Case No: A3/2014/4097

Neutral Citation Number: [2017] EWCA Civ 4097

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr JUSTICE EDER
2010 Folio 209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 August 2017

Before:

LORD JUSTICE TREACY
LORD JUSTICE DAVID RICHARDS
and
SIR CHRISTOPHER CLARKE

- -

Between:

(1) TED BAKER PLC **(2) NO ORDINARY DESIGNER LABEL LTD**	**Appellant**
- and -	
(1) AXA INSURANCE UK PLC **(2) FUSION INSURANCE SERVICES LTD** **(3) TOKIO MARINE EUROPE INSURANCE LTD**	**Respondent**

- -
- -

Stephen Cogley QC and Tim Marland (instructed by **Browne Jacobson LLP**) for the **Appellants**
Jeremy Nicholson QC and James Medd (instructed by **Kennedys Law LLP**) for the **Respondents**

Hearing dates: 15th and 16th February 2017

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Judgment

Sir Christopher Clarke:

Introduction

1. This is an appeal against the rejection by Eder J of a claim against insurers for alleged business interruption ("BI") losses said to have arisen in respect of goods stolen by a trusted employee named Joseph Okyere-Nsiah ("JON"). Ted Baker PLC, the first appellant, is the overall holding company for the Ted Baker brand. No Ordinary Designer Label Ltd, the second appellant, is the UK operating company of the group. Since the first appellant owned none of the stock and suffered none of the losses claimed, the proper claimant is the second appellant, which for convenience the judge described as Ted Baker or TB. I shall do the same.

2. The hearing before Eder J followed an earlier determination by him of issues of coverage, estoppel, rectification etc. where the defendant insurers ("the insurers") lost on every issue. In the hearing the subject of this appeal the judge rejected the claims advanced by the claimants in their entirety but without "*any great enthusiasm*". He found against the claimants in three respects, namely that:

   (a) the claimants were in breach of a condition precedent to the insurers' liability in not providing certain documentation relating to quantum to insurers' loss adjusters;

   (b) it was not possible on the evidence to reach any conclusions about the modus operandi of the employee concerned;

   (c) largely on that account he could not conclude that the loss of profit on any theft exceeded the £5,000 deductible.

   The appellants contend that the judge was wrong in each respect.

3. The judgment is long and detailed. For present purposes, it is only necessary to refer to some of it. In paragraphs [4] – [14] the judge set out the general nature of TB's business operations which involved ordering and buying goods from overseas manufacturers, predominantly in China, and despatching them, once imported, from its main warehouse in North London known as the Ted Baker Distribution Centre ("TBDC"). In paragraphs [15] – [19] he described TB's case as to the thefts of stock from 2003-2008 for which thefts JON was convicted and sentenced to 3 years imprisonment.

4. The claim was advanced in respect of BI losses under a series of policies beginning on 14 March 2004 under which the insurers and their respective proportions changed from time to time. The insurers were (i) AXA Insurance UK PLC ("AXA"), the first

defendant/respondent; (ii) NIG, not a defendant; (iii) Fusion Insurance Services Ltd, the second defendant/respondent; and (iv) Tokyo Marine Europe Insurance Ltd, the third defendant/respondent.

5. The main terms of the policies were as follows:

> "*BUSINESS INTERRUPTION*
>
> *Definitions*
>
> *Indemnity Period*
>
> *The period beginning with the occurrence of the Incident and ending not later than the Maximum Indemnity Period thereafter during which the results of the Business shall be affected in consequence thereof*
>
> *Turnover*
>
> *The money paid or payable to the Insured for goods sold and delivered and for services rendered in the course of the Business at the Premises*
>
> *Maximum Indemnity Period as stated in the Schedule*
>
> *Uninsured Working Expenses as stated in the Schedule*
>
> *Gross Profit*
>
> *The amount by which*
>
> *1) the sum of the amount of the Turnover and the amounts of the closing stock and work in progress shall exceed*
>
> *2) the sum of the amount of the opening stock and work in progress and the amount of the Uninsured Working Expenses*
>
> *Rate of Gross Profit*
>
> *The rate of Gross Profit earned on the Turnover during the financial year immediately before the date of the Incident*
>
> *Annual Turnover*
>
> *The Turnover during the twelve months immediately before the date of the Incident.*
>
> *Standard Turnover*

The Turnover during the period in the twelve months immediately before the date of the Incident which corresponds with the Indemnity Period

……..

to which such adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or other circumstances affecting the Business either before or after the Incident or which would have affected the business had the Incident not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident

Basis of Loss Settlement

The undernoted terms of settlement apply only if the paragraph title appears in the Schedule to this Section

Gross Profit/Estimated Gross Profit

The insurance under this item is limited to loss of Gross Profit due to a) Reduction in Turnover and b) Increase in Cost of Working and the amount payable as indemnity thereunder shall be

> *a) In respect of Reduction in Turnover: the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall fall short of the Standard Turnover in consequence of the Incident*
>
> *b) In respect of Increase in Cost of Working: the additional expenditure (subject to the provisions of the Uninsured Working Expenses clause) necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period in consequence of the Incident but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided .*

less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross Profit as may cease or be reduced in consequence of the Incident

provided that if the sum insured by the item on Gross Profit be less than the sum produced by applying the Rate of Gross Profit to the Annual Turnover (or to a proportionately

increased multiple thereof where the Maximum Indemnity Period exceeds twelve months) the amount payable shall be proportionately reduced…

Additional Increased Cost of Working

The insurance under this item is limited to such further additional expenditure beyond that recoverable under paragraph (b) of any of the above items insured hereby as the Insured shall necessarily and reasonably incur during the Indemnity Period in consequence of the Incident for the sole purpose of avoiding or diminishing a reduction in Turnover or Gross Revenue.

Professional Accountants Clause

Any particulars or details contained in the Insured's books of account or other business books or documents which may be required by the Company under part (b) of Special Condition 2 for the purpose of investigating or verifying any claim hereunder may be produced by professional accountants if at the time they are regularly acting as such for the Insured and their report shall be prima facie evidence of the particulars and details to which such report relates

The Company will pay to the Insured the reasonable charges payable by the Insured to their professional accountants for producing such particulars or details or any other proofs information or evidence as may be required by the Company under part (b) of Special Condition 2 of this Section and reporting that such particulars or details are in accordance with the Insured's books of accounts or other business books or documents

provided that the sum of the amount payable under this Clause and the amount otherwise payable under the Section shall in no case exceed the liability of the Company as stated.

Special Conditions

………….

2. Claims Conditions

a) In the event of any loss destruction or damage in consequence of which a claim is or may be made under this Section the Insured shall

- notify the Company immediately

- deliver to the Company at the Insureds expense within 7 days of its happening full details of loss destruction or damage caused by riot civil commotion strikers locked-out workers persons taking part in labour disturbances or malicious persons

- with due diligence carry out and permit to be taken any action which may be reasonably practicable to minimise or check any interruption of or interference with the Business or to avoid or diminish the loss

b) In the event of a claim being made under this Section the Insured at their own expense shall

> *i) - (not later than 30 days after the expiry of the Indemnity Period or within such further time as the Company may allow) deliver to the Company in writing particulars of their claim together with details of all other insurances covering property used by the Insured at the Premises for the purpose of the Business or any part of it or any resulting consequential loss …*
>
> *ii) - deliver to the Company such books of account and other business books vouchers invoices balance sheets and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim ..*

c) If the terms of this condition have not been complied with

- no claims under this Section shall be payable …….

<u>BUSINESS INTERRUPTION – ALL RISKS.</u>

(Exclusions)

CONSEQUENTIAL LOSS arising directly or indirectly from

(d) disappearance unexplained or inventory shortage misfiling or misplacing of information …"

6. The amount claimed in the Re-Amended Particulars of Claim of 13 January 2013 for the policy years 2004/5 – 2008/9 was £1,998,000 after application of the policy

excess, although a number of different figures were put forward in evidence. The claim reduced shortly before trial to £904,000, although it went up again to £1,453,000. The judge estimated the combined costs of the past and present trials as likely to exceed £5 million – a state of affairs which he rightly categorised as appalling and which he hoped, under the Jackson reforms, would never happen again.

The Claims Co-operation issues

7. The first set of issues with which the judge had to deal were what he described as the Claims Co-operation issues. In essence the defendants said that TB had failed to provide certain information and documentation required under the terms of the policies with the result that TB was debarred from advancing any claim at all. TB, for their part claimed that the insurers were precluded from making these complaints for a number of reasons, including estoppels of different kinds and waiver.

8. In [41] - [92] the judge made a number of factual findings, which it is necessary to summarise insofar as they bear on and are necessary to determine the first two grounds of appeal. I do so, in part, by quoting the relevant paragraphs of the judgment.

9. As the judge recorded in [42] - [44]:

> "42 On or about **12 December 2008**, TB notified Mr Burbedge of Layton Blackham ("LB"), then their insurance brokers, of the discovery of JON's thieving activities. On that date, Mr Burbedge notified AIG of a claim for theft of stock under their fidelity policy. AIG appointed as loss adjusters ASL. By email dated that same day i.e. 12 December 2008, ASL made an initial request to Mr Burbedge for information as set out in a schedule attached to that email which ASL said would be helpful in presenting the claim to insurers including a detailed description of internal controls relating to stock recording and counting and, in due course, a schedule of all the stock items thought to have been stolen. Mr Burbedge forwarded that request to Mr Page [Finance Director of TB].
>
> 43. On 15 December 2008, Mr Burbedge sent an email to Gina Griffiths of Layton Blackham asking her to notify AXA of the incident. In particular, Mr Burbedge asked her to inquire whether AXA would want to appoint WC [Woodgate & Clark Ltd, Loss Adjusters] or would be happy to rely on ASL ….

44 On **18 December 2008**, there was an initial meeting which took place at the TBDC attended by Messrs Page, Connolly, and Burbedge on behalf of TB; and Mr Ledger and Ms Raby of ASL and Mr [John] Coonan of WC. The meeting lasted about 1½ hours. There is a dispute between the parties as to precisely what was said and discussed at that meeting."

10. On **23 December 2008** Mr Coonan sent his IMMEDIATE ADVICE (CONSEQUENTIAL LOSS) report to the insurers with various comments including "supposed cause" as "loss of gross profit due to theft of stock by employee" and a suggested reserve of £300,000. On **29 December 2008** Mr Coonan sent his "Preliminary Report (Consequential Loss)" to AXA. Then:

> "50 A few minutes later, on **29 December 2008**, Mr Coonan's secretary sent an email to Mr Burbedge, asking Mr Connolly and Mr Page to send the following information and documents:
>
> *"1. Copy of Mr Okyere-Nsiah's employment file and details of any references obtained.*
>
> *2. Copies of the results of physical stock takes undertaken from 2000-2008.*
>
> *3. Details of computerised registration systems and records of shortages during the period 2000-2008.*
>
> *4. Breakdown of shortages by item description and cost value.*
>
> *5. Performance of each stock item, confirming whether or not there was unsatisfied demand for these items or where replacement garments were obtained from stock stores, ensuring that no loss of sales resulted.*
>
> *6. Confirmation that there was unsatisfied demand for stock where it is your client's intention to pursue a claim for loss of gross profit.*
>
> *7. Copies of your clients profit and loss accounts for 2005, 2006, 2007 and if available 2008 together with management accounts for the same period."*

11. Then:

> "52 Shortly thereafter, Mr Burbedge discussed the matter with Mrs Stone [a Director of Bluefin Insurance Services Limited ("Bluefin"), TB's insurance brokers]. She was and is a highly experienced insurance broker, specialising as 'a claims advocate' in pursuing large and difficult claims against insurers. She advised that they would need to give information, as indicated in her note of discussion with him dated 31 December:
>
> > *"Loss – do we need to give details of each item. – yes*
> >
> > *Do we need to complete 2008 Pi s – yes.*
> >
> > *Do we need to prove unsatisfied demand for LoP claim – yes."*

12. On or about **1 January 2009** Bluefin commenced operations taking over LB's responsibilities as insurance brokers for the claimants, together with some of LB's employees, including Mr Burbedge.

13. On **8 January 2009,** a meeting took place at AXA, recorded in a document entitled "STRATEGY PLAN". This recorded, inter alia, that AXA should hold off instructing forensic accountants until they got legal advice; and that in relation to professional accountants' charges "*Agree to pay under the terms of the Policy for producing information"*. In her oral evidence, Mrs Taylor of AXA explained that what that meant was that AXA would pay whatever the policy called for (as to which there was a dispute with TB). But, as she said, until the liability question was determined AXA could not commit to paying whatever might be payable under the Professional Accountants Clause ("PAC").

14. Then:

> "57 On **12 January 2009**, Mrs Stone met Mr Burbedge. During this meeting, he indicated that Mr Page had expressed unhappiness about having to provide all of the information requested not because he did not want to provide the information but because, if a lot of information was required, it would be costly and time-consuming to put it together. Mrs Stone and Mr Burbedge also discussed a 'Claim Strategy', which she recorded in her contemporaneous typed-up "meeting notes" as follows:

"*1. Insurer to admit liability – provide non financial information, particularly recovery opportunities.*

2. Provide outline quantum indication but park detailed quantum questions until admission of liability forthcoming. …"

Mrs Stone also recorded, amongst other things:

"AXA – BI Claim

Not intended to cover such events xs £5k each time a BI loss occurred following theft …

Overall

… If overcome liability hurdles – 'negotiated' amount.

Claims follows AIG claim – AIG have to admit liability first

W&C Shopping list

See 29.12.08 email"

[It is apparent that Mrs Stone saw difficulties with the

claim]

58 On 14 January 2009, Mrs Stone undertook an analysis of the cover provided by AXA under the policy schedule for 2008-09, and the policy wording. She noted General Conditions Clause 15 – "*Everything to be done by the Insured is a CP* [Condition Precedent]". As she accepted in evidence, she was also aware, after her review and analysis, of the Special Claims Conditions in the policy wording at page 38 and the General Claims Conditions at page 6."

15. On **6 February 2009**, Mr Coonan of WC, the Loss Adjusters, who had received none of the documentation and information requested on 29 December 2008 (or at the meeting on 18 December 2008, when he was said to have asked for the same information), sent a chasing email to Mr Burbedge which said:

"I refer to my e-mail dated 29 December 2008, to which I have not yet received a response. I look forward to hearing from you or your client as soon as possible with the information requested"

16. On **10 February 2009** Mrs Stone spoke to Mr Coonan on the phone asking for a further meeting with him, Mr Raby and Mr Page to discuss the further information required. She said that she hoped she would be able to provide some response to his request for information.

17. Then:

> "65 On **13 February 2009**, Mrs Stone sent an email to Ms Raby [of ASL, AIG's Loss Adjuster] and Mr Coonan [AXA's Loss Adjuster] confirming a meeting on 2 March 2009. The email states, in particular:
>
> "*As explained, the purpose of the meeting is to provide the outstanding information previously requested to enable you to report to your principals with the aim of securing a commitment to provide indemnity. This includes ... item 1 on your 29 December e-mail ...*
>
> *I shall also circulate headline claim details so you have an idea of overall quantum and how it was calculated. ... all items relevant to recovery possibilities will be provided.….*
>
> *Subsequently Lindsay [*i.e. Mr Page of TB*] can produce the more in depth stock and financial information needed to support the claim (John the balance of your shopping list is currently parked here ...)*"

18. On **17 February 2009**, Mrs Stone sent an email to Mr Coonan attaching Mr Page's finalised drafts, which she described as 'headline details' of claims for loss of stock and loss of profits. The claims were for the years 2005-2008 only, with an explanation that TB believed the thefts began in 2005. The claims totalled £3,756,397 for loss of profits plus £1,435,373 for stock cost, without allowance for excesses in relation to either.

19. Then:

> "67 On **2 March 2009,** in accordance with Mrs Stone's request, an important meeting took place at TB's offices attended by Mrs Stone, Mr Burbedge, Mr Page, Ms Raby, and Mr Coonan. There are three separate contemporaneous notes of this meeting i.e. Mr Burbedge's, Mrs Stone's and Mr Coonan's. In addition, each of them as well as Mr Page gave evidence both in their written witness statements and in cross-examination as to what happened at this meeting. Drawing these different pieces of

evidence together, the following is a summary of my conclusions as to the discussion at that meeting:

i) Mr Coonan asked for various documents and reiterated that the information he was seeking was largely unchanged from what he had sought in December 2008.

ii) Neither Mr Page nor Mrs Stone said that the requests were unreasonable as such. However, Mr Page said that in the first instance AXA should confirm whether or not liability (i.e. for BI losses) was accepted and then TB would, if such confirmation were provided, go on to provide all documentation that would be required in support of the figures and agree the methodology and assumptions. Although I accept that this was not an outright refusal as such, my assessment of the totality of the evidence is that, contrary to the evidence of Mr Page, this was more than a "suggestion" on his part. Rather, Mr Page was adamant that he did not have the resource to provide all the financial and stock detail requested; and he made it clear that he was not prepared to put in the time and incur the cost of obtaining and preparing such information unless he knew that AXA were, in principle, going to pay the claim**.** TB's representatives indicated that all necessary supporting documents, turnover records and stock reconciliation sheets would then be supplied; but producing such information would be laborious and would require the use of external resources, the cost of which they were unwilling to incur until after agreement in principle by AXA that losses of gross profits adequately demonstrated would be reimbursed. This is consistent with, for example, Mrs Stone's contemporaneous note which states: "*Not prepared to do work until liability admitted*" and Mr Coonan's subsequent email dated 24 March 2009.

iii) Mrs Stone raised the question of accountant's charges. She said that TB wanted insurers to pay for KPMG to provide the information listed in items 2 to 7 of Mr Coonan's "shopping list". Mr Coonan said that in his view TB had to pay for the cost of preparing and presenting a quantified claim to AXA but that cover was available for additional costs incurred to produce particulars to verify the information. Mrs Stone argued that the costs of providing the information requested should be accepted under the policy. Mr Coonan said he did not believe the cover for accountants' fees was as broad as she was suggesting."

20. In [68] the judge said:

> "In his written statement, it was Mr Page's evidence that Mr Coonan seemed to accept his proposal i.e. that AXA should first confirm in principle whether or not liability was accepted before the information requested was provided. However, I am satisfied that Mr Coonan never expressed himself in such terms. In cross-examination, Mr Page accepted that this was indeed the case although his evidence was that this was his (Mr Page's) interpretation of Mr Coonan's manner because he (Mr Coonan) did not disagree and said he was taking it to his principals. I do not accept that evidence in particular because, quite apart from Mr Coonan's own evidence, it is plain from Mrs Stone's evidence that he (Mr Coonan) did disagree. As she said in her written statement: "*I would say positions did not change during the meeting as the adjusters had no authority to make decisions on liability or funding.*" Rather, it seems plain that the meeting ended on the basis that Mr Coonan would report back to underwriters, take further instructions and get back to her when such instructions had been obtained."

21. On **10 March 2009** AXA's underwriting department in London produced their Large Loss Advice. On **17 March 2009** Mr Coonan produced an interim report to AXA, covering some 6 pages. In that report [70]:

> "i) Mr Coonan referred to his requests for detailed evidence supporting loss and to the position about that indicated by TB.
>
> ii) Mr Coonan commented about various difficulties for TB on the claim for loss of profits.
>
> iii) Mr Coonan reported that TB had requested that it instruct either KPMG or other forensic accountants to present a quantified claim and that the accountants' charges be accepted under the Professional Accountant's Clause (PAC); and that he had advised TB that it was responsible for the costs of preparing and presenting a quantified claim although cover was available for additional costs for accountants to produce particulars to verify the information. He said that he did not believe the clause might be used to fund the costs of accountants investigating and presenting a quantified claim and asked whether AXA agreed."

The report also disclosed that TB had indicated that it was prepared to supply all necessary supporting documents, turnover records and stock reconciliation sheets but

maintained that the task would be laborious and the use of external resources would be required and that it did not wish to incur this expenditure until it received agreement in principle that losses of gross profit adequately demonstrated would be reimbursed.

22. On **24 March 2009**:

> “73 Mr Coonan e-mailed Mrs Stone noting *"I have issued a further report to Insurers and currently await instructions. I shall contact you again once these instructions are received." In addition, Mr Coonan stated that the information in the stock and loss of profit documents provided was "... entirely speculative regarding frequency and size of thefts and not supported by factual information"* and then ended as follows:
>
> > “*I note that your client is not prepared to undertake the exhaustive reviews and analysis of stock shortage and claim reconciliation information at this stage until such time as agreement in principle that liability is accepted has been provided.*”

23. Then:

> “74 Following receipt of Mr Coonan's interim report dated 17 March 2009, it was carefully considered by Mrs Julie Taylor, the claims handler at AXA responsible for the claim. She prepared an internal Strategy Report for consideration at the internal Strategy Meeting that (in the event) took place on **30 March 2009**. Her main focus was on issues of cover; she left quantum details for Mr Coonan to pursue. As to accountants' charges, she considered the PAC and agreed with the views indicated by Mr Coonan. In the report, Mrs Taylor proposed that AXA should agree to pay for producing information to verify a quantified claim but not to put the claim together in the first place, in accordance with Mr Coonan's interpretation of the policy wording; and this was agreed at the meeting. However, it would appear that she did not relay these views to Mr Coonan. Also, she could not commit to paying any sums under the PAC whilst liability under the policy remained uncertain; and she 'parked' responding to Mr Coonan on the matters he had raised for instructions until she had got legal advice from solicitors on policy indemnity.”

24. Then:

> “75 On **1 April 2009**, Mrs Taylor telephoned Mr Coonan and told him that Kennedys had been instructed and that she would

update him in due course. As submitted by Mr Cogley, it would seem that this can only be a reference to the matters upon which Mr Coonan was seeking instructions and on which he had said he was going to revert to Mrs Stone. In the event, Mrs Taylor never did revert to Mr Coonan. In cross-examination, Mrs Taylor explained that this was due to the fact that she could not authorise expenditure under the PAC because she (i.e. AXA) had not admitted liability and was still seeking legal opinion. Further, Mrs Taylor accepted in cross-examination that she did not go back to Mr Coonan because, until AXA had received legal advice, AXA had "parked" getting back to him and "parked" the matters that he had raised and in respect of which he wanted instructions; and that these matters would remain "parked" until AXA "unparked" them. In addition, she also accepted that all the liability issues that Mr Coonan had raised in his interim report dated 17 March 2009 were also effectively "parked" until AXA had dealt with the issues then being considered by the solicitors. This evidence would seem consistent with the note of her telephone conversation with Mr Coonan. Mr Cogley relied heavily on this evidence; and it was his submission that thereafter the defendants never "unparked" the quantum issues…"

25. Thereafter there were telephone calls between Mrs Stone of Bluefin and Mrs Woodgate and Mrs Taylor, both of AXA. A note of a telephone call from Mrs Taylor to Mrs Stone of 16 April 2009 reads:

> "*Advised in discussion with U/w re intent of cover & what we are actually covering. Legal advice will be sort [sic], not least of all because of potentially [sic]. Insured do not want to expend money on collecting info if indemnity not being offered... [*AS will*] diary for two weeks, I'll advise her in meantime if anything to report.*"

26. Then:

> "78 On **14 May 2009**, Mrs Stone emailed Mr Coonan stating: "... AIG's position –their decision on liability is promised next week. No doubt it will take a little longer but it would be appreciated if their decision were also available in the near future so that we can agree a methodology that suits both insurers for the financial substantiation required" (emphasis added). Mr Coonan never replied to this email.

….

80 On **28 May 2009**, Mrs Stone telephoned WC stating that she had sent all outstanding information required to them and would like to know the present position. Prior to the point being raised in these proceedings, it would appear that neither TB nor Mrs Stone were ever told that she had not in fact sent all outstanding information and that the 29 December 2009 (sic) requests were still outstanding.

81 On the same day, AXA telephoned Bluefin setting out its position on liability, i.e. that there was no intention to give this cover i.e. for employee theft; but there was no mention of outstanding documentation.

82 On **11 June 2009**, Mrs Taylor on behalf of AXA wrote to Mrs Stone on behalf of the claimants fully reserving AXA's rights:

"*1. ... AXA ... fully reserves all its rights under the Policy and at law and ... AXA's ongoing conduct of this matter, including but not limited to conduct through its adjusters, Woodgate & Clark, or others instructed by or on behalf of AXA, will be subject to that reservation.*

2. ... this letter nor any conduct related to this matter shall be construed as a waiver of, nor shall AXA be estopped from asserting in the future, any rights and defences it may have under the Policy or in law. No representations, express or implied, by AXA, or its agents or its employees in respect of coverage under the Policy in respect of the Claim shall be effective unless and until communicated in writing by AXA or by any solicitors that may be instructed on their behalf. ..."

83 On **23 June 2009**, Mrs Stone replied, acknowledging the letter and noting the reservation of rights.

84 On **13 July 2009**, AXA notified co-insurers of the claim stating that: "If liability were to be admitted we would instruct forensic accountants to comment on the claim made".

85 On **10 August 2009**, following receipt of a copy of the police report, Mr Coonan sent an email to Mrs Stone, referring to it and stating: "*In the meantime, I look forward to receiving any further claim submission your client wishes to make at this stage.*" Mrs Stone replied on the same day, saying in summary that she was in direct correspondence with AXA regarding an admission of liability and stating: "*The insured have updated their stock claim as the results of the anticipated 2008 shortfall are now available. It is down slightly to £1.674m in total, so still exceeds the AIG policy limit. Once AXA has confirmed they are prepared to deal with this claim, I will forward the details on.*

> 86 On 25 August 2009, AIG admitted liability under its policy. In light of that development, on the same day, Mrs Stone emailed Mrs Taylor (of AXA) with a copy to Mr Coonan informing her of AIG's stance and reciting that AIG wished to proceed to finalise and verify the loss amount so they could proceed to settlement. The email stated: "*Clearly given the work involved the Insured will not wish to undertake this exercise twice. You may deem it prudent therefore to ask John Coonan to contact me so that both adjusters can agree a "specification" for the quantum exercise ... I look forward to hearing from you, especially as this loss was notified to AXA over eight months ago. It is time a decision on liability was available in the interests of TCF* [Treating Clients Fairly]".

27. On **28 August 2009** Mrs Stone emailed Ms Raby of ASL, AIG's Loss Adjuster, copied in to Mr Coonan, to say that AXA were still dragging their feet and to record that as previously discussed Ted Baker would not be willing to undertake this exercise twice and would wish to "*re-visit the opportunities that the AIG policy presents to provide accounting assistance to the Insured*". She suggested four different dates for a meeting. On **9 September 2009** Mr Coonan emailed Mrs Taylor of AXA to record that "*The insured is reluctant to carry out the necessary quantification works twice and the brokers have advised that they are pressing you and your underwriters for your own admission of liability*".

28. Thereafter a meeting took place on **16 September 2009** at TB's offices between Mrs Stone, Mr Page and Mr Ledger, on TB's side and Ms Raby of ASL, for AIG, and Mr Coonan of WC, for AXA. The main purpose of the meeting was to progress finalisation of the loss amount in respect of cost of stock with AIG. Following the meeting Mr Page emailed to Ms Raby, copied to Mr Coonan, PI reports for the season from Spring/Summer 2005 to Spring/Summer 2009 inclusive.

The judge's conclusions on the Claims Cooperation issues

29. The insurers first contended that, in breach of Special Claims Condition 2 b) (i) TB failed to deliver to ACA any "*particulars of claim*" until their email dated 17 February 2009 and were, therefore, out of time. The judge found that AXA had, in effect, allowed "*further time*" as contemplated by 2 b) (i) and that the email of 17 February 2009 was properly to be characterised as the delivery of particulars of claim within the time allowed by the insurers. But he accepted that the particulars sent in that email made no claim in respect of 2004 and that, in consequence, any such claims were now precluded as a matter of construction of the policy.

30. The insurers contended, secondly, that, in breach of BI section, Special Claims Condition 2b) (ii) and/or General Conditions, Claims Condition 1 d) TB failed to deliver to AXA relevant information and documents thereby precluding any claim at all. The information and documentation which had not been provided was that contained in Mr Coonan's shopping list as set out in his email of 29 December 2008.

31. As to that the judge decided three matters. First, he held the requirement to deliver the Categories of documents other than Categories 1 and 7 was not "reasonable" in the circumstances and having regard to the time and expense which would have to be incurred by TB in complying with that requirement. In relation to Category 7 even TB's own expert accepted that this was reasonably requested and it was common ground between both experts that a request for management accounts was routine for commercial claims. None of this information was provided and neither the experts nor the judge could see any reason why it was not.

32. Second, the judge concluded that so far as the material in Category 7 was concerned, the PAC had no relevance. That clause included (see [5] above) the following provision:

> "*The Company will pay to the Insured the reasonable charges payable by the Insured to their professional accountants for producing such particulars or details or any other proofs information or evidence as may be required by the Company under part (b) of Special Condition 2 of this Section and reporting that such particulars or details are in accordance with the Insureds books of accounts or other business books or documents*".

33. TB had contended that the information and documentation sought in the email of 29 December 2008 qualified for payment under the PAC and that the insurers' refusal to accept to pay for the cost of complying with the shopping list was a breach of the PAC such that they could not justifiably complain of any breach by TB in failing to deliver the documentation. As to that, the judge found that, whilst assistance from external accountants would probably have been desirable if not essential in respect of Categories 2-6, the information and documentation under Category 7 was not such as to qualify for payment under the PAC and it could and should have been provided by TB themselves without any input from external accountants.

34. Thirdly, the judge considered the various ways in which TB claimed that the insurers were precluded from taking the point that the condition precedent was not complied with. In effect, TB said that the parties had agreed to "park" all issues of quantum

until the question of liability in principle was in effect agreed, or settled in one way or another, and that the insurers had either agreed this contractually or had waived such entitlement as they might have had to take the point that they did, or had, by one or other of three species of estopppel (estoppel by representation, estoppel by convention or estoppel by acquiescence) become precluded from doing so.

35. The judge set out in summary in paragraphs [119] - [125] the legal submissions that had been made to him and his observations thereon. He did not find it necessary to resolve all the issues that had been ventilated. As he recorded, he had rejected the insurers' case that TB was in breach of any relevant claims co-operation clause save in respect of (i) TB's claims in respect of 2004; and (ii) Category 7 of Mr Coonan's shopping list.

36. As to the former, he regarded any suggestion of any agreement, waiver or estoppel which might preclude the insurers from asserting a breach with regard to any claim in respect of 2004 as "*quite hopeless*", if only because there was no suggestion of any such claim until after the commencement of the proceedings.

37. As to the Category 7 material the strategy adopted by Mrs Stone and Mr Page was that TB were not prepared to do the additional work and incur the additional expense in providing the documentation/information in the shopping list, apart from Category 1 (which was provided), until liability was admitted in principle. Whilst no blanket "agreement" to such effect had been made at the meeting of 24 March 2009, nevertheless either at that meeting or as confirmed in Mr Coonan's email of 24 March 2009, Mr Coonan:

> "129. …in effect agreed to take instructions with regard to paying the costs of instructing accountants to do such work - i.e. the work that Mr Coonan described in that email as the "exhaustive reviews and analysis of stock shortage" – or at least made a representation that that is what he would do and that he would revert once such instructions had been received. To that extent, I accept that Mr Coonan, in effect, agreed or at least represented that matters in respect of such work had to await the receipt by Mr Coonan of instructions from insurers and the communication of such instructions by Mr Coonan to Mrs Stone. As it seems to me, the highpoint of Mr Cogley's case is that Mr Coonan never did revert one way or another and, in my view, Mrs Stone and Mr Page reasonably assumed, in the meantime, that the need to do such work was "parked" pending a response by Mr Coonan or until, at least, the question of liability in principle had been resolved one way or another. In legal terms, there was, in my judgment, a limited agreement to such effect; alternatively an estoppel by representation to similar effect."

38. However, as the judge found, that agreement or estoppel related only to the additional work as referred to by Mr Coonan specifically in his email of 24 March 2009. There was "*never any unequivocal representation*" that TB were not required to deliver the documents/information in Category 7 of Mr Coonan's original shopping list. The delivery of such information did not involve the additional cost of any accountants and both experts, as the judge had already observed, could see no reason why this information was not delivered. Further:

> "131 …… and for the avoidance of doubt, if and to the extent that Mr Page or Mrs Stone may have thought or assumed that TB was not required to deliver such documents/information, such thinking or assumption was in my view not the result of any agreement or representation by the defendants. Moreover, there is, as I understand, no dispute that none of the documents/information in Category 7 of Mr Coonan's shopping list was ever delivered to AXA. In my judgment, this is fatal to TB's claim in these proceedings."

The appellants' submissions

(1) Ground 1: agreement to park category 7

39. Mr Stephen Cogley QC submits that Eder J's conclusion that Category 7 was not parked was in error for a number of reasons. First, neither party had pleaded that any distinction should be drawn between different items on the shopping list. TB's case was that everything was parked, consistent with their view that all the outstanding items were covered by the PAC. The insurers' case was that none of it was. This is not, he submits, a mere pleading point. The absence of any such distinction in the pleadings reflected the fact that none of the documentation or emails supported any such distinction. Further there was no evidential foundation for such distinction. TB's evidence from those present at the meeting (Lindsay Page of TB and Anne Stone of Bluefin, its broker) was consistent with everything outstanding on the list being treated in the same way. Mr Coonan's evidence did not depart from this. Mrs Taylor, AXA's claims handler agreed that everything raised by Mr Coonan in his report was parked[1]. She certainly agreed that "whether, and the extent to which, the professional accountants clause can be used to obtain information was parked" and that everything that was parked remained so until unparked, which never happened.

[1] The passage relied on is in part of the cross examination dealing with the meeting of 8 January 2009 which neither TB nor Mr Coonan attended. The judge referred to this evidence at [75] of his judgment. It is not at all clear that Mrs Taylor was accepting that after the meeting of 2 March 2009 the totality of the shopping list was then parked or that that had been agreed between the insurers and TB or represented by the former to the latter. Further her evidence did not cover communications with TB as opposed to internal communications at AXA or with Mr Coonan. Hence, no doubt, the reference at [132] of the judgment to "*even taking Mrs Taylor's evidence at its highest*".

40. In the second and fourth paragraphs of Mr Coonan's email of 24 March 2009 Mr Coonan had said:

> "*I have issued a further report to Insurers and currently await instructions. I shall contact you again once those instructions are received.*
>
> ….
>
> *I note that your client is not prepared to undertake the exhaustive reviews and analysis of stock shortage and claim reconciliation information at this stage until such time as agreement in principal [*sic*] that liability is accepted has been provided.*"

The second paragraph, Mr Cogley submits, relates to the timing period i.e. the period during which the parking shall take place viz until contact had been made again after instructions had been received. The fourth paragraph notes that TB is not prepared to undertake onerous work on quantum material absent an admission of liability in principle. It seems, he suggests, that the judge may have elided the two paragraphs by confining the parking of the production of material to material that fell within the second paragraph, in effect "cross-infecting" the issue as to what was parked with the issue as to what it was reasonable/unreasonable to request on account of cost. In fact everything remained parked, as Mrs Taylor confirmed, and did so notwithstanding the fact that AXA determined that the PAC clause extended to the production of information at their Strategy Meeting on 30 March 2009 under item 6 of the agenda, where AXA resolved "*Professional Accts charges. Agree to pay under the terms of the policy. They use KPMG*".

41. The judge sought to support his view in respect of the non-parking of the material in Category 7 by reference to the PAC clause. But his construction of it was erroneous. On its literal and unambiguous construction it extended to "*…the Insureds books of account or other business books or documents which may be required by [the insurers] under Part (b) of Special Condition 2...*" In turn the relevant part of Special Condition 2 relates to delivering to the insurer "*such books of account and other business books vouchers invoices balance sheets and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim ...*" Thus, the profit and loss accounts and management accounts, which ordinarily the insured would be able to provide, fall within the wording of Special Condition 2 (b) and the PAC. Ease or cost of production does not come into it. Further the PAC clause is part of AXA's standard wording and it cannot be suggested that its construction can depend on post contractual circumstances such as how much it might cost to produce the material sought.

42. Thus there is no reservation inherent in the PAC clause based on whether the requirement to produce is onerous or whether the involvement of accountants is necessary. The PAC clause covers material which *"...may be produced by professional accountants...."* There is no requirement that the material must or can only be produced by professional accountants, or that, if the materials could be furnished without the additional cost of accountants, then it is somehow excluded. The word "may" is permissive and gives the insured an option as or how it meets any demand for material that falls within it.

43. What the judge should have found, and the only possible correct conclusion, was that the PAC clause *prima facie* covered all outstanding material on the shopping list; that in any event, the entirety of the shopping list was parked until Mr Coonan responded to the claimants with the substance of instructions from the defendants. Since neither Mr Coonan nor the insurers ever did revert the claimants were never in breach of condition precedent. This was entirely in accord with the insurers' own evidence.

(2) Ground 2: duty to speak

44. Mr Cogley submits that the judge failed properly to consider the claimants' arguments on duty to speak. He appears to have confined such a duty to situations where the insurer is hoodwinking the insured. This is not so. The duty arises (even in a case that is not one of utmost good faith) where the claimant would expect the estopped party "*acting honestly and responsibly*" to make its position known. Even more so must that be the position in a case where there is a duty of utmost good faith.

45. It was not the claimants' case that the insurers were hoodwinking them. They advanced a submission that, if the court accepted, as was the case, that the laimants believed the provision of the shopping list material was parked but in fact it was not then it would follow that (as the defendants knew that that was the claimants' belief) the defendants were, indeed hoodwinking the claimants by their silence into breaching a condition precedent. This was not, however, a necessary constituent of the claimants' case.

46. What the judge found was that both sides agreed to park the provision of the shopping list items (subject to his findings on item 7) – so the hoodwinking concept fell away. But that did not mean that the duty to speak did as well.

47. On the judge's hypothesis:

(i) Mr Coonan knew that the claimants and their broker regarded all of the material requested including that in Category 7 as being covered

by the PAC clause and wanted confirmation as to whether insurers would pay under that clause for its production;

(ii) Mr Coonan had undertaken to seek instructions on that issue and to get back to the claimants with a response;

(iii) Nonetheless, and notwithstanding the claimants' position, the provision of material under item 7 remained somehow "live" and was not dependent on the response;

(iv) Nobody expressly or otherwise differentiated between the items on the list; and

(v) There was never any renewed request for the material on the list post 2 March 2009.

48. In those circumstances the conduct of Mr Coonan and/or the insurers in not renewing the request for the Category 7 material and/or not pointing out that the provision of that material was not dependent on instructions which Mr Coonan was seeking can only be characterised as misleading. It does not matter whether or not it was deliberately or calculatedly misleading. Silence and inactivity combined with the representation that Mr Coonan would get back to the claimants with the response on their position meant that the agreement to park or estoppel by acquiescence extended to all the matters on which the claimants were awaiting a response including the material in Category 7.

Discussion

(1) Introduction

49. It is important to distinguish four different issues:

(a) whether the items in the shopping list, on the assumption that they were reasonably required, fell within Special Claim Condition 2 b) (ii) ("the Condition");

(b) whether the insurers reasonably required the production of those items for the purpose of investigating or verifying the claim;

(c) whether any charges payable by the claimants for producing those items fall within the PAC clause;

(d) whether there was some form of agreement to park the production of all or any of these items.

50. The four issues interrelate. But the answer to one issue does not necessarily determine the answer to another. Thus, an item may fall within the Condition, but it may not be reasonable to require its production. Whether it is reasonable to require its production may depend on whether the charge for its production is payable by the insurers. But even if it is payable, it might be unreasonable to require its production e.g. if the labour required in producing it, whoever paid for it, was disproportionate to any value to be derived from it. Or it might be unreasonable to require its production unless the insurers had confirmed in advance that they would in fact pay the cost of producing it. As to (d), the parties could in March 2009 have agreed to park the production of material whose production would be expensive but to make no such agreement in relation to what could readily be provided without any real expense. Or they could have agreed to park the production of the whole list on the basis that items 1-6 were expensive to produce and the material in Category 7 was not much use on its own. What agreement or understanding, if any, was reached between the parties was a question of fact. Lastly, the fact that the Category 7 material could be supplied without expense does not necessarily mean that it was excluded from any agreement or representation.

51. It is not disputed that the production of the accounts in Category 7 fell within the Condition and that their production was reasonably required.

(2) The PAC

52. The judge found that "*assistance from external accountants would probably have been desirable, if not essential in respect of Categories 2-6*" [112]. The appellants submit that item 7 also fell within the PAC, which, for ease of reference, is set out again below:

> *"Professional Accountants Clause*
>
> *Any particulars or details contained in the Insureds books of account or other business books or documents which may be required by the Company under part (b) of Special Condition 2 for the purpose of investigating or verifying any claim hereunder may be produced by professional accountants if at the time they are regularly acting as such for the Insured and their report shall be prima facie evidence of the particulars and details to which such report relates.*
>
> *The Company will pay to the Insured the reasonable charges payable by the Insured to their professional accountants for producing such particulars or details or any other proofs information or evidence as may be required by the Company under part (b) of Special Condition 2 of this Section and reporting that such particulars or details are in*

accordance with the Insureds books of accounts or other business books or documents……"

53. There is not, however, a complete overlap between the Condition and the PAC. The Condition, so far as relevant, provides:

> *"The Insured shall:*
>
> *ii) - deliver to the Company such books of account and other business books vouchers invoices balance sheets and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim."*

54. A company such as TB will in ordinary course prepare management and profit and loss accounts. It can produce them, if requested to do so by insurers, by the simple expedient of copying them. Under Category 7 of the shopping list Mr Coonan sought copies of such accounts for specified years. No professional accountant was needed for their production.

55. The PAC is not directed towards getting the insurers to pay for the production of accounts (whether management or profit and loss) which the company would in ordinary course produce, or for the audit thereof, or the costs of copying accounts already in existence. It is concerned with work that is necessitated by a request from the insurers which falls within the remit of a professional accountant. Its first paragraph deals with the production, not of the Insured's books of account or other business books or documents, but of "*any particulars or details contained in*" such material. The second paragraph provides for the insurance company to pay the reasonable charges payable by the Insured to their accountants "*for producing such particulars or details*" or "*any other proofs information or evidence as may be required by the Company"* under the Condition, and "*reporting that such particulars or details are in accordance with the books of account or other business books or documents*". The clause is, thus, concerned with extracting particulars or details in books of accounts or other documents as required by insurers. The phrase "*or any other proofs information or evidence*" cannot in context be regarded as intended to cover photocopying an existing account in the possession of the insured, as opposed to providing proofs, information or evidence as to the accuracy or composition of items contained or reflected in such accounts or which form part of the underlying material. If all that had been sought was the material in Category 7 the suggestion that TB should instruct accountants to copy the accounts and pay them for that exercise would have been viewed with some hilarity.

56. It was, accordingly, open to the judge to hold [115] that, so far as Category 7 was concerned, the PAC was irrelevant. The appellants contend that the judge appeared to have thought that if the item sought was not covered by the PAC and could easily have been provided without cost, there could not have been an agreement or an estoppel in relation to its production. I do not regard the judge as having been guilty of that error. But the fact that the material in Category 7 was easy to produce and that the appellants did not need the protection of the PAC in respect of it had a bearing on whether any agreement was made or any estoppel arose.

57. The judge was not precluded from holding that there was no agreement or understanding to the effect that Category 7 would be parked because of the pleadings**.** In circumstances where one side said there was no agreement to park anything and the other said that the agreement extended to everything in the shopping list, the judge was not disabled from finding that parking extended to only six of the seven items. From a purely technical point of view a pleading that none of seven items were parked includes an averment that each of them was not. More significantly, it is often the case that the position is not as absolute as one side would have it and a judge is entitled to come to an intermediate finding.

(3) Agreement or representation as to parking Category 7

58. As to parking, the gist of the judge's findings as to what happened at the meeting on 2 March 2009 was threefold.

59. First, Mr Coonan reiterated that the information he was seeking was largely unchanged from what he had sought in December 2008. This obviously included Category 7.

60. Second, neither Mr Page nor Mrs Stone said that the requests were unreasonable as such. Mr Page said that in the first instance AXA should confirm whether or not liability was accepted and TB would then go on to provide all documentation that would be required in support of the figures and agree the methodology and assumptions. The reason given was that Mr Page did not have the resources to provide *all* the financial and stock detail requested and was not prepared to put in the time and incur the cost of obtaining and preparing such information unless he knew that AXA was in principle going to pay the claim. All necessary supporting documents, turnover records and stock reconciliation sheets would then be supplied; but producing such information would be laborious and require the use of external resources the cost of which the appellants were unwilling to incur before agreement in principle by AXA

that losses of gross profits adequately demonstrated would be reimbursed. Mr Coonan disagreed with this.

61. Third, Mrs Stone said that TB wanted the insurers to pay for KPMG to provide the information listed in items 2 – 7. Mr Coonan said that in his view TB had to pay for the cost of preparing and presenting a quantified claim to AXA but that cover was available for additional costs incurred to produce particulars to verify the information. The meeting ended on the basis that Mr Coonan would report back to underwriters, take further instructions and get back to Mrs Stone when such instructions had been obtained.

62. Thereafter Mr Coonan sent the email of 24 March 2009. It said:

> *"Further to our meeting on 2 March 2009 at your client's offices.*
>
> *I have issued a further report to insurers and currently await instructions. I shall contact you again once these instructions are received.*
>
> *In the meantime I acknowledge receipt of your stock and loss profit documents headed Final Versions. You will of course appreciate that the information you have provided is entirely speculative regarding frequency and size of thefts and not supported by factual information or documents.*
>
> *I note that your client is not prepared to undertake the exhaustive reviews and analysis of stock shortage and claim reconciliation information at this stage until such time as agreement in principle that liability is accepted has been provided."*

The judge noted [73] that Mrs Stone accepted in evidence that the last paragraph accurately acknowledged the discussion at the 3 March 2009 meeting.

63. The second paragraph of the email does not specify the nature of the instructions Mr Coonan awaited. But the meeting of 2 March 2009 had raised two principal issues: (i) whether any quantum documents should be produced before an admission of liability in principle; and (ii) whether payment would be made under the PAC for production of the material in Categories 2-7. In those circumstances the inference that a reasonable person in TB's position would draw was that he was seeking instructions on both issues. Mr Coonan's report of 17 March 2009 had in fact covered both subjects and Mr Coonan made plain in his evidence at trial that he was seeking instructions on whether there was to be an admission of liability and on the PAC issue.

64. The judge found [129] that either at that meeting or as confirmed in the 24 March 2009 email Mr Coonan in effect agreed to take instructions with regard to paying the costs of instructing accountants to do the work described in the email as the "*exhaustive reviews and analysis of stock shortage*" or at least made a representation that that was what he would do and that he would revert once such instructions had been received. Any agreement or reasonable assumption by Mrs Stone and Mr Page was so limited. But there was never any unequivocal representation, let alone agreement, that TB was not required to deliver the accounts in Category 7.

65. The question whether there was an agreement or a sufficiently unequivocal representation to found an estoppel was an objective question in the sense that it was necessary to determine what, in the light of the background knowledge known to both parties and the communications which passed between them, a reasonable person would understand to have been agreed or represented. The appellants submit that the judge's finding was a consequence of a finding of fact and not a finding of fact itself. They do so in order to escape the practical restrictions on an appellant's ability to overturn findings of fact, including the evaluation of primary facts, on appeal: see *McGraddie v McGraddie* [2013] UKSC 58; *Fage UK Ltd v Chobani UK* [2014] CWCA Civ 5 at [114] – [115]; *DB's Application for Judicial Review* [2017] UKSC 7.

66. The distinction is somewhat misplaced. A determination as to (i) the background knowledge of the parties; (ii) the communications between them; and (iii) what a reasonable man would conclude in the light of them is properly to be treated as a composite question of fact. As Aiken LJ said in *Argo Systems v Liberty Insurance* [2012] Lloyd's Rep IR 67 at [41]:

> *"I accept that when a judge at first instance has to decide whether there has been a waiver of a breach of warranty for the purposes of section 34(3) of the MIA 1906 , and the judge therefore has to decide whether the insurer has made an unequivocal representation that it will no longer rely on its legal right that it is discharged from liability under the policy,*

> *the judge is making a finding of fact on whether an unequivocal representation has been made. The judge has to place his assessment of the evidence against the legal concept of what constitutes an "unequivocal representation by words or conduct". That is an objective legal concept; either there has been such an unequivocal representation or there has not."*

At the same time, items (i) and (ii) are issues of primary fact, and item (iii) is a judicial assessment of what a reasonable man (a theoretical character) would think in the light of (i) and (ii).

67. The relevant facts known to both sides included the fact (a) that items 2 - 6 were, or were claimed to be difficult and expensive to supply; and (b) that item 7 did not fall into that category. The concerns raised by TB were concerns about producing information that would be costly or difficult to produce and not about producing the material in Category 7 which was neither of those. The fact that Mrs Stone asked for all the items on the shopping list to be covered by the PAC did not signify that there was any concern about the cost of producing the Category 7 material. No cost was involved. The rationale invoked for not supplying the items in Categories 2 – 6 before any admission of liability, namely excessive cost, and the dispute as to whether such costs should be incurred before any admission, did not apply to Category 7.

68. In those circumstances the judge was entitled to find that it was not clear that a willingness to take instructions necessarily carried with it a representation that copies of accounts which required practically no expense to produce, and which the insurers still wanted, need not be produced until after the instructions had been obtained. His conclusions were not without evidential foundation but based on what he found had happened at the meeting (which was the subject of oral evidence which it was for him to evaluate) and the written communications between the parties. He was entitled to conclude that the evidence did not establish that the parties agreed or that the insurers unequivocally represented that the entirety of the shopping list, whether expensive to produce or not, did not have to be provided pending the taking of instructions.

(4) Duty to speak

(i) Introduction

69. The judge recorded Mr Cogley's submission that there was, in the present case, a relationship between the parties (namely that of insured and insurer with duties of good faith on each party) that sufficiently engaged the duty to speak; and that, in any event, regardless of the general position between insured and insurers, the duty to speak arose on the facts of this case. Here, it was said, the position adopted by the defendants was such that they were "hoodwinking" TB and Mrs Stone into

committing a breach of a condition precedent, which was just the sort of unsavoury and unconscionable behaviour which gave rise to a duty to speak.

70. The judge regarded that submission as:

> "*... difficult in particular because (i) Mr Nicholson submitted (rightly in my view) that insofar as AXA owed any relevant duty of good faith, it did not extend to any general duty positively to warn TB that it needed to comply with policy terms; (ii) Mr Cogley's submission that the defendants were "hoodwinking" Mrs Stone and TB is tantamount to an allegation of bad faith on the part of AXA but, as submitted by Mr Nicholson, such serious allegation was not put to Mr Coonan or any other AXA witness as, in my view, it needed to be if it was to be pursued; and (iii) there is no evidence at all to support the suggestion that it should be inferred that the defendants' silence was deliberate which was, in my view and again as Mr Nicholson submitted, similarly a serious allegation which needed to be put if it was to be pursued.*"

In the result [132] the judge held that, even if Mr Cogley's legal submissions as to waiver were correct, and even taking Mrs Taylor's evidence at its highest, he did not consider that such matters availed TB with regard to the requirement to deliver documents in Category 7 "*for similar reasons to those stated above*".

(ii) The authorities: *good faith in insurance contracts*

71. In relation to insurance such authority as there is in relation to a duty of good faith arising *after* the contract has been made and operating to the benefit of the insured is slender. In *Drake Insurance plc v Provident Insurance plc* [2003] EWCA Civ 1834 [2004] 601 Rix LJ said that he was not aware that it had actually been successfully invoked to provide the assured with any remedy other than a return of premiums. Clarke LJ, as he then was, said that, so far as he was aware, there was no authority for the proposition that the insurer owed a duty to take reasonable care to make appropriate inquiries before avoiding the policy. Pill LJ observed that the post contractual duty of good faith was a very limited one, citing Mance LJ in *Brotherton v Asegurados Colseguros SA* [2003] 2 All E.R (Comm) 298. He referred to the words of Lord Clyde in *Manifest Shipping Co. Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469:

> *"7 But once it is recognised that in a contract of insurance, and indeed in certain other contracts, an element of*

> *good faith is to be observed, and that that element may impose certain duties particularly of disclosure between one party and the other, duties which may vary in their content and substance according to the circumstances, then a question may arise as to the utility of the concept of an utmost good faith or an uberrima fides. In my view the idea of good faith in the context of insurance contracts reflects the degrees of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made."*

Pill LJ held that, even though the insurers did not have blind-eye knowledge of the relevant fact, their duty of good faith required them to tell the insured what they had in mind and give him an opportunity to update them on the January 1994 accident (the relevant question being whether that accident had been reclassified as a no fault accident) before avoiding. Clarke LJ thought that there was much to be said for this conclusion but he did not found his decision on it because of the difficulty of knowing where to draw the line.

(iii) The authorities: duty to speak in other commercial contracts

72. In relation to commercial contracts generally there is authority supporting a duty to speak in certain circumstances. In *The Lutetian* [1982] 2 Lloyd's Rep 140, 157 Bingham J, as he then was, regarded the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 903 as having provided persuasive authority for the proposition that the duty necessary to found an estoppel by silence or acquiescence arose where a reasonable man would expect the person against whom the estoppel was raised acting honestly and responsibly to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. In *Moorgate Mercantile* Lord Wilberforce said that the question whether there was an estoppel had to be asked "*having regard to the situation in which the relevant transaction occurred, as known to both parties*" and the reasonable man was to be one in the position of the party asserting the estoppel. His formulation has found favour subsequently: see the *Indian Endurance* [1998] AC 878, 913 where Lord Steyn said:

> "Lord Wilberforce said, at p 903, that the question is whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property to take such steps to make that claim

known…' at p 903. Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence"

and the cases cited below.

73. In *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 252 Rix LJ observed *obiter* that a duty to speak might arise pursuant to either contractual obligations involving collaboration and co-ordination with other business advisors or obligations as an honest business partner. He adopted the general principle contained in *Moorgate Mercantile* and *The Indian Grace.* In that case the question arose in circumstances where ING Bank failed to disclose what it knew to be a difference between it and Ros Roca on the calculation of its fee.

74. Blair J considered this line of authority in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311. In essence he held that a duty to speak, failure to fulfil which would give rise to estoppel by acquiescence, may arise on the particular facts where one party is proceeding on the assumption that something is agreed, whereas the other party knows that it is in dispute. In such a case the duty to speak may arise because a reasonable man would have the expectation referred to by Bingham J and set out in paragraph 72 above.

75. The reference to "*acting honestly*" did not, he held, mean that the party against whom the estoppel was asserted had to be guilty of actual dishonesty in the sense of acting fraudulently. He accepted [133] the submission that, absent a relationship of good faith or partnership or something akin to a joint enterprise the courts would not impose a duty to speak in the absence of impropriety of some description by the person alleged to be estopped. That impropriety might, however, come from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations. Andrew Smith J adopted this statement in *Kaupthing Singer & Friedlander Ltd v UBS AG* [2014] EWHC 2450 (Comm), where he held that a bank would not be acting honestly (in the sense explained by Blair J) or responsibly if it knew about or even seriously suspected a mistake of the kind then in question.

76. In the present case, which does involve a relationship of good faith, impropriety in the sense identified by Blair J is, *a fortiori*, sufficient to give rise to an estoppel. I would add that in the paragraphs preceding [133] Blair J appears to have been resolving the question as to whether it was necessary, in a case not involving a good faith obligation, to show that the person estopped was acting both dishonestly and irresponsibly; and to have answered that question in the affirmative [132]; but then [133] to have given "*dishonesty*" a limited meaning: "*dishonesty' in an equitable*

sense". This seems to me, with respect, a misreading of the phraseology used by Lord Wilberforce, Bingham J and Rix LJ. The question is what a reasonable person in the position of the person asserting the estoppel would expect of a person acting "*honestly and responsibly*" so that irresponsible but not dishonest behaviour could itself give rise to an estoppel. The reasoning in *Starbev* ends up by identifying that as the question; but by a somewhat circuitous route. I would, however, adopt his approach to what could amount to dishonesty in this context.

77. The judge considered *Drake Insurance*, *Starbev*, and *ING Bank* and the authorities referred to in them.

(iv) Discussion

78. In determining whether there was a duty to speak there are a number of material considerations.

79. First, an insurer is, generally speaking, under no duty to warn an insured as to the need to comply with policy conditions. That was particularly so in the present case, where TB was represented by Mrs Stone, an Executive Director of its insurance brokers. She was described by the judge as a highly-experienced broker, specialising as a claims advocate in pursuing large and difficult claims against insurers. She knew from an early stage – at least 14 January 2009 – of the effect of the Condition Precedent clause.

80. Second, the judge was not satisfied that there was any bad faith in the form of hoodwinking on the part of the insurers i.e. deliberately keeping quiet about the obligation to provide the information requested in order to avoid TB waking up to the need to do so before it was too late. That was, in fact, the claimants' case but it was never put to Mr Coonan or any other witness. The judge was right to reject it on that account.

81. Third, on the judge's findings any agreement or representation went no further than to deal with the material in Categories 2-6 and did not deal with Category 7. The judge found [130] that no agreement or representation was made that the Category 7 material did not have to be provided.

82. That is not, however, necessarily the end of the matter. The authorities show that whether an estoppel arises is not wholly dependent on whether the person sought to be

estopped has made some representation express or implied. It may arise if, in the light of the circumstances known to the parties, a reasonable person in the position of the person seeking to set up the estoppel (here TB) would expect the other party (here the insurers) acting honestly and responsibly to take steps to make his position plain. Such an estoppel is a form of estoppel by acquiescence arising out a failure to speak when under a duty to do so.

83. This is not a matter with which the judge deals otherwise than to say that, even if Mr Cogley's legal submissions as to waiver were correct, and even taking Mrs Taylor's evidence at its highest, those matters did not avail TB with regard to the requirement to deliver documents in Category 7 "*for similar reasons to those stated above*". Those reasons had addressed the question as to whether there was any agreement or representation.

84. TB's failure to provide the Category 7 material did not occur in a vacuum but in circumstances where Mr Coonan was due to get back to TB with a response to its position after taking instructions on the two issues. It seems to me that, in the particular circumstances of this case, as known to the parties, someone in the position of TB would reasonably expect the insurers to say if they required the Category 7 material before Mr Coonan reported back, particularly if failure to provide the information was to be said to be fatal to the claim. True it is that the considerations of cost and expense raised by TB which had prompted Mr Coonan to say that he would take instructions and report back did not apply to the Category 7 material. Nevertheless, the material sought by the insurers had been sought as a package by them and, as the judge found, Mrs Stone had sought confirmation that the insurers would pay for KPMG to provide the information listed in Categories 2-7, not 2-6. She was, accordingly, rightly or wrongly, treating the Category 7 material as covered by the PAC, on which Mr Coonan was to revert, and in the same class as Categories 2-6. No separate consideration appears to have been given by either side to Category 7, nor any differentiation made in discussion between Categories 2-6 and 7, and it was apparent from what Mrs Stone said that she was not doing so.

85. Further, the information contained in Category 7 was of very little use on its own. The insurers must have realised (or would if they had thought about it) that TB would have the Category 7 material to hand: in February 2009 Mrs Stone had said that "*the balance of your shopping list is currently parked here*". It would have been the simplest thing for them to confirm that, notwithstanding the wait for instructions, they still wanted the Category 7 material before the upshot of those instructions was communicated. But they did not do so. Indeed, the suggestion that the insurers were under no liability because of a failure to comply with the Condition by providing the material in the shopping list did not appear in Kennedys' letter of 19 November 2009 (in which, whilst denying liability, they invited TB to produce evidence of each theft, evidence of what was stolen and its value, and a calculation by reference to the BI terms – but not the Category 7 material) but only in AXA's Defence of 27 April 2010.

86. On 16 April 2009 Mrs Taylor told Mrs Stone that she would "*advise her in meantime if anything to report*". This message did not indicate that there was something outstanding from TB. On the contrary, the absence of any reference to that effect suggested the opposite. Further, on 28 May 2009 Mrs Stone telephoned WC and said that she had sent all outstanding information required to them and would like to know the present position. The insurers, through their loss adjusters, thus knew that that is what TB thought (and inferentially that they thought that everything was parked). On 10 August 2009 Mr Coonan said that he looked forward to receiving any further claim submission TB wished to make without any suggestion that something already required was outstanding.

87. In the light of what had passed between the parties, TB was, in my view, entitled to expect that if the insurers regarded the Category 7 material (alone) as outstanding, due, and unparked, then, acting honestly and responsibly, they should have told her. Not to do so was misleading.

88. An estoppel of this nature in a contract of this kind does not require dishonesty or an intention to mislead; nor any impropriety beyond that inherent in the conclusion that the insurers should have spoken but did not. In the circumstances to which I have referred the insurers were, in my view, under a duty to tell TB that the Category 7 material was indeed outstanding and was required before the upshot of any instructions was revealed. If they had done so the documents would no doubt have been supplied. Since they did not do so it would be unjust and unconscionable to allow them to escape any liability on the ground of non-compliance with a condition precedent in relation to the Category 7 material.

89. I would not regard this conclusion as dependent on the contract being, as it was, one *uberrimae fidei.* It is not, therefore, necessary to decide the extent to which, if at all, the fact that it is such a contract may enlarge the circumstances in which a duty to speak arises. It is however, clear that the fact that the contract is of such a nature will, if it does anything, increase the likelihood of a party having a duty to speak.

90. Accordingly, the judge was in error in finding that a condition precedent to liability under the policy had not been complied with and that TB's claim failed on that account alone.

91. I have had the advantage of reading in draft the judgment of David Richards LJ on the remaining grounds of appeal, with which I agree,

Lord Justice David Richards

92. I agree with the judgment of Sir Christopher Clarke. While TB succeeds as regards the insurers' duty to speak, it fails in my view on its appeal against the quantum findings made by Eder J. for the reasons which I set out in this judgment. It follows, if the other members of the court agree, that overall the appeal must be dismissed.

93. The judge rejected TB's claim in its entirety on the grounds that it failed to establish any loss recoverable under the policies. To reiterate, TB's claims were for the loss of profits resulting from those of JON's thefts of stock under the business interruption cover. It abandoned before trial claims for the value of the stolen stock. There was an excess of £5,000 under the policies for each and every loss. The insurers speculate that TB withdrew its claim for the loss of stock because it knew it could not show that stock with a value of more than £5,000 had been stolen on any occasion. Instead its claim was based on showing that each theft resulted in a loss of profits in excess of £5,000.

94. It was an issue before the judge as to whether the excess fell to be treated as an exception to cover, so that the burden of proving that the loss was less than £5,000 fell on the insurers, or as part of the cover under the policy, so that the burden of proving loss in excess of £5,000 lay on TB. The judge decided in favour of the insurers on this issue and TB has not appealed against that ruling.

95. TB sought to establish its case by expert accountancy evidence provided by Mrs Katherine Britten, to which the insurers responded with expert accountancy evidence from Mrs Catherine Rawlin and expert retail stock control and systems evidence from Mr Richard Emery.

96. A huge volume of expert evidence was filed and relied on at trial. Each expert provided four reports and there were two joint statements. These reports extended to well over 1,000 pages. In addition, each expert was the subject of searching cross examination. The judge referred at [31] to "a vast mass of expert evidence which depends on certain assumptions and very complicated analyses which, in turn, depend on matters which are somewhat speculative". At [141], he was driven to describe it "as something of a swamp" and commented that the difficulty in handling such evidence and identifying relevant issues was exacerbated by the fact that a large amount of this material "was a moving feast (if that is the right word) right up to – and even during – the trial". Coming, as they do, from a judge with great experience of trials with highly complex issues and evidence, these are very serious criticisms of the way this evidence was presented to the court, and made a task that would be challenging in the best of circumstances significantly more difficult.

97. These observations and descriptions of the evidence are material, too, to the application of the principles that govern the approach of appellate courts to challenges to findings of fact made by the trial judge. These principles and the authorities establishing them are too well-known to need lengthy discussion. Referring to the decisions of the Supreme Court in *McGraddie v McGraddie* [2013] UKSC 58; [2013]

1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, Henderson LJ recently commented in *Hamid v Khalid* [2017] EWCA Civ 201 that what emerges with clarity is that an appellate court should not interfere with a trial judge's conclusions on primary facts unless satisfied that the judge was "plainly wrong". In *Henderson*, Lord Reed said [62] that "[w]hat matters is whether the decision under appeal is one that no reasonable judge could have reached. At [67] Lord Reed said:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

98. On the issue of quantum, TB relies on two grounds of appeal. The first (Ground 3) is that the judge was wrong to conclude that TB had failed to demonstrate that on each occasion of theft, stock with a value of more than £5,000 was stolen, so that it could not demonstrate that its loss of profit resulting from each theft exceeded the policy excess of £5,000. The second (Ground 4) is that the judge was wrong to reject TB's case as to the gross profits lost as a result of the thefts or, alternatively, should have accepted the figure advanced by the insurers' expert witness.

99. Ground 4 was added only after the hearing of TB's renewed application for permission to appeal. Underhill LJ considered that the judge had rejected TB's case on the loss of gross profits in its totality and had not accepted that TB had suffered any loss of gross profits, and that therefore Ground 3 on its own would not assist TB. Plainly, if TB could not establish that it had sustained *any* loss of gross profits, it could not show losses of gross profits in excess of £5,000 as a result of any theft.

100. TB did not accept that this was a correct reading of the judgment, and so Ground 4 is prefaced by a statement that it is without prejudice to TB's contention that the judge did not make any finding that no loss of gross profit had been established. In my view, TB is right about this. Underhill LJ identified paragraphs [159] – [164] as containing the finding that TB had failed to prove that it had suffered any loss of gross profit at all. The judge states his conclusion arising from those paragraphs at [165] where he referred to his "overall conclusion that TB has failed to establish even on the basis of the broad approach any lost profit *above the excess*" (my emphasis). That this accurately states his conclusion and that he did not find that TB had failed to prove any loss of gross profits at all is made clear in [175] where he referred to "the facts that….(ii) there is no doubt that TB suffered substantial losses arising out of the thefts…(iii) such losses amounted, even on the defendants' experts' evidence, to some £2.16 million".

101. Properly understood, the judge found that TB had not proved any loss of profits in excess of £5,000 as a result of any of JON's thefts, and he had two discrete grounds for this finding. The first is that covered by Ground 3, that the judge did not accept the assumptions made by TB's expert as to the number of boxes and items stolen on each occasion. This was referred to by the parties and the judge as JON's *modus* operandi. The second is that he rejected the assumptions as to the rate of lost sales that underlay Mrs Britten's model. This is covered in his judgment at [159] – [172] and I will proceed on the basis that this is covered by Ground 4.

102. It is accepted by TB that if it fails on Ground 4, it cannot succeed on this appeal. I propose therefore to deal first with Ground 4.

103. At [135] the judge noted Mr Cogley's submission on behalf of TB that the fact that an insured peril and consequential loss may be difficult to demonstrate by <u>direct</u> evidence does not preclude the Court from finding that both have occurred. Mr Cogley relied in particular on *Equitas v R & Q Reinsurance Co (UK)* [2009] EWHC 2787 (Comm); [2010] 1 Lloyd's IRLR 600 and *Municipal Mutual Insurance Ltd v SEA Insurance Co Ltd* [1998] Lloyds Rep IR 421 to establish, and the judge accepted, that modelling and drawing inferences can be used both to establish that the insured event occurred and the quantum of loss. This is not disputed by the insurers. At [138] the judge, while acknowledging the role of this type of evidence, noted that "ultimately, in order for a claimant to succeed, the Court must be satisfied on a balance of probabilities that one or more events have occurred as a result of one or more insured perils; "nothing less will do". This is not disputed by TB.

104. At [140] the judge held that once one or more events caused by an insured peril is shown and an actionable head of loss established, the Court will generally assess damages as best it can by reference to the materials available to it. Eder J accepted that (i) the balance of probability test is not an appropriate yardstick to measure loss; and (ii) lack of precision in relation to quantum is not a bar to recovery. The judge referred to this approach as the broad approach.

105. The basic but critical aspect of TB's claim for the loss of gross profits resulting from the theft of an item is that TB loses no profit until the time at which the item would have been sold, and its loss of profit is calculated by reference to the price at which the item would then have been sold.

106. At [159] the judge identified correctly that the biggest issue concerning loss of gross profit is what has been referred to throughout the proceedings as the "timing of unfulfilled demand". The "timing of unfulfilled demand" describes the point at which a sale of an item is lost as a result of the theft of the item. As Eder J set out:

> "Thus if an item were stolen on (say) 1 January 2008, the potential profit lost on that particular item would have to be calculated, in theory at least, by reference to some hypothetical potential sale not on that date (1 January 2008) but on some future date. Inevitably, such an exercise would need to seek to take account of matters which would (or would not) have occurred but for the theft including (i) how long that item

would have remained at the TBDC; (ii) when it would have been sent out to a particular retail location and, at that time, to which location; (iii) if and when it would have been sold; and (iv) if sold (as opposed to disposed of by way of scrappage) at what price".

107. TB's case was based on the modelling exercise carried out by their expert witness, Mrs Kathryn Britten. At [162] the judge said:

> "As to the validity and general reliability of such exercise, the central issue was the methodology adopted by Mrs Britten in assessing the timing of unfulfilled demand and, in particular, her use of what was described as a "blended gross margin". In calculating lost profit, Mr Cogley accepted, indeed emphasised, that the starting point was that a lost sale on a particular item which had been stolen might occur at any time and he also readily accepted that the calculation of the lost profit on that item and he also readily accepted that the calculation of the lost profit on that item can present what he described as a "problem". However, he submitted that the claim in the present case was not for the lost profit of any particular item stolen but for the lost profit on a vast number of stolen items; and that in that context, the use of a "blended gross margin" was both justified and indeed more reliable than what he described as the more "granular" approach adopted by Mrs Rawlin and Mr Emery."

108. The blended gross margin approach started by taking the average sales figures for TB, which produced an average margin. Certain adjustments were then made to those average sales figures to reflect that, compared to actual sales, there was a lower probability that the stolen items would have been sold in the early weeks of the sales period for any season. At [163] the judge noted how this adjustment was made by Mrs Britten:

> "(a) to exclude any sales made prior to the start of the season -because there are unlikely to be lost sales before the start of the main selling season/de minimis; (b) to include only 35.65% of the sales made in the next four weeks; (c) to include only 87.5% of the sales made in the next four weeks; and (d) to include all sales from that point....Mr Cogley (and Mrs Britten) recognised that this only produced a blended gross margin for a single season; and that, since the seasons and the policy years did not run together, in order to establish the appropriate loss of gross profit in any given policy year, it was necessary to take into account the figures for more than one season and make further adjustments".

109. At [164] the judge said in relation to the modelling exercise of Mrs Britten:

> "...even applying the broad approach stated above, I remain unpersuaded that it provides a sufficiently reliable or reasoned method for assessing the appropriate loss of profit in the

present case. In particular, as submitted by Mr Nicholson, it seems to me that (apart from some "dilution" in the early part of each season), it assumes, wrongly in my view, that the (hypothetical) sales profile of the stolen items would have followed the profile of actual sales. By way of a number of homely examples, Mr Cogley vigorously advocated that such criticism was fundamentally flawed; and Mrs Britten herself emphasised that she had applied the "full range of discounts". However, as submitted by Mr Nicholson, although the latter was true in a sense, I remain unpersuaded that the stolen items would have followed the path of average items. In response, Mrs Britten sought to justify the approach that she had adopted on various different bases; and the various adjustments she had made. However, at the end of the day, I remained unpersuaded (even applying the broad approach) that the explanations proffered by her satisfactorily addressed what seems to me the main flaw in her modelling exercise."

110. Eder J then went on at [165] to state that:

> "…I do not necessarily accept the accuracy or reliability of the exercises carried out by Mr Emery and Mrs Rawlin. In that regard, Mr Cogley advanced a number of criticisms with regard to what he described as their "granular" approach. I recognise the potential force of at least certain of those criticisms. However, it is unnecessary for me to consider them in detail because, even if certain of those criticisms are justified in whole or in part, they do not affect my overall conclusion viz that TB has failed to establish even on the basis of the broad approach any lost profit above the excess"

111. Before Eder J there was an argument advanced by the insurers that the model employed by Mrs Britten was not contractually compliant with the adjustment provision for calculating loss. Mr Cogley in his written submissions advanced arguments that Mrs Britten's methodology is contractually compliant. That aspect of the insurers' case is not pursued by them before us.

112. Mr Cogley submitted before us that the judge's rejection of Mrs Britten's evidence is flawed because it does not recognise the similarity between her evidence and the evidence of the insurers' expert Mrs Rawlin. Mr Cogley submitted that the reason for the discrepancy in the figures which each expert produced is that Mrs Rawlin's sale of the lost stock would have occurred later in the season (being the timing of unfulfilled demand).

113. Mr Nicholson for the insurers pointed out that in her first report Mrs Britten did not consider the unfulfilled demand threshold. It was only after one of the insurers' experts, Mr Emery, said that there would be a lag before a depletion in the warehouse resulted in a lost sale that Mrs Britten made adjustments. Her adjustments took Mr Emery's rate at which a particular item ran out in the last few weeks of a season and applied it to the first few weeks of the season. Mr Nicholson referred to Mr Emery's criticism of this approach in his fourth report dated 7th July 2014 at 5.3.5-6:

> "The purpose of my analysis was to establish the rate of diminishing SKU availability during the last 8 weeks of the Retail season. Mrs Britten has used it to establish the rate of Diminishing SKU Availability for the first 8 weeks of the season. It is clear to me that this is not an appropriate use of my analysis because the rate of sale products in the first few weeks of the season is much slower than in the last few weeks"

114. This was put to Mrs Britten in cross examination:

> "Q. Do you agree with that as well?
> A. Yes I do.
> Q. Well, that is a nonsense, isn't it, Mrs Britten, that you have done that, because you're looking at the wrong end of the season? The reason why that doesn't work is as Mr Emery explains at 5.3.6?
> A. It would be a nonsense if the result was significantly different, but in fact I tested the percentage that I'd used by carrying out the same analysis, but only looking at last dates following the TBDC going out of stock in the first two SUN periods, and the percentages that I arrived at were very, very similar. So I decided that, having adopted Mr Emery's numbers before I saw his criticism, I had no need to change them.
> Q. Do we find any reference to that testing in your 25 June report?
> A. No, because I'd written the report before I saw this.
> Q. Do we find your test or analysis in any material put before the court?
> A. No, because I haven't changed my calculations.
> Q. Mrs Britten, the point is it's just fundamentally inappropriate to use an analysis that one expert has carried out for one purpose and then apply it backwards the wrong way round for an entirely different purpose; that's correct, isn't it?
> A. Put like that, yes."

115. At [164] of the judgment Eder J made findings of fact when he said that he was not persuaded that Mrs Britten's methodology "provides a sufficiently reliable or reasoned method for assessing the appropriate loss of profit in the present case" and that "it assumes wrongly in my view, that the hypothetical sales profile of the stolen items would have followed the profile of actual sales".

116. Mr Cogley's submissions on Ground 4 are essentially an attempt to re-argue TB's case. In my judgment, he cannot establish, as he must, that the judge was plainly wrong in his assessment and rejection of Mrs Britten's modelling exercise. The rejection was not because of any objection to modelling *per se* as a means of establishing loss but because the judge did not accept Mrs Britten's approach to the timing of unfulfilled demand, which Mr Cogley accepted before us was the nub of this part of the case.

117. As earlier noted, Eder J was provided with voluminous expert evidence, heard extensive cross examination of the expert witnesses and received very full written and oral submissions. All of this he examined in detail in the preparation of his careful judgment. In reviewing his decision, it is not for this court to embark on the same exercise and it is precisely because of the nature of the trial judge's fact-finding exercise that this court will interfere only if he has neglected evidence, which is not suggested here, or has gone plainly wrong.

118. As I earlier observed and he made clear, Eder J was not well served by the way in which the expert evidence was presented to him. Nor were we. In giving permission to appeal, Underhill LJ underscored the necessity of a clear presentation of the issues on quantum and the relevant expert evidence. In his decision granting permission to appeal, he stated that "the quantum issues will require the Court to be given a thorough understanding of the approaches taken by the parties and their experts" and he went to emphasise "that it is particularly important that the skeleton arguments give a clear, *succinct* [his emphasis] and well-analysed guide to the quantum evidence and to how their respective cases on the quantum issues were put to Eder J, supported by full cross-referencing". On this basis, Underhill LJ did not think it necessary to increase the estimate of two days, of which one was available for the quantum issues. I am grateful to Mr Nicholson and his team for the analysis annexed to their skeleton argument for the appeal. But the greater onus was on TB which needed to explain the issues and clearly identify the ways in which the judge was plainly wrong. The benefit of an oral hearing is that the essential issues can be identified and examined, albeit with only limited available time. Having done so, I am for the reasons given above satisfied that TB cannot succeed on its appeal under Ground 4.

119. Ground 3 relates to the other basis on which the judge found that TB had not established any loss of profits in excess of £5,000 as a result of each and every theft.

120. In order to establish recoverable loss, TB assumed that the amount of stock stolen by JON on each occasion was 3.5 boxes, with each box containing 68.25 items, meaning an average of 238 items per incident. The calculation of the profits lost as a result of each theft was calculated on this basis. The figures chosen were an extrapolation of the quantity of stock stolen by JON on the last five or six thefts before his arrest, of which there was some evidence.

121. This was an assumption of fundamental importance to the establishment and calculation of the loss allegedly suffered by TB. But it was only an assumption and the judge considered that it was too speculative to provide a viable foundation for TB's case. At [154] he said that it was "not based on any real evidence at all – or at least, it is based on evidence which is extremely tenuous." While agreeing that it was "a possible average" (the judge's emphasis), "it seems to me difficult, if not impossible, to say that other figures are not equally possible and, indeed, reasonable and realistic".

122. The judge observed that even slight changes to the input assumptions produce quite significant changes to the number of incidents and, ultimately, the amounts recoverable after applying the £5,000 excess to each and every incident. He proceeded to illustrate this by some examples, "which would dramatically reduce the total amount recoverable and in certain policy periods extinguish any claim completely" and some other examples that would have the opposite effect. He concluded that "[o]n the evidence available and within a relatively broad range, it seems to me quite impossible to say that one set of assumptions is more or less reasonable than any other set of assumptions even adopting the broad approach" [i.e. to establishing the quantum of a claim].

123. The judge considered that figures for the last few thefts carried out by JON did not provide a sound basis for extending a similar average backwards over a period of four years. Nor did it help to assume, as the judge accepted was likely, that JON started small but grew greedy. If anything, it suggests that JON would steal a smaller number of items on each occasion. While the judge was also prepared to accept that JON would try to minimise the risk of detection, "whether he would do this by minimising the number of incidents of theft or the number of boxes/items stolen on each incident of theft is, in my view, entirely speculative".

124. For these reasons, the judge at [158] concluded that "the evidence fails to show that the claimed losses as calculated by TB fall above the excess of £5,000 each and every loss".

125. In his submissions, Mr Cogley focussed on the last year or so of JON's thefts. He emphasised, correctly, that JON could not probably have executed more than one theft per day and that, on that basis, some of the judge's hypothetical examples were not feasible for that period. Mr Cogley accepted that there would have been variations, with the amount of stock stolen on some occasions being incapable of resulting in lost profits in excess of £5,000. But, he submitted, that was the whole point of the modelling of an average loss. It was not speculation, but the only way realistically to account for the known facts of the case.

126. In my judgment, these submissions do not provide a sound basis for overturning the judge's finding that TB had not, and indeed probably could not, establish the loss it claimed. The assumed volume of stolen items for each theft was crucial for establishing the quantum of TB's claim but it was highly speculative. For understandable reasons, Mr Cogley focussed his attention on the last year or so, because the scale of the thefts had grown to a point that, when combined with the maximum number of probable incidents of theft (one per each of JON's working days), enough items may well have been stolen on a substantial number of occasions to create the possibility of lost profits in excess of £5,000. But that is very far from

being enough to establish a basis for TB's claim as pleaded and presented to the judge.

127. I conclude that the judge was entitled to form the view that this fundamental element in the establishment and calculation of TB's claim lacked the substance needed to prove its case on the balance of probabilities.

128. For these reasons, I reject the challenge to the judge's decision that TB had failed to establish the loss it claimed on both of Grounds 3 and 4. I would therefore dismiss this appeal.

Lord Justice Treacy

129. I agree with both judgments. In consequence, the appeal is dismissed.