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APPEAL REF: QB 2021 007

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM
THE COUNTY COURT AT KINGSTON-UPON-HULL
CLAIM NO F09YM920

Date: 28th March 2023

Before:
MR JUSTICE RITCHIE

- -

BETWEEN

DAVID FREDERICK CUCKOW

Appellant/Claimant

- and –

AXA INSURANCE UK PLC

Respondent/Defendant

John McDonnell KC and **Richard Bowles**, (instructed by SSB Law Solicitors) for the **Appellant/Claimant**
Leigh-Ann Mulcahy KC and **Christopher Knowles**, (instructed by Kennedys) for the **Respondent /Defendant**

Hearing date: 16th March 2023

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APPROVED JUDGMENT

Mr Justice Ritchie:

The background

1. This is an appeal from a judgment of HHJ Richardson dated 1.2.2021 after the trial of a claim for indemnity by the Claimant against the Defendant insurer under the *Third Party (Rights Against Insurers) Act 1930* (the 1930 Act).

2. The Claimant entered a written contract with a company called Mark Group Limited ("MGL") for the installation of cavity wall insulation (CWI) at his house in September 2012, after MGL or their agents or contractors had carried out a suitability survey. Hereafter I will call the contract and survey the "C&S documents".

3. Damp emerged in 2014 which the Claimant blamed on the CWI. MGL went into liquidation in October 2015 and Deloitte LLP ("Deloittes") were appointed as administrators. Deloittes failed, over the next 3 years, to identify and retain the Claimant's C&S documents and when the Claimant sent his letter of claim in October 2018 the documents were (allegedly) not in Deloittes' possession, power or control. AXA UK Plc ("AXA) insured MGL and were notified of the claim, so they asked Deloittes for the C&S documents because they considered that they were entitled to do so under the terms of the insurance policies which they had written for MGL's liabilities. Deloittes failed to hand them over or even to look for them. AXA then declined indemnity. The Claimant then sued MGL and obtained judgment.

4. Having obtained judgment, the Claimant sued AXA under the 1930 Act. The Judge dismissed the claim. The Judge construed the key clauses in the insurance policy: the Claims Notification Condition and the Claims Procedure Condition ("the Conditions") in a way that resulted in the conclusion that Deloittes (acting for MGL) were in breach by failing to supply the C&S documents to AXA after a reasonable request had been sent.

5. By a notice of appeal dated 24.3.2021 the Appellant seeks to overturn the judgment. There were 4 grounds of appeal served with the Notice of Appeal. Ground 1 was that the Judge did not construe the terms of the insurance policy correctly. The Appellant asserted that the Judge focussed on the reasonableness of the requests (wrongly) and should have focussed on whether the requests were breached. It was submitted that Deloittes only had to hand over documents which they had in their possession or power at the date of the request. They did not have the C&S documents so they were not in breach. Ground 2 was in the alternative and to the effect that if the Judge's construction was correct, and the loss or disposal of the C&S documents could lead to a breach of the policy terms, on the proper construction of the policy, in 2018 there was no breach because there was no finding of Guilty Disposal (defined as intentional, reckless or negligent disposal) and/or Deloittes had no Knowledge of Importance (defined in para. 11 below) about the documents. Ground 3 was a finesse of the Ground 2 assertion that

Deloittes' did not have the requisite Knowledge of Importance at the time when the documents were disposed of. Ground 4 was another extension of ground 2, Ground 2 asserting that Deloittes did not have Knowledge of Importance because of the Judge's findings of fact.

6. Permission to appeal was granted for all four Grounds by Lambert J on 26.1.2022.

7. The Appeal was listed for hearing in late 2022 but adjourned due to the ill health of the Appellant's leading barrister. A second skeleton was served by the Appellant further finessing the submissions on the Grounds and answering the Respondent's skeleton. Then, in early 2023, the appeal was adjourned again for the same reason. The Appellant filed and served a third skeleton argument 2 weeks before the hearing (whilst never amending or applying for permission to amend his Grounds of Appeal). In the third skeleton he relied on S.2 of the 1930 Act to aid in the construction of the Conditions (I shall define these below) in the policy. Further the Appellant asserted that the Conditions were not conditions precedent in law. Further still, the Appellant sought to amend Ground 2 to withdraw the concession that negligence was sufficient for Guilty Disposal, now asserting that only intention or recklessness would have been sufficient. I granted permission for the Appellant to rely on the third skeleton a matter of 2 weeks before the appeal hearing. Any application for permission to amend the Grounds themselves remained unissued and outstanding for the appeal hearing.

8. The Respondent submits that this Court should uphold the Judge's rulings in law.

9. There is no appeal against the Judge's findings of fact.

Bundles and evidence

10. I had before me the following bundles: an original appeal bundle, a supplementary bundle and an authorities bundle. Recently the Court received an updated appeal bundle and an updated supplementary bundle, then a bundle of skeleton arguments and finally a further bundle of authorities.

Definitions

11. I define the words "Knowledge of Importance" as the actual or constructive knowledge of MGL/Deloittes that the C&S documents and the information therein would be important to AXA's effective handling of their defence against any future claim which *might* be brought by the Claimant and AXA's ability to claim a contribution or indemnity against any sub-contractors or materials suppliers, so AXA would reasonably want to request MGL/Deloittes to provide them.

12. I define "Guilty Disposal" by MGL/Deloittes as causing or permitting of the loss or disposal of the C&S documents and the information therein with the requisite mental

state: intention, recklessness or fault-based carelessness, at a time when they also had Knowledge of Importance.

The issues in this appeal

13. The issues on this appeal were as follows.

Substantive issues

14. Did MGL breach the Conditions in its insurance policy in November 2018? This depended on the proper construction in fact and in law, of the policy. This involved consideration of whether:
    (1) The information in the documents existed at the time of the request;
    (2) MGL/Deloittes had Knowledge of Importance when the documents were lost or disposed of;
    (3) MGL/Deloittes effected a Guilty Disposal of the C&S documents;
    (4) The request for the C&S documents to be produced was reasonable; and
    (5) The Conditions were properly characterised as "conditions precedent" entitling AXA to refuse indemnity or were they merely written conditions entitling AXA to claim for damages for any loss they could prove.

Procedural issues

15. The procedural issue was whether the Appellant should be permitted to raise new points and/or amend the Grounds of Appeal to pursue arguments not made in the Court below. The Appellant submitted he should be permitted, on appeal, to advance the following arguments which were either not advanced at the trial or were conceded at the trial by the Claimant.

    (1) The Conditions were not conditions precedent.
    (2) The 1930 Act assists in the construction of the Conditions.
    (3) That MGL's knowledge at the date when the C&S documents were lost or disposed of was not Knowledge of Importance such that they were in breach of the Conditions (for various reasons).
    (4) That Guilty Knowledge had to be proved by AXA before they could establish breach of the Conditions.
    (5) That negligence was not sufficient to establish Guilty Disposal and hence breach, only intentional or reckless disposal would be sufficient.

Chronology of facts

16. The facts found by the Judge are not in dispute so I can set them out here in chronological order.

Before the request for the C&S document

17. In September 2012 the Claimant agreed with MGL to install CWI and signed a written contract. At para. 17 of the Judgment the Judge listed the directors of MGL as Chris Brazendale; Nathan Snowden-Merrills; William Rumble and Steve Crow. MGL "employed" (the Judge's words) technical sales advisers who carried out a suitability survey of the Claimant's house before the contract. It was not clear whether the use of the word "employed" was strict or whether MGL used subcontractors. The CWI work was paid for or subsidised by the UK Government. It was installed on the 13th of September 2012 at the Claimant's house. The Claimant was given a guarantee which he retained. The Claimant did not retain copies of the contract or the survey.

18. MGL entered into a policy of insurance with AXA on the 31st of March 2011 and that policy was renewed annually until it went into administration.

19. The Claimant noticed damp in his house in 2014 but does not appear to have done anything about it. The Judge made no findings of fact in relation to when this occurred but counsel for AXA informed me of this being in 2014, according to the Claimant's skeleton in the trial below.

20. Before October 2015 MGL started to receive claims in relation to defective CWI work.

21. In 2014 MGL had recorded a gross profit of £96.5 million and a net profit of £40 million. They had more than 1,000 employees. On the 7th of October 2015 MGL were placed into administration. Three partners of Deloittes were appointed as administrators and the team consisted in total of 12 staff, one of whom was Joe Barry.

22. On the 14th of October 2015 Deloittes agreed to sell part of MGL's business to Billsave UK Ltd, a new company set up by the same four directors of MGL set out above. Billsave were given by Deloittes a licence to occupy MGL's old headquarters in Leicester and some other properties.

23. As to retention and preservation of the CWI documents:

    (1) under that sale contract Deloittes required Billsave to retain the documents in the offices for which they were granted a licence to occupy by Deloittes.
    (2) It was a condition of the grant and the sale that Billsave would keep all of the documents in other properties which were <u>not</u> licensed to them in good condition and deliver them up upon reasonable notice to Deloittes.
    (3) MGL had 7,517 boxes of other documents stored at Stor-a-File which were not covered by the sale contract but Joe Barry gave evidence to the Court that there was an "informal agreement" with Billsave for those to continue to be stored at Stor-a-File for 12 months and then to be delivered up to the Deloittes.

24. On the 16th of October 2015 the landlord of the head office served Billsave with a notice to quit, giving them 24 hours to go. Joe Barry attended on the 17th of October 2016 and saw documents in large numbers strewn across the floor of the head office which was being cleared. Billsave then moved to two smaller offices. Joe Barry visited there and did not know where the documents from head office had been stored.

25. Stor-a-File provided Deloittes with an inventory of boxes. It showed 7,517 boxes and the contents of each box were described (roughly) on the inventory. Deloittes never inspected the boxes. In November 2015 (sic) MGL's account with Stor-a-File was transferred to Deloittes. Billsave had discussions with Deloittes in November/December 2016 about Deloittes wishing to obtain possession of the boxes. Joe Barry had communications with Stor-a-File at that time and they highlighted 383 boxes as "now available" for collection from Stor-a-File but they still held all of the other boxes. In cross examination Joe Barry said this:

> "A. That's correct, and as far as I can see from my discussions with Stor-a-File in November 2016, twelve months on, that was the case. That box listing (?) appeared to still be there, albeit with 383 boxes highlighted which we were told were now available for the administrators to collect.
> Q. So was your understanding in November 2016 that all 7,517 boxes were still there, but it was being expected that you would take away 383 of them?
> A. That was my understanding, although having read the email exchanges it wasn't explicitly stated what remained of the other 7,100 and so boxes.
> Q. Based on that conversation with Stor-a-File, presumably the 7,517 boxes are still there, still with Stor-a-File, are they?
> A. I can't comment on that. What I would say is that on the schedule that I was provided in November 2016, the list of 7,500 boxes remained and there were 383 lines highlighted in yellow which had also been copied into a second tab. And it was those 383 boxes that my attention was directed to. I then asked Charles Hamilton, who worked in the legal team, whether indeed it was only 383 or whether the list that concerned me and Deloitte was the 7,500 and he confirmed that only 383 were available for the administrators to collect."

Just a little later in cross examination he gave this evidence:

> "Q. Okay. Now, you wrote to BillSave requesting documents in December 2016. Is that right?

> A. At one point, through a combination of emails and letters, I was probably requesting, or myself or my team were probably requesting information from BillSave, multiple times a week at that stage. So yes, that does sound correct.
> Q. I do not mean on individual claims, I mean in terms of getting the records that they had agreed to store, back?
> A. Okay. I understand. Yes, so specifically in relation to the boxes that were held at Stor-a-File, I wrote to Nathan Merrills in November 2016 and agreed to take back whichever boxes he no longer required, and that correspondence commenced in November and I believe the account was actually switched over in February of 2017.
> Q. Okay. We have an email chain attached to your statement, it is at page 598 to 599 of the supplemental bundle. It is your exhibit page 36 to 37.
> A. Thank you. 13th
> Q. If we look at page 37 of the earliest email in time, yours to Nathan Merrills of December 7th 2016, you say: "I have received your letter dated December regarding Mark Group documents currently in your possession. We would like to arrange for our storage provider, Iron Mountain, to collect these as soon as reasonably practicable. Can you advise exactly how many boxes there are, please?" Then you have got a response on page 36, I think you are working from your exhibit---
> A. Yes. 16th
> Q. --- on the from Charles Hamilton: "Attaching the inventory record that we hold. Unfortunately, we do not hold anything more detailed. These are being held by a third party, Secure Storage. We would be happy to allow an inspection visit". Then you write back saying "To clarify, am I right in thinking we are talking about anything highlighted yellow, 383 lines, rather than the 7,317 boxes on your records list? Are you going to be able to provide me with contact details for your storage provider, please?" Then he confirms: "That is correct, it is only the 383 highlighted boxes". You do not ask there what happened to the 7,135 boxes that you had an inventory for that were not highlighted, do you?
> A. That's correct. No, I don't ask that question."

A little later Joe Barry gave this evidence:

> "Q. Okay. We will come to the itinerary in a second. You say in your statement at paragraph 25, the last sentence: "No explanation was provided to me by BillSave as to why only 383 of the boxes

> were available". That suggests you asked for an explanation but it does not sound like you did ask for an explanation. Is that correct?
> A. To the best of my memory I did not ask for an explanation."

26. Joe Barry was then asked about the boxes identified as the 383 "available" ones. They were marked on the inventory "NB" so were relevant to the New Build business (which had been sold to Billsave), not to Deloittes. Of the 7,135 not marked and so not included in the 383, some were marked "CWI" which meant cavity wall insulation and these included boxes for September 2012. In relation to those boxes Joe Barry admitted that no one from Deloittes had ever asked to look inside them or to have them back from Stor-a-File and did not know what had subsequently happened to them.

27. Finally in evidence in relation to the 7,135 files Joe Barry said this:

> "Q. Is it possible that the 7,517 boxes remain with Stor-a-File?
> A. It is possible, yes, but I can't confirm whether that is the case."

28. So Deloittes did not ask Stor-a-File for delivery of the other 7,135 boxes at any time or contact Stor-a-File to claim breach of bailment if the boxes were no longer held. They did nothing. The 7,l35 boxes which were not taken back included documents for September 2012 and site folders for this period and all Joe Barry could say was that it was "possible" that they contained the C&S documents. I comment here that had he sent a member of staff to Stor-a-File and asked for the September 2012 boxes he would have been able to answer the question more accurately at trial. He did not. He also gave evidence that Deloittes paid for Stor-a-File to keep storing what they had until July 2021.

29. In evidence one of the excuses given by Joe Barry was that initially they directed claimants to CIGA, the providers of the guarantees for the work, and initially they dealt with claims but then later they stopped responding.

30. In April 2016 the first CWI claim received by Deloittes since MGL had gone into administration. From before December 2016 Deloittes were asking Billsave for documents for each of these claims. Amanda, in the Billsave office, provided some. By December 2016 Deloittes were asking Billsave for CWI documents multiple times per week, but still Deloittes never went to Stor-a-File to look themselves.

31. As for claims notification to AXA, Deloittes set up a volume system. They would scan the documents received from all claimants and then send the originals to AXA.

32. On the 21st of August 2018 the Claimant issued a claim against MGL (in administration) for damages for breach of the contract for the installation of CWI at his house and in tort for breach of a duty of care. There is a conflict of findings of fact in

the judgment because it is also stated that the claim was issued in September 2018. This conflict does not matter.

33. On the 31st of October 2018 the Claimant's solicitors sent a letter of claim to MGL and copied that to AXA. In that letter of claim the Claimant asked MGL for the C&S documents. The letter of claim accuses MGL of breach of contract, breach of statutory duty and negligence as follows:

> "1. You failed to have regard to the Supply of Goods and Services Act 1982 Part 2 Section 13 in that there is an implied term that the supplier will carry out the service with reasonable care and skill; you failed to carry out the insulation with reasonable care and skill;
> 2. You failed to have any or any adequate regard to the Supply of Goods and Services Act 1982 in your duty to carry out the work with reasonable care and skill;
> 3. You failed to have any or any adequate regard to the information in the publication "Energy Efficiency Best Practice in Housing Guide (2002, Energy Saving Trust Good Practice Guide 26) and/or you failed to take any or any reasonable steps by way of research or any other literature on the subject matter or otherwise to discover the dangers of incomplete filing of a cavity wall and acting thereon before it was too late to benefit our client;
> 4. You failed to have any or any adequate regard to the information in the "Approved Document C – Site Preparation and Resistance to Contaminants and Moisture" published by The Office of the Deputy Prime Minister 2004;
> 5. You failed to have any or any adequate regard to the information in the 'Technician's guide to best practice – Installing Cavity Wall Insulation' (Version 2.0) published by the Cavity Insulation Guarantee Agency in July 2002;
> 6. You failed to carry out an appropriate assessment of the property prior to installing the insulation and after installing the insulation. You failed to advise our client of the assessment findings;
> 7. You failed to provide our client with any after care information;
> 8. You failed to insulate the property with the correct material;
> 9. You failed to calculate the amount of insulation required in comparison to the amount of insulation used and the incorrect quantities were used;
> 10. You failed to recognise the existence of voids within the cavity and the fact that such voids cause cold spots and mould;
> 11. You failed to remove all debris and rubble prior to the installation. You failed to check wall ties were in an adequate condition;

> 12. You failed to reduce cold spots by leaving voids within the cavity;
> 13. You caused or permitted our client to reside in a property which is subject to mould growth;
> 14. In the premises, you exposed our client to an unnecessary and foreseeable risk of injury;
> 15. Contrary to Schedule 1 Section C4 of The Building Regulations 2000 you failed to ensure that the walls and floor of the property would adequately resist the passage of moisture to the inside of the building;
> 16. Contrary to Schedule 1 Section D1 of The Building Regulations 2000 you failed to take reasonable precautions to prevent the subsequent permeation of toxic mould spores into any part of the building;
> 17. Contrary to Section 7 of The Building Regulations 2000 you failed to carry out the workmanship so as to adequately perform the functions for which the insulation was designed for;
> 18. Contrary to Section 13(3) of The Building Regulations 2000 you have failed to provide a building notice to the responsible local authority.
> 19. You installed cavity wall despite degraded brickwork being present."

The AXA request for C&S documents

34. Despite the letter of claim Deloittes did not contact Stor-a-File and ask for the September 2012 boxes. On the 7th of November 2018 AXA emailed Deloittes requesting the C&S documents and warning that a failure to provide them might lead to a refusal of indemnity. On the 15th of November Deloittes sent to AXA a spreadsheet of new claims including a record of AXA's 7th of November 2018 e-mail to Deloittes but not the letter of claim which they had received.

35. On the 21st of November 2018 AXA communicated with Deloittes again requesting the C&S documentation for the claim by the Claimant, reciting the full terms of the Claims Notification and Claims Procedures conditions, asserting that they were conditions precedent and warning that AXA would decline cover if the documents were not provided. Still Deloittes did not ask Stor-a-file for any of the boxes which they held to Deloittes' command. On the 22nd of November 2018 Deloittes sent to AXA another spreadsheet, this time including the Claimant's letter of claim, as listed in a column rather than in its full form, but failing to provide the C&S documents and leaving the columns for those documents in the spreadsheet blank. It was a matter of note that for other claims the schedule has ticks in the columns for Deloittes being in possession of the contract and survey documents. Therefore, Deloittes did have the power to obtain the contract and survey documents for other recently notified CWI claims.

36. Joe Barry had a crucial recorded conversation with Ms Andrew of AXA on 23rd November 2018, in which he said:

> "Our issue is that erm nine times out of 10 we don't have the information that is being requested, I think that's the that's the fundamental issue here …. You know we have extracted as much company information as we can get and we don't have that information is what we are having to do is to make ad hoc information requests to the business that purchased the Mark Group assets and we having to ask them and invariably they are sometimes coming back with information but most of the time they're not and we're not in a position where we can ask them about 500 different claims, it's erm we just they can't cope with the volumes and we don't have the information so that it sounds like that's the fundamental issue because notifying you of the claim is not enough" …

Further on he said:

> "I understand that, and this is why you want to have a conversation because I don't think this kind of senior people have been involved in this to actually have a proper conversation with just been knocking stuff backwards and forwards not really understanding the issue but it sounds I mean in terms of the directors of Mark Group … So I understand that the directors of Mark Group have an obligation I completely understand that but practically speaking if they don't have access to the information they can't provide it there is one guy who actually is a legal counsel so will be best placed anyway to know this guy called Nathan Merrill's don't know if ever dealt with Nathan ... Anyway, so I will have a chat with Nathan and I also have a chat with our risk team. The issue that we have which is which is very similar to what you've sort of said to me is that whenever we ask them to do something that the relationship is one where they are typically helpful but again given volumes, you know they would be looking to us for costs contribution basically because it's going to be a full-time job for someone to sit and confidently respond to these information requests. Erm, I can't guarantee that they have it I mean they have moved onto new systems … It's a different business you know they are Billsave. Mark Group no longer employs anyone. … I completely understand the frustrations because you are asking us for stuff we're not getting it to you ... And that is a combination … If I'm being totally honest it is a

> combination of not having it fine and it's probably partially a lack of forethought at the beginning of the administration that we would get hundreds and hundreds of claims of this type otherwise we probably would have done more to cover more detailed information."

Finally he said:

> "where I sense this is going to go is that well … If we can't get the information if it comes down to that, I mean no one is doubting its existence but if it gets to a point where we can't get the information to sensible cost then ultimately it might not be officially voided but the insurance is as good as voided isn't it.*"*

37. On the 28th of November 2018 Deloittes communicated to AXA stating they were unable to locate the C&S documents for the Claimant and that they were inundated with claims. Deloittes still had not gone to Stor-a-File and asked for the September 2012 boxes despite the very clear warning that the insurance indemnity was going to be declined.

38. On the 29th of November 2018 AXA communicated to Deloittes that they were declining indemnity for breach of the Claims Notification and Claims Procedures Conditions.

39. In evidence Joe Barry admitted that in 2018 he did not look for the C&S documents requested by the Claimant and AXA for the Claimant's claim nor did he ask the Billsave directors for them nor did he ask Stor-a-File for them despite knowing that they were probably storing 7,135 boxes at Deloittes expense which they could call for. The Judge found as follows:

> "145. With the benefit of hindsight, it is perhaps **surprising** that despite the agreement between Deloitte and Billsave Joe Barry made no such enquiries. There was no attempt to establish whether the documents still existed and if so, where they were being held. Whilst the administrators were undoubtedly concentrating on maximising the realisation of MGL's assets and investigating whether there were any claims which could be pursued for the benefit of creditors, the very nature and size of the business that MGL had operated prior to going into administration meant that it was likely that there were going to be claims made against it during the course of the administration. There is evidence from Ms Andrew that claims were made in relation to cavity wall insulation installations prior to MGL going into administration. Those claims made their way to AXA

> (she referred to having been able to look at AXA's files). It was not therefore the case that prior to administration all claims against MGL were dealt with under the CEGA guarantee. Whilst the administrators no doubt had their priorities, any experienced insolvency practitioner ought to have known that an administration of the size of MGL's might throw up matters to deal with which did not fall within the administrator's priorities but which nevertheless the administrators would need to deal with. To do this the administrators would require access to information, including the books and records of MGL."

And:

> "151. The clear inference from the evidence however is that by December 2016 (and in breach of its agreement with Deloitte) Billsave had divested itself of the responsibility for these 7,135 boxes."

40. On the 19th of December 2018 the Claimant's claim was served on MGL and AXA. The pleadings in that action were not before me and are not summarised in the judgment. However, in the skeleton argument before the Judge at the trial the Claimant's counsel summarised the claim as follows by reference to the trial bundle pagination:

> "In breach of its duty of care, alternatively its contractual duty, Mark Group:
> i. Failed to identify that the property required work before the CWI was installed/failed to carry out work needed before installing the CWI/failed to warn the Claimant of the need to do work before installing the CWI **[440/10a-c]**. The necessary work was that to prevent water entering the external wall cavity, including replacing degraded brickwork.
> ii. There is debris present in the external wall cavity which enables the damp proof course to be bridged by moisture/water. This should have been removed before installation of the CWI **[440/10d]**.
> iii. There were voids left in the insulation on completion of Mark Group's works **[441/10e]**.
> c. Further "the presence of the CWI has caused and/or allowed damp and moisture to penetrate into the internal walls of the Property resulting in damage to plaster, woodwork and decoration. External and internal remedial works are required and the cavity will need to be refilled with suitable CWI" **[442/12]**.

> d. The Claimant relied in the Proceedings upon the report of Peter Hodgson, MRICS, which provides further background as to the basis of the Claimant's claim against Mark Group **[444/-]**.
> e. A schedule of loss produced in the Proceedings, including explanation of the various heads of loss, is at **[491/-]**."

41. On the 2nd of April 2019 the Deloittes administrators ceased to act and MGL was moving towards dissolution. Deloittes total incurred fees to that date were over £1.9 million.

42. On the 1st of July 2019 the Claimant obtained judgment for damages against MGL of £30,434 plus costs of £20,721 totalling over £51,000. MGL were not going to pay the judgment sum and so the Claimant's only route to compensation was against AXA. It appears that the claim against MGL was undefended. No contribution or indemnity was claimed by MGL against any sub-contractors of MGL who may either have been the surveyors or the installers. Of course if both were MGL employees no such claim could have been raised but Deloittes should have had access to the modus operandi of MGL in 2012 though their directors and these matters could have been investigated and determined, had Deloittes made such inquiries.

43. On the 2nd of August 2019 Billsave entered administration.

The claim against AXA

44. The Claimant issued his claim against AXA on a date unknown to me because the claim form is undated. The Particulars of Claim were dated 5.8.2019. The Claimant relied on the the 1930 Act asserting that it entitled the Claimant to step into the shoes of MGL and claim indemnity under the insurance policy to satisfy his judgment. The particular policy was not identified but the Claimant pleaded all of the policies from 31.1. 2011 to 1.4.2016.

45. In the defence, dated 2.10.2019, AXA defended on 3 bases: (1) that MGL breached conditions precedent in the insurance policy; (2) that the risk was not covered by the insurance policy; (3) that the claim was excluded from the risk. It is convenient to say here that the defences numbered (2) and (3) were abandoned at trial.

46. Judgment was delivered by Her Honour Judge Richardson on 1.2.2021. I have summarised the findings of fact above and so will only summarise the relevant remaining findings and rulings hereunder. AXA accepted that it carried the burden of proof on the issue of whether there had been a breach of the relevant conditions. AXA asserted failure to notify, that the proper construction of the Conditions was that their request for the C&S documentation was reasonable and that MGL breached the Conditions by failing to provide the C&S documentation.

47. The Judge rejected the AXA defence in relation to failure to notify AXA properly in accordance with the Claims Notification Condition. There was no challenge made to the Judge's findings on that point on appeal.

48. In relation to the C&S documents, AXA's case was that these had existed in the past and that Deloittes' excuses for the failure to provide them did not avoid their breach. So, taking the excuses one by one: the volume of claims, not wanting to trouble Billsave, the expense of looking for the documents and the confusion, were not adequate justification for failing to provide the C&S documentation. AXA asserted that even if the documents were no longer available to Deloittes in November 2018 the request was still reasonable and if Deloittes had *unwisely* disposed of or lost the documents within the limitation period the breach was still established.

49. The Claimant's case at trial was that on the proper construction of the Conditions, the scope of a reasonable request for documentation was limited to information within MGL's possession, power or control at the time of the request, so that MGL did not breach the Conditions by failing to provide the C&S documentation. It was no longer in MGL's possession, power or control. However, in the alternative it was conceded by the Claimant through junior counsel at trial that if MGL *ought* to have realised when the documents were lost that AXA would want or need them (see para. 58 of the judgment) that would be a breach. Thus, the Claimant conceded that Knowledge of Importance at the date of disposal of the documents (before the request by AXA) would amount to a breach. This concession was expressly made based on the Claimant's interpretation of the judgment of Peter Leaver QC sitting as a deputy High Court judge in *Widefree Limited v. Brit Insurance Limited* [2009] EWHC 3671 (QB), and in particular para. 100:

> "[100] The insurers submitted that such a construction would mean that an insured could destroy relevant evidence, and still be able to recover. I do not agree. **If an insured knows, or should know, that evidence or information is or might reasonably be required by his insurers and does not retain it, that insured runs the risk of being unable to satisfy the condition precedent.** But if the insured has been told by a responsible person, in the present case, the police, that the information is not relevant and is of no use as evidence and as a result does not retain it, I do not think that he will be unable to satisfy the condition precedent. The insured would not, in such a case, be required to conclude that although the police had advised that the information was not relevant, or even 'evidence', the insurers might take a different view so that if the information or 'evidence' were not retained, the condition precedent had not been satisfied and his claim would be defeated. A court would be

> reluctant to construe the general exclusion in a way that produced such a draconian result." (My emboldening)

50. It is apparent from the Judge's summary of the parties' cases that Knowledge of Importance either as defined above or in some other way was at the heart of the issues at trial. How that should be defined under a proper construction of the policy will be considered below. It is also apparent that neither AXA, who carried the burden of proof, nor the Claimant, who was seeking to defeat the allegation of breach, made any submissions on the definition or scope of Guilty Disposal. Instead AXA concentrated in cross examination on showing "*unwise"* disposal or carelessness by Deloittes, without ever actually putting to Joe Barry that he and his team were careless.

51. When the Judge came to the construction of the Conditions she referred expressly to the guidance given by the House of Lords in *Investors Compensation Scheme v West Bromwich* [1998] 1 WLR 896, at para 912 and in particular the words of Lord Hoffman. In addition to the judgment of Popplewell J in *Lukoil v Ocean Tankers* [2018] 1 Lloyd's Rep 645, at para 8. The Judge also referred to *Denso v Great Lakes* [2018] 4 W.L.R. 93, at para. 26, and *MacGillivray* on Insurance Law 13th edition. The Judge went on to take into account the commercial purposes of conditions precedent which required the provision of documentation to the insurer and also referred to *Pilkington v CGU* [2004] Lloyd's Rep IR 891, at para 58.

52. The ratio of the Judge's decision in relation to documents which MGL/Deloittes no longer in their possession or power and their Knowledge of Importance at the time of disposal is set out at paragraphs 128 - 131 and 141 as follows:

> "131 … It would not be reasonable to request information that never existed. It would not be reasonable to request information which the insured is no longer able to provide, unless the insured **knew or should have known that the evidence or information is or might be (sic) reasonably be required."**

> "141. In fact, in light of my finding that it would not be reasonable to request information which the insured is no longer able to provide, unless the **insured knew or should have known** that the evidence or information is or might be reasonably be required, the issues to be determined are:
>
> (a) were the contract and pre-installation survey still in existence on 7 November 2018 and/or 21 November 2018?
>
> (b) if not, at the time that these documents became unavailable to it did MGL know or ought it to have known that the contract and pre-installation survey in relation to Mr Cuckow's property might reasonably be required?" (My emboldening).

53. The Judge then found as a fact that the C&S documents were lost or disposed of before November 2018 in para 154:

> "154. … The burden of proof on this issue lies with AXA; it cannot discharge the burden on the available evidence and establish that in November 2018 the documents that it sought existed."

54. The Judge made factual findings but no express ruling on Guilty Disposal, as follows:

> "155. Any documents that became **unavailable** did so in the period December 2015 to December 2016. The installation at Mr Cuckow's property took place in September 2012. The limitation period still had some time to run even by December 2016. The policy had an exclusion for design and advice work. MGL was a large company which prior to its administration had the means to archive and retrieve documents. There had been some claims against MGL prior to it going into administration. The first post-administration claim was made in about May 2016 and between May and August 2016 AXA was aware of between 60 and 70 claims. Whilst not the tsunami that the current figures indicate, this was or ought to have been a significant enough number to alert MGL (or in practice Deloitte) to the fact that any installation undertaken within the then limitation period **might** be the subject matter of a claim. It is for this reason (amongst others) that it is **good business practice to retain records for at least 6 years**.
>
> 156. Those documents which Deloitte gave Billsave custody of (and it would appear that this was the vast bulk of the documents relating to the business of MGL) effectively created a contract of bailment between MGL and Billsave. Whilst it might be said that it was not unreasonable for Deloitte to have adopted this approach, this was a system (for want of a better way of describing matters) which, as with the spreadsheets that it used, suited Deloitte but did not abrogate from any legal responsibilities or obligations that MGL held or might hold.
>
> 157. For all of these reasons, I find that at the time that these documents became unavailable to it **MGL knew or ought to have known that the contract and preinstallation survey in relation to Mr Cuckow's property might reasonably be required**. MGL cannot now rely on the absence of these documents when asserting that it was not in breach of its obligations under the claims notification condition and the claims procedures condition. It was

> MGL which through its actions **unwisely** put performance of its obligations under the policy beyond its power." (My emboldening).

55. So, it is clear to me that the Judge framed the breach by MGL/Deloitte as consisting of a failure to supply information in documents which MGL no longer had but had possessed in the past and had disposed of with Knowledge of Importance. At para. 158 the Judge found that MGL by the actions of Deloittes had breached the Conditions by failing to provide the information in the C&S documents to AXA. The Judge called the disposal unwise and that good business practice would have involved retaining the documents. What she did not do was descend into an analysis of Guilty Disposal of any sort. This is probably because neither party made submissions on that issue.

The Conditions

56. I consider that the relevant policy was probably that in force from 1.4.2014 to 31.3.2015 because that is when, from what I was told in submissions, the loss emerged in the Claimant's house, but all the policies had the Conditions in them so it not significant. The Conditions in the AXA policy were as follows (with irrelevant parts excluded but indicated by "…"):

> "**Policy Conditions**
> "These are conditions of the cover and apply throughout your policy…. If you do not comply with a condition you may lose all right to cover under your policy or to receive payment for a claim.
> …
> **Claims Notification Condition**
> You must
> 1 as soon as practical
> a …
> b **give us all information** we request
> …
> If you do not comply with this condition we have the right to refuse to pay your claim.
>
> **Claims Procedures Condition**
> …
> 2 At your expense you **must provide us with**
> a full details in writing of any injury, loss or damage and **any further information we may reasonably require**
> b any assistance to enable us to settle or defend a claim
> …
> If you do not comply with this condition we have the right to refuse to pay your claim."

When construing clause 1b the parties agreed that any request had to be reasonably made despite the absence of the word "reasonably".

Appeal - CPR 52

57. I take into account that under CPR rule 52.21 every appeal is a review of the decision of the lower Court. The appellate Court will allow the appeal if the decision was wrong or unjust due to procedural or other irregularity.

58. The rule also provides that and unless the Court rules otherwise or a practice direction makes different provision, it will not hear oral evidence or new evidence which was not before the lower Court. So this Court is restricted to the evidence before the lower Court under CPR rule 52.21(2) unless the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA) are met, namely that it was (1) not obtainable with reasonable diligence before the lower court, (2) would have an important influence on the result and (3) was apparently credible though not incontrovertible, are satisfied and the Court permits the new evidence to be admitted.

59. Under CPR rule 52.20 this court has all the powers of the Court below and the power to affirm, set aside or vary the order; refer the claim or an issue for determination by the lower Court or order a new trial or hearing.

The Grounds of Appeal

60. The Appellant/Claimant filed Grounds of Appeal dated 19.3.2021. There were and remain 4 Grounds. They have not been amended. The parties did not use my defined terms, however it will assist understanding of the issues in the appeal if I do so.

61. The foundation of the appeal explained in the skeletons was the assertion that the Judge misled herself by focussing on the issue of the reasonableness of the request instead of the issue of whether the Conditions were breached when, in 2018, the C&S documents requested no longer existed. It was submitted that, on the proper construction of the Conditions:

    (1) **Ground 1:** a failure to provide documents which did not exist at the time of the request could not and did not amount to a breach. Knowledge of Importance is irrelevant under a proper construction of the Conditions.

    (2) **Ground 2:** (On the topics of Knowledge of Importance and Guilty Disposal) in the alternative, the Appellant submitted that if a failure to provide documents, which MGL did not possess or have in its power at the time of request, could amount to a breach, then it could only do so if *"the insured deliberately or recklessly (alternatively negligently) discarded or lost"* the C&S documents. So, because the Judge did not find as a fact that MGL deliberately, recklessly or negligently lost the C&S documents, there was no breach. Further MGL did

not know nor should it have known that AXA was *likely* to request the C&S documents so it had no Knowledge of Importance.

(3) **Ground 3:** In the further alternative, the Knowledge of Importance required to trigger breach should have been actual or constructive knowledge that AXA "*was likely"* to request the C&S documents not, as the Judge ruled, that AXA "*might*" do so.

(4) **Ground 4:** In the final alternative, if the Judge's ruling on Knowledge of Importance was correct then on the findings of fact MGL did not have such knowledge of importance, so there was no breach.

(5) **The third skeleton:** This raised three new points. (1) The Appellant asserted that the Conditions should be interpreted by reference to S.2 of the 1930 Act. (2) The Appellant applied (without making an application formally) to withdraw concessions made by junior counsel at trial and maintained by the leading counsel on appeal in the first two skeletons. Those concessions were in relation to the condition precedent point (Judgment para. 37), and the Knowledge of Importance point (Judgment para. 58). (3) The Claimant then sought to argue a new construction, which involved withdrawing a concession that negligence would be sufficient to establish Guilty Disposal, as follows:

> **"**an insurer should be allowed to disclaim cover if a reasonable request was made for information that an insured had **deliberately or recklessly** discarded or lost at a time when the insured know or should have known that that information would or was likely to be reasonably requested by the insurer." (My emboldening)

62. In summary, by the time of the third Skeleton the Appellant relied on the following matters to submit that the insured (MGL/Deloittes) were not in breach. The Appellant submitted in his primary case on appeal that:

(1) Possession and power is the only criterion. MGL could not be in breach for failing to provide documents which it no longer had at the time of the request by the insurer (AXA).

(2) Knowledge of Importance. Knowledge of Importance of any sort was irrelevant. On the proper construction of the Conditions, in which knowledge was not mentioned and retaining documents was not mentioned, and in the absence of an express requirement to retain and preserve documents elsewhere in the policy, the knowledge of MGL/Deloitte at the time of loss or disposal of the documents was irrelevant.

Alternatively, if a failure to supply documents which had been lost or disposed of could be a breach then the Appellant submitted that:

(3) Express terms. AXA had imposed an express term elsewhere in the policy for the insured to retain a copy of any insurance taken out by a subcontractor so it could have done so to cover C&S documents but it did not. If there was no

express duty to retain and preserve documents, none should be created by construction of the Conditions.

(4) Common sense and impossibility. It cannot be a breach to fail to supply documents when that was impossible. A party cannot contract for the impossible and then be accused of breach by failing to perform the impossible. The Conditions should be construed accordingly.

(5) Implied terms. Because there was no express term in the policy requiring MGL to retain and preserve the C&S documents, no such clause should be implied in law or in fact and AXA had not pleaded that such a clause should be implied.

(6) Construction. S.2 of the 1930 Act assists in defining what it was reasonable for an insurer to ask for and that was only documents in the power or possession of the insured at the time of the request so the Conditions should be construed in line with the Act.

(7) The facts do not make out Knowledge of Importance. That on the Judge's findings of fact the C&S documents were lost on the earliest possible date in the range which the Judge found (December 2015-December 2016) and as at December 2015 no Knowledge of Importance could have arisen.

(8) Guilty Disposal. (Skeletons 1 and 2) The Judge did not find as a fact that Deloittes intentionally or recklessly disposed of the Documents or were negligent/careless when they were lost, so there was no Guilty Disposal.

(9) Guilty Disposal. In the 3rd Skeleton, if permission is granted to amend Ground 2, the Appellant wishes to withdraw the concession that negligence is or can be sufficient to found Guilty Disposal and to advance the case that only intentional or reckless disposal of documents can found Guilty Disposal.

63. In response AXA submitted as follows:

(1) The Claimant can obtain no better rights against AXA than MGL had.

(2) MGL breached the reasonable request by AXA for the C&S documents by failing to provide them.

(3) The Judge was right to rule that because MGL had disposed of or lost the C&S documents at a time when they had Knowledge of Importance, they were in breach later when AXA requested the documents.

(4) Deloittes' failure to retain or preserve and to search for the documents either in November 2018 or in the past was the root of the breach. The Judge found Deloittes' document retention behaviour was surprising and unwise.

(5) The Appellant's case, if accepted, would provide an obvious unfairness. If Guilty Disposal with Knowledge of Importance was permitted any insured could shred documents which were obviously crucial to the insurer just before the insurer requested them and that would not be a breach.

(6) The express clause relating to sub-contractors' insurance was for a specific purpose and is not relevant to interpretation of the Conditions.

(7) Grounds 2, 3 and 4 are new arguments not raised at trial and this Court should refuse to entertain them. The reasons put forwards were as follows. MGL did not plead these constructions. Putting these forwards involves the Appellant withdrawing a concession made by junior counsel at the trial that: Knowledge of Importance alone at the time of disposal would trigger a breach. AXA had relied on MGL's counsel's submission to the effect that a previous disposal of documents with Knowledge of Importance would trigger a breach of a later request. AXA relied on the prejudice rule in *Singh v Dass* [2019] EWCA Civ 360 at paras. 16-17 and the judgment of Arden LJ in *Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd* [2008] EWCA Civ 978 at [21]:

> "in circumstances such as the present, where there has been no disclosure relative to the new way in which the appellant seeks to put his case and virtually no opportunity to consider the matter, I do not consider that the court can reasonably expect the party against whom the amendment is sought to be made to be specific about the evidence he would have adduced had the point been raised earlier. If there is any area of doubt, the benefit of it must be given to the party against whom the amendment is sought. It is the party who should have raised the point at trial who should bear any risk of prejudice."

(8) AXA submitted that they would have cross examined the Claimant's witnesses as to Guilty Disposal had the point been in issue, and they would have investigated the issue and perhaps called other evidence.

(9) Ground 4 fails on the Judge's findings of fact because even in December 2015 MGL/Deloittes knew that CWI claims had been made already against MGL so they should have retained the C&S documents for all CWI installations which were within the 6 year limitation period.

(10) The third skeleton introduced new arguments not run below and new Grounds of appeal for which no Amended Grounds had been produced. The withdrawals of concessions were opposed and would prejudice AXA because if the arguments had been run at trial AXA would have defended the case differently in relation to intention/recklessness/carelessness.

(11) The condition precedent issue was conceded by the Claimant at trial and should not be allowed on appeal.

Procedural issues

64. I permitted the Appellant to make all of his arguments at the hearing and informed both parties that I would decide on the procedural issues in this reserved judgment.

65. Before I can determine the substantive issues I must determine which of the Grounds can go forwards. AXA have raised objections to Grounds 2-4 and the third skeleton. I note that the new arguments raised in the third skeleton were not before Lambert J who granted permission for Grounds 1- 4 as originally drafted and were not raised before the trial Judge.

66. Pursuant to CPR r.52.17 the notice of appeal may be amended but only with permission. Pursuant to CPR r.52.21(5) a party may only rely on a matter contained in the appeal notice unless the Court gives permission. The principles to be applied were set out in *Pittalis v Grant* [1989] QB 605 CA at 611; and in *Singh v Dass* [2019] EWCA Civ 360, in which Hadden-Cave LJ summarised them as follows:

> "The legal principles
> 15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad [2009] EWCA Civ 2* at [30] and [49]).
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])."

67. I shall now apply these factors to Grounds 2-4 as currently drafted.

68. **Ground 2, Guilty Disposal.** At trial the Claimant's primary case was that if MGL did not have the documents then that was the end of it, there was no breach. In the alternative it was conceded by the Claimant at trial that if MGL ought to have realised when the documents were lost that AXA would want or need them (see para. 58 of the judgment) that would be a breach. This is what I have called the Knowledge of Importance point. It is clear from the judgment that the Claimant put his alternative case at trial on the basis that Peter Leaver QC's judgment in para. 100 of *Widefree* about Knowledge of Importance were correct.

69. In Ground 2, the Appellant seeks to argue a new mental state point, namely that Guilty Disposal was also necessary alongside Knowledge of Importance for the Judge to be able to have found a breach. This was not argued at trial.

70. When approaching this Ground firstly, I must be cautious before I permit such a volte face in this appeal. The reasons for that are obvious. All parties are encouraged and required to bring all of their evidence and all of their arguments before the trial Judge so that the determination of the issues occurs at the trial, not thereafter on appeal. The proper and fair administration of justice is behind this rule. So is the need to keep costs down and in addition the need to allocate a fair proportion of the Courts' resources to each claim. On this factor the weight would be against allowing Ground 2 to go forwards.

71. Secondly, I must ask whether new evidence will be required as a result of this Ground going forwards. AXA submit that if Guilty Disposal had been in issue (on the Claimant's alternative case) they would have investigated matters in relation to that and cross-examined Joe Barry and Ms Atkinson differently. Those submissions are logical and, in my judgment, likely to be accurate. AXA might have gained further concessions or damaging admissions from these witnesses on Guilty Disposal and might have gathered more evidence before the trial. However, the burden of proof on breach of the conditions lay on AXA not the Claimant during the trial. So, the failure to gather evidence was their own in the light of the pleadings and breach was denied by the Claimant in the pleadings. More importantly, I take into account that AXA won on Knowledge of Importance and impliedly won on the Guilty Disposal point at trial. AXA cross examined Joe Barry at length and in detail on Deloittes' failure carefully to identify, preserve and retain the C&S documentation and all CWI documentation. Some of that cross examination is set out above. The result was clear in the factual findings in the judgment. In addition, as I shall explain below, I will find that the Judge made findings which amounted to carelessness by Deloittes in relation to the loss or disposal of the C&S documents and the Appellant accepted and conceded in Ground 2 that negligence would be enough. So, I am unconvinced that AXA are prejudiced by the Appellant's Ground 2 in relation to a finding of carelessness.

72. Thirdly, I must look at whether AXA have had time to deal with Ground 2, and they have, since 2021. As to whether AXA have acted to their detriment, I have dealt with that under prejudice above.

73. As for Grounds 3-4, these arise directly out of the Knowledge of Importance issues which were before the trial judge, are construction arguments and I do not consider that there is anything new or prejudicial to AXA in them over and above my comments on Ground 2 above.

74. I consider that the interests of justice are relevant to the decision as well and the fact that between 90 and 1,733 other cases are apparently stacked up behind this one.

The 3rd Skeleton

75. I take into account that in March 2023 the Appellant first decided to try to raise 3 new Grounds. I shall now deal with two of them: the 1930 Act and the request to withdraw the concession on condition precedent.

76. Withdrawing a concession made at trial was considered by Peter Gibson LJ in *Jones v MBNA* [2000] 6 WLUK 831, unreported, at para. 38:

> "38. It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

77. Firstly, applying the *Singh v Dass* factors to these two new Grounds, the starting point is that no application has been made to amend the Notice of Appeal or the Grounds therein and no redrafted Grounds were put before the Court. This is a substantial procedural breach. Procedural rigour on appeals is important.

78. Secondly, I will be cautious in allowing a last-minute Ground only set out in the Appellant's third skeleton. However, I must take into account that I granted permission for the third skeleton after the previous hearing was adjourned due to the ill health / incapacity of the Appellant's counsel.

79. Thirdly, I do not consider that AXA are prejudiced by the conditions precedent and the 1930 Act new Grounds. These are points of law in relation to the written terms. Evidence upon these is not relevant. The evidence at the trial would not have been run substantially differently if these had been raised and AXA's counsel accepted such in submissions. Indeed, AXA's skeleton for trial identified the condition precedent issue as a primary one and addressed it. The Claimant then conceded it at trial. In my

judgment these are matters of argument in relation to the construction of the Conditions more than matters of evidence.

80. Fourthly, as to *Singh v Dass* factor 4(a), AXA has had adequate time to deal with these points of law because I built that time into the directions which I gave at the last adjourned hearing; 4(b) AXA has not acted to its detriment on the faith of the earlier omission to raise the points; and 4(c) in my judgment AXA can be adequately protected in costs.

Guilty Disposal

81. As to the Appellant's desire to withdraw the concession made in Ground 2 on negligence in Guilty Disposal, that concession was made in the Notice of Appeal and in the skeleton argument for which permission was granted. In my judgment this proposed amendment has a serious and wide-ranging effect.

82. I note that there was no mention in the parties' skeletons at trial of Guilty Disposal in any form. Both parties proceeded on the basis of Peter Leaver QC's para. 100 approach in *Widefree* that Knowledge of Importance was the relevant issue and the only test. In the Respondent's skeleton for trial AXA agreed with the *Widefree* test and put the issue in this way:

> "… Here, the documents would be unavailable because Deloitte chose to part with them, without keeping copies or ensuring it could retrieve them if necessary. It did so despite the limitation period for claims arising from the installation of cavity wall insulation in 2012 not having run out. That conduct cannot affect the reasonableness of the request. It simply amounts to the insured *unwisely* putting performance beyond their power. Any other conclusion causes AXA to have to indemnify its insured for a liability from a claim which, because of its insureds' actions, it could not settle or defend."

83. AXA's submission at trial was that Deloittes "*unwisely put performance*" of the Conditions beyond their power. The Claimant's submission was that the Conditions are "*not breached if the insured no longer has that information unless it ought to have realised at the time it disposed of it that the Defendant would want or need it*," and then went on to rely on *Widefree* in which Guilty Disposal is not considered either.

84. So, neither party addressed Guilty Disposal head on, both concentrated on Knowledge of Importance. Perhaps not surprisingly the trial Judge also concentrated on Knowledge of Importance.

85. In Ground 2 and in his first two appeal skeletons, the Appellant made submissions on the basis that AXA had to prove one of the three qualifying factors of Guilty Disposal

to succeed in proving breach. Those were: intentional disposal, reckless disposal or negligent disposal. The Claimant did not plead lack of intention or recklessness as a defence to the assertion of breach in any Reply. Trial counsel for the Appellant overlooked taking this point at trial. Leading counsel did not take this point on appeal and it was only in the third skeleton that the Appellant first wished to separate off negligence and argue that it was not enough. The abandonment of negligence as a part of Guilty Disposal was raised on 1.3.2023, 15 days before the adjourned appeal.

86. It is submitted by AXA that it would have been a completely different case that AXA would have had to meet if it had needed to prove intentional or reckless destruction or loss of the C&S documents by Joe Barry and his team at Deloittes, not carelessness. Reading the transcripts and the judgment it is clear that AXA's cross examination of Joe Barry was mainly to the effect that Deloittes had been careless about identifying and retaining the C&S documents. As a result of AXA's cross examination of Joe Barry, the Judge made findings of fact and criticisms of Deloittes' utter failure to make any efforts to find, protect and preserve the C&S documents in 2018 and of their careless failings in 2015-2016 as set out above (although she did not use the word careless). As I shall set out below the Judge's findings are akin to a finding of intentional refusal in 2018 and negligence or carelessness in 2015-2016.

87. Taking each *Singh v Dass* factor in turn, firstly, I consider that the Guilty Disposal issue should have been taken by the Claimant at trial, but was not, so I shall be cautious in allowing this new point to be run. Secondly, I must ask whether new evidence will be needed or the trial would have been run differently if this point had been pleaded by the Claimant (in a Reply) and fought at the trial. I consider that it would. If AXA had known, through the pleadings, that the Claimant's case was that AXA had to prove that Deloittes intentionally or recklessly lost or destroyed the C&S documents their approach would most probably have concentrated on the difference between intention and carelessness and AXA would have sought to prove intentional/reckless loss or disposition with carelessness as a fallback. Reading the cross examination of Joe Barry it is clear that intentional loss was not put to him by AXA and, as set out above, the skeletons and verbal the submissions do not address intentional/reckless Guilty Disposal at all. If it had been a point taken in any Reply served by the Claimant and at trial then it I consider that it would have been dealt with by AXA. I do not consider that costs would be an adequate remedy in relation to this point.

Decisions

88. Although this is finely balanced, in the overriding interest of justice, I do grant permission to the Appellant to advance in this appeal Grounds 2-4 and the legal arguments on the 1930 Act and the condition precedent points, so that the parties have aired most of their issues before this Court.

89. However, I refuse permission to amend Ground 2 of the Grounds of Appeal as requested in the third skeleton argument. Allowing the Appellant to mount, as a new Ground, the argument that intention/recklessness were required but not negligence would prejudice AXA unfairly.

The Law in relation to interpretation of insurance conditions

General rules as to construction

90. Insurance policies are to be construed according to the general principles of construction of contracts. My task is to give effect to the common intention of the parties objectively discerned when the policy was effected. As Lord Hoffman stated in *Investors Compensation Scheme v West Bromwich* [1998] 1 W.L.R. 896, at para 912:

> "the methodology is not to probe the real intentions of the parties, but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention. The question resolves itself in a search for the true meaning of language in its contractual setting."

91. When construing the Conditions in the policy the standard approach is that this Court should take into account the following principles: (1) the Court determines the ordinary meaning of the words in their ordinary and popular sense as understood by reasonable people; (2) the Court takes into account the legal effect of the words and the case law on the previous interpretation of the words; (3) the Court's construction should accord with sound commercial principles and good business sense; (4) the Court's construction should seek to avoid unreasonable results because the parties are unlikely to have intended such; and (5) a term will not be implied just because it may make the contract more sensible but only if the relevant factors are in place which include, when reading the policy as a whole, that the common intention of the parties would have been so expressed or because it is necessary for business efficacy.

92. In *Arnold v Britton* [2015] UKSC 36, Lord Neuberger gave guidance on the contractual construction of leases as follows:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, … That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall

purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. … Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed,

> even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
> 22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22)." (Factor seven is not relevant).

93. In 2018 in *Lukoil Asia Pacific v Ocean Tankers* [2018] EWHC 163 (Comm), Popplewell J summarised the approach thus, at para [8]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant."

Conditions precedent to liability

94. The issue of whether or not the Conditions were conditions precedent is crucial. If they are then AXA was entitled to refuse indemnity if the Conditions had been breached. If they were not then only damages may be claimed by AXA for the losses resulting from the breach. As Colman J put it in *Alfred McAlpine v BAI* [1998] 2 Lloyd's Rep. 697, at p.700 in relation to the effect of non−compliance with a clause which is not a condition precedent:

> "These considerations point against a mutual intention that insurers should have a complete defence to any claim where there has been any breach of the notification clause however trivial in effect."

95. The editors of *MacGillivray* 15th Ed. say this about the creation of conditions precedent:

> "**Creation of conditions precedent.**
> 10-034 In modern policies those terms the due observance of which is intended to be a condition precedent to the insurer's liability or a pre-condition of recovery are usually described expressly as conditions precedent. Where the policy wording demonstrates a clear intention to give a clause the status of a condition precedent, the clause will be recognised as such. Either the policy describes an individual clause in such a way as to show that it is a condition precedent, such as "[n]o claim … shall be payable unless the terms of this condition shall have been complied with", or a general condition precedent clause states that compliance by the insured with obligations cast on him by the policy is a condition precedent to the insurer's liability to pay claims. A variety of different formulations have been used to that end, but any ambiguity in the wording will be construed against the insurers. In one case, a clause stating that observance of all policy conditions was a condition precedent to liability was not conclusive as to a particular condition; the nature of which made it inappropriate to possess that status. This decision is open to question in as much as the majority of the Court of Appeal treated the clause in question as if it said that observance of all conditions precedent in the policy was a condition precedent to liability, and the dissenting judgment of Fletcher Moulton LJ is persuasive."

96. The *MacGillivray* footnotes to that paragraph included the following cases in support of the proposition that if "the policy wording demonstrates a clear intention to give a clause the status of a condition precedent, the clause will be recognised as such". *Welch v Royal Exchange Assurance* [1939] 1 K.B. 294; … *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc* [2017] EWHC 391 (Comm) at paras. 22–31.

97. In *George Hunt Cranes v Scottish Boiler* [2002] EWCA Civ 1964, Potter LJ considered the law in relation to conditions precedent. The insurer was providing fast track insurance with fast pay-outs for a commercial organisation and had a condition of fast notification by the insured of claims against it, which the insured broke. The insurer relied on the condition as a condition precedent. The policy stated that: *"No claim under this policy shall be payable unless the terms of this condition have been complied with.*" Firstly, on labelling Potter LJ stated:

> "11. In this connection it is frequently pointed out that in relation to clauses of this kind, if the contract states that the condition is a 'condition precedent' or a 'condition of liability', that is influential but not decisive as to its status, especially when the label condition precedent is attached on an indiscriminate basis for a number of terms of different nature and varying importance in the policy. One may at once observe that that is not the case here. It is also the position that where, in a policy, individual terms are described as conditions precedent, while others are not, the label is more likely to be respected in relation to a clause expressly so identified; for instance, *Stoneham v The Ocean Railway and General Accident Insurance Co* (1887) 19 QB 237 per Kay J at 241. However, where one clause is labelled 'condition precedent', and a question arises as to the status of a clause not so labelled, the latter is not, ipso facto, precluded from being regarded as such. If, as in this case, the wording of the clause is apt to make its intention unambiguously clear, then in my view the absence of the rubric need not be fatal. As with any other contract, the task of construction requires one to construe the policy as a whole. However, in this respect, as it seems to me, if there is a clear expression of intention on the wording of the clause that it shall be treated as a condition precedent, that label or apparent intention cannot simply be ignored. It should at least be regarded as a starting point. I would adopt the further formulation in *MacGillivray*, 9th Ed, 19−35:
>
> > "Such clauses should not be treated as a mere formality which is to be evaded at the cost of a false and unnatural construction of the words used in the policy, but should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology."
>
> 12. It seems to me that the wording of the final sentence of clause 2(c) is sufficient to avoid any suggestion that the clause is a trap for the unwary assured."

98. Secondly, on comparison with other previous decisions in which insurers had clauses purporting to create a condition precedent, Potter LJ ruled:

> "16. The fourth ground of appeal is that the judge below placed undue reliance upon the decision in *Welch v Royal Exchange Assurance* [1939] 1 KB 294, in which the Court of Appeal was concerned with a clause in a fire policy which, by one of its conditions, provided that, on making a claim, the insured should, inter alia, "give to the corporation all such proofs and information in respect of the claim as may reasonably be required", and in condition IV included a term identical to the last sentence in clause 2(c) in this case, namely that "no claim under this policy shall be payable unless the terms of this condition shall have been complied with." By an earlier term of the policy, it was provided that the conditions of the policy were "so far as the nature of them respectively will permit" to be deemed to be conditions precedent to the right of the insured to recover. It was held that condition IV was a condition precedent to the liability of the insurers and that the failure of the assured to provide information reasonably required in respect of the claim until the hearing of arbitration proceedings relating to it constituted a bar to his claim."

99. In relation to the commercial reasons for the characterisation of a condition by reference to its commercial importance Potter LJ said this:

> "15. … it is argued that there is no commercial reason to consider that the parties intended that a breach of clause 2(c) should have any more significant consequence for the insurers than a breach of 2(a), (d) or (e), all of which lack any indication that they are other than ordinary terms rather than conditions precedent. I do not find that argument persuasive. Compliance with general condition 2(c) is plainly of greater importance than compliance with (a), (d) or (e). As for (a), the requirement for immediate notice of a happening which may give rise to a claim is frequently encountered in insurance policies and most unlikely to be regarded as a condition precedent. Its function is to put the insurer on notice that a claim may be coming rather than a necessary indication to him that it is time to investigate, which he will be able to do once he knows that a claim will be made. So far as (d) is concerned, unlike (c) it has nothing to do with notification, assessment or investigation of a claim, delay in which may well prejudice the insurer. It goes to the interests of the insurer in overseeing and/or taking over proceedings at a much later stage. The same is true of (e)."

100. The Court of Appeal ruled that the clause was a condition precedent and upheld the trial Judge's decision.

101. A comparable case is *Denso Manufacturing v Great Lakes* [2017] EWHC 391, a decision of Sara Cockerill QC, sitting as a Deputy High Court Judge. One of the issues considered was a provision of information clause which was breached by delay. An ATE insurer required in its policy that the insured company must forward to the ATE insurer all bills or other communications which might be payable under the policy without delay. The insured had a costs order made against it then went into liquidation and the liquidators failed to pass on costs settlement offer documents to the ATE insurer for 2 months. The costs were then assessed. The third party sought to enforce the order against the ATE insurer under the 1930 Act. The ATE insured refused to indemnify the company in liquidation and hence the third party due to breach of the condition. The deputy analysed the condition as follows:

> "37 The first question is whether these conditions are capable by nature of being conditions precedent. Great Lakes submits that the position is straightforward. It turns upon the effect of condition 7 of the Policy. It says that there is ample authority that such general clauses can create conditions precedent. It says that the clauses relied on here are plainly commercially vital, and apt to be conditions precedent; not least because on the facts of this case, given that Great Lakes's potential liability to pay any "Adverse Costs" did not arise "until the Legal Proceedings are finally concluded" and "Adverse Costs" were defined as "The fully mitigated costs of the Opponent in the Legal Proceedings to the extent that the Insured is legally liable to discharge them", the period and events which came after the conclusion of proceedings was central to the risk run.
>
> 38 It submits that there cannot really be any serious argument that the "objective commercial purpose underlying" the claims co-operation conditions and the conditions requiring the provision of information in relation to the assessment of those costs were fundamental to the Policy and amply justified (indeed compelled) their being construed as conditions precedent to Great Lakes's liability to make payment. It submits that it is difficult to see how insurers could have sufficient protection if these clauses were not conditions precedent—otherwise the insured would have little incentive once a case was lost.
>
> 39 Denso does not take serious issue with the submission that the conditions are intrinsically capable of being conditions precedent. However, it argues that none of the conditions identified are

conditions precedent at all. They are simply statements of expectation regarding cooperation. There is nothing akin to the limited category of cases (e g notification within 30 days) where the courts have been prepared to construe the conditions as conditions precedent. It also (as I have indicated) relies on the *Maccaferri Ltd* case as denoting a stricter approach emerging and as encouraging a consideration both of subjective knowledge and the materiality of the information.

40 On this issue it seems to me that Great Lakes is correct and that in the light of the wording and context of this ATE policy the terms relied on are capable of being conditions precedent. Conditions 7, 9 and 11 are apt to be conditions precedent in circumstances where insurers are exposed to the risk of adverse costs as the central plank of their liability. In this context, particularly in relation to mitigating the costs risk at the centre of the insurance it is also very important that the insured assist by providing all relevant documents. The Policy cannot work without the input of the insured because the insurer is not a party to the litigation, and is entirely reliant on the insured co-operating with it and giving it information. Once the litigation is over there are still important steps to be taken in minimising the quantum of recovery, which the assured may feel little incentive to do once the case is lost without such firm requirements. This is not a case like *In re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB [2018] 4 WLR 93 where the commercial purpose of making the clauses conditions precedent is non-existent (in that case the wages book was simply used for premium calculation); here the commercial purpose of the conditions is obvious.

41 So far as the *Maccaferri Ltd* case is concerned I agree with Great Lakes that that was a very different case to the present. What was important there was how one dealt with a clause which required a subjective assessment by the insured as to whether a claim was likely; there the state of the insured's knowledge was indeed critical and intrinsic to operation of the clause. Unlike in that case, the present conditions all seek to exclude liability for an anterior obligation which had already arisen (that is, the Costs Order). They are not obligations that relate to whether cover is available in the first case. The clause here partakes much more of the nature of the clauses in the *Aspen Insurance UK Ltd* case [2009] 2 All ER (Comm) 873 and the *Pilkington United Kingdom Ltd* case [2005] 1 All ER (Comm) 283."

102. I take into account the words of the editors of *MacGillivray* on construction of proof of loss clauses at para. 19-052:

> "**Construction of conditions.** It is the practice of insurers to incorporate into their policies provisions to the effect that particulars or proof of loss are to be delivered in a certain way or within a certain time. These clauses are often expressed to be conditions precedent to recovery and what has been said in relation to clauses requiring notice of loss applies with equal force to clauses requiring particulars or proof of loss. In *Welch v Royal Exchange Assurance* [1939] 1 K.B. 294, for example, the policy provided that no claim was to be payable unless the required particulars were given within a reasonable time. It was held by the Court of Appeal that production of the particulars within a reasonable time was a condition precedent to recovery and that, even if the insured ultimately did provide them, he could not succeed in his claim. Where the insured was obliged as a condition precedent to payment to deliver proofs and information reasonably required by the insurer, and no time limit for delivery was stipulated, it was held that delivery must be effected in a reasonable time and that the absence of prejudice suffered by the insurer did not extend the time within which it was to be performed.
>
> If the stipulation as to time is a condition precedent, a failure to furnish particulars puts an end to the insurer's liability and the insured cannot revive his rights by delivering particulars at a later time. The benefit of any such clause can be waived by the insurer and the same principle will apply as in the case of waiver of notice clauses. A mere failure to mention the clause as a defence to a claim at an early stage will not amount to a waiver. The insurer may grant an extension of time but any conditions attached to such extension must be strictly followed. It has been held that a clause requiring, as a condition precedent to recovery, that the insured provide all the written details and documents that the insurer asked for is not "unfair" (and therefore deprived of effect) under Part II of the *Consumer Rights Act 2015*, replacing (with effect from October 2015) the *Unfair Terms in Consumer Contracts Regulations 1999*: *Parker v National Farmers Union Mutual Insurance Society Ltd* [2013] Lloyd's Rep. I.R. 253 at [185]–[192]."

Analysis of the Conditions

The label

103. The Conditions were written under the heading "Policy Conditions". MGL was warned that if it did not comply MGL "may lose all right to recover under your policy". The Claims Notification Condition stated that MGL "must" do various things under the

warning "if you do not comply with this condition *we have* the right to refuse to pay your claim." (My italics). The same applied to the Claims Procedure Condition. On an objective construction of those words it is quite clear that AXA were intending to frame and write the Conditions as conditions precedent.

104. In the context of this case and the requests for the C&S documents, the Conditions were not merely "labelled" as conditions precedent. The information in the documents requested was important and its loss would disadvantage AXA commercially so the labelling of the tin matched the contents of the tin.

The commercial importance

105. Turning to look at the commercial importance of the Conditions in relation to this specific request for the C&S documentation, I consider that the information in the contract and survey documents were fundamental or central and important to AXA's ability to defend any claim brought and to make a claim for contribution or indemnity against any subcontractor, surveyor or installer or any materials suppliers. This was the Judge's finding.

106. So, whilst in the absence of such information in the documentation, AXA could employ an expert surveyor to inspect the property, consider the damp, if necessary get a builder to take samples of the cavity wall insulation and to open up the walls to see where it was put and what it was made of and the construction of the house and it's damp proof coursing and it's foundations and brickwork, and whilst those matters might be of assistance in defending the claim, they would not assist AXA in determining whether the contract had any clauses limiting liability, any caveats or exemptions, or in determining whether the surveyor, if he was a subcontractor, failed to carry out a proper pre-contract survey. Nor will any post event survey assist AXA in bringing claims against the installers or suppliers of any CWI used or other third parties without the terms of their contracts. Therefore, in my judgment the information in the C&S documentation had the potential to make a considerable commercial difference to AXA's liability and the level thereof.

107. Whilst such wording may not have made all breaches of all requests made under those conditions sufficient to be breaches of conditions precedent, as the case law shows, in this case I consider that in relation to a request for the information in the C&S documents, that was important to AXA's ability both to defend the claim and to seek a contribution or indemnity from any subcontractors.

108. Therefore, in my judgment the Conditions in issue in this case were properly to be construed as conditions precedent in relation to the requests made in November 2018 and the Judge was right so to find and the concession made by the Claimant at trial was justified.

Construction of the obligation to provide information

109. Having determined that the Conditions were conditions precedent the next matter to review is what they meant and whether they were breached. Stripping out the otiose words the Conditions were as follows:

> "**Claims notification condition:** You **must** … **give us** all **information we request**.
> **Claims procedures condition:** At your expense **you must provide** us with … any further **information** we may **reasonably require;** any assistance to enable us to settle or defend a claim." (My emboldening)

110. This type of clause is commonly described as an obligation to furnish evidence clause. It is quite simple to construe in relation to information in documents which the insured does have in its possession when reasonably requested and the usual argument would then arise only over any delay in providing them. However, in relation to documents which the insured does not have in its possession or power when asked, it is more tricky. There was no case law put before me on this issue.

111. The time when the duty to provide or give information in documents arises is, in my judgment, only when the request is made and received by the insured (MGL/Deloittes). There is no express general duty owed to AXA to protect or retain documents set out in the policy and AXA did not seek to imply such in their pleadings or in submissions. So there was no pre-existing express duty which MGL/Deloittes breached before November 2018.

112. The editors of *MacGillivray on Insurance Law* 15th Ed. summarise the case law on such obligations at para. 19-057 as follows:

> "**Obligation to furnish evidence.** The policy may provide that the claimant shall furnish all such information and evidence as the insurers may from time to time require. Under this clause the insurers can ask for evidence and information which may not be absolutely necessary to prove the claimant's case. Any such evidence or information must not, however, be asked for unreasonably. In a case where death was alleged to have resulted from an accident, the insurers requested a post- mortem examination and the judges of the Inner House of the Court of Session could not agree whether this was a reasonable requirement. The demand for evidence must be made directly on the claimant or on those acting for him. If the claimant is obliged merely to "furnish" evidence or information, it is submitted that he can only be asked for evidence or information within his own possession and cannot be required to

> procure evidence or information from others in the absence of a clear indication to the contrary in the policy."

113. So, the issue of whether a request made by the insurer for information in documents which the insured no longer has is: (1) reasonable, or (2) breached by the insured failing to give or provide the documents which they do not have in their possession or have been lost, is not covered by the text.

Impossibility, unreasonable result and absurdity

114. The Appellant submits that if an insured does not have the documents requested then asking for them creates the absurd result of requiring an impossibility.

115. A term may be construed to avoid absurd result. Lord Reid espoused this principle in *Wickman Tools v L.G. Schuler* [1974] A.C. 235, at p 251 thus:

> "the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. For more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear."

116. In 1998 Lord Hoffman in *ICS v West Bromwich* at p 913 put the principle this way:

> "The "rule" that words should be given there "natural and ordinary meaning" reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

117. An example from insurance law is provided in *Re an Arbitration between Coleman's Depositories and the Life and health Assurance Association* [1907] 2 KB 798, the Court of Appeal construed a clause which required that the insured employer to forward to the insurer *"immediately on receipt"* every claim etc. as meaning "with all reasonable speed." Per Fletcher-Moulton LJ at p 805:

> "The Courts have not always considered that they are bound to interpret provisions of this kind with unreasonable strictness, and although the word "immediate" is no doubt a strong epithet, I think that it might be fairly construed as meaning with all reasonable speed considering the circumstances of the case."

118. Various cases were relied upon in relation to the impossibility point. Impossibility arising after the contract was made was considered in *Eurico SPA v Philipp Bros.* [1987] Lloyd's L.R. 215. The Court of Appeal considered a clause which allowed the buyers of rice cargo to require delivery at "*one main North Italian port … to be declared … on passing Suez*". The buyer declared Ravenna as the port. The ship was unable to enter that port due to her draft, so discharge took place at Ancona. The sellers claimed demurrage. The majority considered that the parties could have found out about the draft limit at Ravenna. In requiring delivery there, the buyer was requiring the seller to perform the impossible. The seller sought to imply a term that choosing Ravenna was excluded under a proper construction of the term. By a majority consisting of the Master of the Rolls and Stephen Brown LJ (Croom-Johnson LJ dissenting) the Court ruled that the parties were free to agree whatever they wanted, even if that was impossible to perform, as it was in the case. The term was construed as allowing the buyer to choose delivery at Ravenna because the buyer was given the unfettered choice of main Northern Italian ports. The Master of the Rolls explained the decision as follows (at page 218):

> "So far as I am aware, there is no authority which is directly decisive of this problem. It is therefore necessary to go back to first principles. My starting point is that parties to any contract are free to agree upon any terms which they consider appropriate, including a term requiring one of the parties to do the impossible, although it would be highly unusual for parties knowingly so to agree. If they do so agree and if, as is inevitable, he fails to perform, he will be liable in damages. That said, any court will hesitate for a long time before holding that, as a matter of construction, the parties have contracted for the impossible, particularly in a commercial contract. Parties to such contracts can be expected to contemplate performance, not breach.
>
> The tools available to a court in this exercise of reluctance to accept that the parties have contracted to do the impossible are those of construction of the express terms used by the parties and of implying a term which qualifies, but does not contradict, the express terms. In many, and perhaps most, cases it may be debatable whether the court is giving the words a "commercial construction" or whether it is implying a qualifying term and I cannot think that it matters. What does matter is that in its struggle to make common sense prevail, the court cannot say that the parties agreed upon something, however sensible, when their chosen words show clearly that they agreed the exact opposite.
>
> Let me give examples. Suppose a contract between the late Mr. Henry Ford for the sale of one of his famous Model T cars. Legend has it that he was in the habit of giving his customers a free choice

> as to the colour of the paintwork, provided always that they chose black. A contract to supply a car in the colour of the customer's choice, provided that he chose black, would create no problem. Black would be his only option. But a contract which in express terms gave the customer a free choice of colour simpliciter would have created serious problems for Mr. Ford. Even though the contractual matrix known to the parties was that Mr. Ford would not or could not produce cars in any colour other than black, it would have been quite impossible to construe the contract other than as giving the customer a range of options as to colour or to imply a term that he must choose black.
>
> …
>
> However, in the instant case the parties have expressly chosen to limit the buyers' choice in a particular way, namely to main Italian ports. This cannot mean some main ports and the plain implication is that the parties were satisfied, albeit wrongly and even negligently, that the vessel could enter any main Italian port. Given the small margin of error in relation to Ravenna, and there is no suggestion that there would have been a problem in relation to any other main Italian port, this is not so improbable as it would have been if the vessel has been a V.L.C.C. In these circumstances it seems to me to be quite impossible in principle to construe "main Italian port" as "all main Italian ports except Ravenna" or to imply a term that, notwithstanding the express terms of the option, the buyers could not choose Ravenna or any main port with a draft limitation of less than the vessel's draft on arrival or to hold, as did the Council of the Rice Brokers' Association, that "it was the Buyers' responsibility to ensure that the vessel's draft did not exceed that of the Port so nominated by them, and that therefore the consequences of their not complying with this duty were for their account."
>
> …
>
> This distinction is not mentioned in any of these cases, but the reason is, I think, that in each case the "impossibility" in fact arose after the date of the contract. If this is right, they represent no departure from principle and are not material to the instant appeal. It would have been quite different if, subsequently to the making of this contract, a sudden storm had silted the harbour at Ravenna and reduced the maximum permissible draft, but this is not suggested."
>
> (My emboldening)

119. I take from this case that the Courts will try to avoid construing a contract as requiring one party to perform the impossible, but where the words are clear the construction will match the words.

120. At trial AXA relied on *Firma C-Tade S.A v Newcastle P&I* [1990] Lloyd's LR 191, per Lord Goff at p 199 ("The Fanti"). F was a member of a Protection and Indemnity club. The club rules provided for indemnity against claims for loss or damage to the Fanti, their ship, and cargo owners, if they had "paid out". This was called a "pay to be paid" clause. The ship started leaking on the way to Nigeria and then sunk. The claimant owned the cargo of cement and made a claim against F and obtained judgment but then F went into liquidation before paying the claim. The claimant sought to enforce the indemnity under the 1930 Act. The P&I club defended on the basis that F had not paid so they were not liable under the pay to be paid clause. The House of Lords considered the indemnity was not triggered until F paid out. Because F's rights had been transferred to C, a self-payment would be required to trigger liability and that was impossible. The fact that payment became impossible when F went into administration and that the claimant could gain no better right that the insured had are sound principles governing the application of the 1930 Act. The commercial reasons for a pay to be paid clause may be substantial for solvent members. Futility and impossibility were dealt with at page 200 of the report and it was said that the fact that a contractual condition may become impossible to perform does not render the contract of no effect and depends on the construction of the contract. I take that into account.

The implication of terms

121. Whilst the text of *Chitty on Contracts* 34th Ed. at para 16-003 discusses Lord Hoffman's suggestion that implication of terms and construction are two sides of the same coin in *A-G of Belize v Belize Telecom* [2009] UKPC 10, there is no need for any comment on that here. There are separate approaches. They are similar but different coins and the implication of terms is generally to occur only where the contract does not cover the matter.

122. Implied terms to give effect to the intention of the parties could cover a duty to retain and preserve documents, if the circumstances so required, but in this case no such term was pleaded or raised by AXA. Such implication of terms arises where the point is not dealt with in the contract and it is the obvious and necessary unexpressed intention of the parties or where business efficacy requires. In *Marks & Spencer v BNP Paribas* [2015] UKSC 72, Lord Neuberger ruled as follows:

> "28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would

> seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.
>
> 29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:
>
> > "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.""

123. I have also carefully considered the chapters of *Lewison* on Construction put before the Court. As to para. 7.88 I accept that in cases of real doubt or ambiguity the contra proferendem rule may be applied for contracts drafted by insurers when considering clauses which favour the insurer: per Briggs LJ in *Nobahar-Cookson v Hut* [2016] EWCA Civ 128, but as Gloster LJ ruled in *Morris v Blackpool* [2014] EWCA Civ 1384, that rule only comes into play when the Court is unable to reach a conclusion on construction on the material before it. I do not consider that is the case in this appeal so I rule that the contra proferentem rule does not apply.

124. In my judgment there was no scope in this case for the implication of terms by the Judge. None was pleaded or raised before the Judge and none is appropriate. In the current case the Conditions in the policy do cover the matter. The Conditions enabled AXA reasonably to request to be provided by the insured with the information in documents. The issue is how the Conditions are to construed.

Analysis

125. I start by looking at the plain wording of the Conditions in the context of the policy and what MGL's business was. MGL were to give or provide information to AXA after a reasonable request. One cannot give what one does not have and one cannot provide

what one does not have. That is plain. I am surprised that Deloittes did not give AXA the standard form of contract used by MGL in September 2012. If it was never amended then it would have contained most of the information AXA needed on the terms of the contract even though the particulars contract was not provided. However a blank for of survey would not help give any information.

126. The relevant part of the MGL's work was CWI installation but the policy covered the two other arms of their business (including new builds). Such work could give rise to claims for personal injury or death or breach of contract for damage to the client's properties. The policy and the schedule expressly covered CWI work and MGL's liability for third party claims for that work.

127. Both parties objectively had similar commercial interests in relation to such claims. MGL wished to be insured so that they could continue to make a net profit of £40 million per annum (as they did in 2014) and AXA wished to insure them – no doubt with a view to making a commercial profit. Both knew, or ought to be taken as knowing, that claims by CWI clients were possible (that is why insurance was taken out, amongst other reasons) and if they were made in contract the limitation period under the *Limitation Act 1980* would be 6 years after the contract, or longer if the latent damage provisions applied.

128. MGL had a commercial interest in ensuring the insurance policy remained valid, for if it was avoided, they themselves would have to satisfy the third party liabilities. AXA had an interest in ensuring that the documents necessary to defend any third party claims were passed to them by MGL with all relevant information which they would need to defend the claim and to make claims for contribution against or indemnity from suppliers or sub-contractors. Whilst MGL were solvent (and also after administration) they had a parallel mutual interest with AXA in preserving and protecting contractual documents and surveys for CWI work so the insurance would remain valid. So, it might be said that objectively there was no need for an express clause requiring MGL to preserve and retain relevant documents because it was in their own interests to do so. It might also be said that interpretation of the Conditions should follow their mutual interests.

129. The Judge considered the construction of the requirement to give/provide by focussing solely on the reasonableness of the request by AXA. I consider that approach too narrow. The Judge should also have looked at breach at the same time.

130. So, when considering whether a reasonable request has been made and broken, the correct approach is to determine, using the normal principles of construction, the scope of the clause and whether it has been breached. This is to be done by looking at the whole policy and the circumstances and then by determining the common intention of

the parties as to what the words "reasonable request" and "must give" and "must provide" would have meant when the policy was entered.

131. As to "reasonable request", the Judge found that the C&S documents being requested by AXA were obviously important and MGL/Deloittes knew or ought to have known that. I shall now look at a cascade of examples of requests and breaches and see what the parties would reasonably have intended by the use of the words in the Conditions.

In possession

132. Dealing firstly with the information in C&S documents which did exist, if AXA had requested important documents which were, at the time of the request, in the possession or power of MGL and MGL had refused to hand them over, that would have been a plain breach of the "must provide" or "must give" wording. If, on the other hand, the documents were in another person's possession, different considerations as to disposal would arise.

Past possession

133. I do not consider that the parties intended that only documents in the possession or power of the insured at the time of the request would be relevant. That is too narrow a construction of the words "reasonable request" and "information". In my judgment the Judge was right to rule that the words of the Conditions did cover the information in documents which had been in MGL's possession in the past. But which ones?

Never existed

134. If AXA requested the information in documents which were not in MGL's possession or power in November 2018 because they had never existed, then in my judgment the words "reasonable request", "must provide", "must give" and "information" are to be interpreted as a matter of business common sense and objective common intention to mean that no breach has occurred. For to interpret this contract term as permitting AXA ab initio to require the impossible and then to refuse indemnity would be absurd and would not make good business sense to both parties and would not be their common intention and would make the request unreasonable. How could non-existence of C&S documents ever occur? It could for instance occur if MGL's surveyor had broken the MGL procedures and made an oral contract with the customer and if the surveyor had been too busy to make a written report, so the written contract and survey had never been generated, but the work had been done on an oral contract. In my judgment these words were intended to mean that if the insured does not give or provide the documents he will be in breach unless he has a reasonable reason which explains why he cannot provide or give them. I shall explain that in more detail below. So, if the documents never existed, the proper construction of the Conditions is that they do not bite on documents which never existed either because the request is unreasonable or because "must provide" does not bite on non-existent documents. The express words do not state that the insured should perform the impossible or the absurd. They are general,

not specific. They do not equate to the specific and expressly unfettered option granted to the buyer to choose a main Northern Italian port in the *Eurico* case, for instance. If the parties had been asked on 1.4.2014 what does this clause mean in the factual scenario just described (MGL never had what AXA reasonably thought existed and so asked for) they would in my judgment have said, "well that is obviously not a breach, the words "must provide" and "reasonable request" do not apply to documents which never existed, they relate expressly to information".

Disposed of

135. Turning now to information in documents which did exist (in the past) but have been disposed of. The Judge held that MGL/Deloittes probably did not have possession of or power over the Claimant's C&S documents when these were requested in 2018 so probably could not give or provide the information in them. But do the words "reasonable request" and "must give/provide" and "information" apply to all documents previously possessed or does the method of disposal have a part to play?

Innocent loss

136. I consider that on the proper objective construction, if the insured had innocently lost the important documents, for instance in an office fire, the words "reasonable request" and "must give/provide" and "information" would not bite on such documents and the interpretation against absurdity and impossibility applies. This would also be supported by a common sense commercial interpretation of the Conditions.

Intentional destruction

137. Taking the other extreme for the set of facts leading to the destruction of important documents, I consider that on a plain and objective interpretation of the words in the Conditions different factors apply where the information in important documents has been disposed of or lost through the insured's intentional fault. So, if the insured shredded the documents (because of fear of discovery of a VAT fraud) that would not be a good reason for explaining why he failed to give or provide and, in my judgment, the requirement to give/provide would bite on the information in those past possessed documents. This is because the request was reasonable and the excuse for failing was not reasonable and objectively, the parties at the time the policy was entered, would have intended the words to mean and be construed in that way. But the extremes of innocence and guilt are not this case. It lies in the middle.

Careless disposal

138. Turing to the specifics of the case. The Judge found that MGL/Deloittes never identified the whereabouts of the C&S documents at two times: (1) in November 2018 when Deloittes did nothing to try to find them other than (perhaps) had a chat with one ex-director of MGL (which was unrecorded). They did not contact all of the ex-directors of MGL and Billsave by phone or email to ask directly where the documents were. They did not contact Stor-a-File to follow up on the contract for storage which they had

paid for until July 2021. It seems to me that this omission in itself was a telling breach of the "must provide" or "must give" requirement. It matches what may have been a breach of the duty imposed on Deloittes by Statute in S.2 of the 1930 Act, namely to provide the information in the C&S documents to the Claimant in response to the 2018 letter of claim. In addition, (2) Deloittes did not take any proper care to identify, preserve and protect the information in the C&S documents in the period 2015-2016.

139. What then is the scope of Guilty Disposal when interpreting whether an insured "must provide" or "must give" to AXA the information in important documents which the insured has carelessly lost or disposed of and whether the request is "reasonable"?

140. In my judgment, the correct construction of the Conditions, determined objectively at the time of contracting, is that the parties intended that Knowledge of Importance and fault-based loss were an inherent part of the determination of whether the Conditions were breached and whether any request was reasonable.

141. In my judgment the reasonable and objective construction of the words in the Conditions which makes sound business sense, is that the request reasonably covered not only important information in documents which the insured actually had in its possession or power in November 2018 but also the information in documents which the insured should have had but which they had disposed of with guilty intent, recklessness as opposed to merely lost innocently. I shall deal with fault-based carelessness below. It would be hollowing out the force of the Conditions were this Court to interpret them as covering only what the insured had on the day of receipt of the request. That would permit wholesale guilty shredding the day before and would disadvantage AXA.

142. After the request was made by AXA and MGL/Deloittes failed to provide the C&S documents I consider that MGL/Deloittes were in breach if, at the time when the documents were lost or disposed of, MGL/Deloittes had:

(1) **Knowledge of Importance**, that the information in the C&S documents would be important to AXA in the event that a claim was made by the Claimant and so that AXA would want to ask for them; and with such knowledge;
(2) **Effected a Guilty Disposal,** involving fault based intentional / reckless (or arguably careless) disposal or loss of the documents.

Knowledge of Importance

143. In relation to Knowledge of Importance, at trial the Claimant's counsel wrote this in his skeleton argument:

> "20. It is further submitted that on its proper construction the obligation under paragraph 2 a of the claims procedures condition is

> limited to an obligation to provide information within the insured's possession or control at the time the Defendant requested it, and is not breached if the insured no longer has that information unless it ought to have realised at the time it disposed of it that the Defendant would want or need it."

In addition, in his trial skeleton, the Claimant relied on what Peter Leaver QC stated at para.100 in *Widefree:*

> "If an insured knows, or should know, that evidence or information is or might reasonably be required by his insurers and does not retain it, that insured runs the risk of being unable to satisfy the condition precedent."

144. As a result of the Judge's undisputed findings of fact, in my judgment it is not open to the Appellant now to assert that MGL/Deloittes were unaware of the importance of and hence the need to preserve and retain the information in the C&S documents because they would reasonably be required by AXA, should a claim be started by the Claimant. This Knowledge of Importance existed because, as the Judge found, the limitation period was still running for the Claimant and because CWI claims had already been made before MGL went into administration. I consider it reasonable to infer from the evidence and the judgment that the Judge considered that AXA would already have asked for C&S documents from MGL relating to those previous claims so their importance would be obvious from those requests. Likewise for the 60-70 claims received by Deloittes before the Autumn of 2016. But, even without such requests, the documents were obviously important for any future claim as a matter of pure logic because of their contents. The fact that the Claimant had not yet claimed, but might or might not do so, is nothing to the point. As for the ground of appeal based on the difference between whether AXA "might" or "were likely" to want the C&S documents, the distinction is without merit in my judgment. The "might" in the Judge's judgment was about whether the Claimant "might" suffer damp in his property and so start a claim, not whether the documents might be important.

Guilty Disposal

145. As to Guilty Disposal, if MGL/Deloittes' intention or recklessness was the cause of the disposal then the fault element is high and I consider that objectively the parties would have intended that Knowledge of Importance combined with such fault would constitute a breach of the Conditions. The Judge did not find expressly as a fact that there was intention or recklessness on MGL/Deloittes' part in relation to the disposal of the documents in 2015-2016 but I interpret her findings in relation to 2018 as intentional failure to seek out the documents.

146. However, if mere carelessness was the cause of the loss of the documents, I consider that the common intention of the parties relating to the scope of the "must give/provide" and "reasonable request" conditions and whether they will have been breached is harder to discern. It all depends on the factual matrix.

147. S2 of the 1930 Act imposed a duty on MGL/Deloittes which was owed to the Claimant in relation to the following documents:

> "S.2 **it shall be the duty** of the bankrupt … company … to give at the request of any person claiming that the bankrupt, debtor, deceased debtor, or company is under a liability to him **such information as may reasonably be required by him** for the purpose of ascertaining whether any rights have been transferred to and vested in him by this Act **and for the purpose of enforcing such rights**, if any, and any contract of insurance, in so far as it purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties thereunder …" (My emboldening).

When the Claimant expressly requested the C&S documents in the letter of claim sent to MGL/Deloittes in 2018, although the Act had been superseded by the 2010 Act, it still applied. I consider that the words "information for the purpose of enforcing the claim" in S.2 entitled the Claimant to receive the C&S documents. The question arises: did the 1930 Act create a duty to retain and preserve the documents? The words set out clearly did not say retain or preserve. They were "it shall be the duty … to give at the request" so they are similar to the Conditions in the policy. That duty was owed to the Claimant not to AXA. I consider that the Act takes the argument no further forwards in relation to the interpretation of the Conditions I have ruled upon above, because the Act does not resolve the interpretation point in relation to the distinction between careless disposal and intentional disposal or the issue in relation to lost documents.

148. In other cases, with a different factual matrix, the loss may be due to innocent carelessness. So, for instance, due to a house move or a staff member's silly error. Let us imagine that a director of MGL carelessly crashed his car into a lake when carrying the key box containing the C&S documents and they were destroyed. There would be no "fault" vis-a-vis AXA involved in such a loss. If that was the case, why should an insured lose cover for such a careless error absent any express duty to retain and preserve in the policy? Would this not just be another part of the insured risk? Another example would be if the September 2012 box had been lost by falling out of the back of a removal company's lorry when MGL moved from the head office in 2015. I do not consider that the Court would or should construe the Conditions, by applying the common intention of the parties when the policy was signed, so as to debar the insured in such no-fault circumstances. It all depends on the facts.

149. The Judge's findings on the circumstances of the disposal or loss of the information in the C&S documents are set out above. The Judge found various key facts, on the evidence, including that MGL/Deloittes knew or ought to have known of the importance of the Claimant's C&S documents during the time range of their loss or disposal and yet did not identify or retain them.

150. In late 2016 Deloittes/MGL were not prepared to pay for the contracts and surveys to be searched for individually by Billsave staff or Deloittes staff. Deloittes did nothing to demand the delivery up of the 7,135 indexed boxes stored with Stor-a-File, which included September 2012 documents, when they blithely accepted the highlighted 383 boxes relating to "NB" instead of focussing on boxes marked "CWI". They simply ignored the other boxes. Nor did they seek the head office files, or the non-occupied office files.

151. Then, in November 2018, after the letter of claim from the Claimant and the request from AXA, Deloittes again decided to do nothing (save perhaps hold one conversation with one ex-director) to find out anything about the existence or whereabouts of the C&S documents either from Stor-a-file or the ex-directors of MGL at Billsave. That was clear from Joe Barry's evidence in cross examination and acknowledged, for instance, in Joe Barry's telephone call made on 23 November 2018 with Ms Andrew. They had paid for storage up to July 2021 and yet decided not to contact Stor-a-File.

152. The consequences of Deloittes' decisions have been catastrophic for the Claimant's judgment. He has been deprived of the fruits of the judgment he would otherwise have been entitled to enforce against AXA.

153. The Judge found that Deloittes' behaviour in relation to the loss or disposal of important documentation was "*surprising*" (judgment para 145), and stated that Deloittes *"unwisely put performance of its obligations beyond its power*" (Judgment para. 157), but did not actually say they were careless. In my judgment, the inference from all of the Judge's findings is clearly one of careless failure to identify, retain and preserve the C&S documents between 2015 and 2016. The findings of fact in relation to Deloittes' refusal to look for the documents in 2018 were more stark.

154. If it is necessary for me to do so, I find that, arising from the Judge's findings of fact and the transcript of evidence, (1) between late 2015 and December 2016 MGL/Deloittes carelessly failed to identify, retain and preserve the C&S documents despite having Knowledge of Importance; and (2) in November 2018 MGL/Deloittes intentionally did not try to identify and gain possession of the C&S documents despite having Knowledge of Importance and knowledge of the potential whereabouts of the documents, at Stor-a-File.

155. The Appellant conceded in Ground 2 (the alternative submission) that if the past loss or destruction of documents, with sufficient Knowledge of Importance, was the correct interpretation of the Conditions, then "negligent" loss or destruction of the documents (if proven) would suffice to complete the breach. So the Appellant's **Ground 2** reads as follows:

> "alternatively, even if a reasonable request was made for information that no longer existed or was unavailable, the failure to provide that information would, on a true construction of the conditions, only amount to a breach of the conditions if the insured deliberately or recklessly **(alternatively negligently)** discarded or lost that information at a time when the insured knew or should have known that that information would or was likely to be reasonably requested by the insurer." (My emboldening).

156. I must consider what that concession or submission really meant. In tort law negligence involves a duty of care owed to the Claimant, breach of duty and causation of loss. In this case the contract did not expressly impose a duty of care to retain and preserve the documents. S.2 of the 1930 Act did not do so either until a request was made by the Claimant. The relevant statutory duty is one owed to the Claimant not to AXA. The term "negligently" can thus reasonably be understood to mean "carelessly" in the context of the facts in this case and the Knowledge of Importance of the documents to AXA. Therefore, in my judgment the concession on negligence was the same thing as a concession on carelessness. So, the general question whether carelessness is sufficient for Guilty Disposal is an argument for a different case because the Appellant's Ground 2 and first two skeleton arguments on appeal conceded that point and it was not raised in the pleadings or at the trial.

157. Therefore, the Appellant asserts and concedes that careless loss or disposal of the documents was sufficient for Guilty Disposal and hence breach.

Conclusions

158. I consider that the Judge was right to rule as, a matter of construction of the policy, that MGL, by the actions of Deloittes, breached the Conditions of the policy by failing to provide AXA with the C&S documents which they reasonably requested. The Judge rightly found Deloittes knew or ought to have known that the C&S documents were important, relevant and would be needed for AXA's defence of a claim the Claimant might bring against MGL and their ability to raise a claim for contribution or indemnity. The Judge found that Deloittes' had (1) Knowledge of Importance in relation to the information in the documents requested; and (2) found, by implication from her express factual findings, that Deloittes had effected a Guilty Disposal due partly to intentional refusal to identify and seek the relevant documents in 2018 and partly due to a careless

failure to identify, retain or preserve the C&S documents between October 2015 and December 2016. I respectfully agree.

159. Thus, the result which the Judge came to was unimpeachable on the issues before her.

160. I have granted permission for the Appellant to rely on the all the original Grounds and two new points from the third skeleton as requested. I have refused permission to amend Ground 2.

161. On Ground 1, the appeal is dismissed because, in my judgment, a request made under the Conditions is properly to be construed as reasonable if it related to information in documents previously in the possession of the insured but which have been lost due to Guilty Disposal combined with Knowledge of Importance.

162. On Ground 2, the appeal is dismissed because the Judge found that in November 2018 Deloittes intentionally did not seek out or try to find and give over the documents and between 2015 and 2016 Deloittes were careless when losing or disposing of the C&S documents.

163. On Ground 3, the appeal is dismissed because the Judge's ruling on Knowledge of Importance was correct. Her use of the word "might" related to the possibility of a claim not the importance of the C&S documents.

164. On Ground 4, the appeal is dismissed because, on the facts, the Judge found Deloittes had Knowledge of Importance and that finding was justified on the evidence.

165. On the unpleaded Grounds in the third skeleton, the appeal is dismissed because the Conditions were rightly characterised as conditions precedent and although the 1930 Act S.2 is similar to the Conditions it does not undermine the Judge's rulings on construction.

166. In my judgment none of the Grounds justify this Court interfering with the Judge's conclusions made in her well laid out and clear judgment on the issues raised before her. For the reasons set out above I dismiss the appeal.

END

Consequentials

167. I will award the costs of the appeal against the Appellant on the standard basis to be summarily assessed if not agreed. I would welcome written submission on the costs within 7 days or a short hearing can be listed before me before the Easter break.