Claim No: HT-2019-000389

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 495 (TCC)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 5 March 2021

B e f o r e:

RECORDER ANDREW SINGER QC
(sitting as a Judge of the Technology and Construction Court)

RAYMOND SEHAYEK
DAPHNA SEHAYEK **Claimants**
- and -

AMTRUST EUROPE LIMITED **Defendant**

Mr Shomik Datta
(instructed by **Northover Litigation**, Solicitors) for the Claimants
Mr Doré Green
(instructed by **Shoosmiths LLP**, Solicitors) for the Defendant

Hearing dates: 16th-17th February 2021

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

Introduction

1. This is a trial of preliminary issues ordered by Alexander Nissen QC sitting in the TCC on 9th October 2020. The issues relate firstly to the interpretation of a policy of insurance underwritten by the Defendant ("the Policy") for defects relating to a new build property in Grove End Gardens, St John's Wood, London ("the Property"). The Property is owned by the Claimants whose claim for sums they say are payable by way of indemnity under the Policy has been rejected by the Defendant giving rise to the substantive proceedings in this Court. Secondly, the preliminary issues raise questions of estoppel and/or waiver alleged to arise in favour of the Claimants.

2. Mr Shomik Datta appeared for the Claimants and Mr Doré Green for the Defendant. I am grateful to them both for their helpful and comprehensive written and oral submissions. I have taken them all into account in reaching my judgment. I do not deal in this Judgment with every point raised, but that should not be taken as meaning that I have not considered them all; simply that I do not regard it as necessary for them all to be set out in this Judgment. The trial was held remotely due to the Covid-19 restrictions. It was nevertheless a public hearing.

3. The burden of proof is on the Claimants to show that they are entitled to the benefit of the Policy on the balance of probabilities. That burden applies equally to issues which need to be established to demonstrate entitlement under the Policy such as the preliminary issues which have been the subject of this trial.

The Preliminary Issues

4. The preliminary issues are as follows:

(a) Were the Rules incorporated into the Policy?

(b) Is the provision of cover under the Policy conditional upon the Developer complying with the Rules?

(c) Are the Claimants entitled to the benefit of Section 3.2 of the Policy in relation to the Property given the definition of "the Developer" within the Policy?

(d) Is the Defendant:

(i) estopped from asserting that DPD was not the Developer in relation to the Property for the purposes of the Policy; alternatively

(ii) estopped from asserting that the Rules had not been complied with by the inception of the Policy; alternatively

(iii) estopped from relying on the strict terms of the Rules and/or Policy to assert that the Property was not covered by the Policy on the basis that DPD was not the Developer; alternatively

(iv) has the Defendant waived any breach of the Rules and affirmed the Policy by incepting the Policy and dealing with the Claimants' asserted claim thereunder?

The Facts

5. I heard oral evidence from Mr Sehayek on behalf of both Claimants and Mr Smith, the Scheme Administrator for the Defendant underwriters. I was satisfied that they both

gave their evidence honestly and sought to deal with all questions in an open and co-operative manner. It was not suggested to me that either party's witness evidence was unreliable or that their evidence should be disbelieved or discounted in any material respect. For the avoidance of doubt, I accept that their evidence both in their witness statements and in their oral evidence before me was truthful and accurate.

6. The factual background to these preliminary issues was not disputed and is mostly apparent from the documentation which has been presented to the court and is within the trial bundle.

7. I make the following findings of fact on the witness and documentary evidence presented to me. Since, as noted above, there have been no substantive disputes between the parties as to the factual background, it is unnecessary for me to explain my reasons for making those findings.

8. Dekra Penthouse Developments Limited ("DPD") was incorporated on 8th March 2001. Mr and Mrs Cunnington were the directors of DPD and Mr Cunnington was its sole shareholder.

9. In late 2004/early 2005 LABC (a trading style of MD Insurance Services Limited who acted as agents for the Defendant in these proceedings) issued an initial Certificate of Insurance for a development at Trinity Road, London SW17. That insurance was underwritten by Liberty Syndicate 4472 at Lloyds, not the Defendant in these proceedings. The Developer was listed as "Dekra". Correspondence was with Mr Cunnington of "Dekra". On 1st March 2005 Mr Cunnington on behalf of Dekra sent an Indemnity Agreement and Rules of Registration to the Defendant's agents which

resulted in June 2005 in a Certificate being issued to "Dekra". The final Certificate when issued was also in favour of "Dekra".

10. On 28th April 2005 Dekra Developments Limited ("DDL") was incorporated with the same directors and ownership as DPD. On 29th April 2005 Dekra Holdings Limited ("DHL") was incorporated. In that company's case Mr and Mrs Cunnington were equal shareholders.

11. In October 2007 "Dekra" entered into a Deed of Indemnity in respect of a development at Wellington Court in St John's Wood. When dealing with that development, the present managing agent (again acting for a different insurer) referred to Dekra as an existing developer.

12. On 24th January 2008 Alison Woods of LABC sent an email to Mr Cunnington in respect of a third development at the Terraces, St John's Wood. That email reads:

> "Further to your enquiry regarding the above new site. If GD Investments are the developers we will require a Contract Notification Form and Registration Form being filled in by and signed by them. If Dekra Developments are to be the builder, this should be under contractor information on the Contract Notification Form and if they just put reference that Dekra are already registered with LABC New Home Warranty than[sic] this will be taken into consideration when rating.

> I have attached the necessary forms if you wish to pass these on to GD Investments. If you have any further enquiries please do not hesitate to contact me."

This third development was, I was told and accept, different to the usual developments because there was a third party (GD Investments) who were the developer whereas Mr Cunnington/Dekra's usual approach was to be both developer and builder.

13. On 29th October 2009 a final Certificate of Insurance was provided for Trinity Road. The developer was "Dekra".

14. On 16th December 2011 the final Certificate of Insurance was issued for Penthouse 2 at Wellington Court and also listed "Dekra" as the developer as did subsequent certificates issued thereafter for the remaining penthouses.

15. On 25th March 2013 Grove End Gardens London Limited ("GEG") was incorporated with the same directors as DPD and DDL. The sole shareholder of GEG was DHL.

16. On 7th May 2013 Mr Cunnington applied to LABC/the Defendant in the name of Dekra in respect of a development at Grove End Gardens. That is the development which includes the Property the subject of these proceedings. The Contract Notification Form includes the following. In Section 5 of the Form in answer to the question "Who will carry out the building works?" is stated "Dekra". Likewise, the name of the builder is "Dekra". The LABC Warranty Registration Number is given as 004279. In answer to the question "Are you connected with a developer who is already registered with LABC Warranty?" the answer is given "Yes". In addition, in handwriting is written (probably by Mr Cunnington):

> "Dekra are a building company that do their own developments. We have been building for 30 years: see sheets attached."

In addition in handwriting the following had been written (also probably by Mr Cunnington):

> "Company - Dekra
>
> You will have more information than I could send."

17. In a document generated internally by the Defendant's managing agents which is undated but must have been produced after 7th May 2013 and before 11th June 2013 the developer is described as Dekra Developments. That document also makes clear that the developer is an existing developer, ie one that has been insured before, and the references in the internal document are to the previous developments at Trinity Road and Wellington Court as well as to the Terraces development with GD Investments.

18. On 11th June 2013 LABC sent a Quotation for the Grove End Gardens development in which the client was named as DDL. The Quote Details noted that the client was an "existing developer under 19376" which is the reference to Wellington Court. The quote also required the Contract Notification Form to be "completed and signed in the full developer name". Further, a "suitable cross-company guarantee" was to be provided in respect of cover for Section 3.2 of the Policy. It was noted that:

> "We are unable to issue any Certificates without receipt of the Cross-Company Guarantee."

19. On 18th June 2013 a lease was granted of the airspace above Grove End Gardens to GEG. On 19th June 2013 a payment was made to LABC by Davenport Lyons Solicitors on behalf of DPD in the sum of £59,557.08 and in acceptance of LABC's quote for insurance for the Grove End Garden development.

20. A Developer's Indemnity Agreement was entered into on 26th June 2013 between DDL and the Defendant. DDL confirmed receipt of the LABC Rules on 1st July 2013. An Initial Certificate for Grove End Gardens was issued by LABC on 27th August 2013. The Developer was named as DDL.

21. On 12th December 2013 GEG and DPD entered into a JCT Building Contract for DPD to construct the penthouses at Grove End Gardens, one of which is the Property. Sales brochures were issued in 2014 marked "Dekra" penthouses for sale at Grove End Gardens. In May 2014 Davenport Lyons solicitors, prepared an Information Sheet which states that the vendor was GEG and that "GEG will provide LABC cover for the Development." A "Certificate of Registration" of the Development was included in the Information Pack. The First Claimant could not recall whether he read this at the time and made clear by his evidence that he sought to rely entirely on his solicitors in acting for him in the purchase of the Property. The Developer was named as DDL consistent with the Initial Certificate.

22. When the Claimants paid the £10,000 reservation fee for the Property in August 2014, the vendor was listed as DHL.

23. In November 2014 the Claimants' then solicitors sent a letter of advice to the First Claimant who accepts that the letter was sent but said he did not believe he had read it very carefully at the time. He did however agree having been told by his own solicitors

that the vendor of the Property was GEG. There were also pre-contract negotiations between the Claimant's solicitors and the solicitors acting for the vendor. That included discussions as to the insurance cover to be provided with the Policy. It is clear that the Claimants' solicitors considered the best form of cover would be provided by NHBC insurance. They were unfamiliar with the LABC Policy and asked to see a copy of the same. They also noted that "These schemes do actually vary significantly if you look at their policy documents so there are no 'normal standards'."

24. On 3rd December 2014 the Claimants and GEG entered into an Agreement for Lease. The price of the Property was £5.1 million. Clause 10.6 of that Agreement provides:

> "The Vendor shall on or before service of the Completion Notice provide the Purchaser's solicitors with the following documents …
>
> 10.6.7. the Cover Note."

The Cover Note is the LABC Warranty underwritten by the Defendant.

25. On 24th February 2016 DPD requested a Completion Certificate from LABC for Penthouse A. (The Property the Claimants purchased is Penthouse F). That was met with a request for a "suitable cross-company guarantee." On 25th February 2016 DHL provided a cross-company guarantee of DDL's liabilities.

26. On 25th July 2016 LABC's in house Site Manager wrote to Mr Cunnington confirming that Plot F had been "finished to a good standard with only snagging remaining to complete."

27. On 28th July 2016 GEG's solicitors sent a Notice to Complete to the Claimants (dated 27th but not sent until 28th) and included the LABC New Homes Warranty Certificate

of Insurance. The Certificate of Insurance which includes cover for defects insurance, structural insurance, contaminated land and additional cover for Local Authority building control functions states on its face that the Developer was DDL. Above the signature for and on behalf of the Underwriter is the following sentence.

> "The Underwriter agrees to provide insurance in respect of the Housing Unit during the Period of Insurance subject to the terms and conditions of the policy."

28. The Policyholder is defined in the insurance so far as Sections 3.2, 3.3, 3.4 and 3.5 are concerned as:

> "The Owner acquiring a freehold or leasehold interest, or their successors in title, or any mortgagee in possession or lessor excluding the Developer, Builder, any relatives or associated companies or anyone having an interest in the construction or sale of the Housing Unit."

29. It is agreed that the Claimants fall within the definition of Policyholder.

30. So far as the definition of Developer is concerned which is, of course, central to the issues the court has to decide, the Policy provides that a Developer is:

> "Any person, sole trader, partnership or company who is registered with the LABC New Home Warranty and has registered the New Development and (i) with whom the Policyholder has entered into an

> agreement or contract to purchase the Housing Unit on either a freehold or leasehold basis; or (ii) who constructs the Housing Unit and with whom the Policyholder has entered into an agreement or contract to purchase the Housing Unit on either a freehold or leasehold basis."

31. Mr Sehayek told me, and I accept, that he had always understood that the Developer was "Dekra". I also accept that the Claimants relied on the existence of the Certificate of Insurance when purchasing the Property as is stated at Paragraph 20 of Mr Sehayek's witness statement.

32. In early 2017 DDL and DPD went into insolvent liquidation.

33. On 15th September 2017 the Claimants' Surveyor made a claim for defects under the Policy. There was an exchange of correspondence until 23rd April 2018 when the Defendant (through LABC) refused to cover. Prior to the refusal of cover, the Claimants' Surveyor had sent an email on 23rd March 2018 to LABC Warranty which includes the following:

> "As we have set out in correspondence to your colleague, the Clients' contractual link is with Grove End Gardens London Limited (GEGLL) who they purchased the flat from. Dekra Penthouses Limited (DPL) who you consider to be the 'Developer' constructed the buildings as Contractor to GEGLL and provided the LABC cover the benefit of which is with our Clients."

34. As I have noted already, on 23rd April 2018 LABC rejected the claim on the basis that the dispute between the Claimants and the Developer was excluded because there had been significant reductions in the sale price and the homeowners were aware of the reported issues prior to purchase. That decision was met with a further email of the same date from the Claimants' Surveyor which disputed that there was any reduction in the price of the flat by the Developer and further disputed that the Claimants were aware of any defects in the work as at the agreement to purchase or completion of the purchase of the Property. A request was made for information in respect of the details of the alleged price reduction and the mark-up to the Schedule of Defects previously provided detailing under which provision of the Policy cover was either to be provided or declined. There was a further rejection of the Claimants' claim on 3rd August 2018 on the basis that the issues raised concerned "contractual matters" and therefore amounted to an exclusion under cover for contractual disputes between the Developer and the Policyholder. It was accepted by Mr Sehayek in cross-examination that there was a rejection of cover under Section 3.2 of the Policy.

35. On 20th February 2019 the Claimants sent a Letter of Claim to the Defendant. There was an inspection carried out on 22nd May 2019 but no substantive reply to the Letter of Claim was received and these proceedings were issued on 29th October 2019 seeking damages of approximately £735,000.

36. Paragraph 31 of Mr Sehayek's statement reads:

> "It is of note that in none of these communications did LABC assert that the Policy was invalid for non-compliance with the rules. Nor was it ever asserted that we did not have the protection of the insurance

> provided by the LABC Warranty. Until the Defendant served in these proceedings, it has always been the LABC's position and understood by us that the bases for rejecting the claim were (i) an agreed reduction in the purchase price based on prior knowledge of defects, and (ii) there being a contractual dispute with the developer. This position has not altered in pre-action correspondence as the Defendant simply failed (despite various promises) to reply to our letter of claim. It was on this basis that we instructed our solicitors to pursue this claim.

I accept that that evidence is accurate and reflects the Claimants' honestly held understanding.

37. Paragraphs 14 and 15 of Mr Smith's witness statement provide:

> "I can confirm that we issued cover for Dekra Developments Limited at Grove End Gardens on the basis:
>
> (a) It was registered under the Scheme (a copy of Registration and the Scheme Rules are exhibited hereto at ROS5);
>
> (b) We obtained the signed Developers Indemnity Agreement (a copy of which is exhibited hereto at ROS6);
>
> (c) Escrow security was provided by Dekra Developments Limited (a copy of the agreement is exhibited hereto at ROS7); and

(d) We had a cross-company guarantee from Dekra Holdings Limited for the defaults of Dekra Developments Limited (a copy of which is exhibited hereto at ROS8).

15. I have been shown a copy of the Agreement to Lease between the Claimants and Grove End Gardens (London) Limited (a copy of which is exhibited hereto at ROS9). The document demonstrates Dekra Developments Limited was not the entity that entered into a sale agreement with the Claimants and therefore that Dekra Developments Limited does not appear to meet the Policy definition of 'Developer'. The entity entering into the contract was Grove End Gardens (London) Limited.

38. Likewise I accept that the facts set out in Paragraphs 14 and 15 are accurate and are Mr Smith's honestly held understanding of the position. I also accept, as did both Counsel in the case, that DDL does not meet the Policy definition of Developer because it did not enter into a sale agreement with the Claimants, nor was it the builder of the Claimants' Property.

Legal Principles and Submissions

39. The issue of which entity/ies was/were covered by the definition of Developer was not set out in the Particulars of Claim because the Defendant had not raised the point before its own Defence. Paragraphs 14 and 15 of the Defence set out the Defendant's case which is in brief that it is denied that DPD is "the Developer under the Policy." Not least the reason for this is that there was no contractual nexus between DPD and the Claimants.

40. The Reply sets out the Claimants' case on the construction and interpretation of the Policy at Paragraph 4(k), particularly sub-paragraphs (iv) to (vi) and at Paragraph 9(d). The estoppel/waiver case is also set out at Paragraphs 7(g) and 9 of the Reply. In short, the Claimants' position is that although the Policy refers to DDL as the Developer, that "does not reflect the reality." The Claimants say that the Developer was DDL and/or DDP and/or GEG. Alternatively, that the words "and associated companies" should be implied into the Policy.

41. The principles of construction are now well settled, and are summarised in the Supreme Court's decision in ***Arnold v. Brittain*** **[2015] AC 1619**. In his judgment, Lord Neuberger emphasised seven factors, the first of which at Paragraph 17 was:

> "The reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, 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 focusing on the issue covered by the provision when agreeing the wording of that provision."

At Paragraph 18 Lord Neuberger noted that:

> "The clearer the natural meaning, the more difficult it is to justify departing from it."

42. In the insurance context, the Supreme Court also made clear in ***Impact Funding Solutions v. Barringstone Support Services*** **[2016] UKSC 57 at para.6** that:

> "In a case of real doubt the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions."

43. I was also referred to observations of Coulson LJ in ***Manchikalapati v. Zurich Insurance plc*** **[2019] EWCA Civ 2163 at paras.78 to 82**. Coulson LJ said:

> "If it is said by an insurer that, as a matter of interpretation, the policy ostensibly designed to respond to the very events which have in fact occurred somehow does not respond *at all*, then that may indicate that the interpretation being urged on the court is not in accordance with its natural language."

Coulson LJ also warned against the use of a "strained and artificial construction (often requiring the interpolation of words not present)" as an impermissible exercise of construction of an insurance policy.

44. I was also referred to ***Lewison on Interpretation of Contracts*** **at paras.10/15, 10/18, 10/19 and 10/21**. That final paragraph states that:

> "Although extrinsic evidence may be adduced to explain or identify a person named in a contract, evidence will not be allowed to contradict the written contract."

45. The Defendant's Counsel has quite properly drawn my attention to the important point that an exclusion applied to the Policy is not an exclusion clause but is a clause to "define the scope of cover which the insurance policy is intended to afford": see ***Crowden v. QBE Insurance (Europe) Ltd*** **[2018] Lloyd's Rep IR 83 at para.65** and the ***Arch Insurance Litigation*** **[2020] Lloyd's Rep IR at 72-73, 363 and 373**.

46. The Defendant submits that the extrinsic evidence properly relied on shows clearly that the insurance cover for the Property was arranged between the Defendant and DDL. The parties agree that the Court can look to the underlying transaction to construe the Policy. The process of construing the Policy includes deciding whether there has been a misnomer of the parties to a contract. In that regard, the principles were summarised by Ramsey J in ***Liberty Mercian Ltd v. Cuddy Civil Engineering Ltd and Another*** **[2013] EWHC 2688 (TCC) at para.80-82** where the Learned Judge stated that so far as the principle of misnomer is concerned:

> "First there must be a clear mistake on the face of the instrument when the document is read by reference to its background or context."

47. At Paragraph 84 the Learned Judge identified the second requirement which is:

> "It must be clear what correction ought to be made to cure the mistake."

48. The Defendant points out, correctly in my judgment, that even if it is correct that DPD was the Developer under the Policy, that does not satisfy the requirements for cover because of the lack of contractual nexus with the Claimants. The Defendant describes the argument at Paragraph 9(d) of the Reply as "the kitchen sink argument" and argues that such an argument based on the need to imply a term to the effect that the definition of Developer "extends to associated companies and/or wholly owned subsidiaries" fails to meet the test set out authoritatively in ***Marks & Spencer v. BNP Paribas Security Services Trust Co (Jersey) Ltd*** **[2016] AC 742**. At Paragraph 28 of the majority judgment in that case it was pointed out that:

> "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 terms should be implied and if so what term."

It was further pointed out at Paragraph 29 that:

> "The process of implication involves a rather different exercise from that of construction."

The Supreme Court's decision in the ***Marks & Spencer*** case emphasised the requirement to show that an implied term was "necessary to give the contract business efficacy or so obvious that it went without saying." The Defendant's position in this litigation is that such an implied term is not necessary, not least because there is no fault

in the Policy which required to be cured by implication. The issue is that the cover provided simply does not extend to the Claimants because the party named as Developer has no contractual nexus with them. It is further argued that the implied term is contrary to the express terms of the contract.

49. As to arguments of estoppel/waiver, the Claimants' submissions which are put by way of "fallback" are essentially that the Defendant has represented by providing a Certificate and the Policy on 28th July 2016 and/or by subsequent dealings in 2018 that the Property would be covered by insurance under Section 3.2 of the Policy and further that the insurers would cover the Property regardless of whether the defects were the responsibility of DPD or another associated company (DPD, DHL or GEG). It is further submitted that the Claimants clearly relied on the Representations (my underlining) by completing the purchase and it would be "unconscionable" to allow the Defendant to resile from its prior representations. I was referred to ***McGillivray*** **at paras.10/103 and 10/106** and as to knowledge I was referred to the Court of Appeal's decision in ***HIH Casualty & General Insurance v. Axa Corporate Solutions*** **[2003] Lloyd's Rep IR 1 at paras.21 to 23**.

50. The Defendant's position is that the pleaded representations do not assist the Claimant because the Defendant is said to have represented that it would provide cover under the Policy "in accordance with the Terms and Conditions of the Policy" and that is what the Defendant is doing. It is the Defendant says simply the position that the Developer named in the Policy does not meet the Policy definition of Developer.

51. The Claimant also relies on waiver. Essentially, the Claimant prays in aid the payment of the premium by DPD and information from DPD during construction including site

inspections by the Defendant's agents followed by issue of the Certificate of Insurance Cover. In the alternative, dealing with the claims in 2018 is said to amount to a waiver. In that regard, I was referred to ***McGillivray*** **at paras.10/107 and 10/109**.

52. I have already summarised the Defendant's case as to estoppel. As to waiver arising in 2018, the Defendant submits that the emails relied on by the Claimants are not helpful because they do not show that the point relied on for the first time by the Defendant in its Defence had been appreciated at all let alone abandoned. Reliance is placed by the Defendant on the Court of Appeal's judgment in ***Bolton Metropolitan Borough Council v. Municipal Mutual Insurance Ltd*** **[2006] EWCA Civ 50 at paras.31 to 33**. I was also referred to the judgments in ***HIH Casualty*** at first instance and that which I have referred to at paragraph 49, in the Court of Appeal. The authorities and propositions of law which have been set out above were not disputed by either party's counsel.

Discussion and Decisions

Issues (a) and (b)

53. The parties have agreed the answers to Issues (a) and (b) are No in respect of both issues.

Issue (c)

54. The key question which answers Issue (c) is who is the Developer under the Certificate/Policy as a matter of construction or if relevant by implication?

55. The iterative process of construction of written agreements is now well settled. I have noted above at paragraphs 46 and 47 that the legal position so far as what might be described as a "misnomer" case is well set out by Ramsey J in ***Liberty Mercian*** **at paras.82 and 84 above**. Here, where it is accepted (as it must be) that the Certificate and Policy named DDL as the Developer, the Claimants must demonstrate that there is a "clear mistake on the face of the instrument when the document is read by reference to its background or context" (per Ramsey J). Another way of putting it is whether the party named makes commercial nonsense and was a clear mistake. If that hurdle is overcome, then "it must be clear what correction ought to be made to cure the mistake" (see **para.84** cited above).

56. In my judgment, the Claimants' case on construction fails to overcome both of these tests.

57. I accept, as did the parties, that extrinsic evidence is relevant and that includes evidence as to the formation of the underlying transaction between the Defendant insurer and the "Developer" leading to the inception of insurance cover. However, that does not assist the Claimants who need to show that the factual background leads to the conclusion that naming DDL as Developer was a clear mistake. The Claimants cannot show such a mistake here where there was no evidence to suggest that when DDL entered into the Developer's Indemnity Agreement and when a cross-company guarantee was provided in respect of DDL's liabilities that was in any way a mistake, let alone one known to either party and certainly not to the Defendant. The point is analogous to that in ***Liberty Mercian*** at **paras.98 to 99**. An objective reading of the evidence leading to the inception of the Policy is clearly only consistent with that cover having been agreed between DDL and Amtrust. Whilst I accept the evidence of previous dealing (by a

different insurer) with an entity known as "Dekra", that cannot, as Mr Green in my judgment rightly submitted, be taken on any view to include GEG which did not exist until March 2013. Nor can evidence of previous dealings shed any light on the Claimants' understanding of the position when they completed the purchase of the Property because at that date they did not know anything about the history. Neither, in my view, does the factual background assist in construing the words "DDL" in the insurance as meaning "DDL or any associated company." The factual background does not demonstrate that that particular position had occurred before. Further even accepting, as I have done, that the Claimants believed they were purchasing the Property from "Dekra" does not lead to an objective interpretation of the underlying transaction to which the Claimants were not a party being with an entity other than DDL. Likewise, the fact that the definition of Policyholder does allow for "associated companies" whereas the definition of Developer does not, means that the construction argued for by the Claimants is even harder to justify.

58. It follows that there is no mistake/misnomer here let alone a clear one.

59. Further, the "correction" that ought to be made is not clear. The pleaded case is set out in a number of alternatives and the argument was likewise put on those bases. That does not of itself show that there is no clear correction but does, in my judgment, demonstrate that this is not a simple case of misnomer. The use of the phrase "associated companies" is not a clear correction. It is unclear how many entities might be caught by that description. Nor is it clear why a reasonably objective reader of the Policy/Insurance Certificate would understand the naming of a specific entity needed to be read as including other specific entities or associated companies.

60. As entered into with DDL the insurance cover as a whole is not commercially unworkable. The cover post the Initial Period is still in place (subject to exceptions such as chimneys and flues). It follows that the Claimants have some benefit from the insurance as entered into. The submission at Paragraph 37 of the Claimants' Opening Skeleton is therefore incorrect and was not pursued in Closing Submissions. So far as implied terms are concerned, that submission also fails, in my judgment. The Claimants accepted that the test for implication was harder to surmount and is, as I have already noted, one of necessity. There is no necessity in implying the words "or associated companies" into the definition of Developer. The problem is not with the words of the Policy; namely with the party who is named (in my judgment, as I have already decided above, without a mistake having been made) as the Developer. The implication of terms which widen the description of the Developer cannot be seen as being necessary (however desirable it obviously is for the Claimants).

Issues (d)(iv)-(iv)

61. It is, therefore, necessary to decide whether what the Claimants' Counsel referred to as the fallback position as to estoppel/waiver is made out.

62. As to estoppel, the Claimants' pleaded case clearly identifies the Representations relied upon by them in respect of the plea of estoppel. Mr Green submitted that even on the basis that both those Representations were made, they do not assist the Claimants because what needs to have been represented was that cover would extend to GEG/associated companies of DDL including GEG and that is not the Claimants' pleaded case. He further submitted that if that further representation was the Claimants' pleaded case it was not made out on the facts or as a matter of law.

63. In his Opening Skeleton, Mr Datta for the Claimants submits that the Defendant made a clear and unequivocal representation that "the insurance would cover the premises regardless of whether responsibility for the relevant defect was the responsibility of DPD or another associated company including GEG." I agree with Mr Green's submission that this argument strays beyond the pleaded case expressly or by implication. In any event, and more importantly in my judgment, the evidence does not demonstrate any such representation was made by the Defendant or its agents at all, let alone clearly and unequivocally. The only representations can be found on the face of the documents, namely the Certificate and Policy, which do not so provide. There is no suggestion that any other representations were made other than those in the documents. Indeed, those documents clearly provide, as I have already held, that the cover relates to defaults of the Developer as defined (which does not extend to associated companies such as GEG). It is impossible, in my judgment, to say that the representations now relied upon by the Claimants were made by the Defendant. The only representations made were those pleaded and they do not advance the Claimants' positions at all as they are not representations which lead to the insurance cover responding to the Claimants' claim under Section 3.2. On the basis that no clear unequivocal representations were made by the Defendant to the Claimants as alleged and/or as now contended for, the plea of estoppel must fail. I do accept that the Claimants relied on an insurance policy being place and that reliance was to their detriment, but since there was no detrimental reliance on clear and unequivocal representations that GEG was the Developer the facts of reliance of themselves do not engage any estoppel.

64. As far as waiver is concerned, the Claimants rely on two different waivers. The first is the issue of the Certificate and the Policy, but that must fail for the same reasons as the estoppel said to arise from the same representations.

65. The second waiver claimed is said to arise from the way in which the Defendant and its agents dealt with the claims in 2018 and specifically the way in which the claims were rejected although cover for GEG as Developer was not specifically rejected. I am not satisfied that there was any clear appreciation on the Defendant's part that they had the right to reject the claim under Section 3.2 for the additional reason that the cover did not extend to a non-developer. There is no evidence at all that the Claimants understood that this reason for rejection existed, let alone that the Defendant also appreciated that was the position.

66. Further, the mere fact that cover was denied by the Defendant on one ground does not of itself mean that there was a waiver by election (or otherwise) of the right to refuse cover on another ground: see ***Bolton* at paras. 31 to 33**. The documents in this case (which are the only basis on which the waiver plea is advanced) do not show any explicit or even implicit waiver of any other grounds of rejection by the Defendant.

67. In addition, insofar as the Claimants rely upon waiver by estoppel, that requires detrimental reliance which has not been pleaded and/or demonstrated at all. It did not feature in the Claimants' witness statement or in Mr Sehayek's oral evidence.

68. It follows that for the above reasons the answers to the preliminary issues are:

(a) No (agreed);

(b) No (agreed);

(c) No;

(d) (i)-(iv) No.

69. I will hear Counsel on any consequential matters if they cannot be agreed in advance.