Neutral Citation Number: [2024] EWHC 262 (Comm)

Case No: CL-2021-000408

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

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

Date: 12/02/2024

Before :

LIONEL PERSEY KC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

HAMSARD ONE THOUSAND AND FORTY-THREE LIMITED

Claimant

- and -

AE INSURANCE BROKERS LIMITED

Defendant

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Hefin Rees KC and Rumen Cholakov (instructed by **St Paul's Solicitors**) for the **Claimant**
Daniel Shapiro KC and Hamish Fraser (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing Dates: 6-9 and 13 March 2023

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Approved Judgment

This judgment was handed down remotely at 10:30 am on 12th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

Lionel Persey KC

Introduction

1. This is a claim by Hamsard One Thousand and Forty-Three Limited ("**Hamsard**") against its former insurance broker AE Insurance Brokers Limited ("**AE**") for alleged breaches of its duties as an insurance broker which, it claims, led to the avoidance of an insurance policy ("the **Policy**") that had been provided by Policyfast on authority of the underwriters, Fusion Insurance Services Limited ("**Fusion**"). The Policy was a policy of property insurance that had been issued in respect of an industrial site at Cornwall Road, Smethwick, West Midlands ("the **Premises**").

2. Fusion avoided the Policy on two grounds. First, they said that there was a failure by Hamsard to disclose the association of Hamsard's Directors with prior failed companies. Secondly, they claimed that that there had been a failure to disclose the Administration status of the occupying tenant, Incanite Foundries Limited. These failures to disclose were, Hamsard say, failures of AE who should have taken, but did not take, Hamsard's principal, Mr Mark Beresford ("**Mr Beresford**"), through each question on the proposal form to ensure that they were answered correctly and that each of the terms proposed by Fusion met Hamsard's demands and needs. Hamsard claims £2,648,769.99.

3. AE denies Hamsard's claim in its entirety. They say that the claim is founded upon the lies of Mr Beresford, that there was no breach of duty on AE's part, that there was in any event no causation between the breaches that AE are said to have committed and Hamsard's alleged losses, and that Hamsard has further failed to prove that they have suffered any recoverable loss.

The parties, the key personnel and the Premises

4. Hamsard is a company acquired by Mr Beresford and his wife in 2012. It purchased a subsidiary called Incanite Foundries Limited ("**Incanite**"). Hamsard took ownership of the Premises upon which Incanite conducted its foundry business. These comprised a site of about 3.8 acres with useable buildings extending to 93,000 sq. ft. The buildings were old heavy industrial buildings and consisted, inter alia, of a gravity die cast area, a fettling shop, a pattern shop, and an aluminium foundry and an iron foundry. The Premises abutted onto the Birmingham Canal.

5. Mr Beresford started his working life at American Express Europe Limited and then moved to Wates Construction Group. He left Wates in 1992 and set up his own business development consultancy. He put together a plan to search for prospective acquisitions in the foundry industry. His intention was to turn these acquisitions around and to grow and consolidate them into a profitable group.

6. AE is a company of insurance brokers based in Romsey, Hampshire.

7. Simon Rees is now a director of AE. He was employed as a General Manager of AE between 2012 and 2014. He first became involved with Mr Beresford in the late 1990s when he worked for another firm of insurance brokers.

The witnesses

Witnesses of fact

8. Mr Beresford was the only factual witness called by Hamsard. He gave evidence over nearly one and a half days. His veracity was put front and centre of AE's submissions. AE submitted in their written closing that Mr Beresford's evidence lacked any scruple and consisted largely of lies. I listened very carefully to his evidence. I formed the view that he has, over the very considerable time that has passed since the relevant events of 2013 and 2014, constructed an account which bears little resemblance to reality and instead seemed to me to be directed towards explaining matters in such a way that would best support his claims. I have little doubt that by the time that he gave evidence he had persuaded himself that what he was telling me was true. I found, and find, myself unable to accept his evidence unless it is supported by contemporaneous documents or by inherent probabilities.

9. Mr Rees gave evidence on behalf of AE. He gave his evidence well and I find him to have been honest in what he told me. He did not purport to remember everything that had happened some nine years previously and fairly conceded that, with the benefit of hindsight, he could and, perhaps, should have done some things differently. Again, I rely largely upon the contemporaneous documents when deciding what happened.

10. It had been the intention of AE to call Ms Stella Goulding, who was employed by AE and assisted Mr Rees at the time. Although she had given a witness statement and attended court through much of the evidence of Mr Beresford and, I believe, of Mr Rees, AE decided not to call her. They did so, ostensibly, for reasons of time although she would not have been a particularly lengthy witness. I have treated her statement as not being in evidence.

The expert witnesses

11. Each party called a broking expert and an underwriting expert. Hamsard also called an expert to address the quantum of their claim.

12. Hamsard called Mr Roger Flaxman as their broking expert and Mr Victor Broad as their underwriting expert. AE called Ms Sue Taylor as their broking expert and Mr Stephen Hartigan as their underwriting expert.

13. It appeared from the Joint Statements produced by the experts following their meetings that they had agreed many of the issues between them and AE suggested that supplemental expert reports be dispensed with. Hamsard's solicitors refused and instead put a number of leading questions to Hamsard's experts which can fairly be said to challenge some of what had been agreed by them in the Joint Statements. This was, in my view, inappropriate.

14. Mr Flaxman had not read some of the important messages between the parties and his evidence was at least in part based upon information that had been provided to him by Mr Beresford. Mr Broad had also received information directly from Mr Beresford without disclosing this in his reports and did not appear to understand that his role was not simply to act as a conduit for the views of his client and the instructions of his appointing solicitors. I did not find either of these two witnesses to be satisfactory.

15. Ms Taylor and Mr Hartigan were good witnesses. They were both clearly experts in their respective fields.

16. I should, however, say that I have my doubts as to the need for calling this sort of expert evidence in a case of this nature. I have very much in mind the observations of Leggatt J (as he then was) in *Involnert Management Inc v Aprilgrange Limited & Others* [2015] EWHC 2225 (Comm) at [294]:

> "… Without any disrespect to these witnesses, all of whom are clearly very experienced brokers, I am doubtful of the value of much of the evidence from broking experts which was adduced in this case and is typically adduced in cases of this kind. It is common place, and this case was no exception, for broking experts to be asked to give their opinions on whether the defendant brokers owed duties to do the various things which they were allegedly negligent in failing to do. The general duties of insurance brokers have, however, been considered by the courts in many cases and, to a substantial extent, have become a matter of law ..."

I will make only limited reference to the broking and underwriting evidence below.

17. Ms Fellows is a very experienced RICS Registered Valuer and Director at Savills (UK) Limited. She produced a well-structured report and was a good witness. However, her report was founded upon a number of faulty assumptions and her approach and conclusions did not, through no fault of her own, accord with the reality of the case. Hamsard's pleaded claim was for reinstatement costs for the damage that had allegedly been caused during the sale of the machinery and fixtures and fittings at the Premises, together with loss of rent. Ms Fellows was, however, instructed to prepare a valuation report. Her report valued the Premises in 2016 and also estimated their hypothetical rental value. She had been instructed to value the Premises in an assumed undamaged state as at their date of sale and on the assumption that they were fully let. She was also encouraged to assume a hypothetical rental value of between 2.80 to £3.00 per sq. ft even though the contemporaneous estimate was £2.00 per sq. ft after refurbishment. The effect of this was to lead to a vast increase in both the hypothetical valuation of the Premises and of their rental value.

The facts

18. The relationship between Mr Beresford and Mr Rees dates back to the late 1990s. In the late 1990s Mr Rees arranged insurance policies for another of Mr Beresford's

companies, Feldaroll Foundry ("**Feldaroll**"), when he was working for another insurance broker. In 2008 Feldaroll lost major customers and entered into administration in August of that year. Mr and Mrs Beresford's next company, Surecast Alloys Limited ("**Surecast**"), an aluminium foundry business, purchased Feldaroll's business and equipment for £5,000.

19. Mr Rees moved to AE in around 2008. Mr Beresford first approached AE in 2008 or 2009 to organise insurance for Surecast, of which Mr Beresford was a director. Having lost major customers, on 26 June 2012 Surecast entered into a Creditors Voluntary Liquidation ("**CVL**") with assets of £197,000 but liabilities of £844,000 with the result that Surecast's creditors received nil pence in the pound. Their position is to be contrasted with that of Mr Beresford who had received the benefit of £187,000 in directors' loans. There is no evidence that he ever repaid this sum, even though he was served a statutory demand by the liquidators which he contested and, which I infer, he did not repay.

20. On about 24 January 2012, Mr and Mrs Beresford acquired Hamsard and Incanite from a Mr Howell for £1.4 million. The consideration allocated for the Premises was £650,000. The acquisition was funded by various loans and there was also a deferred consideration of £675,000 owed to Mr Howell. This was secured by way of a legal charge over the Premises. A debenture was entered into with Aldemore Bank plc ("**Aldemore**") in the sum of £370,000.

21. On 25 February 2012 Hamsard, as lessors, and Incanite, as lessees, entered into a 25 year lease for the Premises at a rent of £185,000 per annum ("the **Lease**"). Pursuant to the Lease, Incanite undertook a series of covenants, including carrying out Works to the Premises. The Tenth Schedule to the lease, which identified what these Works were to be and the Schedule of Condition have not been disclosed by Hamsard. It is therefore unclear what Works were required and agreed at the point Incanite entered into the Lease.

22. In April 2012 Incanite acquired the business and assets from the liquidator of Surecast for the sum of £20,000. In that month, Mr Rees attended a meeting with Mr Beresford and Mr Howell (now Incanite's Finance Director) in order to establish Hamsard's insurance demands and needs. Mr Beresford and Mr Howell suggested that the then declared value of the Premises at £1.78 million might be inadequate because on a cost per square foot basis the value could be £3 million, or above. On 27 June 2012 Hamsard agreed to AE's Terms and Conditions of Business and Mr Beresford signed them on 10 July 2012. On 30 June 2012 AE placed a QBE Policy on the Premises for a sum insured of £2.2 million. Loss of rent cover was included for 12 months up to £100,000.

23. Mr Rees attended a meeting with Mr Beresford on 3 June 2013 to discuss Hamsard's insurance needs for the year commencing 30 June 2013. Mr Beresford asked to increase the building sum insured from £2.2 million to £6.7 million. The loss of rent cover remained £100,000 for a 12 month indemnity period. Following this meeting, AE searched the market and recommended a Zurich Policy after negotiating the premium initially quoted by them down from around £18,500 to

£6,569.35. Mr Beresford gave instructions to place the Zurich Policy. At the same time, he gave instructions to place Directors & Officers ("**D&O**") Insurance for Hamsard from Ace Insurance Services Group Ltd ("**Ace**") at a premium of £698.58. Both premiums were to be paid in instalments, financed by Premium Credit.

24. Soon after the Zurich Policy was placed, Incanite lost major customers, causing cash flow difficulties during the second half of the year. Incanite stopped paying E.ON, its energy supplier, from August 2013. I find that it is probable that Incanite also ceased paying rent to Hamsard at about this time. Without advising Mr Rees of Incanite's financial difficulties on 12 August 2013 Mr Beresford asked Mr Rees by email to reduce the buildings sum insured from £6.7m to £4m on the basis that he had "been advised that a figure of £35-40 sq ft (x100,000) is more appropriate". Mr Beresford asked Mr Rees in the same email if the insurers could adjust the premiums and advise the difference in premium. Ms Goulding replied on 12 September 2013 and told Mr Beresford that the resultant reduction in premium would be from £6,569.35 to £4,165.48, but she warned that the sum insured ought to be for the reinstatement cost. Mr Beresford gave instructions to reduce the sum insured on 13 September 2013, asserting the value of the Premises was no more than £4m.

25. It is not clear from the evidence before me that Incanite made further premium instalment payments after around September 3013. Incanite was not paying rent at this time. Hamsard have alleged that Incanite had transferred title to equipment in lieu of rent but I am unable to find that they did so on the evidence which I have seen and heard.

26. By the end of 2013 Incanite's business had failed. Incanite's iron foundry ceased manufacturing on 18 December 2013 and the aluminium foundry ceased trading after the Christmas shutdown. On 8 January 2014, E.ON issued a winding up petition.

27. In mid-January 2014, Mr and Mrs Beresford attended a meeting with Aldermore who held fixed and floating charges over both Incanite and Hamsard's assets. At the meeting Mr Beresford explained that trade had ceased, the vast majority of employees had been made redundant, and that various tangible assets had been transferred from Incanite to Hamsard in lieu of unpaid rent from 2013. It would appear from this that Mr and Mrs Beresford had been transferring assets out of one of their companies in the months before it ceased trading into another of their companies. This occurred before the appointment of administrators. It was expressly agreed between the Beresfords and Aldemore that no rent would be paid during the period of administration.

28. In February 2014 Premium Credit contacted AE to inform them that Incanite had defaulted on its finance agreement. Following this notification from Premium Credit, Mr Rees telephoned Mr Beresford. The conversation is reflected in a letter of 14 February 2014 from Mr Rees to Mr Beresford. In the conversation Mr Rees was informed that the Administrators were taking over control of the business but would not be continuing to pay the premium for the Zurich Policy. Mr Beresford instructed Mr Rees that the sum insured of £4 million was excessive and that it

should be reduced to £1.2 million. Mr Rees informed Mr Beresford that unoccupied buildings were an issue for insurers and that placing a new buildings insurance policy could be problematic, more expensive, and result in a reduction in the insured perils to fire, lightning, aircraft and explosion ("**FLEA**") cover only. Mr Rees explained that Hamsard had two options: either to pay the entirety of the outstanding premium of £3,645.45 to Premium Credit and continue the Zurich Policy on the same terms or to start two new policies for the buildings insurance and the D&O liability insurance. Mr Rees asked Mr Beresford to confirm his instructions.

29. Mr Beresford replied on 18 February 2014 that he thought "the best policy will be to start afresh on the buildings but we will need a monthly premium arrangement". Mr Beresford stated that "I will be instructing agents to sell the site shortly but don't expect a quick sale!". His decision was to obtain a property policy with a lower premium and on monthly instalments. Mr Beresford nevertheless wanted to maintain the D&O policy for the protection that it gave him as a director.

30. As Mr Rees was away on holiday, Ms Goulding replied by email on 18 February 2014 in order to ask for further information regarding the placement of the new policy and to confirm the extent of the cover required. She informed Mr Beresford that Zurich had reduced the existing cover to FLEA cover only as the Premises were not occupied. This was reflected in the cancellation schedule, the effective date of which was 11 March 2014. She wrote:

> "… I am assuming the caretaker visits the premises daily…
>
> I am assuming that loss of rent is no longer required….
>
> We have as requested advised Zurich to reduce the building sum insured to £1,200,000 – they have asked for sight of the valuation to understand the basis on which the declared value has been set. Please could you provide this as soon as possible to enable a return premium to be provided …"

31. Mr Beresford replied to this email within the next two hours in the following terms:

> "… The premises are still occupied by the Administrators who assure me that have it insured for now. They are likely to be there until the end if [sic] March or even April. Once they have gone and plant and equipment is sold and removed I will appoint Me [sic] Alan Dudley as caretaker. As soon as the debenture [with Aldemore] is lifted we will sell the buildings as site.
>
> The valuation was verbal from a local surveyor but I will dig out correspondence for you in y [sic] event ..."

32. Mr Beresford's response is consistent with him working his way through Ms Goulding's email and answering each query. Incanite was not paying any rent and would not in the future be paying any rent and there was no suggestion that a new tenant might replace Incanite. AE submit that the response that Mr Beresford was intending to sell the buildings as soon as the debenture was lifted could only have been intended to mean that loss of rent cover was not required. I agree that this is

the only sensible way in which this email can be, and would at the time have been, read.

33. Mr Beresford has, however, asserted that there was a telephone call between himself and Mr Rees in which he responded to Ms Goulding's email and told him that loss of rent cover was required. This was referred to by AE at trial as the "Invented Phonecall". There is no contemporaneous record of this alleged telephone call. The first time that it was referred to was in a Letter of Claim served by Mr Beresford's third firm of solicitors, Mishcon de Reya, on 5 June 2019. That was more than five years after the event. Mr Beresford maintained that this telephone call took place in his written and oral evidence. I have no hesitation in rejecting this evidence. I did not find Mr Beresford to be at all convincing when he was cross-examined about it. His evidence was not consistent with the documentary evidence. Why, for example, did he not simply respond to Ms Goulding's email of 18 February 2014 to say that, contrary to her assumption, loss of rent cover was required? I am satisfied that he would have so responded had such cover in fact been required.

34. On 24 February 2014, after he had returned from holiday, Mr Rees replied to Mr Beresford's email of 18 February 2014 as follows:

> "… Hi Mark,
>
> Thank you for coming back to me.
>
> The only way that both the current buildings and Directors and Officers Liability policies can continue is by payment of the outstanding monthly premium to Premium Credit Ltd. Therefore, we will arrange for new policies for both [in] the name of Hamsard. However, there are likely to be drawbacks to new policies as per my previous letter. In terms of the buildings insurance, it seems that the properties are therefore occupied at present, is that the case? If the premises are occupied, it will dramatically reduce the cost of the insurance and ensure wider cover ..."

35. Mr Beresford responded by email that same day and explained the Premises would be occupied by the Administrators for at least another 3 months, after which he would retain a caretaker. Mr Beresford again stated: "we are shortly going to put the property up for sale and I support finding a new insurer as we don't have the funds to cover the arrears". There was no mention of any intention on the part of Hamsard to seek a further tenant or tenants for the property.

36. Quotations for the new cover were provided by Mr Rees to Mr Beresford on 5 March 2014, with two alternative quotations on the basis of the buildings being occupied or unoccupied:

(1) Option 1 was for "Standard property owner's buildings insurance including £5m property owner's liability. Cover is Fire and Perils including subsidence subject to £350 excess increased to £1,000 for subsidence. This is for an occupied property being used by the administrators only with no foundry activities." The premium was £3,003.56 per annum and the insurers, Towergate/Fusion, were

expressed to be "aware of the current position of the property". This option was accordingly, AE say, quoted by Towergate/Fusion on the basis that the Premises were being used by the administrators only.

(2) Option 2 was unoccupied property owners' cover limited to FLEA perils and subject to unoccupancy conditions. The premium was £4,255.30.

37. Neither option included cover for loss of rent or accidental damage and neither option was stated to include such cover. Both options were based on the £1.2 million reinstatement building value as instructed by Mr Beresford. This reduction in building value had raised red flags for Mr Rees who urged caution in the 5 March 2014 email and explained the consequences of reducing the sum insured: "If I may urge caution with regards to the sum insured because this isn't the market sale value. In the event of a claim the insurers will survey and if they believe that the sum insured is insufficient to reinstate all the buildings they can apply average. The average clause means that the claim would be reduced by the same proportion of the under insurance".

38. AE was at that time coming under significant pressure from Premium Credit to cancel the buildings insurance and D&O liability policy. Mr Rees informed Mr Beresford that Hamsard would need to make a decision as to whether to continue with those policies or to replace them with one of the quoted options by 7 March 2014. Mr Beresford telephoned Mr Rees and instructed AE to cancel the Zurich Policy and place cover as per Option 1. Mr Rees recorded these instructions in an email dated 11 March 2014 and confirmed that the insurance had been placed on the basis the Premises were occupied by Administrators for "administrative use only". It was made clear that if the Premises became unoccupied for more than 14 days, Hamsard would need a new policy.

39. Mr Rees then proceeded to complete the proposal form for Option 1 through the Policyfast online portal on 11 March 2014. Particular points of note with regard to the completed proposal form are that:-

(1) Mr Beresford was named as proposer, and Hamsard was given as his trading name;

(2) The property was said to be let to others on a 6 month tenancy agreement;

(3) The property was said not to be within 250 metres of a canal;

(4) Under the "Covers required and sums insured" section of the proposal form appeared the following

"… Buildings sum insured	**£1200000**
Landlords Contents Sum insured	**£0**
Loss of rent per annum	**£0**
…	
Accidental Damage Cover for Buildings Insured	**No**
Accidental Damage Cover for Landlord's Contents	**No** …"

The proposal provided that the Insurer assumed, for the purposes of the quotation, that the Proposer (i.e. Mr Beresford) had never been subject to bankruptcy proceedings or any mandatory or voluntary insolvency proceedings. It further provided that "any material fact, which is information that may influence the Insurer in the acceptance and terms provided, has been disclosed and recorded".

40. Ms Goulding sent the Policy Schedule, Key Facts and Policy wording documents to Mr Beresford under cover of an email dated 19 March 2014. In her covering email she asked Mr Beresford to "read through [the documents] to make yourself aware of the policy terms conditions and warranties and to ensure the cover given meets with your requirements (failure to comply with a condition or warranty can invalidate your policy cover)" and to contact AE in the event that any amendments were required.

41. Mr Beresford denies ever receiving this email at the time. This denial was first made some five years after the event. It was not, however, suggested by Hamsard that AE had either not prepared the email or had not sent it. In their written Closing Submissions Hamsard for the first time submitted that, given its lengthy attachments, the email might have bounced back. They relied on AE's failure to call Ms Goulding, which meant that they could not ask her whether the email had bounced back, and also upon the inadequate disclosure that AE had given. Against this, it was however admitted in Hamsard's Amended Particulars of Claim that the email was received although it was said that the Statement of Facts attached to it was not seen by the Claimant "for several days". I find that Mr Beresford did receive the email at the time it was sent.

42. In the event, AE managed to maintain the D&O policy with Ace, and Hamsard subsequently renewed the D&O policy for a further 12 months.

43. The Premises were in poor condition in March 2014 and it is clear from the evidence that they were already unsuitable for letting before the removal of any equipment. On 27 March 2014 Mr Beresford contacted both Bulleys Chartered Surveyors ("**Bulleys**") and Bond Wolfe Ltd ("**BW**") and requested quotes for their possible appointment as managing agent of the Property. Mr Perriton of Bulleys replied, "I am sure we could assist on a sale but not on a rental basis unless you are intending to undertake a full scale refurbishment/ redevelopment on site". Mr Bassi of BW replied, "I would however stress to you that a number of the buildings would need to be brought up to a let-able state before such figures could be realised". It was, therefore, the case that both Bulleys and BW considered that the Premises were not in a condition in which they could be let.

44. Bulleys also visited the Premises in April 2014 before sending a more detailed letter to Mr Beresford on 28 April 2014. Mr Perriton noted that plant and equipment was in the process of being removed during their visit but did not suggest that this was worsening the condition of the Premises or causing damage. Mr Perriton's opinion was that "in respect of a rental disposal of the individual units, I think this would be extremely difficult to undertake without significant work involved on the site and it would need careful consideration with regards to the cost involved".

45. The Premises were handed back to Hamsard by the Administrators on 13 May 2014. On 29 May 2014 Mr Rees received a call and an email from Mr Beresford stating that the Administrators had left the Premises but had left behind mess and damage.

Mr Beresford stated this damage had been caused when plant and equipment was removed from the Premises.

46. Mr Rees replied the same day to inform Mr Beresford that the insurers would need to know what damage has occurred and why he believed it was caused by the tenant (administrator). He further stated that Policyfast would provide full cover for 45 days from the date when the Premises became unoccupied, and then FLEA cover would apply. Mr Beresford forwarded a report prepared by Bulleys to AE on 2 June 2014 which stated that "the Administrators have caused significant damage to the building" and left a large amount of debris. The report included a quotation for the general clean up and repairs provided by Humphries Demolition Ltd ("**Humphries**") to a total of £274,500.

47. Mr Rees informed Mr Beresford on 3 June 2014 that: "Looking at the report I do not believe that the insurers will consider this to be a claim under the policy. The policy provides cover for damage caused by an insured peril such as fire, lightning, storm, flood, theft etc but this seems to be more of a maintenance problem or lack of care caused by the tenant at the time". Mr Rees said, however, that he would notify the insurers about the possible claim and see how they responded. The report was forwarded to Policyfast and Fusion on 3 and 4 June 2014. Ms Goulding chased Fusion for a response on 17 and 20 June 2014. On 26 June 2014 Fusion confirmed they had appointed Questgates Ltd ("**Questgates**"), a firm of loss adjusters, to investigate the claim.

48. On 30 June 2014 Ms Goulding sent Mr Beresford the D&O policy documentation issued by Ace to his email address. As before, Ms Goulding asked Mr Beresford to read through the documentation to ensure the cover met his requirements and to contact her if he had any queries. Mr Beresford replied some 12 minutes later, in order to raise a query about one of the documents.

49. Mr Bishop of Questgates visited the Premises on 15 July 2014 with Mr Rees and Mr Beresford in attendance. Mr Rees said in his witness statement that the damage was "mainly a housekeeping issue" rather than damage that would be covered under the Fusion Policy. Questgates prepared and sent to Fusion a preliminary report on 17 July 2014, which was then updated on 24 July 2014. Questgates stated that as a precautionary measure in relation to a possible loss of rent claim they would "seek the appropriate support documentation to show the rent would have been due to be paid during the relevant interruption period". They had apparently not appreciated that there was no loss of rent cover under the Fusion Policy. Questgates suggested that underwriters should make an overall precautionary reserve of £338,650. On 24 July 2014 Mr Bishop sent a letter to Mr and Mrs Beresford requesting further information, including a copy of the Lease. On 10 July 2014 Fusion notified Policyfast that cover would continue but that, as the Premises had been empty for more than 30 days, the cover would be restricted to FLEA perils only, with an excess of £1,000.

50. In July 2014, Mr Beresford informed AE that he had a new prospective tenant for part of the Premises. Mr Rees called Policyfast to establish whether they would continue the policy with the proposed new tenant in place. In early August 2014, the new tenant, A to Z Waste Management Ltd, moved into part of the Premises and Fusion was accordingly notified. On 8 August 2014, Policyfast informed AE that the tenant's business in waste management was not an acceptable trade and that they would not be able to provide cover for the Premises as a consequence. At around this time, Mr Rees phoned Policyfast and confirmed that they had been told that Incanite was in administration during the quotation/placement process for the Policy.

51. AE started the process of obtaining quotations for new buildings insurance but advised Mr Beresford that given the ongoing issues with the Premises the only avenue available would be with the Lloyd's market. Despite casting the net as wide as AE could the only insurer who was prepared to cover the risk was Amtrust. Amtrust indicated that they would be prepared to insure the Premises for a premium of £48,000, with an excess of £25,000, to a line of up to £500,000 sum insured. The Premises were subsequently insured via a different broker for FLEA perils only for the same sum insured (£1.2m), and without cover for loss of rent.

52. On 28 July 2014 Mr Beresford emailed AE a series of invoices for works, including engineering, electrical and security at the Premises, to be "processed". On 30 July 2014 Mr Beresford forwarded AE a schedule of works quoted by Fox Industrial Limited "to restore the buildings to an empty shell with no debris, with essential repairs only, to allow weather proofing and a safe and operational electrical system. The buildings may then require fairly extensive refurbishment if they are to be relet". The price for these proposed works was quoted at £590,700.

53. On 5 July 2014 Mr Beresford forwarded AE a quote from Humphries, dating from 23 May 2014, for £144,500 for clearance of the contents of the Premises which had been left by the Administrators. On 1 September 2014 he emailed AE a further quote from Jenmar Construction Ltd dated 23 August 2014, for reinstatement works for about £300,000. On 30 September 2015 Mr Beresford emailed Mr Rees, stating that "... the quotes that we submitted were put together by primary contractors working for Hamsard but many elements of the quotes we think we could possible [sic] do cheaper ..."

54. On 5 November 2014 a telephone note from Ms Goulding records that Mr Beresford had appointed a firm of solicitors specialising in insurance. This was Wansboroughs. On 13 November 2014, Mr Beresford advised Mr Rees that he had been asked to respond to a letter from the Financial Ombudsman Service (**"FOS"**) and he asked if he was insured for loss of rent. Mr Beresford stated that his "view [was] that even if the policy excludes [loss of rent cover], the delays warrant consideration". AE submitted that it was reasonably to be inferred from this request that Mr Beresford knew that the Fusion Policy did not include loss of rent cover. I agree.

55. Mr Beresford's email of 13 November 2014 stated that the "administrator settled and has paid on £40,000 rent for the period of their occupation". AE said that this was untrue and that this lie was required to support Mr Beresford's then claim under the Fusion Policy and/or his FOS complaint. I am satisfied that Mr Beresford's assertion is incorrect. The final Administrators' report shows that the payment of £40,000 was an agreed settlement for Hamsard to release its claim over the £67,500 (plus VAT) of plant and machinery that Mr and Mrs Beresford had transferred from Incanite to Hamsard, purportedly in lieu of unpaid rent for periods in 2013, that is to say before the Administrators were appointed. The late disclosed settlement, which AE had been asking for since 2020 but which was only disclosed on the eve of the trial, shows that it was also agreed that the settlement would cover any rent otherwise payable by the Administrators. It had, however, been expressly agreed between the Beresfords and Aldemore that no rent would be paid during the period of administration.

56. Also on 13 November 2014 Mr Rees replied that "the policy did not provide cover for loss of rental income because the premises were unoccupied". Mr Rees explains in his witness statement that he meant by this that there was no insurable interest when the Fusion Policy was placed, because there was no tenant, Incanite having failed and the Lease having terminated.

57. On 17 November 2014 Fusion sent a letter to Mr Beresford notifying that they would be avoiding the Fusion Policy ab initio on the basis of the non-disclosure of:

(1) Mr Beresford's involvement with prior failed companies, namely Incanite, Surecast, and Feldaroll; and

(2) The fact that the tenant, Incanite, was in administration.

This was later confirmed in a letter from Fusion to Mr and Mrs Beresford on 27 March 2015.

58. Mr Beresford met with Mr Rees on 28 April 2015 in order to discuss various potential claims, including a possible claim by Hamsard against AE, although he had apparently been advised not to pursue it, presumably by Wansboroughs. Mr Beresford advised Mr Rees at this meeting that the legal advice he had received was that "it would be difficult to successfully claim against AE insurance brokers because AE has sent the policy details and Statement of Fact and [Mr Beresford] did not check the documents" and that he had therefore decided not to pursue AE. He did not suggest at this meeting that he had not seen the policy details and Statement of Facts at the time.

59. On 28 May 2015 Mr Beresford made a complaint against QBE to the FOS, saying that: "QBE have declined to pay our claim despite us now having evidence from the broker to show that the policy was quoted on the basis the THE [sic] ADMINISTRATORS ONLY were in occupation".

60. On 1 October 2015 Mr Jeremy Heron, a financial adjudicator at the FOS, sent his findings to Mr Beresford. Mr Heron found that "you do not appear to have been asked at any point [on the SOF] whether you had been previously connected with a

company that [has] gone into administration" though Mr Heron went on to find that such information should nevertheless been disclosed. Mr Heron therefore declined to ask Fusion/QBE to amend its decision to avoid the Fusion Policy. AE were highly critical of Mr Heron's conclusions before me.

61. In his response to Mr Heron of 5 October 2015, Mr Beresford rightly pointed out that insurers must have known about the administration of the tenant/ Incanite as the Fusion Policy was quoted on the basis "the administrators are in occupation only". Mr Heron found that this did not change his conclusions. He said in his reply of 15 October 2015 that "it must be borne in mind that, in the knowledge that Incanite was in administration, you may have been unable to obtain cover on the foundry premises from any of QBE's competitors as well". I agree with AE's submission to me that this illustrated muddled thinking on the part of Mr Heron. The absence of an operating foundry in fact reduced the risk and, provided the premises were occupied (here by the administrators), would not affect cover. It does not seem that this point was raised at the time by Mr Beresford or, indeed, by Mr Rees.

62. Hamsard then instructed a second firm of solicitors, Edwin Coe. Edwin Coe sent a Letter of Claim dated 19 November 2015. There was no mention of the "Invented Phonecall" in the Edwin Coe Letter of Claim.

63. The Premises were sold in about July 2016 for, according to Mr Beresford, £705,000. The deferred consideration owed to Mr Howell seems to have been paid in September 2020.

64. It appears there was a fire at the Premises in November 2016, following which the Premises were completely redeveloped as a Mercedes commercial vehicle dealership and parking lot.

65. Hamsard then took no action until 5 July 2019 when Mishcon de Reya, Mr Beresford's third firm of solicitors, sent AE's solicitors a replacement Letter of Claim. It was in this letter that the "Invented Phonecall" was mentioned for the first time.

66. In mid 2020, Hamsard instructed its present, and fourth, firm of solicitors. They issued the claim on 22 December 2020.

The law

67. There is no dispute between the parties as to the scope of the duties owed by AE as broker to Hamsard. They are well established in the authorities to which I was referred.

68. In *Standard Life Assurance v Oak Dedicated Ltd* [2008] Lloyd's Rep IR 552, Tomlinson J (as he then was) held at [102] that the following duties were uncontroversial:

> "… (1) It is the duty of a broker to identify and advise the client about the type and scope of cover which the client needs and, in doing so, to match as

precisely as possible the risk of exposures which have been identified within the client's business with the coverage available.
(2) Having identified what cover the client needs, it is the broker's duty to arrange insurance cover which clearly meets those requirements.
(3) If the cover which is needed by the client is not available, the broker must take care to ensure that the precise nature of what is and is not covered is made entirely clear to the client.
(4) In relation to the preparation of the policy, the broker must be careful to ensure that the policy language clearly encompasses the needs of the client.
(5) The duties of the broker on the renewal of an existing policy are no different from on the initial placement, and at each renewal the broker must ensure that the cover arranged clearly meets the client's needs in most appropriate manner ..."

69. In *Dunlop Haywards (DHL) Ltd & Others v Barbon Insurance Group Ltd* [2009] EWHC 2900 (Comm), Hamblen J (as he then was) held at [168-169] that the following duties are duties which it would generally be expected that an insurance broker would owe:

"… (1) to exercise reasonable care and skill in the fulfilment of its instructions and the performance of its professional obligations;
(2) carefully to ascertain the client's insurance needs and to use reasonable skill and care to obtain insurance that met those needs;
(3) carefully to review the terms of any quotations or indications received;
(4) to explain to the client the terms of the proposed insurance; and
(5) to use reasonable skill and care to draw up a policy, or to ensure that a policy was drawn up, that accurately reflected the terms of the agreement with the underwriters and which was clear and unambiguous so that the client's rights under the policy were not open to doubt …"

70. In *Jones v Environcom Ltd (No 1)* [2010] PNLR 27, David Steel J held at [54-56] that:

"… a broker:
(a) must advise his client of the duty to disclose all material circumstances;
(b) must explain the consequences of failing to do so;
(c) must indicate the sort of matters which ought to be disclosed as being material (or at least arguably material);
(d) must take reasonable care to elicit matters which ought to be disclosed but which the client might not think it necessary to mention.
All this flows from the requirement that the broker should take reasonable steps to ensure that the proposed policy is suitable for the client's needs. By definition, a policy which is voidable for non-disclosure is not suitable …"

71. The application of these principles will necessarily depend upon the facts of the case.

The issues

72. The parties had identified 31 issues for determination at trial. I encouraged them to agree a rather more wieldy list and they slimmed it down to seven issues. I agree that this list reflects all of the issues that I need to decide.

Breach of duty

Issue 1(i): Was AE in breach of duty in respect of the alleged non-disclosure of the association of Hamsard's Directors with prior failed companies (Incanite, Surecast and Feldaroll)?

73. Hamsard claim that as a matter of fair presentation of the risk AE ought to have disclosed Mr Beresford's association with Incanite, Surecast and Feldaroll. Mr Rees did not deny that he was aware of Mr Beresford's involvement with these companies. Hamsard contend that Mr Beresford's involvement with these three companies ought to have been disclosed in response to the question "Are there any material facts that the insurer should be made aware of?" Mr Hartigan accepted in cross-examination that the involvement of a director of a company with three insolvencies or administrations in recent years is something that would be of material interest to an underwriter.

74. AE rely upon a defence of waiver pursuant to section 18(3)(c) of the *Marine Insurance Act 1906* ("**The 1906 Act**"). Section 18(3)(c) of the 1906 Act provides an exception to the principle that an insurer may avoid the contract of insurance in the event of a material non-disclosure if there is "any circumstance as to which information is waived by the insurer".

75. AE's argument arises in this way. The Statement of Facts dated 17 March 2014 provided as follows:

> "… We are assuming for the purpose of this quotation, the following information:
>
> 1. You, the Proposer or any named persons on this policy have not … been declared bankrupt or are subject to bankruptcy proceedings, any voluntary or mandatory insolvency…"

This assumption asks for confirmation of the position of Hamsard, Mr Beresford and Mrs Beresford. It seeks confirmation of their position only. None of them had been declared bankrupt, been in administration or subject to voluntary or mandatory insolvency proceedings. The assumption was, therefore, true for them. Having sought confirmation as to whether Hamsard, Mr Beresford and Mrs Beresford had been declared bankrupt, been in administration or subject to voluntary or mandatory to insolvency proceedings, but not having enquired as to whether any companies which they had owned or been directors of had been in administration, AE submit

that the underwriters had thereby waived disclosure as to whether any companies which they had owned or been directors of had been in administration. Having restricted the ambit of their request for confirmation, AE argue that Fusion had thereby waived disclosure of further material information beyond the request. AE submit that they were, therefore, under no duty to provide such information.

76. Hamsard say in their closing submissions that this argument was unpleaded and that it not open to AE to rely upon it. I agree that it is unpleaded. It was, however, raised by AE in their written opening and had been adverted to by Mr Hartigan in his expert's report served some three months before the trial. Moreover, it was addressed in some detail in Hamsard's oral opening submissions and no pleading point was raised by them at that time. I consider that AE should in these circumstances be permitted to take the point. It is in any event a pure point of law.

77. AE rely upon the principle summarised in *MacGillivray on Insurance Law* (15th Ed) at 16-083:

> "… if an insurer asks whether individual proposers have ever been declared bankrupt, they waive disclosure of the insolvency of companies of which they have been directors …"

That principle (as set out in an earlier edition) was, AE say, approved by the Court of Appeal in *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705 at [17]: "if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the questions".

78. AE submits that the waiver in the present case is as clear or clearer than in *Doheny* and the later cases of *R&R Developments v AXA* [2010] 2 All ER 527 (Comm) and *Ristorante Ltd v Zurich* [2021] EWHC 2538. In *Doheny*, the proposal form had a "DECLARATION", the fifth of which was: "5. No director/partner in the business, or any Company in which any director/partner have had an interest, has been declared bankrupt, been the subject of bankruptcy proceedings or made any arrangement with creditors." The Court of Appeal (obiter) agreed that the fifth declaration applied only to individuals rather than companies and that the insurers had waived disclosure of any information about the solvency of the companies with which the individuals had been connected: see Longmore LJ at [21], Sir Christopher Staughton at [29] and Potter LJ at [37].

79. In *R&R v AXA* the insured was asked: "Have you or any …Directors either personally or in connection with any business in which they have been involved …[e]ver been declared bankrupt or are the subject of any bankruptcy proceedings or any voluntary or mandatory insolvency?" The insured answered in the negative. Insurers sought to rely on the fact that one of the directors of the insured had been the director of a company that had been placed in administrative receivership. The court held that on a proper construction of the question, it related to the insured company and its directors alone [30]-[32]. The Court further held that any requirement to provide

information about the insolvency of companies with which the directors had been involved had been waived [42].

80. The conclusions in *Doheny* and *R&R v AXA* were not altered by general declarations that: "I/we understand that any material fact, which is information that may influence the Company and the acceptance and terms provided, has been disclosed and recorded". The same conclusion was also reached by Snowden V-C (as he then was) in *Ristorante Ltd (t/a Bar Massimo) v Zurich Insurance Plc* [2021] EWHC 2538 at [91]. He held that, having specified the persons in respect of whom a previous liquidation would be disclosable, the insurer thereby limited its right of disclosure in respect of other unspecified persons or companies which had been placed into liquidation. He also rejected at [95] the insurer's submission that the position might be different where the policy was arranged by and through an insurance broker.

81. Hamsard sought to distinguish this case from the preceding authorities by submitting that AE had put Mr Beresford front and centre as the proposer and main object of the risk assessment and it was therefore very much relevant and disclosable that he had previously been involved with other companies that had been insolvent. I do not agree. The question that was asked on the proposal form was clear and the reply given to it was correct. Had Fusion wished to have any further information as to whether the insured and the proposer had any interest in businesses which had been declared bankrupt or had made arrangements with their creditors then it could have asked. It did not do so.

82. I am satisfied that Fusion had waived disclosure of any further material information beyond that requested by them and that there was, therefore, no duty upon Hamsard (or AE) to provide such information.

Issue 1(ii): Was AE in breach of duty in respect of the alleged non-disclosure of "the Administration status of the occupying tenant Incanite"?

83. Hamsard contend that AE was in breach of duty in failing to disclose to Fusion that Incanite was in administration. AE say that Fusion were informed of this by Mr Rees.

84. This is a relatively narrow issue. It was not in the event disputed by AE that the fact that Incanite were in administration ought to have been disclosed to underwriters. The only question that I have to decide is whether Mr Rees did inform Fusion that Incanite were in administration. Fusion have said that they were not so informed.

85. AE's failure either to make or to retain a broking file means that there is no contemporaneous evidence of what was, or was not, said by Mr Rees to Fusion at the time that the risk was placed by him on Hamsard's behalf. AE submit, however, that the contemporaneous documents, supported by the experts' views on what they

show, demonstrate that Fusion knew that the Property was occupied by Administrators only.

86. The first document upon which AE relies is Mr Rees' email of 5 March 2014 (see [36] above) which provided Mr Beresford with the quotations for insurance that Mr Rees had received. Mr Rees describes Option 1 as quoted on the basis it was "an occupied property being used by the administrators only with no foundry activities". Mr Rees identified the basis of the quotation so as to give Mr Beresford the opportunity to correct him if the Premises were not occupied or if he intended to restart foundry activities. AE submitted that the likelihood was that Mr Rees had identified that position to Fusion. A decade after the events, Mr Rees neither remembered nor purported to remember exactly what happened. However, AE submitted that the probability is that there was such a call in order for Mr Rees to provide the information in the email:

(1) There must have been such a call for Mr Rees to obtain the quoted "Premium is £2,963.56 plus a £40 admin fee, total £3,003.56 per annum."

(2) Given that Mr Rees was taking the trouble to provide quotations from two different underwriters, with Options 1 and 2 for the Premises being described either as "an occupied property being used by the administrators only with no foundry activities" or as "unoccupied", the probability is that he informed the respective underwriters of the two different situations of the property;

(3) Similarly, there was probably a call to Fusion/Policyfast in respect of Option 2. Again, there is no documentary record with Fusion/Policyfast but, AE contend, it is to be inferred that this is where the policy condition quoted in Option 2 comes from and equally the annual premium of £4,255.30.

87. AE further refer to a phonecall between Mr Beresford and Mr Rees in which Mr Beresford gave his instructions to cancel the Zurich Policy and place the Fusion Policy in accordance with Option 1. This phonecall is recorded in the email of 11 March 2014. Upon Mr Beresford confirming his instructions to proceed with Option 1, Mr Rees repeats in his email that the basis of the insurance was that the Premises were for use by the Administrators for "administrative use only". AE submit that given that Mr Rees took the time to reiterate and emphasise the basis of insurance to Mr Beresford it is likely he had informed Fusion.

88. Less than six months later, in the transcript of a call between Mr Rees and Policyfast in August 2014, Mr Rees stated, "we told you that the administrators were in the building dealing with the disbursal of the assets of the tenant which is Incanite Foundries…" AE submit that Mr Rees would not have informed Fusion that he had told them of the position if he had not done so.

89. Hamsard invite me to find that Mr Rees' evidence was untruthful and that Fusion/Policyfast were never informed of Incanite's administration by AE. They rely on the fact that Mr Rees did not challenge Fusion's letter to the Beresfords of 17 November 2014 in which they said that they had never been told that the tenant was in administration. Mr Rees fairly accepted that a broker had a duty to assist his client in helping to present a claim. On the one hand, I find it surprising that such

a challenge was not made if Mr Rees really did consider that he had informed underwriters of the administration. On the other, Mr Beresford did on several occasions assert to Policyfast/Fusion that Mr Rees had informed underwriters of this. It is to be inferred that he did so because that is what Mr Rees had told him.

90. The position is not clear on the factual evidence. I do not consider the evidence of the experts to be helpful in resolving what is a purely factual question. I find, on balance, that Hamsard have failed to establish that Mr Rees did not inform underwriters that Incanite were in administration.

91. It follows from my finding in relation to this issue that Hamsard have failed to establish that AE were in breach of their contractual and tortious duties as a competent broker.

Issue 2: Was AE in breach in failing to place loss of rent cover for Hamsard on 11 March 2014?

92. It is common ground that loss of rent was not covered by the policy. Hamsard submits that AE was in breach of duty in failing to place loss of rent cover for Hamsard on 11 March 2014. AE says that loss of rent cover was not required: Hamsard had received no rent for some months, that it had been agreed that the Administrators would not be paying rent, that there was no paying tenant in place or likely to be in place, and that it was Hamsard's stated intention as at 11 March 2014 that they intended to sell the Premises. Further, as I have already found, Ms Goulding asked for confirmation that loss of rent cover was not required and implicitly received such confirmation.

93. Incanite ceased trading on 18 December 2013. It then owed £2.6 million to its creditors. Although Mr Beresford suggested in his oral evidence that Incanite continued to pay rent until August 2014 there was no evidence to support this and indeed he eventually admitted that there was no prospect of rent being paid beyond the appointment of administrators or even in January. I am satisfied that Incanite had stopped paying rent to Hamsard in 2013. The administrators record that assets had been transferred from Incanite to Hamsard in lieu of unpaid rent in 2013.

94. That Incanite had stopped paying rent in 2013 is consistent with the contemporaneous facts. Incanite had cash flow issues from mid 2013, it ceased paying its utilities bill in August 2013 and was unable to meet payments to suppliers at some point after that.

95. It is stated in the Administrators Report that it had been agreed between the Beresfords and the Administrators/Aldemore in January 2014 that no rent would be paid during the period of administration. Mr Beresford could not explain why the Administrators would write that rules of engagement had been agreed with the Beresfords after their meeting if in fact no such agreement had been reached. I am satisfied that it was in the Beresfords' interest to agree with Aldemore that no rent

would be paid. This was only rational. There were creditors who were owed £2.6 million, Mr Beresford could not have expected any continuing payment of rent, and it therefore made sense for Mr Beresford to agree no rent should be paid so that Aldemore could be repaid in full. Mr Beresford agreed that he needed Aldemore to be paid in full and to recover everything owed in order to avoid them putting Hamsard into administration as entitled by the debenture.

96. Hamsard drew my attention to a Deed of Settlement that was agreed between them and the Administrators on 26 September 2014. This was disclosed very shortly before the trial commenced. They claimed that it supported their assertion that the Administrators had paid rent. I do not agree. The Deed of Settlement released the parties from all actions, claims, rights, demands and set off in relation to: a) "the purported transfer of Plant from the Company to Hamsard in January 2013" in the sum of £81,060; and b) "Hamsard's claim for rent as an expense of the administration of the Company". I am, however, satisfied that the Administrators did not agree to pay rent.

97. The contemporaneous documents establish that AE were instructed three times by Mr Beresford that the Premises would be sold rather than relet: twice on 18 February 2014 and again on 24 February 2014. I find that all further references to the Premises up until the 27 March 2014 were directed towards their sale. It was only on 27 March that Mr Beresford asked BW if they would be interested in taking on the role of managing agent in relation to letting the properties. BW had already told Mr Beresford prior to the inception of the Policy that the Premises were not in a lettable condition.

98. I have already dealt with Ms Goulding's question in her email of 18 March 2014 in which she asked Mr Beresford "I am assuming that loss of rent is no longer required". I am satisfied that his response to this was that as "soon as the debenture is lifted we will want to sell the buildings as site", in other words he was saying "Yes" to Ms Goulding's assumption that loss of rent was no longer required. I also find that it could only have reasonably been understood to mean the same.

99. It is readily apparent from the above that cover for insurance for loss of rent was not required by Hamsard. It must also have been clear in these circumstances that Mr Beresford needed something more to support this claim. I have no doubt that this is why he came up with the story that he had instructed Mr Rees by telephone to place cover for loss of rent. Mr Beresford's evidence to me was that he could not remember what was discussed in any such phone call: "I can't remember a specific detail… I can't be specific on anything on it. I'm not going to – I'm not going to guess as to the content of that conversation some nine years ago now". In his witness statement, however, that is precisely what Mr Beresford did purport to do. On Hamsard's case the first time Mr Beresford would have been aware that loss of rent was not covered was upon receiving an email of 14 November 2014 from Mr Rees. His reaction on receiving this email shows no indication of surprise or disappointment of the kind Mr Beresford now alleges. I reject Mr Beresford's explanation that he was too shocked and distressed to express disappointment by

way of email. He in fact continued to instruct Mr Rees to place insurance for him for his new business until at least June 2015.

100. I have no hesitation in finding that AE were not in breach of duty in failing to place loss of rent cover for Hamsard.

Issue 3: Was AE in breach of duty in failing to explain adequately, or at all, to Hamsard the term of the Policyfast on-line Quotation Request and/or Statement of Facts as drafted by AE on behalf of Hamsard that responded "No" to "Accidental damage cover for buildings"?

101. Hamsard contend that AE failed to procure accidental damage cover for Hamsard in breach of its duties as a competent broker. Their case is that accidental damage cover had always been provided in the past and that if, for some reason, such cover could not be provided on this occasion then it was incumbent upon AE to explain why that was the case, in order to give Hamsard options. AE say that Mr Beresford never had any particular interest in accidental damage cover and that Hamsard had no need of such cover. AE further submit that it was in any event plain on the face of the Statement of Facts that the Fusion Policy did not cover accidental loss and that Mr Beresford made no complaint in respect of this at the time.

102. Mr Beresford told me that since Mr Rees' email of 5 March 2014 did not expressly state it was not for all risks cover he assumed that it was for all risks cover and that the sentence in the email which said that "cover is for Fire and Perils including subsidence subject to £350 excess increased to £1,000 for subsidence", told him that the excesses for fire and perils and subsidence were £350 and £1000 respectively. He said "This reads to me that this is, I believe, an all risks policy, but the fire and perils have a higher excess". AE invite me to reject this evidence. Fire and Perils have a meaning that is well known in insurance law – they do not include accidental damage. If Mr Beresford did not in fact understand what Fire and Perils meant, he never queried it or showed any indication of that fact at the time.

103. It was common ground on the expert evidence that Mr Rees' email of 5 March 2014 contained a reasonable statement as to the cover which was going to be provided under Option 1:

(1) Ms Taylor's evidence was that Mr Rees' email contained a reasonable summary of the cover and that the full details were provided shortly after the cover was placed. Her opinion was that there was a danger of looking at things retrospectively and with hindsight as to what else could have been said, whereas it would be standard practice to use the terminology fire and perils to a commercial client. I find that her evidence should be accepted.

(2) Although Mr Flaxman had not seen or considered the 5 March 2014 email when he wrote his first report he confirmed that his new Opinion, as set out in his Supplemental Report, was that the email "made clear the reduced cover,

and the claimant then opts for that reduced cover". I was quite unconvinced by his attempt to withdraw from that evidence in re-examination.

104. I should say that I would under other circumstances have some sympathy for the view that the meaning of fire and perils might not be entirely clear to someone in Mr Beresford's position. The difficulty in the present case is that it is impossible for me to assess what Mr Beresford did or did not know about the cover he was being offered on 5 March 2014 in circumstances where other aspects of his evidence have been so unsatisfactory.

105. This is in any event not a consideration here because of the Statement of Facts for the Policy which was sent to Mr Beresford after the Policy was concluded. This clearly recorded "No" to "Accidental damage cover for buildings". AE submit that they took reasonable steps to confirm the scope of the cover, having already set out a summary of it in the 5 March and 11 March 2014 emails and by sending Mr Beresford the Policy documents on 19 March 2014 and asking him to read them through and notify them if he had any queries. As I have already said, Ms Goulding's email of 19 March specifically requested that Mr Beresford "ensure the cover given meets with your requirements".

106. Ms Taylor said that the industry norm is for a broker to provide the documentation produced by the insurer to the client and to ask them to review it to ensure it contains no errors and meets their demands and needs. If Mr Beresford had any queries he was invited to contact AE. She said that AE had followed ordinary practice, and that it was then a matter of checking for the client rather than actually not understanding at all what was to be expected. I accept Ms Taylor's evidence and reject Mr Flaxman's evidence to the contrary.

107. I have already found that Mr Beresford had received the email of 19 March 2014 which appended the Statement of Facts and other policy documents. AE submit that it follows from this that if he failed to read or consider the documents which were sent to him, when he was advised to do so and to revert if he had any queries, then this was his own responsibility. That is just what he did when the D&O cover was sent to him on 30 June 2014: see [48] above. I find that Hamsard and Mr Beresford must have reasonably understood that they had a responsibility to check the information and ensure the cover met with their requirements.

108. AE relied upon the case of *O'Connor v B D B Kirby & Co* [1971] 1 Lloyd's Rep 454. This is authority for the proposition that where a broker's breach of duty consists of negligence in completing the proposal form, the subsequent negligence of the client in checking the form will exonerate the broker from liability. I consider that similar reasoning applies in the present case.

Causation

109. I have found that AE are not liable to Hamsard for any breaches of their duty to act as a competent broker. It is therefore strictly unnecessary for me to address the issues as to causation. I do so in the event that I am wrong in any of my findings in relation to Issues 1 to 3 above.

110. Before dealing with the issues as to causation it is appropriate first to consider the background against which they need to be considered. Hamsard and Incanite were in dire financial straits from the second half of 2013. Incanite had stopped paying E.ON and Hamsard. Hamsard had stopped paying Zurich. Mr Beresford sought to reduce his insurance premiums, first by asserting that the value of the Premises was less than that which he had previously declared and second, by changing underwriters because he could not afford to pay Zurich the sum of £3,645.45 which was outstanding in February 2014. He needed a cheap insurance policy payable in monthly instalments. He selected Option 1 of the two options quoted to him by AE on 5 March 2014. The annual premium was £3,003.56.

Issue 4: If there had been disclosure of (i) Mr Beresford's directorship of prior failed companies and/or (ii) that the Property was occupied by the Administrators of the occupying tenant Incanite, would Hamsard have obtained (a) the Fusion Policy or (b) alternative insurance cover, and if so, would such cover have covered the claimed property damage?

111. Hamsard submits that but for AE's breaches of non-disclosure of the directorships and/or Incanite's administration, the Fusion Policy is unlikely to have been available, but on the balance of probabilities another insurance provider would have given cover on the same terms. AE contends that no alternative insurer would have written accidental damage cover at a premium which would have been acceptable to Hamsard.

112. There is a marked difference of approach in the way in which the parties have approached this issue. Hamsard deal with the question on the assumption that alternative cover would have been obtainable had full disclosure of all material matters been given. They do not explicitly say that this would have been on the same terms as the cover provided by Fusion. AE instead primarily focussed upon the final question asked, namely whether any such cover would have covered the claimed property damage.

113. I will proceed on the basis that other insurers would have been prepared to insure Hamsard on the same terms as provided by Fusion had full disclosure been given. These terms, however, expressly excluded liability in respect of accidental damage. I am satisfied that alternative underwriters would have been, at the least, very reluctant to insure the Premises against accidental damage and would probably not have been prepared to do so. This is because of the poor condition that they were in. Mr Hartigan opined that in the unlikely event that an insurer would have been prepared to offer cover for accidental damage then it would have done so at a greatly increased premium and subject to survey. Such a survey would have revealed the condition of the Premises. Bulleys and BW had both advised Mr Beresford that the

Premises were not in a lettable condition. Mr Broad accepted in cross-examination that if the premises were in an unlettable condition then an insurer would not willingly give cover.

114. I find that such cover as alternative insurers might have been prepared to offer Hamsard would not have covered the claimed property damage.

Issue 5: On 11 March 2014 could loss of rent cover be placed for Hamsard and/or at any premium Hamsard was willing and able to pay?

115. Incanite was not paying rent. It had been agreed that the Administrators would not pay any rent. As at 11 March 2014 there was no prospect of anyone leasing the premises and Mr Beresford intended to sell the premises. In these circumstances Mr Flaxman agreed that there was no rent to be had and, therefore, no insurable interest in respect of loss of rent. He gave the following further evidence

> Q. I think you agree that advanced or anticipated loss of rent cover would be rare, expensive and not used except where there was a known anticipation of future rent being paid?
>
> A. Yes.
>
> Q. So that wouldn't apply here, would it?
>
> A. No.

116. I am unable to accept Hamsard's submission that the reality was that cover for loss of rent would have cost something similar to the Zurich policy. There was no reliable evidence before me as to what such cover would have cost save that it would have been expensive. We already know that Mr Beresford was not prepared to pay the Zurich premiums. I do not consider that he would have paid or, indeed, was in March 2014 in a position to pay whatever extra sum that he would have been quoted for loss of rent cover.

Issue 6: Whether (i) Mr Beresford would, if it had been explained, have asked for the accidental cover, whether (ii) accidental damage cover would have been available at all, or at what premium, and/or whether (iii) Mr Beresford would have been willing to pay the premium for the same.

117. I have already made findings in relation to question (ii) under Issue 4 above. I consider that accidental damage cover would probably not have been available at all and that, even if it had, it would not have been available at a premium that Mr Beresford was either able or prepared to pay in March 2014.

Loss

Issue 7: What is the quantum of Hamsard's claim?

118. I have found that Hamsard have failed to establish either liability or causation. I can therefore briefly summarise my findings in relation to quantum.

119. Hamsard's pleaded claim is for £2,648,769.99, made up as follows:

(1) Reinstatement costs of the Premises £1,512,500

(2) Loss of rent (20 weeks during reinstatement) £106,538.40

(3) Ongoing loss of rent (since the date, after 20 weeks, when reinstatement works ought to have been concluded) £1,745,711.60

(4) Damage to fixtures and fittings (assuming maximum cover under a valid policy in the terms of the policy) £10,000

Against these heads of claim Hamsard gives credit for the net sale price achieved for the Premises (un-reinstated) in the sum of £683,598.00 and for rent received in the sum of £42,382.01.

120. *Reinstatement costs.* This claim is in respect of the reinstatement cost of the damage allegedly done to the buildings on the Premises in May 2014 when equipment was removed and sold by the Administrators. There is no evidence before the Court of the damage actually done in May 2014 or of the nature and extent of the work that would have been required to repair it. I would at the very least have expected a detailed schedule of the work that needed to be done to have been prepared at the time. This was not done. Whilst I have no doubt that some damage was caused during the removal of equipment by the Administrators I am quite unable to assess just how much damage was done or what it would have cost to rectify.

121. *Loss of rent during reinstatement.* This claim is difficult to understand. The claim assumes that the reinstatement would have taken 6 months. However, no rent was being received and no tenancy was imminent at the time. Even if loss of rent cover had been obtained there would have been no recoverable loss of rent.

122. *Ongoing loss of rent.* This head of claim is in truth a claim for the alleged consequential losses of rent which would have been received by Hamsard had the Premises been fully let prior to their sale. The claim was not, however, pleaded in this way and I refused an application by Hamsard to amend their Particulars of Claim to put the case in this way at the outset of the trial.

123. I can, however, say that had the claim been open to Hamsard then I would have found against it. This is because consequential losses arising from non-payment of an indemnity are not usually recoverable in broker's negligence cases: *Verderame v Commercial Union Assurance Co Plc* [1955-95] PNLR 612; *Ramwade Ltd v WJ Emson & Co Ltd* [1987] RTR 72 and *Sprung v Royal Insurance (UK) Limited* [1999] 1 Lloyd's Rep 111. Hamsard drew my attention to the cases of *Arbory Group Ltd v West Craven Insurance Services (A Firm)* [2007] Lloyd's Rep IR 491 and *Manchester Building Society v Grant Thornton UK LLP* [2022] AC 783 and said that these were authorities supporting their claim for consequential losses. I do not agree. *Arbory* was a case involving business interruption insurance. *Manchester Building Society* is a case relating to the application of the SAAMCO principle in the context of the alleged negligent advice given by a firm of auditors. There is no mention of either *Verderame* or *Ramwade* in the judgments of the JSCs. The only reference to broker's negligence in the *Manchester Building Society* case is to the

case of *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] 2 All ER (Comm) 929. I consider that the editors of *Colinvaux's Law of Insurance* (13th Ed) are correct when they observe at §16-148 that "it follows from *Aneco* that there is no general rule that the broker cannot be liable for a sum greater than the amount of the lost cover, and that the sole question is whether the broker's duty extends solely to placing insurance cover of the type sought or whether the broker has also assumed duties akin to those of an investment adviser, the position found in *Aneco*". In the present case AE did not take on any extended duties beyond placing insurance cover of the kind sought by Hamsard. Nor has Hamsard pleaded that AE took on any such extended duties. Hamsard's losses are, therefore, restricted to the shortfall in the sum which would have been recoverable under the policy: see *Verderame*.

124. *Fixture and fittings.* The Fusion Policy provides cover for fixture and fittings in the sum of £10,000. Hamsard claims this as a direct loss that would have been recoverable under the policy had it not been avoided. AE simply say that there is no evidence in support of this claim. No evidence has been specifically drawn to my attention by Hamsard. I am, however, satisfied that if Hamsard had persuaded me that AE were liable for the breaches of duty alleged against them then I would have found this sum proven.

Conclusions

125. For the reasons that I have given above I dismiss Hamsard's claims.