Neutral Citation Number: [2024] EWHC 341 (TCC)

Case No: HT-2020-LDS-000008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG

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Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

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Between :

SCOTBEEF LIMITED

Claimant

- and –

(1) D&S STORAGE LIMITED (IN LIQUIDATION)
(2) LONHAM GROUP LIMITED

Defendants

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Mr Andrew Brown (instructed by **Birketts LLP**) for the **Claimant**
Mr Michael Proctor (instructed by **Kennedys Solicitors**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing date: 24 October 2023
Date draft circulated to the Parties: 5 February 2024
Date handed down: 20 February 2024

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APPROVED JUDGMENT

Her Honour Judge Kelly

1. This judgment follows the trial of a preliminary issue agreed to be tried by consent order made on 23 February 2023. The preliminary issue was agreed in the following terms:

> "Whether the First Defendant had any right of indemnity against the Second Defendant under Marine Liability Policy No: 117040 DB, in relation to the loss claimed by the Claimant, which can be enforced by the Claimant pursuant to the Third Parties (Rights against Insurers) Act 2010".

The Claimant asserts that the First Defendant has a right of indemnity when the First Defendant's insurance policy with the Second Defendant is interpreted in conjunction with the Insurance Act 2015 ("the 2015 Act"). The Claimant asserts that it can enforce that right of indemnity pursuant to Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act"). The Second Defendant asserts that the First Defendant did not have any such right of indemnity under the terms of the insurance policy and thus there is nothing to enforce under the 2010 Act.

2. The Claimant was represented by Mr Andrew Brown of counsel, and the Second Defendant was represented by Mr Michael Proctor of counsel. I had the assistance of skeleton arguments from both counsel before the start of the hearing. The First Defendant did not appear and was not represented.

3. The Claimant and the First Defendant have been involved in proceedings since 2020. After the First Defendant went into liquidation, the Claimant sought to add the Second Defendant with the intention of enforcing any judgment obtained against the Second Defendant pursuant to the 2010 Act.

4. In the consent order made on 23 February 2023, the parties noted that the liquidators of the First Defendant had confirmed that the First Defendant did not intend to take any further active part in these proceedings. The Claimant and both Defendants agreed to the lifting of the stay imposed by section 130(2) of the Insolvency Act 1986 and the Second Defendant was added to the proceedings.

5. As the First Defendant is not taking any further active part in proceedings, further reference in this judgment to "the parties" refers to the Claimant and the Second

Defendant only unless otherwise stated. The parties agreed that the preliminary issue set out above would be determined before the Claimant was required to file and serve an Amended Claim Form and Particulars of Claim and before the Second Defendant was required to file and serve a Defence.

Background

6. The background to the dispute between the Claimant and the First Defendant is set out in the judgment handed down on 14 October 2022 ("the 2022 judgment"). It is not repeated here.

7. In the 2022 judgment, the court made various findings of fact about the lack of incorporation of industry specific terms. In particular, the court found that the Food Storage & Distribution Federation ("the FSDF") terms had not been incorporated in the relationship between the Claimant and the First Defendant as the First Defendant had asserted. No specific findings were made as to the incorporation of any other terms, whether industry standard terms or otherwise.

8. A brief chronology will assist.

30.06.16	The first insurance policy entered into between the First and Second Defendant was made. The UK Warehousing Association ("the UKWA") terms and conditions were referred to as being in use by the First Defendant.
??.02.17	The Claimant started a relationship with the First Defendant whereby the First Defendant agreed to freeze and to store meat for the Claimant. The relationship was arranged via Woolley Bros. (Wholesale Meats) Ltd ("Woolley Bros") who had an existing storage relationship with the First Defendant. No direct communication occurred between the Claimant and the First Defendant and there was no written contract setting out terms of storage.
27.02.17	The first weekly invoice from the First Defendant to the Claimant. The invoice referred to UKWA terms as follows: "A Member of UKWA UKWA Terms & Conditions Apply Settlement Terms Strictly 30 Days Net" Invoices continue to be sent making reference to UKWA terms and conditions until May 2017.

00.05.17	the First Defendant becomes a member of the FSDF.
15.05.17	On this date, the first reference is made to the Claimant of the membership of the First Defendant of the FSDF. An invoice referred to FSDF terms as follows: "A Member of FSDF FSDF Terms & Conditions Apply Settlement Terms Strictly 30 Days Net" The First Defendant's weekly invoices continued to make reference to FSDF terms and conditions until 4 February 2019.
30.06.18	The insurance policy is renewed between the First and Second Defendant. FSDF terms and conditions were referred to as being in use by the First Defendant.
07.01.19	Woolley Bros and the First Defendant entered into a general service agreement for a 12 month period. It was said to be "on the terms and conditions set out in this agreement" for the First Defendant to provide third-party refrigeration services. No mention was made of FSDF, UKWA or other industry standard terms.
18.02.19	The First Defendant sent invoices from this date until 3 November 2019 which made no mention of FSDF or UKWA terms and conditions. There was one exception where an invoice was sent in a previously used FSDF format on 16 September 2019.
30.06.19	The insurance policy is renewed between the First and Second Defendant. FSDF terms and conditions were referred to as being in use by the First Defendant.
03.10.19	Six pallets of meat were transferred from the First Defendant to the Claimant. They were discovered to contain mould.
14.04.20	An inspection took place of 102,355 kg of the Claimant's meat in the possession of the First Defendant. It was declared unfit for human or animal consumption.
20.07.20	The claim is issued.
18.01.21	The First Defendant files an initial Defence asserting express incorporation of the FSDF terms and conditions or alternatively via a course of dealing.
29.03.21	An Amended Defence is filed for the First Defendant asserting that Woolley Bros acted as agent for the Claimant and that Claire Portsmouth, an employee of the First Defendant, telephoned the Claimant and Woolley Bros on 15 May 2017 to give notice that the FSDF terms and conditions were incorporated into any trading

	relationship moving forward.
21.10.21	First preliminary hearing on whether the FSDF terms were incorporated into the contract between the Claimant and First Defendant.
24.11.21	The First Defendant was wound up by order of ICC Judge Burton.
14.10.22	The 2022 judgment on the incorporation of the FSDF terms preliminary issue was handed down. The findings included: (1) The FSDF terms and conditions were not, and never were, incorporated into the contractual relationship between the Claimant and the First Defendant. (2) Claire Portsmouth had not telephoned either the Claimant or Woolley Bros to notify them of the incorporation of FSDF terms. (3) There were no findings that any other terms were incorporated into the contractual relationship. (4) No evidence was provided to the Court which would enable findings to be made about any other third party trading relationships of the First Defendant. There was some evidence about the First Defendant's relationship with Woolley Bros, but findings were not sought by either the Claimant or the First Defendant during the course of the FSDF preliminary issue hearing.
04.11.22	Kennedys solicitors wrote to the Claimant to state that they act for the now Second Defendant. They relied on the "Duty of Assured Clause" to deny liability on the grounds that the clause required the First Defendant to take all reasonable steps to incorporate the FSDF terms and conditions. The letter sets out: "As Scotbeef Ltd successfully argued in the preliminary hearing held on 21 October 21 that D&S Storage Ltd took no steps to incorporate the FSDF Terms and Conditions into their contract. We also refer you to Judge Kelly's judgment dated 14 October 2022 in which she found that D&S Storage Ltd failed to take any steps to incorporate the FSDF terms and conditions and that they were not incorporated into the contract between your clients and D&S Storage Ltd. In the light of these conclusions and the judgment, we consider that D&S Storage failed to comply with the condition precedent and our clients have no liability under their policy to indemnify D&S Storage Ltd"
06.12.22	The Claimant's solicitors replied substantively to the letter of 4 November 2022. That letter noted the Duty of Assured Clause and asserted that the clause distinguished any representation by the First Defendant in respect of trading conditions which were incorporated at the time of the policy (under sub-clauses (i) and (ii) and the reasonable steps which were required by the clause to incorporate FSDF terms and

	conditions into any new contracts (under sub-clause (iii)). The Claimant asserted that as the contract between the Claimant and First Defendant predated the relevant contract of insurance, it was only necessary to declare the existence and terms of the contract with the Claimant for the indemnity to apply.
09.12.22	The Second Defendant's solicitors replied asserting that the only trading terms declared by the First Defendant to the Second Defendant were the FSDF terms with a limit of £250 per tonne. It was asserted that the condition precedent required that the First Defendant "continuously trades under the conditions declared and approved by the Underwriters in writing". The Claimant had successfully argued that the First Defendant did not incorporate the FSDF terms and conditions. The Second Defendant disagreed with the Claimant's interpretation of the Duty of Assured Clause and asserted that as a matter of commercial sense, there was no restriction of the requirement to use reasonable steps to incorporate FST after terms and conditions only in respect of new contracts.
23.02.23	By consent, the Second Defendant is added as a Defendant to this claim and the terms of a preliminary issue is agreed between the parties.

9. I have had the benefit of reading the witness statements of Mr Simon Charles Dowling dated 2 June 2023 for the Claimant and Ms Joanna Weight ("Ms Weight") dated 10 October 2023 and Mr Kevin Harris dated 10 October 2023 for the Second Defendant, together with the various documents to which I was taken during the course of the trial and directed to in the skeleton arguments. During the trial, I had the benefit of hearing oral evidence from Ms Weight for the Second Defendant.

10. Any findings on the issue do not turn solely on the credibility of the oral evidence, but also on the documentary evidence contained within the trial bundles and the legal arguments. I do not propose to rehearse all of the arguments raised by the parties, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole and all the arguments raised by the parties before coming to my decision.

The Terms of the 2019 Insurance Policy

11. The relevant terms of the insurance policy between the Second Defendant and the First Defendant are as follows:

Term/Condition	Page in Policy
TRADING CONDITIONS: FSDF Terms and Conditions at £250 per tonne	1
Warehousekeepers Legal Liability Conditions	4
Warehousekeepers Liability Conditions This insurance shall indemnify the Assured for their legal liability for physical loss or damage to goods and/or merchandise and/or equipment in accordance with the National Association of Warehousekeepers Trading Conditions (N.A.W.K.) and/or the United Kingdom Warehousekeepers Association Conditions (U.K.W.A.) Road Haulage Association Conditions and/or under the Assured's own trading conditions and/or other conditions as may be approved by the Underwriters in writing.	
IMPORTANT cover provided under this section of the policy is subject to the GENERAL CONDITIONS, EXCLUSIONS AND OBSERVANCE TERMS.	7
General Conditions Conditions General Conditions, Exclusions and Observance…	8
DUTY OF ASSURED CLAUSE It is a condition precedent to the liability of Underwriters hereunder:- (i) that the Assured makes a full declaration of all current trading conditions at inception of the policy period; (ii) that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing; (iii) that the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured. Reasonable steps are considered by Underwriters to be the following, but not limited to same: • the Assured makes specific reference to their trading conditions in job quotations to their customers; • if "own conditions" are used, i.e. not industry standard trading	9

conditions such as BIFA or RHA, a copy of those conditions should be made available to the insured's customers at the time of contracting;
• the Assured specifies their trading conditions on all invoices and written communications to their customers.

If a claim arises in respect of a contract into which the Assured have failed to incorporate the above mentioned conditions the Assured's right to be indemnified under this policy in respect of such a claim shall not be prejudiced providing that the Assured has taken all reasonable and practicable steps to incorporate the above conditions into contracts;

(iv) that the Assured shall at no time deliberately and/or knowingly and/or recklessly furnish incorrect information either verbally or on any documentation issued or completed in performance of the Assured's business including without limitation any Bills of Lading and/or other documents containing or evidencing a contract, of carriage or otherwise, and/or any customs documents and/or shipping documents;

(v) that the Assured shall at all times act with due diligence.

The policy is subject to and incorporates the provisions of the Insurance Act 2015 and any modification thereof unless such modification has been excluded under the policy. In connection therewith the policy includes LMA5264.

IMPORTANT INSTRUCTIONS IN THE EVENT OF A CLAIM… 10
The Assured shall as a condition precedent to their right to be indemnified under this policy give to the Underwriters immediate notice in writing:-
(i) of any claims made against them or;
(ii) of the receipt of notice from any person of any intention to hold the Assured responsible for the results of any breach of professional duty in connection with the Assured's business…

The effect of a breach of a condition precedent is that the Underwriters are entitled to avoid the claim in its entirety. 11

The Issues

12. The parties set out their respective positions on various matters which need to be determined in order to answer the preliminary issue raised. The Claimant phrased what it described as the sub issues as follows:
    a. Sub Issue 1: What is the proper construction of the 'Duty of Assured Clause'?
        i. Should sub-clause (ii) be read as an extension of, or subordinate clause to, sub-clause (i), so that it is also rendered ineffective under the Insurance Act 2015? Or is it a free-standing warranty or condition precedent requiring the First Defendant to trade on FSDF terms even if misrepresented as being incorporated under sub-clause (i)?
        ii. Does sub-clause (iii) impose a duty on the First Defendant to take all reasonable steps to incorporate the FSDF terms to existing contracts, even where it believed they already were incorporated, or did it merely relate to new contracts with third-parties entered into during the Insurance Contract?
    b. Sub-Issue 2: Can sub-clause (i) stand as a warranty or condition precedent in light of the effect of the Insurance Act 2015?
        i. Did the First Defendant misrepresent its trading terms to the Second Defendant, what is the effect of the Insurance Act 2015 if so?
        ii. If sub-clause (ii) is an extension of sub-clause (i), does its existence run contrary to the Insurance Act 2015?
    c. Sub-Issue 3: Depending on the answer to Paragraph (a)(ii) in Sub-issue 1, does the First Defendant's contract with the Claimant fall within the ambit of sub-clause (iii), if so, did the First Defendant take every reasonable step to incorporate the FSDF terms, or is that irrelevant?

13. The Second Defendant disagreed with the way those sub-issues were framed by the Claimant but did agree that, broadly speaking, those were the issues for the court to decide. The Second Defendant during oral submissions categorised the sub-issues as:
    a. Is sub-clause (i) invalidated by section 9 of the 2015 Act?
    b. Is sub-clause (ii) struck down by section 9 of the 2015 Act?
    c. Does sub-clause (iii) relate only to future contracts after the inception of the policy and, even if this is correct, does that assist the Claimant's argument?

d. Do the sub-clauses satisfy the transparency requirements?
e. Was there a breach of the sub-clauses, in particular sub-clause (ii)?

14. I will use the wording of the sub-issues as suggested by Claimant when finding are set out below.

The Law

15. The parties agree that if the First Defendant was entitled to be indemnified under its insurance policy with the Second Defendant, the Claimant has a right to enforce that indemnity pursuant to the 2010 Act. If there is a breach of a condition precedent in the insurance contract by the First Defendant, that would prevent the First Defendant and therefore the Claimant from making a claim under the policy. In order to establish liability on the part of the Second Defendant, the Claimant must establish liability on the part of the First Defendant and that such liability is insured under the insurance policy (see *BAE Systems Pension Funds Trustees Ltd v Royal & Sun Alliance Insurance Plc* [2018] Lloyd's Rep I.R. 77, paragraphs 16, 17 and 24).

16. Insurance policy provisions should generally be construed in the same manner as other contractual documents as summarised in *Law of Insurance Contracts*, *Service Issue* No 56 (July 23):

"*In a particular case, the English court seeks the intention of the parties to the contract, and presumes that words are used in their ordinary sense and in accord with legal precedent. The ordinary meaning of words read in isolation is displaced by any special meaning they acquire from the immediate context of the policy or from the wider context of the trade or industry and, closely related to the latter, words are construed in the light of the object or purpose of the contract of insurance as a whole…Whether or not there is ambiguity, the court seeks to avoid a literal construction which gives absurd results…. If there is ambiguity, the words will be construed contra proferentem….*

"*Whether or not there is ambiguity, the court seeks to avoid a literal construction of warranties which would give absurd results. To that extent, at least, the courts put upon words a "reasonable" construction.*".

17. *Colinvaux's Law of Insurance* (13th edition) ("Colinvaux") notes a judicial tendency to construe narrowly obligations imposed by a condition precedent in respect of liability, although it also notes that the judicial tendency is "not one universally followed".

18. The parties disagree about the legal effect of the 2015 Act on the Duty of Assured Clause in the contract of insurance between the First and Second Defendants. Previously, insurance contracts were uberrima fides contracts such that any breach of good faith by the assured would allow the insurer to avoid the contract. That duty has been ameliorated as a result of the 2015 Act. The specific submissions of each party will be set out below in relation to the issues.

19. The relevant sections of the 2015 Act are as follows:

> **2.— Application and interpretation**
> (1) This Part applies to non-consumer insurance contracts only.
> (2) This Part applies in relation to variations of non-consumer insurance contracts as it applies to contracts, but—
> (a) references to the risk are to be read as references to changes in the risk relevant to the proposed variation, and
> (b) references to the contract of insurance are to the variation.
>
> **3.— The duty of fair presentation**
> (1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.
> (2) The duty imposed by subsection (1) is referred to in this Act as "the duty of fair presentation".
> (3) A fair presentation of the risk is one—
> (a) which makes the disclosure required by subsection (4),
> (b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
> (c) in which every material representation as to a matter of fact is substantially correct, and every material representation
> as to a matter of expectation or belief is made in good faith.
> (4) The disclosure required is as follows, except as provided in subsection (5)—
> (a) disclosure of every material circumstance which the insured knows or ought to know, or
> (b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to
> make further enquiries for the purpose of revealing those material circumstances.
> (5) In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if—
> (a) it diminishes the risk,
> (b) the insurer knows it,
> (c) the insurer ought to know it,
> (d) the insurer is presumed to know it, or
> (e) it is something as to which the insurer waives information.

(6) Sections 4 to 6 make further provision about the knowledge of the insured and of the insurer, and section 7 contains
supplementary provision.

8.— Remedies for breach

(1) The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—
(a) would not have entered into the contract of insurance at all, or
(b) would have done so only on different terms.
(2) The remedies are set out in Schedule 1.
(3) A breach for which the insurer has a remedy against the insured is referred to in this Act as a “qualifying breach” .
(4) A qualifying breach is either—
(a) deliberate or reckless, or
(b) neither deliberate nor reckless.
(5) A qualifying breach is deliberate or reckless if the insured —
(a) knew that it was in breach of the duty of fair presentation, or
(b) did not care whether or not it was in breach of that duty.
(6) It is for the insurer to show that a qualifying breach was deliberate or reckless.

9.— Warranties and representations

(1) This section applies to representations made by the insured in connection with—
(a) a proposed non-consumer insurance contract, or
(b) a proposed variation to a non-consumer insurance contract.
(2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

10.— Breach of warranty

(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.
(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.
(3) But subsection (2) does not apply if—
(a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
(b) compliance with the warranty is rendered unlawful by any subsequent law, or
(c) the insurer waives the breach of warranty.
(4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—
(a) before the breach of warranty, or
(b) if the breach can be remedied, after it has been remedied.
(5) For the purposes of this section, a breach of warranty is to be taken as remedied—

(a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
(b) in any other case, if the insured ceases to be in breach of the warranty.
(6) A case falls within this subsection if—
(a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
(b) that requirement is not complied with.
…

11.— Terms not relevant to the actual loss
(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—
(a) loss of a particular kind,
(b) loss at a particular location,
(c) loss at a particular time.
(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.
(4) This section may apply in addition to section 10.

14.— Good faith
(1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished.
(2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.
(3) Accordingly—
(a) in section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from ", and" to the end are omitted, and
(b) the application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012.
(4) In section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (disclosure and representations before contract or variation), subsection (5) is omitted.

15.— Contracting out: consumer insurance contracts
(1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects any of the matters provided for in Part 3 or 4 of this Act than the consumer would be in by virtue of the provisions

of those Parts (so far as relating to consumer insurance contracts) is to that extent of no effect.
(2) In subsection (1) references to a contract include a variation.
(3) This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

16.— Contracting out: non-consumer insurance contracts
(1) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects representations to which section 9 applies than the insured would be in by virtue of that section is to that extent of no effect.
(2) A term of a non-consumer insurance contract, or of any other contract, which would put the insured in a worse position as respects any of the other matters provided for in Part 2, 3 or 4 of this Act than the insured would be in by virtue of the provisions of those Parts (so far as relating to non-consumer insurance contracts) is to that extent of no effect, unless the requirements of section 17 have been satisfied in relation to the term.
(3) In this section references to a contract include a variation.
(4) This section does not apply in relation to a contract for the settlement of a claim arising under a non-consumer insurance contract.

17.— The transparency requirements
(1) In this section, "the disadvantageous term" means such a term as is mentioned in section 16(2) or 16A(4).
(2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.
(3) The disadvantageous term must be clear and unambiguous as to its effect.
(4) In determining whether the requirements of subsections (2) and (3) have been met, the characteristics of insured persons of the kind in question, and the circumstances of the transaction, are to be taken into account.
(5) The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured (or its agent) had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.

Schedule 1 INSURERS' REMEDIES FOR QUALIFYING BREACHES
1.
This Part of this Schedule applies to qualifying breaches of the duty of fair presentation in relation to non-consumer insurance contracts (for variations to them, see Part 2).

2.
If a qualifying breach was deliberate or reckless, the insurer—
(a) may avoid the contract and refuse all claims, and
(b) need not return any of the premiums paid.

> 3.
> Paragraphs 4 to 6 apply if a qualifying breach was neither deliberate nor reckless.
>
> 4.
> If, in the absence of the qualifying breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid.
>
> 5.
> If the insurer would have entered into the contract, but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.

20. In *Chitty on Contracts* (34th edition) ("Chitty"), the impact of the 2015 Act on warranties and conditions precedent as a result of representations made is considered at 44-059:
"*It has been a common feature of many commercial insurance contracts that pre-contractual representations of fact made by the assured to the insurer, often in a proposal form, are warranted to be true or that the policy contains conditions precedent to the liability of the insurer that such pre-contractual representations are true. Such warranties or conditions precedent may be express or may be introduced by provisions stating that the pre-contractual representations are the "basis" of the contract or are incorporated into the contract. The effect of such provisions is that if any pre-contractual representation which is the subject of such a warranty or condition precedent is untrue, the insurer is automatically discharged from all liability under the insurance contract as from the date of the breach of the warranty or condition precedent. The 2015 Act renders such provisions as invalid in that s. 9(2) provides that a representation made by the assured cannot be converted into such a warranty (or presumably conditions precedent) by such means (including by means of a "basis of the contract" clause). This prohibition appears to be aimed at provisions which seek to convert, without discrimination, all or a large number of pre-contractual representations into a warranty by basis of the contract clauses or the like. As recognised in the Explanatory Notes accompanying the Act, it should remain possible for insurers to include specific warranties relating to existing or past facts within their policies."* (emphasis added).

The Evidence

Mr Dowling

21. Mr Dowling did not give oral evidence. Mr Dowling was employed by the Claimant as a director. He had no direct knowledge of any terms and conditions between the Claimant and the First Defendant. All of the arrangements had been made by Woolley Bros for the Claimant and Woolley Bros delivered meat to the First Defendant which was then frozen. Ownership of the meat was then transferred to the Claimant and the First Defendant stored the meat for the Claimant.

22. Invoices were sent from the First Defendant to the Claimant directly for storage. Mr Dowling only knew that Woolley Bros had told the Claimants that the First Defendant had adequate insurance. Mr Dowling accepted that he did not have any first-hand knowledge of the of the First Defendant with the Second Defendant nor any terms which any insurance policy contained.

Ms Weight

23. Ms Weight was the only witness to give oral evidence. She is a senior underwriter for the Second Defendant. She described that the First Defendant took out a warehouse keepers liability policy which was underwritten by the Second Defendant and insured with it for four years. She dealt with the 2017 and 2018 renewals and a colleague who is no longer with the Second Defendant, Matt Hayward, dealt with the relevant 2019 renewal.

24. Ms Weight stated when the Second Defendant quoted for a risk, the Second Defendant would rely upon information provided by the broker which would include information such as the turnover of the company, limits of liability, types of goods and trading conditions. She stated it was particularly important that the First Defendant contracted on the basis of its own trading conditions or one of the standard sets of trading terms drafted by the major industry organisations.

25. When the Second Defendant began to underwrite the insurance for the First Defendant, the Second Defendant was advised that the First Defendant was a member of the UKWA and traded subject to their standard trading conditions. Those conditions included a limit

of liability at £100 per tonne of cargo lost or damaged. In 2017, the Second Defendant was informed that the First Defendant had changed its membership from UKWA to FSDF.

26. Ms Weight requested a copy of the FSDF terms and conditions because she was not familiar with them at the time. She wanted to review them to ensure they contained the limits, exclusions and time limits which the Second Defendant wanted to manage the risk. She noted the increase of liability from £100 per tonne to £250 per tonne. However, liability was limited and there was an exclusion for consequential losses. There were also time limits for claims and litigation. As the claims record of the First Defendant was clear and there was no change to turnover or storage limits, the Second Defendant considered that the risk remained acceptable and therefore it insured the First Defendant. A risk posed by the First Defendant not trading on standard trading terms would not have been acceptable as an insurance risk to the Second Defendant.

27. The Second Defendant considered that it was "of the utmost importance that insureds take all reasonable steps to incorporate the trading terms which they notified to us". This was because the Second Defendant bases its underwriting decisions on the assumption that the standard terms will apply to the contract between the insured and their customers. For that reason, the" "Duty of the Assured" clause is, therefore, expressed as a condition precedent in order to impress upon the insured the importance of complying with the requirements".

28. As the First Defendant had not taken all reasonable steps to incorporate the FSDF terms in its contract with the Claimant, as found by the 2022 judgment, indemnity under the policy was rejected.

29. In cross-examination, Ms Weight was taken to the insurance policy itself. She agreed that questions were asked of the First Defendant which the Second Defendant thought were important for it to decide whether to ensure the First Defendant. The terms in use between the First Defendant and its customers were important. Those important terms included the exclusions to liability including limits to liability and time bars. She agreed that the limitation of liability by tonnage was important. She was taken to the specific limits set

out at page 2 of the policy. She accepted that the limit of £250 per tonne was not set out within those limits specifically. It could have been added but she did not consider that was necessary because the £250 per tonne was set out under the heading trading conditions at page 1 of the policy.

30. She was next taken to page 10 of the policy where she agreed that important instructions were set out in the event of a claim. Those instructions read:

> "The Assured shall as a condition precedent to their right to be indemnified under this policy give to the Underwriters immediate notice in writing:-
> (i) of any claims made against them or;
> (ii) of the receipt of notice from any person of any intention to hold the Assured responsible for the results of any breach of professional duty in connection with the Assured's business…"
>
> On the next page of the policy after other instructions were given were the words: "The effect of a breach of a condition precedent is that the Underwriters are entitled to avoid the claim in its entirety".

31. Ms Weight agreed that there was nothing to stop the Second Defendant limiting liability to 9 months after any particular incident in the policy of insurance itself. However, she stated that it would normally be set out in the trading conditions and so therefore the Second Defendant would not usually include it within the policy itself. She agreed that all of the terms which the Second Defendant considered to be important in the FSDF terms could have been set out on the face of the insurance contract itself.

32. Ms Weight did not accept that in the absence of trading upon standard terms, the Second Defendant would have accepted the insurance risk in this case. Although the relevant terms could have been included in the contract of insurance itself, the basis for underwriting she explained was that the Second Defendant relied upon the standard conditions under which the insured traded.

Mr Harris

33. Mr Harris is a senior claims adjuster at the Second Defendant. When he received notification of the claim from the First Defendant on 28 November 2019, he noticed that the policy stated that the FSDF terms were in use by the First Defendant. He too stated that he had never come across the FSDF terms before. However, having considered the

FSDF terms, he noted that they were similar to other industry standard terms albeit with a higher liability level of £250 per tonne for loss and damage.

34. Mr Harris was told by the First Defendant that the FSDF terms had been incorporated with their customers because they had been referred to on invoices sent to customers. During the course of the claim by the Claimant against the First Defendant, Mr Harris stated that he was becoming increasingly concerned that the First Defendant had taken very limited (if any) steps to incorporate the FSDF terms with the Claimant. He therefore sent a reservation of rights to the broker of the First Defendant on 21 August 2020 stating that he was concerned that the First Defendant had breached the terms of the insurance policy and that a breach of condition precedent could void policy coverage.

35. The First Defendant stated that it had taken steps to incorporate the terms, including a telephone call being made in 2017 by Claire Portsmouth as well as including reference to the FSDF terms on its invoices. Mr Harris stated he took the assurances of the First Defendant at face value. He stated he expressed concern about the documentation which the Second Defendant had seen not supporting the assurances given by the First Defendant about incorporation. However, it was agreed that the Second Defendant would continue to support the defence of the First Defendant until the court had made a decision on incorporation of the FSDF terms.

36. The findings made in the 2022 judgment were that the First Defendant had not taken steps to incorporate the FSDF terms. No telephone calls had been made by Claire Portsmouth, references to the FSDF terms had not been made on invoices or other documents. It was not stated that the FSDF terms were available on request nor any information given as to where the FSDF terms might be found. As such, the First Defendant had taken no substantive steps to incorporate the FSDF terms into its contract with the Claimant. The First Defendant was therefore in breach of its condition precedent, “as set out at page 9 of the Policy”. By this stage, the First Defendant had entered liquidation. As the Claimant was seeking to add the Second Defendant into the proceedings, the Second Defendant notified the Claimant of the breach of condition precedent.

The Claimant's Submissions

37. The Claimant submits that section 14 of the 2015 Act abolishes the blanket good faith requirement for insurance contracts. Other elements and duties are then put into place by the 2015 Act itself.

38. In respect of warranties and representations, section 9(2) of the 2015 Act prevents any representation made by the insured in connection with a proposed non-consumer insurance contract being converted into a warranty by means of any provision of the insurance contract. The Claimant asserted that this interpretation of the 2015 Act is supported the explanatory notes to the 2015 Act at paragraph 84 which state "This section abolishes basis of the contract clauses in non-consumer insurance… It remains possible for insurers to include specific warranties within their policies".

39. The Claimant further relies upon the interpretation of the editors of Colinvaux. At paragraph B-0114, the editors set out their view that the effect of section 9 of the 2015 Act is to prevent a misrepresentation being made as part of the business insurance duty of fair presentation from being undermined by the device of requiring the assured to warrant the correctness of statements made. "Statements are thus to be treated as representations rather than warranties".

40. Section 16 of the 2015 Act prevents parties to an insurance contract contracting out of the effect of section 9 of the 2015 Act. If there is an attempt to contract out of other parts of the 2015 Act, those clauses will also be of no effect unless the requirements of section 17 of the 2015 Act have been satisfied in relation to that specific term. Section 17 requires the insurer to take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered. The disadvantageous term must be clear and unambiguous. The Claimant likened the effect of section 17 to Lord Denning's "red hand" pointing to the clause before notice for any such clause could be effective.

41. In this case, the First Defendant did not, on the findings made in the 2022 judgment, incorporate the FSDF terms and conditions into its contract with the Claimant. The Claimant therefore categorises this failure as one concerning the First Defendant's duty of

fair presentation. The duty of fair presentation is as set out in section 3 of the 2015 Act. Section 8 and Schedule 1 of the 2015 Act then deal with remedies for any breach of the duty of fair presentation by the First Defendant. Plainly, the breach of not incorporating the FSDF terms is a qualifying breach. However, the breach here is neither deliberate nor reckless. Any innocent misrepresentation is dealt with in paragraphs 4 and 5 of Schedule 1 of the 2015 Act. Where there is an innocent breach, there is potential for the contract to survive and to be amended on terms which would have been sought by the insurer.

42. Section 10 of the 2015 Act deals with any breach of warranty. The section permits any breach of warranty to be remedied. There is no wholesale avoidance of an insurance policy as a result of a breach unless the breach is not remedied.

43. The Claimant submits that as the contract specifically incorporates the 2015 Act, the provisions of the contract must be read and interpreted in the light of the remedies available to both parties under the 2015 Act. In interpreting the Duty of Assured Clause, it is important to note that nowhere within the clause itself does the contract set out what a breach may mean for the First Defendant. The only place where a sanction is mentioned is two pages later in the contract, at the very end of the section headed "IMPORTANT INSTRUCTIONS IN THE EVENT OF LIABILITY CLAIM".

44. The Claimant accepts that the First Defendant misrepresented the fact of incorporation of the FSDF terms into its contract with the Claimant. That misrepresentation cannot become a warranty as a result of section 9 of the 2015 Act. The Claimant accepts that the misrepresentation could go to the First Defendant's duty of fair presentation. However, as it is not pleaded or raised as an issue that this misrepresentation was either deliberate or reckless, the contract cannot be avoided under Schedule 1, paragraph 2 of the 2015 Act. Other remedies are available to the insurer in those circumstances.

45. That background is very important because it informs the manner in which the court should interpret the Duty of Assured Clause. Sub-clause (i) of the Duty of Assured Clause if read by itself cannot be a warranty or treated as a condition precedent because of the 2015 Act. The Claimant submits that sub-clause (ii) should be read as being a subordinate clause or a continuation of sub-clause (i) in order to give proper meaning and effect to the

terms of the 2015 Act. If the two were not read together, sub-clause (ii) read by itself would inevitably cause an absurd result because it would undermine the 2015 Act.

46. By way of example, a single contract is entered into by the insured one day after the policy is incorporated and it does not incorporate the FSDF terms. That breach would enable the insurer to avoid the policy as of right in circumstances where a claim is made in respect of a different contract to the contract where the FSDF terms were not incorporated, and the fact of non-incorporation was discovered months later and entirely accidentally. The Claimant submits that situation would be absurd on its face. Protections have been put in place by the 2015 Act. If sub-clauses (i) and (ii) are not treated separately, they are in effect representations and thus cannot be treated as a warranty or a condition precedent but rather must be looked at as a breach of fair presentation point. Reading sub-clauses (i) and (ii) together would make sense for both parties to the contract. If the breach was deliberate or reckless, the insurer may avoid the contract. Where an innocent misrepresentation is made, Schedule 1 then permits additional terms to be read into the contract under paragraph 5.

47. As to sub-clause (iii), the Claimant submits that this sub-clause deals with new contracts and the future, that is after the inception of the insurance contract. Whilst the First sentence of sub-clause (iii) could be read as relating to both past and future events, the examples set out in the sub-clause as being considered by the underwriters as reasonable include reference to job quotations and making available the relevant terms “at the time of contracting”. The clear implication in the use of that language is that the intention was to apply to future contracts. Indeed, an absurd result would pertain if sub-clause (iii) applied to contracts entered into before the inception of the policy.

48. If the court accepts the Claimant’s submissions, sub-clause (iii) does not apply to the relevant contract between the Claimant and the First Defendant and the Second Defendant will not be able to avoid liability to the Claimant.

49. Alternatively, the Claimant submits that if sub-clause (iii) does apply retrospectively, it breaches the transparency rules of the 2015 Act. Pursuant to clauses 16 and 17, some contracting out of the 2015 Act is permitted. However, that is only the position if the

transparency requirements have been satisfied. Those requirements include the insurer taking sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into. In addition, the disadvantageous term must be clear and unambiguous in effect. There is no evidence at all that the Second Defendant ever brought the clause or the asserted effect of that clause to the attention of the First Defendant before the contract was entered into.

50. The situation regarding sub-clauses (i) and (ii) is more complicated, whether they are read together or separately. The Claimant accepts that the non-incorporation of the FSDF terms is a qualifying breach albeit not a deliberate or reckless breach. Paragraph 4 of schedule 1 permits the insurer to avoid the contract if it can prove that the insurer would not have entered into the contract on any terms.

51. The Claimant submits that the evidence of Ms Weight and Mr Harris does not suffice to show that the Second Defendant would not have entered into a contract on any terms. Ms Weight accepted in cross-examination that there were three considerations which were truly important, those being the limit of liability, limitation of consequential losses and the time bar. She also accepted that those specific areas of importance could have been included directly in the insurance contract. For example on page 1 of the contract, when referencing trading conditions, the contract notes that the First Defendant was using "FSDF Terms and Conditions". However, the entry concerning trading conditions goes on to add "at GBP250.00 per tonne". Other details from the FSDF terms could have been incorporated directly into the contract in the same way as the limit per tonne of £250 was incorporated into the contract. The court could have opened up the contract under paragraph 5 of Schedule 1 and inserted the additional terms stated as being important to the Second Defendant.

52. Further, it was plain from the evidence of Ms Weight that she was not familiar with FSDF terms as being industry terms. She needed knowledge of those terms in order to manage the risk of ensuring when those terms are being used. It was plain that the specific terms being used by the First Defendant and the limitation of liability per tonnage were of vital importance. If they were not, why was the phrase "FSDF Terms and Conditions at GBP 250 per tonne" set out on the first summary page? The Claimant asserts that declaration

has an obvious impact on the reading of the policy as a whole and strengthens the link between sub-clauses (i) and (ii).

53. If the court accepts that the evidence of the First Defendant does not show that the Second Defendant would not have entered into a contract on any terms, the Second Defendant has not sought to make any amendment to the policy either in pleadings or correspondence as would be permitted under paragraph 5 of schedule 1. The result is that the Claimant can claim against the Second Defendant.

54. A final point on transparency is that the 2016 to 2017 policy did not refer to the 2015 Act at all and did not state that they were subject to and incorporated the provisions of the 2015 Act. The 2019 policy did state that it was subject to the 2015 Act yet the Duty of Assured Clause is exactly the same. It is difficult to see that there is transparency if on the one hand the 2019 policy is implying that the protections afforded by the 2015 Act have been incorporated into the policy and then two pages later stating that any claim could be avoided.

The Second Defendant's Submissions

55. The Second Defendant's case is that sub-clause (ii) of the clause has to be read separately and there is nothing in the clause itself which could or should lead the court to construe sub-clauses (i) and (ii) together. Sub-clause (ii) is clear and unambiguous and the Second Defendant has always asserted that as such, the First Defendant was in breach of the condition precedent to liability under the policy. The Second Defendant has never characterised its case as a breach of duty of fair presentation.

56. Sub-clause (ii) is not breached by any misrepresentation concerning the declaration under sub-clause (i) of the Duty of Assured Clause. It is a requirement to take action that is required by sub-clause (ii). It is a requirement to trade continuously using FSDF terms, those being the only terms approved by the Second Defendant at the inception of the policy.

57. Mr Proctor for the Second Defendant summarised the arguments made by the Claimant as raising five issues:

(1) Is sub-clause (i) invalidated by section 9 of the 2015 Act?
(2) Is sub-clause (ii) struck down by section 9 of the 2015 Act?
(3) Does sub-clause (iii) relate only to future contracts after the inception of the policy and, even if this is correct, does that assist the Claimant's argument?
(4) Do the sub-clauses satisfy the transparency requirements?
(5) Was there a breach of the sub-clauses, in particular sub-clause (ii)?

58. The Second Defendant submits that sub-clause (i) does not seek to convert a representation into a warranty. It simply provides an obligation to make a declaration at the start of cover.

59. Sub-clause (i) simply says that all current terms at inception must be declared. It does not purport to transform the terms declared into a warranty. The term does not become a warranty in any event because if there was a breach of that sub-clause, cover is not terminated in its entirety. Rather, if the FSDF terms are not incorporated, the right to be indemnified in respect of that particular claim will still be accepted by the Second Defendant provided that the assured has taken "all reasonable and practical steps to incorporate the above conditions into contracts". As a result of that wording, the Second Defendant submits that sub-clause (i) is not invalidated in any event.

60. In any event, the Second Defendant submits that sub-clause (i) is not really relevant to their arguments. It relies primarily upon sub- clause (ii). Sub-clause (ii) has been breached. The Claimant accepts that is the position if the sub-clauses are read separately. The Second Defendant can therefore avoid this claim.

61. As to sub-clause (ii), section 9 of the 2015 Act could only be relevant to this sub- clause if it is read in conjunction with sub-clause (i) and the court reads the clauses together as being a pre-contractual representation which is then treated as a warranty. The plain reading of sub-clause (ii) requires the assured to take specific action during the currency of the policy, that is to trade on FSDF terms. It is not a clause where any representation is made which could be converted into a warranty.

62. As is made clear by the underlined part of the extract from Chitty (as set out above), the intention of the 2015 Act is aimed at provisions which seek to convert without discrimination pre-contractual representations into warranties. Here, the mischief aimed

at by section 9 of the 2015 Act is not relevant to sub-clause (ii). There is no ambiguity. Sub-clause (ii) can be interpreted in accordance with its intended effect, that is that the assured continuously trades under FSDF terms. They are the approved trading conditions.

63. As is noted in Colinvaux at paragraph B-0127, "the creation of continuing obligations by warranty… is not subject to any statutory restraints…". The continuing obligations therefore are not subject to section 9 of the 2015 Act, although they would be subject to sections 10 and 11 as a continuing obligation throughout the currency of the contract. It cannot reasonably be seen as an extension to sub-clause (i), but rather it is a freestanding obligation to trade on particular terms. It is irrelevant to any breach of subclause (ii) if there is a breach of sub- clause (i). Breach of sub-clause (i) does not necessarily mean that there would be a breach of sub-clause (ii) and vice versa.

64. Further and in any event, the Second Defendant submits that it is not a difficulty if the assured mistakenly believes that the FSDF terms have been incorporated. All the First Defendant had to do was to take all reasonable and practical steps to incorporate those terms. The other party may not have accepted that going forward but attempts could have been made to incorporate. Breach of sub-clause (ii) does not invalidate the whole contract, it just stops indemnity in respect of a specific claim. That is a very different outcome.

65. The Second Defendant submits that the Claimant's arguments about sub-clause (iii) do not assist the Claimant. In fact, properly read, this sub-clause is actually for the benefit of the First Defendant assured as an answer to any breach of sub- clause (ii). It provides an escape route for the assured to claim indemnity under the policy but it does not mean that there has not been a breach of sub-clause (ii).

66. In any event, there is no justification looking at the wording of the policy and the Duty of Assured Clause to infer that sub-clauses (ii) or (iii) solely relate to future contracts entered into after the inception of the policy. For example, job quotations can be used in ongoing relationships. There could be a series of staged jobs under the same contract. However, in any event, the court found in the 2022 judgment that the First Defendant had not referred to FSDF terms on invoices after the inception of this insurance policy.

67. Separating out the consequences for past and future contracts would, in any event, be an absurd result for interpretation of this Duty of Assured Clause. The purpose of the clause would not be achieved if pre-and post-inception contracts had different results.

68. As to the transparency requirements pursuant to the 2015 Act, the Second Defendant submits that they do not apply to sub-clause (iii). Sub-clauses (i), (ii) and (iii) cannot reasonably be described as akin to a fair presentation of risk – they do not involve pre-presentation of risk and therefore are not caught by section 17 of the 2015 Act.

69. The sub-clause is not less advantageous than section 10 of the 2015 Act, rather in all material respects it is identical. However, in any event, as the Duty of Assured Clause is not a warranty, but rather a condition precedent, section 10 would not apply in any event. Even if section 10 did apply, the First Defendant would have had an opportunity to remedy the breach by taking reasonable steps to incorporate the FSDF terms and then the Second Defendant would not be able to avoid liability for the claim.

70. Further, even if there is an applicable requirement of transparency in respect of sub-clause (iii), that requirement has been met. The term is clear and has been set out in three previous policies. Attention is drawn to the general conditions at the start of the Warehousekeepers Liability Conditions. The first sentence of the Duty of Assured Clause sets out that it is a condition precedent. As such, any reasonable assured would know that a breach would mean that the underwriter was not liable. The effect of breach of the clause is only two pages later and is perfectly clear. Just because it is two pages later, does not mean that it is not transparent.

71. The Claimant does not put forward any positive case that there is no breach. As the Claimant tacitly accepts, there has been a breach. The Claimant cannot show that the First Defendant complied with the Duty of Assured Clause and the Second Defendant is therefore entitled to avoid the policy.

Findings

Sub Issue 1: What is the proper construction of the 'Duty of Assured Clause'?

i. Should sub-clause (ii) be read as an extension of, or subordinate clause to, sub-clause (i), so that it is also rendered ineffective under the Insurance Act 2015? Or is it a free-standing warranty or condition precedent requiring the First Defendant to trade on FSDF terms even if misrepresented as being incorporated under sub-clause (i)?

ii. Does sub-clause (iii) impose a duty on the First Defendant to take all reasonable steps to incorporate the FSDF terms to existing contracts, even where it believed they already were incorporated, or did it merely relate to new contracts with third-parties entered into during the Insurance Contract?

72. In my judgment, sub-clauses (i), (ii) and (iii) have to be read together, rather than as separate clauses. That appears to be the approach which was agreed between the First and Second Defendants. The wording of the next part of the Duty of Assured Clause refers to all three of those sub-clauses when stating that if the assured has taken all reasonable and practicable steps to incorporate the relevant FSDF terms into contracts, the Second Defendant will still indemnify the First Defendant.

73. I do not accept the submission of the Second Defendant that sub-clause (i) is not a representation. In my judgment, the statement made by the assured that it was trading on FSDF terms is plainly a representation. As such, it cannot become a warranty as a result of section 9 of the 2015 Act. The term is framed as requiring a declaration of current trading conditions. If, as happened here, an assured asserted that terms were incorporated and, later, a court found that in fact they were not incorporated, the assured will be in breach of that sub-clause as a result of the representation it made before the policy was incorporated. That has the effect of turning the representation into a warranty, regardless of how that representation is described.

74. However, I do not accept the Claimant's submission that sub-clause (ii) must be read as a subordinate clause to sub-clause (i). Nor do I accept the Claimant's submission that sub-clauses (ii) and (iii) can only relate to new contracts. There is nothing in the wording of sub-clause (ii) to indicate that it relates only to new relationships or new contracts. As to sub-clause (iii), as Mr Proctor observed, whilst the examples given may relate to new

contracts, job quotations can be made in existing relationships and invoices will be sent if there is an ongoing relationship and work done for those with whom the First Defendant was already in a trading relationship.

75. The wording of sub-clause (ii) makes reference to continuous trade "during the currency of this policy". Given the reference to trading during the currency of the policy, I do not accept that any breach caused by the failure to incorporate terms before the inception of the 2019 policy can be relevant to this sub-clause.

76. That being said, I cannot see anything wrong in principle in requiring an assured to trade using particular conditions during a particular policy period, even if the assured mistakenly believed that those particular terms were already incorporated into a relationship with one of its clients.

77. As to sub-clause (iii), in my judgment, it does impose a duty on the First Defendant to take all reasonable steps to incorporate the FSDF terms into existing contractual relationships as well as new relationships. I accept the submission made by Mr Proctor that in reality, sub-clause (iii) could be of assistance to an assured. If an assured mistakenly believed that FSDF terms were incorporated and a court later found that they were not, the assured could still claim indemnity if it persuaded the Second Defendant that all reasonable and practical steps to incorporate the FSDF terms had been taken.

78. However, I do not accept that the sub- clause is solely for the benefit of an assured. On a plain reading of sub-clause (iii), even if a client of the assured accepted that the FSDF terms were in fact incorporated, if the assured had not taken all reasonable and practicable steps (for example by not specifying the trading conditions on all invoices and written communications), the assured would be in breach of sub- clause (iii). That would be the position even if a breach of sub-clause (iii) was wholly irrelevant to the apparent aim of ensuring that FSDF terms were incorporated to a contract because it was accepted that the FSDF terms were in fact incorporated into a contract.

Sub-Issue 2: Can sub-clause (i) stand as a warranty or condition precedent in light of the effect of the Insurance Act 2015?

i. Did the First Defendant misrepresent its trading terms to the Second Defendant, what is the effect of the Insurance Act 2015 if so?

ii. If sub-clause (ii) is an extension of sub-clause (i), does its existence run contrary to the Insurance Act 2015?

Sub-Issue 3: Depending on the answer to Paragraph (a)(ii) in Sub-issue 1, does the First Defendant's contract with the Claimant fall within the ambit of sub-clause (iii), if so, did the First Defendant take every reasonable step to incorporate the FSDF terms, or is that irrelevant?

79. It is desirable to consider sub-issue 2 and sub-issue 3 together. The First Defendant did misrepresent its trading terms to the Second Defendant because the FSDF terms were not incorporated into its contract with the Claimant. As stated above, in my judgment it is necessary to read sub-clauses (i), (ii) and (iii) together. I accept the submission of the Claimant that it is necessary to consider the sub-clauses in the context of the duty of fair presentation required by the 2015 Act and in the context of remedies for breach when considering the sub-clauses and the transparency requirements of the 2015 Act.

80. Do those sub-clauses satisfy the transparency requirements? In my judgment, they do not. Firstly, in my judgment, the effect of sub-clause (iii) is to put the assured in a worse position. The assured is in breach of sub-clause (iii) if it does not take all reasonable and practicable steps, even if the FSDF terms have in fact been incorporated.

81. I have no evidence that any steps were taken by the Second Defendant to draw the disadvantageous sub-clauses to the assured's attention before the contract was entered into. The fact that the same sub-clauses were contained in a previous contract does not, by itself, suffice to establish that the Second Defendant had taken sufficient steps to draw attention to the disadvantageous sub-clauses.

82. If I am wrong about the fact that the same term was incorporated into a previous contract, I find in any event that the disadvantageous term is not clear and unambiguous as to its

effect. Mr Proctor submitted that any reasonable assured would know that a breach of a condition precedent would mean that the underwriter was not liable. In my judgment, reading the contract as a whole, it is far from clear what effect a breach of sub-clause (iii) has. Immediately after sub-clause (iii), the contract sets out that in respect of an individual claim, if an assured has taken all reasonable and practicable steps, the right to be indemnified in respect of that claim would not be prejudiced. However, two pages later, the contract states that the effect of breach of a condition precedent is that the underwriters are entitled to avoid the claim in its entirety. It is not possible to reconcile those two clauses.

83. I am supported in my judgment that sub-clause (iii) in particular is a disadvantageous term and does not satisfy the transparency requirements of the 2015 Act by the commentary in Colinvaux. Whilst the Second Defendant referred me to one section of paragraph B-0127 of Colinvaux, the full section relating to the creation of continuing obligations was not relied upon. The section as a whole reads as follows:

> "CIDRA 2012 s.6 and IA 2015 s.9 have done away with the much of what was tolerated by the common law by preventing the conversion of representations of fact into warranties. Representations must therefore be assessed by reference to the rules on presentation of the risk. The creation of continuing obligations by warranty, by contrast, is not subject to any statutory restraints: where there is a future breach, the effect of IA 2015 is to preclude reliance by an insurer upon the warranty at a time when there is no breach or where, in the event of breach, the loss is unrelated to the breach".

84. Whilst the editors of Colinvaux accept there can be continuing obligations by warranty, a breach of sub-clause (iii) would permit the Second Defendant to avoid indemnifying an assured in respect of a claim even if the loss was unrelated to the breach.

85. I have found that any breach of the sub-clauses should be viewed in the context of the duty of fair presentation. As such, the insurer's remedies in respect of such qualifying breaches fall to be considered. It was not submitted that the qualifying breach was deliberate or reckless. The First Defendant believed that the FSDF terms were in fact incorporated into its contract with the Claimant. No claim has been made by the Second Defendant for a remedy under Schedule 1 of the 2015 Act. As the qualifying breach was not deliberate or reckless, in order to avoid the contract and refuse the claim, the Second Defendant would have to show that it would not have entered the contract with the First Defendant on any terms.

86. I do not accept that the evidence of the Second Defendant suffices to prove that it would not have entered the contract on any terms. The Second Defendant agreed to a further contract of insurance when the First Defendant stated it had changed its trading terms from UKWA terms which were recognised as being industry-standard. The Second Defendant agreed to the FSDF terms even though those making the decision were wholly unaware of what those conditions were until the First Defendant wished to rely upon them. That is clear evidence for the Second Defendant being prepared to indemnify when industry standard trading conditions were not being used. Further, I accept the argument made by the Claimant that insofar as individual terms were of importance to the Second Defendant, they could have been specifically incorporated into the insurance contract itself. That would have given the Second Defendant the same protection in reality is it agreed to when agreeing to accept the FSDF terms.

87. For all the reasons set out above, the Second Defendant is required to indemnify the First Defendant in respect of the Claimant's claim. As a result, the Claimant can enforce that right of indemnity pursuant to the 2010 Act.

88. I am grateful to counsel for their very able assistance in this matter.