, such rights of indemnity which Target had against QBE in respect of Target's liability to the claimants were assigned or transferred to the claimants. This means that if QBE would have been obliged to indemnify Target under the Policy in respect of its liability to the claimants, QBE was now obliged to pay any such indemnity to the claimants.

37. However, the claimants' rights against QBE are only as good as Target's rights would have been against QBE. In other words, if QBE had a defence to any claim which might have been made by Target, QBE is entitled to rely on that defence against the claimants.

38. QBE defends the claim brought by the claimants against it on two principal grounds which are relevant to the current application. First, the claimants' claim against Target and/or Target's liability to the claimants and/or the relevant losses were excluded from cover pursuant to clause 2.4.17 of the Policy issued by QBE (the Insolvency Exclusion, quoted below).

39. Secondly, even though the claimants obtained judgment against Target, in fact Target had no liability to the claimants in respect of the Keydata Bond, because such rights which the claimants had against Target had been assigned to the FSCS and had not been reassigned at any relevant time. This defence applies only in respect of the Keydata Bond and does not apply in respect of the Meteor Plan, because the FSCS had made no compensation payment to the claimants in relation to the Meteor Plan.

40. The claimants dispute that QBE is entitled to defend the claim on either of these grounds.

The Policy

41. Under the Policy issued by QBE in favour of Target, the period of the insurance was from 20 February 2009 to 19 August 2010. The relevant limit of liability under the Policy was £1,500,000 any one claim and in the aggregate.

42. The Policy contained the following provisions:

"2 Insured section - Professional Liability

2.1 Professional liability cover

2.1.1 **Civil liability**

The **Insurer** agrees to indemnify the **Insured** against legal liability to pay compensatory damages or awards (including where applicable claimants' legal costs and expenses but not including ombudsman awards) for any **claim** first made against the **Insured** during the **period of insurance** and notified to the **Insurer** in accordance with the terms of this **policy**, in respect of any civil liability for breach of applicable **FSA** rules/regulations or other common law duty incurred:

(a) by the Insured in the conduct of the financial services practice;

(b) by the Insured in the conduct of the financial services practice arising from any act, error or omission committed or alleged to have been committed by any consultant, sub-contractor appointed representative or agent for whose acts, errors or omissions the Insured is legally liable ...

2.3 Professional liability extensions

2.3.2 Fidelity

The **Insurer** will indemnify the **Insured** for any loss up to the amount shown in the **schedule** as the **limit of indemnity** in the aggregate during the **period of insurance** against loss of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes owned or leased by the **Insured** directly resulting from a **fraudulent act** first discovered and notified to the **Insurer** during the **period of insurance** in connection with **financial services practice** ...

2.4 Professional liability limitations and exclusions

This **Insured section** excludes and does not cover any **claims**, liability, loss, costs or expenses: ...

2.4.17 **Insolvency**

arising out of or relating directly or indirectly to the insolvency or bankruptcy of the **Insured** or of any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the **Insured** has arranged directly or indirectly any insurances, investments or deposits ..."

43. The Policy was itself a renewal of an earlier policy issued by QBE in favour of Target ("the Expiring Policy"). The Expiring Policy included similar insuring provisions and an Insolvency exclusion clause, which provided that:

"QBE shall have no liability under this Policy in respect of any Claim or loss: ...

INSOLVENCY

2.6 directly or indirectly arising out of, or in any way involving the insolvency of any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the Insured has advised or arranged, directly or indirectly, any insurances, investments or deposits unless the Claim or loss arises directly from Legal Liability from the Insured's advising or arranging of insurances, investments or deposits with the particular entity or entities set out above."

44. The claimants emphasise that the Policy was issued against a particular regulatory background, namely that Target was required to maintain minimum levels of professional indemnity insurance in compliance with the FSA Handbook, chapter 13 of the Interim Prudential Sourcebook for Investment Businesses ("IPRU (INV)") (November 2007). In particular:

(1) IPRU (INV) 13.1.4(1) required Target to take out and maintain at all times professional indemnity insurance that is at least equal to the requirements set out in IPRU (INV) 13.1.4(2) to (15).

(2) IPRU (INV) 13.1.4(2) provided that the policy must incorporate terms which are appropriate and must make provision for cover in respect of any claim for loss or damage, for which Target may be liable as a result of an act or omission by Target or any person acting on behalf of Target including employees, appointed representatives or its other agents.

(3) IPRU (INV) 13.1.4(8) provided that the policy must not be subject to conditions or exclusions which unreasonably limit the cover provided for in IPRU (INV) 13.1.4(2) (whether by exclusion of cover, by policy excesses or otherwise).

(4) IPRU (INV) 13.1.4(10) provided that the policy should not exclude any type of business or activity that has been carried out by the firm in the past or will be carried out by the firm during the time for which the policy is in force.

QBE's application for summary judgment or strike out

45. QBE applies for summary judgment dismissing the claim pursuant to CPR 24.2(a)(i) or an order striking out the claim on the ground that the claim form and the particulars of claim disclose no reasonable grounds for bringing the claim pursuant to CPR 3.4(2)(a).

46. I understood that QBE's primary application was for summary judgment. Pursuant to CPR 24.2(a)(i), the court may grant summary judgment against a claimant if it considers that the claimant has no real prospect of succeeding on the claim. This means that in order to avoid summary judgment, the claim must have a realistic, and not merely a fanciful, prospect of success. The prospect of success may be analysed by scrutiny of the evidence before the court at the hearing of the application for summary judgment.

47. At a hearing of a summary judgment application, the court may determine discrete issues of law or contractual construction. In *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at para 15, Lewison J summarised the principles governing the court's approach to an application for summary judgment. As to the determination of a point of law or construction, Lewison J said:

"... 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 Limited* [2007] EWCA Civ 725."

48. I note that, in *TFL Management Services Ltd v Lloyds TSB Bank plc* [2014] 1 WLR 2006, at paras 26 to 27, Floyd LJ having quoted Lewison J's approach, made the following additional observation:

"The court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action ... Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; ... Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy ..."

49. Of course, the burden is on QBE to establish that the claimants have no real prospect of succeeding at trial and there is no other compelling reason to proceed to trial.

50. The two grounds relied on by QBE in support of its application are:

(1) The application of the Insolvency Exclusion in clause 2.4.17 of the Policy.

(2) Target was not liable to the claimants in respect of the Keydata Bond, because the claimants had assigned their rights of action against Target to the FSCS.

51. In his skeleton argument on behalf of the claimants, Mr Donald Lilly accepted that these issues were capable of summary determination: "The Claimants' primary contention that is on both grounds for which the Defendant claims summary judgment, the issues can and should be decided on a summary basis in favour of the Claimants". However, Mr Lilly added that if the court were in doubt as to the correctness of the claimants' position on these issues, this is not an appropriate case for summary judgment, because there are factual matters relating to the issues which should be explored at trial, in particular:

(1) The nature and extent to which QBE represented that the Policy was compatible with Target's professional indemnity insurance obligations under the (then) FSA Handbook.

(2) Whether and to what extent QBE drew to Target's attention the change in wording in the Insolvency Exclusion as between the Expiring Policy and the Policy under which the claimants' claim is made.

(3) Whether the FSCS would contest or support the claimants' position that they held the relevant rights against Target when the claimants commenced proceedings against Target in 2014.

The Insolvency Exclusion

52. QBE accepts that, but for the two grounds of defence relied on by QBE, the claimants' claim against Target falls within the scope of the insuring provision in clause 2.1.1 of the Policy (para 48 of QBE's skeleton argument).

53. The Insolvency Exclusion provides that:

"This **Insured section** excludes and does not cover any **claims**, liability, loss, costs or expenses: ... arising out of or relating directly or indirectly to the insolvency or bankruptcy of the **Insured** or of any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the **Insured** has arranged directly or indirectly any insurances, investments or deposits ..."

54. Mr Tony Singla, acting for QBE, submitted that the Insolvency Exclusion applies to the claimants' claim against Target for the following reasons:

(1) For the Insolvency Exclusion to apply, the relevant insolvency must be a cause of the relevant claim, liability or loss, but need not be a proximate cause.

(2) The scope of the Insolvency Exclusion makes commercial sense against the backdrop of the 2008 financial crisis following the collapse of Lehman. A professional indemnity insurer would have wanted, in this economic environment, to adopt a cautious approach and exclude cover for claims arising out of or relating to the insolvency of financial institutions with whom Target arranged investments.

(3) The change in the wording of the Insolvency Exclusion from that in the Expiring Policy to that in the Policy is significant demonstrating the parties' contractual intention.

(4) The relevant claim, liability or loss was caused, as regards the Keydata Bond, by the insolvency of Keydata and SLS and, as regards the Meteor Plan, by the insolvency of Lehman.

55. Mr Donald Lilly, acting for the claimants, submitted that the Insolvency Exclusion does not apply to the claimants' claim against Target for the following reasons:

(1) The Insolvency Exclusion does not apply to negligent advice given by Target.

(2) The Insolvency Exclusion applies only in respect of investments made by Target for itself and not investments made by Target on behalf of its customers.

(3) If the Insolvency Exclusion does apply in respect of investments made by Target on behalf of its customers and even if it was the result of negligent advice, the Policy creates an "uncommercial and arbitrary division between advice given in respect of different forms of investment". In respect of certain investments, such as corporate bonds, provided that the issuer honours its obligations under the bond, the only realistic loss which an investor will suffer will be non-payment arising by reason of insolvency on the part of the issuer. If QBE's construction is right, argue the claimants: "This has the effect of excluding wide tracts of ubiquitous financial business from the scope of the Policy; something the parties to the Policy could not have intended".

(4) The purpose of the Policy is to provide professional indemnity insurance to what was an FSA-regulated body. Under the provisions of the FSA Handbook, chapter 13 of IPRU (referred to above), Target was obliged to maintain minimum levels of professional indemnity insurance. In particular, IPRU (INV) 13.1.4(10) provided that the policy should not exclude any type of business or activity that has been carried out by the firm in the past or will be carried out by the firm during the time for which the policy is in force.

(5) As regards the change in the Insolvency Exclusion wording between the Expiring Policy and the Policy, there is no evidence that this was brought to the attention of Target.

(6) Even if QBE's construction were correct, the Insolvency Exclusion does not apply to the claim relating to the Keydata Bond, because the word "insolvency" in the Exclusion must be construed as referring to a formal insolvency process, such as a liquidation, and because Keydata defaulted on the Keydata Bond six days before being placed in administration. In their skeleton argument, the claimants accept that: "If 'insolvency' under the Insolvency Exclusion Clause is to be construed as an 'act of insolvency' (ie Keydata being unable to pay its debts as they fall due), then there is nothing to the point". I understand from this that the claimants' pleaded position that the loss in respect of the Keydata Bond and the Meteor Plan was caused by Target's negligent advice and not by a relevant insolvency (para 21.1 of the particulars of claim) is no longer maintained. I also understand that the claimants accept that, if QBE's construction of the Insolvency Exclusion is correct, it applies in respect of Target's liability for the Meteor Plan. Nevertheless, in case I am mistaken, I will address the issue of causation below.

<u>The principles governing the construction of the Insolvency Exclusion</u>

56. The Insolvency Exclusion is one provision of a contract of insurance. The principles of contractual interpretation have been well rehearsed. Mr Singla for QBE relied on Lord Neuberger's statement of principle in *Arnold v Britton* [2015] AC 1619, at para 15:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

57. Of course, as Mr Lilly on behalf of the claimants stated, if something has gone wrong with the language, the law could not require the court to attribute to the parties an intention which a reasonable person could not have understood the parties to have had (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14). Indeed, where there are two competing constructions of a contractual provision, the court should adopt that construction which is more consistent with business common sense (*Rainy Sky SA v Kookmin Bank* [2012] 1 Lloyd's Rep 34; [2011] 1 WLR 2900). In *Wood v Capita Insurance Services Ltd* [2018] Lloyd's Rep Plus 13; [2017] 2 WLR 1095, at paras 10 to 15, Lord Hodge JSC explained how the court's approach to contractual construction has not essentially changed over recent years.

58. I do not think that the parties disagreed about the general principles of contractual construction. However, there was a divergence in the parties' positions with respect to the approach to construing insurance exclusions.

59. Mr Lilly submitted that an insurance exclusion had to be clear and unambiguous and that the principles governing the construction of exemption provisions in ordinary contracts apply to insurance exclusions. To this end, he argued that in order for an insurance exclusion clause to exclude negligence from cover, it should make express reference to negligence, adopting the court's approach to the construction of exemption clauses set out in decisions such as *Canada Steamship Lines Ltd v The King* [1952] AC 192, page 208 and *Dorset County Council v Southern Felt Roofing Co Ltd* (1990) 48 BLR 96. Further, Mr Lilly submitted, the exclusion clause must be construed on the understanding that a party to a contract will not be taken to have surrendered valuable rights unless the wording of the relevant provision is sufficiently clear (relying on *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, pages 850 to 851 and *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] 1 Lloyd's Rep 461, para 23).

60. However, I am not aware of any authority where the *Canada Steamship* line of authority has been applied to an insurance contract. Nor was Mr Lilly able to identify any such authority. I suspect that this is for good reason, because these authorities are concerned with contractual attempts to exclude, restrict or limit primary liability which a party in breach of contract or guilty of tortious conduct would otherwise bear. The position in respect of insurance contracts is wholly distinguishable in that an exclusion clause in an insurance policy is not designed to exclude, restrict or limit a primary liability on the part of the insurer; instead, it is intended to define the risk which the insurer is prepared to accept by way of the insurance contract. Further, the exclusion clause in an insurance policy does not ordinarily operate to deprive the insured of rights which existed prior to or but for the cover afforded by the Policy.

61. Another way of expressing Mr Lilly's submission is to adopt what is in essence a contra proferentem approach, namely that in the case of ambiguity the construction which is more favourable to the insured should be adopted. Indeed, this was the approach adopted by the Court of Appeal in *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, page 456 and in *Blackburn Rovers Football & Athletic Club plc v Avon Insurance plc* [2005] Lloyd's Rep IR 447, para 9.

62. However, this wholesale approach to the construction of insurance exclusions has been called into question by the Supreme Court's judgment in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] Lloyd's Rep IR 60. In that case, the court construed an exclusion in a solicitors' professional liability insurance policy which excluded cover for "loss in connection with any claim or any loss ... arising out of, based upon, or attributable to any ... (ii) breach by any insured of terms of any contract or arrangement for the supply to, or use by, any insured of goods or services in the course of providing legal services ...". The issue before the Supreme Court was whether this exclusion clause excluded cover in respect of the insured solicitors' liability to a loan company who advanced funds to the solicitors' client which could be drawn down by the solicitors in the conduct of litigation on behalf of that client, but in respect of which the solicitors assumed a personal liability to the loan company in the event that the solicitors failed to discharge their professional duties to the client. The court held that the exclusion clause applied.

63. In reaching this decision, the court explained the approach to construing insurance exclusions. At paras 5 to 7, Lord Hodge JSC (with whom the majority agreed) said:

"In determining the appeal, the court has, first, to construe the relevant terms of the policy against its factual matrix ... This approach to construction is well established. The court looks to the meaning of the relevant words in their documentary, factual and commercial context: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, para 21, per Lord Clarke of Stone-cum-Ebony JSC; *Arnold v Britton* [2015] AC 1619, para 15, per Lord Neuberger of Abbotsbury PSC. As I see no ambiguity in the way that the policy defined its cover and as the exclusion clause reflected what The Law Society of England and Wales as the regulator of the solicitors' profession had authorised as a limitation of professional indemnity cover, I see no role in this case for the doctrine of interpretation contra proferentem ... The extent of AIG's liability is a matter of contract and is ascertained by reading together the statement of cover and the exclusions in the policy. An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly. The judgment of Carnwath LJ in *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2006] Lloyd's Rep IR 38, to which counsel for Impact referred, is an example of that approach. But the general doctrine, to which counsel also referred, that exemption clauses should be construed narrowly, has no application to the relevant exclusion in this policy. An exemption clause, to which that doctrine applies, excludes or limits a legal liability which arises by operation of law, such as liability for negligence or liability in contract arising by implication of law: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, page 850, per Lord Diplock. The relevant exclusion clause in this policy is not of that nature. The extent of the cover in the policy is therefore ascertained by construction of all its relevant terms without recourse to a doctrine relating to exemption clauses."

64. To a similar effect was the judgment of Lord Toulson JSC, with whom the majority also agreed. At para 35, his Lordship said:

"The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed: see, among many authorities, *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] 2 Lloyd's Rep 647; [2005] 1 WLR 215, para 12, per Lord Bingham of Cornhill. This applies not only where the words of exception remove a remedy for breach, but where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation."

65. In my judgment, applying this approach, the court must adopt an approach to the interpretation of insurance exclusions which is sensitive to their purpose and place in the insurance contract. The court should not adopt principles of construction which are appropriate to exemption clauses – ie provisions which are designed to relieve a party otherwise liable for breach of contract or in tort of that liability – to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford. To this end, the court should not automatically apply a contra proferentem approach to construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the court would be entitled to opt for the narrower construction. This result may be achieved not only by the applicable of the contra proferentem approach, but also the approach adopted by Lord Clarke JSC in *Rainy Sky SA v Kookmin Bank*, that in the case of ambiguity, the court may opt for the more commercially sensible construction, at para 21: "If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". That said, as Lord Clarke JSC also said, at para 23 of his judgment: "Where the parties have used unambiguous language, the court must apply it". This would, however, be subject to considerations of absurdity or where something plainly has gone wrong with the language of the contract.

<u>The construction of the Insolvency Exclusion</u>

66. As apparent from the parties' submissions summarised above, there are two competing constructions advanced by the parties:

(1) QBE contends that the Insolvency Exclusion applies if the insolvency of Keydata or SLS (in respect of the Keydata Bond) or Lehman (in respect of the Meteor Plan) is a cause, even if not a proximate cause, of the relevant claim, liability or loss.

(2) The claimants contend that the Insolvency Exclusion applies only if: (a) there has been a non-negligent act, error or omission giving rise to Target's liability; and/or (b) Target arranged an insurance, investment or deposit with the insolvent business, firm or company on its behalf and not on behalf of its customers; and/or (c) the relevant insolvency is a formal insolvency process, rather than an inability to pay one's debts as they fall due.

67. Both parties point to the commercial sense of their competing constructions. QBE refers to the reasons for caution in respect of insolvency immediately following the financial crisis in 2008. The claimants refer to the regulatory background which required Target to maintain professional indemnity insurance and which, in particular, should not exclude any type of business or activity carried out by Target at the material time, and argue that if the Insolvency Exclusion were construed as QBE suggests, "wide tracts of ubiquitous financial business" would be excluded from the scope of the Policy.

68. I begin by observing that the language of the Insolvency Exclusion is relatively clear. According to its terms, the Insolvency Exclusion excludes from cover any claim, liability or loss "arising out of or relating directly or indirectly to the insolvency or bankruptcy" of Target or any business, firm or company with whom Target has arranged – directly or indirectly – any insurance, investment or deposit.

69.. Mr Singla's principal submission was that if the relevant insolvency were a cause of the claim, liability or loss, whether or not it was a proximate cause, that would be sufficient to engage the Insolvency Exclusion. For this purpose, Mr Singla relied on the words "directly or indirectly" which, he said, qualified the words "arising out of". However, I think those words qualify "relating ... to", given that they are embedded in that phrase and not in the phrase "arising out of".

70. That said, it seems to me that the undeniable sense of these words is to emphasise that the causative effect of the relevant insolvency need not be as strong or efficient so as to

constitute a proximate cause. I come to this conclusion for two principal reasons. First, the Insolvency Exclusion does not limit itself to a single causative link, eg "caused by" (which is usually construed as requiring a proximate cause) or "arising out of" (which has been variously construed as requiring a proximate cause or some lesser causative connection). Instead, the Insolvency Exclusion uses two differently expressed causative links, namely "arising out of" and "relating ... to". Indeed the latter descriptive link may be construed in some instances as requiring a mere connection or relation, by way of a common causal history, but that is not suggested in this case. If the intention had been to import a requirement of a proximate cause, the Insolvency Exclusion would not have used both of these expressions.

71. Secondly, the use of the words "directly or indirectly" plainly indicates that the causative link may be more remote than a proximate cause. There has been a sound tradition in attributing to the word "indirectly" a sense which reduces the causative effect of the specified excluded peril downwards from a proximate cause. In *Coxe v Employers' Liability Assurance Corporation Ltd* [1916] 2 KB 629, Scrutton J said:

"the words which I find it impossible to escape from are 'directly or indirectly'. There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim causa proxima non remota spectatur. If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words is that the maxim causa proxima non remota spectatur is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause. But a line must be drawn somewhere ..."

72. I asked Mr Singla whether it was sufficient for the insolvency to be a mere cause or whether it needed to be a significant or strong cause, albeit not so significant or strong as to amount to a proximate cause. I had in mind the construction adopted in *Beazley Underwriting Ltd v The Travelers Companies Inc* [2012] Lloyd's Rep IR 78, at paras 128 to 130, by Christopher Clarke J, who said that: "I am prepared to accept that 'arising out of' ... does not dictate a proximate cause test and that a somewhat weaker causal connection is allowed ... That does not, however, determine what degree of causal connection is required ... In my judgment a relatively strong degree of causal connection is required". Mr Singla submitted that the insolvency needed to be a mere cause, but it was insufficient if the insolvency was merely the historical context or background (relying on Cooke J's construction in *ARC Capital Partners Ltd v Brit UW Ltd* [2016] Lloyd's Rep IR 253, at para 27). It may be a matter of semantics, but, like Scrutton J, I think that a line must be drawn somewhere (see also Mustill J's comments in *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406, page 441). I consider that for the Insolvency Exclusion to apply, it must be specifically accountable as a cause of the claim, liability or loss: in this sense, it must be significant; it must stand out as a contributing factor, at least, to the claim, liability or loss.

73. The question then arises whether the Insolvency Exclusion imports any or all of the three limitations submitted by Mr Lilly for the claimants. As to Mr Lilly's submitted construction requiring the Exclusion to apply only to non-negligent acts, errors or omissions. As explained above, there is no reason why the court should be predisposed to giving the Insolvency Exclusion a narrow construction merely because it is an insurance exclusion. Further, the *Canada Steamship* line of authorities is not applicable to the construction of an insurance exclusion. Nevertheless, I recognise that the Exclusion is potentially of wide effect. Even Mr Singla for QBE recognised the "very broad width of the clause" (para 55 of his skeleton argument). Accordingly, if there is any ambiguity, the court should be alert to the commercial purport and effect of the exclusion in construing it.

74. However, I do not think there is any genuine ambiguity. Moreover, I think it highly unlikely that the parties could have intended to limit the Insolvency Exclusion to non-negligent acts, errors or omissions for two reasons. First, there is no suggestion in the language of the provision that it is so limited. The insuring provision in clause 2.1.1 provides cover for civil liability for both negligent and non-negligent acts, errors and omissions. Further, clause 2.4 of the Policy which sets out the policy exclusions begins by providing that "This **Insured section** excludes and does not cover any **claims**, liability, loss, costs or expenses ...", before specifying the individual exclusions. In so doing, it makes it clear that any claim, liability or loss which otherwise falls within the scope of the insuring provision – which may be based on negligent or non-negligent liability – may be removed from the scope of cover by an applicable exclusion. Secondly, the claimants' construction in this respect would have an odd effect in that there would be cover for negligent conduct (which in theory Target as the insured would have been able to take steps to control) but there would be no cover for non-negligent conduct (which Target would have less opportunity to control). I do not consider that such a limitation had been intended by the parties to the insurance contract.

75. I therefore reject the first of the claimants' constructions in extending the Insolvency Exclusion only to non-negligent acts, errors or omissions.

76. As to Mr Lilly's submitted construction that the Insolvency Exclusion is limited to the insolvency of a business, firm or company with whom the insured has arranged insurances, investments or deposits on its behalf and that the Insolvency Exclusion does not apply where such insurances, investments or deposits have been arranged by Target on behalf of its customers. In answer to the obvious point that the Insolvency Exclusion is not limited to claims for first-party losses because this is a professional indemnity policy which is predicated on the

incurring of liability in the provision of financial services to the insured's customers, Mr Lilly referred to the fact that by way of an extension under the Policy, there was cover for first-party loss under the Fidelity cover under clause 2.3.2. In addition to this, Mr Lilly also posited the example of Target arranging an insurance, investment or deposit in its capacity as a trustee for a customer. Mr Lilly's primary submission was that the Insolvency Exclusion applied only if it invested its own money, and not the money of its customers.

77. I did not find this construction convincing for two reasons. First, there is no explicit – or even implicit – indication in the Insolvency Exclusion that it applies only to insurances, investments and deposits arranged by Target on its own behalf. Indeed, the word "arranged" carries with it the suggestion that Target is placing the insurance, investment or deposit on behalf of someone else. Secondly, although there is an extension for first-party fidelity losses, this is principally a third party professional liability policy, albeit with first-party loss cover afforded by way of an extension. The opening words of clause 2.4 to which the Insolvency Exclusion related makes it clear that it applies to claims and liabilities, as well as losses, which can be relevant only in the context of the liability cover.

78. There is an additional reason for this construction which reinforces my conclusion. The Expiring Policy included an insolvency exclusion in materially different terms, which excluded cover for any claim or loss "directly or indirectly arising out of, or in any way involving the insolvency of any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the Insured has advised or arranged, directly or indirectly, any insurances, investments or deposits unless the Claim or loss arises directly from Legal Liability from the Insured's advising or arranging of insurances, investments or deposits with the particular entity or entities set out above". The Insolvency Exclusion in the Policy differs from that in the Expiring Policy in at least four respects: (a) the opening words have been extended to include "liability", as well as claims and losses; (b) the causal connection required is differently expressed, but still in broad terms connoting something less than a proximate cause; (c) the Expiring Policy excludes cover in cases where the insured has "advised or arranged" the insurance, investment or deposit, whereas the Insolvency Exclusion in the Policy excludes cover only where the insured has "arranged" the insurance, investment or deposit; and (d) there is an exception to the exclusion in the Expiring Policy, namely where "the Claim or loss arises directly from Legal Liability from the Insured's advising or arranging of insurances, investments or deposits with the particular [insolvent] entity or entities". This means that if the claim or loss arose "directly" from the insured's legal liability, there would have been cover under the Expiring Policy. There is no such exception in the Insolvency Exclusion in the Policy.

79. Of these differences, I think it is significant that the Insolvency Exclusion in the Policy is limited to insurances, investments and deposits which Target as the insured has "arranged", and does not extend to those insurances, investments and deposits as to which it has only advised, and that it no longer includes the exception, indicating that the main part of the Insolvency Exclusion embraces insurance, investments and deposits arranged by Target on behalf of its customers. This seems to underline the interpretation I have adopted above, namely that there will be no cover under the Policy in respect of liability relating to investments which Target has arranged for its customers by reason of the insolvency of the relevant institution. The court is entitled to take into account the Expiring Policy, being an antecedent agreement between the same parties, as an aid to construction of the Policy (see *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161, paras 83 to 84; *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2007] EWHC 145 (TCC), para 150). In any event, I make it clear that even if I did not take into account the differences with the Expiring Policy, I would have adopted the same construction.

80. Mr Lilly, however, disputes that the court should have regard to the Expiring Policy in this respect, because there is no evidence that the change in the wording of the Insolvency Exclusion was ever brought to the attention of Target. It is true to say that there is no evidence as to whether the alteration was or was not brought to Target's attention. However, I do not think that is a material consideration. It might have been relevant if the relevant wording was incorporated into the Policy and the Expiring Policy by reference to external standard terms and conditions which were not set out in the policy document. However, both generations of the relevant exclusion were set out in the contractual document and were not incorporated by reference. In those circumstances, the court is entitled to assume that the parties to the contract – both insurer and insured – have read those terms and therefore would have been aware of the difference (*Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511, para 43). This is especially so where the insured, as in this case, was represented by a professional insurance broker.

81. As to Mr Lilly's third construction, namely that an "insolvency" must refer to a formal insolvency process, such as a liquidation, rather than an inability to pay one's debts as they fall due whether or not there is a formal insolvency process. In support of this submission, Mr Lilly refers to the fact that the Insolvency Exclusion refers to both a "bankruptcy" and an "insolvency", which correlate to a formal declaration of insolvency in respect of individuals and companies respectively. This submission is relevant only in respect of the Keydata Bond (as discussed below). I do not accept this submission, because: (a) in dealing with commercial contracts, such as insurance contracts, the court will have regard to the ordinary business meaning of the words used, rather than a technical legal definition which would not be uppermost in the mind of the parties (*Spinney's (1948) Ltd v Royal Insurance Co Ltd*, pages 428 to 429); (b) there is no good reason why the exclusion should be limited in its effect only to such time as there is a formal insolvency process in place, given that the mischief which is

sought to be excluded is the insolvency (ie the inability to pay debts) itself, which would ordinarily pre-dates any formal process; (c) the use of the word "bankruptcy" is used in the same general sense; and (d) if it were intended that the Insolvency Exclusion would apply only to formal insolvency processes, I would have expected the clause to define "insolvency" accordingly or at least refer to a "liquidation", an "administration" and the like.

82. I have reached these conclusions as to the meaning of the Insolvency Exclusion principally by reference to the wording of the Insolvency Exclusion in the context of the placement of the Policy of this kind. I also consider that this construction makes sense commercially for the reason advanced by QBE.

83. There are two considerations I have not yet discussed, namely the submission by the claimants that: (1) this linguistic construction of the Insolvency Exclusion would operate to exclude "wide tracts of ubiquitous financial business" of the insured; and (2) the purpose of the Policy was to provide professional indemnity insurance to discharge Target's obligations to maintain such insurance under the FSA Handbook, chapter 13 of IPRU, bearing in mind that the Policy must not exclude any type of business or activity carried out by Target.

84. As to the first of these considerations, although I consider that the Insolvency Exclusion may have a broad effect, I do not think it is of such a nature as to leave the insured without substantial cover. The Insolvency Exclusion would not apply to cases where an insolvency has no causative effect on the claim, liability or loss or where there is no relevant insolvency. For example, there may still be indemnifiable claims, in the absence of insolvency as a relevant cause, where the returns are not as promised by Target, where the risks of an investment are not as identified by Target, where the contractual terms of the investment include unnecessarily onerous or harsh provisions, where the costs of the investment are higher than advised, or where Target's liability arises from advice rather than from arranging investments.

85. As to the second of these considerations, although the regulatory background is relevant, I do not think that the requirement to maintain professional indemnity insurance materially affects the construction of this exclusion for the following reasons: (a) there is no indication in the Policy itself that it was intended to discharge Target's regulatory obligations (at para 11 of his witness statement, Mr Greene on behalf of the claimants referred to the fact that the Policy uses the words "Financial Advisors" on its first page to support an inference that the Policy was marketed as being compliant with the relevant regulatory requirements for independent financial advisers, but I do not consider that there is justification for such an inference); (b) there is no evidence as to the circumstances surrounding the conclusion of this Policy that its purpose was to discharge Target's regulatory obligations; (c) it was incumbent on Target, not QBE, to ensure that Target obtained sufficient professional indemnity cover; and (d) IPRU (INV) 13.1.4(10) to which the claimants refer provided that the policy should not exclude any type of business or activity carried out by Target, but I do not consider that the Insolvency Exclusion excludes a "type of business or activity", but merely excludes a cause of a claim, liability or loss. Indeed, IPRU (INV) 13.1.4(8) explicitly refers to a professional indemnity policy containing exclusions and states that they should not be unreasonable. There is no evidence to suggest that the Insolvency Exclusion was unreasonable.

86. I would add that if either of these considerations were in fact material, I do not consider that they were sufficient to override the plain meaning I have ascribed to the Insolvency Exclusion. As I mentioned, the language of the Insolvency Exclusion is clear and unambiguous. In any event, I do not regard that meaning as lacking commercial justification.

87. Therefore, I accept QBE's construction of the Insolvency Exclusion and I do not accept the claimants' construction of that exclusion. That is, if the relevant claim, liability or loss was caused – even if not proximately – by the insolvency of the firm, business or company with whom Target arranged an insurance, investment or deposit, there is no cover under the Policy. The Insolvency Exclusion is not limited in effect in any of the ways submitted by the claimants.

<u>Does the Insolvency Exclusion apply on the facts of the case?</u>

88. The only cause of the loss associated with the Keydata Bond and Meteor Plan, and therefore the only cause of the resulting claim or liability, which has been identified by the parties is the insolvency of Keydata and SLS (in respect of the Keydata Bond) and the insolvency of Lehman (in respect of the Meteor Plan). Indeed, these events precipitated the claimants' losses.

89. I note that the claimants plead (at para 21.1 of the particulars of claim) that the cause of the claim, liability or loss was Target's negligence. Of course, any such negligence (or other act, error or omission) giving rise to a liability must exist for the Insolvency Exclusion even to be considered, because without such liability on the part of Target, there would be no prima facie cover under clause 2.1.1. The exclusions set out in clause 2.4 for the most part contemplate that there would be such negligence or other event giving rise to a liability before the exclusion will have to be applied. The question is, for the purposes of the Insolvency Exclusion, whether the relevant insolvency was a cause of the claim, liability or loss, even if it operates in combination with Target's own negligent liability.

90. In my judgment, the claim, liability or loss associated with the Keydata Bond was caused by the insolvency of Keydata and SLS and that the claim, liability or loss associated with the Meteor Plan was caused by the insolvency of Lehman, within the meaning of the Insolvency Exclusion. In each case, it was the inability of the Keydata, SLS and Lehman to pay their debts as they fell due which gave rise to the relevant claim, loss or liability. The claimants have no real prospect of contending otherwise.

91. Indeed, I did not understand Mr Lilly for the claimants to dispute such causation, save in respect of the Keydata Bond. Mr Lilly's argument in respect of the Keydata Bond did not concern

the question of factual causation, but as to the meaning of "insolvency". I would add that, even if Mr Lilly had been right to construe the reference to "insolvency" as a formal insolvency process, the fact that Keydata entered into administration six days after it defaulted on its obligations, that administration was sufficiently close in time to the original default as to amount to a relevant cause for the purposes of the Insolvency Exclusion.

92. In any event, at para 22 of their skeleton argument, the claimants accepted that "If "insolvency" under the Insolvency Exclusion is to be construed as an "act of insolvency" (ie Keydata being unable to pay its debts as they fall due), then there is nothing in this point". Given that I have rejected the claimants' construction of "insolvency", it follows that a cause of claim, liability or loss in respect of the Keydata Bond was Keydata's insolvency (or SLS's insolvency) within the meaning of the Insolvency Exclusion.

The effect of the assignment to the FSCS on Target's liability to the claimants

93. The second ground of QBE's application for summary judgment or strike out is relevant if the first ground based on the Insolvency Exclusion is not successful.

94. A critical element of any claim under a liability insurance policy is that the relevant liability to the third party to be indemnified must be ascertained or established, by judgment, award or agreement. I note that, under the Third Parties (Rights Against Insurers) Act 2010, there is an additional basis of ascertainment or establishment, namely by obtaining a declaration in proceedings against the insurer that the insured is liable to the third party (sections 1(4) and 2 (2)). However, the current claim is made under the 1930 Act. Target's liability to the claimants has been established by the judgment of the court entered on 16 February 2015.

95. QBE argues in support of its application for summary judgment that, notwithstanding that judgment, Target in fact bore no liability to the claimants in respect of the Keydata Bond because the claimants had assigned its rights of action to the FSCS. In addition, QBE argues that the claimants' proceedings against Target which resulted in that judgment were an abuse of process, because the claimants were aware that they had no right to commence proceedings against Target. These arguments apply only in respect of the claimants' claim relating to the Keydata Bond and not the Meteor Plan.

96. The claimants respond to QBE's arguments as follows: (a) the assignment of their rights of action against Target to the FSCS related only to such rights in respect of losses for which compensation was actually paid to the claimants; (b) the FSCS had acknowledged that the rights of action had been reassigned to the claimants; (c) even though there was no reassignment, the claimants were entitled to a reassignment and the FSCS was willing to effect such a reassignment, and the court is entitled to treat that as done which ought to have been done; and (d) it is not open to QBE to go behind the judgment establishing Target's liability to the claimants.

97. In order to consider this ground of QBE's application, the underlying facts surrounding the assignment of the claimants' rights of action against Target should be summarised. The facts are set out in more detail above. The pertinent facts are as follows:

(1) On 15 February 2011 the FSCS paid compensation to the claimants in the sum of £84,642.92 in respect of the Keydata Bond. By reason of having signed the application form for compensation, which included section K, the claimants agreed to the assignment to the FSCS of its rights of action against Target (as a third party) in respect of the Keydata Bond.

(2) On 16 August 2011 the FSCS and the Claimants concluded a reassignment agreement under which such rights against Target as were assigned to the FSCS were assigned back to the claimants.

(3) On 23 April 2013 the FSCS paid compensation to the Claimants in the sum of approximately £77,598.11 (including interest). In its letter informing the claimants of its decision, the FSCS stated that: "Your rights against the firm and any relevant third parties are also transferred to FSCS". The terms of the assignment were set out in section K of the claimants' application form.

(4) In May 2014 the claimants commenced proceedings against Target.

(5) On 29 January 2015 in response to the claimants' request that the FSCS join the proceedings which the claimants had instituted against Target as a claimant, the FSCS replied that it would not consent to be joined as a claimant to the proceedings, but added: "we would look at reassigning the claimants' rights against the firm, so that you can continue the litigation without further notice to FSCS". Following further exchanges, on 2 February 2015 the FSCS asked the claimants' solicitors whether they wished the FSCS to issue a reassignment for the claimants.

(6) On 16 February 2015 judgment was entered against Target in favour of the claimants.

(7) By a letter dated 1 November 2016, the claimants' solicitors requested the FSCS to "assign the rights [against Target] back to our client with immediate effect", and further stated that the FSCS was obliged to re-assign these rights pursuant to COMP 7.4.2R of the FCA Handbook.

(8) There is no evidence that a further reassignment agreement was in fact effected.

98. Therefore, although there was an assignment to the FSCS and a reassignment of the claimants' rights of action against Target in respect of the Keydata Bond in 2011, upon payment of further compensation by the FSCS in 2013, there was a further assignment by the claimants to the FSCS of their rights of action against Target. Although there were exchanges between the claimants and the FSCS as to a further reassignment, there is no evidence that such a reassignment was ever executed.

99. Against this background, the following issues arise:

(1) What was the nature and extent of the assignment of the rights of action to the FSCS?

(2) Had those rights been reassigned to the claimants? If not, is the court entitled to treat the reassignment as having been effected?

(3) Is it open to QBE to go behind the judgment and question Target's liability to the claimants?

The nature and extent of the assignment

100. The losses suffered by the claimants were quantified by the court's judgment dated 16 February 2015 in the sum of £197,698.05 in respect of both the Keydata Bond and the Meteor Plan. I am not aware how much of this quantified loss is attributable to the Keydata Bond.

101. The total losses suffered by the claimants relating to the Keydata Bond, according to the FSCS, were £162,233.11. Of this sum, the FSCS paid £84,642.92 to the claimants in 2011 and took an assignment of rights of action at that time and later, in 2013, the FSCS paid £77,598.11 (including interest) to the claimants, and again took an assignment.

102. On QBE's case, notwithstanding that the FSCS compensated the claimants for only a part of their loss, all of the claimants' rights of action against Target to the full extent of the loss suffered by the claimants were assigned to the FSCS. On the claimants' case, the original assignment was effective to assign to the FSCS the claimants' rights against Target to the extent of £84,642.92, but these rights were re-assigned to the claimants, and the later assignment to the FSCS was effective in respect of the rights of action against Target to the extent of £77,598.11.

103. QBE relied heavily on the language of the terms of the assignment (which are set out in section K of the application form for compensation) and the claimants, as well as relying on the language of the assignment, emphasised the purpose of the FSCS as a compensation scheme. Both parties also relied on post-assignment correspondence between the parties. However, I found such correspondence of less assistance and even wondered if the court should have regard to such correspondence in construing the terms of the assignment (in the absence of any pleaded contractual commitment or estoppel). In any event, I do not consider that such correspondence helped to determine the issue at hand.

104. The terms of assignment set out in section K of the FSCS application form, to which the claimants agreed, are quoted above. The terms of the assignment relevant to the extent of the assignment include the following: (a) clauses 1 and 2 refer to the transfer of "All my rights ... in respect of the Claim" against the relevant firm or third party; (b) clause 4 provides that on payment of compensation, the claimant (the applicant for compensation) will no longer have any right to make any claim against the relevant firm or third party in respect of the claim and the right to claim is vested in the FSCS; (c) clause 5 contains a promise by the claimant not to exercise any right or remedy against the firm or third party in respect of the claim; and (d) clause 6 provides that any funds received by the claimant in respect of the claim will be paid to the FSCS. Each of these provisions however depends on the meaning of "Claim" (which is also relevant to the definition of a "Third Party Claim"). Section K of the FSCS application form defines "Claim" to mean "The losses arising as a result of protected business with the Firm".

105. Having considered the parties' submissions, I reached a preliminary view about the construction of the FSCS terms of payment and the extent of the assignment. However, I do not think that I should express my view in this respect because I consider that there is further information which would be relevant to an analysis of the assignment which should be the subject of submissions before the court, not least all of the relevant provisions of the FSA/FCA Handbook COMP 7 which were in force at the relevant time. My reasons for declining to express any view are that I can see competing arguments in favour of each party's submitted construction. If QBE were right and the assignment related to the full extent of the claimants' loss, there must be a reason for such an assignment. To take an obvious example, if the claimant's total loss was £1 million, but received compensation to the extent of £50,000, there is no immediately obvious commercial or policy reason to justify the assignment to the FSCS of rights to claim £1 million. Indeed, as Mr Lilly submitted, the purpose of the FSCS must be to provide compensation for losses suffered by consumers by reason of wrongdoings carried out by a regulated firm. The operation of the assignment in the manner argued by QBE would seem, at first blush, to deprive the claimant of the right to compensation in excess of any payment received by the FSCS. That said, the position may well be different if there were an obligation on the part of the FSCS, in the event that it pursued the relevant firm or third party, to account to the claimant for any sums recovered in excess of the compensation paid to the claimant by the FSCS. I note that in the FCA Handbook (August 2017), there is such a provision at COMP 7.6.2R. Indeed, in *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc* [2009] Bus LR 465, David Richards, J referred (at para 43) to a similar provision in the FSA Handbook then before the court (COMP 7.2.3(3)R and 7.2.4R). These comments, however, ignore the terms of the assignment set out in section K of the FSCS application form. I note that, in addition to the terms referred to above, para10 of the terms in section K required the FSCS to conduct proceedings and settlement negotiations taking into account the claimant's interests.

106. As I did not hear full submissions on the purpose and remit of the FSCS and these provisions of the FSA/FCA Handbook (which has undergone amendment), I do not think that I can come to a concluded view on the extent of the assignment. In addition, this issue is complicated by the question whether or not the assignment was a legal assignment (pursuant to section 136 of the Law of Property Act 1925 or any other statute) or an equitable assignment. Such issues have a bearing on the claimants' title to sue. Although it was submitted that the

assignment was a legal assignment, I did not hear detailed submissions in this respect and so cannot come to concluded view.

Reassignment

107. As explained above, it seems clear that there was no actual re-assignment of the rights of action assigned to the FSCS in 2013 (unlike the rights which were assigned in February 2011 and were reassigned in August 2011).

108. The claimants relied upon an email dated 1 June 2017 from the FSCS to the claimants' solicitors stating that: "Your clients have already had their rights reassigned to them per the attached". The document attached, I understand from paras 19 to 21 of Mr Greene's witness statement, was a copy of the 2011 reassignment agreement. If so, I do not see that this justifies the assertion made by the FSCS in the email that the rights had been reassigned to the claimants as at 2017. Even though the FSCS and the claimants may have concurred in correspondence (short of a contractual agreement), it does not necessarily follow that the rights were in fact reassigned. In circumstances where there is no evidence of such a reassignment, it would be impossible to conclude that there had been such a reassignment.

109. That leaves the question whether the court should overlook any prima facie deficiencies in the claimants' title to sue in circumstances where: (a) the FSCS had decided not to pursue Target and the claimants were therefore entitled to a reassignment of the rights assigned to the FSCS; and (b) the claimants had subsequently requested a reassignment from the FSCS.

110. This issue raises further complex questions. I can see force in an argument that where, by reason of COMP 7.2.3R and/or 7.4.2R of the FCA Handbook, the claimants were entitled to a reassignment and such entitlement existed before judgment was entered by the court in favour of the claimants, the mere fact that the reassignment was sought afterwards might not ultimately affect the claimants' title to sue, if there had been an enforceable agreement to reassign. However, I prefer not to express any concluded views on this issue.

Is the judgment binding on QBE?

111. It is now well established that, although a judgment of the court may operate to ascertain or establish an insured's liability for the purposes of a liability insurance policy, the liability insurer is still entitled to question whether or not there was in fact a liability on the part of the insured to the third-party claimant and whether the real basis of any liability falls within the scope of the cover afforded by the liability insurance policy (*AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2014] Lloyd's Rep IR 509).

112. There are two situations, however, which occur to me in which the insurer might be bound by the judgment obtained by the third-party claimant against the insured, namely where: (1) the insurance policy contains an express or perhaps an implied term requiring the insurer to be bound by the judgment; and (2) where the insurer is a party or otherwise privy to the proceedings which resulted in the judgment.

113. In the present case, the claimants point out that QBE was given the opportunity to participate in the proceedings against Target, but declined to do so. QBE declined to participate, because it considered that it was under no liability to indemnify Target under the Policy. I do not consider that that is sufficient to prevent QBE from questioning the existence or nature of any liability on the part of Target to the claimants, even though that liability was ascertained or established by the judgment entered on 16 February 2015.

114. Finally, there remains the question whether the claimants are guilty of an abuse of process by reason of its proceedings against Target. However, having declined to determine a number of the issues referred to above, this is not an issue which can be resolved on a summary basis.

Should the court grant summary judgment or make a strike-out order?

115. I have found that QBE is right in its submission that the Insolvency Exclusion applied to exclude Target's liability to the claimants in respect of the Keydata Bond and the Meteor Plan from the cover afforded by the Policy.

116. Given the complexity of the issues relating to the assignment, I do not consider that this is an appropriate ground for a summary judgment or an order for a strike out.

117. The question remains whether or not QBE is entitled to summary judgment, or a strike-out order, by reason of the application of the Insolvency Exclusion.

118. The claimants argue that there are factual matters which must be explored at trial in relating to the question of construction, if the claimants' construction was not accepted at this stage, namely: (1) the nature and extent to which QBE represented that the Policy was compatible with Target's obligations under the FSA Handbook; and (2) whether and the extent to which QBE drew the change in the wording of the Insolvency Exclusion between the Policy and the Expiring Policy. Accordingly, the claimants argue, it would not be appropriate to grant summary judgment.

119. As to the first of these considerations, there is no evidence in the Policy itself or arising from the surrounding circumstances that QBE made any representations that the Policy was compatible with Target's obligations under the FSA Handbook. At para 11 of his witness statement, Mr Greene on behalf of the claimants referred to the fact that the Policy has on its first page the words "Financial Advisors" and invited the court to infer that the Policy was marketed as a policy compliant with the relevant regulatory requirements for independent financial advisers. However, there is no evidence of such marketing and no justification for such an inference. Moreover, as explained above, I do not think that this consideration materially affected the true construction of the Insolvency Exclusion. This is therefore not a reason not to grant summary judgment.

120. As to the second of these considerations, I have made it clear above that the true construction of the Insolvency Exclusion did not depend on the change in the wording between the Expiring Policy and the Policy, although that change did reinforce that construction. Moreover, I do not think it was incumbent on QBE to draw any alteration in the wording of the Policy to the attention of Target. This is therefore not a reason not to grant summary judgment.

121. In these circumstances, I allow QBE's application on the ground that QBE bears no obligation of indemnity under the Policy in respect of Target's liability to the claimants by reason of the Insolvency Exclusion. The claimants have no real prospect of succeeding in their claim against QBE.

122. I assume that QBE will seek summary judgment dismissing the claim, but I await to hear from counsel as to the orders which ought to be made.