Neutral Citation Number: [2024] EWCA Civ 446

Case No: CA-2023-002297

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT
His Honour Judge Pelling KC
[2023] EWHC 2649 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- - - - - - - - - - - - - - - - - - - -

Between :

PROJECT ANGEL BIDCO LIMITED **Appellant**
(In Administration)
- and -
(1) AXIS MANAGING AGENCY LIMITED
(As Representative of Syndicate 1686 at Lloyd's of London)
(2) NAVIGATORS UNDERWRITING AGENCY LIMITED
(As Representative of Syndicate 1221 at Lloyd's of London)
(3) THE MEMBERS OF LLOYD'S SYNDICATE 4444 AS CONSTITUTED FOR THE 2019 UNDERWRITING YEAR OF ACCOUNTING ACTING THROUGH THEIR MANAGING AGENT CANOPIUS MANAGING AGENTS LIMITED
(4) MARKEL SYNDICATE MANAGEMENT LIMITED
(As Representative of Syndicate 3000 at Lloyd's of London)
(5) ENDURANCE AT LLOYD'S LIMITED
(As Representative of Syndicate 5151 At Lloyd's of London)
(6) RENAISSANCERE SYNDICATE MANAGEMENT LIMITED (As Representative of Syndicate 1458 at Lloyd's of London)
(7) ZURICH INSURANCE PLC **Respondents**

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Simon Salzedo KC and Joanne Box (instructed by **Addleshaw Goddard LLP**)
for the **Appellant**
Ben Quiney KC and Caroline McColgan (instructed by **DAC Beachcroft LLP**)
for the **Respondents**

Hearing date : 18/04/2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 02/05/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal is the extent of cover provided by a Buyer Side Warranty & Indemnity Insurance Policy underwritten on behalf of Project Angel Bidco Ltd ("PABL") and issued on 3 December 2019 (the "Policy").

2. On 19 November 2019, PABL exchanged with various sellers a Share and Purchase Agreement ("SPA") for the acquisition of the entire issued share capital of Knowsley Contractors Limited (trading as King Construction) ("King"), which carried on business as a provider of civil engineering and general construction services mainly to local authorities and principally to Liverpool City Council. The Policy was taken out in connection with that acquisition.

3. A warranty & indemnity policy ("W&IP") such as the Policy is a specialist insurance product by which those acquiring a company or business can insure against the risk that the target business is not in the state warranted by the Sellers and thereby was worth less than the purchase price at the date when the sale took place. At the heart of the appeal is PABL's contention that there is a contradiction between the extent of cover provided by the insuring clauses and the exclusions from cover; in particular the exclusion of liability for any loss arising out of an "ABC Liability" as defined in clause 1.1 of the Policy. That contradiction gives rise to an obvious mistake which the court can and should correct as a matter of interpretation of the Policy. In a careful judgment HHJ Pelling KC held that there was no such contradiction; and thus, the question of a corrective interpretation did not arise. His judgment is at [2023] EWHC 2649 (Comm).

The facts

4. The question arose as a preliminary issue which fell to be decided on assumed facts. I can take those facts from the judge's judgment.

5. PABL is now in administration and King has been placed in liquidation, allegedly as the result of events alleged to entitle PABL to claim an indemnity from the underwriters under the Policy.

6. The SPA included a number of warranties including the following:

> "11.1 The Company nor any person for whose acts the Company may be vicariously liable is engaged in relation to the Business in any litigation, arbitration, mediation, prosecution or other legal proceedings or alternative dispute resolution or in any proceedings or hearings before any Authority; no such matters are pending or threatened or have been settled by a deferred prosecution agreement; and so far as the Sellers are aware there are no circumstances which would give rise to any such matter.
>
> …

11.4 The Company has not received notification that any investigation or enquiry is being or has been conducted by any Authority in respect of its affairs and so far as the Sellers are aware there are no circumstances which would give rise to any such investigation or enquiry.

11.5 So far as the Sellers are aware the Company has not committed any material breach of contract, tort, statutory duty or law which will cause material damage or material loss to the Company.

…

13.5 Bribery and corruption

(a) Neither the Company nor so far as the Sellers are aware (without having made any enquiry of a third party) any of its officers, directors, employees any other person performing services for or on behalf of the Company (including but not limited to any agent, distributor, contractors or sub-contractors, joint venture, joint venture partner and any other person contemplated by section 8 Bribery Act 2010) (Associated Person) has at any time prior to the date of this Agreement committed any offence under the Bribery Act 2010 or any legislation or common law or regulation anywhere in the world creating offences in respect of bribery or fraudulent or corrupt acts.

(b) The Company has in place procedures details of which are set out in the Disclosure Letters in line with the guidance published by the Secretary of State under section 9 Bribery Act 2010 designed to prevent any person working for or engaged by it including its officers, directors, executives, employees, workers and Associated Persons from committing directly or indirectly offences of corruption or bribery or omitting to take actions which would facilitate or permit bribery or corruption.

(c) Neither the Company, nor, so far as the Sellers are aware (without having made any enquiry of a third party) any of its officers, directors, employees, Associated Persons, any of the Sellers nor any party connected with any of the Sellers has paid directly or indirectly to any person or any Authority or Relevant Person any sum or offered or promised or provided any tangible or intangible gift, favour, service, entertainment, education or promotional or travel expenses or anything else of value in the nature of a bribe or inducement.

For the purposes of this paragraph 13.5 Relevant Person means:

(i) an executive, official, employee or agent of a governmental department, agency, or instrumentality; or

> (ii) a director, officer, employee or agent of a wholly or partially government-owned or controlled company or business;
>
> …
>
> (d) Neither the Company nor so far as the Sellers are aware any of its officers, directors, employees or any Associated Person is or has been the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body or any customer regarding any offence or alleged offence under the Bribery Act 2010 and the Seller does not know of any such investigation, inquiry or proceedings have been threatened or being pending, and so far as the Sellers are aware, there are no circumstances which would give rise to such investigation, inquiry or proceedings.
>
> (e) The Company maintains a record of all entertainment, hospitality and gifts given to or received from any third party.
>
> …
>
> (g) Neither the Sellers nor so far as the Sellers are aware any party connected with any of the Sellers have violated any applicable domestic or foreign anti-bribery, anti-corruption, money laundering or anti-terrorism Regulations.
>
> (h) The Company remains eligible to be awarded contracts or business under section 23 of the Public Contracts Regulations 2006 and section 26 of the Utilities Contracts Regulations 2006 (each as amended)."

7. Following entry into the SPA, PABL took out the Policy. The judge explained that generally, W&IPs are underwritten on a bespoke basis and usually negotiated in parallel with the negotiations between the seller and purchaser of the company or business concerned. In that regard at least the genesis of the Policy was unusual because the negotiations that led to it commenced only after exchange of the SPA, although before completion. The Policy was heavily negotiated between RSG on behalf of the underwriters, Paragon on behalf of PABL with PABL's solicitors involved in at least some of the pre-contractual meetings. The exclusion of liability for any ABC Liability and the definition of that expression were the subject of detailed negotiations. It was a condition of the SPA that the Sellers had to approve the terms of the Policy before the SPA could be completed.

8. The Policy itself was structured conventionally, with a schedule, then detailed policy wording followed by various appendices including a cover spreadsheet ("Cover Spreadsheet") on which PABL places particular reliance. The relevant terms of the Policy were as follows:

> "Buyer-Side Warranty & Indemnity Insurance Policy

Project Angel

Policy Number: RSG19WI257584

Issued by RSG Transactional Risks Europe as Coverholder for and on behalf of the Underwriters

Date of Issue: 3 December 2019

Insurance Schedule

Item 1 Insured:

Project Angel Bidco Limited, a company incorporated under the laws of England and Wales with Company Number 11957072 and whose registered office is at 18 Goodlass Road, Speke, Liverpool L24 9HJ

Item 2 Acquisition Agreement:

The agreement for the sale and purchase of the entire issued share capital of the Target Group between the Insured, the Sellers, Andrew James, Re Surf Limited, M&P Doyle Properties Limited and the Target Group and dated 18 November 2019

Item 3 Policy Period: Commencement Date: 3 December 2019

Expiry Date:

1. 2 years from Completion in respect of the General Warranties …

Item 4 Limit of Liability:

£5,000,000 in the aggregate for the Policy Period

…

Appendix A Schedule of Underwriters

Appendix B Mandatory Exclusions

Appendix C Cover Spreadsheet

…

The Coverholder has been appointed as agent of the Underwriters to issue this Policy to the Insured.

The Coverholder is not an Underwriter and is not liable to pay any Loss under this Policy.

Terms and Conditions

1. Definitions and Interpretation

1.1. Definitions

In this Policy:

…

ABC Liability any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws.

Anti-Bribery and Anti-Corruption Laws

means all laws or regulations in relation to anti-bribery, anti-corruption, anti-money laundering, counter-terrorist financing, financial sanctions, export control or any other aspect of financial crime.

Breach means any of the following:

I. breach of clauses 9.1 and 9.4 of the Acquisition Agreement in respect of the General Warranties;

…

in each case in respect of any of the Insured Obligations.

…

Coverholder means RSG Underwriting Managers Europe Limited, trading as RSG Transactional Risks Europe, acting as agent for and on behalf of the Underwriters.

Cover Spreadsheet means the cover spreadsheet attached to this Policy as Appendix C

…

Excluded Insured Obligations means:

I. a Breach of any of the Insured Obligations marked as "Excluded" in the Cover Spreadsheet; or

II. a Breach of any of the Insured Obligations marked as "Partially Covered" in the Cover Spreadsheet to the extent that such Loss arises out of that part of the Insured Obligation for which cover is not provided under this Policy.

…

Insured Obligations

means the Insured Signing Obligations and the Insured Completion Obligations

Insured Signing Obligations

means the General Warranties, Fundamental Warranties and Tax Warranties as stated on the Commencement Date (save for those warranties that expressly refer to some other date) in each case to the extent referred to in the Cover Spreadsheet as "Covered" or "Partially Covered".

…

Loss has the meaning attributed to it in Clause 4.1.

…

1.2. Interpretation

1.2.1. The headings of this Policy do not affect its interpretation.

…

1.2.6 No party to this Policy shall have the benefit of any presumption regarding the interpretation or construction of this Policy based on which party drafted it.

3. Insuring provisions

3.1. Insuring clause

Subject to the terms and conditions of this Policy, the Underwriters shall, in excess of the Retention and in aggregate for the Policy Period up to the Limit of Liability, indemnify the Insured for, or pay on the Insured's behalf, any Loss covered by this Policy.

…

4. Calculation of Loss

4.1. Definition of Loss

Subject to the other provisions of this Clause 4, Loss means:

4.1.1. the amount of monies which the Insured is legally and/or contractually entitled to claim against the Sellers pursuant to the Acquisition Agreement for a Breach or would be entitled to

claim in respect of such Breach if the Limitation Provisions were disregarded

…

5.2. Exclusions

The Underwriters shall not be liable to pay any Loss to the extent that it arises out of:

…

5.2.15. any ABC Liability;

…

5.3. Mandatory exclusions

The Underwriters shall not be liable to pay any Loss to the extent that it arises out of any of the matters excluded by Appendix B.

5.4. Operation of exclusions

If only part of any Loss is excluded under the provisions of this Clause 5, the Underwriters shall remain liable for that part of any Loss, which is not so excluded.

…

9. Subrogation

9.1. Right to subrogate

If the Underwriters make any payment to the Insured under this Policy then, subject to Clause 9.2, the Underwriters shall be subrogated to the Insured's and Target Group's respective rights of recovery against any person in respect of such Loss.

9.2. Subrogation against the Sellers

The Underwriters shall only be entitled to exercise rights of subrogation against the Sellers if the Loss arose in whole or part out of the Sellers' fraud or fraudulent misrepresentation.

…

11. Other provisions

…

11.2. Entire agreement

This Policy constitutes the entire agreement between the Insured and the Underwriters concerning the subject matter of this Policy and supersedes any previous agreement, oral or written, between the parties concerning the subject matter of this Policy. Nothing in this Clause shall exclude or limit any liability or any right, which any party may have, in respect of any statements made fraudulently or dishonestly prior to the Commencement Date.

…

Appendix C - Cover Spreadsheet

This Cover Spreadsheet contains a conclusive list of the Insured Obligations, being:

1. The warranties numbered 1 to 17 inclusive set out in schedule 5 of the Acquisition Agreement (the General Warranties);

…

Notwithstanding that a particular Insured Obligation is marked as "Covered" or "Partially Covered", certain Loss arising from a Breach of such Insured Obligation may be excluded from cover pursuant to Clause 5 of the Policy.

Warranty	Warranty Content	Status	Comments
Schedule 5	Warranties		
11	Litigation and disputes		
11.1		Partially covered	Warranty deemed amended by addition of the wording "so far as the Sellers are aware" prior to the words "nor any person"
11.2		Covered	
11.3		Covered	
11.4		Covered	
11.5		Covered	
13.5	Bribery and Corruption		
13.5a		Covered	
13.5b		Covered	

13.5c		Covered	
13.5d		Covered	
13.5e		Covered	
13.5f		Covered	
13.5g		Covered	
13.5h		Covered	

”

The claim

9. In November 2022 PABL issued proceedings against the underwriters claiming £5 million (i.e., the limit of underwriters' liability under the Policy) alternatively damages; a declaration that the Sellers were in breach of warranties 11.1, 11.4, 11.5 and 13.5; together with other relief. It is important to note that the claim was not restricted to breaches of warranty 13.5. At one stage the claim included a claim to rectify the Policy, but that has been abandoned.

10. The allegations pleaded in support of the claim all related to matters which were alleged to amount to breaches of each of those warranties. As a result of the matters which are said to amount to breaches of those warranties, PABL says that Liverpool City Council has ceased to do business with King (or has severely reduced that business). PABL accepts, however, that unless the definition of ABC Liability is corrected as proposed, all the alleged breaches fall within the scope of that exclusion.

The interpretation issue

11. The issue of interpretation that arises is the interaction between the statements in the Cover Spreadsheet that the Insured Obligations include warranties 13.5a to 13.5h, and the exclusion in clause 5.2.15 of the underwriters' liability to pay any loss to the extent that it arises out of any ABC Liability as defined. PABL argues that there is a plain contradiction between the scope of the Insured Obligations on the one hand, and the exclusion of liability for loss arising out of an ABC Liability on the other. If the definition of ABC Liability is read literally, then no Loss arising out of a breach of warranty 13.5 would ever be covered by the Policy, even though the Cover Spreadsheet marks each of those warranties as included in the conclusive list of Insured Obligations. That contradiction stems from a mistake in the drafting of the definition of ABC Liability, which the court can and should correct as a matter of interpretation. The underwriters argue, and the judge agreed, that there is no such alleged contradiction. The various parts of the Policy, when read together, gives rise to no obvious error or absurdity. It is clear as it stands, and is not susceptible to correction by the court.

Legal principles

12. The judge set out the general principles of contractual interpretation at [15]. Neither party took issue with that statement of principle, and there is no need to repeat it.

13. There is, however, one additional point of interpretation on which PABL relied, in relation to the use of labels to encapsulate defined terms. In *Chartbrook Ltd v Persimmon Homes* [2009] AC 1101 Lord Hoffmann said at [17]:

> "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement: compare *Birmingham City Council v Walker* [2007] 2 AC 262, 268."

14. Lloyd LJ applied that observation in *Cattles plc v Welcome Financial Services Ltd* [2010] EWCA Civ 599, [2010] 2 Lloyd's Rep 514 at [35].

15. At [16] the judge made the further point (which again is not challenged):

> "Specifically in relation to insurance policy exclusions, the true effect of any relevant exclusion is to be 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 and in a manner that is consistent with and not repugnant to the purpose of the insurance contract – see *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57 per Lord Hodge at [7]. The contra proferentem principle has been expressly excluded by the parties to the Policy as a principle of construction by clause 1.2.6."

16. In *Impact Funding* Lord Toulson, in his concurring judgment, said at [35] that "words of exception may simply be a way of delineating the scope of the primary obligation".

17. At [17] the judge summarised the principles which enable the court to correct an error in drafting, with which, again, neither party took issue. I therefore set it out:

> "Specifically in relation to an alleged error in a contract, the general principle is that "the literal meaning of a provision in a contract can be corrected if it is clear both (i) that a mistake has been made, and (ii) what the provision is intended to say." – see *Chartbrook Ltd v Persimmon Homes* [2009] AC 1101 per Lord Hoffmann at [22] to [25] and most recently *MonSolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 per Nugee LJ at [25]. However, because, as Lord Hoffmann put it in *Chartbrook* (ibid.), "… we do not easily accept that people have made linguistic mistakes particularly in formal documents …" there is a high hurdle to be overcome before a court will conclude that it is clear a mistake has been made and typically will do so only where the clause in question is "… an obvious nonsense …" – see *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556 per Lewison LJ at [15]."

18. I think, however, that since this principle is at the heart of the appeal, it needs a little more elaboration. *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 was a case approved by Lord Hoffman in *Chartbrook*. After the passage from the judgment of Brightman LJ which Lord Hoffmann quoted, Brightman LJ went on to say:

> "Perhaps it might be summarised by saying that the principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, "Of course X is a mistake for Y"."

19. *Britvic plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2021] ICR 1648 concerned the question of interpretation of rule C.10 (2) in a pension scheme. The rule provided for an increase in pensions calculated by reference to RPI "or such other rate" decided by the employer. It was argued that "such other rate" was an obvious error for "such *higher* rate". This court rejected that argument. The clarity necessary to conclude that a mistake has been made and what the correction should be was described by Sir Geoffrey Vos MR at [32]:

> "Unlike the judge, however, I cannot satisfy myself that there has in this case been a clear mistake on the face of rule C.10(2). I can quite see that there *may* have been such a mistake. I can even see, as I have said, that it looks suspiciously likely that the draftsman simply pulled rule C.10(2) from the Six Continents Pension Plan without considering that it had not appeared in the Six Continents Executive Pension Plan, so that continuity for all members was thereby jeopardised. I can see also that the provision as drafted is unsatisfactory in the ways eloquently expostulated by Mr Bryant, and arguably inconsistent with some of the immediately surrounding materials. What I find impossible to hold, however, is that the cure for the mistake (if mistake it was) is clear. I accept that substituting the word "higher" to make rule C.10(2) read "or any higher rate" would be a desirable alteration, but it is very far from the only possible redrafting that would cure the mistake just as well. One might, for example, add a percentage range for the employer's discretion above LPI. There are several quite reasonable possibilities, and neither the BPP itself nor the admissible factual background tell the objective observer for sure which it should be." (Emphasis in original)

20. Sir Geoffrey noted that the clause as drawn was arguably inconsistent with other parts of the scheme, but that was not enough. Nor is impracticability necessarily enough. In *JIS (1974) Ltd v MCP Investments Nominees I Ltd* [2003] EWCA Civ 721 the parties entered into a lease of a building in Chelmsford consisting of offices and some ground floor shops. Simplifying the facts somewhat, the tenant took a lease of the whole building, but granted a sub-lease back to the landlord of the ground floor shops. The lease contained a break clause entitling the tenant to terminate the lease, but only on giving vacant possession of the whole building. The practical effect of that was that the break clause was inoperable unless the landlord agreed to surrender the sub-lease of the shops. The lease contained a definition of the "demised premises" which referred to the whole building, although the shops were excluded for the purposes of

rent review. The tenant argued that there had been an obvious mistake and that the shop units ought also to be excluded for the purposes of the break clause. This court rejected that argument. Carnwath LJ said:

> "[18] … The break clause is not obvious nonsense on its face. The complaint is that, when one analyses the lease and the underlease in more detail, one can see that the clause is practically inoperable. The tenant can only give vacant possession of the shop units to the landlord if either it can first buy the underlease back from the landlord/underlessee, or if it comes to an end for some other reason. Neither, it is said, would have been a possibility which was in the contemplation of the parties. The former would imply that the landlord could, in effect, prevent the exercise of the option by refusing to sell. The latter was very unlikely because of the intrinsic value of the underlease, and contrary to the intention of the parties who contemplated the underlease extending effectively for the same period as the lease.
>
> [19] This argument is powerful and certainly relevant to rectification. However, in my view the problem is quite different from the obvious nonsense which was corrected in *Holding & Barnes*. The task of interpretation does not allow the court to rewrite the contract."

21. The importance of not only the clarity of the mistake but also the clarity of the cure was emphasised by Lord Hodge in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [86]:

> "Even if, contrary to my view, one concluded that there was a clear mistake in the parties' use of language, it is not clear what correction ought to be made. The court must be satisfied as to both the mistake and the nature of the correction."

22. In *Chartbrook* Lord Hoffmann said at [25]:

> "What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

23. This observation is of relevance in addressing the question: if there is an error, what is the nature of the cure?

The nature of the insurance

24. As the judge said, the Policy is a specialist insurance product by which those acquiring a company or business can insure against the risk that the target business is

not in the state warranted by the Sellers and thereby was worth less than the purchase price at the date when the sale took place. This is reflected in the definition of Loss:

> "the amount of monies which the Insured is legally and/or contractually entitled to claim against the Sellers pursuant to the Acquisition Agreement for a Breach [i.e. a breach of warranty described as an Insured Obligation]".

25. The measure of damages in a buyer's claim against the seller for breach of warranty is the difference between the value of the shares as warranted and their true value. It must be borne in mind that the relevant difference in value is between the shares themselves on the two different bases, not the loss (if any) suffered by the target company itself. Accordingly, if the company is subject to a liability which ought to have been disclosed but has not been, the resulting loss to the buyer of the shares may be greater than the amount of the target company's own undisclosed liability. Equally there may be a breach of warranty which has caused the target company no loss, but which nevertheless causes a diminution in the value of the shares.

26. Clause 3.4 of the Policy made it clear that PABL could claim on the Policy without exercising any right of recovery against the Sellers; although it did not give up its right to sue the Sellers if it chose to. More unusually (at least in the case of a conventional type of insurance policy), the combination of clauses 9.1 and 9.2 excluded the underwriters' right of subrogation unless the Loss arose in whole or in part out of the Sellers' fraud or fraudulent misrepresentation.

27. These features of the Policy give rise, in my view, to two competing (and entirely rational) perspectives. From the point of view of PABL it naturally wanted the extent of cover to be as wide as possible. But from the perspective of the underwriters, they would naturally have wanted to limit their liability under the Policy, especially in circumstances where they would have no right of recourse against the Sellers, and where they would not have had the opportunity available to the buyers to carry out due diligence on the target company.

Apparent inconsistencies

28. It is of critical importance to appreciate that PABL does not suggest that the Policy can be *interpreted* to conform with the way in which it says it has effect simply by applying the usual principles of contractual interpretation. Its argument is entirely dependent on persuading the court both that there is an obvious error in the Policy and also that there is a clear means of curing it. Although the application of a corrective interpretation is part of the overall iterative process of interpretation it is "a different exercise from that of choosing between rival interpretations": *Monsolar* at [25] per Nugee LJ.

29. The first step in PABL's argument is to show that there is an inconsistency between the insuring clause and the Cover Spreadsheet on the one hand, and the exclusion of Loss arising out of any ABC Liability on the other. The second step is that the inconsistency arises because of an error in the drafting of the definition of ABC Liability. The third step is to correct that error so that the corrected definition reads:

> "ABC Liability any liability **for** actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws."

30. Thus, the proposed correction is only one letter, turning "or" into "for".

My approach

31. I propose to address this argument in three stages:

    i) Is there an apparent inconsistency, as alleged?

    ii) If there is an apparent inconsistency, does the contract itself answer the question which of the inconsistent clauses is to prevail?

    iii) If it does not, what is the court's response?

    Plainly these three stages contain a considerable degree of overlap; and ultimately the question must be resolved by the iterative process of interpretation of the contract as a whole.

32. As a general proposition, it is reasonable to assume that the parties to a contract intended that all parts of it should be effective. Sometimes, however (whether due to drafting error or compromise during negotiations) different parts of a contract are in conflict. In this connection, as Bingham LJ put it in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565:

> "It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses."

33. To similar effect, Males LJ said in *Septo Trading Inc v Tintrade Ltd* [2021] EWCA Civ 718, [2021] 2 Lloyd's Rep 591 at [28]:

> "Thus there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being 'emasculated', but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which

> detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting."

34. But there are three important qualifications to be made to that statement of principle. First, as the Supreme Court held in *FCA v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649 at [77]:

> "The assumption that the parties intended each of two seemingly inconsistent clauses in their agreement to have effect is a sound starting point where the parties to the contract would reasonably be expected to have had both clauses simultaneously in mind. … But sometimes that is not a reasonable assumption—for example in the case of complex contractual documents which themselves contemplate and provide for the possibility of inconsistency."

35. Second, where the contract does itself contemplate the possibility of inconsistency, it may itself provide for an order of precedence to be applied in resolving the inconsistency. In *Pagnan* itself, for instance, the contract provided that in case of conflict between the special terms and the incorporated printed form, the special terms should prevail. Similarly, one clause in a contract may state that it is "subject to" another clause in the same contract. In such a case, the second clause will normally take precedence over the first: *Scottish Power Plc v Britoil (Exploration) Ltd* (1997) 141 SJLB 246; *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245. The same conclusion follows where the second clause is said to have effect "notwithstanding the provisions" of the first clause: *The World Symphony* [1992] 2 Lloyd's Rep 115. By contrast, where the second clause is expressed to take effect "without prejudice" to the first clause, the first clause will normally take precedence over the second: *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607.

36. Third, the nature of the apparently inconsistent clauses may lead to the answer. In *Generali Italia SpA v Pelagic Fisheries Corpn* [2020] EWHC 1228 (Comm), [2020] 1 W.L.R. 4211 Foxton J said at [87]:

> "Elsewhere, I have suggested that what might be described as a "jigsaw" approach to construction, under which all the pieces are to be used if at all possible, can sometimes risk a false equivalence between bespoke and boilerplate contractual provisions. Whatever the merits of seeking to read provisions together as a general rule of construction, however, it is clear that the enthusiasm with which this approach should be pursued will vary between contractual terms, and contractual contexts."

37. As I read it, this was endorsed by Males LJ *in AIG Europe SA v John Wood Group plc* [2022] EWCA Civ 781, [2022] Lloyd's Rep IR 1561 at [51]:

> "I would be inclined to accept that if there is a conflict between the PPJC [the Primary Policy Jurisdiction Clause] and the later clauses, Mr Stewart's submissions that the former should

> prevail would have considerable force. In particular, where clauses conflict with each other, I would accept that the location of the clauses within the policy may indicate that one clause 'is intended to have a higher contractual status' than another."

38. It is this approach which, in my judgment, the Supreme Court applied in *FCA v Arch*. That case concerned the interpretation of a number of different policies covering small and medium enterprises (SMEs) against interruption due to disease. The principal policy under consideration was one issued by Royal & Sun Alliance Insurance plc ("RSA") and designated RSA 3. The policy ran to 93 pages, divided into nine sections. The basic cover was in section 1 of the policy. But section 2 contained a series of extensions, one of which was to extend cover to any interruption or interference with the business following any occurrence of a notifiable disease (as defined) at or within a radius of 25 miles of the premises. The definition of "notifiable disease" included illness sustained by any person resulting from any human infection. The issue was the extent of cover provided to SMEs as a result of the Covid-19 pandemic. One of the arguments advanced by RSA was that the disease clause did not provide cover at all because loss caused by an occurrence of a notifiable disease was excluded if it amounted to an epidemic. That, it was argued, was the result of general Exclusion L, which appeared on page 93 of the policy. The Supreme Court said at [78]:

> "The notion that such a policyholder [i.e. an ordinary policyholder] who is presumed to have reached p 93 of the RSA 3 policy wording would understand the general exclusion of contamination or pollution and kindred risks on that page to be removing a substantial part of the cover for business interruption loss that was ostensibly conferred on p 38 is as unreasonable as it is unrealistic. The reasonable reader would naturally assume that, if the intention had been to put a further substantive limit on the risk of business interruption specifically insured by the extension for infectious diseases in addition to the geographical and temporal limits stated in the extension itself, this would have been done transparently as part of the wording of the extension and not buried away in the middle of a general exclusion of contamination and pollution risks at the back of the policy. The reference in the exclusion to "disease" would reinforce the understanding that the general exclusion could not have been intended to apply to the cover for business interruption caused by an infectious disease, as it would obliterate that cover. It could not sensibly be thought to make a difference that the word "disease" was part of a composite phrase "disease and epidemic". No reasonable reader would suppose that, although one part of this phrase was not intended to apply to the business interruption cover, the other part was."

The reasonable reader

39. There was some dispute before the judge about the order in which the reasonable reader would read the Policy. As recorded by the judge at [13] PABL contended:

> "that the correct way in which the Policy should be read is in the order (a) Schedule; (b) Cover Spreadsheet, and (c) the exclusions whereas the [underwriters] maintain the correct way in which the Policy should be read is in the order set out in the document."

40. The judge regarded that as an arid dispute because the reasonable reader would go through the whole policy. That argument is revived, but in a slightly different form. What is now argued is that in order to understand the insuring clause the reasonable reader would go through the definitions of "Loss", "Breach", "Insured Obligations" and then look to the Cover Spreadsheet to see which warranties were covered. I do not see why that should be so. The insuring clause specifically provides that the obligation to insure is "subject to the terms and conditions of this Policy." In order to understand what that means, the reasonable reader would surely read the policy as a whole. Nor do I see why the reasonable reader would look only at the selected definitions before turning to the Cover Spreadsheet and then dot back to the exclusions.

41. Ultimately, I agree with the judge that the argument is an arid one; not least because both sides agreed that the interpretation of the Policy was an iterative process, which required a consideration of the Policy as a whole.

Is there an apparent inconsistency as alleged?

42. On the face of it, the inclusion of warranties 13.5 (and its sub-paragraphs) among the Insured Obligations, and the breadth of the exclusion of Loss arising out of ABC Liability do appear to conflict. Put shortly, in relation to warranty 13.5 the Policy appears to give with one hand and take away with the other. Mr Quiney KC, for the underwriters, struggled to give any concrete example of a Loss arising out of a breach of warranty 13.5 which would fall outside the ABC Liability exclusion and was thus a Loss to which the Policy would respond. One possibility that was canvassed was a breach of warranty 13.5 (e) (warranty that the company maintains a record of all entertainments, hospitality and gifts given to or received from a third party). Another possibility is a breach of warranty 13.5 (h) (continuing eligibility to be awarded contracts under regulation 23 of the Public Contracts Regulations 2006, regulation 23 (4) of which enables a public authority to treat as ineligible an economic operator subject to certain insolvency or enforcement procedures).

43. There is, to my mind, an apparent conflict (at least in part) between the inclusion of the whole of warranty 13.5 in the Insured Obligations on the one hand, and the width of the ABC Liability exclusion on the other. Although Mr Salzedo KC, for PABL, said that it did not matter if there was only a partial contradiction, I consider that it does have a bearing on the questions (a) whether the contradiction was the result of an obvious error and (b) if so, what (if any) correction should be made? I will deal with those questions in due course.

44. But that is not all that the ABC Liability exclusion covers. In the present case, the claim asserts breaches of warranties 11.1, 11.4, and 11.5. It is common ground that unless the ABC Liability exclusion is corrected as proposed those claims must also fail. Yet it is easy to envisage other breaches of those warranties that would not be excluded by the ABC Liability exclusion.

Does the policy show how to resolve the conflict?

45. Mr Quiney KC's first point was that the structure of the policy shows that Appendix C (which contains the Cover Spreadsheet) was subordinate to the ABC Liability exclusion. The Cover Spreadsheet was a summary document only. I did not find this point persuasive. The definition of "Insured Obligations" in the body of the Policy is linked expressly to the Cover Spreadsheet. It is not possible to relegate the Cover Spreadsheet to a "summary document", when it is the only means of identifying which warranties are within the scope of the Policy.

46. Mr Quiney's second point was that the ABC Liabilities exclusion was a heavily negotiated bespoke term, and for that reason must be given more weight than the Cover Spreadsheet. Mr Salzedo KC's answer to this point was that the designation of each of the warranties as "Covered," "Excluded" or "Partially Covered" was equally bespoke and negotiated. I agree with that up to a point, although I accept that the definition of ABC Liability is particularly detailed and wide ranging, whereas the single word used to denote a warranty is of broader brush. In addition, I do not consider that it can fairly be said that the ABC Liability exclusion is "buried away" at the back of the Policy. Its existence is, to my mind, transparent.

47. Mr Quiney's third point was that the rubric at the head of the Cover Spreadsheet gave the conclusive answer. To repeat that rubric it states:

> "Notwithstanding that a particular Insured Obligation is marked as "Covered" or "Partially Covered", certain Loss arising from a Breach of such Insured Obligation may be excluded from cover pursuant to Clause 5 of the Policy."

48. The use of the word "notwithstanding" showed clearly that the exclusions in clause 5 took precedence over the Cover Spreadsheet. I did not understand Mr Salzedo KC to dispute that in principle; but he said that the rubric only extended to "certain Loss" arising from a Breach of the Insured Obligation in question. It would not be reasonably understood to exclude "all" Loss. Mr Salzedo illustrated the point by posing the question: if you asked him does he own the books by Charles Dickens, and he answered that he owned certain books by Charles Dickens, the implication is clear that he did not own them all. That is one usage of the word "certain", but the answer would, to my mind, be the same if he knew which books by Charles Dickens he owned, but did not know whether they constituted Dickens' whole oeuvre or not, and was unwilling to commit himself. In that sense, I think that Mr Quiney is right to say that in some contexts "certain" means identifiable. There is some (albeit modest) support for this point in clause 5.4 of the Policy which contemplates that a Loss may be excluded only in part (but implicitly that it may be wholly excluded).

49. What is possible to take from the rubric is that the exclusions were intended to take precedence over the Cover Spreadsheet at least to some extent. To what extent

depends on the scope of the exclusion. But that does not at this stage answer the question: is there an obvious mistake in the drafting of the ABC Liability exclusion?

Is there an obvious mistake in the ABC Liability exclusion?

50. The judge interpreted the exclusion as applying in three different sets of circumstances. He parsed it at [34]:

> "As drafted the definition would appear to cover three different species of ABC liability being:
>
> i) Any liability … in respect of Anti-Bribery and Anti-Corruption Laws;
>
> ii) Any … alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws; and
>
> iii) Any … actual … non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws."

51. Mr Salzedo raised a number of objections to the judge's interpretation. First, the exclusion of Loss arising out of "alleged non-compliance" did not correspond to the defined term namely "ABC *Liability*". Second, the judge's interpretation means that limb i) was entirely redundant because anything that amounted to a liability would be captured by "alleged or actual" non-compliance. Third, "any liability" did not specify whose liability, whereas the exclusion as a whole did ("any member of the Target Group or any agent, affiliate or other third party"). Fourth, the reasonable reader encountering the word "liability" would expect it to be liability "for" something. The reasonable reader would thus interpret the first use of the word "or" as being a mistake for "for".

52. Before dealing with the detailed textual issues, it is necessary to consider the question whether there has been an obvious mistake more broadly. The mistake (if there was one) must, as it seems to me, be a mistake that was common to both parties. So it is necessary to consider the question from the perspective of the underwriters.

53. As Mr Quiney submitted, the Loss to which the Policy responds is a loss in share value. It is not a liability policy intended to cover the insured against the risk of third party liabilities.

54. Although the proposed correction is only one letter, it has a very significant effect. It would confine the exclusion to cases of "liability". It would thus bring within the scope of the Losses for which underwriters are liable, any diminution in share value attributable to an allegation of non-compliance with anti-bribery laws even if the allegation was never proven nor even investigated. It is not difficult to see why underwriters would have wished to exclude such a Loss. Suppose that the target company's main customer becomes aware of an allegation of non-compliance by the target company, and without further investigation decides to cease business with the target company. That could plainly impact on the share value, even though nothing

was ever established or proved. Moreover, it is not to be forgotten that warranty 13.5 (a) was a warranty which extended to "any legislation common law or regulation anywhere in the world". As Mr Quiney submitted, the taint of bribery or corruption (even if only alleged) may damage a business beyond simply incurring a liability to some third party.

55. In my judgment, the existence (from the point of view of the underwriters) of a coherent and rational explanation for why the ABC Liability exclusion took the form that it did is a strong pointer against the conclusion that there is an obvious drafting mistake. It is common ground that the ABC Liability exclusion was a specifically negotiated clause. As Lord Hodge said in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [11] the court:

> "… must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest... Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

56. I turn, then, to the textual issues. It is necessary to say at the outset that the textual points are not intended to lead to the conclusion that the natural meaning of the definition is what PABL argues. They are intended to lead to the conclusion that there is an obvious drafting mistake. The first is the lack of correspondence between the definition and the defined term. Although the term defined is part of the material that is relevant to interpreting the definition, a definition may give the defined term a meaning which is larger than the meaning of the defined term. Indeed, that is often the purpose of a definition. The words of the definition do include the concept of liability even though they go further. Second, the argument from redundancy seldom carries much weight in this context. As Hoffmann LJ put it in *Arbuthnot v Fagan* [1996] LRLR 135:

> "In a document like this, however, little weight should be given to an argument based on redundancy. It is a common consequence of a determination to make sure that one has obliterated the conceptual target."

57. Third, it may be that the judge was wrong in leaving the word "liability" hanging. But that is because of his particular method of parsing the definition. It is equally coherent to read the definition, taken as a whole, as concerning liability of the group identified in the remainder of the definition (i.e., "any member of the Target Group or any agent, affiliate or other third party"). Fourth, I would accept that normally one would expect to see "liability" *for* something. But it is not beyond ordinary usage to refer to liability *in respect of* something. The Policy itself uses different phrases. The definition of "Misclassification Liability" deals with liability "arising from"; the definition of "Secondary Tax Liabilities" deals with any tax liability "which is primarily the liability of a party other than a member of the Target Group;" the definition of "Shareholder Instrument Tax Liability" deals with liability "arising or in connection with;" and the definition of "Transfer Pricing Liabilities" deals with tax liability "arising in connection with". So the Policy does not use consistent wording to attach the concept of liability to that which gives rise to it.

58. I would accept that the definition is not a masterpiece of drafting. But nor is it if corrected in the manner proposed. The concept of liability for *alleged* non-compliance is a difficult one to understand if it is contrasted with liability for *actual* non-compliance. It takes some ingenuity (although it is not impossible) to think of circumstances which would engage liability for alleged non-compliance but which did not engage liability for actual non-compliance.

59. In short, despite the apparent contradiction, I have not been persuaded that there has been a clear drafting error.

If there was a mistake, what is the cure?

60. As we have seen, in order to correct a drafting mistake by interpretation, it is necessary not only that the mistake must be clear, but also that the cure must be clear. One reason why the tenant failed in *Arnold v Britton* was that even if there had been a mistake, it was not clear what the correction should be. Similarly in *Britvic*, the fact that the alleged mistake could be cured in several different ways was a bar to a corrective interpretation since neither the instrument in question nor the objective background told "the objective observer for sure which it should be". In *Trillium* too, the fact that there were several possible ways of curing the alleged mistake was a bar to the relief sought.

61. A particularly stark example arose in *Doe d Spencer v Goodwin* (1815) 4 M & S 265. In that case a lease contained a proviso for forfeiture on breach of "all or any of the covenants hereinafter contained." The lease contained a number of covenants on the part of the tenant, but none of them were positioned after the forfeiture clause. Bayley J said at 270:

> "Now here it is plain there is a mistake somewhere, but where it lies I am at a loss to discover. As the lease now stands, "hereinafter contained" is incorrect, because there are not any subsequent covenants on the part of the lessee to which it can apply; but whether the error lies in the insertion of those words, or in the omission of other covenants, I am at a loss to conceive with any sufficient certainty to be able to determine that those words ought to be struck out."

62. The problem is posed in stark terms here too. Let it be assumed that there is a contradiction between the terms of the ABC Liability exclusion and the designation of warranty 13.5 as "Covered". Let it also be assumed that that contradiction arose because of a drafting mistake. Was the mistake in drafting the ABC Liability exclusion; or was the drafting mistake in including warranty 13.5 among the obligations "Covered"? I can see no clear answer to that question. It is true that PABL's proposed correction would use less red ink than changing the Cover Spreadsheet, but as Lord Hofmann explained, the quantity of red ink does not matter. As I have said, the underwriters had a coherent and rational reason for wanting to avoid liability for Loss arising out of ABC Liability. The ABC Liability exclusion covers not only warranty 13.5 but at least the current claims made under warranty 11. It is not to my mind clear that the error (if any) lay in the drafting of the ABC Liability exclusion as opposed to the Cover Spreadsheet.

Result

63. I would dismiss the appeal.

Lord Justice Arnold:

64. I have not found this case easy. Both sides' arguments have force. But in the end, I have reached the same conclusion as Lewison LJ. I agree with Lewison LJ's reasoning. I would add one further point. I wondered whether it was part of PABL's case that there was an obvious typographical error in the definition of "ABC Liability" i.e. "or" was mistakenly typed when "for" was intended. Counsel for PABL's response to that question was to say that a typographical error was one possible explanation for the inconsistency PABL contended for, but not the only possible explanation. I can understand why he was unwilling to commit himself to that explanation given that (i) there is no claim for rectification, (ii) the ABC Liability exclusion was individually negotiated and (iii) the actual wording of the definition appears to have a rational explanation when viewed from the perspective of the underwriters' commercial interests. But if one cannot conclude that there is an obvious typographical error in the definition of ABC Liability, then I find it difficult to conclude that there is an obvious mistake in the Policy with an obvious correction.

Lord Justice Phillips:

65. I agree with Arnold LJ that the arguments in this case are finely balanced, but I prefer those of PABL for the following reasons.

The legal and commercial context

66. In my judgment the Policy falls to be interpreted together with the SPA and, further, the commercial purpose and intended effect of the Policy must be understood in that overall context: the execution of the Policy (approved by the Sellers) was a condition precedent of completion of the SPA and an executed copy of the SPA was deemed to be appended to the Policy.

67. The Sellers under the SPA comprised four individuals (together holding shares equivalent to 70% of the equity in King) and one company (holding the remaining 30%.) The main shareholder, Mark Doyle, held 61%.

68. By paragraph 7.1 of Schedule 6 of the SPA, PABL was required to pursue any warranty claim covered by the Policy against its underwriters in preference to the Sellers and, by paragraph 6.1 of Schedule 6, the Sellers were only liable to PABL in respect of such claims to the extent that PABL did not recover from underwriters. Therefore, PABL agreed to give up its claim against the Sellers to the extent of its claim against underwriters (and to that extent I disagree with paragraph 26 of Lewison LJ's judgment).

69. The effect of the above, combined with the unusual agreement of underwriters to waive any right of recourse to the Sellers (save where they have been fraudulent), was that the underwriters assumed primary liability for the warranties listed in the Policy as "covered" to the extent of that cover and the Sellers were (subject to the risk of the underwriters defaulting) released from liability. It follows that, in commercial terms,

and despite apparently playing no role in its negotiation, the Sellers were major beneficiaries of the Policy, explaining why their approval of its terms was a pre-condition of completion of the SPA. The commercial purpose of the Policy, and in particular the Cover Spreadsheet, included enabling the Sellers to ascertain, in giving their approval, the extent to which they were being released from liability to PABL.

Is there an inconsistency?

70. In my judgment Mr Salzedo KC was right in submitting that there is a clear conceptual distinction, both generally and specifically under the Policy, between coverage of risks and the exclusion of certain losses which would otherwise be covered. A typical example would be cover of damage to real property and separately of personal property, with an exclusion of losses arising under those covered heads but resulting from flood. But if there was specific cover for property damage caused by flood, there would be a clear conflict between that coverage and the exclusion of loss caused by flood.

71. The Policy, if the ABC Liability exclusion is read literally, contains precisely that type of conflict. All eight warranties within warranty 13.5 in respect of Bribery and Corruption are expressly described as "covered" in the Cover Spreadsheet and are therefore Insured Obligations (and not Excluded Obligations) for the purpose of the insuring provision in clause 3 and the definition of Loss in clause 4 of the Policy. However, the exclusion of ABC Liability, if read as extending beyond liability and including any loss arising from actual or alleged non-compliance with anti-bribery and anti-corruption laws, would fully and directly exclude any and all losses which would otherwise be covered by the warranties at 13.5(a)-(d), (f) and (g). The fact that there might conceivably be losses under 13.5(e) and/or (h) (or under clause 11 of the SPA) which might not be excluded does not, in my judgment, remove the fundamental inconsistency or undermine the need to resolve it. There is no doubt, in my view, that the Policy, if read as the underwriters contend, gives with one hand and immediately takes back with the other, such that the use of the term "covered" in the Cover Spreadsheet would be rendered misleading and, in substance, wrong.

72. The inconsistency is particularly stark and unfortunate, in my judgment, because the Sellers, in approving the form of the Policy and proceeding to complete the SPA, were entitled to proceed on the basis that they would effectively be released (subject to the exclusions and limitations of the Policy cover) from the warranties shown as "covered" in the Cover Spreadsheet, including the warranties in respect of Bribery and Corruption at 13.5. There was a significant risk that they would not have appreciated that such release was effectively reversed by the ABC Liability exclusion and that they (mainly individuals) would be personally liable to PABL.

Does the policy provide for resolution of the inconsistency?

73. The caveat in the Cover Spreadsheet, warning that certain losses arising from the breach of an Insured Obligation was nonetheless be excluded under clause 5 of the Policy, is no more than an anodyne statement of the distinction referred to above. It is part of the structure of the Policy that gives rise to the inconsistency: it does not even purport to resolve a situation where cover for an Insured Obligation is effectively removed entirely by an exclusion.

74. In that regard, it is noteworthy that the Policy expressly recognised the concept of Excluded Obligations. Had parties intended to exclude the Bribery and Corruption warranties from the scope of the insurance, there was a simple mechanism to do so: I see no basis for interpretating the caveat in the Cover Spreadsheet as effectively converting an Insured Obligation to an Excluded Obligation.

75. It follows, in my judgment, that the Policy does not itself provide a resolution of the inconsistency.

Has something gone wrong with the language of the ABC Liability exclusion?

76. Mr Quiney KC readily accepted that the wording of the ABC Liability exclusion was "odd". In my judgment it goes further than that. The label itself clearly envisages that the exclusion relates to loss arising out of a "liability" of some sort and the definition duly starts with that word. But rather than proceeding to define what liability is encompassed (by whom, to whom and for what), the words which follow, if read literally (as broken down by the judge), move jarringly to exclude losses arising from "non-compliance" with anti-bribery and anticorruption legislation generally, thereby subsuming the concept of "liability" in respect of such legislation and rendering it redundant. Further, had that interpretation truly been intended by the sophisticated drafters of the Policy, the exclusion would have been worded as follows: "Liability of, or actual or alleged non-compliance by, any member of the Target Group…".

77. Therefore, in my judgment, particularly when read in the context of the inconsistency to which the judge's interpretation gives rise, it is obvious that something has indeed gone wrong with the language of the ABC Liability exclusion.

Is there an obvious cure for the mistake?

78. The simple cure proposed by PABL fixes all of the problems identified above. Reading the exclusion as "Liability for..." rather than "Liability or…" removes the awkwardness in the language, renders the text consistent with the label, avoids rending the concept of liability redundant and removes the inconsistency between the Insured Obligations and the scope of the exclusions. It is also consistent with the commercial sense of the overall structure that the Sellers should be able readily to identify, from the Cover Spreadsheet, from which warranties they were and were not effectively released. I am also influenced by the fact that, when I first read the definition, my immediate assumption was that the letter "f" had been omitted.

79. I do not consider that the existence of the alternative "solution" of changing all eight 13.5 warranties from "Covered" to "Excluded" undermines the obviousness of PABL's proposal. That change to the basic coverage provisions of the Policy (promoting an exclusion over such coverage provisions), is far more dramatic and difficult to justify, yet would still leave the linguistic infelicities of the ABC Liability definition uncorrected. It also increases, rather than decreases, the exposure of the Sellers, who will have been seriously misled by the express description of the eight warranties in 13.5 as "covered" if they are to be read as "excluded".

80. I also accept Mr Salzedo's submission that, although the omission of the letter "f" may well have been a typographical error, it is not necessary for PABL to prove that such an error was made. The task is one of interpretation, not rectification. The

meaning of the provision is to be determined by the iterative process of considering the proposed interpretations of the policy textually and contextually, an important element in this case being that something has plainly gone wrong with the language used, whether typographically or otherwise. Undertaking that task, I am satisfied that the intention of the parties is best and properly reflected by adopting the interpretation proposed by PABL.

Conclusion

81. I would allow the appeal.