



Neutral Citation Number: [2025] EWCA Civ 203

Case No: CA-2023-000738

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN LEEDS**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**  
**HHJ KELLY (SITTING AS A JUDGE OF THE HIGH COURT)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 5 March 2025

Before :  
**LORD JUSTICE COULSON**

**LORD JUSTICE FRASER**  
and  
**LORD JUSTICE ZACAROLLI**

Between :

**LONHAM GROUP LIMITED**  
- and -

**Appellant**

(1) SCOTBEEF LIMITED  
(2) D&S STORAGE LIMITED (IN LIQUIDATION)

**Respondents**

Mr Stewart Buckingham KC and Mr Michael Proctor (instructed by Kennedys Law LLP)  
for the Appellant

Christopher Boardman KC and Mr Andrew Brown (instructed by Birketts LLP) for the  
First Respondent

The Second Respondent was not represented and did not appear

Hearing date : 12 December 2024

**JUDGMENT**

**Lord Justice Fraser :**

1. This judgment is in the following parts:
  - A. Introduction
  - B. Factual Background
  - C. Legal Framework
  - D. The judgment under appeal
  - E. Grounds of Appeal
  - F. Representations and Warranties
  - G. Transparency
  - H. Respondent's Notice
  - I. Conclusions

**A. *Introduction***

2. This case concerns the Insurance Act 2015 and the proper categorisation of representations and warranties of information provided by the insured to the insurer as part of the insurance proposal leading to the formation of the contract of insurance. The first respondent, Scotbeef Ltd (“Scotbeef”) is in the business of meat production and distribution for retail purposes, and as part of that business used refrigeration facilities provided by the second respondent, D&S Storage Ltd (“DS”). DS specialised in chilled and frozen storage in warehouse facilities. It is now in liquidation, an event which occurred after proceedings had been started against it by Scotbeef, and after the First Preliminary Issue judgment had been handed down by the court below. That claim by Scotbeef against DS related to damage caused by deterioration of the meat being stored by DS.
3. Lonham Group Ltd (“Lonham”) was the insurer of DS at the relevant time. In outline, if the insurance provided by Lonham to DS was valid and covered the risk of the event that occurred (of which more below), then Lonham would be liable to indemnify DS for the losses caused by the claim brought by Scotbeef. As a result of the provisions of the Third Party (Rights against Insurers) Act 2010, Scotbeef would be entitled to the benefit of that indemnity by Lonham.
4. In the First Preliminary Issue judgment, at which point in the action the only parties to the claim were Scotbeef and DS, the court made findings concerning the terms and conditions that governed the contractual relationship between Scotbeef and DS. DS had contended that particular trade standard terms applied to that relationship, those terms limiting the losses being claimed by Scotbeef. The findings regarding incorporation of the trade terms were adverse to DS, which then entered into liquidation. The insurers of DS, Lonham, were then joined to the action and following the hearing of another preliminary issue, which I will call the Second Preliminary Issue, the court found that Lonham was liable to indemnify DS (and therefore Scotbeef was entitled to the benefit of the indemnity too).
5. This Second Preliminary Issue that was ordered was in the following terms: “Whether the First Defendant [DS] had any right of indemnity against the Second Defendant [Lonham] under Marine Liability Policy No: 117040 DB, in relation to the loss claimed by the Claimant [Scotbeef], which can be enforced

by the Claimant pursuant to the Third Parties (Rights against Insurers) Act 2010”.

6. Scotbeef had asserted that DS had a right of indemnity against Lonham, when the relevant insurance policy with Lonham was interpreted in conjunction with the Insurance Act 2015 (“the 2015 Act”). Scotbeef asserted that it could enforce that right of indemnity pursuant to Third Parties (Rights against Insurers) Act 2010 (“the 2010 Act”). Lonham’s case was that DS did not have any such right of indemnity under the terms of the insurance policy due to a breach, or breaches, of warranty by DS, and that there was therefore nothing to enforce under the 2010 Act. The warranties within that contract of insurance related to information provided to Lonham by DS at inception of the policy regarding the terms under which DS was contracting with its customers.
7. The Judge below found in favour of Scotbeef on the Second Preliminary Issue, in which DS played no part due to its liquidation. DS has similarly played no part in this appeal, which is brought by Lonham with leave granted by my Lord, Coulson LJ, on the grounds explained in section E below. There are no issues on this appeal in respect of the operation of the 2010 Act. The parties are agreed that *if* DS were to be entitled to an indemnity by Lonham, then in all the circumstances of this case Scotbeef could take the benefit of that indemnity directly. However, the position of Lonham (who were underwriters under the policy) is that DS was in breach of conditions precedent in the insurance policy by contracting with Scotbeef other than on the standard trade terms declared to it, and is therefore not entitled to indemnity under the insurance policy. The judge had decided that the information provided to Lonham by DS about the contracting terms constituted representations rather than warranties, and so fell to be considered within the provisions of Part 2 of the 2015 Act (set out below). Lonham’s case before the judge, and before us on this appeal, is that as warranties they fell to be considered under sections 9 and 10 within Part 3 of the 2015 Act.
8. It is the effect of the 2015 Act that requires consideration in order to decide the issues on the appeal. There is very little authority on the 2015 Act to date, and none on the points that arise on this appeal concerning representations and warranties.

**B. *Factual background***

9. In view of the issues on this appeal, the facts can be summarised briefly. Lonham and DS entered into an insurance policy with Lonham as DS’ liability insurer, the first such policy being entered into on 30 June 2016. The policy was renewed on an annual basis thereafter. It provided insurance cover for warehousekeepers’ legal liability subject to the terms and conditions of the policy, which are set out in relevant part at [22] and following below. The particular policy that governed the claim brought by Scotbeef was taken out on 30 June 2019. In the insurance policy documents in June 2016 DS stated that it was trading on the UK Warehousing Association (“the UKWA”) terms and conditions. These are standard terms provided by that trade association.

10. In February 2017 DS started a contractual relationship whereby DS agreed to freeze and store Scotbeef's meat products at DS' warehouse. This was arranged by Woolley Bros. (Wholesale Meats) Ltd ("Woolley Bros") who had an existing storage relationship with DS. Woolley Bros is an associated company of Scotbeef but nothing turns on the nature of that relationship. There was no direct communication between Scotbeef and DS and there was no written contract setting out terms of storage. For the purposes of the issue in this appeal, the involvement of Woolley does not matter but it is part of the factual background. The first invoice sent to Scotbeef by DS in February 2017 referred to the UKWA terms and conditions as follows:

"A Member of UKWA  
UKWA Terms & Conditions Apply  
Settlement Terms Strictly 30 Days Net"

11. Invoices continued to be sent by DS to Scotbeef making reference to the UKWA terms and conditions until May 2017. In that month, DS became a member of a different trade association called the Food Storage and Distribution Federation ("the FSDF"). An invoice sent by DS to Scotbeef on 15 May 2017 referred to FSDF terms as follows:

"A Member of FSDF  
FSDF Terms & Conditions Apply  
Settlement Terms Strictly 30 Days Net"

12. Weekly invoices from DS to Scotbeef continued to make reference to FSDF terms and conditions until 4 February 2019. The policy which is the subject of these proceedings remained with Lonham during the period from 2016 onwards, and was renewed on 30 June 2019.

13. On 3 October 2019 six pallets of meat were transferred from DS to Scotbeef and were found to be contaminated with mould. On 14 April 2020, an inspection was performed on all Scotbeef's meat then stored at the warehouse and 102,355 kgs of meat was found to be similarly damaged, such that it was considered unfit for consumption either by humans or animals. It was therefore destroyed. On 23 July 2020 Scotbeef issued a claim against DS seeking damages for the losses caused by this in the sum of £395,588.

14. In its defence (which was amended, but nothing turns on that) DS contended that the contract between it and Scotbeef was on certain standard trade terms, namely those of the Food Storage and Distribution Federation or FSDF. These terms, known as the FSDF terms both in the proceedings below and on this appeal, contained inter alia a financial limitation of liability of £250 per tonne. They also contained a time-bar, which would have provided that Scotbeef's claims had to be brought within 9 months from the date of the event giving rise to the claim, otherwise those claims would be time-barred.

15. The terms and conditions which governed the contractual relationship between DS and Scotbeef thereafter became a significant issue in the litigation between those two parties. The judge, Her Honour Judge Kelly, sitting in the Business

and Property Courts in Leeds, held a trial of the First Preliminary Issue on 21 October 2021 to determine the terms of the contract between the parties. On 14 October 2022 she dismissed the case advanced by DS and found that the FSDF terms had not been incorporated into the contract with Scotbeef. She found that from February 2019 until the renewal of the policy in June 2019, and continuing through up to the discovery of the contaminated meat in October 2019, DS had taken no steps to incorporate the FSDF terms into the contract with Scotbeef, save for one vague reference to them in a single invoice amongst the multitude that were issued during this period. Accordingly, she found for Scotbeef on the preliminary issue. The effect of her finding on the non-incorporation of the FSDF terms meant that no part of Scotbeef's claim was time-barred, as the 9 month period in the FSDF terms did not apply; and also that the £250 per tonne limit on recovery did not apply either. None of those findings on the contractual relationship between DS and Scotbeef went on appeal. There is no issue on incorporation of terms on this appeal.

16. Shortly after trial of the First Preliminary Issue, DS went into liquidation and was wound up by order of ICC Judge Burton on 24 November 2021. Scotbeef applied to join Lonham to the proceedings on 22 December 2022, and by a consent order on 23 February 2023 Lonham became the second defendant in the proceedings. In that consent order, the parties noted that the liquidators of DS had confirmed that DS did not intend to take any further active part in these proceedings. The Claimant and both Defendants agreed to the lifting of the stay imposed by section 130(2) of the Insolvency Act 1986 (which was automatic upon DS' liquidation) and Lonham was added to the proceedings, which then continued.
17. The second preliminary issue in the terms I have set out at [5] above was ordered, also by consent. The hearing of that issue, which was the second preliminary issue trial, took place on 24 October 2023. This trial involved Scotbeef, seeking to obtain indemnity from Lonham through the insurance cover DS had arranged for its own liability, relying upon the Third Parties (Rights against Insurers) Act 2010. However, Lonham's position to defend this claim by Scotbeef was straightforward. It was that DS had failed to comply with the condition precedent in the policy by contracting with Scotbeef on terms *other* than the ones declared to Lonham by DS. Accordingly, Lonham maintained that it was entitled to avoid the claim, and therefore Scotbeef could not enjoy the benefit of indemnity through the operation of the 2010 Act.
18. The issue therefore could be stated in general summary terms as follows. Did DS have valid insurance cover provided by Lonham that would indemnify its liability to Scotbeef, given that its contractual relations with Scotbeef were on terms other than the ones disclosed to the insurers when the policy was renewed? The policy, relevant to this dispute, is the one that was in effect for the period 30 June 2019 to 29 June 2020. In her judgment on that second preliminary issue, and as explained further at [50] and following, the judge decided that Scotbeef was entitled to be indemnified by Lonham.
19. There are four sections of the policy that are particularly significant on this appeal. The relevant extracts are set out below, together with their headings,

which also appear in the policy itself. DS is referred to, in the usual way in such a policy, as the Assured.

20. The schedule to the policy identified the premises and the Assured's Business Activities as "Warehousekeeper". Under "Trading Conditions" on the same sheet, the following appears: "FSDF Terms and Conditions at GBP250.00 per tonne."
21. There then follow the conditions of the policy themselves, which are of a form such that they include and apply to elements of cover not provided under this specific policy, for example "Carrier Conditions", plainly used for those who obtain cover as carriers. Page 2 makes clear that, for this policy, those other conditions are "not covered", and that phrase appears against certain entries such as "Carrier Conditions", "Trailers, Containers and other equipment" and so on. However, for this cover, the following conditions are relevant and appear in the following terms.
22. "Warehousekeepers Legal Liability Conditions  
Warehousekeeper Liability Conditions

This insurance shall indemnify the Assured for their legal liability for physical loss or damage to goods and/or merchandise and/or equipment in accordance with the National Association of Warehousekeepers Trading Conditions (N.A.W.K.) and/or the United Kingdom Warehousekeepers Association Conditions (U.K.W.A.) and/or Road Haulage Association Conditions and/or under the Assured's own trading conditions and/or other conditions as may be approved by Underwriters in writing.

IMPORTANT cover provided under this section of the policy is subject to the GENERAL CONDITIONS EXCLUSIONS AND OBSERVANCE TERMS" (emphasis added)

23. Further relevant terms are found in the section headed "General Conditions". These are as follows:

"Conditions  
General Conditions, Exclusions and Observance....

#### DUTY OF ASSURED CLAUSE

It is a condition precedent to the liability of Underwriters hereunder:-

- (i) that the Assured makes a full declaration of all current trading conditions at inception of the policy period;
- (ii) that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing;
- (iii) that the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the

Assured. Reasonable steps are considered by Underwriters to be the following, but not limited to same:

- \* the Assured makes specific reference to their trading conditions in job quotations to their customers;
- \* if “own conditions” are used, i.e. not industry standard trading conditions such as BIFA or RHA, a copy of those conditions should be made available to the insured’s customers at the time of contracting;
- \* the Assured specifies their trading conditions on all invoices and written communications to their customers.

If a claim arises in respect of a contract into which the Assured have failed to incorporate the above mentioned conditions the Assured’s right to be indemnified under this policy in respect of such a claim shall not be prejudiced providing that the Assured has taken all reasonable and practicable steps to incorporate the above conditions into contracts;

(iv) that the Assured shall at no time deliberately and/or knowingly and/or recklessly furnish incorrect information either verbally or on any documentation issued or completed in performance of the Assured’s business including without limitation any Bills of Lading and/or other documents containing or evidencing a contract, of carriage or otherwise, and/or any customs documents and/or shipping documents;

(v) that the Assured shall at all times act with due diligence.

The policy is subject to and incorporates the provisions of the Insurance Act 2015 and any modification thereof unless such modification has been excluded under the policy. In connection therewith the policy includes LMA5264.”

24. Various other conditions follow, such as those dealing with excluded goods, weapons and/or arms and/or ammunition and so on, and then following other terms dealing with insolvency and fraud the following heading appears:

“IMPORTANT INSTRUCTIONS IN EVENT OF LIABILITY CLAIM”

25. Following this heading there are requirements to give prompt notice of a claim and so on, requirements to mitigate loss, and a requirement that the Assured not admit liability. After further terms such as the documentation that must be provided, the following term appears:

“The effect of a breach of a condition precedent is that Underwriters are entitled to avoid the claim in its entirety”.

26. LMA5264 is referred to in the policy terms as shown in the final line of the quotation of the clause that is set out at [23] above. LMA stands for Lloyds Market Association and this association produces what is called “model wording” for certain situations. LMA5264 is known as the Application Clause, or Wraparound Clause, that relates to the 2015 Act. The full terms of LMA5264 were provided to us at the hearing by Mr Boardman KC. LMA5264 states the following under “General”:

“1. Unless otherwise indicated, no term of this insurance contract is intended to limit or affect the statutory rights or obligations of any of the parties to this contract under, and/or the effect of, Parts 2, 3, 4 or 5 of the Insurance Act (the “2015 Act”).

Some parts of LMA5264 expressly repeat and recite sections of the Act itself. It is not immediately clear to me why that repetition is necessary. However, as Mr Buckingham explained, there are other elements of LMA5264 that include matters not taken directly from the statute itself, such as a section headed “critical information” that states “It is a condition precedent to the Insurer’s liability under this insurance contract that the following matters are true and accurate at the time of inception of the contract: *[insert critical information....]*”

27. The Insurance Act 2015 is primary legislation and it does not require any “opt in” on the part of the contracting parties, within the terms of the particular insurance policy itself, for that law to apply. Some parts of LMA5264 simply repeat sections of the 2015 Act. The effect of those sections of the 2015 Act is not increased, nor are they considered differently in my judgment, because they are in a so-called wraparound clause, rather than by operation of the statute itself. However, the benefit of LMA5264 is that it makes clear, both to insurers and the assured in any particular case, that the Insurance Act 2015 applies, and summarises the terms and the broad effect of the statutory provision. I shall not reproduce the whole of LMA5264 here. However, one element of it bears quotation, because it deals with the issue in this appeal.

28. After “General”, the following appears in LMA5264:

**“The duty of fair presentation**

4. Before this insurance contract is entered into, the Insured must make a fair presentation of the risk to the Insurer, in accordance with Section 3 of the Insurance Act 2015. In summary, the Insured must:

- (a) Disclose to the Insurer every material circumstance which the Insured knows or ought to know. Failing that, the Insured must give the Insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries in order to reveal material circumstances. A matter is material if it would influence the judgment of a prudent insurer as to whether to accept the risk, or the terms of the insurance (including premium); and
- (b) Make the disclosure in clause (4)(a) above in a reasonably clear and accessible way; and
- (c) Ensure that every material representation of fact is substantially correct, and that every material representation of expectation or belief is made in good faith.

5. For the purposes of clause (4)(a) above, the Insured is expected to know the following:

- (a) If the Insured is an individual, what is known to the individual and anybody who is responsible for arranging his or her insurance.
- (b) If the Insured is not an individual, what is known to anybody who is part of the Insured’s senior management; or anybody who is responsible for arranging the Insured’s insurance.



(c) Whether the Insured is an individual or not, what should reasonably have been revealed by a reasonable search of information available to the Insured. The information may be held within the Insured's organisation, or by any third party (including but not limited to the broker, subsidiaries, affiliates or any other person who will be covered under the insurance). If the Insured is insuring subsidiaries, affiliates or other parties, the Insurer expects that the Insured will have included them in its enquiries, and that the Insured will inform the Insurer if it has not done so. The reasonable search may be conducted by making enquiries or by any other means."

29. It will be seen, when a comparison is made with the two clauses 4 and 5 in LMA5264 that I have reproduced in [28] above, that these seek to summarise sections 3, 4 and 5 in the 2015 Act. Section 3 of the 2015 Act is also headed "the duty of fair presentation". That is the term used both in the Law Commission Report leading to the 2015 Act (of which more below); the 2015 Act itself; and also LMA5264 to refer to the requirement upon an insured fairly to inform the insurer of the salient facts, such that the insurer can properly consider the risk and assess the premium. Clause 5 of LMA5264 deals with what the insured is expected to know; and section 4 of the 2015 Act deals with "knowledge of the insured". They are broadly similar, although use slightly different wording, to the terms of the 2015 Act. However, none of the submissions before us by either party depended upon the wording of LMA5264 itself, rather than those within the 2015 Act, applying to any particular provision.
30. The information provided to Lonham by DS for the policy is central to the main issue in this case, although there is no dispute about the nature and extent of that information. Lonham was told by DS that it was trading on standard trade terms. Basically, Lonham was providing insurance to DS for its warehousekeeping business, indemnifying it against claims from its customers. However, Lonham had no control over the many different contracts that DS would enter into with those different customers. It therefore required for the purposes of providing insurance to DS, as can be seen from the terms of the policy under the general conditions and "Duty of Assured" set out at [21] to [23] above, that DS trade under certain recognised trade body trading conditions (such as the UKWA); or under DS' own trading conditions; or "other conditions as may be approved by Underwriters in writing". At least two of the standard trade sets of conditions in this case, namely the UKWA and the FSDF terms, had limitations within them in terms of DS' financial exposure to its customers. The premium was relatively modest for the year in question here, namely £1975. That premium was calculated by the underwriters based on the information provided to them by the insured about the nature of the contract terms being used by DS.
31. Certainly so far as the UKWA and FSDF conditions are concerned, these contained financial upper limits per tonne, which the evidence before the judge showed was £100 per tonne for the UKWA and £250 per tonne for the FSDF. There was also a time bar for claims to be notified which was measured in months rather than the six years which would apply under the Limitation Act. Both of these matters would directly impact the extent of the potential loss were a claim to be made on the policy. These matters therefore go to the extent and

type of risk to which the insurers would become exposed by entering into the contract of insurance with DS.

**C. Legal Framework**

32. Because this is the first appellate judgment dealing with these matters, I will provide some limited introduction to the statute that lies at the heart of this appeal. The Insurance Act 2015 significantly changed the law governing non-consumer insurance contracts in this jurisdiction, and in particular the Marine Insurance Act 1906 (“the 1906 Act”). The 1906 Act had put the common law rules governing insurance contracts on a statutory footing, these rules having developed during the 18<sup>th</sup> and 19<sup>th</sup> century. These were potentially harsh rules, at least so far as representations, warranty and risk were concerned, and the 1906 Act came to be seen as insurer friendly.
33. Section 33(3) of the 1906 Act stated that a warranty “must be exactly complied with, whether it be material to the risk or not”. This had put on a statutory footing the potentially harsh common law rule that a breach of warranty would void the policy regardless of its materiality to the risk. For example, in marine insurance, the number of seamen or hands employed on a vessel was often important, due to the increased ability to beat off pirate attacks. In *De Hahn v Hartley* (1786) 1 TR 343, the insured warranted that the ship would sail from Liverpool with 50 hands onboard. In fact, when the ship left Liverpool it had only 46 hands on the ship, though it picked up six more hands in Anglesey and had 52 hands thereafter, obviously a number in excess of those required. After sailing onwards from Anglesey it was then lost, at a time when it had more than the required 50 hands. However, the court held that the insurer’s liability terminated when the ship left Liverpool, because there were fewer than 50 hands aboard and that was a breach of warranty. The insurer was not liable for any losses that arose after this date, however they were caused. The difference between whether something informed to insurers at the time of policy inception was a representation or a warranty was therefore of critical importance. Exact compliance with a warranty meant exactly that.
34. That approach to warranties in particular continued, all the way through the 20<sup>th</sup> century, and even though the insurance market became far more sophisticated. The 2015 Act followed the recommendations in a joint report of the Law Commission of England and Wales, and the Law Commission of Scotland, in *Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment* (Law Com No 353; Scot Law Com No 238), and the report appended a draft Bill which became the 2015 Act. The report explained that the harshness of the 1906 Act, in particular how representations could become warranties due to very general wording, could operate to the disadvantage of the insured. The old common law approach, enshrined in the 1906 Act, had developed during a period when an insured knew a great deal about the risk to be insured, and the insurers knew very little. As the insurance market developed throughout the 20<sup>th</sup> century, this was increasingly not the case, and by the end of the 20<sup>th</sup> century, reform was considered to be long overdue. An earlier Law Commission report as long before as 1980 had also recommended reform.

35. One of the other aspects of the 1906 Act was section 17, which stated that “a contract of marine insurance is a contract based upon the utmost good faith” with a second part that goes on to state “and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party”.
36. The 2014 Law Commission report followed an earlier one in 2009 which dealt with consumer insurance, and in particular the consumer’s duty to answer questions posed by the insurer. This report led to the enactment of the Consumer Insurance (Disclosure and Representations) Act 2012. That Act replaced the consumer’s duty to volunteer information with a duty to answer the insurer’s questions honestly and reasonably. The intent both of the 2012 Act relating to consumer insurance, and the 2015 Act relating to non-consumer insurance, was fully explained in the two reports. This was to reset the balance between fairness in the insurance industry, with overly technical, historical and potentially harsh rules that had far outlived their usefulness.
37. The explanatory notes to the 2015 Act itself explain, under the heading “the duty of fair presentation”, that the statute:  
“...updates and replaces the existing duty on non-consumer policyholders to disclose risk information to insurers before entering into an insurance contract. It redefines its boundaries under the banner of the “duty of fair presentation”, effectively requiring policyholders to undertake a reasonable search of information available to them, and defining what a policyholder knows or ought to know. The Act also requires insurers to play a more active role, asking questions in some circumstances. Importantly, the Act introduces a new system of proportionate remedies where the duty has been breached. This replaces the existing single remedy of avoidance of the contract, except where the policyholder has breached the duty deliberately or recklessly.”
38. The subsequent note on “warranties and other terms” states:  
“Under the current law, breach of a warranty in an insurance contract discharges the insurer from liability completely from that point onwards, even if the breach is remedied. An insurer may also avoid liability even if the breached term would not have increased the risk of the type of loss occurring which was actually suffered. The Act abolishes “basis of the contract” clauses, which have the effect of converting pre-contractual information supplied to insurers into warranties. It also provides that the insurer’s liability will be suspended, rather than discharged, in the event of breach of warranty, so that the insurer is liable for valid claims which arise after a breach has been remedied. Further, it provides that non-compliance with a warranty or other term relating to a particular type of loss should not allow the insurer to escape liability for a different type of loss, on which the non-compliance could have had no effect”.
39. The “basis of the contract” clauses to which the explanatory notes refer were a device that had been adopted in a great many insurance contracts. Such a clause would state that the contract had been entered into on the basis of *all* the information provided by the insured, or words to that effect. This could have the legal effect of creating warranties in respect of each such piece of information, such that if any part of that information turned out to be incorrect, the insured would be in breach of warranty and the insurance cover void. This

approach to information and warranties no longer applies since the 2015 Act was passed. That is not to say, however, that there is no place in an insurance contract for warranties at all; they remain of considerable importance, as will be seen in this judgment. There is an entire part of the 2015 Act, Part 3, dealing specifically with warranties. Here, because the judge below held that the information concerning the trading conditions being used by DS were not warranties, but were representations, those sections were not applied to the facts of this case and Part 2 was applied instead.

40. However, as my Lord, Lord Justice Coulson observed during the hearing of this appeal, it is not necessary to consider material such as the explanatory notes to the 2015 Act itself in order to construe what the sections themselves mean. The sections are clear and there is no ambiguity. The relevant sections that relate to this appeal are as follows.
41. Section 2(1) of the 2015 Act, which is the application and interpretation clause, states that Part 2, the duty of fair presentation, which comprises sections 2 to 8 of the 2015 Act, relates only to non-consumer contracts. The contract in this case is a non-consumer contract. Section 3 of the 2015 Act reads as follows:

**“3. The duty of fair presentation**

(1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

(2) The duty imposed by subsection (1) is referred to in this Act as “the duty of fair presentation”.

(3) A fair presentation of the risk is one—

- (a) which makes the disclosure required by subsection (4),
- (b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
- (c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

(4) The disclosure required is as follows, except as provided in subsection (5)—

- (a) disclosure of every material circumstance which the insured knows or ought to know, or
- (b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—

- (a) it diminishes the risk,
- (b) the insurer knows it,
- (c) the insurer ought to know it,
- (d) the insurer is presumed to know it, or
- (e) it is something as to which the insurer waives information.

(6) Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains supplementary provision.”

42. This section makes it clear that the duty upon a party seeking insurance fairly to “present the risk” to the insurer has not changed as a result of the passing of the 2015 Act. When one steps back and considers the matter logically, that makes perfect sense. Any insurer must be aware of, and assess, the risk that is to be insured, in order properly to calculate the premium and make a business decision as to whether to provide cover, and if so on what terms. Equally, the insured wants to acquire insurance on fair terms, and not fall foul of a technicality where a representation may be wrong, such that in the event of a claim, their insurance cover is avoided.

43. Sections 4 and onwards provide as follows:

“4 **Knowledge of insured**

(1) This section provides for what an insured knows or ought to know for the purposes of section 3(4)(a).

(2) An insured who is an individual knows only—

(a) what is known to the individual, and

(b) what is known to one or more of the individuals who are responsible for the insured's insurance.

(3) An insured who is not an individual knows only what is known to one or more of the individuals who are—

(a) part of the insured's senior management, or

(b) responsible for the insured's insurance.

(4) An insured is not by virtue of subsection (2)(b) or (3)(b) taken to know confidential information known to an individual if—

(a) the individual is, or is an employee of, the insured's agent; and

(b) the information was acquired by the insured's agent (or by an employee of that agent) through a business relationship with a person who is not connected with the contract of insurance.

(5) For the purposes of subsection (4) the persons connected with a contract of insurance are—

(a) the insured and any other persons for whom cover is provided by the contract, and

(b) if the contract re-insures risks covered by another contract, the persons who are (by virtue of this subsection) connected with that other contract.

(6) Whether an individual or not, an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

(7) In subsection (6) “information” includes information held within the insured's organisation or by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance).

(8) For the purposes of this section—

(a) “employee”, in relation to the insured's agent, includes any individual working for the agent, whatever the capacity in which the individual acts,

(b) an individual is responsible for the insured's insurance if the individual participates on behalf of the insured in the process of procuring the insured's insurance (whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity), and

(c) “senior management” means those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised.

### **5 Knowledge of insurer**

(1) For the purposes of section 3(5)(b), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity).

(2) For the purposes of section 3(5)(c), an insurer ought to know something only if—

(a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or

(b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).

(3) For the purposes of section 3(5)(d), an insurer is presumed to know—

(a) things which are common knowledge, and

(b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.

### **6 Knowledge: general**

(1) For the purposes of sections 3 to 5, references to an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.

(2) Nothing in this Part affects the operation of any rule of law according to which knowledge of a fraud perpetrated by an individual (“F”) either on the insured or on the insurer is not to be attributed to the insured or to the insurer (respectively), where—

(a) if the fraud is on the insured, F is any of the individuals mentioned in section 4(2)(b) or (3), or

(b) if the fraud is on the insurer, F is any of the individuals mentioned in section 5(1).

### **7 Supplementary**

(1) A fair presentation need not be contained in only one document or oral presentation.

(2) The term “circumstance” includes any communication made to, or information received by, the insured.

(3) A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

(4) Examples of things which may be material circumstances are—

(a) special or unusual facts relating to the risk,

(b) any particular concerns which led the insured to seek insurance cover for the risk,

(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

(5) A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.

(6) A representation may be withdrawn or corrected before the contract of insurance is entered into.

## **8 Remedies for breach**

(1) The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—

(a) would not have entered into the contract of insurance at all, or

(b) would have done so only on different terms.

(2) The remedies are set out in Schedule 1.

(3) A breach for which the insurer has a remedy against the insured is referred to in this Act as a “qualifying breach”.

(4) A qualifying breach is either—

(a) deliberate or reckless, or

(b) neither deliberate nor reckless.

(5) A qualifying breach is deliberate or reckless if the insured —

(a) knew that it was in breach of the duty of fair presentation, or

(b) did not care whether or not it was in breach of that duty.

(6) It is for the insurer to show that a qualifying breach was deliberate or reckless.

44. There then follows a part of the statute that specifically deals with warranties and representations, and changes the legal regime that breach of any warranty will result in the insurer automatically being entitled to avoid the policy and hence evade liability.

## **PART 3 WARRANTIES AND OTHER TERMS**

## **9 Warranties and representations**

(1) This section applies to representations made by the insured in connection with—

- (a) a proposed non-consumer insurance contract, or
- (b) a proposed variation to a non-consumer insurance contract.

(2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

## **10 Breach of warranty**

(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.

(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

(3) But subsection (2) does not apply if—

- (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
- (b) compliance with the warranty is rendered unlawful by any subsequent law, or
- (c) the insurer waives the breach of warranty.

(4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—

- (a) before the breach of warranty, or
- (b) if the breach can be remedied, after it has been remedied.

(5) For the purposes of this section, a breach of warranty is to be taken as remedied—

- (a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
- (b) in any other case, if the insured ceases to be in breach of the warranty.

(6) A case falls within this subsection if—

- (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
- (b) that requirement is not complied with.

(7) In the Marine Insurance Act 1906—

- (a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,
- (b) section 34 (when breach of warranty excused) is omitted.



### **11 Terms not relevant to the actual loss**

(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

- (a) loss of a particular kind,
- (b) loss at a particular location,
- (c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4) This section may apply in addition to section 10.”

45. Part 4 of the 2015 Act deals with fraudulent claims, and Part 4A deals with late payment of claims. These are not relevant to the issue on this appeal and therefore I do not reproduce sections 12 and 13; and section 13A, respectively.

46. Part 5 deals with good faith and contracting out.

### **“Good faith**

#### **14 Good faith**

(1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.

(2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

(3) Accordingly—

(a) in section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from “, and” to the end are omitted, and

(b) the application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.

(4) In section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (disclosure and representations before contract or variation), subsection (5) is omitted.

## **Contracting out**

### **15 Contracting out: consumer insurance contracts**

(1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Part 3 or 4 of this Act than the consumer would be in by virtue of the provisions of those Parts (so far as relating to consumer insurance contracts) is to that extent of no effect.

(2) In subsection (1) references to a contract include a variation.

(3) This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

### **16 Contracting out: non-consumer insurance contracts**

(1) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which section 9 applies than the insured would be in by virtue of that section is to that extent of no effect.

(2) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term.

(3) In this section references to a contract include a variation.

(4) This section does not apply in relation to a contract for the settlement of a claim arising under a non-consumer insurance contract.

47. Section 16A deals with Contracting out of the implied term about payment of claims in respect both of consumer and non-consumer insurance contracts.
48. Section 17 then deals with transparency. This is relevant to the appeal both due to its inclusion in Ground 6 of the appellant's grounds, and also because it arises as a result of the Respondent's Notice.

### **“17 The transparency requirements**

(1) In this section, “the disadvantageous term” means such a term as is mentioned in section 16(2)...

(2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.

(3) The disadvantageous term must be clear and unambiguous as to its effect.

(4) In determining whether the requirements of subsections (2) and (3) have been met, the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account.

(5) The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.”

49. In the context of this appeal, the relevant reforms in the 2015 Act relate to the differences between representations and warranties. Essentially, the central dispute between the parties relates to whether the Duty of Assured Clause which is set out at [23] above, when properly construed, contains warranties at sub-clauses (ii) and (iii) in respect of the trading conditions under which DS was contracting with Scotbeef. If it does, and those warranties are conditions precedent, then – because DS was not trading on the terms and conditions disclosed to the insurer when the policy was renewed, at least so far as its contractual arrangements with Scotbeef was concerned – the conditions precedent were breached by DS and Lonham is not liable to indemnify DS (and by extension therefore, there is no indemnity which Scotbeef can enforce directly). Depending upon the answer to that issue, there is a potential subsidiary issue as to whether those terms fall foul of the transparency requirements as a result of sections 16 and 17 of the 2015 Act. Scotbeef successfully argued before the judge, and maintains the position before this court, that sub-clauses (ii) and (iii) are representations and therefore fall to be considered under section 3 of the 2015 Act. Lonham’s position is very clear, and is that the requirements to trade on particular trade terms, or other standard terms disclosed to the insurer by DS, are warranties and DS was in breach of those warranties by contracting with Scotbeef on the basis found by the judge in the First Preliminary Issue. If they are warranties, then they fall to be considered under sections 9 and 10 of the 2015 Act, and not sections 3 and following which apply to the fair presentation of risk.

***D. The judgment under appeal***

50. At [72] to [78] of the judgment below the judge acceded to the argument advanced by Scotbeef that the three relevant provisions in the “Duty of Assured Clause” should be dealt with together. Rather than characterising them separately, she stated at [72] that “in my judgment, sub-clauses (i), (ii) and (iii) have to be read together, rather than as separate clauses.” This was in distinction to the submissions for Lonham that each was what was called “a free-standing warranty or condition precedent”. The judge went on to consider whether sub-clause (i) could “stand as a warranty or condition precedent in light of the effect of the Insurance Act 2015”. She considered this jointly with a differently worded issue, namely whether the contract between DS and Scotbeef “fell within the ambit of sub-clause (iii), [and] if so, did [DS] take every reasonable step to incorporate the FSDF terms, or is that irrelevant?”
51. I consider that the judge erred in construing the three sub-clauses together, as though either *all* three of them had to be warranties, or *all* three of them had to be representations. The fact that these provisions fall under a heading “Duty of

Assured Clause” may not have helped, because duty is used in the singular. However, that clause or provision plainly includes a number of different duties that arise at different times. There are five sub-clauses, (i) to (v), and the first deals with the contracts in existence at the time of policy inception. The final one, (v), requires DS to act with due diligence “at all times”. There is no reason that sub-clauses (i), (ii) and (iii), all of which deal with the terms upon which DS contracts with its customers, all have to be dealt with identically. The way they are grouped together in the policy does not justify, in my judgment, the “all or nothing” collective approach that was adopted by the judge.

52. I consider that the decision by the judge in [72] of her judgment that “sub-clauses (i), (ii) and (iii) have to be read together, rather than as separate clauses” was an error that coloured all that came later, when she was characterising the sub-clauses.

53. The judgment continued:

“79. It is desirable to consider sub-issue 2 and sub-issue 3 together. The First Defendant did misrepresent its trading terms to the Second Defendant because the FSDF terms were not incorporated into its contract with the Claimant. As stated above, in my judgment it is necessary to read sub-clauses (i), (ii) and (iii) together. I accept the submission of the Claimant that it is necessary to consider the sub-clauses in the context of the duty of fair presentation required by the 2015 Act and in the context of remedies for breach when considering the sub-clauses and the transparency requirements of the 2015 Act.

80. Do those sub-clauses satisfy the transparency requirements? In my judgment, they do not. Firstly, in my judgment, the effect of sub-clause (iii) is to put the assured in a worse position. The assured is in breach of sub-clause (iii) if it does not take all reasonable and practicable steps, even if the FSDF terms have in fact been incorporated.

81. I have no evidence that any steps were taken by the Second Defendant to draw the disadvantageous sub-clauses to the assured's attention before the contract was entered into. The fact that the same sub-clauses were contained in a previous contract does not, by itself, suffice to establish that the Second Defendant had taken sufficient steps to draw attention to the disadvantageous sub-clauses.

82. If I am wrong about the fact that the same term was incorporated into a previous contract, I find in any event that the disadvantageous term is not clear and unambiguous as to its effect. Mr Proctor submitted that any reasonable assured would know that a breach of a condition precedent would mean that the underwriter was not liable. In my judgment, reading the contract as a whole, it is far from clear what effect a breach of sub-clause (iii) has. Immediately after sub-clause (iii), the contract sets out that in respect of an individual claim, if an assured has taken all reasonable and practicable steps, the right to be indemnified in respect of that claim would not be prejudiced. However, two pages later, the contract states that the effect of breach of a condition precedent is that the underwriters are entitled to avoid the claim in its entirety. It is not possible to reconcile those two clauses.

83. I am supported in my judgment that sub-clause (iii) in particular is a disadvantageous term and does not satisfy the transparency requirements of the 2015 Act by the commentary in *Colinvaux*. Whilst the Second Defendant referred me to one section of paragraph B-0127 of *Colinvaux*, the full section relating to the creation of continuing obligations was not relied upon.”

54. She then went on to analyse that passage from the well-known textbook, and then stated:

“85. I have found that any breach of the sub-clauses should be viewed in the context of the duty of fair presentation. As such, the insurer's remedies in respect of such qualifying breaches fall to be considered. It was not submitted that the qualifying breach was deliberate or reckless. The First Defendant believed that the FDSF terms were in fact incorporated into its contract with the Claimant. No claim has been made by the Second Defendant for a remedy under Schedule 1 of the 2015 Act. As the qualifying breach was not deliberate or reckless, in order to avoid the contract and refuse the claim, the Second Defendant would have to show that it would not have entered the contract with the First Defendant on any terms.

86. I do not accept that the evidence of the Second Defendant suffices to prove that it would not have entered the contract on any terms.”  
(emphasis added)

55. The judge therefore found that Lonham was required to indemnify DS in respect of the claim that was brought by Scotbeef. Central to the challenge brought to that conclusion by Lonham on this appeal, is that by arriving at the conclusion that she did in respect of reading the three sub-clauses together, the judge, having decided that (i) was a representation, grouped all three of them together and went on to apply the regime under sections 3 to 9 of the 2015 Act to all three sub-clauses. Having concluded, effectively, that the sub-clauses should be “read together” she applied her reasoning concerning sub-clause (i) as a representation to each of them, and failed properly to characterise each of sub-clauses (ii) and (iii) as warranties. This led her into error because she failed properly to analyse that as warranties, and conditions precedent, either or both of these other sub-clauses had been breached because DS had not contracted with Scotbeef on the FDSF terms – or as the judge found, on any trade standard terms at all. Lonham maintains that the failure by DS to contract with Scotbeef on the trade terms DS declared to the insurers should have been held to have been a breach or breaches of conditions precedent by DS, with the conclusion following that finding that the insurer was entitled to avoid liability.

### ***E. Grounds of Appeal***

56. Seven different grounds of appeal were advanced by Lonham, and a limited number were granted leave by my Lord, Lord Justice Coulson. Grounds 1, 2 and 4 were refused leave.
57. In granting leave on Grounds 3, 5, 6 and 7, he stated:

“However, the grant of permission on these four Grounds is subject to two important caveats. First, all these grounds rely on the Appellant’s assertion that Clauses (i)-(iii) do not fall within the scope of section 3. I rule that, in light of the wholesale deficiencies I have identified in Ground 1, the Appellant cannot run Grounds 3, 5, 6 and 7 on the basis that all three of the clauses do not fall within the scope of s.3. Clause (i) clearly does. However, what the Appellant does have a real prospect of success in showing us that Clauses (ii) and (iii), in isolation from Clause (i), do not fall within the scope of s.3.

The second caveat is this. There is a significant overlap between Grounds 3, 5, 6 and 7. In my view, the issue that remains, once Grounds 1 and 2 fall away, is singular and straight-forward: should Clause (i) have been read by the Judge as distinct from (ii) and (iii) and, if so, does the s.3 duty of fair presentation of risk, and the provisions under the Act which follow that duty (particularly s.9), nevertheless apply to Clauses (ii) and (iii)? In my view, that issue can be argued as part of or growing out of Ground 3. The argument which the Appellant wants to make, namely that this case engages ss.10-11 of the Act rather than ss.3 and 9, is the logical consequence of Ground 3.” (emphasis added)

58. The grounds which were successful in obtaining the grant of permission, subject to the two caveats I have quoted at [57], as drafted are as follows (I have retained the original numbers to avoid confusion, and included the explanatory text that the appellant included within the grounds themselves):

“Ground 3: the learned Judge erred in law by finding that Clauses (ii)-(iii) were within the scope of the duty of fair presentation of risk contained in s.3 of the Act. The Court should have found that the condition precedent in Clause (i) was separate from Clauses (ii)-(iii), and that the latter two were not within the scope of s.3.

Ground 5: the learned Judge erred by considering whether Clauses (ii)-(iii) placed the assured in a worse position as regard s.3 of the Act:

That question is irrelevant in circumstances where these clauses were not within the scope of the s.3 duty.

Alternatively, if the question falls to be considered, the Judge misconstrued Clause (iii) in finding that it was a disadvantageous term on the basis that the effect of this clause was said to be that the assured is in breach if it does not take all reasonable steps to incorporate the FSDF Terms into its contractual relationships with its customers, even if the FSDF Terms have in fact been incorporated. As detailed below, that interpretation of Clause (iii) is unrealistic, contradictory and interprets the provision to produce a commercially absurd result. On its true construction, the assured would not be in breach of Clause (iii) if the assured has succeeded in incorporating the FSDF Terms (“the Alternative Argument”).

Ground 6: the learned Judge was wrong to subject Clauses (ii)-(iii) to the transparency requirements in s.17 of the Act. There was no “contracting out” of s.3 by virtue of clauses (ii)-(iii), and therefore the transparency requirements

were inapplicable. Alternatively, as stated above, clauses (i)-(iii) did not put the assured in a worse position in regard any matters provided for in the Act, and therefore the transparency requirements were inapplicable.

Ground 7: the learned Judge erred in finding that Lonham’s remedies for breach of the conditions precedent in Clauses (ii)-(iii) were limited to the remedies specified in s.8 of the Act. This was based on the incorrect finding that these Clauses were within the scope of s.3 of the Act.”

59. Notwithstanding that clear direction by my Lord, Lord Justice Coulson that the different grounds upon which leave was granted lead to “the issue that remains.....[which] is singular and straight-forward”, both the skeleton arguments sought to break down these different grounds of appeal and points into further sub-issues, which in my judgment sought further to over-complicate the legal issues in an unhelpful manner. This reached its nadir the day before the hearing of the appeal itself, when the parties lodged a document with the court headed “Agreed List of Issues” which contained four issues and eleven sub-issues. Sensibly, at the hearing both leading counsel concentrated on the main issues in the appeal, identified succinctly in the grant of leave. I concur with my Lord, Lord Justice Coulson, that there is but a singular and straight-forward issue on this appeal. It is the one identified by him, and is in essence the heart of Ground 3. If that issue is resolved in favour of Lonham, then a subsequent issue arises on the Respondent’s Notice, which also touches upon the issue in Ground 6 of the appeal grounds, namely transparency. It is therefore convenient to deal with Ground 6, that part of the Respondent’s Notice and transparency, jointly, after having resolved as a matter of construction the issue concerning sub-clauses (ii) and (iii) of the policy.

***F. Representations and Warranties***

60. The part (i) of the clause was found by the judge to be a representation, and therefore governed by section 3 of the 2015 Act. The issue that lies at the heart of each of the four grounds upon which limited leave was granted goes to the proper characterisation of sub-clauses (ii) and (iii), and whether they are warranties. Those sub-clauses are:

“(ii) that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing;

(iii) that the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured.”

[This clause then goes on to give examples of what the insurers would consider to be reasonable and practicable steps.]

61. Limited authority was cited to us because there is not very much available, and none directly on point. It could be said that the lack of authority on the 2015 Act to date potentially demonstrates the degree to which it has successfully reformed insurance law and practice.

62. In *Chitty on Contracts* Sweet & Maxwell (35<sup>th</sup> ed. 2024) at 5.059 the following is stated concerning “basis of the contract” provisions, representations and warranties.
- “The 2015 Act renders such provisions as invalid in that s.9(2) provides that a representation made by the assured cannot be converted into such a warranty (or presumably conditions precedent) by such means (including by means of a “basis of the contract” clause). This prohibition appears to be aimed at provisions which seek to convert, without discrimination, all or a large number of pre-contractual representations into a warranty by basis of the contract clauses or the like. As recognised in the Explanatory Notes accompanying the Act, it should remain possible for insurers to include specific warranties relating to existing or past facts within their policies.”
63. In *Colinvaux’s Law Of Insurance* Sweet & Maxwell (13<sup>th</sup> ed. 2024) at 1-006 and following dealing with classification of insurance terms, the following appears:
- “1-006 Secondly, *conditions precedent to liability*. Such conditions assume that the policy is validly made and the risk has incepted, and prevent a claim by the assured unless the condition has been complied with as regards any particular loss....[The 2015 Act] section 11 removes the automatic right of an insurer to rely upon a condition precedent where the condition relates to the risk and there is no link between the purpose of the condition and the loss.
- ...
- 1-009 Fourthly, *present warranties*. A present warranty is a promise made by the assured in the application for insurance, related to the truth of statements made by the assured. If there is any deviation from the truth, at common law the risk is treated as not attaching – because the risk is not as described by the assured – so that there can never be a claim. This is sometimes referred to as a “true warranty”. The Consumer Insurance (Disclosure and Representations) Act 2012 section 7, and [the 2015 Act] section 9, which are in identical terms and apply to consumer and business insurance respectively, are designed to prohibit present warranties.
- 1-010 Fifthly, *future warranties*. A future warranty is a promise by the assured that something will not be done, or requirements will be satisfied, after the contract has been made. At common law, if the warranty is broken, then the risk terminates automatically and it can reattach only where the insurers agree (or are estopped from denying) that it should do so. Again, this is a “true” warranty because it prevents any claim being made at any time in the future. The principles of automatic termination and non-repair have been abolished by [the 2015 Act] section 10, and replaced with the rule that a breach of warranty merely suspends the risk during the period of breach. However, [the 2015 Act] section 11 applies in relation to section 10, so that if a loss occurs in the period of breach, and the loss is unrelated to the breach of warranty, then the breach of warranty can be disregarded.”
64. *The Interpretation of Contracts* by Lewison, Sweet & Maxwell (8<sup>th</sup> ed. 2023) states certain principles that are widely accepted, and are not controversial in this appeal. The two most relevant are in section 2, namely that “in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole document”; and



section 5, “where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions”. It is convenient to refer to only one authority within the large number within those two sections of Lewison that support those principles, which I fully accept and endorse. In *EE Ltd v Mundio Mobile Ltd* [2016] EWHC 531 (TCC) Carr J (as she then was) stated at [30]:

“Agreements should be read as a whole and construed so far as possible to avoid inconsistencies between different parts on the assumption that the parties had intended to express their intentions in a coherent and consistent way. One expects provisions to complement each other. Only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.”

65. In *ABN AMRO Bank NV v Royal and Sun Alliance Insurance plc and ors* [2021] EWHC 442 (Comm); [2021] Lloyds Rep. IR 467 Jacobs J considered a highly complex case concerning a claim for £31.5 million by a bank under a policy of marine cargo and storage insurance with 14 different underwriters. In a very comprehensive judgment in excess of 1,000 paragraphs following a 20 day trial, in which issues of non-disclosure, misrepresentation, rectification and estoppel were dealt with, he stated at [175] to [178] that the principles which govern the construction of policies of insurance are those applicable to commercial instruments and indeed to contracts generally. Although his judgment was partly set aside on appeal (namely some of the findings on estoppel) the Court of Appeal (Sir Geoffrey Vos MR, Andrews and Edis LJ) at [22] and [64] endorsed his approach to construction of insurance policies at [2021] EWCA Civ 1789; [2022] 1 W.L.R. 1773.
66. At [179] of *ABN AMRO* at first instance, Jacobs J stated after consideration of the authorities on construction in summary that “These authorities show the importance of considering the wording of a particular clause in its contractual context”. That is the approach which I consider the judge below adequately failed to do.
67. It is clear, when that exercise of construction of the contract of insurance is undertaken, that each of sub-clauses (i) to (v) are dealing with different and distinct things, although there is some overlap in the sense that all of (i) to (iii) deal with the contract terms upon which DS is contracting with its customers. DS was carrying out the business of warehousekeeping. It is for that reason that it sought and obtained insurance for warehousekeepers’ legal liability. A warehousekeeper is likely to have a large number of different customers, with a wide range of needs. Some might deposit goods at the warehouse rarely, but for lengthy periods. Others might use the facilities very frequently but for shorter periods. There will be a very large number of permutations in between. The purpose of this insurance policy was to provide insurance for the legal liability that DS would have to all its different customers, with all the different types of goods that might be stored, across all these different permutations, for the period of the insurance.

68. Sub-clause (i) deals with the trading terms of all the existing contracts that DS had with its existing customers at the time of inception of the policy. That is why it stated that DS “makes a full declaration of all current trading conditions at inception of the policy period.” It deals with the existing state of affairs as at commencement of the policy period. This can, by definition, only relate to existing customers that DS has when the policy commences. It does not have contractual relations with parties that are not, as at that date, its customers.
69. Sub-clause (ii) states “that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing” (emphasis added). This, by its wording, relates both to existing customers who continue their business with DS during that period, and also new customers who might be obtained during that period and commence contractual relations with DS during the policy period. The use of the phrase “continuously trades” clearly refers to the operation of DS’ business during the currency of the policy. Sub-clause (ii) therefore deals with the future business operation of DS from the date of inception of the policy, going forwards and during the policy period, both to existing and new customers. Using the language of *Colinvaux* from the passage above, it is a future warranty, namely “a promise by the assured that... requirements will be satisfied, after the contract [of insurance] has been made.” That promise is that the trading in which DS engages during the period of cover will be on the trading conditions that the insurer knows about and has agreed. The requirements are therefore that DS continuously carries out its business using those approved trading conditions. Here, prior to the period of the damage to Scotbeef’s meat, that was originally the UKWA terms; then it changed to the FSDF ones, after DS became a member of that other trading association.
70. Sub-clause (iii) is plainly aimed at DS’ new business relations. These could be contracts with new customers, or new contracts entered into with existing customers. Mr Buckingham KC for Lonham referred to it as “a proviso”. It requires that DS “shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured”. “All contracts entered into by” DS encompasses what it does in business terms *after* the date of inception of the policy. The clause then goes on to specify what type of conduct will be considered to constitute reasonable steps, including making specific reference to its own trading conditions in job quotations, and specifying its own trading conditions on all invoices and written communications and so on. However, the fact that sub-clause goes on to do this does not detract from the primary element of the sub-clause. This is incorporation of the trading conditions into contracts yet to be formed with new customers, or new contracts with existing customers. In a sense it is a proviso, in that it recognises that potentially DS may not succeed (as a matter of law) in incorporating its terms and conditions. This is why the clause continues as follows:

“If a claim arises in respect of a contract into which the Assured have failed to incorporate the above mentioned conditions the Assured’s right to be indemnified under this policy in respect of such a claim shall not be prejudiced

providing that the Assured has taken all reasonable and practicable steps to incorporate the above conditions into contracts.”

71. This means that *if* during the policy DS were to execute a new contract with a particular customer; but DS were to fail to have its standard trade terms conditions incorporated into that contract; then DS would still be entitled to be indemnified for liability as long as it has taken all reasonable and practicable steps to incorporate DS’ conditions into that contract. In a sense therefore, it could be described as a proviso, as it is an exception for contracts not on DS’ standard terms. It is possible, of course, that a new contract with a new customer could in law be entered into on that new customer’s standard terms, rather than DS’ terms. This part of the sub-clause could potentially give DS the benefit of the insurance (as long as the reasonable steps were taken such that DS fell within its scope) if, for some reason, that customer’s standard terms happened to be incorporated instead. Importantly however, for the purposes of the issues on this appeal, this sub-clause too is a future warranty, as explained by *Colinvaux*. The requirements that DS is promising it will satisfy go to the same subject as that in sub-clause (ii), namely incorporation of the trading conditions in business transacted by DS after the date of inception of the policy. Sub-clause (iii) however deals with circumstances where DS may not in law have achieved that incorporation.
72. Thus, as a matter of construction, each of sub-clauses (i), (ii) and (iii) deal with all of the different permutations upon which DS has traded and will trade in the future. As classes, these are existing customers; existing customers who continue to trade on existing contracts; existing customers who may place new business with DS; and new customers in the future. Collectively, all of the different potential business arrangements by DS are included, and they are all subject to the same requirement, namely that the business is conducted on the standard trade terms declared by DS. The only potential liability which is covered under the policy for trading not on those standard terms is the one where DS has failed to achieve this, but has taken all reasonable and practicable steps to have them incorporated (which is the subject of sub-clause (iii)). It was entirely a matter for DS as to how it conducted its business, and the terms upon which it trades with all of its customers is something that was uniquely in the power of DS (as opposed to the insurer) to organise. Hypothetically, of course, a potentially new very large business opportunity could arise and that customer might refuse to contract with DS on those standard terms. What DS decided to do in that situation would be a business decision, but in order for the new contract to be covered by its existing policy terms DS would have to comply with sub-clauses (ii) and (iii). The provisions are conditions precedent to indemnity under the policy that required DS to trade with its customers only on approved standard trading terms during the term of the Policy. Unlike sub-clause (i), they do not contain any pre-policy representations and do not seek to regulate pre-policy disclosure by the assured.
73. There is no finding in the Judgment that sub-clauses (ii)-(iii) contain any representation or obligations regulating pre-policy disclosure. The judge incorrectly concluded that these provisions were within the scope of section 3 of the 2015 Act because the different clause, sub-clause (i) of the Duty of

Assured Clause, was a pre-contract representation and because she found that the three sub-clauses (i)-(iii) should be read together. I consider this to be an error of law in terms of how she construed those latter two sub-clauses. They are plainly what are called future warranties. To adopt a phrase from Mr Buckingham's skeleton argument, the sub-clauses "regulate the conduct of the assured during the Policy term" (emphasis in original).

74. I then turn to the further consideration of sub-clauses (ii) and (iii) as warranties, and whether their status within the policy, when that document is construed as a whole, match their description by Lonham as conditions precedent. In my judgment, they are warranties, as I have explained above. They are also clearly conditions precedent. This is for the following simple reason. The clear wording of the policy states that they are.
75. The policy includes them under the heading "General Conditions, Exclusions and Observance". This means that what follows includes reasons why the policy coverage could be excluded. The heading of the clause is "DUTY OF ASSURED CLAUSE." The word duty has as some of its synonyms responsibility, obligation and burden. It is a requirement. Yet further and expressly, the policy states "It is a condition precedent to the liability of Underwriters hereunder..." (emphasis added). That wording introduces the sub-clauses that follow, and the text follows on immediately after the heading "DUTY OF ASSURED". Further in the policy, under the heading "IMPORTANT INSTRUCTIONS IN EVENT OF LIABILITY CLAIM" it is stated that "The effect of a breach of a condition precedent is that Underwriters are entitled to avoid the claim in its entirety". The judge below seemed to put some emphasis on the fact that this statement about breach of a condition precedent appears two pages later than the Duty of Assured Clause. There are two difficulties with that. Firstly, it means that she was not construing the sub-clauses within the policy as a whole, which is the exercise that is required. Secondly, the Duty of Assured Clause itself says that the clauses are "conditions precedent to the liability of Underwriters." Giving those words their natural meaning, which again is what is required as a matter of construction, is sufficient to demonstrate that they are conditions precedent; and that they must be complied with before liability will attach to the underwriters.
76. Construing the policy as a whole therefore, it is expressly stated within the agreement that if there is a breach of a condition precedent, the insurers are entitled to avoid the whole claim.
77. Their categorisation as warranties means that rather than being governed by Part 2 and section 3 of the 2015 Act, which deals with fair presentation of the risk, sub-clauses (ii) and (iii) fall to be considered under Part 3, namely sections 9 and following. These are the sections that apply to warranties. Section 9(2) does not assist Scotbeef, because that provision deals with a representation that could (without the Act) be converted into a warranty either by a declaration of basis of the insurance clause, or otherwise. This is no longer possible since the 2015 Act came into force, and the section states that "such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any

other contract (and whether by declaring the representation to form the basis of the contract or otherwise).” Given these two sub-clauses were always future warranties, this section has no application. Lonham is not relying upon representations that it maintains have somehow become warranties. Sub-clauses (ii) and (iii) were always future warranties.

78. Section 10(1) of the 2015 Act deals with breach of warranty, abolishing the rule that any breach of warranty that “results in the discharge of the insurer's liability under the contract is abolished”. It goes on in section 10(2) to deal with the liability by an insurer in a breach of warranty situation:  
“An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.”
79. It then goes on at section 10(3) to state that “subsection (2) does not apply if—  
(a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,  
(b) compliance with the warranty is rendered unlawful by any subsequent law, or  
(c) the insurer waives the breach of warranty.”  
None of those sub-sections of section 10(3) apply here. There was no change of circumstances, compliance with the warranty was not rendered unlawful, and there was no waiver by Lonham.
80. Section 10(4) does not apply either. This states that “subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—  
(a) before the breach of warranty, or  
(b) if the breach can be remedied, after it has been remedied.”  
Here, the loss arose after the breach of warranty, and before it had been remedied. Nor do any of the scenarios in section 11 apply either. Sub-section 10(2) plainly continues to apply and Lonham is entitled to rely upon it.
81. Therefore sub-section 10(2) is the only part of this section that is relevant to these circumstances. This expressly states that the insurer has no liability for any loss after a warranty has been breached but before it has been remedied. That is what occurred here. There is a finding of fact in the judgment following the hearing of the First Preliminary Issue that the FSDF terms and conditions were not, and never were, incorporated into the contractual relationship between DS and Scotbeef. That finding is binding and means that regardless of what meat was deposited with DS and when, DS was in breach of the warranties contained in sub-clauses (ii) and/or (iii) which are conditions precedent to liability under the policy. None of the subsequent exceptions in the 2015 Act for avoidance of liability in the event of breach of warranty apply. Therefore Lonham has no liability to indemnify DS in respect of the losses claimed by Scotbeef.
82. Subject therefore to the issue concerning transparency requirements later in the 2015 Act (which arises in Ground 6 of the appellant’s grounds and the third

ground in the Respondent's Notice), my primary conclusion is that the judge erred in her construction of the policy terms; sub-clauses (ii) and (iii) are properly construed as warranties; and as a result of this she applied the wrong sections of the 2015 Act. When the law is correctly applied in terms of categorisation of these two clauses, it can be seen that the two sub-clauses are warranties; as a result of the findings of the judge on the First Preliminary Issue, regardless of the date(s) when the meat was sent to DS, DS was in breach of either or both of those warranties, which are conditions precedent to liability; and under section 10(2) of the 2015 Act Lonham has no liability to indemnify DS.

**G. Respondent's Notice**

83. Scotbeef lodged a Respondent's Notice comprising three separate grounds. They are as follows.

“Ground One:

As a matter of law, on a correct construction of the Policy, the Learned Judge ought to have held that sub-clause (ii) of the Duty of Assured Clause should be construed as subordinate to sub-clause (i), excludes the more specific circumstances envisioned in sub-clause (iii) and/or is restricted to obliging the assured to continue trading using the conditions disclosed pursuant to sub-clause (i).

Ground Two:

As a matter of law, on a correct construction of the Policy, the Learned Judge ought to have held that sub-clause (iii) should be construed as applying to contracts executed within the currency of the Policy, to contracts that the assured knows are not subject to the conditions disclosed under sub-clause (i) and/or excludes the failure to comply with the more specific requirement in sub-clause (i).

Ground Three:

As a matter of law, on a correct construction of the Insurance Act 2015, and to the extent that sub-clauses (i) to (iii) are to be considered separately, the Learned Judge ought to have held that sub-clause (ii), in addition to sub-clause (iii), puts the assured in a worse position within the meaning of section 16 and fails to satisfy the transparency requirements of section 17.”

84. Grounds One and Two are in a sense interlinked, and I read them as potentially ingenious attempts to restrict the sensible effect of the two sub-clauses were they to be found to be warranties. They are, with respect, a little difficult to unravel, and Mr Boardman's valiant attempts to do so during oral argument did not identify any particular logic underpinning them which is to be found in the natural meaning of the words of the two sub-clauses. I find the arguments inherent in each of them extremely strained.
85. Considering Ground One first, it is not immediately clear in terms of linguistic analysis what the phrase “sub-clause (ii) of the Duty of Assured Clause should be construed as subordinate to sub-clause (i)” is intended to mean. I take it to mean that (ii) should be considered to be subject to sub-clause (i), which was found to be a representation and in respect of which leave to appeal was refused. However, the status of sub-clause (i) as a representation has no effect whatsoever upon the separate requirement in sub-clause (ii). Given my analysis

of the three sub-clauses above, and the temporal difference between them – sub clause (i) dealing with a representation of existing fact as at the date of inception, in terms of fair duty of presentation of risk, namely the terms upon which it has *already* contracted with customers - and sub-clauses (ii) and (iii) containing future warranties, it is my analysis of the three clauses that they deal with separate matters. Why should sub-clause (i), which is “a full declaration of all current trading conditions at inception” of the policy have any primacy over sub-clause (ii), a promise of what will happen in terms of trading conditions going forwards into the future throughout the duration of the policy? The first deals with the existing factual situation as at a particular date; the second states what DS promises it will do in the future over a period of (usually, and as here) a year, in all its trading activity during that period. DS makes a future warranty containing its trading intentions. Sub-clauses (i) and (ii) are each an entirely different specie of clause.

86. In a sense Mr Boardman was driven towards some construction of sub-clause (ii) that attempted to have it folded within, or read as subject to, the representation at sub-clause (i), because unless it could be linked in some way with a representation (namely the statement of trading conditions as at the date of inception of the policy) which would plainly fall into the fair presentation of risk requirements of the 2015 Act, its express wording deals with what is to occur in the future. I consider that there is no basis to allow the nature of sub-clause (i) to flow into the analysis of sub-clause (ii).
87. Sub-clause (ii) is forward looking, and clearly a warranty. It includes not only new contracts entered into after inception of the policy, but also trade carried on - from the point of inception - on contracts that already exist. Mr Boardman raised some objection to this point when it was explored during oral submissions, and submitted that this approach could impose an obligation on DS to change the terms of its existing contracts with its existing customers.
88. Mr Boardman's key contention that the two sub-clauses operated in the way he contended was that sub-clause (ii) should be read as containing a representation because of the fact of the representation in sub-clause (i). He submitted that if, at inception of the policy, there were to be an existing contract governed by trading terms which had not been declared and approved by insurers, then it would necessarily follow that sub-clause (ii) would be breached one second into the new policy period.
89. I do not accept those submissions. Sub-clauses (i) and (ii) deal with fundamentally different things. Sub-clause (i) is about the provision of information upon which the insurers will make their underwriting decision, and their assessment of risk. That is why it is a representation and falls to be considered under the fair presentation of risk parts of the 2015 Act. Sub-clause (ii) is about the future conduct of DS (and therefore a future warranty).
90. First, looking at the contract of insurance as a whole, Mr Boardman’s argument at [87] could only be the case if DS had already breached the representation in sub-clause (i). Further and in any event, sub-clause (ii) does not impose a positive obligation upon DS to change its trading conditions; rather it would act

as an exclusion from cover if DS continued to trade under any existing contractual relationship on terms that were not declared and approved.

91. Ground Two appears to me to be a little confused. There is no reason for the strained construction urged upon the court concerning sub-clause (iii). Nor is there any reason to consider its effect as restricted “to contracts that the assured knows are not subject to the conditions disclosed under sub-clause (i) and/or excludes the failure to comply with the more specific requirement in sub-clause (i)” (emphasis added). If that were right, then sub-clause (iii) would be limited to a specific set of exceptions where the assured had failed to comply with sub-clause (i) in any event. In other words, were this Ground to be valid, in order for sub-clause (iii) to be of any effect the representation at sub-clause (i) by the assured would have to be inaccurate or incomplete for the sub-clause to have any operation at all, and DS would know, when making the representation at (i), that it had already failed to contract on its standard terms. This would mean that DS would have failed to make a full declaration of all current trading conditions; even though at sub-clause (i), it states that it has. In this counter-factual, on Mr Boardman’s analysis, sub-clause (iii) would operate only as exculpating or excusing that failure by stating that it *had* taken all reasonable steps, in the past. It had just failed to achieve this. I do not consider that construction to be tenable given the clear meaning of the words. I also reject it, given what sub-clause (iii) says in express terms, namely “the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured.” This uses the future tense, “shall take”, rather than the past tense such as “has taken”. The use of the future tense means steps that have not, as at the date of inception, yet been taken. In my judgment, this sub-clause relates to contracts that have not yet been entered into; its wording cannot be interpreted as applying to contracts already entered into, but on terms other than the ones that DS has already stated apply in sub-clause (i).
92. Each of the points raised in argument in Grounds One and Two of the Respondent’s Notice (save for the point about sub-clause (iii) applying to contracts executed within the currency of the Policy) have no merit in my judgment, and cannot be supported when the words of the different sub-clauses are given their natural meaning.
93. Ground Three arises in the potential scenario whereby sub-clauses (i) (ii) and (iii) are, as a matter of construction, found to be separate, which is the construction which I consider to be the correct one. This is the situation in which DS now finds itself, given my analysis above concerning construction of the policy clauses. In this scenario DS seeks to rely upon a separate point, namely that “sub-clause (ii), in addition to sub-clause (iii), puts the assured in a worse position within the meaning of section 16 and fails to satisfy the transparency requirements of section 17.”
94. This therefore requires consideration of the transparency requirements of the 2015 Act. Transparency also arises when considering Ground 6 in the appellant’s grounds of appeal, although it is convenient to deal with all the points on transparency here.



**H: Transparency**

95. This point by Scotbeef in its Respondent's Notice dealt with the risk that Scotbeef's proposed construction of sub-clauses (ii) and (iii) as being subordinate to sub-clause (i) and representations (rather than warranties) might fail. Mr Boardman maintained that even if these two sub-clauses were not to be considered as falling with the section 3 duty of fair presentation, but to be dealt with under sections 9 and 10 of the 2015 Act, they did not satisfy the transparency requirements in Part 5 of the Act. This requires consideration of sections 16 and 17 of the 2015 Act.
96. Section 16 restricts an insurer's ability to contract out of the provisions of the 2015 Act; it is headed "contracting out". At section 16(1), there is a strict prohibition on contracting out of the section 9 restriction on turning representations into warranties; this covers the "basis of the contract" type clauses. The section states:
- "(1) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which section 9 applies than the insured would be in by virtue of that section is to that extent of no effect."
97. At section 16(2), there is a qualified prohibition on contracting out of other matters provided for in Parts 2 to 4 of the Act. Any term of a policy that puts an assured in a worse position is not binding unless it satisfies the transparency requirements in section 17. This would apply to any attempt to contract out of section 10 (which restricts an insurer's ability to avoid liability for breach of warranty) or section 11 (which restricts an insurer's ability to avoid liability for breaches unrelated to loss).
98. Section 17 sets out the transparency requirements for contracting out under section 16(2), namely that the insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into (or if it arises as a result of a variation, the variation is agreed); and the disadvantageous term must be clear and unambiguous as to its effect.
99. The passages of the judgment upon which Mr Boardman relies, which he states are relevant to this issue are as follows:
- "[79] ...I accept the submission of the Claimant that it is necessary to consider the sub-clauses in the context of the duty of fair presentation required by the 2015 Act and in the context of remedies for breach when considering the sub-clause and the transparency requirements of the 2015 Act."

Further, in the context of considering the question posed "Do those sub-clauses satisfy the transparency requirements?":

"[80]...In my judgment, they do not. Firstly, in my judgment, the effect of sub-clause (iii) is to put the assured in a worse position. The assured is in breach of sub-clause (iii) if it does not take all reasonable and practicable steps, even if the FSDF terms have in fact been incorporated".

100. There are other isolated passages that touch on this point. At [81] the judgment below stated “I have no evidence that any steps were taken by the Second Defendant to draw the disadvantageous sub-clauses to the assured’s attention”; at [82] “I find in any event that the disadvantageous term is not clear and unambiguous as to its effect”; and at [84] “a breach of sub-clause (iii) would permit the Second Defendant to avoid indemnifying an assured in respect of a claim even if the loss was unrelated to the breach.”
101. Finally on this point at [85] in her judgment, the judge considered “the insurer’s remedies in respect of such qualifying breaches.” The judge held that “The First Defendant believed that the FSDF terms were in fact incorporated into its contract with the Claimant,” and later that “As the qualifying breach was not deliberate or reckless, in order to avoid the contract and refuse the claim, the Second Defendant would have to show that it would not have entered the contract with the First Defendant on any terms”. At [86], the following passages appear: “I do not accept that the evidence of the Second Defendant suffices to prove that it would not have entered into the contract on any terms,” and that “I accept the argument made by the Claimant that insofar as individual terms were of importance to the Second Defendant, they could have been specifically incorporated into the insurance contract itself.”
102. With respect to the judge, all of this analysis follows on from her finding that sections 2 and 3 apply to sub-clauses (ii) and (iii), and draws heavily on the relevant sections of the 2015 Act were that initial finding concerning the sub-clauses to be representations to be correct. For example, questions of breach of the duty of fair presentation; her conclusions that she rejected the evidence called by Lonham regarding the importance of the risk; whether the breach was intentional, reckless or neither; and whether DS knew that it was in breach of its duty of fair presentation of risk (all highly material under section 8(5) of the 2015 Act) do not assist Mr Boardman in this respect. The judge’s finding at [84] that “a breach of sub-clause (iii) would permit [Lonham] to avoid indemnifying an assured in respect of a claim even if the loss was unrelated to the breach” seems to concentrate upon the old common law rule which I have explained above, and rather glosses over the abolition of that rule and the reforms passed in the 2015 Act in this respect. She did not analyse any of the provisions of sections 10 and 11 of the 2015 Act, nor did she need to do this (on her analysis) because she did not find sub-clauses (ii) and (iii) to be warranties. Given the findings I have explained above, there is no question of the policy attempting to have the insured DS “contract out” of the provisions in respect of fair presentation of risk, which is what section 16(1) deals with.
103. Under section 16(1), any term of a policy which seeks to put the insured in a worse position regarding representations is of no effect. However, that section does not apply here as the two sub-clauses are warranties, as a matter of construction, and not representations. Lonham is not attempting to have representations converted into warranties as I have explained. Section 16(1) is of no application to sub-clauses (ii) and (iii).
104. One particular passage in Scotbeef’s written skeleton merits reproduction here in full because it encapsulates the confusion that can be caused when failing

properly to characterise whether a clause is a representation or a warranty. At paragraph 29.2 the skeleton argument stated:

“The practical effect of Lonham’s analysis of the 2015 Act is that the protections and remedies provided by s.8 and Schedule 1 do not apply, or apply fully, to the Policy. It is akin to an implied contracting out of Part 2 which is precluded by s.16(1). It would subvert the purpose of the introduction of the duty of fair presentation and its remedies, and would return the law to avoidance under the 1906 Act for breach of the duty of good faith. Such an interpretation that renders the 2015 Act partly or wholly ineffective should not be upheld, especially where the Duty of Assured Clause provides that ‘The policy is subject to and incorporates the provisions of the Insurance Act 2015’” (emphasis added)

105. There is no “implied contracting out” inherent in analysing sub-clauses (ii) and (iii) as warranties, rather than representations. That is the first exercise that is required in deciding which part of the 2015 Act applies to them. If that exercise in construction goes wrong at that first stage of the analysis, and such clauses are not recognised as warranties, then what follows is concentration upon the wrong part of the Act. Including warranties in a policy – warranties being governed by Part 3 of the Act – does not subvert the purpose of Part 2, which is where one finds section 8 and all the other sections dealing with fair presentation of risk. Nor does it return the law to the old regime under the pre-2015 Act period.
106. I accept that any attempt to contract out of the legal effect of sections 10 and 11 of the 2015 Act would fall within the qualified prohibition within section 16(2). As such, in order to be permitted and of legal effect, such a term must comply with the transparency requirements under section 17. However, the first question for this Court on transparency is a simple one and it is this. Is there any term in this insurance policy which is seeking to have DS contract out of the legal effect of sections 10 and 11 of the 2015 Act at all? If there is not, then the effect of sections 16 and 17 simply do not arise.
107. In my judgment, there is no such attempt at contracting out. This is for two reasons. The first is that section 10(2) is what – as I have explained at [81] above – expressly states that Lonham has no liability under the contract of insurance in respect of the loss occurring after the warranty in the contract has been breached but before it is remedied. This is by operation of the 2015 Act, not as a result of any purported contracting out device within the policy. Although I am not persuaded by Mr Buckingham that in reality in this policy the parties were “contracting in” (a point he made in writing but did not amplify orally) – because there is no need to “contract in” to the provisions of the 2015 Act – he is correct in that the policy itself expressly states that it is subject to the 2015 Act; and LMA5264 reproduces (as I have explained above at [26] to [29]) this express statement and even summarises some of the provisions. The part of LMA5264 I have reproduced at [26] expressly recites the parties’ rights under Parts 2, 3, 4 and 5 of the 2015 Act. Indeed, the Duty of Assured Clause itself states ‘The policy is subject to and incorporates the provisions of the Insurance Act 2015’. That is directly contrary to the type of wording that would be necessary to achieve any contracting out.

108. The second reason is that sub-clauses (ii) and (iii) do not put the insured in a worse position than DS would be anyway. That is the second requirement in section 16(2) in order for section 17 to apply.
109. Accordingly, it is not necessary to analyse the requirements of section 17 and whether they were satisfied or not. The transparency requirements in section 17 simply do not arise in this case because no part of section 16 applies to the two sub-clauses relied upon by Lonham.
110. It follows from this therefore that I am not persuaded by any of the three grounds contained in the Respondent's Notice, and I reject them. The issue concerning transparency that is raised in Ground 6 of the appellant's grounds of appeal ought to be resolved in Lonham's favour too, and sections 16 and 17 of the 2015 Act do not apply.

***I. Conclusion***

111. Therefore, if my Lords agree, I would allow the appeal, which succeeds on Ground 3 and Ground 6.

**Lord Justice Zacaroli:**

112. I agree.

**Lord Justice Coulson:**

113. I also agree.