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Case No: LM-2020-000012

IN THE HIGH COURT OF JUSTICE
BUBINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/05/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

CHRISTOPHER SIMON JONES	**Claimant**
- and -	
ZURICH INSURANCE PLC	**Defendant**

- -
- -

Mr George Spalton QC (instructed by **Edwin Coe LLP**) for the **Claimant**
Mr Graham Eklund QC (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 4-6 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by the Claimant ("Mr Jones") to recover the agreed value of a Rolex Daytona Tropical watch ("the Watch") under a policy of insurance ("Policy") underwritten by the Defendant ("Zurich"). The agreed value of the Watch was £190,000. Mr Jones alleges that he lost the watch as the result of a fall while skiing in Aspen in Colorado on 30 March 2019. Zurich puts the Claimant to proof as to whether and if so in what circumstances the watch came to be lost. Zurich has not pleaded any positive case either that the watch was not lost or was lost in circumstances not covered by the Policy. In any event Zurich alleges that it is entitled to avoid the policy by reason of a failure by Mr Jones to disclose a previous loss when proposing cover to Zurich.

2. I heard oral evidence adduced on behalf of Mr Jones from Mr Jones, Mr Thomas Trautmann, who is Mr Jones' uncle and was at all material times his executive assistant, and Mr Dourneau, who was skiing with Mr Jones on the day when the loss is alleged to have occurred. I heard oral evidence adduced on behalf of Zurich from Mr Michael Green, a senior market underwriter employed by Zurich, who underwrote the Policy on its behalf.

3. Expert underwriting evidence was adduced from Mr Pipe by Mr Jones and from Mr Coates by Zurich. The parties had intended to adduce expert evidence concerning the value of the Watch but in the end that was unnecessary because it was agreed in the course of the trial that as a matter of construction the Policy was an agreed value policy with the result that its value at any particular date was immaterial. An attempt by Mr Eklund QC to rely on the evidence for a collateral purpose failed for the reasons set out in a ruling I have given during trial concerning that application. It is not necessary that I set out either the issue or my reasons for ruling that attempt to be impermissible.

4. The first issue between the parties (that concerning whether and in what circumstances the Watch came to be lost) is one that depends in the end primarily on the oral evidence of Mr Jones. For reasons that I explain in detail hereafter, I have come to the conclusion that I cannot accept Mr Jones' evidence save where it is corroborated, against his interest or admitted. The issues that arise between the parties concerning avoidance depend on the evidence of Mr Jones and Mr Trautmann but is also the subject of significant documentation. The reliance issue is one that involves me assessing the evidence of Mr Green on what by definition is a hypothetical issue. I have approached the factual issues between the parties that are material to this dispute by testing the oral evidence of each of the witnesses wherever possible against the contemporary documentation, admitted and inconvertible facts and inherent probabilities. This is an entirely conventional approach – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413. This is not to say that a judge can attempt, or that I have attempted to, resolve factual disputes by referring only to contemporaneous documentation. It is necessary to consider all of the evidence – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at paragraphs 88-89. However, there is nothing in that authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques I have referred to.

Credibility

5. I am satisfied that other than Mr Jones, each of the witnesses who gave oral evidence were honest witnesses who did their best to give accurate evidence on the issues that they could assist to the best of their recollection. Any evidence from those witnesses that I reject is because I consider their recollection to be mistaken in those respects.

6. Turning to Mr Jones, I set out my reasons for reaching my conclusion concerning his credibility at this stage. I record that Mr Spalton QC who appears on behalf of Mr Jones did not at any rate strenuously seek to persuade me that I should adopt any other course. That approach was plainly justified simply on the basis of the oral evidence that Mr Jones gave in the course of the trial. I set out some examples of the problem below.

7. At the heart of this case lies a failure on the part of Mr Jones to disclose the prior loss of a diamond from a ring apparently being worn by his then girlfriend at the time. It is common ground that Mr Jones made a claim quantified in the sum of £15,000 in respect of this loss. It is common ground that in the proposal documentation for the Policy, under the question "*Any losses or claims in the last 5 years"*, the answer provided was "*No"*. When Mr Eklund QC who appears on behalf of Zurich, asked why that was so, Mr Jones said:

> "Correct, I had, but that information wasn't relayed to Thomas who didn't relay it at the time of the loss of the diamond. It was a very irrelevant thing in that category of my life, so something, you know, human error I think you'd call it.
>
> Q. That you hadn't told him?
>
> A. That I hadn't told him that an ex- girlfriend lost a diamond"

Mr Jones added:

> "He wasn't working for me at the time, so that's why when I just told him, "Can you go and insure my watches", he just went and insured my watches, I don't -- he wasn't to know about my pre -- especially of something with such irrelevance as the 15 grand diamond that I have claimed when my ex-girlfriend decided to lose it."

This evidence was plainly wrong because as Mr Jones accepted – T1/20-21 – he had been sent an email by the claims handler concerned with the loss of the ring that had been copied to Mr , which set out in significant detail some information being sought in respect of the loss. This resulted in the following exchange between Mr Eklund and Mr Jones:

> "Q. So this is Mr Trautmann being involved in providing the proof to the insurers of the damage, photographs and any original purchase receipt or invoice for the ring. Do you see that?
>
> A. Agreed."

Following some questions about further emails that establish very plainly that Mr Trautmann was aware of the claim in respect of the loss of the diamond from the ring, the following exchange took place:

> "Q. Mr Trautmann clearly knew that you'd lost the diamond beforehand, didn't he? When this presentation was made in May 2018 to Zurich, Mr Trautmann plainly knew that there had been a loss of the diamond, didn't he?
>
> A. Again, you can see from his files, or from his email he's trying to dig up information from it because, as stated, my office is a fairly busy place and this is not on the highest priority of a £15,000 diamond when I'm trying to take out insurance of watches that I collect.
>
> Q. Just answer the question for me please. It's fairly clear, isn't it, that Mr Trautmann did know when this proposal was being put forward to Zurich that you had … lost a diamond?
>
> A. Yes.
>
> Q. And that you'd made a claim for it?
>
> A. Correct.
>
> Q. And that you'd had previous insurance?
>
> A. Correct.
>
> Q. And that he'd been involved in helping you to claim the indemnity from the previous insurers.
>
> A. Correct."

In my judgment these answers show at the very least a fairly fundamental lack of recall of critical events material to this dispute. On that ground alone, this merits the cautious approach to Mr Jones' evidence. These exchanges also show what became a recurring theme during Mr Jones' evidence – an unwillingness to answer questions where he perceived a truthful answer would damage his case and an unwillingness to concede points that he likewise perceived to be damaging. These too are factors that merit the caution to which I have referred.

8. This theme continued as Mr Jones' cross examination continued as the following exchanges demonstrate. Having explained his living arrangements in answer to some questions from Mr Eklund that I need not take up time describing but which in summary did not involve at any material time living with his parents, the following exchange took place:

> "Look at page 63, please. See at the bottom of page 63 --- it says "No claims, previously lived with parents"?
>
> A. Yes.

Q. That is false, isn't it

A. I mean in theory, yes.

Q. It is not in theory, Mr Jones, it is false.

A. Correct."

This is significant for two reasons. First it shows a willingness to countenance inaccurate answers to questions asked of him that he knew to be false and secondly it illustrates an unwillingness to give frank answers in the course of his evidence. A further example came when Mr Eklund asked Mr Jones about the quotation provided by Zurich for insurance in the terms of the Policy, which included a statement of facts that Zurich made clear formed the basis of the quotation and requested confirmation of its accuracy as a condition of providing cover. That document included a statement concerning prior claims that it is common ground was false. Mr Jones maintained that he had not seen the document but accepted that the document must have been provided either to Mr Trautmann or Mr Jones. The following exchange then took place:

"Q. The confirmation, if it was provided, would be false, wouldn't it?

A. Why?

Q. Because you had had a claim in the last five years?

A. I mean if that's your opinion I ---

Q. It is not my opinion, Mr Jones. It is not my opinion, just look at the facts. You are an intelligent man, read the document: "Here is the proposal has anyone who permanently resides with them, made any household claims or suffered any loss or damage, whether insured or not, in the last five years following those detailed in this quotation under previous claims details - no. "You understand that, don't you?

A. Correct.

Q. So if confirmation was given that that was accurate that would be false, wouldn't it?

A. Again, there's human error and you can clearly see by the other documents that we were - everybody knew about the diamond and it's not something I'm trying to hide from a new insurance policy like this one. It's a slightly different calibre of insurance insuring up to £300,000 and insuring a £15,000 diamond, but it ---

Q. Just answer this question. The answer, if confirmation was given, the confirmation would be false, wouldn't it? (Pause) Is there an answer?

> A. You know I didn't see the document, so I can't answer.
>
> JUDGE PELLING: Well, I understand that you say you did not see the documents, but that, with respect, was not the question you were asked. The question you were asked was to confirm whether, if this information was provided to the underwriters, it would by definition be false?
>
> A. By definition yes, it would be false. Sorry, my Lord."

This was yet another example of Mr Jones seeking to avoid answering unpalatable questions until forced – ultimately by me on this occasion – to answer that which had been asked. None of this is the conduct of a witness of candour and provides further significant support for the conclusion I have reached concerning Mr Jones' evidence.

9. When Mr Eklund turned to the circumstances of the alleged loss the same issues concerning Mr Jones' lack of candour again became apparent. Mr Eklund asked Mr Jones about an initial report made by Mr Jones to his broker concerning the loss of the watch by email on 1 April 2019. The substance of that report included the suggestion that Mr Jones first noticed his watch was missing "*... on the lift shortly after the crash ...*" and that he and Mr Dourneau had "*... spent a few hours ...*" looking for the watch. That version of events was not Mr Jones' evidence at trial. This led to the following exchange in cross examination:

> "Q. That statement that you went back to an area for a few hours looking is a false statement, isn't it?
>
> A. Again, it was a long time ago, so I - I- yes.
>
> Q. You say that you went back, you state that "we" went back, which is a reference to Mr Dorneau, was also false, wasn't it?
>
> A. We were skiing together.
>
> Q. You were skiing together? You were not looking together. Mr Dorneau says you were never looking together.
>
> A. No.
>
> Q. So that is false also? (Pause) The answer to that is yes, isn't it?
>
> A. Sorry, correct, yes."

I accept the answers ultimately given by Mr Jones in this exchange were true but only because he was driven to make those concessions. Although not fully apparent from the transcript these concessions were very reluctantly made. What is more important for present purposes is that the initial report of the loss by Mr Jones to his brokers was false in material respects and could only have been known to him to be false at the time when he made the report. The report was made the day after the alleged loss when the events of the previous day would have been fresh in Mr Jones' mind. The failure to give a full

and frank statement of the circumstances of the loss might have been understandable given that the loss was being reported by email to a broker while Mr Jones was still on holiday in the resort. However that does not apply to a description that was false in the respects I have referred to.

10. Next it is necessary to consider a formal statement by Mr Jones to Zurich's claim investigators. The statement is recorded on a form that will be familiar to those used to seeing statements in criminal cases. At the head of the statement There appears the following:

> "Witness Statement
>
> (C J Act 1967. S.9; MC Act 1980, s.5A (A) and 5(B): Criminal Procedure Rues 2005. Rule 27.1
>
> NAME Christopher Simon Jones …
>
> This statement consisting of pages signed by me is true to the best of my knowledge and belief I make it knowing that if it is tendered in evidence I shall be liable to prosecution if I have wilfully stated in it anything l know to be false or do not believe true"

Mr Eklund took Mr Jones to various corrections made in handwriting. He was unable or unwilling to assist as to whether the handwritten corrections were made by him or Mr Trautmann on his behalf but in his presence. Mr Eklund suggested that the corrections indicated that Mr Jones must have read the document carefully as to which Mr Jones was prepared to accept only "*I don't recall reading through it but I clearly signed it so."*. To be clear, I find that the corrections were made either by Mr Jones in his own handwriting or by Mr Trautmann on Mr Jones' instructions and in his presence after which he signed the statement as he accepted. Mr Eklund then took Mr Jones to various parts of the statement and the following exchanges took place:

> "Q. What your statement says: "... as I knew how to get back to the crash site I retraced my steps. I looked everywhere with Pierre for about 30 minutes." We now know that that is not correct, is it?
>
> A. I mean again you don't retrace your steps on a ski slope, it's about between the crash and you skiing back down. You kind of ---
>
> JUDGE PELLING: With respect, that was not the question either. The question was - look at paragraph 72, read it to yourself, tell me when you have finished reading it to yourself.
>
> A. Okay.
>
> Q. Is that statement true or false?
>
> A. False.

JUDGE PELLING: Thank you."

A little later in this same section of the cross examination the following exchange took place:

> "Q. Paragraph 20: "There was a previous claim for a ring, it was a diamond ring for an ex-girlfriend. I received a £12,000 claim." That is incorrect, isn't it, because you received £15,000?
>
> A. That is incorrect.

Mr Eklund then asked Mr Jones about a part of his statement in which he suggested that at the time his company's turnover increased from £12m to £50m. He took Mr Jones to some accounts up to 30 November 2018 that showed a turnover of £24m and the following exchange took place:

> "Q. If we look at page 315, we have a profit and loss account showing turnover in 2018 up to 30th November 2018 of 24 million.
>
> A. Correct.
>
> Q. It is nothing like 50 million that you were suggesting, is it?
>
> A. It's I think in dollars, because most of my business is conducted in USD, and I gave between – as well as my other accounts (inaudible) when I'm doing business in the UAE and America.
>
> Q. Just look at paragraph 32 of your witness statement.
>
> A. Which page is that? Q. 274. Your turnover went from £12 million – do you see that?
>
> A. I can see that.
>
> Q. -- to 50 million. It is not dollars. There is a quotation mark. That is intended to mean pounds, is it not?
>
> A. Again, this was part of an interview with Lol where we were – I mean, great discussion and, you know, as far as I was aware it was just a sort of a vague discussion that we were discussing. I didn't know it was going to be at this point in time scrutinised and…
>
> Q. Mr Jones, this is your statement which you have signed and corrected. It is not just a note of a conversation.
>
> A. It's not the statement. This was a conversation that I was having with Lol at the time, and unless I can refer back to paperwork prior to it to then sign it off, then yes. Again, this was

> a very sort of nice coffee we were having and discussing the claim. I didn't know we were going to end up in two years of --
>
> Q. This is a statement that you sent, having gone through it with Mr Trautmann apparently, you said earlier, which clearly indicates in paragraph 32 that you were representing to Zurich that the turnover from your art dealing went from 12 million to 50 million, which you will see in the accounts, and when we look at the accounts it just does not show that at all, does it?
>
> A. Again, I have other accounts. When you look at all the accounts then they – but again, this was a very rough figure that I was giving Lol and Megan at the time."

This exchange is significant not because Mr Jones exaggerated in the course of a conversation that he perceived to be informal but because he plainly corrected the statement as I have explained but did not correct something that was plainly inaccurate and must have been known to him to be inaccurate. In a statement that made plain it was formal in nature and one in which he was expected to provide a true and accurate account. The failure to correct this part of his statement further undermines the confidence I can safely have in his uncorroborated statements and his attempt to divert Mr Eklund's questions concerning the contents of the statement by reference to an earlier conversation between Mr Jones and the investigators further undermines any confidence that I could have in the truth and accuracy what Mr Jones said. Had the statement been produced in the course of the meeting with the investigators and signed by Mr Jones at the end of that meeting without an adequate opportunity to read it through this point might have had some substance. However that is not what happened. The statement was prepared by the investigators and sent to Mr Jones and as is plain and he was left to sign it and correct it in his own time.

11. Two further examples will be enough. The first concerned Mr Jones' involvement with other companies. Mr Eklund cross examined Mr Jones about paragraph 15 of his statement to Zurich's investigators, where Mr Jones stated that he had never been involved in a company that had gone into liquidation, administration, receivership or been wound up. Mr Eklund took Mr Jones to some documentation concerning a company called Age Management Formulations Limited and then the following exchanges took place:

> "Q. Age Management Formulations Limited went into creditors' voluntary liquidation on 30th January 2014, did it not?
>
> A. I have no recollection.
>
> Q. Go to page 18 of bundle B. This is the final report and account for liquidation pursuant to section 106 of the Insolvency Act 1986, well before 126 of the Insolvency Rules 1986, in relation to Age Management Formulations Limited. Yes?
>
> A. That is correct.

Q. And we can see that on page 27 there is the summary of assets and debts and we see that the deficiency was something in the order of £336,000.

A. Correct.

Q. And there was one asset, was there not, the patent and licence, £3,500.

A. Again, this was my father's company and I had no involvement in the company and subsequently I haven't spoken to my father for the last several years.

Q. You were a director of the company.

A. Again, I was very young at the time and he most likely probably signed documents on my behalf. My father is an alcoholic and a (inaudible), not a great person, so this is – I was as shocked as you were to see these. I've been an art dealer and before that I worked for my uncle (inaudible). I'd had a relationship with him.

Q. You see under "asset realisations, patents and licence, £3,500." Do you remember paying that amount for intellectual property rights?

A. Over the years I've given my father a lot of money. He's subsequently stolen it. Done a lot of hare-brained ideas. We don't speak.

Q. Just answer the question.

A. I don't know.

Q. I am not going to pry into your private [affairs]. That is what you got, intellectual property rights. It is the only asset.

A. I had zero involvement in this company and my father would have put me as a director because I was lending him money to do that whole --

Q. I am asking you about buying the patent and the licence. I think you have agreed that you paid £3,500 for it.

A. Probably because my father asked me to at the time.

Q. Mr Jones, just listen to the question and answer the question. You have agreed that you paid £3,500 for the patent and the licence.

A. Hus Gallery, yes.

> Q. It is your gallery; you are a director of it.
>
> JUDGE PELLING: Can I just ask you this. Hus Gallery Limited at the time we are talking about: did you own all the shares in it?
>
> A. No.
>
> JUDGE PELLING: How many other shareholders were there?
>
> A. Three. Three including myself.
>
> JUDGE PELLING: And were you the only director?
>
> A. No.
>
> JUDGE PELLING: How many other directors?
>
> A. There would have been the three of us.
>
> JUDGE PELLING: Was the payment the subject of discussion amongst the – at a board meeting?
>
> A. No. I mean, I was very young at this point. I can't recall.
>
> JUDGE PELLING: Thank you."

The following points emerge from these exchanges. First, the answer to Mr Eklund's first question was untruthful. Mr Jones knew full well that the company concerned had gone into liquidation if for no other reason than he was a director of it. Secondly, the answers when read as a whole demonstrate that what Mr Jones had said in his statement to Zurich's investigators was untrue and thirdly I do not accept that Mr Jones is likely to have used the assets of a company of which he was a director to purchase assets even if asked by his father to do so without seeking the agreement of his fellow directors and shareholders. To do otherwise would itself be dishonest conduct.

12. The other example concerns the supply of a photograph by Mr Jones' solicitors to Zurich allegedly showing Mr Jones wearing the watch that was allegedly lost. It is not now in dispute that the photograph that was supplied was cropped so as to remove the date that it was taken and that date was many months prior to the date when Mr Jones says he purchased it. Mr Eklund sought an explanation of this in cross examination. The explanation that Mr Jones gave in summary was that he had been lent the watch by the person who sold it to him and the photograph showed him wearing it during this period. The following exchanges then took place:

> "Q. Would you turn to page 4 of bundle B? This is your statement, paragraph 15 you mention the purchase of a watch, "In January 2019 I decided to buy the Rolex Tropical. I had been looking for a Rolex Tropical for quite some time and Dino told me that he had one available. I went to see the Rolex Tropical and given that it was from 1976 I thought it was in exceptional condition. There were no major marks on it and Dino also

mentioned it had not been reconditioned. I agreed with Dino that I would part- exchange my Rolex Cosmo and then because the Rolex Tropical was more expensive I would pay the balance of the purchase price of the Rolex Tropical." That also indicates, doesn't it, that Dino had one available and one had become available in January 2019?

A. This is when we had first started speaking about the watch and he had found one and then he said "Actually, you know what, I would be willing to do the deal" because I'm sure he had to find someone to buy my – he needed a period of time to find someone to buy my Sigma Dial. It wasn't just a simple I would buy a watch outright. I mean, these things take time. There's not a huge amount of collectors of watches of this value.

Q. Just look at what you said, this is your evidence which you didn't want to change. You were asked expressly this morning if there was anything you wanted to correct or change and you said no: "I had been looking for a Rolex Tropical for quite some time and Dino told me that he had one available", that was in January 2019 that statement isn't it?

A. The wording, yes, but, again, I had conversations with Dino on a weekly basis about different watches and different things I was would like to invest in or collect. Q. So it was in January 2019 Dino tells you that he has got one available?

A. No, that we could complete on the deal. I tried many watches before then. I tried all different versions(?) Again, these watches, the rarity of them is dial face, is year, is condition, I looked at ten watches three months, four months prior to that because he always knew that the Sigma Dial was not the one that I wanted to keep long-term and I always looking for something cleaner and more my style. I wanted ---

JUDGE PELLING: Would you just read to yourself, please, the second and third sentence of this paragraph and tell me when you have completed that.

A. Yes.

JUDGE PELLING: Is there anything in the answers that you have just given that you would like to alter in light of reading those two sentences?

A. Yes. The wording here is that I went to see the Rolex Tropical. Again, that's vague wording, and I apologise for that, but I have a tight relationship with Dino as my watch these rarer Rolexes.

> MR EKLUND: Mr Jones, I am just picking up on a question my Lord asked you, "I went to see the Rolex Tropical and given that it was from 1976 I thought that it was in exceptional condition." If you had truly seen and worn this watch in October 2018 you wouldn't have needed to go and see it in January 2019 to discover that it was in exceptional condition would you?
>
> A. My Lord, an item of this value, I went back and I went to look, we're not talking about a ... You know, this is ... Again, I looked at several watches between then – you know, it's something that as a collector you want to make sure that I was buying the right one.
>
> Q. It doesn't say that in your evidence does it? Nor does it say in your evidence that you had worn the watch for a day, and it just happens to be the day of the photograph with a dog.
>
> A. When we were going through the statement I was searching for any kind of photograph I had, it actually happened to be a coincidence and I thought "Great, they'll see" – there was the watch."

In my judgment the following emerges from this exchange. First, if the watch was the one shown in the photograph then the evidence in the statement that Mr Jones was told by Dino that he had one available in January 2019 must plainly be wrong, as must his evidence in the statement that he went to see it and that he concluded then that it was in exceptional condition. This is all information that Mr Jones would have acquired from the time he borrowed the watch in 2018 if indeed that is what happened. Mr Jones had no sensible answer to this point when it was put to him by Mr Eklund. Put quite simply either Mr Jones' evidence concerning the photograph is wrong or paragraph 15 of his statement is wrong and in either case it is difficult to accept that whichever version is wrong could be the result of errors in recollection. In my judgment this material illustrates very clearly why very great caution is required before Mr Jones' uncorroborated evidence is accepted.

13. There are other examples which support these conclusions. They are all apparent in the transcript for day 1 of the trial when Mr Jones gave his evidence. Having given this issue very considerable thought, I have concluded that I should reject Mr Jones evidence unless it is corroborated or against his interest or an admission.

The Loss

14. In his closing submissions, Mr Spalton QC submitted that all that Mr Jones had to establish was that "… *he lost the Rolex Tropical watch on 30 March 2019 whilst skiing in Aspen*." In my judgment what has to be proved is not quite that simple. It is necessary to start with the Policy. There is no dispute that the Watch was covered under the Policy. Under the Valuables cover section of the Policy the Watch was covered while

> "Kept in a bank;
>
> in the principal safe or vault of a hotel or motel;

> being worn;
>
> in a room attended by you;
>
> in the locked safe at 9 Princes Gate Mews. The safe must have been installed and secured in accordance with the manufacturers specification and, unless as a result of an aggravated burglary;
>
> violent force must have been used to gain entry to the safe."

15. Mr Eklund submits that I should resolve this issue by concluding that Mr Jones has not proved that the loss has occurred or occurred in circumstances where the Policy responds. His main basis for that submission is to ask rhetorically why I should believe Mr Jones.

16. I fully accept that Mr Jones would have been in great difficulty about this element of his case if it depended on his uncorroborated testimony. However it does not. There is material from within Mr Dourneau's evidence that supports Mr Jones case that he lost the watch while out skiing. There is some documentation that in its fundamentals is consistent with that having occurred. It is true to say that there are inconsistencies and untruths on the part of Mr Jones concerning how the Watch came to be lost but that does not entirely demolish this part of Mr Jones' case. The reality is the point that I put to Mr Eklund in the course of his closing submissions – the only basis that I could discount this material was if I concluded that Mr Jones had planned from the outset to defraud Zurich by falsely claiming that the Watch had been lost when it had not, by planning to make false statements to Mr Dourneau to the effect that he had lost his watch when he had not, then to make false reports of the loss both to local police and the hotel and resort lost and found staff and then make a false report to his insurance broker the following day.

17. Mr Eklund maintains that the inconsistencies and dishonest representations made by Mr Jones in that report and in the statement that he signed and submitted to Zurich's loss adjusters more than sufficiently justify reaching such a conclusion. I do not agree. First, for all that I have criticised Mr Jones for, I do not think he is someone who would set out to defraud his insurers in this manner. Secondly the various inconsistencies are much more consistent with Mr Jones not seeing any need to treat the enquiries of his insurers either seriously or respectfully rather than him perusing a fraudulent scheme. If someone in the position of Mr Jones had set out to defraud Zurich, then I am sure such a person would have done all that he could to eliminate the inconsistencies on which Zurich rely.

18. It is necessary to start with Mr Dourneau's evidence. He confirms that Mr Jones had a fall while skiing at or shortly after 14.00 on the date Mr Jones alleged the fall occurred. Mr Jones could not have anticipated such a fall if he had pre planned to defraud Zurich and because it is common ground that Mr Dourneau is an honest witness I accept his evidence concerning Mr Jones' fall. If and in so far as there is a dispute about it, I find that the fall was not a particularly serious one. Had it been, Mr Jones and Mr Dourneau would not have been laughing about it as I accept occurred because I accept Mr Dourneau's evidence on that point. I do not accept that the fall was so serious as to leave Mr Jones sitting at the side of the trail for any significant period of time. To the extent Mr Jones suggests otherwise I reject that evidence. I accept Mr Dourneau's

evidence that Mr Jones did not say anything to Mr Dourneau about him having lost the Watch just after the fall or at any stage while the two of them were skiing. That was what Mr Dourneau says in his statement and confirmed in his oral evidence – see T1/169. It follows from all this, as I have already indicated in the section of this judgment concerning Mr Jones' credibility, that the suggestion by Mr Jones at an earlier stage in the saga that he and Mr Dourneau had searched for the lost watch was untrue. I accept Mr Dourneau's evidence that at dinner that evening it became apparent to him that Mr Jones had lost the Watch. I find that could only have been because Mr Jones said that is what had happened in the course of conversation at or after dinner that evening – see T/170.

19. Turning to the contemporaneous documentation that is available, there is documentary evidence that Mr Jones reported the loss of the Watch at the hotel where he was staying on 30 March 2019, as is apparent from the "*Lost Item information*" document that in fact Zurich obtained from the hotel in the course of its enquires into the loss. The making of such a report by Mr Jones is consistent with him having lost the Watch unless I am to conclude that he made a false report of the loss to support a fraudulent claim. As I have made clear that is not a finding that I can safely make and I do not do so, particularly when that document is considered with the next that I refer to.

20. Mr Jones also reported the loss to the local police authorities. That is apparent from his note to that effect on hotel notepaper. It is equally clear that Mr Jones reported the loss to the resort operators because that much is apparent from the email from Ms Linda Gerdenich of the Aspen Skiing Company recording the report, which is dated 31 March 2019. Mr Jones acknowledged this email the same day. Nothing can be inferred safely from the timings for the reasons Mr Spalton identified in his oral closing submissions. Mr Eklund did not suggest otherwise. The next contemporaneous document that is relevant is a record of the report made to the local police. There is a superficial oddity about this document because it records the loss as having occurred at 0726 on 31 March 2019 as having been reported at 0728. I can draw no adverse inferences from that oddity. It is much more likely to be an input error because it is highly unlikely that a loss could have occurred and then be reported less than 2 minutes later. This document adds little to the other material that I have referred to because there is no express reference to Mr Jones in the report. Nonetheless it corroborates Mr Jones' evidence that he reported the loss to the police.

21. Unless it is to be said that this is material created by Mr Jones for the purpose of "window dressing" a fraudulent claim, it supports his contention that he lost his watch sometime on 30 March 2019.

22. In summary this evidence establishes and I find that (1) he was skiing on the afternoon of 30 March with Mr Dourneau; (2) he fell while skiing that afternoon; (3) he had noticed the loss of the Watch by the time he joined Mr Dourneau for dinner on the evening of 30 March; and (4) he reported the loss of the Watch to (a) his hotel, (b) the resort operators and (c) the local police.

23. Given this material, it is unsurprising that the focus of Mr Eklund's cross examination concerning the loss was as to what might have happened on 30 March. However that is of limited significance given the terms of the Policy unless it is to be suggested either that the Watch was not lost at all or was not lost while being worn by him. The first

possibility could only be so if all the contemporaneous material to which I have referred consisted of false reports generated by Mr Jones for the purpose of cloaking a fraudulent claim with some credence. Whilst I accept that this material is in a sense self-serving and whilst I have formed a very unfavourable view of Mr Jones' credibility as a witness, I am not prepared to conclude that he has masterminded a fraudulent claim in this way.

24. As to the second possibility, that is in the circumstances an unreal one. Zurich has not advanced any theory to the effect that the Watch was or could have been lost in such circumstances. If it was lost at some stage while Mr Jones was skiing then the Policy would respond whenever and whatever the circumstances of the loss. It was not suggested to Mr Jones that the Watch had been lost while he was not wearing it and it was not secured in the Hotel's main safe. There is no material at all that supports such a theory. Unless I conclude that Mr Dourneau was lying about the discussion at dinner on the evening of 30 March (and to be clear I do not arrive at any such conclusion) then the loss must have occurred before then.

25. That leaves the inconsistencies in the various statements made by Mr Jones concerning the circumstances of the loss. As I have said in the credibility section of this judgment, there is no good or indeed any explanation as to these inconsistencies. With considerable hesitation, I have come to the conclusion that this should not lead me to conclude that Mr Jones has failed to prove he lost his Watch sometime during the afternoon of 30 March while skiing. The differences are differences of detail. The fundamentals – that he lost the watch while skiing on 30 March remained unaffected by these inconistencies. People give knowingly misleading accounts of events and evidence for all sorts of reasons including attempting to make an otherwise good claim look stronger than it might appear. If Zurich had alleged that the claim was a fraudulent one, it would have been for it to prove that allegation. Zurich has made no such allegation. Mr Jones does not have to prove the claim is not fraudulent but only that a loss occurred in circumstances where the Policy provides cover for the loss. Given the state of the evidence I accept that a loss to which the Policy is capable of responding has been proved.

Avoidance

Avoidance of Consumer Insurance Contracts – the Law

26. Zurich seeks to avoid the policy on the basis of misrepresentations made by or on behalf of Mr Jones to Zurich prior to Zurich underwriting the Policy. It is common ground that the Policy is a "*consumer insurance contact"* within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012. In summary the effect of that Act is:

    i) any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of the Act – see Section 2(5)(a);

    ii) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer – see Section 2(2);

iii) A failure by the consumer (that is in this case Mr Jones) to comply with the insurers request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of the Act – see Section 2(3); and

iv) Whether a consumer has taken all reasonable care not to make a misrepresentation is to be determined in light of all the relevant circumstances - see Section 3(1) – but a misrepresentation made dishonestly is always to be taken as showing a lack of reasonable care – see Section 3(5);

An Insurer has a remedy against an insured only if the insured has breached its duty under Section 2(2) of the Act and the insurer shows by evidence that it would not have entered into the contract at all or would have done so only on different terms – see Section 4(1). A representation that satisfies these requirements is referred to in the Act as a "*qualifying misrepresentation"*. The remedy that is available to an insurer depends on whether the misrepresentation is either (a) deliberate or reckless; or (b) careless. If it is deliberate or reckless then the insurer may avoid the contract of insurance concerned and refuse all claims – see Schedule 1, Paragraph 2 of the Act – but if the misrepresentation is merely careless then the Insurer may avoid the contract of insurance if the insurer establishes that it would not have entered into the contract of insurance at all had the insured complied with its Section 2(2) duty – see Schedule 1, Paragraphs 4-5 of the Act. For a misrepresentation to be deliberate or reckless, the insurer must establish that the insured (a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and (b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer – see Section 5(2).

Zurich's Pleaded Misrepresentation Case

27. Zurich's pleaded case concerning misrepresentation is founded on a representation that Mr Jones had not suffered any losses in the five years prior contained in (a) a conversation between Mr Jones' broker and Mr Green on 7 June 2018 and (b) a question included in the Claimant's Statement of Fact namely: "*Have you made any claims or suffered any loss or damage whether insured or not in the last 5 years*?" to which the answer was recorded as being "*No"*. Zurich allege of these answers that:

> "The answer was false and was not corrected. Further or alternatively, the presentation of the risk was not fair."

because Mr Jones had made a claim in 2016 for the loss of a diamond from a vintage diamond ring and received a payment of £15,000 – see paragraph 4 of the Amended Defence. Zurich plead what it alleges should follow from this at paragraph 17 of its amended Defence as being:

> "1) To avoid the policy because if it had been informed of the previous claim, it would not have provided the Claimant with any insurance. The Defendant will refer to the following:
>
> a) The fact of a previous claim relating to a loss of jewellery would have been very material given that a significant part of the exposure under the policy related to jewellery.

> b) The loss of the diamond would have been a very relevant consideration in relation to a policy where expensive jewellery was a very substantial part of the Defendant's exposure.
>
> c) The Claimant is and was a young person who the Defendant would expect to have an active social life in London and abroad, giving rise to increased risk of loss.
>
> 2) Alternatively, if the Defendant is not entitled to avoid the policy, it would be entitled to apply different terms to the policy.
>
> 3) In the further alternative, the Defendant would be entitled to charge an additional premium for the policy. Accordingly, any loss or indemnity which the Claimant proves he is entitled to in principle, would fall to be reduced proportionately in accordance with the provisions of paragraph 8 of Schedule 1 to the Consumer Insurance (Disclosure and Representations) Act 2012."

As will be apparent from what I have said so far, the only express reference to the Act is to Schedule 1, paragraph 8, which is in the section of the Schedule concerned with careless misrepresentations. It is not anywhere alleged that the misrepresentations were deliberate or reckless. Zurich's Defence concludes at paragraphs 23-24 by pleading that:

> "23. By reason of the false answer in the Statement of Fact and/or the unfair presentation of the risk, as pleaded in paragraph 16 hereof, the Defendant became entitled to avoid the policy and by the Defence avoided the policy from inception and by this Amended Defence confirms, that it does avoid the policy from inception. …
>
> 24. In the premises, it is denied that the Claimant is entitled to an indemnity or a declaration entitling him to an indemnity from the Defendant whether as alleged in paragraph 13 or 14 of the Particulars of Claim or otherwise."

28. I have set out the Amended Defence in the detail I have because in the course of the closing submissions a dispute arose as to whether Mr Eklund was entitled to assert that the misrepresentation that Zurich allege have been made was deliberate or reckless when no such allegation has been pleaded or whether it is confined to a case that the misrepresentation it alleges is one that was made carelessly. Mr Eklund accepts that Zurich has not pleaded that the misrepresentations on which it relies were deliberate or reckless but maintains that he does not have to do so. He submits that where the " … *evidence establishes quite clearly now that there was quite deliberate and reckless conduct in relation to the representations given to the insurers and it is open to the court to make that finding, because you have to go through those hoops following what the Act lays out*" – see T3/105.

29. Mr Spalton maintains that this is wrong and if an allegation of fraud or something similar is to be alleged then it has to be pleaded. Given the definition of what constitutes

a deliberate or reckless misrepresentation, he submits that to make an allegation to that effect is to make an allegation of fraud. Mr Eklund did not make an application to amend Zurich's Defence. Mr Spalton did not suggest that I could not be invited to conclude that the alleged misrepresentations relied on were made carelessly on the pleadings as they stand: indeed he accepted that was the basis on which the issue had been pleaded – see T3/131 - and did not suggest that in making submissions about that Mr Eklund was precluded from suggesting that the misrepresentations were made dishonestly within the meaning of Section 3(5) of the Act. This creates an air of unreality about the situation which is made all the more unfortunate because it only arose as an issue in closing submissions.

30. In my judgment this is an issue that has to be approached as a matter of general principle. No authority has been cited by either party as being relevant to it. That being so, as a matter of general principle, if it is to be alleged by an insurer that a misrepresentation that it alleges to be a qualifying misrepresentation under the Act has been made deliberately or recklessly then that must be distinctly pleaded. This is all the more the case when as here it is based on documentation that has been available in the litigation context for weeks if not months prior to trial and it is alleged that it is to be inferred that the misrepresentations have been made deliberately or recklessly from documents or conduct that was known about well before trial. In the absence of an insurer pleading that a misrepresentation has been made deliberately or recklessly, it is not open to an insurer to assert that at trial where the only allegation pleaded is that the misrepresentations have been made carelessly. I also consider that if an insurer wishes to allege that a misrepresentation has been made dishonestly for the purposes of relying on Section 3(5) of the Act then that too must be pleaded for the same reasons.

31. With these points placed to one side, there are four issues that have to be resolved being:

    i) Has Mr Jones made a misrepresentation to Zurich;

    ii) Has any misrepresentation made by Mr Jones been made in breach of his duty to take reasonable care not to make a misrepresentation to Zurich; and

    iii) Has Zurich shown that without the misrepresentation Zurich would not have underwritten the Policy or would have done so on different terms.

    If the answer to all three of these questions is affirmative, then Zurich is entitled to avoid the Policy but must return the premium. If the answer to questions (i) and (ii) is affirmative but to (iii) is negative but if it is shown that Zurich would have charged a higher premium then Zurich is entitled to reduce the sum paid in respect of the claim proportionately applying the formula set out in Schedule 1, Paragraph 8 of the Act.

The Alleged Misrepresentation

32. This issue is relatively straightforward. By the close of the case it was not in dispute that there had been a misrepresentation as alleged by Zurich. The misrepresentation that the Claimant had not made any claims in the five years prior to the proposal leading to the Policy was maintained throughout the process down to and after inception. BBPS Limited trading as Bluefin Network ("Bluefin") were brokers who presented the proposal to Zurich and who in turn had been introduced to Mr Jones by Macbeth

Insurance Brokers ("Macbeth"). Both Macbeth and Bluefin were Mr Jones' brokers for the purpose of the proposal.

33. The initial presentation by Mr Underwood of Bluefin was dated 16 May 2018. It contained the statements "*Any losses or claims in the last 5 years – No*" and "*No claims history as previously lived with parents"*. Both the first representation and both elements of the second elements of this representation was false and thus were misrepresentations. I am concerned for present purposes only with the first representation and the first element of the second representation. The representation that Mr Jones had no claims history was false because he had claimed and recovered £15,000 in respect of the lost diamond suffered on or about 2 August 2016. This is not in dispute.

34. On 21 May 2018, Mr Green of Zurich provided a quotation. It was by email and in the following terms:

> "As requested, please find attached our quotation for Mr Jones' home insurance which I trust meets with your requirements.
>
> Please note that our quotation is subject to the installation of a safe with a cash rating of at least £6,000 in accordance with the manufacturer's instructions within 60 days of policy inception.
>
> [Thi]s Quotation is based on the information below and cover cannot be incepted without confirmation of its accuracy. If anything is missing, incorrect or has changed you must inform us or your insurance broker as soon as possible as this may affect the premium or cover we can provide. If you are in doubt about any change please inform us or your insurance broker. Your failure to do so may result in any insurance we provide becoming invalid and claims not being met, or not being met in full.
>
> Has the proposer, or anyone who permanently resides with them:
>
> - made any household claims or suffered any loss or damage whether insured or not in the last 5 years other than those detailed in this Quotation under "Previous Claims Details"? No "

On 6 June 2018, Bluefin emailed Mr Green as follows:

> "Hello mate,
>
> Thanks for sending over these terms.
>
> We have received the order to go on cover with effect from 0001 on 7" June 2018.
>
> Please can you issue the full documents to us ASAP.
>
> Thanks as always mate!"

This did not contain the confirmations that had been sought by Mr Green. Mr Green accordingly made contact with the producing broker (Bluefin) on 7 June 2018 by phone and sought the confirmations previously requested. The call was recorded and a transcript of what was said included the following exchange:

> "[Mr Green] Has the proposer, or anyone who permanently resides with them made any household claims or suffered any loss or damage whether insured or not in the last five years.
>
> Answer [Mr Underwood]: No mate, not at all."

It was on that basis that Mr Green agreed to underwrite cover - see lines 84 and 100 within the transcript of the conversation. Mr Green sent the Policy documentation to Mr Underwood by email later that day. Included with the documentation sent was one entitled "*Statement of Fact*". This was a document to which Section 2(3) of the Act applied. Within the "*Important Notes*" there appeared the statement that:

> "It is important you check the information in your Statement of Fact as your policy and cover is based on the information you have given us via your insurance intermediary during the application process or subsequently as confirmed in your most recent Statement of Fact … you must take reasonable care to ensure all information provided by you or on your behalf is, to the best of your knowledge and belief, accurate and complete.
>
> You must tell your insurance intermediary immediately if at any time any of the information is incorrect or changes. If we have wrong information this may result in an increased premium and/or claims not being paid in full, or your insurance may not be valid and claims will not be paid"

The Statement of Fact contained a statement under the heading "*IMPORTANT Please read the following information carefully"* It then stated:

> "This Statement of Fact, together with your policy booklet. your schedule, any amendment to cover notice and your agreement to pay the premium, is an agreement between you and us….
>
> it is important that you check your Statement of Fact as this sets out the information we were given when we agreed to provide you with the cover and the terms of your policy. Although we may undertake checks to verify your details, you must take reasonable care to ensure all information provided by you or on your behalf is, to the best of your knowledge, accurate and complete."

The Statement of Fact included the following question and answer:

> "Have you made any claims_ or suffered any loss or damage whether insured or not in the last 5 years? **No"**

No correction was ever provided. It was suggested in the course of the trial that this was misleading by reference to the notes because it did not suggest in terms loss as one of the illustrations of what had to be reported. I reject that point. First, it was not suggested by either Mr Jones or Mr Trautmann that they had misunderstood what was required. Secondly, it is plain that the words in italics beneath the question and answer as to claims in the prior five years are examples of what should be included and not definitive. Thirdly, the terms of the question itself are entirely clear and unambiguous. Finally, although the incident involved the loss of a diamond from the ring it was fairly plainly a claim in respect of damage to the ring. This point is one that in my judgment has no merit.

Breach of Duty to Take Reasonable Care Not To Make a Misrepresentation

35. Mr Trautmann had been a bit coy about the circumstances in which these representations came to be made in his statement – see Paragraph 5. However the issue was explored in cross examination with both Mr Jones and Mr Trautmann. Where there is any conflict between them I prefer the evidence of Mr Trautmann over that of Mr Jones for the reasons already explained.

36. In the course of his evidence Mr Trautmann accepted that he was experienced with a wide variety of different insurance products for principals by whom he was employed and of the need to tell the truth to insurers – see T1/135. He confirmed that material received from insurance brokers in relation to Mr Jones would be addressed to Mr Jones care of Mr Trautmann – see T1/ 137. In relation to the issue concerning prior claims history, Mr Trautmann said in cross examination:

> "you would have answered Yes to that question, would you not?
>
> A. I probably should have but obviously I didn't."

He added

> "my father was very ill, I had other things on my mind. I was also then, when I joined the company, like I said, I wasn't just working for Christopher; I was working for three directors. So one part of a daily thing, little bit of insurance would have been a very minor part. I'd got 10, 12, 15 things constantly on the go that need to be done today, not tomorrow."

In relation to the source of information concerning prior losses he accepted that the normal procedure would be to ask Mr Jones - see T1/ 140. Superficially in relation to the prior claims issue relevant to this case, Mr Trautmann said:

> "Q. Given that we know that the loss of a valuable was not disclosed to Zurich, and if your evidence is correct you did not know at the time, then you would have had to ask Mr Jones.
>
> A. Yes.
>
> Q. So I presume you would have asked Mr Jones.

> A. I may have, I may not have. I cannot recall. Like I said, at that time two or three years ago now, I do not.
>
> Q. So in paragraph 5 of your statement you say in the second sentence: "I do not recall being specifically asked about whether Christopher had any previous losses or any insurance claims". Almost certainly Macbeth would have asked that question, would they not?
>
> A. As a well-known high-end insurance company, yes."

In relation to the source of the information that appeared first in the Bluefin presentation, Mr Trautmann said this:

> "Q. So the information is recorded on the presentation that Bluefin made, set out on page 61. There is name, address, age, gender, marital status, (inaudible) art gallery. That is all information that you would have provided to Carl Sharp at MacBeth.
>
> A. Correct."

In relation specifically to the information concerning previous claims experience Mr Trautmann said:

> "Q. And then two lines on: "Any losses or claims in the last five years. No." That would be as a result of the questions which you asked Mr Jones, whether or not there had been any losses in the last five years.
>
> A. Yes. Well, that's like your previous statement before, yes.
>
> Q. Yes.
>
> A. Yes.
>
> Q. So that is recording what Mr Jones told you.
>
> A. Yes. I mean, not necessarily if he did or didn't, but yes, that's recording the facts as they were there for Carl Sharp to pass on to Bluefin.
>
> Q Well, if you had forgotten all about the loss of the diamond as you said, you would ask the question of Mr Jones: "Are there any losses?" and he said No, so you would have told Carl Sharp no.
>
> A. Correct."

Following some confusion about what was being asked, this exchange took place:

> "JUDGE PELLING: I think the question was that this information must have come from, you, so the question you are being asked is do you accept that the information that you supplied to the broker must have come from Mr Jones?
>
> A. Yes, to the best of my knowledge that would be the case"

37. To similar effect is this exchange specifically in relation to Mr Green's request for confirmation of answers before inception could take place:

> "Q. Do you remember Mr Sharp asking you for confirmation that there had been no previous losses in the last five years?
>
> A. Subconsciously probably yes, but absolutely not with a certainty but I'm sure we had that conversation."

A little later, Mr Trautmann accepted he would be the source of the instructions to provide cover from 7 June. On being asked "*on instructions from whom"*, Mr Trautmann replied "*From Christopher Jones"*. In relation to the confirmation given to Mr Green by Mr Underwood in the telephone conversation referred to above, Mr Trautmann said:

> "Q. We can be sure that you gave that confirmation on instructions from Mr Jones that that was the case.
>
> A. Yes."

38. In relation to the Statement of Fact, Mr Trautmann's evidence was:

> "Q. Let us just look at the statement of fact. There are some pretty big words in the right hand column. Letters, I mean, not words. What is the heading?
>
> A. "Important".
>
> Q. And below that?
>
> A. "Please read the following information carefully."
>
> Q. Then the next line says: "This statement of fact together with your policy booklet or schedule and the amendment to cover notice and the agreement to pay the premium is an agreement between you and us." That is straightforward, is it not?
>
> A. Yes.
>
> Q. "I have been at (inaudible) insurance based on the information detailed below. Cover is based on the information you have given us directly or via your insurance broker." That is straightforward, is it not?
>
> A. Yes.

> Q. This statement of fact required you and Mr Jones to look at it and make sure that the information on it was correct, did it not?
>
> A. That would be the normal procedure, yes.
>
> Q. Yes. It says so, does it not?
>
> A. It does. Whether or not Christopher read this or saw this or I presented it to him, I couldn't tell you.
>
> Q. The last statement is in the form of a question and answer. "Have you made any claims or suffered any loss or damage, whether insured or not, in the last five years?" The answer is No. You know that is not correct.
>
> A. Well, we do now, yes, of course.
>
> Q. And you did at the time, did you not? Between you and Mr Jones, you did.
>
> A. Yes, we know that now, yes, of course. I mean, like I said, we've gone through that, yes.
>
> Q. Well, you did at the time, Mr Trautmann. There is a difference.
>
> A. Yes, he had lost that diamond, yes, in the last five years.
>
> Q. I want to be clear. You and he, or at least he, knew that at the time. You were taking his instructions, your instructions, from him, so at the time that you received this statement of fact you and/or he knew that that answer was not correct.
>
> A. Correct.
>
> Q. And you did not get in touch with the intermediary to tell them so, did you?
>
> A. No."

39. I accept all this evidence and on the basis of it find that the information supplied to Zurich by the brokers was information that came from Mr Trautmann and that he in turn got the information from Mr Jones and that at the time the information was supplied and at the time when the Statement of Fact was received both Mr Trautmann and Mr Jones knew that the answer given concerning previous claims was wrong. On this material I find that the misrepresentation concerning previous claims was made on behalf of Mr Jones in clear breach of his duty to take reasonable care not to make a misrepresentation to the insurer. Zurich had gone out of its way to make clear the information that was required and in my judgment there was no doubt in the mind of either Mr Jones or Mr Trautmann as to what was required.

The materiality Issue

40. This issue is relevant as I have said for two purposes under the Act – first as to whether the misrepresentation I have found to have been made in breach of the statutory duty imposed by s.2(3) of the Act was a qualifying misrepresentation within the meaning of s.4(1)(b) of the Act and secondly for the purpose of ascertaining whether Zurich would not have entered into the Policy on any terms had Mr Jones complied with his duty under s.2(3) of the Act.

41. The difference between the two tests is one of emphasis – a misrepresentation will be a qualifying misrepresentation if either Zurich would not have entered into the Policy at all **or** if it would have done so on different terms, whereas even if the misrepresentation is a qualifying misrepresentation, Zurich is not entitled to avoid the Policy unless it establishes that it would not have entered into the Policy on any terms had Mr Jones complied with his duty. These issues are questions of fact that depend upon the evidence of Mr Green and my assessment of the expert underwing evidence.

42. Turning first to Mr Green's evidence. He is an experienced commercial insurance underwriter whose role then as now is as a senior market underwriter for Zurich private clients – a sector within Zurich's business that provides insurance specifically for high net worth home and motor markets. Mr Green said and I accept that vast majority of his work involves active underwriting in the sector to which I have referred.

43. The factual evidence from Mr Green goes principally to whether he was induced to write the Policy or write it on the terms subject to which it was written whereas the expert evidence is adduced to assist me in deciding whether objectively the misrepresentation ought reasonably to have affected those issues.

44. I start with some remarks about credibility. Mr Spalton submitted that Mr Green's evidence was "*... frankly not worth the paper it was written on ...*". I reject that submission and having listened to and observed Mr Green give evidence at this trial I conclude that he was a witness of truth who gave his evidence fairly and objectively making concessions where appropriate and did all that he could to assist me with the issues that arise. In arriving at that conclusion I have borne very much in mind the point made in a number of authorities that an underwriter's evidence on these issues is hypothetical and therefore prone to exaggeration and embellishment in the interests of the party on whose behalf it is given – see by way of example North Star Shipping Limited v. Sphere Drake Insurance Plc [2005] 2 Lloyds Rep 76 *per* Colman J at paragraph 254. However, as Lord Mustill said in Pan Atlantic Insurance Company Limited v. Pine Top Insurance Company Limited [1995] 1 AC 501 at 551:

> "As a matter of common sense however even where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference. There is ample material both in the general law and in the specialist works on insurance to suggest that there is a presumption in favour of a causative effect."

In my judgment the expert evidence provides one means by which the risk of exaggeration and embellishment can be neutralised. As I explain below, it is common

ground that the prior claim history that should have been, but was not disclosed, was material.

45. Mr Green's evidence as set out in his witness statement on the issues I am now considering in summary was that he was reluctant to write the business in the first place, that he loaded the premium quote as a result and that had he known of the prior claim that would have tipped him into declining cover. He said and I accept that for Zurich the key considerations in deciding whether to provide cover and if so on what terms depends on " … *the individual's claims history, age, area of residence, professional and social activities*." – see paragraph 9 of his statement. Although he was pressed very hard in the course of his cross examination on the veracity of this evidence, it remained intact at the end.

46. Having received the initial presentation from Bluefin, he noted that there had been no previous claims but remained concerned because:

> "… when considering the risk, was that it was unusual for a 27 year old to have the level of wealth indicated by the Proposal and be living in the Knightsbridge area.
>
> I also noted that the proposer was a Director at an art gallery in Mayfair. These details led to a concern that the Claimant may wear the valuable jewellery whilst spending extensive time at work related social events in evenings in central London.
>
> The above factors are relevant as they indicated to me a potential increased exposure to risk for Zurich if the Proposal was to be accepted.
>
> As a result of these concerns I spoke to Mr Underwood of BBPS on 21 May 2018 and explained that the Claimant was younger than our usual demographic and that implied he was likely to be socially more active than the usual insured under this type of policy. I explained that we would only be able to provide proposed pricing for the policy if BBPS and the Claimant could provide further details regarding the jewellery and the level of security that would be in place for the contents."

That these were factors of concern for Mr Green is apparent from his contemporaneous underwriting notes and that they were the subject of discussion with the broker is apparent from the transcript of the call. That conversation transcript satisfies me that Mr Green had real concerns about writing the Policy. He said to the broker that " … *I'll be honest with you the guy's a bit younger than we normally see...*" and that as part of the underwriting assessment that he had been trying to track down Mr Jones' gallery and he requested "… *a bit of his background, family, anything like that*." In relation to the jewellery element of the proposal (which was the insurance cover for Mr Jones' watches) Mr Green said (and I have concentrated what was said by Mr Green for present purposes from various immaterial interjections from Mr Underwood, the broker)) "

> "… because, especially with the jewellery being, you know, relatively high, young guy, probably still socially active, out and

> about. We do need to, you know, kind of be a bit wary of, you know, where he's going to be taking the jewellery and especially with one them being, you know, being relatively valuable, a watch on there as well. 5 grand Rolexes, it's the kind of thing we need to make sure we're comfortable with so I mean rate-wise I've run it through to see where we are and I'm probably going to be around about the £3.8-4 grand mark, something like that. But I'd need to be comfortable with the profile, what he does for a living. And you know, has he come from money, obviously if his parents are minted and he's used to this kind of thing... I've had a look at Company Directorships and he doesn't hold any at the moment, so whether he just works at a Gallery, whether he's the owner of the Gallery, whether his Mum and Daddy have set him up on the Gallery, we'd need to get a better feel for that side things mate, so..."

The conversation ended with Mr Green apparently wondering whether the jewellery might be insured separately with a different insurer. Whilst it is true to say that Mr Green was willing to give an indicative quote, it is plain that quote was one he regarded as at best high and in any event whether to underwrite was provisional on getting further information.

47. It is plain that the principal source of concern for Mr Green was the cover required for the watches and it is also important to note that this conversation took place in the context of it having been asserted that there had been no claims in the previous 5 years. In my judgment in the context of this conversation it is plain that it would have been material to a decision whether to underwrite the jewellery element not merely that there had been a claim in the previous 5 years but that it specifically concerned jewellery. Ultimately some further information was provided and Mr Green offered insurance cover at a premium of £4,249.88 subject to various confirmations including that relating to previous claims considered in detail already. This weighting was 25%. Mr Green's evidence was that

> "The answer relating to there being no previous insurance claims is highly relevant to whether or not a risk will be insured. Given my specific concerns in relation to the Claimant, the answer to whether or not there had been any previous claims was extremely significant to my assessment of the risk."

48. Mr Green's evidence as to what his response would have been had he been told of the prior claim is set out in paragraph 48 of his witness statement. He says of the fact that the prior claim was in respect of damage to jewellery was particularly significant because "… *the majority of the Proposal and ultimately the Policy related to valuable jewellery*". At paragraph 48, he states:

> "In light of those same concerns, I can confirm that if the Claimant had notified me that there had been previous cover in place and that a claim was made under that policy of insurance for a diamond ring, I would have declined cover outright on behalf of the Defendant. As it was, I loaded the premium by 25%

> for the information which was provided. If I had been advised of the additional fact of the loss of and claim in the sum of either £12,000 or £15,000 in relation to a damaged vintage diamond ring, that would have been a straight decline. I have specifically considered whether I would have increased the premium any further if I had been informed of the prior loss and claim. I am in no doubt that I would not have done so. My response would have been a straight decline as I have said in the previous paragraph."

49. Mr Spalton placed significant reliance on the fact that Zurich had not disclosed a macro enabled version of the spreadsheet that Mr Green used as part of the process of arriving at the premium and had not disclosed any internal underwriting guidelines. Had there been no contemporaneous evidence as to Mr Green's approach to the underwriting exercise I would have considered this significant to each aspect of the issue I am now considering. However, in relation to the first issue I have to consider – that relating to whether the misrepresentation was a qualifying misrepresentation – I do not consider these points to be of any significant weight because as I have said whether a misrepresentation will be a qualifying misrepresentation depends on whether Zurich would not have entered into the Policy at all **or** would have done so on different terms. Given the weighting, the obvious concern about the jewellery element of what was being insured, the concerns about Mr Jones personally and that the prior claim related specifically to jewellery all lead me to conclude that it is almost inevitable that had the prior claim been disclosed either cover would have been declined or would have been offered at a rate that was significantly in excess of the 25% loading that Mr Green had imposed.

50. In any event I do not consider what Mr Spalton calls the underwriting manual would have assisted because I accept that there was no underwriting manual as such – see T2/54 – 55 - and because I accept Mr Green's evidence that he had and has significant discretion as to what to underwrite and on what terms.

51. In relation to the spreadsheet tool, I do not consider that as significant as Mr Spalton asserts because as Mr Green said in the course of his evidence the system does not decline cover but merely increases the indicative premium that the underwriter then has discretion to weight further or decline the risk offered as a matter of underwriting judgment. In this case the premium offered was about 25% in excess of the indicative rate generated by the spreadsheet tool so that the evidential value of inputting information about the prior claim will provide limited assistance.

52. I accept Mr Green's evidence that had the box in the tool concerning claims within the last 5 years been altered from 0 to 1, that would have increased the premium and I also accept his evidence based on his experience in using this system that the effect would likely to have been to increase the indicative premium by between 20% and 30%. Although Mr Spalton cross examined Mr Green on the basis that Mr Green did not understand anything about the algorithms embedded in the tool (which he accepted fairly be did not understand), that is immaterial for present purposes. Mr Green had used the tool many times and was well able to give evidence of the likely approximate effect of an entry reflecting Mr Jones previous claims history.

53. However, it is not a basis for concluding that the risk would have been underwritten at the enhanced rate the tool would have generated had the claims history been input simply because the tool would generate a new and in my judgment inevitably a higher rate than what was quoted. I accept Mr Green's evidence that whatever indicative premium the tool offers, whether to underwrite and if so on what terms will ultimately be a decision for Mr Green. This was the effect of Mr Green's evidence in cross examination – see T2/65-66. Finally and in any event, Mr Jones' solicitors must have been aware that what had been disclosed was not macro enabled as and when it was disclosed but no attempt to made to follow up on that issue prior to trial.

54. In the end I found Mr Green's evidence at T2/79-80 convincing and I accept therefore that he would not have underwritten the risk because:

> "because of other factors such as his age, such as how jewellery heavy the risk was, the lack of a previous relationship with the broker, it was already a case which was borderline declinature, which was obviously reflected in the fact that we charged an increased rate, even without knowing some of the risk factors and I think the fact that the client had suffered a fairly substantial, obviously in the grand scheme of things, previous claim of this nature, which really strikes at the very heart what the risk was mainly comprised of. I think it would have pushed it into the territory of it's just not one which would fit our underwriting strategy and with the brokers already disclosing the fact that they had - that they were speaking with other markets, they were speaking with other insurers, I think they would have had other options which we would have been happy for them to pursue."

Later in his cross examination, Mr Green accepted that if he had been supplied with information about the prior loss he would either have sought further information or declined to provide a quote at that stage. This was a fair concession in the circumstances but does not lead to the conclusion that ultimately he would have agreed to underwrite the Policy. In any event on any view he would not have done so on the terms in fact offered, which is all that matters for the purpose of deciding whether the misrepresentation was a qualifying misrepresentation.

55. The agreed position of the underwiring experts – see the joint report at paragraphs A1-2 – is that the previous claim was material information for a prudent insurer to consider when considering a high net worth household proposal and should have been disclosed. Mr Pipe (the expert relied on by Mr Jones) considered it would be reasonable to offer terms even if the prior claims history had been disclosed but that the terms offered would be different from those in fact offered – see paragraph 9.3 of his report and paragraph C9 of the joint report. Mr Coates' view was that appetites for risk differ from underwriter to underwriter and that some would decline to insure on the basis of that information depending on what other information was provided. The reason the claims history is material is obvious – the prior claims history will inform an underwriter in this particular market about how careful and honest the insured is - see paragraph 5.10 of Mr Pipe's report.

56. That is sufficient to establish that the misrepresentation was a qualifying misrepresentation because on the evidence I have considered that Mr Green would probably have declined the risk had the prior loss been disclosed. Even if (contrary to my view) he had decided to provide a quote it would have been at a substantially increased premium.

57. The next issue in the light of this is whether Zurich has established that it would not have entered into the Policy on any terms had the prior claims history been disclosed. This issue is the one where the expert evidence becomes important and where there is a difference of view. Turning first to Mr Pipe's evidence on this issue, it was that it would be unusual to decline to provide cover on the basis of the disclosure of a prior claim of the sort that arises in this case but he also accepted that it was a possible response – see T2/133/5-6. He was not prepared to accept that risk appetites vary in the high net worth market very significantly.

58. Mr Coates evidence was that

> " … any prudent underwriter would share Mr Green's concerns and it is therefore understandable that if a substantial claim such as had been made for the damaged ring, had been disclosed and which related directly to the area of concern (valuables), terms would not be offered. I do not think the issue of whether the claim was for £12,000 or £15,000 matters given they are both substantial amounts and it is of equal relevance that the loss involved an item of valuables. Zurich are a high net worth household market, not a specialist fine art or valuables underwriter, so risks that have a high exposure to valuables will be treated with caution even if they are claim free."

59. In cross examination of Mr Coates, the focus on relative expertise was on the fact that Mr Coates had not been an active underwriter in the high net worth market for 20 years. I accept that this is material to an assessment where practices have changed since he was involved in that market. However, it was not suggested that practices had changed in relation to the issues that arise in this case and so I do not regard this point as a cogent basis for distinguishing between the two experts. Mr Coates is a senior insurance underwriter with extensive experience and his evidence cannot be dismissed simply on that basis.

60. Mr Coates accepted that when faced with information about a previous innocent loss one response would be to go back to the broker and seek further information. What he did not accept was that the only response to such information was to offer revised terms rather than declining to provide a quote. He said that this was an issue that depended on the underwriter's risk appetite – see T2/150/22/23. He added that he did not think that the high net worth market was a single one – see T2/151/3-9. In the end Mr Coates accepted that there were "*lots of other underwriters"* who would have written the Policy even if the prior claims history had been disclosed but equally others who prudently would not. He drew a firm distinction between relatively minor participants in the high net worth market like Zurich and more major players – see T2/156-7.

61. I prefer Mr Coates' evidence concerning different appetites within the high net worth market as correct. It is inherently probable that different underwriters will have different attitudes to risk and it is inherently probable that a major insurer with a market leading position will have a different and more aggressive appetite for risk than other underwriters with a less significant market presence. I accept that in relative terms Zurich is not a market leader in this sector of commercial insurance and that there are others with a much larger presence. The key point however, is that both experts accepted in the end that a reasonable underwriter faced with disclosure of the claims history could decline to offer cover or do so on revised terms. The only difference was in the end one of emphasis.

62. This issue therefore reduces to whether I accept that if this particular claims history had been disclosed this would have led to a refusal to quote as opposed to an offer of cover on even more weighted terms that had been offered already. I accept that it is probable that Mr Green would have returned to the broker and sought further information about the circumstances of the loss had he been informed of it as he should have been. I think it is likely that he would have been given no more information than that which is available now – namely that it was a damage claim based on the loss of a diamond from an antique ring with a damaged clasp. I think it probable that with this information to hand he would have weighed that with the other factors that he identified in the course of his evidence and I find it more probable than not that he would have declined cover having regard to each of the factors referred to in his evidence and summarised earlier in this judgment.

63. I have borne in mind when carrying out this evaluative assessment the absence of a working version of the underwriting tool used to generate indicative premiums but I am not persuaded that should alter my conclusions. As I have indicated in the course of the judgment, I consider Mr Green to be an honest witness and an experienced underwriter with inevitably a wealth of experience in the use of the underwriting tool. I proceed on the basis that his evidence is accurate and that the effect of including the claims history would be as described above and would have resulted in an increase in premium of about 25% over what was quoted.

64. The key point however is that this should not lead to the conclusion that Mr Green would have underwritten the Policy but at an increased premium. I am satisfied that from the outset this was a proposal that was borderline as to whether it would be quoted against. That is apparent from the underwriting notes referred to earlier and from the fact that Mr Green imposed a very heavy weighting above the indicative quote generated by the tool. As is apparent from the underwriting notes, Mr Green was concerned from the significance of the jewellery cover element of the proposal as is apparent from the discussion that took place about the possibility of insuring the Jewellery element elsewhere. The significance of the prior claims history is that it was in relation to jewellery which was precisely the area that Mr Green had doubts about from the outset.

65. On balance therefore I find on the balance of probability that Mr Green would have declined cover for this risk had the prior claims history been disclosed. It follows that Zurich is entitled to avoid the Policy and refuse the claim but must return the premium paid.