Neutral Citation Number: [2021] EWHC 2538 (Ch)

Case No: BL-2020-MAN-000035

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Civil Justice Centre,
Bridge Street West,
Manchester,
M60 9DJ

Date: 21 September 2021

Before :

MR JUSTICE SNOWDEN
(Vice-Chancellor of the County Palatine of Lancaster)

- -

Between:

RISTORANTE LIMITED T/A BAR MASSIMO	**Claimant**
- and –	
ZURICH INSURANCE PLC	**Defendant**

- -

Roddy Dunlop QC (Scot) and Jonathan Schaffer-Goddard (instructed by **Markel Law LLP**) for the **Claimant**
Graham Eklund QC (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing date: 19 May 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2 p.m. on Tuesday 21 September 2021.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is the trial of three preliminary issues, ordered by HHJ Halliwell on 9 September 2020. The one-day hearing took place before me in person.

2. The underlying claim was brought by the Claimant on 24 March 2020, alleging breach of contract by the Defendant insurer in respect of what the Claimant says was the wrongful avoidance of an insurance policy and the refusal to meet a claim under it. In the underlying claim, the Claimant seeks, *inter alia*, a declaration that the Defendant was not entitled to avoid, and has not avoided, the policy of insurance, together with the payment of a sum under the policy of some £633,000, damages, and various other heads of relief.

3. The preliminary issue is all about the meaning of words: namely, the meaning of a particular question that the Defendant asked the Claimant policyholder prior to inception and renewal of the policy, and the legal effect of that meaning.

4. Following the occurrence of an insured peril, the Defendant purported to avoid the Claimant's policy *ab initio* on the basis that the meaning of the question was such that the Claimant's answer was a material misrepresentation or unfair presentation of risk. The Claimant contends that, on the contrary, the meaning of the question was such that the answer it gave was true, that there was no misrepresentation and, by asking the question with the meaning that it had, the Defendant waived its right to certain other information, meaning that there had been no unfair presentation of risk. The Claimant submits that if it is right about these matters, then there was no basis on which to avoid the policy *ab initio*.

Background

5. The factual background to the claim is straightforward and is not in dispute between the parties.

The parties

6. The Claimant is a company which was at all material times the leasehold owner of a property situated at 3/5 Kirk Road, Bearsden, Glasgow (the "Property"). The Claimant has been carrying on business as a bar and restaurant from the Property since the early 2000s. The Defendant is an insurance company.

7. At all material times, the directors and shareholders of the Claimant were Mr Massimo Lilli, Mr Dino Dalsasso and Mr Stefano (also known as Stephen) Dalsasso. Mr Lilli, Mr D Dalsasso and Mr S Dalsasso had formerly been directors of certain other companies:

    i) Mr Lilli was a director of each of Massimo Leisure Ltd ("Leisure"), Massimo Edinburgh Ltd ("Edinburgh") and Collecastello Ltd ("Collecastello");

    ii) Mr D Dalsasso was a director of each of Leisure and Edinburgh, and a company secretary of Collecastello;

    iii) Mr S Dalsasso was a director of Leisure.

8. Each of the three companies referred to above had entered liquidation at various times and had subsequently been dissolved: Leisure went into (voluntary) liquidation in September 2009 and was dissolved on 30 March 2011; Edinburgh went into (compulsory) liquidation and was dissolved on 11 April 2012; and Collecastello went into (compulsory) liquidation on 24 June 2014 and was dissolved on 25 June 2015. I refer to these events collectively as the "Other Insolvency Events".

The Policy and the Representation

9. On or about 12 October 2015, the Defendant incepted an insurance policy numbered PR/DLJX 8464 (the "Policy") in respect of the Property for the benefit of the Claimant.

10. The Claimant instructed an insurance broker, Munro and Sons Limited (the "Broker"), in connection with the insurance cover. In written evidence, Mr Gunning, a senior underwriter at the Defendant, explained the process by which the Policy was originally incepted. He explained that the risks to be insured under the policy were presented to the Defendant by the Broker via "Z-Trade", the Defendant's automated computer underwriting system. One of the key functions of Z-Trade was to enable the processing of straightforward applications for insurance. Applications were submitted and evaluated on Z-Trade by an algorithm, without any involvement from an individual underwriter.

11. Mr Gunning explained that the restaurant sector in which the Claimant operates is a "flat trade", meaning it is a low-risk environment subject to strict rules, and which generally carries with it less scope for discretion in the underwriting process. Accordingly, in most cases, restaurants such as the business of the Claimant would be evaluated exclusively on and by the Z-Trade system.

12. The specific risks insured under the Policy were set out in a schedule to it. The schedule provided that the following risks were insured: (i) business interruption and book debts; (ii) money; (iii) employers' liability; (iv) public and products liability; (v) frozen food; (vi) goods in transit; (vii) legal expenses; and (viii) loss of licence.

13. There were a number of other specific risks set out in the schedule which were expressly listed as being uninsured. These were: (i) specified and unspecified items 'all risk'; (ii) employee dishonesty; (iii) personal accident; (iv) business travel; (v) terrorism; and (vi) household contents. Although not identified specifically in the schedule to the Policy, it is clear that the insolvency of the Claimant (or indeed any other person) was not among the insured risks under the Policy.

14. The Policy was renewed with effect from 12 October 2016, and again with effect from 12 October 2017. Upon the inception of the Policy, and at each subsequent renewal, the Defendant's Z-Trade system required the Claimant to indicate its response to various statements of fact as follows:

> "No owner, director, business partner or family member involved with the business:
>
> [(i)] has ever had a proposal or renewal for insurance declined or cancelled; a policy voided, withdrawn or suspended, or special terms imposed by any insurer.

> [(ii)] has ever been convicted of, or charged (but not yet tried) with any criminal offence, other than motoring offences or offences that are spent under the Rehabilitation of Offenders Act 1974.
>
> [(iii)] has ever been the subject of a winding-up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation.
>
> [(iv)] is currently insured with Zurich Insurance plc. for the covers being requested."

The numbering in the extract quoted above has been inserted by me for convenience.

15. It will be apparent from the structure of the question that the introductory wording ("*No owner, director, business partner or family member involved with the business:*") applies equally to each of the numbered statements (i) – (iv). The Z-Trade platform on which the form was completed provided a drop-down menu in respect of each numbered statement. The only options in the drop-down menu were "Agree" or "Disagree". Accordingly, when completing the form, the Claimant (via the Broker) had to consider, in turn, whether it agreed or disagreed with each of the statements in respect of the persons identified in the introductory wording.

16. The critical statement of fact, and the statement at issue in the present case, appears under item (iii). It will be seen that it is a statement about various types of insolvency procedure. I refer to that statement as the "Insolvency Question". In response to the Insolvency Question, on each occasion at inception and at each renewal date, the answer given by the Claimant was "*Agree*". I refer to the question and the answer together as the "Representation".

17. The Defendant also relied on certain other statements contained in the Policy or ancillary documents.

18. First, at inception in 2015, the statement of facts which formed part of the Policy stated as follows:

> "IMPORTANT – Please read the following information carefully
>
> […]
>
> This statement of fact forms part of your insurance policy.
>
> May we remind you that you have a duty to disclose all material facts: that is, those facts that would influence an insurer in the acceptance or assessment of a risk. If you are in any doubt about whether a fact is material, you should disclose it. Failure to do so may invalidate your cover and could mean that part or all of a claim may not be paid. Your duty to disclose is ongoing and does not apply solely at inception or renewal therefore if any

> information on which this insurance is based changes, please notify us immediately.
>
> This statement of facts, the policy, any schedule, endorsements and certificate should be read as if they are one document.
>
> If you are satisfied that this is a true statement of facts you need to take no further action and should retain this statement with your policy. If any of the details are incorrect please contact us immediately, as failure to do so could invalidate your policy. You will be advised of any resultant changes in acceptance, premium or cover and issued with a replacement statement of facts."

19. Second, on renewal of the Policy in 2016 and 2017, the statement of facts stated as follows:

> "IMPORTANT – Please read the following information carefully
>
> This statement of facts, policy, schedule and any endorsement and certificate should be read as if they are one document.
>
> Fair presentation of risk
>
> You must make a fair presentation of the risk to us at inception, renewal and variation of your policy. This means that you must tell us about all facts and circumstances which may be material to the risks covered by the policy in a clear and accessible manner and that you must not misrepresent any material facts. A material fact is one which would influence the acceptance or assessment of the risk. If you have any doubt about the facts considered material, it is in your interest to disclose them to us.
>
> Please check that all of the information recorded in this document is correct. If there are any inaccuracies or omissions please inform us immediately. Failure to make a fair presentation of the risk could result in the policy being avoided, written on different terms and/or a higher premium being charged, depending on the circumstances surrounding the failure to present the risk fairly."

20. Third, in the letter under cover of which the renewal form for policy year 2017 was sent to the Broker (on behalf of the Claimant), the Defendant stated:

> "Your customer must make a fair presentation of the risk to us at inception, renewal and variation of their policy. This means that we must be told about all facts and circumstances which may be material to the risks covered by the policy including but not limited to the information detailed within the statement of facts and that any material facts must not be misrepresented. A

> material fact is one which would influence the acceptance or assessment of the risk. If you or your customer have any doubt about facts considered material, it is in your interests to disclose them to us.
>
> […]
>
> Please check that all of the information recorded in this document is correct and complete. If there are any inaccuracies or omissions please inform is immediately.
>
> Failure to do so could result in the policy being avoided, written on different terms and/or a higher premium being charged, depending on the circumstances."

The claim under the Policy and the purported avoidance

21. On 3 January 2018, the Property was damaged in a fire. The Claimant notified the Broker of the loss, which in turn notified the Defendant. The Claimant sought to be indemnified by the Defendant under the Policy for the loss caused by the fire.

22. On 16 March 2018, the Defendant purported to avoid the Policy from its inception, alleging misrepresentation and/or material non-disclosure of risk because the Representation did not disclose to the Defendant the occurrence of the Other Insolvency Events. The letter was in the following terms:

> "The purpose of this letter however is to confirm that for reasons expanded on below, we consider that there has been a material non-disclosure and/or misrepresentation in this case regarding previous company liquidations.
>
> Having considered this matter in detail with our underwriters, it is clear that this non-disclosure is highly material, and that it also induced us to provide cover, which we would not otherwise have provided.
>
> For that reason Zurich is entitled to, and hereby does, avoid the Policy from its inception on 12 October 2015, and treat it as if it never existed.
>
> The effect of this is that there is no cover in respect of the Claim."

23. The Defendant went on to say that, had the Claimant disclosed the Other Insolvency Events, and had that information been entered into the automated system used to arrange insurance, no quote would have been generated. The Defendant further stated that its underwriters had confirmed that if the information had been disclosed, the Defendant would not under any circumstances have offered cover.

24. On 24 March 2020, the Claimant commenced its claim for breach of contract for the wrongful avoidance of the Policy by the Defendant and the refusal by it to meet the Claimant's claim under the Policy in respect of the fire. Particulars of Claim were served on the same date. The Defence was served on 19 May 2020, and a Reply was

served on 26 August 2020. The first case management conference came before HHJ Halliwell on 2 September 2020.

The issues

25. Following the first case management conference, by an Order of 9 September 2020, HHJ Halliwell ordered a trial of three preliminary issues, namely:

    i) On the facts as agreed or determined … was there an unfair presentation of the risk and/or a misrepresentation of material facts as alleged by the Defendant? ("Issue 1").

    ii) By asking the question giving rise to the Representation (i.e. the Insolvency Question) … did the Defendant waive any entitlement to information about the insolvency of companies of which the Claimant's directors or shareholders had been directors or shareholders? ("Issue 2")

    iii) Did the Defendant avoid the contract of insurance, by its delivery of the letter dated 16 March 2018 or by service of the Defence? ("Issue 3").

26. The scope of the issues to be heard as part of this preliminary trial was originally envisaged by the parties to be rather wider than has materialised. However, on 21 January 2021, the Claimant wrote to the Court to confirm that it had agreed with the Defendant that it would not contest issues of materiality or inducement. I understand this to mean that the Claimant accepts that the Representation was (subject to waiver) material and that it induced the Defendant to enter into the Policy, such that the only live issues concern construction and waiver.

27. As I have said, the relevant facts were agreed between the parties and there was no live factual or expert evidence before me. In light of this, the Claimant submitted that the issues to be decided follow a straightforward logical structure.

28. In relation to Issue 1:

    i) If the Court considers that the meaning of the Insolvency Question was such that the Representation was a misrepresentation of material facts, then the Claimant accepts that the answer to Issue 2 must be "no" and the answer to the Issue 3 must be "yes".

    ii) If the Court considers that the meaning of the Insolvency Question was such that the Representation was not a misrepresentation of material facts (as the Claimant contends), then the Court must consider Issue 2.

29. In relation to Issue 2:

    i) If the Court accepts the Claimant's submission that there was a waiver of the Defendant's entitlement to the information concerning the Other Insolvency Events, then the Claimant submits that this, together with an answer in its favour on Issue 1, provides a complete answer to the Issue 3.

ii) If the Court considers that there has been no waiver, then the Claimant accepts that there was not a fair presentation of the risk and, accordingly, that the answer to Issues 1 and 3 is "yes".

30. I agree with the structure suggested by the Claimant and I follow it for the purposes of this judgment. It will be seen that the Issue 3 is less of a discrete issue and more in the nature of the logical consequence of the conclusions on the other issues; as such, I heard no argument on that issue independent of the other issues.

The interpretation of contracts: key principles

31. The general principles of contractual interpretation are well-known and were summarised by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] AC 1173 at [10]-[13], per Lord Hodge JSC:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning […]
>
> 11. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or

> a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

32. There was no dispute that the interpretation of insurance policy documents should broadly follow the principles generally applicable to interpretation of contracts. The authors of *MacGillivray on Insurance Law* (14th ed.) ("*MacGillivray*") state as follows at [11-01]:

> "Insurance policies are to be construed according to the principles of construction generally applicable to commercial and consumer contracts. The task of a tribunal endeavouring to interpret a contract of insurance is to ascertain and give effect to the intention of the parties in relation to the facts in dispute. Their intention is, however, to be gathered from the wording chosen to express their agreement in the policy itself and from the wording of any other documents incorporated into it, so that,
>
> > 'the methodology is not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The

> question resolves itself in a search for the true meaning of language in its contractual setting'
>
> (Deutsche Genossenschaftsbank v Burnhope [1995] 1 W.L.R. 1580 at 1587, per Lord Steyn."

33. As is the case for the interpretation of contracts generally, the exercise of interpreting questions posed in proposals for insurance policies does not depend on the subjective intention or understanding of the parties. Rather, it is an objective exercise. In R & R Developments v Axa Insurance UK plc [2010] 2 All EW (Comm), after surveying the main authorities on the point, Nicholas Strauss QC concluded at [26]-[27]:

> "This is not an easy point, but in my view … the authorities do not support the proposition that it is necessary to consider in what sense the insured actually understood the question … the authorities in my view establish that, in this context as in all others except for fraud, objective construction reigns supreme and subjective understanding is irrelevant".

Ambiguity

34. In interpreting a contract, the decisions in Rainy Sky, Sigma and Wood v Capita made it clear that if there is genuine doubt or ambiguity as to what the clause in question means, the court is entitled to prefer the meaning that most accords with business commonsense. It is important to understand, however, that this principle only operates if there is real or genuine ambiguity. If the ordinary meaning of the words used is clear and does not give rise to commercial absurdity, the court is not entitled to choose a different meaning which it considers would have been more commercially sensible or desirable.

35. When the court is interpreting questions posed by insurers rather than a negotiated contract term, a different approach applies under which any genuine ambiguity is resolved in favour of the applicant. Thus, if faced with two rival constructions, both of which are objectively reasonable, the insurer will not be entitled to impugn as a misrepresentation of fact an answer given by the policy holder if that answer was true having regard to a construction which it was objectively reasonable to give to the question: see *MacGillivray* at [16-026]:

> "If there is genuine ambiguity in a question put to an applicant by insurers in a proposal form or elsewhere, the latter cannot rely upon the answer as a misrepresentation of fact if that answer is true having regard to the construction which a reasonable man might put upon the question."

36. The same point is illustrated by the remarks of MacKinnon J in Revell v London General Insurance Co Ltd (1934) 50 Ll L Rep 114 at 116:

> "I think Mr Samuels is right when he says – indeed, it is elementary – that if there is an ambiguity in this question so that upon one view of the reasonable meaning which is conveyed to the reasonable reader of it the answer was not false, the company

> cannot say that on the other meaning of the words the answer was untrue so as to invalidate the policy."

Issue 1 - the competing interpretations

37. Mr Dunlop QC's primary submission was that the Insolvency Question posed by the Defendant had a clear and obvious meaning, there was no ambiguity, and that the answer given by the Claimant was true.

38. He contended that this was because, on its face, the Insolvency Question simply asked about insolvency events of an owner, director, business partner or family member involved with business of the Claimant, and did not ask about insolvency events of any other person or company with which any of them might have been connected or involved in some way. Mr. Dunlop QC submitted that this made sense and did not give rise to any commercial absurdity.

39. Mr Dunlop QC also contended that if the Defendant had wanted to know about insolvency events of other entities with which the owners or directors had been connected or involved, it could easily have included words that raised the question. Indeed, Mr. Dunlop QC contended that this was precisely what the Defendant was now seeking to do under the guise of interpretation, namely to insert some missing words into the Insolvency Question so that it read as follows,

> "No owner~~,~~ or director (or any company in which any owner or director have been involved), and no business partner or family member involved with the business … has ever been the subject of a winding-up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation."

Mr Dunlop QC contended that this was a wholly impermissible re-writing of the Insolvency Question.

40. Mr Dunlop QC's alternative argument was that the Claimant's construction of the Insolvency Question was (at least) an objectively reasonable one and, applying the *contra proferentem* principle and by reference to authorities such as Revell (supra), I should conclude that the Representation was true on the basis of the (*ex hypothesi*, objectively reasonable) interpretation given to the Insolvency Question by the Claimant.

41. On behalf of the Defendant, Mr Eklund QC submitted that the Claimant's interpretation was overly literal and lacked any commercial sense. Mr Eklund QC submitted that the Insolvency Question posed by the Defendant could clearly be seen to be primarily concerned with insolvency events that could only affect companies and not individuals. Accordingly, Mr Eklund QC submitted, the only sensible meaning to be given to the Insolvency Question was that it was directed at ascertaining whether other corporate entities with which the directors or owners of the Claimant had been involved had been the subject of one of the various insolvency events referred to.

42. Mr Eklund QC also submitted that it made business common sense for an insurer to wish to know about the prior involvement of directors or owners of the applicant

company in any other companies which had failed in the past. Mr Eklund QC suggested that this information would be of interest to an insurer because it involved "moral hazard". He contended that companies often fail because of mismanagement of their affairs by their directors, and possibly by their shareholders, and hence knowing the history of the owners and directors would be relevant to an insurer being able to form a view of the ability of the owners and directors to exercise sound management of the company they were being asked to insure.

43. Mr Eklund QC further submitted that, contrary to Mr. Dunlop QC's contention, it was not necessary to read any additional words into the Insolvency Question or engage in any wholesale redrafting of it. He submitted that it was not stretching language too much to conclude that when a company was wound up, the company's directors and shareholders could be said to be "the subject of" that insolvency process by reason of the change in their status and the effect of the process upon them. Hence, he said, the directors of the Claimant should have answered that they had been the subject of earlier winding-up proceedings of the other companies of which they had been directors.

Discussion of Issue 1

44. The starting point must be to consider the natural meaning of the words used in the Insolvency Question, in light of the wording of the proposal on the Z-Trade platform as a whole. That requires consideration of the sequence of questions of which the Insolvency Question formed a part. As indicated above, that sequence was as follows,

> "No owner, director, business partner or family member involved with the business:
>
> [(i)] has ever had a proposal or renewal for insurance declined or cancelled; a policy voided, withdrawn or suspended, or special terms imposed by any insurer.
>
> [(ii)] has ever been convicted of, or charged (but not yet tried) with any criminal offence, other than motoring offences or offences that are spent under the Rehabilitation of Offenders Act 1974.
>
> [(iii)] has ever been the subject of a winding-up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation.
>
> [(iv)] is currently insured with Zurich Insurance plc for the covers being requested."

45. It is apparent that the critical opening words ("No owner, director, business partner or family member involved with the business") appear to define the subjects of the enquiry for each of the following four questions. It is equally apparent that there is no express mention of any corporate body with which any of the persons expressly identified has been or is involved or connected with in some way. The literal meaning of the crucial words therefore plainly supports the Claimant's argument.

46. In argument, Mr Eklund QC also accepted that the Defendant would not expect to be told, in answer to the first question, whether any company with which the owners or directors of the Claimant had ever previously been involved had ever had a proposal or renewal for insurance declined or cancelled, a policy voided, withdrawn or suspended, or special terms imposed by any insurer. Mr Eklund QC accepted that an investigation into that question would be almost impossibly wide. It must follow that in relation to the first question, the crucial opening words are limited to the persons identified and do not extend to other companies with which they were involved.

47. The consequence is that the Defendant's argument would require a different meaning to be given to the same opening words when applied to the first question and the Insolvency Question. Though not impossible, that is not, objectively, an obvious intention to impute to the parties.

48. Similarly, the second question (about criminal convictions) makes sense if limited to an inquiry into the criminal record of the persons expressly mentioned in the opening words. It is obvious that an insurer would want to know if the directors or shareholders of the applicant company had a criminal record. It is far less obvious why an insurer would also be interested in criminal offences committed by other companies with which the persons expressly mentioned were or had been involved, and there are no express words in the second question to indicate that an extended meaning must have been intended.

49. A person completing the first two questions on the proposal form would therefore not come to the third Insolvency Question with any predisposition to think that the Defendant was interested in other companies with which the owners or directors of the applicant company were or had been involved.

50. Turning to the words of the Insolvency Question itself, although it is clear that the majority of the insolvency procedures listed are corporate insolvency procedures which would be inapplicable to individuals, the list does include an individual voluntary arrangement. As its name suggests, that is an insolvency procedure for natural persons. The Insolvency Question does, therefore, contain a question of relevance to an individual who is an owner, director etc of the applicant company. The fact that most of the insolvency processes referred to would not be relevant to such an individual does not mean that the question has no purpose for an individual.

51. In passing I note that it is curious that the Insolvency Question makes no reference to bankruptcy, but I regard this as neutral and neither party placed any reliance on the point. The Defendant did not suggest that the Insolvency Question did not relate to an individual director, and hence the lack of a reference to bankruptcy seems to be an omission whichever interpretation is placed on the clause.

52. Further, although Mr. Eklund QC focussed his submissions on a case in which the owner or director of the proposer was an individual, it is perfectly possible (and indeed commonplace) for a business or company to be owned by another company. It is also perfectly possible (albeit less common) to have corporate directors. A corporate owner or corporate director could obviously have been the subject of, or placed into, any of the corporate insolvency procedures identified in the question. Accordingly, the references to corporate insolvency procedures in the Insolvency Question are

potentially meaningful without any need for the expanded meaning for which the Defendant contends.

53. In that regard, I also do not consider that it is to the point that, on the facts of this particular case, all of the directors and owners were individuals. It was obvious that the Insolvency Question was posed on a standard template, and the fact that many of the alternatives might not be applicable in a particular case would not, I consider, cause a person completing the form to consider that a broader meaning was intended.

54. A further, and important, plank of the Defendant's argument is the contention that the existing words of the Insolvency Question are, without more, apt to encompass a requirement to disclose insolvency events in relation to companies with which the owners or directors of the Claimant had been involved. As indicated above, Mr Eklund QC suggested that the words "*has ever been the subject of...*" could fulfil that purpose. In Mr Eklund QC's submission, it would be a natural use of language to say that a director of a company that was ordered to be wound up had "been the subject of" the winding up.

55. I do not accept that argument, either as a matter of the general use of language or on the specific wording and structure of the Insolvency Question. It is plain that individuals cannot, either grammatically or legally, be the subject of a winding up order or a corporate voluntary arrangement. Moreover, the second part of the Insolvency Question speaks in terms of a person "*being been placed into* administration, administrative receivership or liquidation". Even on the broadest meaning of words, if a company goes into administration, one does not speak of its directors "*being placed into*" administration. The words used in the Insolvency Question simply do not fit Mr. Eklund QC's thesis.

56. That leads to a further difficulty with the Defendant's contention. Although Mr. Eklund QC's argument was that the Insolvency Question required the directors and owners of the Claimant also to answer the question by reference to other companies of which they had been owners or directors, there was no indication as to precisely what ownership (or other) connection would be required with any such other company; and there was no explanation as to whether, and if so, how, this extended disclosure requirement might also extend to any business partner or family member involved with the business (the second limb of the opening words).

57. The point can be illustrated by asking, for example, whether it is only other companies in which the owners might have had the same level of ownership interest as in the applicant company that required disclosure; or whether some lesser ownership interest would suffice (and if so, what)? Would it be sufficient if the owners of the applicant company had a passive minority shareholding of, say, under 25% in another private company? Or even a very small investment in the shares of a public company that had failed? Although I recognise that such questions do not arise on the particular facts of the instant case, it does seem to me to be legitimate to ask whether the Defendant can provide a clear explanation of the meaning which it contends should be given in these respects to what is, in essence, a standard form which is intended to apply in all cases.

58. Likewise, I see no obvious reason on the wording of the Insolvency Question to assume that the extension for which the Defendant contends should not apply to any business partner or family member involved with the business as well as to the owners or

directors of the applicant. The logic of Mr. Eklund QC's "moral hazard" argument would seem to suggest that an insurer would be just as interested in the business failures of other companies with which business partners and family members involved in the applicant business had been involved, as they would be for directors and owners. But what degree or type of involvement or connection would trigger the requirement for disclosure in such a case? Again, I was not provided with any clear answer as to how the Insolvency Question should be understood in this respect.

59. Such lack of clarity in the meaning which the Defendant argued I should give to the Insolvency Question is, in my judgment, a significant factor which supports the view that this is not a reasonable interpretation to give to the question.

60. Perhaps recognising the difficulties the Defendant's arguments faced, Mr. Eklund QC also pointed to the fact that the Policy had been arranged through an intermediary in the form of the Broker. He submitted that, whatever the precise wording of the Insolvency Question, a reasonable broker would have understood that the insurer was also interested in information about the insolvency events of companies in which the directors or owners of the Claimant had previously been involved. Hence, he submitted, I should interpret the Insolvency Question so as to require disclosure of the Other Insolvency Events.

61. The difficulty with this argument is twofold. First, I was not shown any evidence as to whether, and if so, how a reasonable broker would have understood the Insolvency Question differently from the ordinary and natural meaning of the words to which I have referred. Second, and in any event, I was not taken to any authority to suggest that the appropriate hypothetical reasonable person for the purposes of interpretation is one who is advised by a hypothetical reasonable broker. I therefore reject Mr. Eklund QC's submission.

62. Although the matter is one of interpretation of the particular Insolvency Question used by the Defendant, two cases in particular were relied upon by both parties in submission and in argument, and it is therefore appropriate that I should say something about them.

63. In Doheny v New India Assurance Co [2005] 1 All ER (Comm) 382 (CA), the Court of Appeal was asked to consider the construction of the following question in an insurance policy proposal (referred to in the judgment as "*declaration 5*"):

> "5. No director/partner in the business, or any Company in which any director/partner have had an interest, has been declared bankrupt, been the subject of bankruptcy proceedings or made any arrangement with creditors."

64. The insured policy holder contended that the question had the following meaning:

> "No director in the proposing business has been declared bankrupt (etc) and no director of any other business, in which any director of the proposing business has had an interest, has been declared bankrupt (etc)."

65. The insurer contended that the meaning was:

> "No director in the proposing business has been declared bankrupt (etc) and no Company in which a director in the proposing business has had an interest has been wound up [or otherwise become] insolvent."

66. It will be immediately apparent that the wording in Doheny differed in a crucial respect from the wording of the Insolvency Question in the instant case. In Doheny, the wording expressly referred to directors and partners and "*any Company in which any director/partner … [has] had an interest*". That wording was not present in the Insolvency Question.

67. In relation to the construction of the question in Doheny, Longmore LJ observed that it is evident that both proposed constructions had difficulties: in English law, a company cannot be "declared bankrupt", nor can it "be the subject of bankruptcy proceedings": see [5]. This is because bankruptcy is, as a matter of English law, a personal insolvency procedure. Longmore LJ did, however, recognise that in common parlance the word "bankruptcy" is used to apply more generally to any form of insolvency (and, indeed, that is how the concept would be understood under US law, where the federal law governing corporate insolvency is called the Bankruptcy Code). Conversely, the meaning assigned to the statement by the insured did not follow the grammar of the clause: see [7].

68. On analysis, the Court of Appeal preferred the interpretation contended for by the insurer. Central to the decision of all three members of the Court were the words "*or any Company in which any director/partner have had an interest*" (i.e. the language that does not appear in the present case). Thus, Longmore LJ found at [10] that:

> "Mr Jess submitted that the words 'any Company in which any director/partner have had an interest' were impossibly vague. While that may be so, I do not see how that advances the argument; whatever construction one adopts, those words have to be interpreted. Indeed the more directors and partners that are in contemplation the more elusive the phrase becomes. They are more readily understood by reference to partners in, or directors of, the business which is insured because, in relation to them, it is easy to establish the basic facts. It is not contended in the present case that Mr or Mrs Doheny did not have an interest in the three companies referred to by the insurers. It might be much more difficult to establish the degrees of interest in partners or fellow directors of other companies of which Mr or Mrs Doheny were also partners or directors."

69. At [25], Sir Christopher Staughton, placing similar weight on the "omitted language" on the facts of this case, found that:

> "I do not know of any further surrounding circumstances, and I cannot think of any that would help. But there is a significant point elsewhere in para 5 of the declaration itself. It specifically contemplates that any company 'in which any director/partner have an interest'—presumably that means has an interest, or may have an interest—has encountered one or more of three

> misfortunes. Those are (i) being declared bankrupt, (ii) bankruptcy proceedings, and (iii) making an arrangement with creditors. A possible interpretation is that individuals may suffer any of those three misfortunes, but a company can only be afflicted by the third, i.e. the need to make an arrangement with creditors. That, as I say, is a possible explanation, but I do not find it very convincing."

70. Finally, Potter LJ held at [36]:

> "Since it is apparent to me from the wording of declaration 5 that the parties anticipated that an individual director, or a company in which he or she had had an interest, were equally amenable to having been declared bankrupt or made subject to bankruptcy proceedings, to construe the words 'bankrupt' and 'bankruptcy' as necessarily applying, or notionally intended to apply, only to the individual director and to exclude the company, is in my view to interpret the clause contrary to, rather than in accordance with, the plain and apparent intention of the parties."

71. Accordingly, the Court of Appeal in Doheny found that the correct interpretation of the question posed by the insurer in that case was to extend the meaning of "*bankruptcy*" to include not just personal insolvency events but also corporate insolvency events. It was central to the reasoning of the Court of Appeal that the question had expressly asked not just about Mr and Mrs Doheny personally, but also about companies in which they had previously had an interest. I accept Mr Dunlop QC's submission that this is a key point of distinction from the instant case. As Mr and Mrs Doheny had formerly been directors and shareholders of companies which had been wound up, their failure to provide that information was a material non-disclosure such that the insurers were entitled to decline liability under the policy of insurance.

72. The second case to which I was referred was R & R Developments v Axa Insurance UK plc [2010] 2 All EW (Comm) to which I have referred to briefly above. In that case, a claimant company took out an insurance policy, a condition of which was that it would be voidable for misrepresentation. Among the questions asked by the insurer of the company was as follows:

> "Have you or any … Directors either personally or in connection with any business in which they have been involved … Ever been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?"

73. The claimant answered in the negative, notwithstanding that one of its directors had been a director of another company that had been placed into administrative receivership.

74. The policy holder submitted that, on the plain meaning of the words used, the question was limited to asking for information about the insured company and its directors alone, and that in relation to the directors, the question applied to their personal affairs including their connection with any businesses in which they had been involved: see

[30]. The policy holder argued, however, that the question did not require an answer in respect of any person other than the insured or its directors.

75. The insurer argued the contrary: the purpose of distinguishing between directors 'personally' and directors 'in connection with any business in which they have been involved' was to broaden the scope of the inquiry to include the affairs of other businesses in which the directors had been involved: see [31]. It was said that this reading would make commercial sense because an insurer might readily be expected to be interested in the claims and insurance history of companies in which the directors had been involved.

76. Nicholas Strauss QC preferred the policy holder's interpretation, finding at [32] that:

> "In my opinion, Mr Smith's submissions are clearly right. The grammar and syntax are clear, from which it follows (see Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913) that they must be followed unless the court is satisfied that 'something [has] gone wrong with the language'. There is no reason to think that it has. It makes perfect sense to ask the insured about the directors' personal position, whether arising from their personal affairs or from any businesses in which they have been involved, without going further and asking about the position of the companies as well. The literal construction makes good commercial sense. It is true that it might also make good commercial sense for the insurers to ask questions about the claims and insurance history of companies with which the directors had been involved, but they have not done so and that is not particularly surprising, since insolvency is not a risk which is insured against even as regards the insured and the directors, let alone remoter parties. The choice is between a sensible construction which accords with the language used by the insurers, and a construction which may be sensible but does not, and plainly the first must be adopted."

77. Mr Dunlop QC submitted that there were clear similarities between the factual position in R&R Developments and the instant case, but that the Claimant is in an even stronger position than the policy holder in R & R Developments. He argued that this is because, unlike in R&R Developments, the language of the Insolvency Question includes no reference whatsoever to any other businesses in which owners or directors have been involved. I accept that submission, and agree more generally with the approach of Nicholas Strauss QC, which in my judgment supports the conclusion which I have arrived at above.

78. What might also fairly be said in favour of the Claimant is that a reasonable insurer in 2015 could at very least be expected to have known of the decisions in both Doheny and R&R Developments. On that basis, I would have expected such insurer to understand the importance, if it wished to make an inquiry into insolvency events of other companies with which the directors of an applicant company had been involved,

of using some words at least referring to such other companies. But as I have indicated, the Insolvency Question did not do that.

79. Having concluded that the Claimant's interpretation of the Insolvency Question is the clear meaning of it, it is not strictly necessary to consider in detail the principles which apply to cases where the language of a contract is ambiguous. However, had I been required to do so, I would have accepted Mr Dunlop QC's secondary submission that the Claimant's interpretation was (at least) a reasonable one, and that the Claimant did not therefore commit a misrepresentation by answering the Insolvency Question in the way that it did.

Issue 2 – waiver

80. As I have found in favour of the Claimant on Issue 1, it is also necessary to decide Issue 2. The crux of this issue is fairly straightforward: did the Defendant, by asking the specific questions contained in the Insolvency Question, waive its entitlement to be told about the Other Insolvency Events?

81. It was accepted by the Claimant that the Other Insolvency Events were (subject to waiver) material, and that the Defendant was induced to enter the Policy by the Representation, such that if the Defendant did not waive its entitlement to the information, there was a misrepresentation and/or unfair presentation of risk and the Defendant was entitled to avoid the Policy.

82. Both parties relied on the same passages of *MacGillivray* in support of their respective positions on the question of waiver. At [17-018] - [17-020], the authors state as follows:

> "Effect of questions in proposal form. The questions put by insurers in their proposal forms may either enlarge or limit the applicant's duty of disclosure. As a general rule the fact that particular questions relating to the risk are put to the proposer does not per se relieve him of his independent obligation to disclose all material facts. Thus, if a burglary insurance proposal form asks questions chiefly concerned with the nature of the proposer's premises and the business carried on there, this will not of itself relieve him of his duty to disclose material facts relating to his personal experience, such as the possession of a criminal record.
>
> It is possible that the form of the questions asked may make the applicant's duty more strict. The applicant may well be reminded by a particular question that the general duty of disclosure enjoins him to state material facts in his possession relating to the subject-matter of the question but outside its ambit.
>
> *It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject-matter of the questions.*

> Thus, if an insurer asks, "[h]ow many accidents have you had in the last three years?" it may well be implied that he does not want to know of accidents before that time, though these would still be material. *If an insurer asks whether individual proposers have ever been declared bankrupt, he waives disclosure of the insolvency of companies of which they have been directors.* Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?"
>
> (my emphasis)

83. On behalf of the Claimant, Mr Dunlop QC submitted that, by asking the Insolvency Question in the way that it did, the Defendant waived any requirement on the part of the Claimant to disclose the Other Insolvency Events.

84. The same issue of waiver arose in both Doheny and R & R Developments, which I have referred to above. In Doheny, the question of waiver was considered *obiter* because, having found in favour of the insurer on the question of construction, it was not strictly necessary to consider the issue. Nonetheless, both Longmore and Potter LJJ reached essentially the same conclusion, namely, that by asking the question in the way it did, the insurer had waived its entitlement to disclosure of other information about substantially the same topic:

> "..if (contrary to the view expressed above) the true construction of the declaration is that it only applies to insolvency of individuals … the insurer has made it plain that he is not interested in insolvencies of the corporate vehicle through which the insured is trading."
>
> (per Longmore LJ at 389)

> "So far as the question of 'waiver' is concerned, had declaration 5 omitted altogether the words 'or any Company in which any director/partner have had an interest' then… like Longmore LJ I would incline to the view that a reasonable man reading the proposal form would be justified in thinking that the insurer had consented to the omission of reference to the insolvency of a company in which the Dohenys had had an interest."
>
> (per Potter LJ at 392)

85. The passages I have quoted above from *MacGillivray* were expressly approved (in substantially the same form in an earlier edition of the work) by the Court of Appeal in Doheny: see [17] and [19] of the judgment, per Longmore LJ, and [37], per Potter LJ.

86. In R & R Developments, the issue of waiver was not *obiter* but formed part of the reasoning of Nicholas Strauss QC. On the facts of that case, the Judge – though

recognising that he was not bound by it – followed the approach articulated by the Court of Appeal in Doheny. He said, at [42]:

> "Although I am not bound by these tentatively expressed opinions, I take the same view. It is clear from the question that the defendant had the concept of businesses with which the directors or partners of the insured were involved in their minds, but chose not to ask questions about the position of such businesses. This is not particularly surprising: given the nature of the insurance, a lack of interest in the insolvency of parties connected with the insured would be natural. In my view, the proper inference for the claimant to draw was that the defendant had no interest in the insolvency of any party other than the defendant and its directors. There is no question of a waiver of all information which might be material; the waiver is limited to information as to the insolvency of businesses with which the directors have been involved, and (where relevant) to information relating to the position of such businesses as regards the other questions applicable to the position of the insured and its directors, but not to the position of businesses with which they were involved."

87. On behalf of the Defendant, Mr Eklund QC pointed to the various statements made by the Defendant, both in the Policy itself and at renewal, that the Claimant had an ongoing obligation to disclose any material facts and circumstances, and was under an obligation to make a fair presentation of risk. I have set out the key wording at paragraphs 18-20 above.

88. In Mr Eklund QC's submission, the mere fact that the Insolvency Question had been asked in the way that it was did not amount to a waiver of the Claimant's general obligation to disclose material facts relating to its directors' or owners' involvement in prior failed companies (in the form of the Other Insolvency Events). Mr Eklund QC again submitted that past involvement in failed companies was a moral hazard from the perspective of an insurer, and certainly information about which they would ordinarily expect to be told, and that this would be obvious to any reasonable broker.

89. In my judgment, the Claimant's submissions are correct and that the Defendant did waive its entitlement to be told of the Other Insolvency Events. This is for the following reasons.

90. First, I accept that the summary of the law given in MacGillivray accurately captures the present state of the law: the question is whether a reasonable man reading the Insolvency Question would be justified in thinking that the insurer had restricted its right to receive all material information, and had consented to the omission of specific information (here, the Other Insolvency Events). In the language of the authors of *MacGillivray*, the question is whether the Other Insolvency Events concerned "*the same matters but outside the scope of the [Insolvency Question], or … matters kindred to the subject-matter*" of the Insolvency Question.

91. To my mind, having identified previous liquidations as a subject on which the Defendant required disclosure, and having specified the persons in respect of whom a

previous liquidation would be disclosable, the Defendant thereby limited its right of disclosure in respect of other (unspecified) persons or companies which had been placed into liquidation. The Other Insolvency Events were all liquidations. They were therefore precisely the same type of insolvency matters which were the subject of the Insolvency Question: the difference is that they related to a different set of persons than those identified in the question.

92. I therefore conclude that it was a reasonable inference for the Claimant to draw that the Defendant did not wish to know about any other liquidations (or, indeed, administrations, administrative receiverships, company voluntary arrangements, and so on), other than those specified in the Insolvency Question.

93. In relation to Mr Eklund QC's submission that the nature of insolvency events is such that I should be slow to conclude that a matter of (it is said) moral hazard (and, by implication, importance) would or could be waived by an insurer. I do not accept that this should weigh heavily in my decision.

94. As Mr Dunlop QC submitted, in both Doheny and R & R Developments, neither the Court of Appeal (*obiter)* nor Nicholas Strauss QC, respectively, approached the question of waiver on the basis that the answer might differ if the information concerned a matter in which an insurer would be particularly interested. Further, in Doheny, the question of waiver was determined on the premise that the wide meaning contended for by the insurer was wrong: thus, Potter LJ agreed with Longmore LJ that if the question had omitted altogether the words "*or any Company in which any director/partner [has] had an interest*", he would have found that a reasonable man reading the proposal form would be justified in thinking that the insurer had consented to the omission of reference to the insolvency of a company in which the Dohenys had had an interest.

95. Finally, I reject Mr Eklund QC's submission that the position is different because the Policy was arranged by and through the Broker. His argument was that a reasonable broker could be expected to have informed the Claimant that the Other Insolvency Events were material facts which the Defendant would expect to be disclosed to it, notwithstanding the specific terms of the Insolvency Question. However, as I have said, I was not shown any expert evidence from an insurance broker which could support such submission, or any authority to support a different approach in this respect.

Conclusion

96. For the foregoing reasons, I conclude that the Claimant succeeds on both Issue 1 and Issue 2. The Representation was not a misrepresentation nor was it an unfair presentation of risk. I will hear submissions on consequential matters when I hand down this judgment in approved form.