Neutral Citation Number: [2023] EWHC 1963 (Comm)

Case No: LM 2022 000064

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 27 July 2023

Before:

SIMON TINKLER
Sitting as a Deputy High Court Judge

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Between:

(1) George on High Limited
(2) George on Rye Limited **Claimants**

- and -
(1) Alan Boswell Insurance Brokers Limited
(2) New India Assurance company Limited **Defendants**

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Ben Elkington KC (instructed by **Edwin Coe LLP**) for the **Claimants**
Roger Stewart KC (instructed by **DWF LLP**) for the **First Defendant**
Neil Hext KC (instructed by **Keoghs LLP) for the Second Defendant**

Hearing dates: 19, 20, 26 and 27 June2023

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Approved Judgment

I direct that 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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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 27 July 2023 at 10:30AM.

Simon Tinkler sitting as a Deputy Judge of the High Court:

1. This case relates to a 16th century hotel called The George. It is in Rye in Sussex. The freehold to the hotel is owned by the First Claimant ("**GOH**"). The business of the hotel and restaurant is operated by the Second Claimant ("**GOR**"). Both companies are under the common ownership of another company which itself is under the common ownership of Mr and Mrs Clarke. In 2004 GOR acquired the freehold to the hotel and the business operated at the hotel. In 2009 GOR transferred the freehold of the building to GOH (a newly incorporated company) but continued to operate the business and employ all the staff associated with it. GOH never operated any part of the hotel or restaurant business. GOR paid rent to GOH for use of the premises for the hotel and restaurant business.

2. The First Defendant (the "**Broker**") is an insurance broker who has for many years arranged insurance cover for the Claimants. The Second Defendant ("**NIAC**") was from 2013 onwards the underwriter of the insurance arranged by the Broker. The relevant policy in this case was entered into for the period 18 November 2018 to 17 November 2019 (the "**Policy**" or the "**Contract**"). It named the "Insured" as "The George on High Ltd t/a The George in Rye".

3. The hotel was largely destroyed by fire on 20 July 2019. The Claimants sought indemnification from NIAC for losses caused by the fire. Those included losses of GOH for damage to the building and losses to GOR caused by loss of business whilst the hotel was closed for reconstruction as well as for loss of stock and contents. NIAC accepted liability in relation to damage to the hotel owned by GOH and made payment. NIAC declined to make any payment to GOR for business interruption and other items. It said that GOR was not insured under the Policy because the words "George on High Ltd t/a The George in Rye" did not cover GOR.

4. GOR claimed against the Broker for losses caused by the non-payment by NIAC because the Broker had therefore negligently failed to organise insurance for GOR (the "**Insurance Claims**"). The Broker, on the other hand, claimed that NIAC should in fact have made payment for the Insurance Claims and that therefore the Broker was not liable to the Claimants. NIAC was thus joined as a Second Defendant.

5. GOH and GOR also both claimed against the Broker for other losses they said were caused by the Broker having arranged insurance that was inadequate in other respects such as under-insuring the value of the buildings (the "**Broker Claims**"). The Broker Claims were settled immediately before the trial, leaving the Insurance Claims to be decided by this court.

6. The Broker accepted that it was liable to the Claimants for the Insurance Claims to the extent NIAC was not liable. In other words, the Claimant was going to be entirely successful in obtaining judgment for the Insurance Claims against one or both Defendants. The dispute was solely between the Broker and NIAC as to who was liable to the Claimants for the Insurance Claims.

7. The Broker says that there are multiple bases on which NIAC should be liable to make payment under the Policy to GOR. These are:

i) On the correct construction of the meaning of Policy NIAC is liable to indemnify GOR (the "**Construction Argument**");

ii) Alternatively, the Policy should be rectified such that NIAC should indemnify GOR under the Policy (the "**Rectification Argument**");

iii) Alternatively, GOH was acting as agent for GOR in relation to the Policy and therefore NIAC should indemnify GOR under the Policy (the "**Agency Argument**"); or

iv) Alternatively, NIAC should, under the doctrine of estoppel by convention, be prevented from denying liability to GOR under the Policy (the "**Estoppel Argument**").

The factual background

8. The claim is made up of four financial elements.

i) A claim for losses caused to GOR for business interruption in an amount agreed at £892,520;

ii) A claim for stock belonging to GOR that was destroyed in the fire in an amount agreed at £23,833;

iii) A claim for contents belonging to GOR that were destroyed in the fire in an amount agreed at £574,805; and

iv) A claim for rent in the period that that hotel was closed that GOR was liable to pay GOH in an amount agreed at £776,000.

9. In addition to the significant quantity of documentation provided at the trial there was evidence in person from four witnesses. Alexander Clarke gave evidence as director and owner of both GOH and GOR. Crawford Allen, Andy Bilner, and Karen Howell gave evidence on behalf of NIAC. There was agreed witness evidence from Christopher Gibbs on behalf of the Broker.

10. In general, the evidence from the witnesses was straightforward and enabled me to form a clear view of the relevant facts. There was criticism of certain witnesses because they strayed into submissions or failed to set out the documents they had reviewed. Those matters had no material impact (either way) on my assessment of their evidence and were in general not particularly relevant to the underlying evidence. By the conclusion of the witness evidence there was little that remained disputed as to matters of fact, though the legal consequences of those facts remained the subject of significant dispute.

11. There were also two witnesses who did not give evidence. I was invited to draw some inferences from that lack of evidence following the authority of *Wisniewski*[1]. Jon Preston was one of the main employees of the Broker who was involved in placing the insurance with NIAC. NIAC invited me to infer from the fact that Mr Preston was not called as a witness that the Broker's intention was that any business operated by GOR was not to be insured. The documentary evidence and other witness evidence, however,

[1] [1998] EWCA Civ 596

indicated an intention from GOR and the Broker to insure the business. NIAC did not provide any evidence that Mr Preston intended not to insure the business of GOR. I did not draw that adverse inference from his lack of evidence. I note for completeness that I disregarded the evidence in Mr Preston's witness statement which had been provided prior to the trial. NIAC also did not call Mr Raj who, it was said, declined the claim and had some knowledge of why the claim was declined. I did not need to determine NIAC's motivation for non-payment under the Policy. I therefore did not draw any adverse inferences from the lack of witness evidence from Mr Raj.

12. NIAC first underwrote insurance in relation to the hotel in 2013. The Broker had approached NIAC to seek that insurance because NIAC already insured another hotel owned by Mr Clarke. The proposal form was signed by Mr Clarke. It described the business as "hotel and restaurant" and included details of turnover, staff numbers and value of contents owned. The name of the proposer was "George on High Limited" with a trading name of "The George in Rye". The form did not mention GOR.

13. That description was repeated in the insurance policy schedule in 2013 which referred to the Insured as being "George on High Limited t/a The George in Rye" and the "Business" as being "Hotel & Restaurant".

14. The insurance continued on the same basis until the policy year 2018-19 with some minor amendments during those years, such as to the breadth of matters insured and the monetary limits on certain categories of insured risks.

15. It was common ground that GOH never traded as The George in Rye. The only legal entity which ever traded at the hotel was GOR. It was also common ground that in 2013 NIAC did not know that GOR ran the business of the hotel and employed the staff who worked in the business. The Broker and Claimants say, however, that the state of knowledge of NIAC changed before November 2018 when the Policy was issued. In particular, they say that NIAC and/or its agents became aware that (i) GOR existed and that (ii) GOR operated the business of the hotel and employed the staff. This arose largely through claims made against GOH or GOR and which were notified to NIAC ("**Historic Claims**").

16. The first occasion when NIAC is said to have become aware of GOR is in 2014. On 17 September 2014 a letter of claim was sent to GOR by solicitors acting for a guest at the hotel, Mr Arkley, who had fallen down the front steps and sustained injuries. The PL1 Claim Notification Form ("**CNF**") identified the defendant as "The George in Rye". Mr Clarke sent the letter and CNF by email to the Broker on 22 September 2014. Anthony Lehman, an employee of the Broker, emailed the letter and CNF to Garwyn on 23 September 2014. Garwyn were NIAC's claims' handlers. On 24 September Sarah Johns at Garwyn acknowledged receipt and confirmed that they were investigating it. The emails between Sarah Johns and Anthony Lehman were headed "NEW CLAIM: George on High Ltd".

17. On 25 September 2014 Mr Clarke filled in a claim form in relation to the incident. The form named the "Policyholder" as "George on Rye Limited". The form was sent by the Broker to NIAC's "Portal Claims" on 30 September 2014. Paul Mehta of Garwyn, whose email signature described his role as "Claims Handler – New India Claims", emailed the Broker on 9 October saying that they intended to "desk-top" investigate the claim. The primary focus of the investigation seemed to be whether the guest had been

drunk when he fell down the steps. Garwyn did not question the identification of GOR as the Policyholder. The case was settled without any payment being made.

18. The second claim related to Jamie Saunders, also known as Jamie Edwards. On 15 September 2015 solicitors acting for Jamie Saunders/Edwards wrote to "The George on Rye Limited" and enclosed a CNF. That form named "The George on Rye Limited" as defendant. The claim was for an accident at work.

19. Mr Clarke sent the letter and CNF to Jonathan Preston at the Broker by email on 21 September 2015. The letter and CNF were then sent by Ian Buckseall, an employee of the Broker to Garwyn by email ("NewIndiaClaims@Garwyn.com") on 21 September 2015. That email named the Insured as "George on High Limited". Meena Bailey at Garwyn emailed Caroline Grimes at NIAC and asked for confirmation for cover for "The George on High Limited". Caroline Grimes emailed back to confirm that "This is on cover". Neither NIAC nor Garwyn questioned whether GOR was insured under the policy.

20. Garwyn produced a report on the incident dated 12 January 2016. That report named the Policyholder as "George on High Ltd t/a The George in Rye". It described the business as "Hotel, Restaurant & Bar". The report said that the hotel, restaurant and bar were operated by the Insured. It also said that Garwyn had seen Jamie Saunders/Edwards' pay slips confirming he was an employee. The payslips provided to Garwyn had named Jamie Saunders/Edwards' employing company as GOR. The report also contained the question "Does the Policyholder's occupation/trade/scope of work correspond to proposal/policy information?". Garywn filled in the answer "Yes". Garwyn went on to note that the "matter will fall for consideration under the Insured's Employers Liability policy of insurance". Garwyn recommended that liability to Jamie Saunders/Edwards be denied in full based on the facts of the claim. Garwyn wrote to Jamie Saunders/Edwards' solicitors on behalf of NIAC denying liability. Again, neither NIAC nor Garwyn questioned whether GOR was insured under the policy.

21. The third claim was in relation Ashley Boldwin. On 17 March 2016 his solicitors wrote to "The George on Rye Limited". They named GOR as defendant and sent a CNF in relation to a claim for an accident at work.

22. Natasha Cox at the Broker sent the letter of claim to "newindiaclaims@garwyn.com" on 22 March 2016. That email named the Insured as George on High Ltd. Sarah Johns at Garwyn acknowledged receipt on 23 March 2016. Mr Clarke completed an insurance liability claim form dated 24 April 2016 in which he named the Policyholder as "George on Rye Ltd", and the business of the Policyholder as "hotel". That form was sent by Natasha Cox of the Broker to Sarah Johns of Garwyn on 26 April 2016. Garwyn did not raise any issue as to whether GOR was insured.

23. Scott Smith of Garwyn contacted Mr Clarke and said he had "*been asked by the insurers* [NIAC] *to meet with you regarding the incident*". The meeting took place on 13 June 2016 (the "**Smith/Clarke Meeting**"). A note was taken at the meeting. Mr Clarke confirmed in evidence at trial that it was not his handwriting on the note. Mr Clarke presumed that it was a note taken by Mr Smith. Mr Smith was not called as a witness by NIAC, and there was no evidence that anyone else was present at the meeting. I find as a matter of fact that the note was taken by Mr Smith, NIAC's claims' handler, and that it is evidence of what was discussed at the meeting.

24. The note is important. It is headed "George on Rye". The first comment on the note reads "*George on High ltd – t/a The George in Rye -------freehlder of the Bldg*".

25. Underneath is written

"*George on Rye Ltd – Alex Clarke Katie Clarke – sole drts and shldrs*

- £3m

-Employees – 50 FT P & ME

- Prvs claims – no

-Oprtns manag – Jenny Poll"

26. The next page is headed "*The Gge in Rye*". Under that is written:

"*– hotel, restaurant, bar*

- Trading 11 years

-34 rooms

-75% occpy rate

Resrnt – 60 seats

Oprtg hrs – 24 hours

7-11 core hours"

27. Mr Clarke gave evidence in relation to the note and meeting. His evidence was that, in essence, he could not recall the specific contents of the meeting but the note suggested to him that he had explained to Mr Smith that GOH owned the hotel and that GOR operated the business of the hotel and restaurant. He could not recall why he was giving the detail set out in the note but thought it might have been because he was explaining why Ashley Boldwin was employed by GOR.

28. Subsequently Crishna Ladwa of Garwyn emailed the solicitors acting for Ashley Boldwin offering to accept liability on a 50/50 basis. In other words, following the meeting NIAC accepted liability for GOR and paid out under the insurance policy.

29. The fourth claim was by Samantha Takis. She was a guest at the hotel and fell down the stairs at the hotel on 31 December 2017. Her solicitors wrote to "The George in Rye" to claim for her injuries. The CNF also identified the defendant as "The George in Rye". Garwyn were sent details of the claim and noted the policyholder as "The George in Rye". A claim was issued naming George on High Ltd as the defendant. It was settled by NIAC. The excess on the claim was settled by way of cheque issued by GOR dated 15 October 2018[2]. Garwyn acknowledged receipt and noted that GOR was

[2] Bundle D p 1231 (electronic)

the payer. They noted in their system that they had received the "Insured's excess cheque".

30. The fifth claim put forward in evidence was from an employee in relation to alleged sexual harassment by a fellow employee. That claim was actually made under the legal expenses insurance. That insurance was not provided by NIAC but by a different insurer and so was not relevant for this case.

31. The evidence in relation to these claims, in summary, shows the following:

    i) On 30 September 2014 Mr Clarke identified George on Rye Limited to NIAC's claims' handlers as an entity that he believed was a policyholder;

    ii) On 21 September 2015 NIAC's claims' handlers were sent a letter before claim and a CNF which named George on Rye Limited as a defendant in litigation in relation to which a claim was being made under the insurance policy;

    iii) On or before 12 January 2016 NIAC's claims' handlers were aware that a claim was being made under the Employer's liability section of the Policy in relation to a person who was employed by George on Rye Limited;

    iv) On 22 March 2016 NIAC's claims' handlers were aware that an Employer's liability claim was being made against George on Rye Limited;

    v) On 26 April 2016 NIAC's claims' handlers were sent a claim form in which the policyholder was named as "George on Rye Limited";

    vi) On 13 June 2016 NIAC's claims' handlers were specifically told at a meeting of the existence of George on Rye Limited. At that meeting Mr Clarke explained in some detail to NIAC's claims' handler that the freehold of the hotel was held by GOH and that the business of the hotel and restaurant was operated by GOR, and that GOH and GOR were under the common ownership of Mr and Mrs Clarke;

    vii) In October 2018 NIAC's claims' handlers received a cheque from GOR which they recorded as being from the "Insured";

    viii) In relation to some claims, NIAC and its claims' handlers assessed the claims and then denied liability to the claimant based on the assessment of underlying merits of the case. On other claims, they accepted liability and made payment under the insurance policies in place at that time; and

    ix) Neither NIAC nor Garwyn, its claims' handlers, purported to deny liability under any insurance policy in relation to any claim because GOR was not insured.

32. The premiums were paid by GOR for the insurance provided by NIAC under the Policy. Mr Clarke gave evidence as follows:

> "*Q…..In terms of the obligations undertaken, it is right, isn't it, that the insurance premiums that you paid, first to other insurers and then to NIAC in relation to both*

buildings insurance and buildings interruption insurance were paid by George On Rye Limited from 2009 through until the fire in 2018?

Mr Clarke: Yes, that's correct. "

Construction Argument /Rectification Argument

33. The Policy names the Insured as "*George on High Limited t/a The George in Rye*". The parties were in dispute as to what this phrase means. The Broker relied on arguments of construction as to why GOR should be treated as insured under this wording, and arguments as to rectification if the wording did not cover GOR. NIAC denied that the words meant that GOR was insured and said that the Contract should not be rectified.

34. There is significant overlap between the issues to be considered in relation to construction and rectification. There are also fundamental differences. I will analyse the separate arguments in detail below but in very broad terms construction is analysing, objectively, what the Contract means. Rectification is, on the other hand, changing the Contract so that it means what it should have meant. There has been academic debate on whether construction and rectification are different parts of one doctrine or are separate doctrines. There have also been debates on whether one should consider rectification first and then construction, or the reverse. In this case, I will consider construction first to establish what the Contract means. I will then consider whether it should be rectified if it does not mean what it is supposed to mean. It was not necessary for me to consider the extent to which construction and rectification are part of the same overarching doctrine.

35. There was one further preliminary point raised. NIAC argued that the Contract cannot be construed as providing insurance to GOR as GOR was not party to it. It is, however, commonly accepted that an insurance policy might have one person who is party to the contract but that the policy might provide insurance for other persons who are not party to the contract. Car insurance policies which are in the name of the main policyholder may, for example, provide insurance for other drivers without them being party to the insurance contract. Similarly, a policy between one company and an insurer may provide insurance cover for multiple companies under the same ownership as the company that is actually party to the contract. Accordingly, I see no reason why, as a matter of principle, GOR could not be a beneficiary under the Policy merely because it was not party to the Contract. Indeed, the specific insurance policy in this case contemplates that a party other than the Policyholder may have an interest under it. The definition of "Additional Interests" states that if another party becomes interested in any of the property insured then the insurer is to be notified but that the interests would not be noted on the policy.

Construction Argument

36. The law in relation to construction of contracts has been the subject of analysis in several recent authorities. I am mindful of paragraph 1.11 of *Lewison on Interpretation of Contracts* which sets out "*Although Lord Hodge said in Wood v Capita Services Limited that the legal profession has had enough syntheses of the principles of contractual interpretation, some judges nevertheless attempt to reconcile the various cases*." I will not attempt to reconcile the cases to which I was referred in submissions

but will, however, set out the relevant authorities and principles so the parties can clearly see the basis for my decision.

37. I start with *Chartbrook Ltd v Persimmon*[3]. Lord Hoffmann gave the leading judgment. He first of all considered the law in relation to construction:

> *"22. In East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61 Brightman J stated the conditions for what he called "correction of mistakes by construction":*
>
> > *"Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."*
>
> *23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50):*
>
> > *"Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."*
>
> *24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.*
>
> *25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."*

38. The matter was considered further in *Pink Floyd v EMI*[4]. Lord Neuberger MR held:

> *"16. Each of the declarations granted below raises a question of interpretation of a provision in a commercial contract. The answer to such a question does not simply depend upon the words used in that provision: it is also dependent on the other provisions of the contract, on commercial common sense, and on the*

[3] [2009] UKHL 38

[4] [2010] EWCA Civ 1429

surrounding circumstances (or the matrix of facts) at the time the contract was made. Accordingly, when construing a provision in a commercial document, one should not carry out "a detailed semantic and syntactical analysis of the words used" – per Lord Diplock in The Antaios II [1985] AC 185, 201.

17. The ultimate aim of interpreting such a provision is to determine what the parties to the contract meant by it. And that involves ascertaining what a reasonable person would have understood the parties to the contract to have meant. In that connection, we were referred, in particular, to passages in the speeches of Lord Hoffmann in Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912F-913G and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21-26.

18. Those well known and important passages demonstrate that while one may proceed on the prima facie assumption that the words at issue mean what they naturally say, they cannot be interpreted in a vacuum. The words must be interpreted by reference to what a reasonable person (who is informed with business common sense, the knowledge of the parties, including of course of the other provisions of the contract, and the experience and expertise enjoyed by the parties, at the time of the contract) would have understood by the provision. So construed, the words of a provision may have a meaning which is not that which they may appear to have if read out of context, or the meaning which they may appear to have had at first sight. Indeed, it is clear that there will be circumstances where the words in question are attributed a meaning which they simply cannot have as a matter of ordinary linguistic analysis, because the notional reasonable person would be satisfied that something had gone wrong in the drafting.

19. In both Investors Compensation [1998] 1 WLR 896 and Chartbrook [2009] 1 AC 1101, Lord Hoffmann made it clear that there is a fundamental difference between interpretation and rectification: the difference arises from the fact that in a claim for rectification, the court can take into account, and in an appropriate case can give effect to, the negotiations between the parties, whereas it cannot do so on an issue of interpretation. This case is concerned with interpretation, so what was said in negotiations is irrelevant and thus inadmissible (thereby ruling out some of PFM's evidence).

20. Further, as Lord Hoffmann also made clear in Investors Compensation [1998] 1 WLR 896, there is a difference between cases of ambiguity, which may result in giving the words a meaning they can naturally bear, even if it is not their prima facie most natural meaning, and cases of mistake, which may result from concluding that the parties made a mistake and used the wrong words or syntax. However, he emphasised the court does "not readily accept that people have made mistakes in formal documents" - Chartbrook [2009] 1 AC 1101, para 23. He also pointed out in paragraph 20, that, as the court, and therefore the notional reasonable person, cannot take into account the antecedent negotiations, the fact that the natural meaning of the words appears to produce "a bad bargain" for one of the parties or an "unduly favourable" result for another, is not enough to justify the conclusion that something has gone wrong. One is normally looking for an outcome which is "arbitrary" or "irrational", before a mistake argument will run.

21. Accordingly, before the court can be satisfied that something has gone wrong, the court has to be satisfied both that there has been "a clear mistake" and that it is clear "what correction ought to be made" (per Lord Hoffmann in Chartbrook [2009] 1 AC 1101, paras 22-24, approving the analysis of Brightman LJ in East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61, as refined by Carnwath LJ in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336).

22. To the same effect, Chadwick LJ said in City Alliance Ltd v Oxford Forecasting Services Ltd [2001] 1 All ER Comm 233, para 13 (in a passage cited with approval in Lediaev v Vallen [2009] EWCA Civ 156, para 68) that the court cannot "introduce words that the parties have not used" into a contract unless "satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence."

39. Finally, these principles were endorsed in *Wood v Capita Insurance Services Ltd* in which Lord Hodge said:

"*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. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*

11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (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 (Rainy Sky 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 and 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: Arnold (paras 20 and 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: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. 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 spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

40. The policy schedule to the Contract set out the following:

"**The Insured: George On High Ltd t/a The George in Rye**

The Business: Hotel & Restaurant (and no other for the purposes of this policy)"

41. The policy schedule, on the same page, set out the various types of insurance available to the Insured with the word "YES" or "NO" after them. The key items for which the schedule was marked "YES" for the purposes of this case were (a) Business Interruption (b) Employers Liability (c) Public Liability and (d) Material Damage. In other words, it is one insurance policy schedule for all the identified risks.

42. What, then, does the Contract mean? In my view, the words in the policy schedule are not on their face clearly wrong, or nonsensical. If, as a matter of fact, the business trading as The George in Rye was operated by GOH then the words make perfect sense. The matter does not, however, end there. In order to ascertain the meaning of the Contract and Policy I need to establish "*the meaning which the document would convey to a reasonable* ***person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract****"*[5] *[my emphasis in bold]*. That requires an assessment of the background knowledge of, and available to, the parties. It does not require, and should not include, an assessment of the subjective intention of the parties, although evidence of intention might be evidence of knowledge of particular matters.

43. I summarised in paragraph 31 my assessment of the actual knowledge of Garwyn as NIAC's claims' handlers in relation to Historic Claims. The question arises as to which, if any, parts of that knowledge can be attributed to NIAC when ascertaining the "*background knowledge which would reasonably have been available to the parties*" at the time of the Contract.

44. NIAC argued at the trial that they, as underwriters, had no knowledge of the involvement of GOR in the Historic Claims. They said that the knowledge of Garwyn, their third party claims' handlers, and other members of NIAC's staff should not be imputed to the underwriters at NIAC.

45. In *Evans v Employers Mutual*[6] the court considered the position when an insured had claimed under a car insurance policy. The original proposal form mis-represented the driving experience of the insured. After the accident for which he was claiming, the insured had told an agent of the insurers the true position in relation to his driving experience. The insurer subsequently tried to deny liability on the basis of the incorrect information in the proposal form, notwithstanding that their agent had been told the correct information. Greer LJ said:

> "*if it be established by evidence that the duty of investigating and ascertaining the facts has been delegated in the ordinary course of the company's business to a subordinate official, the company will in law be bound by his knowledge*"

46. Greer LJ found that the insurer was therefore bound by the knowledge of its official.

47. That case was considered in *Mahli v Abbey Life Insurance*[7] in which Rose LJ said:

> *"In my judgment the provision of information to an insurance company does not necessarily afford to that company knowledge sufficient to found waiver by election; whether it does afford such election depends on the circumstances of its*

[5] Lord Hoffmann in *Investors Compensation [1998] 1 WLR 896,*
[6] [1936] 1 KB 505
[7] [1995]4 Re LR 305

> *receipt and how it is dealt with thereafter. In particular, information will not give rise to such knowledge unless it is received by a person authorised and able to appreciate its significance*. "

48. Rose LJ went on to conclude that in *Mahli* the relevant information had been received at three different times for three different purposes. He therefore said that it was "*quite impossible to impute to the defendants knowledge to support waiver*". Balcombe LJ agreed with this analysis.

49. McCowan LJ, however, dissented and held that *Evans* decided that "*the respondents must be treated as having received the information…and cannot be heard to say that they did not know its contents*."

50. This decision was considered by Andrew Baker J in *Mark Nicholas Kennedy Aldridge & others v Liberty Mutual Assurance Insurance Europe Limited*[8] at paragraphs 41 to 44, in particular. He observed that "*Facts provided by or on behalf of an insured to his insurers but independently of a renewal placement and not to or for onward transmission to the underwriter writing that renewal are not* ***necessarily*** *presumed known to that underwriter*" [my emphasis in bold].

51. The majority decision in *Mahli* and the analysis of Andrew Baker J above is authority for the principle that a matter that requires aggregation of multiple facts known by different people might not necessarily be a matter that is determined to be known to the underwriter. Such a matter might, depending on the facts, be deemed to be known to the underwriters but it is less likely than a matter known in its entirety to one person. There is a further qualification which is that information given to a person not authorised to receive it nor able to appreciate its significance will not be imputed to an underwriter. *Evans* remains authority for the underlying principle that matters known to a subordinate official from undertaking his delegated duty of investigating and ascertaining the facts in the ordinary course will be known to the company.

52. I was also referred to *Hawksford Trustees Jersey Limited v Stella Global UK Limited & anr*[9] which included useful observations on the knowledge of companies generally. Patten LJ said:

> *"31. But if companies (or other non-human entities with a legal persona) are to take advantage of this equitable jurisdiction then it becomes necessary to ascertain the individual or individuals whose expressed intentions qualify as those of the contracting party. Problems of attribution populate large areas of the law. Companies can only act through a human agency and tests have therefore been devised to identify the degree of control and responsibility that is required for the actions of the individual to be treated as those of the company.*
>
> *32. A familiar but instructive analysis of these principles can be found in the judgment of the Privy Council in Meridian Global Funds Management Asia Ltd. v Securities Commission [1995] 2 AC 500 where Lord Hoffmann (at p. 506) said that:*

[8] [2016]EWHC 3037
[9] [2012] EWCA Civ 55

> *"The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company." There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as "the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:" see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.*
>
> *These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort."*

53. Turning to statute, the Insurance Act 2015 ("**IA 2015**") sets out the scope of the duty of "fair presentation" by an insured. That is not determinative of my assessment of what NIAC knew for the purposes of this case but it sets out some principles in relation to knowledge that may be relevant.

54. The relevant sections of IA 2015 set out the duties of "fair presentation" of an insured. They then go on to provide exceptions to those duties of matters that the insurer either already "*knows*" or "*ought to know*" and thus the insured need not disclose or bring to the attention of the insurer.

55. The scope of those terms is covered in IA 2015 s5:

> ***"5 Knowledge of insurer***
>
> *(1) For the purposes of section 3(5)(b), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity).*
>
> *(2) For the purposes of section 3(5)(c), an insurer ought to know something only if—*
>
> *(a)an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or*

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

56. I note in particular that information may be something an insurer ought to know if it is known to an agent (s 5(2)(a)), and knowledge is therefore not limited to knowledge of employees.

57. McGillivray on Insurance Law (15th edition) states at paragraph 16-072 that s5(2)(a) “*is intended to include for example information held by the claims department or reports produced by surveyors or medical experts to assess the risk. Secondly subs 5(2)(b) is intended to require the relevant underwriter to make a reasonable effort to search such information as is available to them within the insurer’s organisation, such as in the insurers electronic records.*”

58. I was also taken to *Bowstead & Reynolds on Agency*. Paragraph 8-208 sets out the general principle that “*A principal is generally imputed with knowledge relating to the subject matter of the agency which an agent acquired while acting for the principal*”. The two principles underpinning this philosophy are firstly that principals should not be in a better position by using an agent than if they dealt with something personally. The second principle is that if an agent has a duty to pass on information then a third party should be able to presume that it has done so.

59. I turn now to NIAC’s internal systems for the sharing of information. In cross examination, the three witnesses called by NIAC were asked about the systems that NIAC had in place pro-actively to pass information from claims’ handlers to underwriters. None of them seemed aware of any such formal system. Mr Allen thought that perhaps a branch manager might have such a responsibility. The branch manager in this case, Mr Raj, did not give evidence.

60. Ms Howell explained that on renewal she would have a brief look on the PURE system at previous claims. Having done so, she was still not aware that GOR operated the hotel. It was not clear if this was because the PURE system

    i) contained information about GOR from the claims’ handlers accepting that GOR was insured but Ms Howell had failed to read that information; or

    ii) the system did not contain the information about GOR that had been given to the claims’ handlers.

61. Ms Howell gave evidence that as an underwriter she did not actually know that the business was operated by GOR, and she believed that she was insuring GOH in the business of running a hotel and restaurant. Her individual belief is further evidenced by the fact that the Employers Liability Insurance certificate which NIAC were required by law to supply, and which GOR were required by law to display, named GOH as the entity whose employees were insured. NIAC argued that this made it inherently unlikely that NIAC would have insured GOR and yet failed to issue a certificate required by statute in the correct name. I am satisfied that Ms Howell would not have knowingly caused the certificate to be issued in the wrong name. It does not follow, however, that NIAC did not know that GOR was the employer.

62. In summary, there was no evidence before me that NIAC had any system under which information flowed from the claims' handler to the underwriter. The underwriters only undertook a cursory review of information in relation to Historic Claims when assessing new underwriting. That was NIAC's prerogative. Those decisions by NIAC not to pass information on or create systems to do so do not, however, mean that as a matter of law NIAC does not know facts that have been told to its staff or agents.

63. Drawing these strands together, in my view the principles that are relevant for this case are:

    i) NIAC is a legal entity and not an individual, and thus its "knowledge" will inevitably be an aggregation of matters known to individuals;

    ii) NIAC as underwriter of the Policy should be held to know facts that are within the actual knowledge of the individuals underwriting the Policy;

    iii) There may be other NIAC employees who have knowledge such that NIAC as a legal entity in its capacity as underwriter is treated as a matter of common law as having that knowledge;

    iv) The underwriters at NIAC would be held under IA 2015, and for the purposes of assessing whether an insured had made a fair presentation, to know things that they "ought to know";

    v) *McGillivray on Insurance Law* indicates that matters that are known to claims' handlers are matters that "ought to be known" to underwriters;

    vi) Garwyn, as NIAC's claims' handlers, were people who were authorised and able to appreciate the significance of information provided to them – indeed their entire role was to assess the extent to which an underwriter was liable to pay out to an insured person under a policy;

    vii) What the underwriters at NIAC are held to know is fact dependant;

    viii) Generally, matters that NIAC's agents know in the course of their duties might be presumed to be known by NIAC; and

    ix) Matters that can only be deduced by collating separate facts known by different people are less likely to be found to be known to the underwriters at NIAC than facts that are clear without such collation.

64. I will now consider what those principles mean about NIAC's knowledge for the purposes of the analysis in this case.

65. The most explicit knowledge that was communicated was at the Smith/Clarke Meeting. Mr Smith was an employee of NIAC's claims' handlers. His role was to assess whether a claim was validly made under an insurance policy. NIAC's claims' handlers were the only people NIAC put forward to interact with the insured in relation to a claim under NIAC's insurance policy. If NIAC had sent a claims handler who was their employee to that meeting then in my view NIAC as a legal entity would plainly know the things that were told to them at the meeting. That is in line with the authority of *Evans*. It is in my view not relevant to NIAC's knowledge for the purposes of this case that the claims

handling was done by an outsourced third-party claims handler. This is because under general principles of agency a principal is aware of matters known to its agents acquired during the course of their work for the principal. I also note that IA 2015 does not distinguish in its description of the knowledge an underwriter "ought to have" between internal and external sources of knowledge. NIAC also sought to argue that the knowledge and actions of the claims' handlers should not be imputed to them because the claims' handlers had no authority to amend the policy of insurance. The claims handlers may indeed have not had authority to amend the Contract, but that does not mean that NIAC is not deemed to know things that were told to the claims handlers. It also does not mean that those things should be excluded from the analysis of what the Contract objectively means.

66. The documentary evidence from the Historic Claims came from four individual claims. Each such claim on its own contained evidence to show that GOR operated the business. The evidence was greater in some cases than in others. From the Saunders/Edwards claim alone there was sufficient evidence to show, in my view, that GOR was operating the business. The same is true in relation to Boldwin. The Arkley claim and Takis claim individually would not, in my view, enable someone to conclude that GOR operated the business. They do, however, add to the overall knowledge supplied to NIAC and its agents. I also note that the evidence was generally provided in the first instance to the dedicated email address for NIAC claims at Garwyn. It seems that Garwyn did not provide a dedicated individual contact for claims by GOH/GOR, or provide the same person to handle each claim. That decision by Garwyn and NIAC to fragment the handling of claims may make commercial sense, bearing in mind the low number of claims over the period. It does not, in my view, mean that NIAC can rely on the knowledge provided to it being so fragmented as to mean that it does not know the things it was told. The evidence was not, in my judgment, so fragmented that, as in *Mahli*, the underwriters did not know it, and indeed in two cases was individually such that it was clear that GOR operated the business.

67. In my judgment, therefore, both NIAC and GOH, as the contracting parties, knew at the time of the Contract:

    i) from the Smith /Clarke Meeting that the Business was operated by GOR;

    ii) from information provided to them in connection with the Historic Claims that GOR operated the Business; and

    iii) from both the Historic Claims and from the Smith/Clarke Meeting that GOR employed the staff working in the business of the hotel and restaurant.

68. I also note that the wording in question in the Contract was not the subject of detailed review or analysis at any time. It was copied in 2013 from a policy proposal document. In 2013 the parties were fairly lax about the precise accuracy of the terms used. The initial proposal said that "The client has owned and run this very renowned hotel in East Sussex for over 10 years". That was, at best, loose language. The client named on the document, GOH, had only existed for 4 years, and had never run the hotel.

69. NIAC then arranged in January 2014 for a survey of the hotel in relation to them becoming the underwriter. Their agents, RiskSTOP wrote "*The hotel was bought in 2004 by the current owners who carried out extensive refurbishment works over the*

next year. The renovated hotel re-opened in 2006 as a 4 luxury premise. The company also owns The Falstaff Hotel in Canterbury.*". The company that owned the Falstaff in Canterbury was neither GOH nor GOR but was another company that was also owned by Mr Clarke.

70. This general non-precision by the Broker and by NIAC's agents in describing who owned and operated the hotel lends weight to the view that the "Insured" as "George on High Ltd t/a The George in Rye" was an imprecise term.

71. Finally, I note that NIAC said at the trial that the information that GOR was operating the business was crucial to it. That seems at odds with the fact that the information was openly provided to its claims' handlers but that the claims' handlers did not consider it relevant or important. It also seems at odds with the fact that NIAC apparently had no system to provide key information from claims handlers to underwriters, and that the underwriter did not look in any detail at the claims made and on which NIAC had accepted liability. It also contradicts the evidence of the underwriter witnesses that if they had been told that GOR had the same directors and shareholders as GOH then they would have added GOR as an insured without further ado. That was, of course, exactly what NIAC's claims handlers had been told at the Smith/Clarke Meeting.

72. I must now put myself in the shoes of a reasonable person and decide, knowing all that background, what the words "George on High Ltd t/a The George in Rye" mean.

73. The Claimants and NIAC all knew at the time of the Contract that the business "t/a The George in Rye" was operated by GOR and not GOH. A reasonable person would in my view look at the description of the Insured as "George on High Ltd t/a The George in Rye" and know that those words were plainly wrong, and insufficient to identify what was meant.

74. The positions of both NIAC and the Broker are, effectively, that some words must be implied into the description of the "Policyholder" for it to make sense to a reasonable person.

75. I am conscious, however, that the court should not imply words into a contract "*unless it is clear both that words have been omitted and what those omitted words were*".[10] This was reinforced by Lord Hodge in *Arnold v Britton*[11] "*The court must be satisfied as to both the mistake and the nature of the correction*".

76. NIAC invited me to find that the Contract should be read as meaning, essentially, "George on High Limited **and (to the extent operated by it) the business** t/a The George in Rye." [Additional words in bold]

77. The Broker, on the other hand, invited me to conclude that the "Insured" should be read as "George on High Limited **and the business operated by GOR** t/a The George in Rye". Or perhaps "George on High Ltd **and George on Rye Ltd** t/a The George in Rye". It might also be possible to treat the words as "George on High Limited **and the business** t/a The George in Rye". [Additional words in bold in all cases]. All three versions lead to the same conclusion that GOR as operator of the business was insured.

[10] Lord Bingham in Homburg Houtinoprt BV v Agrosin Ltd (The Starsin) [2004] 1 AC 715
[11] [2015] UKSC 36

78. In my judgment, a reasonable person would not conclude that the Policy means that the Insured is "George on High Limited **and** (**to the extent operated by it) the business** t/a The George in Rye.". That would make no commercial sense. The parties knew that GOH did not operate the business. If that is what it meant, then there is no reason why GOH or GOR would have paid any insurance premium for business interruption cover because they and NIAC all knew that there was no such business operated by GOH, and therefore nothing to insure.

79. There is another possible meaning that would assist NIAC, which is that "George on High Ltd t/a The George in Rye" means just "George on High Ltd". That seems to me to be even further from the likely objective meaning of the Contract. All parties knew that the hotel and restaurant, which is stated on the policy to be the insured business, was not operated by GOH. The actual policy wording at least referred to "t/a The George in Rye", notwithstanding that GOH did not operate the business. It would make even less sense to list business interruption and employer's liability insurance for GOH, which the parties knew only owned the building, without the reference to the trading name of the hotel.

80. In my judgment, a reasonable person

    i) being aware that NIAC, GOH and GOR all knew that (a) GOH did not operate the business and (b) that GOR operated the business; and

    ii) seeing that the Contract specifically, and on the same page as the description of the Insured, listed business interruption and employer's liability as insured risks;

    iii) knowing that GOR had paid the premiums for the insurance throughout the period since 2013; and

    iv) having all the other knowledge which would reasonably have been available to the parties in the situation in which they were in November 2018 at the time of entering into the Contract

    would conclude that the meaning of the "Insured" is "George on High Limited **and the business operated by GOR** t/a The George in Rye".

81. I note that NIAC's claims' handlers knew that GOR was bringing claims. They took the policy wording to mean that GOR, as operator of the hotel business, was insured. That reinforces the conclusion that the objective meaning of the policy to a reasonable person is the meaning I have determined.

82. I also note that Mr Raj, the branch manager at NIAC, also apparently thought that the objective meaning of the Contract was that GOR was insured. In August 2019 he was said to have confirmed to the Broker that NIAC "*were happy with the claim*" and Mr Gibbs of the Broker reported that "*Ajul did not envisage any problems with the claim and is not aware of anything which could cause a problem".*

Rectification Argument

83. I have determined that the objective meaning of the Contract is that GOR is insured. I will, however, consider the position regarding rectification in case I am not right in my analysis of the construction of the Contract.

84. In *Chartbrook*, Lord Hoffman said:

> *"The requirements for rectification were succinctly summarized by Peter Gibson LJ in Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 71, 74, para 33:*
>
> > *"The party seeking rectification must show that:*
> >
> > *(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;*
> >
> > *(2) there was an outward expression of accord;*
> >
> > *(3) the intention continued at the time of the execution of the instrument sought to be rectified;*
> >
> > *(4) by mistake, the instrument did not reflect that common intention."*

85. This was noted with approval by Lewison LJ in *Cherry Tree v Landmain*[12] at paragraph 120.

86. The first test in *Swainland* is that there is a common intention.

87. It is important to distinguish between the intentions of the parties and the beliefs of the parties. It is the intention of the parties which is crucial. The witnesses of NIAC were cross examined on this subject.

88. Mr Bilner was one of the underwriters at NIAC. In cross examination he was asked:

> *"Q. So, at this stage it is fair to say, isn't it, that you were intending to underwrite and insure the hotel premises at 98 High Street and the hotel and restaurant business carried on from those premises?*
>
> *A: Yes.*
>
> *Q. And to provide employers' liability cover to the employees who were working in the hotel there?*
>
> *A. Yes.*
>
> *Q. And the policy was assessed and paid for on the basis of that risk?*
>
> *A. Yes.*
>
> *Q. I think it is right, I think it follows from what you say in paragraph 11, that you say that if you had been told about George On Rye Limited, there would*

[12] [12] [2013] Ch 305

have been no problem about cover being provided by them simply being identified as the insured, is that right?

A. Well, subject to checks on the relationship between the companies, and yes.

Q. But then you know, don't you, that the same directors, the same shareholders

A. We now know, yes"

89. Ms Howell was another underwriter at NIAC. She said in evidence:

"Q: So, at this stage it is fair to say, isn't it that you were intending to underwrite and insure the hotel premises at 98 High Street and the hotel and restaurant premises carried on form those premises?

Ms Howell: Yes"

90. Finally, Mr Allen was the technical control manager at NIAC. He said in evidence:

"*Q: So, the intention, plainly, of your company was to insure the hotel and restaurant trading as a business at 96-98 High Street. Do you agree?*

Mr Allen: Yes, that was what – that was as proposed"

91. Mr Allen, in re-examination, was invited to reconsider this statement and he did so, saying that NIAC actually intended to insure the business only if it was operated by GOH. I considered that this was an attempt to try and assist his employer's case by rowing back from what he said in cross examination.

92. In my view, the clear intention of NIAC was to provide insurance for, amongst other things, the business of the hotel trading as The George in Rye. That included insurance for liability to employees, the public, and for business interruption. That is what the policy schedule sets out. That was the evidence from Ms Howell, Mr Allen and Mr Bilner. They intended to be paid for such insurance. The intention of Mr Clarke was for GOH and GOR to pay for and receive such insurance. It was in my judgment the common intention of NIAC, GOH and GOR that the business of the hotel trading as The George in Rye would be insured.

93. The parties had this common intention despite the fact that they perhaps held different beliefs as to who operated the business. Mr Clarke was a director of both GOR and GOH. He believed that GOH owned the hotel and GOR operated the hotel. NIAC said that it believed that that the hotel and restaurant business was operated by GOH. That may have been the case in 2013 when it first underwrote the insurance. That was not, however, the case by November 2018 at which point I have already concluded that NIAC knew that GOR operated the business. If I am wrong, however, and NIAC is deemed not to know that GOR operated the business then that does not, in my judgment, affect its intention to insure the business –only its belief as to which entity operated it.

94. The second test In *Swainland* is that there was an outward expression of accord. This requirement was noted by Vos MR in *Ralph v Ralph*[13]:

> *"18. Fourthly, the important point to emerge from JIS (1974) Ltd v. MCP Investment Nominees I Ltd [2002] EWHC 1407(Ch) (Hart J) and [2003] EWCA Civ 721 per Carnwath LJ at [33]-[34], was* ***not*** *that an outward expression of an accord is unnecessary for rectification, but rather that the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms (see also Campbell JA in Ryledar Pty Ltd (trading as Volume Plus) v. Euphoric Pty Ltd (2007) 69 NSWLR 603 at [281]). An accord could include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words: see Chitty on Contracts, 33rd edition (2018) at [3-064]. Leggatt LJ accepted that there could be cases where, depending on the circumstances and the context, the fact that an intention or understanding is shared may be apparent from the fact that nothing is said."*

95. In my view, there was a clear outward expression of meaning. GOR paid the premium to insure the business of the hotel and restaurant. NIAC accepted that payment for that insurance. That is a clear and evidenced expression that both parties were agreed that the business of the hotel and restaurant was to be insured.

96. The third requirement in *Swainland* is that the intention continued at the time of execution of the instrument. The first indication from NIAC that it intended not to insure GOR was in September 2019. That is a significant period of time after the date of the Contract. I am satisfied that even in August 2019 NIAC were not asserting that GOR was uninsured. In my view it is clear that the common intention existed at the time of the Contract.

97. The final requirement in *Swainland* is that the instrument did not reflect that common intention. If I am wrong about the construction of the Contract, and its actual meaning is that the business operated by GOR is not insured, then the Contract did not reflect the common intention to insure the business.

98. Accordingly, as all four tests in *Swainland* are satisfied I would have ordered the contract be rectified to say "George on High Limited **and the business operated by GOR** t/a The George in Rye".

Estoppel Argument

99. It was argued that NIAC should be estopped from denying cover to GOR under the Policy. That argument is separate from the arguments about construction and rectification. The estoppel is said to be on the basis of estoppel by convention.

100. The most recent summary of the relevant principles for estoppel by convention is that of Briggs J in *Benchdollar*[14], with one nuance from *Dixon v Blindley Heath*[15], as

[13] [2021] EWCA Civ 1106
[14] [2009] EWHC 1310 (Ch); [2010] 1 All Er 174
[15] [2016]4 All Er 490

approved in *Tinkler*[16]. Lord Burrows introduced his judgment in *Tinkler* by saying that "*Estoppel by convention is notoriously difficult to pin down. Most commonly, it arises in relation to a contract between the parties. In that context, estoppel by convention may, for example, affect the obligations of the parties or be relevant to the interpretation of the contract*".

101. Lord Burrows summarised the case law on estoppel by convention prior to *Benchdollar* at paragraphs 28 to 41 inclusive of *Tinkler*. I need not repeat those paragraphs here. He then considered *Benchdollar* and in particular the statement of principles by Briggs J at para 52:

> *"In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings … are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

102. Lord Burrows went on to say at paragraph 49:

> *"In Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd ("Stena Line") [2010] EWHC 1805 (Ch); [2010] Pens LR 411 (upheld on appeal without discussing this point at [2011] EWCA Civ 543; [2011] Pens LR 233) Briggs J accepted the submission of counsel that, by reference to The August Leonhardt, his first principle should be amended to include that "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred" (at para 137).*
>
> *50. Although not referring to Stena Line, the same point was made by the Court of Appeal (Longmore LJ, Jackson LJ and Hildyard J) in Blindley Heath."*

103. There are two further matters that need considering before applying the principles to this case. The first is whether estoppel by convention can act as a sword or is merely a shield. The second is whether the *Benchdollar* principles apply to contractual claims. Lord Burrows in *Tinkler* addressed both these points as follows:

> "*74. I have considered whether this submission about the scope of estoppel by convention relates to the question whether estoppel by convention can create a cause of action (acting as a "sword") or, in contrast, can operate only as a defence*

[16] [2021] UKSC 39

(acting as a "shield"). In Amalgamated Investment Brandon LJ examined this question in the context of estoppel by convention and said, at pp 131-132:

> *"[W]hile a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case."*

75. As a general proposition about the law on estoppel, Brandon LJ's comment is too sweeping because it is clear that while, for example, promissory estoppel cannot create a cause of action (Combe v Combe [1951] 2 KB 215, Baird Textiles Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737), proprietary estoppel can (Crabb v Arun District Council [1976] Ch 179).

76. The particular concern about allowing promissory estoppel and estoppel by convention to create a cause of action is that this might undermine the requirement of consideration for the validity of a contract. However, that concern is not relevant to the facts of this case which do not concern contractual dealings. In any event, in the context with which we are concerned, even if one were to insist that the estoppel by convention can support, but must not create, a cause of action in relation to the mutual dealings between HMRC and a taxpayer, it would appear that that restriction is satisfied. The underlying duty to pay tax is imposed by statute and the estoppel relates merely to the dealings between HMRC and the taxpayer in connection with the procedure by which HMRC determine the correct amount of tax to be paid under the statute.

77. Neither counsel made any submissions on the cause of action/defence issue and it was not referred to in any of the judgments below. I therefore say no more about it. It is sufficient for our purposes to make clear that the scope of estoppel by convention extends to the mutual dealings about tax between HMRC and the taxpayer that were in play in this case.

78. There is one linked point of general importance to the law on estoppel by convention. As we have seen, the facts of Benchdollar, like this case, involved mutual dealings between the parties but did not concern a contract or transaction between the parties. Yet the principles laid down by Briggs J (as amended) have been treated as also being applicable to contractual dealings; see, for example, Blindley Heath. In Stena Line Briggs J himself drew on The August Leonhardt (a contractual case) in qualifying his first principle. In Mitchell v Watkinson [2014] EWCA Civ 1472; [2015] L & TR 22, para 52, it was suggested that there is no significant difference between the principles for estoppel by convention applicable to non-contractual dealings, set out in Benchdollar, and those applicable to contractual dealings set out in Chitty on Contracts. While it is possible that there may be some differences required by the relevant contractual or non-contractual context (and, although the Benchdollar principles do not refer to the cause of action/defence issue, one must bear in mind what has been said about that issue in para 76 above), it would appear that the Benchdollar principles are being viewed as general principles applicable to estoppel by convention. It is significant in this respect, that the present edition of Spencer Bower: Reliance-

> *Based Estoppel, 5th ed (2017), chapter 8, centres its whole analysis of estoppel by convention on the Benchdollar principles. Although it is unnecessary to decide this in this case - and we heard no submissions on it - there appears to be no good reason to confine them to non-contractual dealings. In my view, the five Benchdollar principles, with the Blindley Heath amendment to the first principle, comprise a correct statement of the law on estoppel by convention for contractual, as well as non-contractual, dealings.*"

104. I was also taken to *Spencer-Bower: Reliance based Estoppel*. This, and the judgment in *Tinkler*, make it clear that the *Benchdollar* principles as supplemented by *Blindley Heath* apply to consideration of estoppel by convention in relation to contracts. Paragraph 76 of *Tinkler* is also authority, in my view, for concluding that in this case the estoppel is not acting as a sword. The Broker and Claimants are not seeking to create a contract where none existed; they are seeking to prevent NIAC from resiling from a previous interpretation of the Contract on which they have relied. There is no question of this undermining the need for consideration for a contract to be valid, as referred to in the first sentence of paragraph 76.

105. I now turn to the requirements for estoppel by convention. The first requirement is a common assumption. The Broker says that the common assumption is that NIAC were insuring the business trading as "The George in Rye". The fact that the business was legally owned by GOR and not GOH is not, the Broker says, relevant. NIAC, on the other hand, say that their intention was not to insure the business trading as The George in Rye. Their intention was, say NIAC, to insure "GOH **and to the extent it operates the business, the business** t/a The George in Rye". [My added words in bold].

106. For the reasons set out in paragraph 92 I am unable to accept NIAC's assertion of their intention. It is clear to me that NIAC accepted an insurance premium because they intended to insure the business trading as The George in Rye. The common intention of NIAC and GOH was to insure the business of operating the hotel.

107. The second requirement is that NIAC must have conveyed to GOH / GOR some understanding that NIAC expected GOH/GOR to rely upon it. In my judgment, NIAC did this when it, through its agents, accepted liability for claims that related to the business of operating the hotel. Those claims related to staff employed in operating the business. They related to claims by customers of the business. NIAC plainly conveyed by its conduct to both GOH and GOR that it expected and believed GOR to be covered by the insurance under the Policy.

108. The third requirement is that GOH must have relied upon the common assumption. The evidence from Mr Clarke is that he relied on NIAC accepting liability for those claims as being a core fact underpinning his reliance (on behalf of GOH and GOR) that the business operated by GOR was covered under the Policy. GOH and GOR also relied on that assumption when paying the premiums for the insurance.

109. NIAC argued that their conduct in relation to the Historic Claims was equivocal, by which they mean that by participating in the defence of those claims they were not accepting that they were liable under the Policy in relation to them. NIAC says that, at most, they were accepting that they might be liable in relation to them. Accordingly, they should not be estopped from subsequently denying liability. They rely on *Soole v*

Royal Insurance Company[17], and in particular p339 where Shaw J held that "…*the assumption of control of the proceedings is equivocal. It does not necessarily imply a representation by the insurers that they regard the claim….as one which must give rise to a liability to indemnify the insured. It indicates no more than it appears that it may give rise to such liability*". In my view, the critical word in Shaw J's analysis is "necessarily". The assumption of control may give rise to such a representation but does not necessarily do so. In this case, there were multiple claims in which NIAC assumed control, or at least participated, in proceedings. In at least one case NIAC made payment. At no point did they deny liability, or even raise the question as regards whether the business was insured. Accordingly in my judgment, NIAC represented by their conduct that they regarded claims made by GOR relating to the Business as being claims for which they would indemnify GOR should the underlying claim against GOR be valid. Their conduct was not equivocal.

110. NIAC also argued that any representation they made regarding liability under the contract was a representation as to law, and not fact. Accordingly, they say, this cannot give rise to an estoppel, in support of which they cite Shaw J's observation in *Soole* at p340 that "*…since the question of liability or no liability depends on the construction of the contract, a representation in that regard is not to be treated as representation of fact, at any rate not in this case*". Shaw J then went on to consider relevant authorities, noting in passing that "*the decision of each case must depend on its special facts*". He placed reliance in particular (at p 342) in his assessment that the behaviour in *Soole* was of a "*provisional or tentative character*". In this case, the actions of NIAC's agents were not, in my view, equivocal, and neither were they provisional or tentative. They accepted that NIAC would be liable to indemnify GOR if and to the extent the claims were valid, and NIAC disputed the underlying claims on their merits. I am unable to accept NIAC's contention. The agents and NIAC were not representing what they thought the law to be; they were representing their understanding that the objective meaning of the Contract was that GOR was insured.

111. The fourth requirement is that the reliance must have occurred in connection with some subsequent mutual dealing. The first claim was made in 2014. All the Historic Claims pre-date the 2018-19 policy year. The insurance was renewed each year from then on and premiums were paid. That is a mutual dealing.

112. Finally, there has to be detriment to GOR or benefit to NIAC to make it unconscionable for NIAC to assert the true legal (or factual) position. The benefit to NIAC was the receipt of the insurance premiums throughout the five year period from 2014 onwards. The detriment to GOR is that they paid the premiums.

113. In conclusion, in my judgment both NIAC and the Claimants proceeded with the common intention to insure the business trading as The George in Rye under the Policy. NIAC, GOR and GOH conveyed the understanding to each other that the business was insured. GOH and GOR relied on that common intention and subsequently dealt with NIAC on the basis of that reliance. The five requirements in *Benchdollar* are in my view therefore satisfied.

114. Did this cross the line to mean that estoppel is justified? The business trading as "The George in Rye" was named on the Policy. NIAC accepted claims over multiple years

[17] [1971] Lloyds Law Reports 332

in relation to that business. Those claims explicitly identified the fact that the business was operated by GOR. There was a meeting in which it was explained to NIAC's agents that GOH owned the hotel and GOR operated the business, and that both were under common ownership and control. NIAC accepted, and GOR paid, premiums over multiple years for that insurance. Both parties proceeded on that basis. NIAC received the premiums from GOR, intending to insure the business, knowing that GOR operated the business, and having accepted liability in principle and having paid out on previous claims. In my view it is unconscionable for NIAC now to assert a purported right not to indemnify GOR. These actions therefore crossed the line such that in my judgment NIAC should be estopped by convention from denying liability to GOR in relation to the claims made in 2019.

Agency Argument

115. It was argued by the Broker that GOH was acting as the agent for GOR. It was not an argument that was particularly fully developed in the pleadings or before me. It was, in essence, an alternative if the primary arguments failed. I have found that GOR has succeeded on all three primary arguments and therefore need not consider the alternative agency argument. That argument in any event almost certainly stands and falls in line with the conclusions in the primary arguments, a position which the parties, as I understand it, all accepted.

Liability for business interruption

116. Having found that the "Insured" in the Contract means "George on High Limited **and the business operated by GOR** t/a The George in Rye", I therefore find that as a matter of construction NIAC is liable under the Contract to indemnify GOR for losses for business interruption.

Liability for contents

117. The contents in the hotel had originally belonged to GOR. When it sold the hotel to GOH in 2009 it also sold those contents to GOH. After that sale, when the contents were replaced, they were bought by GOR. Thus, by the time of the fire almost all of the contents were owned by GOR. The same question arises in relation to the contents as in relation to the business interruption policy – was GOR insured? For the reasons set out above in relation to business interruption insurance, in my judgment GOR was insured in relation to the contents in the same way.

118. NIAC raised a further argument in relation to contents. NIAC said that if it was liable to GOH under the material damage section of the policy (which covered the damage to the hotel) then it could not be liable to GOR under the material damage section for contents owned by GOR. In my judgment that is not the case. If the Insured is "George on High Limited **and the business operated by GOR** t/a The George in Rye" then the contents are insured whether owned by GOH or GOR. This is similar to the insurance for public liability where the liability could be of GOH (as owner of the building) or GOR (as operator of the business). The liability for contents is limited by the monetary cap on a claim that can be made but not restricted to goods that are owned by only one insured party.

119. It follows that in my view NIAC is liable to indemnify GOR for the value of the contents in the agreed amount of £574,805 (being the original claim by GOR for £576,055 less £1,250 for an item they identified as belonging to GOH).

Liability for stock

120. The same question arises in relation to the stock as in relation to the business interruption policy – was GOR insured? For the same reasons set out above, in my judgment GOR was insured. It follows that NIAC is liable to indemnify GOR for the value of the stock in the agreed amount of £23,833.

Rental claim

121. There is a further claim for loss of rent (the "**Rental Claim**"). This relates to rent that was being paid by GOR to GOH for use of the buildings. That rent was not paid during the period when the hotel was closed for rebuilding. The dispute centres on whether the rent which was not paid during the period the hotel was closed remained payable, or whether it was simply not payable at all in respect of that period. If GOR is not liable to GOH for that rent then GOH has lost rental income and that loss is uninsured. The Broker accepts that it is liable to GOH for any such uninsured loss. If the rent remains payable then it is an additional cost to GOR for which it could claim under its business interruption insurance.

122. The Broker argued that rent continued to be payable by GOR to GOH during the period when the hotel was not open for business. I was not directed towards any documentary evidence to support this assertion. When the ownership of the building was transferred from GOR to GOH in around 2009 no written lease was entered into that set out the terms on which GOR would use and occupy the building. No written lease was entered into after that. The arrangements for occupation continued to be informal. This did not seem to matter to GOH and GOR as both were owned by the same shareholders and had the same directors.

123. After the fire the building could not be used as a hotel until it had been rebuilt. GOR therefore stopped paying rent to GOH. This could have been on the basis that the rent remained payable and was merely being deferred until GOR had cash to pay it. The alternative basis was that the rent was not payable during the period of closure because GOR was not able to use the hotel for its business. There was no evidence from the directors or employees of either GOR or GOH that they thought that rent continued to be payable. No rent was actually paid by GOR to GOH during the period of closure. There was no evidence that GOH took any steps to assert that rent was due. On the contrary, the financial accounts of both GOR and GOH showed that no unpaid rent was accruing to GOH. GOR also did not have an increasing unpaid liability for the rent due to GOH. These accounts were approved by the respective auditors and the directors. The evidence, in my view, shows that as a matter of fact that the terms of the contractual arrangement between GOR and GOH were such that there was no rent payable from GOR to GOH during the period when the hotel was closed and GOR could not operate its business.

124. That means that GOR was not liable for paying the rent to GOH. It also means that during the period when the hotel was closed GOH has lost its rental income from GOR. GOH had insurance against loss of rent for up to £25,000. That was intended to cover

rental income from unrelated third parties, such as the clothing shop "Madisons". That maximum amount has already been paid out by NIAC. Accordingly, GOH has no further claim for rent under the Policy as rent above £25,000 is uninsured. The rent from GOR for which GOH is uninsured is agreed in the sum of £776,000. That sum is not reduced by £25,000 paid to GOH by NIAC as there is no evidence that the amount paid by NIAC related to rent payable by GOR; indeed, the evidence is that the £25,000 relates entirely to rent payable by third parties such as Madisons.

Summary

125. Having found that GOR was insured under the Policy I find that NIAC is liable to GOR for the following losses insured under that Policy:

    i) Business Interruption in the amount of £892,520;

    ii) Stock in the amount of £23,833; and

    iii) Contents in the amount of £574,805.

126. Having found that there was no rent payable by GOR to GOH during the period when the hotel was closed I find that the Broker is liable to GOH in the sum of £776,000 for uninsured loss of rental income.

Judgment ends