Case No: A3/2014/1825

Neutral Citation Number: [2016] EWCA Civ 27
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY MERCANTILE COURT
HIS HONOUR JUDGE COOKE
(Sitting as a High Court Judge)
2BM40007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2016

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LORD JUSTICE KITCHIN

- -

Between :

(1) SAMEER KARIM	**Appellants**
(2) DOUGLAS WEMYSS SOLICITORS	
- and -	
DOUGLAS MACDUFF WEMYSS	**Respondent**

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- -

MR J K QUIRKE (instructed by Douglas Wemyss Solicitors LLP) for the **Appellant**
MR P J DEAN (instructed by Edward Hands & Lewis Solicitors) for the **Respondent**

Hearing dates : 20 January 2016

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Judgment

Lord Justice Lewison:

Introduction

1. Mr Wemyss (as "Seller") sold a solicitor's practice to Mr Karim (as "Buyer") on the terms of an agreement ("the SPA") dated 31 March 2008, with completion taking place on the same day. The practice was carried on by Douglas Wemyss Solicitors LLP.

2. The Purchase Price for the Business and the Assets was defined by clause 3.1 of the SPA as £100,000. The Assets were listed in Schedule 1 to the SPA. Clause 3.1 went on to provide (ungrammatically):

> "In addition to the sums due at the effective time in respect of Debtors and WIP [work in progress] set out in clauses 3.2 and 3.3."

3. Schedule 1 defined the Assets as follows:

> "The Assets included in the sale pursuant to this agreement and their respective values are as follows:
>
> | ASSET | VALUE |
> |---|---|
> | Goodwill | £100,000 |
> | Fixed Assets, Moveable Assets, Business Intellectual Property & IT System | To be apportioned from the goodwill on completion" |

4. Clause 3.2 provided so far as relevant:

> "As each invoice for clients who had Work in Progress at Completion is rendered and paid then the Seller and the Buyer shall agree to deposit the agreed apportioned amount to the account of the Seller on an invoice by invoice basis as soon as cleared funds are received by the Business… Domestic conveyancing files will be valued for WIP purposes on the basis of whether the following "milestones" have been reached: New file opened and search applied for/received £100.00; Contract received or sent out £250.00; Contract Exchanged £350.00; Contract Completed £450.00. Builders Developers transactions or unusually complex matters where a quotation of over £600.00 has been given maybe assessed [separately]. In no case will WIP exceed a bill, but the seller must be consulted and agree before any bill is rendered for a sum less than WIP."

5. By clause 5.2 of the SPA Mr Wemyss warranted that "to the best of his knowledge and belief each of the Warranties is true accurate and not misleading". The Warranties were contained in Schedule 4 to the SPA. Paragraph 1.1 of that Schedule contained a warranty that:

> "… all other information relating to the Business given by… the Seller to the Buyer … are true accurate and complete in every respect and are not misleading."

6. That Schedule contained four other relevant warranties. They were:

> "1.2 There is no information that might reasonably affect the willingness of the Buyer to buy the Business and the Assets on the terms of this agreement.
>
> 10.1 Neither the Seller nor any person for whose acts all defaults the Seller may be vicariously liable has committed or omitted to do any act or thing in relation to the Business which could give rise to any fine or penalty.
>
> 11.1 Neither the Seller, nor any person for whose acts or omissions it may be vicariously liable, is engaged in, subject to or threatened by any:
>
> (a) litigation . . . in relation to the Business or the Assets or any of them . . . .
>
> 11.2 Details of all material claims [and] complaints relating to the Business that have occurred during the 12 months preceding the date of this agreement have been Disclosed."

7. Clause 5.5 of the SPA provided:

> "Without prejudice to the right of the Buyer to claim on any other basis… if any of the Warranties are breached or prove to be untrue or misleading, the Seller undertakes to pay to the Buyer on demand:
>
> (a) The amount necessary to put the Buyer into the position it would have been in if such Warranty had not been breached or had been true and not misleading; and
>
> (b) all costs and expenses (including without limitation, damages, claims, demands, proceedings, costs, legal and other professional fees and costs, penalties, expenses, and consequential losses) incurred by the Buyer (whether directly or indirectly) or the Business as a result of the breach or of such Warranty not being true or misleading (including a reasonable amount of management time)"

8. Clause 5.9 of the SPA capped the Seller's liability at "the purchase price including debtors and [work in progress]".

9. At the same time as the agreement was concluded there was prepared a schedule of work in progress. Mr Karim's evidence about that schedule was this:

> "On completion a full final completed list of WIP and debtors was supplied to me that is referred to as the WIP list of April 2008 … I recall the accountants made a couple of spot checks in respect of files that were listed in the WIP… There were no issues arising from the same at the time."

10. The schedule in question contains a column headed "estimated WIP". To take one example (which was discussed in the course of the hearing) against the name of a client called "Smart" in that column is the figure of £1000. A further column headed "Balance WIP" shows the same figure of £1000 against his name. This pattern is repeated throughout the schedule file by file. The schedule was compiled by collating the figures for each file produced by the LLPs' fee earners who were asked to go through their files and produce a WIP figure for each. In the case of domestic conveyancing the figures were based on the formula in the SPA, and in other cases on the minimum billable amount if instructions were terminated on that day.

11. Mr Wemyss brought a claim against Mr Karim for payment of what he alleged was due in respect of work in progress but which had not been paid. Mr Karim disputed that claim and also brought a counterclaim for misrepresentation and breach of warranty. The progress of the action was beset by procedural errors and missed opportunities. Much potentially relevant evidence was not called. It finally came on for trial before HH Judge Cooke in the Mercantile Court. The trial began on 2 July 2013 but it overran twice and did not conclude until 7 November 2013. The judge gave a comprehensive judgment on 13 February 2014. His task was not helped by the way that the case was prepared and presented; and on many of the issues he had very little relevant evidence. He undoubtedly did the very best that he could and the fact that I disagree with some of his conclusions does not undermine the conscientious way in which he set about his task. Moreover some of the arguments presented to us differ from the way in which the case was presented to the judge.

The claim

12. I begin with the claim. The Particulars of Claim had annexed to them a spreadsheet which was said to justify Mr Wemyss' claim. It was in my view unintelligible, not least because it did not identify what amounts represented work in progress or how they had been calculated. I do not think that Mr Dean, appearing for Mr Wemyss, suggested otherwise. Rather he relied on what he described as the master schedule which he himself prepared for the purposes of the trial. Mr Karim's Defence on the other hand did contain a schedule which at least made some attempt to identify what had been paid by way of work in progress. But that did not explain what was in dispute or why. Mr Karim remedied that situation in a schedule served on 20 June 2013 (some 10 days before trial) which he verified by means of a witness statement made on 24 June 2013. To take the client Smart as an example (which was discussed in the course of the hearing), Mr Karim identified Mr Wemyss' claim as £5,040 and admitted liability for £1,000. He explained his case on the balance as follows:

> "WIP as at 31.3.08 was £1000 increased by DW to £5040 in June 2008 for no reason. SK agreed fixed costs with the client

> after the takeover. DW is only entitled to the WIP that he calculated as at 31.03.08 as SK had agreed an increase in fees with the client after 31.03.08."

13. Mr Karim repeated this process file by file, explaining in each case how much he accepted he was liable to pay, and why he disputed the balance. The upshot was that he accepted liability for £29,075 but disputed the balance of Mr Wemyss' claim amounting to £16,783. The judge accepted a concession made by Mr Dean that £4,000 should be deducted from the claim, and as I understand it therefore awarded Mr Wemyss £12,783 of the disputed balance.

14. Mr Karim's case, as it seems to me, raised two points. The first was that, as a matter of interpretation of the SPA, Mr Wemyss was only entitled to the amount shown in the schedule of work in progress that had been prepared in connection with the SPA. The second was that, as a matter of fact, there was no reason (i.e. no justification) for any change.

15. The judge rejected the contention that, as a matter of interpretation of the agreement, Mr Wemyss was restricted to the amount shown on the WIP schedule. He said at [25]:

> "Firstly, I reject the submission that the effect of the contract is that Mr Wemyss can never recover more than the amount on the WIP schedule for a particular file. It would no doubt have been possible to define the amount due by reference to the schedule, but the contract did not do that. Nor did it set out that WIP was to be valued on the "instructions terminated" basis, which would be likely to produce an absolute minimum figure and so be very favourable to the buyer. The reference to an "agreed apportioned amount" means in my view that an apportionment of the eventual bill must take place, and is to be interpreted as requiring the parties to agree a reasonable apportionment in all the circumstances when the bill had been delivered, and not as referring to payment of an amount that had already been agreed. That would allow for circumstances on any individual file such as eventual negotiation of a premium or discount, and take into account the degree to which the work done before and after completion (whether or not such work was reflected in the WIP schedule) contributed to the final bill. In principle, if the parties do not agree, the court could determine what is a reasonable apportionment having regard to any relevant evidence for each file."

16. The reference to the "agreed apportioned amount" in the SPA is, to my mind, capable of two interpretations. It could mean the apportioned amount which we *have* agreed; or it could mean the amount which we agree to agree in the future. The use of the past participle in the phrase favours the first interpretation. There are obvious difficulties in entering into an agreement to agree, which lawyers entering into an agreement such as the SPA must be taken to understand; and the SPA contains no contractual machinery for resolving any dispute. Moreover in the case of domestic conveyancing the SPA itself prescribes what the judge rightly described as a formula. In those cases work in progress "will be valued for WIP purposes" on the basis of the formula. There

is no indication in the formula that other considerations (such as value to the client) were to be taken into account. In builders or developers transactions or unusually complex transactions the formula did not apply, but the purpose of the formula must surely have been to achieve as much certainty as possible. Mr Wemyss put forward figures in the schedule and Mr Karim accepted them. It is true that the schedule described them as "estimated" but I do not consider that that description meant that they had no contractual force. In my judgment the judge was wrong in his interpretation of the SPA.

17. The second point raises a question of fact. Mr Wemyss had put forward his claim and Mr Karim had disputed it. The schedule that he served on 20 June in effect asserted that there was no reason to alter the agreed WIP figures. On the judge's interpretation of the SPA it would have been open to Mr Wemyss to explain why an alteration to the figure was justified, whether by reference to importance to the client, a mistake in calculating the number of billable hours achieved before completion, or otherwise. The judge held at [26] that it was for Mr Karim:

> "to provide the evidence on which he relies if he disputes Mr Wemyss's figures. This he has not done, save that he has stated certain amounts as being the value of time charged to the files after 1 April 2008 in cases where the eventual bill was less than the amount in the WIP schedule. I accept his evidence on that point…".

18. In my judgment it was for Mr Wemyss, as claimant, to establish his claim. Mr Karim was asserting a negative (i.e. that there was no justification for altering the WIP figures in the schedule). It is unrealistic to expect proof of a negative. The burden was, in my judgment, on Mr Wemyss to justify the change file by file. Mr Dean accepted that he did not do so; and indeed Mr Wemyss gave no evidence at all about Mr Karim's schedule. I appreciate that the schedule was served after Mr Wemyss had served his witness statement, and so was not referred to in that statement. But the judge permitted oral examination in chief on new documents; and Mr Karim's schedule was also put to Mr Wemyss in cross-examination. Thus he could also have been re-examined on it in detail, but he was not. There was a brief reference to the schedule in re-examination, but Mr Wemyss did not engage with its substance. Accordingly in my judgment the judge was wrong to have held that Mr Wemyss had established his claim, except to the extent that Mr Karim had admitted it. In effect he reversed the burden of proof.

The turnover/profit warranty

19. In the course of the negotiations leading up to the making of the agreement Mr Wemyss told Mr Karim in an e-mail dated 4 December 2007 that the turnover of the practice was "on course" for £640,000 during the year 2008 and that net income (i.e. profit) was "on course" for £120,000.

20. HHJ Cooke found that the statement that the turnover and profits were "on course" for £640,000 and £120,000 respectively was not true when made. He also found that Mr Wemyss did not believe it to be true at the time. Nor was it true as at the date of the SPA (31 March 2008) because by then Mr Wemyss had access to subsequent management information which showed that the outcome for the year would be "well

below the stated figures". Mr Wemyss must have known the true position if he had looked at it; because the untruth of what he had said was "blindingly obvious". A more accurate figure for turnover would have been £547,000 or even less, and for profit would have been £92,000. He therefore found that liability against Mr Wemyss had been established both for misrepresentation and breach of warranty.

21. Despite this finding he declined to award Mr Karim any damages because he held that no recoverable loss had been demonstrated.

22. Although Mr Karim's case had, apparently, originally been put on the basis that he was entitled to recover the difference between the price paid and the true value of the business, by the end of the trial it had become clear that the claim was based on clause 5.5 of the SPA (see judgment at [54]).

23. Before delving into the details of the way in which the damages claim was put I think that it is necessary to set out a few principles. The claim was put both as a claim for breach of warranty (i.e. a claim in contract) and also as a claim for misrepresentation (i.e. a claim in tort). The measure of damages differs according to which cause of action is in play. In the case of a claim that there has been a breach of warranty about the quality of an asset that is sold, the measure of damages is the difference between the true value of the asset and its value with the quality as warranted. But in the case of a claim in tort, the measure of damages is the difference between the true value of the asset and the price paid. The point was put clearly by Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158:

> "On principle the distinction seems to be this: in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it."

24. As Prof Treitel explained in "Damages for Deceit" (1969) 32 M.L.R. 556, 558-559 in a passage approved by Lord Steyn in *Smith New Court Ltd v Citibank NA* [1997] AC 254, 282:

> "If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price)."

25. Suppose that A owns a painting that he tells B was painted by a famous artist. If it had been, it would be worth £10,000. B pays £8,000 for it. It was not in fact painted by the famous artist and was only worth £100. If B can establish that what A said was a contractual warranty, then he is entitled to £10,000 - £100 = £9,900. But if he can only establish that the statement was an actionable misrepresentation, then he is

entitled to £8,000 - £100 = £7,900, although if the misrepresentation was (or is treated as) fraudulent he may be entitled to consequential losses as well. Changing the facts, perhaps unrealistically, if the painting as warranted would have been worth £10,000 but is in fact worth £8,000, then on the contractual measure the buyer who paid £8,000 will recover £2,000; but on the tortious measure will recover nothing.

26. There is one further important difference between a claim in contract for breach of warranty and a claim in tort for misrepresentation. In the case of a claim for misrepresentation the claimant must show that he relied on the representation in deciding to enter into the contract (although the representation need not be the sole cause of the decision). However, in the case of a claim for breach of warranty all that the claimant needs to prove is that the warranty has been broken. As Slade LJ said in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564:

> "If a party to a contract wishes to claim relief in respect of a misrepresentation as to a matter which did not constitute a term of the contract, his claim will fail unless he is able to show that he relied on this representation in entering into the contract; in general, however, if a party wishes to claim relief in respect of a breach of *a term* of the contract (whether it be a condition or warranty) he need prove no actual reliance." (Emphasis in original)

27. There is one other point that I should make at this stage. At [54] the judge observed that in a "no transaction" case the loss "is generally assessed as the difference between what was paid and the true value of the asset acquired." In the case of a claim in tort this is undoubtedly correct. But if the claim is put in contract, whether this proposition is correct depends on the term of the contract that has been broken. The "no transaction" point usually arises in the context of claims for professional negligence (normally in relation either to valuation or conveyancing). Such a claim may be framed in tort or in contract. But the essential point is that the contractual term in question is almost invariably an implied term to the effect that the professional will act with reasonable skill and care. So, in the case of a valuation, the implied term does not amount to a warranty that the valuation is correct. It is no more than a warranty that the valuer has used reasonable skill and care in reaching his valuation figure. It is for that reason that the measure of damages in a typical "no transaction" case is the same whether the claim is framed in contract or in tort. But this case is different. In this case Mr Karim was entitled to claim on the basis that the information given to him was warranted to be true; not merely that care had been taken in providing it.

28. In principle, therefore, Mr Karim is entitled to be put into the position in which he would have been if the business had had the turnover and profit warranted.

29. Two particular heads of loss were argued before the judge. The first related to a loan that Mr Karim said that he had taken from a company associated with Mr Wemyss in order to set up or expand a personal injury department. The argument was that if the business had had the turnover and profitability warranted the loan would not have been necessary. The judge rejected that argument for a number of reasons. He said at [55]:

> "Firstly, a warranty as to turnover and/or profit in a period before completion is not the same as a warranty that the LLP as a corporate entity would have any particular level of assets or capital at the date of completion such as might provide capital for future expansion. Nor is it a warranty that the firm will continue to have a particular turnover or earn a particular level of profits at any time after completion, such as might have generated capital for the new business."

30. He went on to say at [56] that there was no accounting or other evidence to support Mr Karim's assertion that additional profits or turnover before completion would have obviated the need to borrow. He also said that the structure of the SPA would have entitled Mr Wemyss to profits earned up to the completion date, and to the value of work in progress, with the result that additional turnover or profit would have increased the payments due to Mr Wemyss; and those payments would have to have been funded by Mr Karim. Mr Quirke abandoned this head of loss after it became clear, following questions from the bench, that Mr Karim had in fact been repaid the amount that he lent the LLP.

31. The second head of loss was an alleged continuing turnover lower than warranted. The judge rejected this head of claim too. He set out his reasons at [61]:

> "The breach of warranty established is in relation to a statement as to turnover for a period that was past at the date of the contract. A shortfall of turnover or profitability in that period was a loss to the LLP which, in the context of this sale effectively fell on the seller and not the buyer. The statement made was not a warranty that any particular level of turnover or profits would continue to be achieved in the future during the period when the buyer owned the business. Insofar as the statement was untrue and affected the net assets or future profit earning potential of the business, that loss is reflected in the difference between the price that a buyer would pay for the business if the statement were true, and that which he would pay in its actual condition. The loss is suffered at the moment of purchase, and does not, in principle, depend upon whether after purchase the financial performance of the business is the same as, or better or worse than, indicated by the statement warranted. But the defendants have failed to provide any evidence that would establish whether the value of the business was less than was paid for it. It would be wholly illegitimate to seek to make good that failure by treating the warranty as if it was a warranty as to future turnover or profitability when it plainly was not, and even more so to seek to claim a loss suffered by the seller as if it were a continuing loss suffered by the buyer for an indefinite period."

32. I think, with respect, that there is some confusion of thought in this paragraph. The first comparison that the judge made was "the difference between the price that a buyer would pay for the business if the statement were true, and that which he would pay in its actual condition". That, as it seems to me, is an accurate summary of the

contractual measure of damages for breach of warranty. To revert to my example: the picture, if painted by the famous artist, would have been worth £10,000. In fact it is only worth £100. Damages for breach of warranty are £9,900. But the judge went on to criticise Mr Karim for not having adduced evidence to show:

> "whether the value of the business was less than was paid for it."

33. This, as it seems to me, is only relevant to the tortious measure of damages. To revert to my example again: the price paid was £8,000 but the picture was only worth £100. Damages in tort are therefore £7,700. So the second implicit comparison that the judge made (price paid v true value) is not the same as the first.

34. I think that we need to start by understanding what it was that was represented or warranted about turnover and profit. The judge was right to say that Mr Wemyss did not make a firm prediction about what turnover or profit would be for 2008. What Mr Wemyss said on 4 December 2007 was that the LLP was "on course" for the stated turnover and profit. Mr Quirke argued that this was a continuing representation or warranty which continued to have causative effect up to the completion date. It is, I think, necessary to unpack this submission. The proposition that a representation can be a continuing representation is well-established. The authoritative source of the principle in modern times is *With v O'Flanagan* [1936] Ch 575, approved by the Supreme Court in *Cramaso LLP v Viscount Reidhaven's Trustees* [2014] UKSC 9, [2014] AC 1093. Lord Reed said at [16]:

> "The law relating to the effect of representations on a contract proceeds on the basis that a representation made in the course of pre-contractual discussions may produce a misapprehension in the mind of the other party which continues so as to have a causative effect at the time when the contract is concluded. It is on that basis that a misrepresentation may lead to the setting aside of the contract as being vitiated by error or fraud."

35. The Supreme Court also approved the statement of Smith J in the Australian case of *Jones v Dumbrell* [1981] VR 199, 203:

> "When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were initially represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly, therefore, an inducing representation is a 'continuing' representation, in reality and not merely by construction of law."

36. Particular facts may, of course, displace these statement of the general effect of a representation, but none are present in our case. I accept, therefore, that Mr Wemyss' statement on 4 December 2007 that the LLP was "on course" for the indicated

turnover and profit was a continuing representation that it remained on that course up until completion. Since the representation was untrue it was a misrepresentation; and since the judge held that Mr Wemyss did not have reasonable grounds for believing to be true (and did not in fact believe it to be true), it was an actionable misrepresentation giving rise to a liability in tort. That liability would attract an award of damages calculated according to the tortious measure: i.e. the difference between the price paid by Mr Karim and the actual value of the Business at the completion date.

37. It is also necessary to consider Mr Karim's alternative claim for damages for breach of warranty. What was warranted depends on the terms of the warranty, which I repeat for convenience:

> "… all other information relating to the Business given by… the Seller to the Buyer … are true accurate and complete in every respect and are not misleading."

38. The first point to note about the form of the warranty is that it is expressed in the present tense. It is not merely warranting that information given to the buyer was true at the time that it was given. Second, the warranty is not merely a warranty that the information is true. It is also a warranty that the information was both complete and not misleading. It is well-established in the law of misrepresentation that a representation that is literally true but is incomplete may be misleading and hence amount to a misrepresentation. For example in *Notts Patent Brick and Tile Co v Butler* (1886) 16 QBD 778 a buyer of land asked the seller's solicitor whether there were any restrictive covenants affecting the land. The seller's solicitor replied that he was not aware of any. That was literally true, but the solicitor failed to say that he had not bothered to look at the title deeds.

39. It seems to me therefore that the information that Mr Wemyss provided was no longer true as at the date of the contract, and moreover was incomplete and misleading. Mr Wemyss was, therefore, in breach of warranty.

40. The upshot is, in my judgment, that Mr Karim was entitled to damages on both the tortious measure and also the contractual measure. Which he chooses will be that which produces the better result for him. The tortious measure is the difference between (a) the price that Mr Karim paid and (b) the true value of the Business. The contractual measure is the difference between (a) the value of the Business if the warranted information had complied with the warranty: i.e. it had been true, complete and not misleading and (b) its true value. The difficulty confronting the judge was that he had no valuation evidence of either:

    i) The true value of the Business at the contract date; or

    ii) The value that the Business would have had if the warranted information had been true, complete and not misleading.

41. It follows, therefore, that for each of the two possible mathematical calculations at least one essential element was missing. Does that mean that Mr Karim recovers nothing? It seems counter-intuitive that when the seller of a business negligently (or worse) inflates its profitability in order to induce a sale of the business and, for good

measure warrants that the information is true, the buyer recovers nothing. It seems self-evident that a business with a profitability which is much less than that which has been represented and warranted is a less valuable business. I can see that in the case of the tortious measure of damages the lack of valuation evidence may present a problem because of the difficulty of knowing whether the buyer has made a good or bad bargain (although even that might be capable of being overcome). Does it follow that the same result applies to the contractual measure?

42. Mr Quirke placed the warranty about turnover (rather than profit) at the forefront of his argument. I do not consider that the turnover is the relevant figure. What the buyer of a business ultimately pays for is profit, not turnover. Turnover is only a means to a profit, and the extent to which turnover represents profit will depend on the profit margin of the business in question. Mr Quirke argued that the LLP's business had fixed costs, and that an increased turnover would feed directly into bottom line profit because the costs would not change. The difficulty with this argument is that the judge made no finding to that effect. Moreover, as a proposition it is not self-evidently correct. To take what is perhaps a trivial example: if increased turnover is generated by fee earners doing more work for clients, one would expect (at least) an increased expenditure on stationery, postage and telephone calls. I reject the argument based on turnover, and prefer to concentrate on profit.

43. Mr Quirke relied on the principle that an award of damages is not precluded simply because of difficulties in assessment. The general principle is stated thus in Chitty on Contracts (32nd ed para 26-015):

> "The fact that damages are difficult to assess does not disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. The fact that the amount of that loss cannot be precisely ascertained does not deprive the claimant of a remedy."

44. In *Simpson v The London and North Western Railway Co* (1876) 1 QBD 274 the plaintiff entrusted certain sample goods for delivery by the railway company to Newcastle to be delivered in time for a cattle show. The goods were not delivered in time and the plaintiff claimed damages for loss of use of the goods and the profit that he would have made by exhibiting and selling them at the show. The question for the court was whether those heads of damage were recoverable. One of the points taken was that an award of damages would be speculative. Cockburn CJ said:

> "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

45. Field J said:

> "Then, as to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is

> that it must be assumed that the plaintiff would make some profit. I may add that I think a larger sum might have been awarded."

46. In *Crewe Services & Investment Corporation v Silk* [1998] 2 EGLR 1 the landlord of an agricultural holding brought an action against its tenant for breach of repairing obligations. The tenancy was a continuing tenancy, and because of the security of tenure given to agricultural tenants its future duration was uncertain. The trial judge awarded damages by reference to the cost of repair, although there was no evidence that the landlord intended to carry out the repairs. This court held that that was not the correct measure: the correct measure for an action brought during the currency of the term was the diminution in value of the landlord's reversion. But the problem was that no valuation evidence had been put before the court. Robert Walker LJ (with whom Lord Woolf MR and Millett LJ agreed) held that that was not fatal to the landlord's claim. He said:

> "I am, however, by no means sure that the judge needed evidence, beyond what was before him, for the simple proposition that a tenanted farm in a seriously bad state — and it must be remembered that the judge rejected Mr Silk's case that the breaches were non-existent or trivial — is worth less than a tenanted farm where the tenant has complied with all his obligations. The judge said at the end of his second judgment that on the termination of the tenancy with the breaches remaining unremedied, "an intending purchaser would insist that due allowance from the purchase price be made for putting all these matters right". By parity of reasoning a purchaser would expect some allowance if he was buying the freehold subject to a tenancy where there were continuing breaches. He would not be satisfied with the bland assurance that all would be put right before the end of the tenancy.
>
> The true position is (as Millett LJ observed in the course of argument) that general damages are at large, and the judge must do the best he can, just as the jury would have had to do when civil actions were heard by juries."

47. In *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91 a buyer brought an action for damages for breach of a contract for the sale of goods. The measure of damages was the difference between the contract price and the market value of the goods at the relevant date. The evidence called at trial was all directed to the market value of the goods at 31 July 1973. However, it was held that the correct date for the comparison was December 1973, about which there was no specific evidence. The sellers argued that in those circumstances the buyers were entitled to no more than nominal damages, but the Privy Council rejected that argument. Lord Keith said:

> "It is apparent on any view that the buyers suffered substantial loss, though the material to enable it to be precisely quantified is lacking.

> Other possible courses canvassed in the course of the argument were (a) to order a retrial of the case on the matter of damages, (b) to restore the figure of damages fixed by Briggs C.J., and (c) to fix a new figure on the basis that the market price of yarn declined steadily and constantly between September 1973 and January 1975, and that therefore the point which the decline had reached at the end of December 1973 is capable of ascertainment. Their Lordships are not disposed to order a new trial. Amendment of the pleadings would be required and the delay, trouble and expense which would be involved in further proceedings do not appear to their Lordships to be consonant with the due administration of justice. The problem about the figure of damages fixed by Briggs C.J. is that it was plainly arrived at upon a wrong basis, and that is now common ground between the parties. In the result, their Lordships have come to the conclusion that the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is."

48. It is perfectly true that the judge rejected the two specific heads of loss that Mr Karim advanced. However, the pleaded Schedule of Loss also contained a claim for the reduction in value of the business as an alternative (put at £75,000). I do not think that the judge gave serious consideration to the question whether, even though the specific heads of loss had not been proved, there was nevertheless a more general loss for which Mr Karim was entitled to be compensated.

49. It seems to me to be self-evident that a person who buys a business with a warranted profit earning capacity of £120,000 suffers a substantial loss if the business in fact has a profit earning capacity of only £92,000. But how can the loss be measured? The profit earning capacity of a business is most usually reflected in its goodwill. As Swanwick J pointed out in *Doyle v Olby (Ironmongers) Ltd* at 161 the value of goodwill is generally arrived at by applying a multiplier to the annual profit. We have the judge's findings about the warranted profit and the actual profit. What we need is the appropriate multiplier. This could have been the subject of expert evidence but was not. What the experts would have given evidence about is what, in the market, buyers and sellers would have agreed as being the appropriate multiplier for a business like that of the LLP. But the best comparable would be the actual business itself. In this case we know from the SPA that the parties agreed the price of £100,000 for the goodwill, fixed assets, moveable assets, business intellectual property and IT system. Although the SPA envisaged an apportionment as between the various asset classes on completion, that was not done. But we know from the accounts and balance sheet of the LLP that as at 31 March 2008 it had fixed assets of £31,860. If we assume that the remainder of the purchase price is apportioned entirely to goodwill, the balance attributable to goodwill is £68,140. So Mr Karim was willing to pay, and Mr Wemyss was willing to accept, the sum of £68,140 as the price of warranted profit of £120,000. Although in most cases the price paid for goodwill is a multiple of profit, the unusual feature of this case is that the price paid was a fraction of profit. Applied to the warranted profitability that gives a divisor of 1.76. In my judgment we are entitled to (and should) assess damages for breach of the warranty about profitability by applying that divisor to the shortfall in profitability. That shortfall is £28,000.

Applying the divisor of 1.76 that gives a difference in value of £15,909. Mr Dean argued that if we adopted this method we should discount the resulting sum to take account of uncertainties. I accept that submission to some extent, and I would round down the figure to £15,000. I would award that sum as damages for breach of warranty.

Failure to disclose claims

50. I have already mentioned the warranties in paragraphs 1.2, 10.1 and 11 of Schedule 4 to the SPA. These warranties were relevant to two claims that were made against the LLP after completion. The claims arose out of a loan that Mr Wemyss had brokered from Messrs Purewal and Malhotra to Mr Le Butt to enable the latter to refinance his debts. Mr Le Butt subsequently complained to the Solicitors Disciplinary Tribunal ("the SDT") that Mr Wemyss had offered terms to which Mr Le Butt had not agreed, and also that he had acted despite a conflict of interest because some of the lenders were also his clients. The SDT upheld those complaints and fined Mr Wemyss £20,000. Mr Le Butt issued two sets of proceedings against Mr Wemyss and the LLP. The first, issued on 25 March 2010, were struck out; and the second, issued in June 2011, appears to have petered out.

51. The judge accepted Mr Wemyss' evidence that he had not received any complaint from Mr Le Butt before completion; and was not aware that there was a potential complaint. However, the fact that Mr Wemyss had been fined by the SDT for acts committed before completion meant that, as the judge held, there had been a breach of both warranty 10.1 and also 1.2.

52. Messrs Purewal and Malhotra issued proceedings against Mr Wemyss alleging (among other things) that they had been induced to lend to Mr Le Butt by a fraudulent misrepresentation made by Mr Wemyss; and also that Mr Wemyss had acted in conflict of interest because one of Mr Le Butt's pre-existing lenders whose loan was to be refinanced was a company connected to Mr Wemyss. That claim was eventually settled by insurers.

53. Mr Wemyss had received letters from solicitors acting for Messrs Purewal and Malhotra in September 2006 and January 2007. The second letter alleged that he had been acting for Messrs Purewal and Malhotra and had been negligent in dealing with their affairs. That letter also demanded that he should pass the letter on to his indemnity insurers. Mr Wemyss did not in fact report the claim to insurers, and the judge was satisfied that he did not disclose it to Mr Karim. The judge held that the threat of a claim was still in existence at the date of the SPA; and that the threat was a matter that might have affected the willingness of a buyer to purchase on the terms offered. Consequently he found that there had been a breach of warranties 1.2, 11.1 and 11.2.

54. Clause 5.8 of the SPA provided:

> "The Seller shall … indemnify the Buyer and/or the Business for any increase in professional indemnity insurance premiums arising as a result of claims made upon the professional indemnity insurance policy of the Business. (The burden of proof as to the reason for the increase in the premiums, and the

element attributable to such a claim or claims shall be upon the buyer)."

55. The judge held that this indemnity was not confined to claims that were un-notified to insurers before the completion date. They included both claims that had been notified and claims that had not.

56. Based on clause 5.8 Mr Karim claimed what he said were additional insurance premiums that the LLP had had to pay in the years following completion plus a sum for management time spent in dealing with the various breaches and with additional with professional indemnity insurance renewals. Although there had been permission to call expert evidence on the reasons for the accepted increases in premium, that opportunity was not taken up. However, Mr Karim relied on inferences that he said could be drawn from documents generated in the course of renewing the policy. The judge accepted that he had to do the best he could on the basis of the material placed before him. The premium for the year 2007-8 had been £27,283; but the premium for the year 2008-9 was £52,500; an increase of £25,217.

57. Mr Karim relied in particular on an e-mail sent by Mr Balme the LLP's insurance broker dated 30 September 2008. That read, so far as relevant:

> "As discussed, it has been extremely difficult to obtain terms this year. The majority of the insurers have applied very strict parameters to the type of practices and the work that they undertake. As a two partner practice, Douglas Wemyss Solicitors LLP no longer fits the stated parameters of the RSA and they have not been deviating from these parameters. It was therefore necessary for us to find an alternative provider. Most firms declined to offer terms either because of the proportion of conveyancing undertaking by the practice or due to the claims record. Finally Travellers agreed to offer terms, but we regarded these as high even in the present market. It was therefore necessary for us to re-approach RSA to see if we could agree a more acceptable compromise. Finally this was achieved.
>
> A report is attached summarising the terms offered and I confirm that cover has been placed in accordance with the stated terms. RSA require more information however before they will issue their Certificate of Qualifying insurance.
>
> As regards the increase in terms, I confirm that on average, premiums have increased by about 20% with Royal and Sun Alliance. Conveyancing rates have on average increased by slightly more than this and a number of insurers have moved away from underwriting cover on conveyancing practices. The main impact on the premium for your practice this year, however, has been a more close focus on the claims record of practices. Whereas in the past it has been possible to apply commercial pressure or get insurers to take a more lenient approach, the market has changed fundamentally and this is not

> now possible. The claims record of Douglas Wemyss solicitors shows an average of over £100k per year in claims payments and reserves. Although this stems largely from one year, this has been the main cause of the dramatic premium increases this year. Please let me know if you need any further information."

58. Based principally on that e-mail the judge was asked to assume that the whole of the increase in premium (apart from the 20% average rise in premium) was attributable to the LLP's claims history. The grounds of appeal asserted that the judge was wrong not to have accepted that assumption, based on Mr Balme's e-mail.

59. The judge went through the documents that had been presented to him, drawing inferences that he considered to be appropriate. In relation to some years he allowed an estimated amount as representing the increased cost of renewing cover attributable to the LLP's claims history. In none of the years in question was that amount the full amount claimed. In all he allowed £58,000 for this head of loss.

60. The grounds of appeal asserted that the judge "unfairly discounted the insurance premium increase for 2008-9" giving reasons for that assertion. They did not attack the judge's award in relation to any other year. It was on the basis of the grounds of appeal (and their then accompanying skeleton argument) that I granted permission to appeal on the insurance premium point. I did not intend to grant (and did not grant) permission to appeal to trawl though the whole of the judge's findings of fact on the question of rises in insurance premium. Mr Quirke applied during the course of the hearing to amend his grounds of appeal to encompass later years; but we ruled against him.

61. The judge dealt with Mr Balme's e-mail as follows:

> "[90] In respect of this year, Mr Quirke submits that the increase attributable to those claims must be £19,760, based on allowing an increase of 20% on the premium for the previous year and attributing all the remaining increase to the effect of insurers taking a harder view of the existing reported claims. I am not however satisfied that the email referred to is a sufficient basis for making such a finding. There is the general point that it appears to be a response to a request for information from Sameer Karim which he may have had an interest in steering towards a conclusion that the claims history was to blame. Further, earlier in the email Mr Balme said that:
>
> "As discussed, it has been extremely difficult to obtain terms this year. The majority of the insurers have applied very strict parameters to the type of practices and the work that they undertake. As a two partner practice, Douglas Wemyss Solicitors LLP no longer fits the stated parameters of the RSA and they have not been deviating from his parameters. It was therefore necessary for us to find an alternative provider. Most firms declined to offer terms either because of the proportion of conveyancing undertaking by the practice or due to the claims record. Finally Travellers agreed to offer terms, but we

> regarded these as high even in the present market. It was therefore necessary for us to re-approach RSA to see if we could agree a more acceptable compromise. Finally this was achieved."
>
> [91] It is apparent therefore that RSA were initially not prepared to provide cover at all, and that this was not due to the claims record but because the firm had only two partners. Other insurers refused to offer cover, in some cases because of the nature of the work (conveyancing) and/or the claims record. A second approach had to be made to RSA, who would no doubt [be] in a position to dictate terms if they were to accept a risk they were initially unwilling to take on. It is also apparent from surrounding emails that it was at this time that Mr Wemyss was persuaded to become a member of the LLP again in order to present it to insurers as having an additional partner. Mr Quirke's calculation is based on the stated general rise for firms whose business RSA was willing to take on and takes no account of any additional amount that they may have charged by reason of the proportion of conveyancing business or because they were having to be persuaded to take on a two partner firm when they would not ordinarily have done so. They must also have known that reappointing Mr Wemyss as a member of the LLP was something of a manoeuvre for their benefit and may have been accordingly slightly sceptical as to whether the firm genuinely fitted the profile that they wished to insure.
>
> [92] I accept from the email that the claims record was an important factor in the premium eventually quoted and that insurers were now looking at the claims record in a different light, so that increased premiums might have been charged even though there had been no further claims notified. It is not however in my view a sufficient basis on which to infer that all the premium except for an increase of 20% on the previous year was attributable to that factor. It is not in my view credible that factors which initially led the insurer to assess the risk as one it did not want to cover at all would not be reflected in the premium if the insurer was subsequently persuaded to accept the risk. In the absence of independent expert evidence which might have weighed up all the factors dispassionately, for which as I say the defendants have only themselves to blame, it is appropriate in my view to be cautious about the inferences to be drawn in their favour from this email. Doing the best that I can, in my judgment a fair inference would be that £10,000 of the increased premium related to the more strict view taken of the claims record."

62. In effect, therefore, the judge awarded just over half the claimed increase in premium, but under 40 per cent of the overall increase. Mr Quirke argued that as there was no

attack on Mr Balme's integrity (which Mr Dean confirmed) there was no warrant for the judge's inference that Mr Balme's e-mail was steered "towards a conclusion that the claims history was to blame"; and that in any event no such allegation was put to Mr Karim. He also argued that the judge was wrong to have inferred that insurers must have known that the reappointment of Mr Wemyss as a partner was "something of a manoeuvre". That inference was, he said, mere speculation and was inconsistent with what Mr Balme had been telling Mr Karim at the time. In addition he argued that an award of under 40 per cent of the increase in premium was not consistent with Mr Balme's statement that the claims history was the "main" reason for the increase.

63. If I may repeat something I have said before (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]):

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

64. The judge in this case was immersed in the detail of the case for many days. He was much better able than we are to evaluate the whole course of the transaction and the relationship between these parties. He was also entitled to take into account the fact that Mr Balme's statement was no more than hearsay, and that Mr Balme had not been called to give evidence so that his statement remained untested. In awarding an amount by way of damages he was also entitled to make allowances for uncertainties. We can only interfere with the judge's finding if we are satisfied that it is "wrong". Although I see the force of Mr Quirke's criticisms I was not persuaded that the judge was wrong. I would dismiss this ground of appeal.

65. Mr Quirke also argued that in addition to the direct additional cost of insurance there was also a consequential loss flowing from the unrevealed claims, and in particular a loss flowing from the publicity given to the penalty imposed upon Mr Wemyss by the SDT. The argument was that an internet search for the LLP would reveal that penalty and that the LLP's reputation was damaged as a result. Mr Quirke accepted that there was no ready means of quantifying that loss, but asked us to do the best we could. The judge did not deal with his head of alleged loss at all. That is scarcely surprising, because although the point was inferentially pleaded it did not feature in the submissions made to the judge. I would decline to make any separate award under this head: the damage to the LLP is, in my judgment, adequately covered by the award I would make for breach of the profit warranty.

Management time

66. As mentioned clause 5.5 of the SPA entitled Mr Karim to claim for "all costs and expenses … incurred by the Buyer … or the Business as a result of the breach or of such Warranty not being true or misleading (including a reasonable amount of management time)." Under this head he claimed the sum of £8,675 for the time spent by him and his employees; and a further sum of £5265 based on 39 hours of Rafik Karim's time at £135 per hour in dealing with insurance matters. Rafik Karim is Mr Karim's father. He had been a successful businessman; and although he is not a lawyer he became a partner in the LLP in August 2009.

67. The judge allowed 60 hours of management time under this head; and there is no appeal against that. However, the hourly rate that he allowed was only £30. He reasoned thus at [80]:

> "The hourly rate at £135 claimed in respect of Rafik Karim seems to me to be wholly excessive; it is more akin to a charge out rate to a client, but Rafik Karim is not a fee earner and that was no suggestion that the firm remunerates him at anything like that hourly rate. Furthermore, it is not appropriate in my view to allow a claim for the cost of management time in respect of Sameer Karim or other fee earners at the rates they would charge to clients. That is not the cost to the firm of employing a fee earner. In so far as part of the time may have been spent by fee earners, there is no evidence that this prevented them from doing any other work which would have been chargeable to clients. Sameer Karim is not an employee and his time does not cost the firm anything since he is remunerated from its profits. Nevertheless, in my judgment, the language of cl 5.5 entitles him to make a claim for a reasonable amount in respect of his own time. In my judgment, a reasonable amount in respect of that management time, in respect of all the individuals involved, would be at the rate of £30 per hour, £1800 in total."

68. Mr Quirke makes two essential points about this. First, he says that the judge was wrong to have approached the question on the basis of the cost to the LLP of the time of the individuals concerned or the lack or opportunity to earn fees because clause 5.5 entitled Mr Karim to a "reasonable amount" for management time. Second, he says that the selected rate of £30 per hour was manifestly too low when assessing that reasonable amount, because Mr Karim was a solicitor and Mr Rafik Karim was an experienced businessman and the Managing Partner of the LLP. The judge gave no reason for selecting the figure of £30, which was simply plucked from the air. Mr Quirke argues that the hourly rate should be £100.

69. I agree with Mr Quirke that the amount recoverable under clause 5.5 of the SPA is not concerned with the cost to the LLP of the management time in question. For one thing, the claim is not made by the LLP but by Mr Karim personally as the buyer under the SPA. For another clause 5.5 expressly entitles him to "a reasonable amount" for management time. Accordingly it seems to me that the judge's concentration on the cost of employing Mr Rafik Karim and the absence of evidence that fee earners were prevented from doing other work was wide of the mark: compare *Nationwide BS v Dunlop Haywards (DHL) Ltd* [2010] EWHC 254 (Comm), [2010] 1 WLR 258. As Mr Quirke pointed out, Mr Karim would still have a claim for management time even if it had all been spent in the evenings or at weekends when he would not in any event have been engaged on fee earning work. In my judgment by concentrating too much on the direct salary cost and loss to the LLP the judge underestimated the value of the claim. The value of an employee's time to an employer must, after all, be worth more than the employee's salary, otherwise there would be no point in employing him. Moreover a claim of this kind must also take into account the costs of internal overheads: *Nationwide BS v Dunlop Haywards (DHL) Ltd* at [18].

70. There is of course the difficulty that the judge had no evidence from either side about an appropriate rate other than a charge out rate; and nor do we. But I am bound to say that on reading this part of the judge's judgment I was surprised at how low the award was under this head. I do not think that he can have included anything for overhead costs even if cost was the correct measure. I have little more reliable material to go on than the judge did; but I would increase his award under this head to £60 per hour. Applied to the judge's finding of 60 hours of time, this result in an award of £3,600 in place of the judge's award of £1,800; an increase of £1,800.

Result

71. To the extent I have indicated, I would allow the appeal. The overall effect is, I think, as follows:

    i) The amount awarded to Mr Wemyss on the claim will be reduced by £12,783;

    ii) Mr Karim is entitled to damages for breach of warranty of £15,000;

    iii) Mr Karim is entitled to an additional sum of £1,800 for the amount attributable to management time.

72. The overall balance in Mr Wemyss' favour is therefore reduced by £29,583, leaving a net figure of £15,417 owing to him, in place of the judge's award of £45,000.

Lord Justice Kitchin:

73. I agree.

Lord Justice Longmore:

74. I also agree.