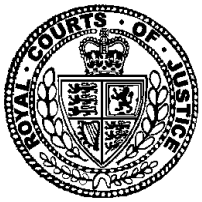

Neutral Citation Number: [2020] EWHC 922 (Comm)

Case No: CL-2018-000236

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 21/04/2020

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

UK ACORN FINANCE LIMITED	**Claimant**
- and -	
MARKEL (UK) LIMITED	**Defendant**

- -
- -

Mr Adam Kramer and Ms Sophia Dzwig (instructed by **Rosling King LLP**) for the **Claimant**
Mr Michael Pooles QC and Mr Jack Steer (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 9-12 and 16 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Tuesday 21st April 2020.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC :

Introduction

1. This is the trial of a claim by the claimant brought under section 1(1) and (4) of the Third Party (Rights Against Insurers) Act 1930 ("Act") by which it seeks to recover an indemnity in respect of two judgments, being a judgment for £385,187.32 and a further judgment for £12,882,713.49, obtained by it against Westoe 19 Limited (formerly Colin Lilley Surveying Limited) ("CLS"), under professional indemnity policies underwritten by the defendant in 2013 and 2014 (collectively "Policies", and respectively "2013 Policy" and "2014 Policy").

2. The claimant is a bridging finance lender mainly to agricultural businesses. CLS was a limited company whose business was property valuation. The underlying judgments against CLS concerned a total of 11 agricultural property valuations undertaken between 11 June 2010 and 30 March 2012. In each case the claimant alleged that CLS had negligently overvalued the properties concerned. The defendant purported to avoid the policies in February 2016 and default judgments were entered thereafter in each of the claims against CLS.

3. The defendant maintains that it was entitled to avoid the Policies as a result of misrepresentations (which it is alleged took effect as warranties) and non-disclosures contained in or evidenced by risk profile documents generated by the defendant prior to the renewal of each of the Policies and approved on behalf of CLS. The Policies were each subject to an unintentional non-disclosure clause. It is common ground that the effect of this provision is that the defendant can avoid the Policies only if the misrepresentations relied on by the defendant were not innocent and free from any fraudulent conduct or intent to deceive. The defendant asserts that CLS could not satisfy it that the alleged misrepresentations and non-disclosures relied on were innocent or free from fraudulent conduct or intent to deceive. There is a dispute between the parties as to whether this issue should be judged by the court on the basis of the evidence led before it by the parties or whether the court's ability to intervene is confined to an investigation of the defendant's decision making processes. This is a question of law to which I turn in detail later in this judgment.

4. The trial took place between 9-12 and 16 December 2019. I heard oral evidence from the following witnesses called on behalf of the claimant:

   (a) Mr Mark Saunders, a director of the claimant; and

   (b) Mr David Linsley, formerly a director of CLS and the individual through whom it is alleged CLS made the misrepresentations on which the defendant relies and who was responsible for much of the business undertaken by CLS at the relevant time.

   I heard oral evidence from the following witnesses called on behalf of the defendant:

   (a) Mr Nicholas Burgess, one of the defendant's underwriters whose evidence was concerned principally with the underwriting of CLS's insurance policy for 2010 and 2011 and the 2014 Policy;

(b) Mr Timothy Spence, one of the defendant's underwriters whose evidence was concerned principally with the underwriting of CLS's insurance policy for 2012 and the 2013 Policy;

(c) Mr David McKechnie, a claims manager employed by the defendant at the time who was responsible for the avoidance of the Policies;

(d) Ms Sonja Wigglesworth, an underwriting manager employed by the defendant who was concerned with both the underwriting of CLS's Policies and the avoidance process; and

(e) Ms Hannah Purves, a claims director employed by the defendant who was ultimately responsible for the avoidance of the Policies.

I heard expert evidence from Mr David Blackburn who was called on behalf of the claimant and Mr Philip Foley who was called on behalf of the defendant. The defendant also adduced evidence in the form of a written report from another expert Mr Mervyn Iles, who purported to give evidence as to the meaning of the phrase "*sub-prime lender"*. His evidence was agreed and he did not give oral evidence.

5. This is a heavily documented commercial dispute relating to events that took place some years ago. In those circumstances, I have approached the factual issues between the parties that are material to this dispute by testing the oral evidence of each of the witnesses wherever possible against the contemporary documentation, admitted and inconvertible facts and inherent probabilities. This is an entirely conventional approach – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413. This is not to say that a judge can, or should attempt to, resolve factual disputes by referring only to contemporaneous documentation. It is necessary to consider all of the evidence – see Kogan v. Martin [2019] EWCA Civ 164 *per* Floyd LJ at paragraphs 88-89. There is nothing either in this authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques I have referred to.

6. Mr Linsley was cross examined on the basis that he was responsible for the misrepresentations on which the defendant relies and that he caused or permitted the representations to be made knowing or believing them to be false or not to be true or on the basis that he was reckless, not caring whether they were true or false. Mr Linsley is not a party or representative of a party but was a witness called by the claimant. He is a chartered surveyor and valuer for whom such findings would by definition be very serious. As he observed in paragraph 7 of his first witness statement "*…In my 41 years of professional practice I have always been mindful of my ongoing RICS professional and regulatory obligations and prior to this insurance issue throughout my career I have never been accused of dishonesty*." In those circumstances, I remind myself at the outset that whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> "'The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the

> evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence...Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation.'"

7. Finally, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest in one respect that his evidence in all other respects is to be rejected. Experience suggests that people may give dishonest answers for a variety of reasons including an entirely misplaced wish to strengthen a true case that is perceived to be evidentially weak as opposed to a desire to advance a dishonestly conceived case in a dishonest manner. What such conduct will usually mean however is that the evidence of such a witness will have to be treated with great caution save where it is corroborated, either by a witness whose evidence is accepted or by the contents of contemporaneous documentation or is against the witness's interests or is admitted.

The Facts

8. Although this dispute is concerned with the 2013 and the 2014 Policies, it is necessary to consider some of the earlier years in order to set in context the contents of the documents on which the defendant relies. It is common ground that the defendant provided CLS with professional indemnity insurance from 2003 to 2015, although neither party suggests it is necessary to consider any insurance period earlier that the January 2011- January 2012 period.

9. At all material times CLS's insurance brokers were Lycetts and the individual who acted for CLS at Lycetts was Mr White. It is trite law and is not in dispute that an insurance broker is the agent for the Insured not the Insurer.

The 2011 Renewal

10. The renewal process for the 2011-12 insurance period commenced in December 2010. On 15 December 2010, Mr White wrote to Mr Lilley of CLS in these terms:

> "**Professional Indemnity Insurance**
>
> **Renewal 2011**
>
> The above policy falls due for renewal on 28th January 2011.
>
> To ensure that I receive renewal terms on the up to date basis, I would be grateful if you could please check and confirm that the inserted details on the enclosed "Risk Profile" are correct. If not, please amend accordingly and return this form to me at your earliest convenience."

The risk profile document ("2010 Risk Profile") referred to in the letter was created by the defendant. In form it asked various questions, the answers to which were designed to elicit information relevant to the assessment by the defendant of the risk it was being asked to underwrite for the purpose of deciding whether to renew and if so on what terms. However, unlike a traditional proposal form, answers to the questions were provided by the defendant in the form sent out prior to renewal that reflected information previously provided. Nothing relevant turns on that however since as is apparent from the broker's letter the purpose of sending out the risk profile was to enable the insured to confirm the information remained accurate or to amend it as necessary. This was apparent too from the first page for example of the 2010 risk profile, which read:

> "This is the information provided to us, which enabled your policy terms and conditions to be calculated. For the purposes of this insurance, these are material facts that have been disclosed fully and truthfully and to the best of your knowledge and belief.
>
> **We recommend that you check this information for accuracy and let us know, within 14 days of inception/renewal, of any inaccuracies or changes required.**
>
> Where corrections or changes are required, we reserve the right to recalculate the policy terms and conditions accordingly. Failure to advise us of corrections or changes may make your policy voidable, or prejudice your rights in the event of a claim."

At Box 4 in the 2010 Risk Profile the following questions and answers were set out:

> "4. **Residential Surveying and Valuing**
>
> **Residential Surveying and Valuing**
>
> Can you confirm that **all** lending institutions for whom the Proposer carries out survey and valuation work are either UK clearing banks or building societies and that the Proposer has not encountered any problems with any such lending institutions?
> Yes
>
> During the last 5 years did either
>
> - the maximum valuation undertaken exceed £1,000,000, or
>
> - the average valuation exceed £500.000 in any one financial year
> No"

In Box 5, in relation to commercial surveying and valuing, the following questions and answers were set out:

> "In respect of the Commercial Surveying and Valuing activities:

> • Can you confirm that **all** lending institutions for whom the Proposer carries out survey and valuation work are either UK clearing banks or building societies and that the Proposer has not encountered any problems with any such lending institutions?
> Yes
>
> During the last 5 years did either
>
> • the maximum valuation undertaken exceed £2,000,000, or
>
> • the average valuation exceed £1,000,000 in any one financial year
> No"

Under cover of an email from CLS to Mr White, CLS returned the Risk Profile with only one amendment concerning an increase in fee income.

11. By an email of 22 December 2010, the defendant requested the broker to ask CLS a number of detailed questions concerning its business including whether it had undertaken "*... any sub-prime work ...*" and if so how much. These requests were passed to CLS by the broker under cover of an email of the same date and responded to by CLS in terms that were passed on to the defendant by the brokers by an email of 29 December 2010. In response to the question mentioned above, CLS's response was " *None, our instructions are directly from the High Street Bank lenders and the likes of Coutts, Handelsbanken, Bank of Scotland Private Banking Division etc.".* Mr Linsley accepted that he was the author or source of this information – see T2/102/24-103/7. As he said at 103/6, " *... I knew who our client lenders were ...".* The defendant offered renewal terms but made clear to CLS's broker the importance it attached to the institutions by whom CLS accepted instructions by its email of 31 January 2011 to Mr White, which was in these terms:

> "We cannot cover work provided by the new panel they are suggesting as it involves secondary lenders. As such should the client wish to proceed with this then we would exclude this from the policy.
>
> For the avoidance of doubt we are writing the risk on the basis that there is no sub-prime exposure and there won't be any going forward. Should this not be the case then we will need to have full details and our terms will not stand."

12. Mr Linsley accepted in the course of his cross examination that the answer in Box 5 was wrong and should have been "*No*" because, as he accepted, the claimant is not and was not either a clearing bank or a building society – see T2/92 - and because, at the time when the Risk Profile form was approved, CLS " … *had done work for UK Acorn Finance, so following from your earlier question, yes, the answer should have been no***."** – see T2/96-97. At one point in his cross examination he suggested that because the Risk Profile forms already had answers typed in them that in some way made a difference. It did not for the reasons that I explained earlier in this judgment. In the end he was driven to accept that in reality there was no material difference between a proposal form that had to be completed and a risk profile the contents of which had to

be approved – see T2/95-96. Whilst this concession was correctly made, the exchange that led to it points to a real difficulty with Mr Linsley's evidence. All too often he did not answer the question asked but instead attempted to argue with counsel, divert attention from questions that he had been asked and qualify answers for which there could be no sensible justification. This is one example. There were a number of others. Whilst that does not lead to the conclusion that I should reject all of Mr Linsley's evidence, it does mean that it needs to be approached with caution unless admitted, corroborated or against his interest.

13. Despite being pressed to confirm the answer to the request for confirmation that all lending institutions for whom the Proposer carried out survey and valuation work are either UK clearing banks or building societies was untrue, Mr Linsley repeatedly asserted that it was merely wrong – see T2/112 by way of example – then asserted it was a mistake and then finally that he didn't know that the claimant was any different from for example Agricultural Mortgage Corporation – see T2/117. That last answer was plainly inconsistent with his earlier acknowledgement that the answer given in relation to commercial valuations was wrong because (a) the claimant was not either a clearing bank or building society and (b) CLS had been doing valuation work for the claimant prior to the date when the form had been approved. This inconsistency is another reason why Mr Linsley's evidence needs to be approached with caution unless admitted, corroborated or against his interest.

The 2012 Renewal

14. Renewal negotiations for the 2012 renewal commenced materially with an email to CLS's brokers dated 16 January 2012. Prior to that the defendant generated a Risk Profile document in similar form to that which had been generated prior to the 2011 Renewal but updated to reflect the information provided in the course of that process. It contained a request in relation to both commercial and residential valuations that CLS confirm that " … ***all*** *lending institutions for whom the Proposer carries out survey and valuation work are either UK clearing banks or building societies and that the Proposer has not encountered any problems with any such lending institutions* …" to which the answer was recorded as being "*Yes"* for both residential and commercial valuations.

15. The 16 January email manifests a clearly developing unwillingness on the part of the defendant to underwrite surveyors and valuers professional indemnity cover. There was a particular concern about such work undertaken on instructions from lenders other than High Street and clearing bank lenders. This is probably so because of the enhanced risk posed by the quality of borrower covenant and the appetite of such lenders for higher loan to value ratios, each of which is likely to lead to a higher level of borrower default and a higher number of claims against valuers than would be expected in respect of loans to High Street and clearing bank lenders. As Mr Rees on behalf of the defendant observed:

> " … As you may well be aware we are having big problems with surveyors at present with a large amount of claims and circumstances relating to surveying and valuing. As such we have been asking further questions to make sure we are comfortable with the exposure."

One of the questions that Mr Rees asked in the same email was:

> "Can you confirm that as last year, the client has never done any sub-prime work? (To clarify we define sub-prime as those who are not UK high street and clearing banks)."

Mr Linsley's instructions to CLS's office manager was to answer this question by stating "*This company has not undertaken any sub-prime bridging work.*" This response was passed to the broker who in turn passed it to the defendant – see the email from Mr White to Mr Rees of 17 January 2012 to which Mr White added "*...I trust this information will enable you to confirm your renewal terms ...".*

16. Mr Linsley's explanation for this response as set out in paragraph 22 of his witness statement is that " … *we understood sub-prime to relate to non-status short term and 2nd charge residential bridging. and residential non-principal lenders*.". There are a number of difficulties about that evidence. First, Mr Linsley's understanding of the meaning of the phrase "*sub-prime"* was irrelevant. What mattered was what the defendant informed CLS via its broker it understood by its use of the phrase. As I have noted already, the defendant informed CLS's broker how the defendant defined the phrase in the email. Secondly, he knew that this was what the defendant meant not merely from the terms of the email but from the terms of the risk profile documents that had been received by him from the defendant via CLS's broker. Thirdly, what he says his understanding to be is not consistent with the answer he provided. His evidence was that CLS did not undertake residential valuation work from early 2010. If he believed that the defendant meant only residential lending by institutions other than high street lenders or clearing banks then his answer should have been that the company did not undertake residential valuation work or simply "yes". Bridging was irrelevant. The only person to mention it was Mr Linsley. Finally, Mr Linsley's evidence in paragraph 22 of his first witness statement is different from that set out earlier in his first witness statement as to his understanding of the phrase "*sub-prime"*. In paragraph 14 of his statement, he says that at all material times his understanding was that " … *sub-prime related only to residential mortgage lending in situations where a mortgage lender was prepared to lend to an individual with an adverse credit record*." Still later in paragraph 36 of his statement, Mr Linsley states that "…*In my experience, as I have already said in this statement, 'sub-prime' relates to residential mortgage lending to a borrower with a bad credit history*". There is no reference in this evidence to bridging, which only appears when he addresses the response to the 16 January email. If his understanding is as set out in paragraphs 14 and 36, it does not explain his reference to "*bridging"* since bridge lending can arise in both residential and commercial lending situations. It does not explain either why he did not respond saying simply that the firm did not undertake residential valuation work. Finally, if and to the extent that he understood how the defendant defined the phrase (and as I have said it was set out in the email that Mr Linsley was answering), the answer that he gave was plainly wrong because on any view he understood that the claimant was neither a UK high street and clearing bank, as is apparent from his answers in cross examination concerning the 2011 Renewal. This provides a yet further reason for me to be cautious concerning Mr Linsley's evidence.

17. The defendant by Mr Rees responded by email on 25 January 2012 by reference to the sub-prime issue in these terms:

> "Can you please ask the client to respond to the following:
>
> - The client suggested at last renewal that there has been no work for sub-prime lenders and note they have confirmed there has been no work with sub-prime lenders on bridging work. I have noted from the file that we have a claim from Northern Rock relating to valuations in 2005 and we would generally class this as sub-prime.
>
> On this basis, apart from Northern Rock, has the client done any other survey & valuation work for any other companies who are not high street clearing banks and building societies or those who offer mortgages to those with adverse credit.
>
> If so can you please confirm the specific number of these since 2005. …"

Mr Lilley responded by a letter of the same date stating:

> "… I wish to confirm that Colin Lilley Surveying Ltd have not carried out any surveys for bridging loan facilities etc for sub-prime lenders and Northern Rock were prime lenders and not sub-prime when work was undertaken for that bank."

On the basis of this information the defendant confirmed renewal of cover for the 12 month period ending on 27 January 2013.

18. Although it was suggested that there was confusion caused by the use of expressions such as UK high street and clearing banks, I reject the notion that there was any actual confusion in the mind of Mr Linsley as to the applicability of such words and phrases to the claimant. I do so because as already noted, Mr Linsley accepted in the course of his cross examination that the claimant is not and was not either a clearing bank or a building society – see T2/92 - and at the time when the Risk Profile form for 2011 was approved, CLS " … *had done work for UK Acorn Finance, so following from your earlier question, yes, the answer should have been no***." –** see T2/96-97. If that was so in January 2011, it was so in January 2012.

The 2013 Renewal

19. By an email of 28 November 2012, CLS's broker began to press the defendant for renewal terms. It is common ground that the first communication relevant to the 2013 renewal from the defendant was an email from Mr Spence to CLS's broker dated 7 December 2012. His email started by warning that:

> "Unfortunately however having reviewed our underwriting and claims files I am conscious there are a few aspects of this risk which make us uncomfortable.
>
> As I'm sure you're aware, over the last few years Markel have sought to underwrite surveyors risks to a much higher degree when they contain a valuation exposure. Furthermore, our

> underwriting appetite has become more strict in the last 12 months given a worsening position across the entire book, this risk included."

The email continued:

> "The questions below do need to be answered the insured's fullest ability in order for us to consider further.
>
> 1. We would define sub-prime as those who are not high street lenders and building societies. This would include those who's lending criteria is more relaxed and would lend to those with adverse credit history for example. Within this definition we would include the Spinnaka panel, Northern Rock, Bank of Ireland, Icelandic banks, e-surv (who we know have sub-prime lenders on their panel) etc.
>
> a. In the insured's email of 22 December 2010 10:05 (attached) they confirmed they did not do any work for any lenders other than high street lenders. It also appears we've had a circumstance notified to us in August 2012 relating to an alleged overvaluation for the lender Swift Advances Plc. We would not deem Swift Advances Plc to be a high street lender, ergo subprime. Please could the insured provide some comments in this regard?
>
> b. With the above in mind can you please confirm whether the client has dealt with any sub-prime lenders? If so we will require rough numbers per annum since 2005."

It is worth noting from this that the examples given within paragraph 1 are merely examples of what the defendant defined as being "*sub-prime*" namely " ... *those who are not high street lenders and building societies*." It is also necessary to repeat what I said earlier namely that Mr Linsley accepted in the course of his cross examination that the claimant is not and was not either a clearing bank or a building society – see T2/92 - and that at the time when the Risk Profile form for 2011 was approved, CLS " … *had done work for UK Acorn Finance, so following from your earlier question, yes, the answer should have been no***." –** see T2/96-97. Thus Mr Linsley clearly knew in December 2012 that the claimant was not either a high street lender or a building society. It is also worth noting that there is nothing within this email that suggests the enquiry was limited to residential valuations.

20. Mr Linsley's initial response was in an email to CLS's broker dated 7 December 2012, in which he stated:

> "Thanks Ian, not entirely unsurprising news from Markel, and we will be grateful if you could look at alternatives such as Torus sooner rather than later so we are not left with bank panel suspension.
>
> I don't think that Markel have realised that we dumped the residential panel work like E-Surv, Connells etc in 2008/9 and

> reconfigured the business as a regional commercial valuation firm for the likes of Barclays, Lloyds and Handelsbanken."

Three days later, on 10 December 2012, Mr Linsley gave instructions to CLS's office manager by an email of that date in these terms:

> "Jen, re below we will need to get out a list of sub-prime jobs done under E-Surv, Connells & any other resi. Panels since Jan 2007.
>
> Don't bother about 2005/6 as the 6 year statute of limitation means we can't get any negligence notifications any earlier than Jan 2007 despite what the underwriter is asking for.
>
> You may already have done this exercise for previous PII renewals???
>
> Don't bother recording the High Street Bank jobs, we need Northern Rock (before they went bang in Sept 2007) and any others like Swift, Tiuta, Birmingham Midshires, GE Money, Bradford & Bingley, Cheshire, Kensington, Mortgage Express, any Irish Banks etc for 2007, 2008, 2009 in particular
>
> Many thanks!!"

It was submitted on behalf of the claimant that this email is critical because it is one of the few that discloses what Mr Linsley was thinking at this time. It is the claimant's case that Mr Linsley thought and this email shows that he thought that the email from Mr Spence to CLS's broker dated 7 December 2012 (or rather the question within concerning what the defendant referred to as sub-prime lending) was exclusively concerned with residential valuations. It was submitted that this email shows that Mr Linsley thought honestly (if mistakenly) that as he puts it in paragraph 37 of his first witness statement:

> "Even though Markel have defined 'subprime' as meaning those who are not high street lenders and building societies, I would not have thought that was intended to apply to commercial lenders for the reasons given above - they were talking about sub-prime lenders and these were not sub-prime lenders. This is why my email to Ms Wilkinson asking for detail of sub-prime work referred to residential panel work and listed all the examples I could think of but did not ask for commercial instructions. It simply did not occur to me that Markel was worried about commercial lending when it talked about 'sub-prime' and 'non high street'."

– see the claimant's closing submissions at paragraph 100. In light of my conclusions concerning the true meaning and effect of the UND clause, whether this is so or not is immaterial since it is not suggested that the defendant had sight of any of this material prior to the decision to avoid the Policies.

21. On 18 December 2012, Mr White (CLS's broker) replied to Mr Spence's email of 7 December in which he said amongst other things:

> "Whilst our client is still busy compiling the requested information, there are a few points of concern which they have asked us to bring to your attention i.e.,
>
> *1. "I don't think that Markel have realised that we dumped the residential panel work like E-Surv, Connells etc in 2008/9 and reconfigured the business as a regional commercial valuation firm for the likes of Barclays, Lloyds and Handelsbanken".*

Mr Spence responded to this email on 20 December

> "Thanks for your email on this one, I appreciate the insured's comments. I would make the following comments in response so hopefully the insured can appreciate our position as insurers and why we're asking these questions.
>
> 1. In our experience there's a direct correlation between work for subprime lenders and claims against our surveyors book of business. Whilst we appreciate that in a large number of these cases the lender has simply made a bad lending decision we do incur defence costs which can be significant even if the claims are entirely spurious.
>
> As such, we are looking very closely at risks where there is a valuation exposure and provision of reports to subprime lenders. We would define sub-prime as those who are not high street lenders and building societies. This would include those who's lending criteria is more relaxed and would lend to those with adverse credit history for example. Within this definition we would include the Spinnaka panel, Northern Rock, Bank of Ireland, Icelandic banks, e-surv (who we know have sub-prime lenders on their panel) etc...
>
> Given the claims-made nature of our policy historic work for subprime lenders and panels, including that which the insured undertook up to 2008/09 is still relevant for us.
>
> … "

The response from Mr Spence does not address directly the point made in the email he was replying to that CLS was *" ... a regional commercial valuation firm for the likes of Barclays, Lloyds and Handelsbanken ..."* However, his comment that " … *historic work for subprime lenders and panels, including that which the insured undertook up to 2008/09 is still relevant for us* … " could have fortified any belief that the defendant's concern was with residential valuations alone, given Mr Linsley's comment that CLS had " … *... dumped the residential panel work like E-Surv, Connells etc in 2008/9 ..."*

22. On 21 December 2012, Mr Linsley responded to the questions posed in the 7 December email from Mr Spence by answers that included an answer to question a by stating:

> "We have undertaken a further review of our files archive since 2006. The company never carried out any work for Spinnaka, Icelandic and Irish Banks.
>
> Since December 2006, 4 residential valuations were carried out for Northern Rock, and 2 residential valuations were carried out under E-Surv for FISA firms you would classify as sub-prime."

In relation to question b, Mr Linsley responded:

> "2007 – 4
>
> 2008 – 1
>
> 2009 – 1
>
> 2010 NIL
>
> 2011 NIL
>
> 2012 NIL"

Following confirmation that the valuation for Swift Advances was an instruction received from e-surv and was included within those disclosed in the responses set out above, on 4 January 2013, the defendant produced an updated Risk Profile, which set out that in respect of residential surveying, CLS had carried out 6 sub-prime valuations (being those disclosed in the answer to question a set out above) but in relation to commercial surveying recorded:

> "Can you confirm that **all** lending institutions for whom the Proposer carries out survey and valuation work are either UK clearing banks or building societies and that the Proposer has not encountered any problems with any such lending institutions?
>
> Yes"

The Risk Profile also recorded that the maximum valuation undertaken during the last five years was £3 million. In reliance upon the information supplied as summarised in the 2013 Risk Profile, the 2013 Policy was written.

Events During 2013

23. On 26 June 2013, Mr Linsley received ten preliminary notifications of claim given pursuant to the Pre-Action Protocol for Professional Negligence from the claimant – see paragraph 41 of Mr Linsley's first witness statement – that related to a number of valuations that CLS acting mainly by Mr Linsley had undertaken between September 2010 and December 2011. The final paragraph of each letter sought acknowledgement within 21 days in accordance with the Protocol and added " *... Please also send a copy of this letter to your insurers and confirm to us who they are at the same time as providing your acknowledgement"*.

24. Those claims included claims in respect of (a) Leaventhorpe Hall, in West Yorkshire consisting of a Hall, a farmhouse, sundry farm buildings and an equestrian centre, where advice was sought in December 2010 in relation to a 6 month bridging loan; (b) separate claims in respect of grazing land and a farmstead at Rhwngddwyafon where advice had been sought in respect of a 3 month bridging loan by the claimant in March 2011; and (c) a claim in respect of a valuation of some land off Shepley Street in Glossop in respect of a 3 month bridging loan by the claimant in November 2011. This is significant because it demonstrates that Mr Linsley knew by no later than December 2010 that the claimant's business included that of providing bridging finance and that CLS was providing advice in connection to with the provision of such finance on not less than three occasions between December 2010 and November 2011.

25. In relation to the Rhwngddwyafon claims, Mr Linsley wrote to the claimant's solicitors following receipt of a formal letters of claim in respect of both the land and the homestead in these terms:

> "Dear Sirs,
>
> UK Acorn Finance Ltd : Rhwngddwyafon, Cwm Pennant
>
> In reply to your correspondence dated 11 August 2014 we can confirm receipt, and receipt of your earlier correspondence dated 16 July 2014, all of which have been notified to our insurers accordingly
>
> …"

It is common ground that this is untrue. Mr Linsley wrote to the claimant in similar terms concerning the Leaventhorpe Hall claim on 11 September 2014. That too was not true.

26. It is common ground that CLS did not notify these claims to the defendant immediately in breach of the express terms of the Policies, which required such notifications to be the subject of an " … *immediate notice in writing* …" by CLS to the defendant. The defendant was first notified of the claims on 21 November 2014, when by email of that date, Mr White sent the defendant a copy of an email sent by Mr Linsley to the Avon & Somerset Police. Although there was some consideration of the underlying substance to the complaint to the police it is not necessary that I take up time describing it because it is complex and immaterial to the issues that I have to determine. The material suggests and I accept that Mr Linsley reported the activities of the claimant to the police. This is apparent from the email of 5 July 2013 from Mr Linsley to Niki White of Avon and Somerset Police, which was forwarded to the defendant by Mr White of Lycetts under cover of an email of 21 November 2014. The email is self-serving but its authenticity is not in dispute. The email's opening paragraph was to following effect:

> "Following my previous email to you, I have set out below a timeline of events and accompanying attachments which in my opinion represent evidence of possible fraud, attempted insurance fraud, and money laundering between related companies. I would be grateful for your comments prior to our engaging with our professional indemnity insurers."

and ended with a paragraph to following effect:

> "I have not responded to UK Acorn Finance to date and they are unaware that I have written to you.
>
> I would wish you to guide me, in the event that you do not consider this to be a criminal matter, as to who if anyone I should report these circumstances to."

The first part of the first sentence was untrue unless it is read as meaning that Mr Linsley had not responded substantively. Mr Linsley refers to this in paragraph 41 of his first witness statement in these terms:

> "Following receipt of these I informed the Serious Organised Crime department of Avon and Somerset Police (the **"Police")** of a potential *"fraud, attempted insurance fraud, and money laundering between related companies".* I requested that the Police provide me with their advice and comments prior to informing Markel of the preliminary notifications."

27. His explanation as to why he did not report the claims to the defendant is that he was concerned about allegations of tipping-off being made against him if he notified anyone else of the allegations that he had made against the Claimant. As he adds at paragraph 45 of his first statement:

> "in fact I was specifically told by DC White of the Police that the notifications I had made to the Police should be dealt with in confidence and that I should leave the matter with the Police for further investigation. I did not want to prejudice the Police investigation by notifying anyone of the preliminary notifications and allegations against the Claimants,... If I were to tell Markel about the preliminary notifications, this would be a direct contradiction of the specific instructions I had received from the Police to not tell anyone."

28. Mr Linsley does not suggest he was told not to report the claims to his insurers either in his statement the relevant parts of which are set out above or in the last of the explanatory emails that he sent to Lycetts being his email of 15 January 2015, where however he states:

> "I was specifically told by SOCA (DC White) to deal in confidence with themselves on these submissions and follow up evidence, statements etc, while they did come back in the interim to state that no one would take Curtis correspondence seriously as it was so ridiculous and self-inflicted by Acorn. You have my email to SC White which specifically states *'prior to engaging with our insurers'*
>
> I have dealt with this matter in utmost good faith, with the Police being of opinion that the Curtis correspondence was only sent out by Acorn for Acorn to show Connaught that they were

> deflecting the 44 defaults to the door of the dealing surveyors, while the matter was being investigated by SOCA, as it still is with government departments now involved, and to whom our files remain open."

I return to this issue later in this judgment when considering the defendant's approach to its decision to avoid the Policies.

29. Returning to the chronology, by a letter to CLS from Addleshaw Goddard dated 15 July 2013, CLS was notified of a claim against it made by Barclays Bank Plc in relation to a properties at 95, 97, 99 and 99A Fowler Street, South Shields, Tyne and Wear. The letter was a formal pre-action protocol letter sent pursuant to paragraph B2.1 of the Professional Negligence Pre-Action Protocol. Paragraph 5 requested an acknowledgement of receipt within 21 days and continued "*… we ask that you forward a copy of this letter to your professional insurers. When you write to acknowledge receipt of this letter, please confirm that a copy has been forwarded to your insurers and provide us with their details."* Paragraph 33 of the letter referred to the fact that the Protocol contemplated that CLS might require "*… as much as three months from the date of [CLS]'s letter of acknowledgement to investigate our client's claim …"*. In fact, the claim was notified to the defendant by Lycetts only on 14 October 2013. As Lycetts's letter makes clear, it had been informed of the Protocol letter only that day. Attached to the letter was a lengthy response to the Protocol letter prepared by Mr Linsley.

30. Prior to that Mr Linsley had sent an email to Addleshaw Goddard on 6 August 2013 which was described by him as being "*… a courtesy acknowledgment of receipt of your correspondence dated 15 July 2013 … pending your receipt of our formal written response"*. Mr Linsley's explanation for these events in the course of his cross examination was:

> "Q. ... and you did not inform your brokers and through your brokers your insurers, until mid-October. Look at page 1304 in the same bundle.
>
> A. Yes, this would be because I had not dealt with PI claims before and I thought we had three months to reply to the notification or letter of claim."

He added that the valuation was one by Mr Colin Lilley, that at some time he took over the correspondence and provided a response. He added that "*... I hadn't dealt with claims before and that was my understanding"*. Although the email acknowledgement dated 6 August 2013 provides some support for the view that Mr Linsley may have taken over conduct from Mr Lilley, that does not explain the delay that followed nor the fact that notification took place as Mr Pooles put in cross examination at "*… precisely the end of the third month …"* referred to in paragraph 33 of the protocol letter. Secondly, the explanation offered ignores the very clear terms of paragraph 5. If Mr Linsley had read paragraph 33, it is inherently improbable that he would not have read the earlier paragraph. Further, Mr Linsley does not suggest that at this time he was unaware of the need to inform insurers immediately of a notification of claim as the following exchange demonstrates:

> "JUDGE PELLING: But hold on, a minute ago - this may be my misunderstanding - but about 25 minutes ago when Mr Pooles asked you in relation to one of the 13 notifications, and he asked you whether you knew that you were required to notify the insurers immediately and after one or two hesitations you said Yes?
>
> A. Yes, your Lordship. The letter of notification would have been notified straightaway. Barclays was not a letter of notification, it was actually a claim with expert witness valuation as such, as distinct from just a notification letter. This was actually a claim, a substantive claim.
>
> Q. Sorry, what is the distinction?
>
> A. The distinction being that we would notify a notification letter, a pre-action protocol letter, yes, straightaway to insurers, but this letter of claim was the first one that I dealt with. I read the Addleshaw Goddard correspondence, which said they required a response, a substantive response, within 90 days or three months of the date of this correspondence, which I took verbatim when I took it over from Colin Lilley.
>
> MR POOLES: I am sorry, what difference does that make to when you notify the insurers?
>
> A. May I just read the Addleshaw Goddard correspondence, please?
>
> Q. If that will help you ...
>
> A. It's a letter of claim, and paragraph 5 of Addleshaws would seem to apply: "We ask that you acknowledge receipt of this letter of claim within 21 days of receipt. We ask that you forward a copy of this letter to your professional insurers."
>
> Q. Yes.
>
> A. "When you write to acknowledge, please confirm that a copy has been forwarded to your insurers."
>
> Q. Well, you had not done any of those things, had you?
>
> A. It would seem not, because it would have been sitting on Colin's desk for a while, when it was received on whatever date in July"

Later in the same section of cross examination Mr Linsley came up with another explanation as to why he did not inform insurers namely that he " … *would have been working through the documentation to provide a substantive reply and I have it in my*

head that when I did this first one, I thought we had 90 days or three months to provide a substantive reply." Before finally saying this:

> "Q. But that does not yet explain why, knowing as you did that claims should be notified immediately - whether they are notifications or whether they are actual claim letters - you do not do it?
>
> A. I have explained the reasons why in relation to the Simon Curtis' ones. As I say, I fully accept what you are saying about the pre- action protocol procedure with this Barclays/Addleshaw Goddard claim. I took it on from Colin Lilley, on the 6th of August it clearly shows that I acknowledged it and it says, "Pending receipt of our formal written response", which I assume was substantive, that I sent to Markel on whatever date.
>
> Q. Yes, the 14th of October.
>
> A. Ah, and it looks as though on the 14th, I also sent a copy to Addleshaw Goddard, which would have been a mistake because I shouldn't have done that."

This was plainly unsatisfactory and self-contradictory evidence that provides further reasons for the view I have taken concerning the degree of reliance I can safely place on Mr Linsley's uncorroborated testimony. In summary he first sought to explain that he had not had not dealt with claims before and thought he had three months to reply, then when faced with earlier evidence to the effect that he knew that he had to report claims to insurers on receipt, that he did not appreciate that the letter was a letter of claim even though Addleshaws' letter was captioned at the start and in bold "*Letter of Claim pursuant to the Professional Negligence Pre-Action Protocol*", then he accepted that a Protocol letter should have been notified to insurers immediately but that this was the first he had dealt with and that he understood from the letter that he had three months in which to respond, thereby ignoring the effect of paragraph 5, as to which he had no credible evidence explaining his failure to comply with it.

31. Mr Pooles' case, which he put fair and square to Mr Linsley, is that the delay in reporting the claims made in the course of 2013 was because he knew it would create the risk that notification would pose to a successful renewal for the following year. Whilst Mr Kramer accepts that Mr Linsley's explanation was not a good one but on the contrary was a bad one – see paragraph 112-3 of his closing submissions – he submits that Mr Linsley's explanation is not consistent with Mr Linsley having a fraudulent purpose in conducting himself as he did on the basis that the instructions came from a clearing bank, was for a relatively modest amount, there was no reason to hide the claim and in any event it could not be hidden given the timings. I return to this issue later in this judgment when I turn to the defendant's decision to avoid the Policies. However I should make clear that however contradictory Mr Linsley's evidence was on this issue, I do not consider that it demonstrates or is even relevant to an assessment of dishonesty. His evidence as to his understanding on timing is consistent with what happened and the timing of disclosure could not impact or reasonably be supposed to impact on a renewal that had yet even to be proposed in a way that was favourable to CLS.

The 2014 Renewal

32. The renewal process leading to the 2014 Policy commenced with an email from Mr Burgess to Mr White on 2 December 2013, reminding Mr White that renewal would fall due on 28th January 2014 and asking that CLS review and update the attached risk profile. The risk profile was the one updated following the 2013 renewal. Mr White forwarded the request to Mr Linsley by an email dated 10 December 2013 which stated:

> "In order for insurers to consider their renewal terms, would you please review and update the attached "Risk Profile". Should any amendments be required, simply annotate on the Risk Profile and return this to me at your earliest convenience."

Mr Linsley responded by email on 18 December 2013, stating that there were no changes to be made other than in relation to income and that was forwarded to the defendant by CLS's broker the same day. Mr Linsley accepted in the course of his cross examination that his response was prepared by reference to the risk profile (T2/164/23-25) and that he would have considered the questions within the risk profile very carefully (T2/166/1-5). The 2014 Policy was written in reliance on these exchanges.

33. By an email dated 14 January 2014, Mr White notified the defendant of another claim. According to the Protocol letter sent by Addleshaws on behalf of the claimants, the claim was being intimated on behalf of Mr and Mrs Brown and that CLS had been instructed by "*... Stonebridge Capital, acting as agents for System 3 Limited and its owners the Browns"*. The valuation the subject of the Protocol letter is dated 7 March 2012 and is addressed to Waterman Capital and its subsidiaries. I refer to this claim hereafter as the "Waterman Claim". The report concerned a development site in Liverpool and the valuation that CLS gave for the site was £3.5 million. As Mr Burgess (the underwriter at the defendant responsible for underwriting the 2014 Renewal) said in the course of his cross examination and as is obvious, Waterman Capital is not either a clearing bank or a high street lender – see T3/91/18-21. As he also accepted, the effect of the report of the claim was that the defendant had been informed of the claim prior to the 2014 Renewal incepting- see T3/91/22-92/3 – which took place on 22 January 2014 – see T3/97/17-20.

34. Mr Burgess maintains that he did not actually learn of the Waterman claim until after the 2014 Renewal had been completed. I accept that evidence. As he said in the course of his evidence there is no mention of the claim in any of the notes he kept – see T3/93/3-10 - and the claim was in his view plainly material to the renewal because as Mr Burgess had said in his statement, he would not have offered renewal terms had he known of the claim. Whilst after the event assertions of this sort by underwriters have to be considered with care because of the effect of hindsight, the contemporaneous documentation relating to the defendant's ever more cautious attitude to valuer risks satisfies me that that Mr Burgess's evidence on this issue should be accepted.

35. I accept Mr Pooles' submission that the claims information that is not repeated in, or incorporated by reference into, a renewal application is not deemed to be known to an underwriter or therefore to insurers for the purpose of renewal underwriting and avoidance – see Aldridge v. Liberty Mutual Insurance Europe Limited [2016] EWHC 3037 (Comm) *per* Andrew Baker J at paragraphs 40 to 43. At paragraph 44, Andrew

Baker J summarises the effect of the authorities he had set out in the previous paragraphs in these terms:

> " In the present case, if there was nothing in the renewal submission that either repeated or specifically incorporated detailed claims information previously submitted to [claims handler], or directed [underwriter] to obtain and consult such information, in my judgment such information was not deemed known to [underwriter] or, therefore, to [insurer] for the purposes of the renewal underwriting and the avoidance defence and, equally, no argument of waiver of disclosure through want of inquiry can run against [insurer] if common prudence would only have demanded inquiry if such information had been known."

36. All that said, that is not the real point made on behalf of the claimant by Mr Kramer. His point is an evidential one. He submits that this notification is a very strong indicator that Mr Linsley was not being fraudulent in his representations concerning work undertaken for non-clearing or non-High Street lenders. He submits that had that been Mr Linsley's mind set he would not have notified the claim through CLS's brokers because he would know that (i) it would not be held covered given what had been said in the various renewals and (ii) it was bound to impact on the pending renewal and may have led to the avoidance of the earlier policies. This last point is of substance because Mr Linsley could not have known whether the claim would have been reported by the claims handling side of the defendant's business to the underwriting side. I return to this issue later in this judgment.

The Policy Terms

37. The terms of the Policies were broadly the same in each relevant year. Each policy contained a preamble that included the following statement:

> "Underwriters having received a Proposal which shall form the basis of and be incorporated in this contract and in consideration of the Premium having been paid to Underwriters, We agree to pay or indemnify to the extent and in the manner herein provided subject to the terms, limitations, exclusions and conditions of this Certificate."

The Policies contained definitions as follows:

> "**Assured/You/Your/Yours**" shall (for the purpose of the General Exclusions, Claims Conditions, General Conditions and all other General Definitions) have the same meaning as that given in the applicable Insuring Clause under which payment or indemnity is being sought.
>
> " **Claim**" shall mean

(i) any claim form, writ or summons or other application of any description whatsoever or counter claim issued against or served upon You, or

(ii) any communication or allegation communicated to You which might result in a Loss

…

Our / Us We" shall mean the Underwriters

…

Proposal" shall mean all information supplied to Us (whether by written, electronic or any other means) for the purpose of effecting this contract of insurance

…

INSURING CLAUSE 1 – PROFESSIONAL LIABILITY (Civil Liability)

We agree to indemnify You against Loss, arising from any Claim made against You during the Period of Insurance in respect of a Wrongful Act in or about the conduct of the Professional Services.

…

NOTIFICATION OF CLAIMS

You or the Company shall, as a condition precedent to Your right to payment or indemnity, give Us immediate notice in writing (or within 7 days for riot Damage) **and**, in respect of Insuring Clauses 1 (Professional Liability),

…

of

(i) any Claim made against You or the Company,

(ii) the receipt of any notice of an intention to make a Claim against You or the Company,

…

(iv) any circumstances of which You or the Company shall become aware which is likely to give rise to

(a) a Claim against You or the Company"

Each of the Policies was subject to an Unintentional Non-Disclosure clause in the following terms:

> "**UNINTENTIONAL NON-DISCLOSURE CLAUSE**
>
> (a) In the event of non-disclosure or misrepresentation of information to Us, We will waive Our rights to avoid this Insuring Clause provided that
>
> (i) You are able to establish to Our satisfaction that such non-disclosure or misrepresentation was innocent and free from any fraudulent conduct or intent to deceive
>
> (ii) the Premium and terms shall be adjusted at Our discretion to those which would have applied had such circumstances been disclosed
>
> (iii) where You should have notified a Claim during a preceding Period of Insurance and the indemnity or cover to which You would have been entitled was in any way more restricted than that provided at the date of notification We shall be liable only to the extent applicable during such preceding Period of Insurance
>
> (b) We shall not deny payment or indemnity on the grounds of Your non-compliance with Claims Condition 1 (Notifications of Claims) or 2 (General Handling of Claims) applicable to the Certificate as a whole subject to proviso (a)(iii) of this clause but where You have prejudiced the handling or settlement of any Loss the amount payable in respect of such Loss (including Costs and Expenses) shall be reduced to such sum as in Our opinion would have been payable in the absence of such prejudice.
>
> (c) in the event of any dispute between You and Us regarding the application of (a) and (b) above, such dispute or disagreement shall be referred by either party for arbitration to any person nominated by the President for the time being of The Royal Institution of Chartered Surveyors."

The Issues

38. In essence the issues that arise for determination are those identified by Mr Pooles in paragraph 41 of his closing submissions namely:

(a) In relation to the representations and disclosures made by CLS in the course of the renewal process leading to the 2013 and 2014 policies:

(i) What, if any, misrepresentations or non-disclosures were made by CLS to the Defendant when placing the Policies?

(ii) Were CLS's misrepresentations (if established) warranties?

(iii) Were those misrepresentations or non-disclosures (if established) material and did they induce the Defendant to write the Policies?

(b) In relation to the defendant's rights under the policies, assuming it is proved the misrepresentations, non-disclosures and breaches of warranties alleged by the defendant against CLS are proved:

(i) Did the Defendant waive any breach(es) of warranty by CLS?

(ii) In light of the unintentional non-discourse clause, was the Defendant entitled to avoid the Polices for misrepresentation/non-disclosure/breach of warranty?

In my judgment however, it is the last of these issues on which the outcome of this case depends.

Misrepresentations and Non-Disclosure

39. As Mr Pooles submits, the 2013 and 2014 risk profiles asked CLS to confirm that all its commercial valuation work had been undertaken for institutions that were either UK clearing banks or building societies and that it had not undertaken any such work for sub-prime lenders as defined. CLS confirmed that to be the position. That was not correct and thus was a misrepresentation. It is admitted that there was a misrepresentation in the 2013 risk profile – see paragraph 150 of Mr Kramer's closing submissions. This is because, as is now common ground, CLS had undertaken valuation work for the defendant, Willow Rivers Wealth Limited, Lancashire Mortgage Corporation and Waterman Capital Limited. This was accepted by Mr Linsley in the course of his cross examination as I have explained and as Mr Kramer put it in paragraph 150 of his closing submissions, "*... The risk profiles were submitted on behalf of CLS and were false.*".

40. If and to the extent that it is contended that Mr Linsley or CLS did not understand what was meant by the phrase "*sub-prime"* as it applied to those from whom instructions were received, I reject that contention. As late as 20 December 2012, Mr Spence had informed Lycetts that the defendant defined it for renewal purposes as meaning "… *We would define sub-prime as those who are not high street lenders and building societies*". That is entirely consistent with the earlier email from the defendant of 7 December 2012, where the meaning of "*sub-prime"* in the renewal context was defined as being " … *those who are not high street lenders and building societies*". The meaning of the phrase "*sub-prime"* in other contexts is irrelevant unless it could be shown that the defendant had been unclear as to what it meant by use of that phrase in the context of the information that it was seeking. In my judgment the information that was required was clear from the risk profile and from the email correspondence between the defendant and CLS's brokers. The expert evidence as to what that phrase meant was irrelevant for that reason. Indeed, permission to adduce such evidence should not have been sought. No advice was sought by Mr Linsley from CLS's broker nor did the broker indicate either in the correspondence between it and CLS or between it and the defendant that it was confused by what was meant. As the claimant's own underwriting expert (Mr Blackburn) accepted, had there been any doubt on this score he would have expected a reasonably competent broker to have raised the issue with the defendant –

see T4/140/9-19. There is no evidence that Mr Linsley was in fact confused by the language used. Mr Linsley's evidence was that there was no difficulty with the phrase as this exchange in the course of his cross examination establishes:

> "Q. Where is it in relation to residential? They define sub-prime as those who are not UK High Street and clearing banks.
>
> A. Yes, I appreciate that you seem to be taking it across the whole board of valuation survey, taking commercial as well as residential as being potentially sub-prime.
>
> Q. What is the difficulty with the phrase in the document, Mr Linsley?
>
> A. There's no difficulty with the phrase in the document.
>
> Q. Right. "Any sub-prime which we define as those who are not UK High Street and clearing banks". It's perfectly clear, isn't it?
>
> A. Okay.
>
> Q. It is perfectly clear, isn't it?
>
> A. Yes, that statement in itself.
>
> Q. It's not limited in any way, is it?
>
> A. It isn't, no.
>
> Q. No, and we see your answer, "This company has not undertaken any sub-prime bridging work".
>
> A. Correct
>
> Q. That wasn't limited either was it?
>
> A. That was in the context of residential because that's how we look at sub-prime. It's always been a residential lending as opposed to commercial.
>
> Q. What did you not understand about the definition that was being applied in the question?
>
> A. No, I accept what you say about that, yes."

The issue concerning whether Mr Linsley had a genuine subjective understanding that the question was confined to residential lending is something I return to when considering the defendant's decision to avoid the Policies to the extent that it is necessary to do so. For present purposes, this evidence establishes that Mr Linsley fully understood the defendant to mean by the use of the phrase "*sub-prime"*.

41. For the reasons set out in paragraph 33 and following above, this was equally so for 2014. I reject the submission that the falsity of the representation was neutralised by notification of the Waterman claim for the reasons set out above. Had the existence of the claim been notified expressly to the underwriters considering the renewal application then plainly the position would have been different. However, it was not and unless it can be shown that the underwriters in fact knew of the claim down to the date when renewal took place, then the fact that the claim had been lodged prior to renewal taking place is not to the point. I accept that a distinction can be drawn between a renewal application made after a claim has been submitted and a claim submitted after a renewal application has been made and that Baker J was concerned with the first but not the second of these situations in Aldridge (ibid.) but that is not a distinction that assists the claimant. The underlying principles concerning the imputation of knowledge remain the same in each situation. Mr Burgess was concerned with underwriting not with the notification of claims. Those concerned with the notification of claims were not concerned with the underwriting of renewals. There is no documentation of any sort that suggests Mr Burgess was aware of the Waterman claim at any stage prior to renewal taking place. This is particularly striking in the circumstances of this case because after the claim had been submitted, the defendant by Mr Burgess emailed various documents to Lycetts asking that Mr White (meaning the insured in context) " … *check the Risk Profile to ensure the details are correct*". Lycetts forwarded the documentation to Mr Linsley under cover of an email dated 28 January 2014. In respect of the Risk Profile, Mr White asked Mr Linsley " *… to please ensure that the inserted details are correct. If not, please alter and return this document to me immediately*". Neither Mr Linsley or Lycetts informed the defendant that what was contained in the Risk profile was inaccurate either by reference to the Waterman claim or otherwise. Mr Blackburn (the claimant's broker expert) and Mr Foley (the defendant's broker expert) were agreed that Lycetts should have notified Mr Burgess of the claim since it was a material fact and it was wrong to rely on the notification of the claim as a claim, particularly given the tight time line between the notification of the claim and the renewal application – see T4/165/5-166/8.

42. In my judgment, it is plain that those responsible for underwriting were not aware of the claim and Mr Linsley and his brokers did nothing to draw the attention of the underwriters to it. As I have said, given the context and in particular the reluctance of the defendant to undertake valuation risks particularly on the instructions of those it defined as "*sub-prime*" lenders, it is in the highest degree improbable that the defendant would have renewed the risk if those responsible for the underwriting were aware of the claim. There was no waiver in these circumstances. I should add however, that there is no evidence that Mr Linsley knew of the need to inform the underwriters of the claim and there is no evidence that Lycetts advise him that he should do so or even considered doing so. This is material to an assessment of Mr Linsley's honesty in respect of the misrepresentations relied on by the defendant to which I turn in more detail when considering the defendant's decision to avoid the Policies.

43. There is one final point I should make: Mr Pooles suggested that the juxtaposition between the notification of the claim and the request for renewal represented sharp practice by Lycetts in order to maximise the chances of securing renewal terms. I reject that suggestion. There is not a scrap of evidence other than the coincidence of timing to justify it, it is a serious allegation to make against a broker for whom integrity is the key to success in a market which depends on the utmost good faith of its practitioners

and it would be entirely inappropriate to reach even a provisional conclusion on that issue when Lycetts are not a party to or witness in this litigation.

The Warranty Issue

44. As noted above, the policy documentation included a provision to the effect that "… *Underwriters having received a Proposal which shall form the basis of and be incorporated in this contract* …". The effect of this provision is that the representations on which the defendant relies were warranties and in consequence (subject to the unintentional non-disclosure clause) CLS unconditionally guaranteed the accuracy of those representations. That this is so is not in dispute between the parties. The policies by reference to which this claim is brought pre-date the Insurance Act 2015, which in consequence is of no relevance to any issue that arises. In those circumstances, the effect of the misrepresentations (apart from the unintentional non-disclosure clause) referred to earlier is that no liability can arise on the policies relied on by the claimant – see The Good Luck [1992] 1 AC 233, where it was held that a breach of such a warranty automatically discharges an insurer from the time of the breach and HIH Casualty & General insurance Limited v. Axa Corporate Solutions [2002] EWCA Civ 1253 *per* Tuckey LJ at paragraph 2. It follows, as was held in Arab Bank Plc v. Zurich Insurance Limited [1999] 1 Lloyds Rep 262, that the effect of including a reference to the "*right to avoid"* in an unintentional non-disclosure clause is that a breach of warranty should be treated as having the same effect as a misrepresentation or non-disclosure but without the need to prove materiality or reliance. There is no material difference between the unintentional non-disclosure clause in that case and the clause in this case.

45. It is in that context that it is necessary to consider the claimant's submission, advanced by reference to paragraph 9 of the amended Reply, that the right to rely on the provision making the Proposal the basis of the policies has been waived. In paragraph 9 that assertion is advanced by reference to the "*… avoidance letter of 8 February 2016 …"* ("Avoidance Letter"), which it is alleged "*… expressly purported to avoid for pre-contractual misrepresentation and non-disclosure and did not contend that the Policies were discharged for breach of warranty, thereby waiving the breach of warranty"*.

46. In so far as is material, the Avoidance Letter stated at paragraph 1.2:

> "Having considered the matter carefully, we regret to inform you that Markel has formally avoided the Policies as a result of CLS's deliberate and dishonest misrepresentations and on-disclosure. …"

Other parts of the Avoidance Letter not referred to by Mr Kramer in his closing submissions included paragraph 4, which set out what were described as being the "*Relevant Policy Terms*". Those set out included the provision that made the Proposal the basis of the contract between the parties. At paragraph 6.7 of the letter, it was stated on behalf of the Defendant that:

> "CLSL has not established to Markel's satisfaction that the non-disclosure or misrepresentation of CLSL's clients was innocent and free from any fraudulent conduct or intent to deceive. Indeed, Markel believes that the non-disclosure and/or

> misrepresentations were deliberate and dishonest. Merkel is not therefore obliged to waive its rights to avoid the Policy."

47. I reject the submission that the defendant waived its right to treat the misrepresentations on which it relies as a breach of warranty. My reasons for reaching that conclusion are as follows.

48. First, it is difficult to see why the author of the letter would have included the provision that made the Proposal the basis of the contract between the parties if the intention had been to waive reliance on that provision other than to state (if that was the case) that reliance on that provision was waived. There is no such statement. The much more natural reading of the letter when read as a whole and in its relevant factual context is that reliance was being placed on that provision.

49. Secondly, I do not consider paragraph 1.2 contradicts that being the correct meaning much less that it does so unequivocally. As Rix J as he then was explained in Arab Bank Plc v. Zurich Insurance Limited (ibid.) a breach of a warranty of the representations given by an insured prior to inception of a policy have the same effect as a misrepresentation or non-disclosure. The letter treats them as such.

50. Thirdly, there is nothing within the letter that comes close to constituting a waiver of a right to treat the misrepresentations as a breach of warranty. The principles that apply are entirely clear. First, where there is a breach of warranty there is no scope for traditional waiver by election because the insurer is automatically discharged from liability upon breach and therefore has no choice to make – see HIH Casualty & General insurance Limited v. Axa Corporate Solutions (ibid.) *per* Tuckey LJ at paragraph 7. Secondly, the only waiver available is waiver by estoppel and for that to avail an insured it is necessary that it both plead and prove the necessary ingredients of such a waiver. As was held at first instance in HIH Casualty & General insurance Limited v. Axa Corporate Solutions what is required to be pleaded and proved is:

> " … a clear and unequivocal representation that the reinsurer (or insurer) will not stand on its right to treat the cover as having been discharged on which the [reinsured] (or insured) has relied in circumstances in which it would be inequitable to allow the reinsurer (or insurer) to resile from its representation. In my judgment it is of the essence of this plea that the representation must go to the willingness of the representor to forego its rights. If all that appears to the representee is that the representor believes that the cover continues in place, without the slightest indication that the representor is aware that it could take the point that cover had been discharged (but was not going to take the point) there would be no inequity in permitting the representor to stand on its rights. Otherwise rights would be lost in total ignorance that they ever existed and, more to the point, the representee would be in a position to deny the representor those rights in circumstances in which it never had any inkling that the representor was prepared to waive those rights. It is of the essence of the doctrine of promissory estoppel that one side is reasonably seen by the other to be foregoing its rights."

By the time this case arrived at the Court of Appeal, it was common ground that to succeed the insured had to establish a clear and unequivocal representation by Axa that it would not insist on its right to treat the reinsurance cover as discharged – see HIH Casualty & General insurance Limited v. Axa Corporate Solutions (ibid.) *per* Tuckey LJ at paragraph 19(a). There is no such representation here. The Court of Appeal did not consider any of the points made by the first instance judge referred to above to be misplaced but focussed instead on the evidence relevant to whether these requirements had been made out.

51. In my judgment the claimant has not pleaded the necessary ingredients of a waiver of the type it is entitled to rely on and certainly has not established any of those requirements by reference to the only document it has pleaded an entitlement to rely on. In those circumstances I reject as unarguable the suggestion that the defendant waived its right to rely on the breach of warranty I am considering in this section of the judgment. In HIH Casualty & General insurance Limited v. Axa Corporate Solutions (ibid.), the Court of Appeal appeared ready to recognise the possibility that an estoppel by convention might also support a waiver as well as an estoppel by representation. However in that case, as in this, no such suggestion was pleaded and in this case has not been argued so there is no need for me to say anything further about it.

52. In those circumstances, it is not necessary that I consider whether the detrimental reliance necessary to found a waiver by estoppel has been established here. I make clear however, that I accept Mr Pooles' submission that for detrimental reliance to be established it is necessary for the assured to show that it attached some significance to the alleged representation and acted on it – see In HIH Casualty & General insurance Limited v. Axa Corporate Solutions (ibid.) *per* Tuckey LJ at paragraph 23. Given that a breach of warranty should be treated as having the same effect as a misrepresentation or non-disclosure – see further paragraph 45 above – I do not see how detrimental reliance could be established in the circumstances of this case and it hasn't been.

53. In those circumstances, I accept Mr Pooles' submission that, subject to the unintentional non-disclosure clause, the misrepresentations were breaches of warranty that entitled the defendant to avoid the policies as of right and without any further inquiry as to the impact that the misrepresentations had on the underwriting of the extensions.

The unintentional Non-Disclosure Clause – Defendant's Claimed Entitlement to Avoid the Policies

54. It is common ground that the defendant's right to avoid whether for misrepresentation, non-disclosure or breach of warranty is governed by the Unintentional Non-Disclosure ("UND") clause. There is a dispute as to how a court should give effect to that provision however, which it is necessary to resolve before turning to the facts of this case, although in the end it may be that the same result will follow whichever path to that result is adopted.

The Effect of the UND Clause

55. The claimant contends that it is for the court to determine as a matter of fact on the evidence before it whether it is satisfied that the misrepresentations relied on by the defendant were free from any fraudulent conduct or intent to deceive. The defendant contends that the court's role is limited to determining whether the defendant's decision

to avoid the policies, on the basis that the misrepresentations on which it relies were not free from any fraudulent conduct or intent to deceive, was one that was open to a reasonable decision maker on the basis of the facts and matters such a decision maker was entitled to take into account in arriving at such a decision. It submits however, that whichever test is applied the result should be the same on the facts of this case and that the court should conclude that the misrepresentations on which it relies were not free from any fraudulent conduct or intent to deceive and in deciding that they were not, the defendant acted rationally.

56. It is convenient to start by setting out again the relevant parts of the UND Clause, which is these terms:

> "a) In the event of non-disclosure or misrepresentation of information to Us, We will waive Our rights to avoid this Insuring Clause provided that
>
> (i) You are able to establish to Our satisfaction that such non-disclosure or misrepresentation was innocent and free from any fraudulent conduct or intent to deceive
>
> …
>
> (c) in the event of any dispute between You and Us regarding the application of (a) and (b) above, such dispute or disagreement shall be referred by either party for arbitration to any person nominated by the President for the time being of The Royal Institution of Chartered Surveyors."

57. I agree with Mr Kramer that the issue is one that in the first instance depends upon construction of the UND Clause. It is necessary to carry out this exercise before turning to the question whether the UND clause takes effect as alleged by the defendant. This is so because Mr Pooles' submission as to the approach to be adopted depends on the implication of a term that qualifies the apparently absolute terms in which the UND clause is expressed by concepts of good faith, genuineness and the absence of arbitrariness, capriciousness, perversity and irrationality, relying on authorities such as Socimer International Bank v. Standard Bank London [2008] EWCA Civ 116; [2008] 1 Lloyds Rep. 558 but principally on Braganza v. BP Shipping Limited [2015] UKSC 17; [2015] 1 WLR 1661. The applicability of the approach mandated by Braganza (ibid.) depends on the nature of the clause that is said to be qualified in the way set out in that case. This issue was addressed most recently by Jackson LJ in Mid Essex Hospital Services NHS Trust v. Compass Group UK [2013] EWCA Civ 200 at paragraph 83, where he summarised the position in these terms:

> "An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the

> authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so."

However, as Males LJ held in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613 at para. 113 that:

> "Although the Mid Essex case uses the expression "absolute contractual right" that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken. To say that a term provides for an absolute contractual right and therefore no term can be implied puts the matter the wrong way round."

58. This approach is also necessary because, as I have said, qualifying a contractual term in the manner identified in Braganza depends upon the implication of a term having that effect. The principles applicable to the implication of terms were comprehensively set out by the Supreme Court in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72; [2016] AC 742 and applied in Ali v. Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531, UTB LLC v. Sheffield United Limited [2019] EWHC 2322 (Ch) and (in a Braganza context) Taqa Bratani Ltd and others v. Rockrose UKCS8 LLC [2020] EWHC 58 (Comm). In summary where, as here, there is a detailed commercial agreement:

(i) Terms are to be implied only if to do so is necessary in order to give the contract business efficacy or was so obvious that it goes without saying;

(ii) It is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court considered that the parties would have agreed if it had been suggested to them; and

(iii) no term may be implied into a contract if it would be inconsistent with an express term".

It is only once the construction exercise has been carried out that the necessity and inconsistency issues can be resolved.

59. The principles applicable to the construction of a contract are well known. It is not necessary that I rehearse all of them at length. It is however worth noting that the relevant words of a contract are construed in their documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015]

UKSC 36 [2015] AC 1619 *per* Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph. Of these principles, that summarised at (d) is not material in the circumstances of this case because it is not suggested by either party that there is any factual matrix material that is relevant to the construction exercise I have to undertake in this case.

60. I now turn to the construction of the UND Clause. It is necessary to read the clause as a whole. This I have done. However, neither party suggests it is necessary to look beyond those parts of the UND Clause set out above.

61. Although the claimant places some reliance on the arbitration clause in paragraph (c) as impacting on the true construction of the UND Clause, I do not agree that it has any impact on the construction issue that arise in this case. The arbitration agreement within the UND Clause was a contractually agreed means by which a dispute was to be resolved. It says nothing about the question that the tribunal charged with resolving the dispute had to ask itself when resolving a dispute. In principle the question should be the same whether the parties use the agreed dispute resolution mechanism or (as in fact is the case here) they chose not to do so but instead to litigate the dispute.

62. In my judgment the only relevant phrase is " … *You are able to establish to Our satisfaction that such non-disclosure or misrepresentation was innocent and free from any fraudulent conduct or intent to deceive* …" Within that phrase, the only part that matters for present purposes are the words " … *to Our satisfaction …"*. In my judgment the effect of that language is twofold. First, it makes clear that the burden is placed on CLS to establish that any misrepresentation of non-disclosure was " … *innocent and free from any fraudulent conduct or intent to deceive …"*. This is the effect of the words " … *You are able to establish …"*. Secondly, the language used clearly states that the decision maker is the defendant. That is the effect of the words " … *to Our satisfaction …"*. It follows that it is wrong as a matter of principle to conclude that the court (or, for that matter an arbitrator) can substitute its judgment for that of the defendant. The contract confers the decision making power on the defendant. As Lady Hale DPSC observed in Braganza (ibid.) at paragraph 18, "*It is not for the courts … to substitute themselves for the contractually agreed decision-maker …"*. That being so, unless the unqualified terms of the agreement are qualified by implication, the parties are bound by the decision of the defendant.

63. It is against that background that it is necessary to consider further the decision of the Supreme Court in Braganza (ibid.) In my judgment, it is clear that there is to be implied into the agreement between these parties a term to the effect identified in that case. As Baroness Hale DPSC made clear, that case was concerned with the activity of a "…*contractual decision maker …*" – see paragraph 17 – and the nature of the contractual term being considered was one by which " … *one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts* …" This is precisely the category of contractual provision that Jackson LJ considered was in principle likely to be qualified in Braganza terms in Mid Essex Hospital Services NHS Trust v. Compass Group UK (ibid.) at paragraph 83, which he summarised as being a term that involved a party " … *making an assessment or choosing from a range of options, taking into account the interests of both parties*…" . I have set out above the relevant principles applicable to the implication of terms into a contract. Applying those principles, the implication of such a term plainly satisfies the necessity

requirement since without such a term, it would be open to the defendant to make decisions that were arbitrary, capricious or irrational. As Lady Hale stated in Braganza (ibid.) at paragraph 18:

> " … the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

Neither party can be treated sensibly as having intended to permit the defendant to make decisions that were arbitrary, capricious or irrational. Thus it is necessary to imply a term in order to eliminate the possibility of such decision making since it is only by implying such a term that the UND Clause can be given business efficacy or because the necessity for the implication of such a term is so obvious that it goes without saying. There is no question of such an implied term contradicting the agreement of the parties. On the contrary it is giving effect to that which both are to be treated as having intended.

64. It is necessary next to set out what terms will be implied applying Braganza (ibid.). In my judgment that requires a term to be implied into the contract between the parties to the effect that the defendant will not exercise its decision making powers conferred by the UND Clause arbitrarily, capriciously or irrationally in the sense identified by the Court of Appeal in Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948 1 KB 223. This requirement imports two elements – namely (i) a requirement that the defendant will not take into account matters that it ought not to take into account and will take into account only matters that it ought to take into account; and (ii) a requirement that it does not come to a conclusion that no reasonable decision maker could ever have come to – see Braganza (ibid.) per Lady Hale at paragraph 30 and Lord Neuberger at paragraph 103.

65. In arriving at a conclusion as to whether this latter requirement has been satisfied, it is necessary to bear in mind the often quoted direction in Re H (Minors) (Sexual Abuse: Standard of Proof) (ibid.) that " … *the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities …*" - see Braganza (ibid.) per Lady Hale at paragraph 36. In a case such as this, where contractually the onus has been placed on the insured to prove the misrepresentation or non-disclosure " … *was innocent and free from any fraudulent conduct or intent to deceive …*" this principle requires the decision maker to bear in mind that it is inherently more probable that a misrepresentation has been made innocently or negligently rather than dishonestly in arriving at an evaluative conclusion based on the whole of the material that the decision maker ought to take into account.

66. There are limits on the degree to which the Wednesbury principles can be incorporated into a commercial contract. As Lady Hale observed at paragraph 31 of her judgment:

"*… It may very well be that the same high standards of decision-making ought not to be expected of most contractual decision-makers as are expected of the modern state*…" How in practice this qualification is to be applied is not developed. However, I accept Mr Pooles' submission that it would be a mistake to expect an insurance company in the position of the defendant to adopt "*… the same expert, professional and almost microscopic investigation of the problems both factual and legal, that is demanded of a suit in a Court of Law"* – see CVG Siderurgicia del Orinoco SA v London Steamship Owners Mutual Insurance Association Ltd [1979] 1 Lloyds Rep 557. Finally, it is necessary to note that even in the public law context, if it appears to a court to be highly likely that the outcome would not have been substantially different even taking account of the error then a court ought not generally to interfere with the decision of the decision making body.

67. In resisting these conclusions, Mr Kramer submits that there are a number of decisions in the insurance and reinsurance context that suggests a different approach ought to be taken in relation to the UND Clause and other clauses that he submits are to broadly similar effect. I consider these submissions to be mistaken for the following reasons.

68. First, the decision of the Supreme Court in Braganza (ibid.) is a recent decision of the Supreme Court that was intended by that court to be of general application. No good or indeed any reason has been identified by Mr Kramer for the general law as stated by the Supreme Court not to apply to insurance contracts. In my view, a UND clause is a classic example of a clause to which the principles in that case should be applied. Secondly, many of the decisions on which Mr Kramer relies pre-date the decision of the Supreme Court in Braganza (ibid.) and therefore may require reconsideration in the future. Thirdly, none of the authorities relied on by Mr Kramer concern UND clauses and in my view should be treated as applying to their own particular facts particularly where they were decided before Braganza (ibid.). This is so not merely because of the general applicability of that authority but because the law relating to the implication of terms qualifying otherwise unqualified contractual decision making provisions has been a relatively recently developing area of the law, not available to the judges deciding most of the authorities relied on by Mr Kramer. With those general points made I turn to the authorities relied on by Mr Kramer.

69. In Napier v. UNUM Limited [1996] 2 Lloyds Rep 550, Tuckey J as he then was, was concerned with a clause that required the production of "*… proof satisfactory to …"* the insurer of the insured's inability to work. The point about that case is that it was recognised by the Judge that very clear words would be required if the clause was intended to give the insurer the right to decide. It is precisely this concern that underpins the approach of the Supreme Court in Braganza (ibid.). He concluded that the "*proof satisfactory*" requirement was simply a vouching provision. That of itself is the clear distinction between this case and Napier (ibid.) because the clause in this case was intended to give the insurer the right to decide as I have concluded already. Although Tuckey J considered very clear words to be required for a clause to have that effect and I consider the words used here were of the required level of clarity, in any event it is worth noting Lady Hale's observation in her judgment in Braganza (ibid.) at paragraph 18 that contractual terms " … *in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common* …". It may be that the difference is reflective of the passage of time from 1996 to 2015. In any event the clause being considered by Tuckey J was not a UND clause, which is

a provision that potentially exposes the defendant to a liability that the defendant would otherwise have been able to avoid by reason of the representations being warranties. This same point applies to the extracts from textbooks that Mr Kramer relies on at paragraphs 162.2 -162.4 of his closing submissions.

70. Brompton v. AOC International Limited [1997] IRLR 639 does not assist either not least because the clause is not even of passingly similar effect to the UND Clause in this case. Brown v. GIO Insurance Limited [1998] Lloyds Rep IR 202 is consistent with the conclusions that I have arrived at above. There is no merit in the suggestion that the terms of the clause in that case were clearer than the UND Clause. In Brown (ibid.) the sole aggregation clause made the reassured the "*sole judge"* as to whether losses arose from one or more than one event. There is no material difference between a provision that makes someone the sole judge of something and a provision that requires someone to establish something " … *to Our satisfaction*."

71. Marlow v. East Thames Housing Group Limited [2002] IRLR 796 does not assist either. The issue in this case is not whether the decision of the defendant is challengeable in the courts – it is unless the parties choose to comply with their arbitration agreement – but rather with the basis of challenge. The Judge in that case relied on Napier (ibid.) and Brompton (ibid.), which for the reasons I have explained I do not consider assist. The clause being considered in that case was not a UND clause or otherwise similar to the clause that I have to consider and the case was decided years prior to Braganza (ibid.) against which all the authorities relied on my Mr Kramer must be tested.

72. Indeed the inconsistency between cases such as Napier (ibid.) on the one hand and the later and more authoritative Braganza (ibid.) on the other is apparent from the treatment in the text book referred to by Mr Kramer in paragraph 168.4 of his closing submissions. The reason that the authors do not explain Napier (ibid.) having analysed Braganza (ibid) is because the former is inconsistent with the later more recent and authoritative decision.

The Defendant's Avoidance Decision

73. In my judgment the real issues that arise are three in number – (i) did Mr McKechnie (a) fail to take into account any facts and matters that he ought to have taken into account or (b) take into account any facts and matters that he ought not to have taken into account, (ii) would the decision have been the same even if any such errors had not occurred and (iii) was the decision one that no reasonable decision maker could have arrived at on the material that ought properly to have been considered.

74. Whilst the issue in (iii) above has to be examined even if issue (i) or (ii) are resolved in favour of the defendant, it is difficult to see how the test referred to in (iii) above could be satisfied if the issues I refer to in (i) and (ii) were resolved in favour of the claimant. I accept that the burden rests on the decision maker to satisfy the court on these matters but I do not accept that it is or was for the defendant to prove fraud. The contract between the parties placed the burden of satisfying the decision maker on CLS as insured.

Process

75. Normally, references to process in this context is a reference to the issue I summarise in (i) above. However, in addition to this issue, Mr Kramer criticises Mr McKechnie for adopting what he characterises as a flawed investigative process because he did not arrange a meeting to discuss the issues that were of concern to the defendant before reaching a decision and because most if not all of the primary investigation was left to Mr McKechnie. In fact, as might be expected, there was an internal review process leading to the final decision, but equally as might be expected, the reviewing officers did not examine all the material that Mr McKechnie examined.

76. I reject both these submissions for the following reasons. Firstly, in my judgment this criticism misses the critical point. In the public law context challenges to the process by which decisions are arrived at are legally distinct from Wednesbury challenges. There is nothing in Braganza (ibid.) that incorporates into private law any public law concepts other than two distinct elements to the Wednesbury test summarised above. Secondly, any such challenge if permitted in principle would have to be approached with caution since it would be equally if not more of a mistake in such a context to expect of a commercial decision maker the same standards that are expected of the state or a process that is similar to that adopted by a state court or tribunal or an arbitrator.

77. Thirdly, in my judgment if Mr McKechnie failed to take into account facts and matters that he ought to have taken into account or has taken into account facts and matters that he ought not to have taken into account, then the fact that he did not involve or was not required to involve others within the hierarchy of the defendant is immaterial. The decision making would be flawed subject to the defendant establishing that the decision would have been the same even if that was not the case. Equally, if Mr McKechnie has taken into account all the facts and matters that ought to have been taken into account and has not taken into account facts and matters that he ought not to have taken into account then the fact that the defendant assigned the primary decision making to Mr McKechnie is also irrelevant. The only issue that then remains is whether the decision was one that no reasonable decision maker could have taken. Again if the answer is that no reasonable decision maker could have arrived at the conclusion that Mr McKechnie arrived at then the fact that others within the hierarchy of the defendant were not involved in the primary investigation and decision making is immaterial. On the other hand if the decision was a rational one in the Wednesbury sense, the non-involvement of others within the organisation of the defendant is immaterial.

78. Fourthly and specifically in relation to the failure to arrange a meeting, in my judgment that is of itself immaterial as well. Of course, if the defendant had failed to ask Mr Linsley about the issues that were of concern, that would have created a heightened risk that the defendant would fail to take account of something that it should have taken into account or took into account something that should not have been. However, ultimately again the only issues are those I have identified and the reasoning set out in paragraph 77 applies with equal force to the submission that there should have been a meeting before a decision was taken.

79. Fifthly, in my judgment the suggestion that there has to be a meeting in every case goes beyond what can reasonably be expected of an insurance company in circumstance such as those that arose in this case. In my judgment, an insurance company is fully entitled

to approach the issues that arose by seeking an explanation in writing and in most cases at least to reach a decision taking account of the information supplied to it by or on behalf of the insured in response. There may be exceptional cases where follow up correspondence is necessary or where a meeting may be appropriate but there is nothing in the circumstances of this case that suggests a meeting was required in this case.

80. Finally, I find that Mr McKechnie gave the claimant a more than adequate opportunity to respond to the issues that were of concern to the defendant by his letter to Lycetts dated 12 March 2013 (it is common ground this was an error and should have been 2015) and because the 8 February 2016 letter by which cover was formally declined ("Decision Letter") expressly concluded by inviting CLS "…*if you have information that you believe is relevant or should be taken into account by [the defendant] please come back to us and we will consider whether this affects the policy coverage decision"*.

81. Although there is some criticism that the 12 March letter did not spell out in terms that the defendant was considering avoiding the Policies, in my judgment that criticism too is misplaced. First, in emails from Mr McKechnie sent to Lycetts in December 2014, it had been made clear that all the defendant's rights had been reserved pending further investigation. Even if Mr Linsley did not know what that meant, Lycetts as CLS's agent ought plainly to have known. The 12 March 201[5] letter makes clear that the letter was seeking CLS's detailed comments on various issues and that "*... in the interim, Markel's position remains completely reserved …"*. In my judgment there could be no doubt in the mind of Mr While at Lycetts and in reality none in the mind of Mr Linsley that what the defendant was doing was investigating whether or not it could avoid liability for CLS's claims for cover under the Policies. There is nothing in the point therefore that the letter did not state expressly that the defendant was considering avoiding the Policies. In any event as I have noted already, the Decision Letter expressly concluded by inviting CLS "…*if you have information that you believe is relevant or should be taken into account by [the defendant] please come back to us and we will consider whether this affects the policy coverage decision"*. CLS did not respond to that invitation.

82. It is also submitted that it was obvious that the response that was forthcoming was a speedy and ill-considered response. I do not accept that to be right either. The response to the 12 March letter was sent to the defendant on 18 May 2015. Two months is more than sufficient time to make a considered response to the 12 March letter not least because CLS and Mr Linsley were not responding to the letter unaided. This letter had been passed to CLS by the defendant via Lycetts. The defendant was fully entitled to assume that the responses were fully considered, particularly given that the responses came via brokers acting for CLS and were in the form of insertions into the letter by Mr Linsley, who knew therefore that the defendant was considering avoiding the Policies and that the answers that he gave would be material to that decision. Although Mr Kramer submits that Lycetts were nothing more than a post box, that submission would have more force if there was any evidence that CLS or Mr Linsley had sought advice from Lycetts in relation to the response to the 12 March letter that had either been refused or was not provided.

83. The formal decision to avoid is contained in a letter from Robin Simon dated 8 February 2016 ("Decision Letter"). The letter defined the "First Policy" as being the 2013 Policy and the "Second Policy" as being the 2014 Policy. It identified the basis on which it

had been concluded that CLS had made misrepresentations and non-disclosures in section 5 of the Decision Letter in these terms:

> 5.1 CLSL acted for UK Acorn Finance Limited ("UKAF") providing valuations between Septembe 2010 and December 2011. In June 2013, UKAF notified claims in relation to six substantia valuations provided by CLSL. The letters of claim were not notified to Markel. A further fiv letters of claim in relation to the UKAF valuations were sent in the second half of 2014, bu not notified to Markel until several months later. UKAF was not a high street bank or buildin society.
>
> 5.2 In March 2012, CLSL was instructed to carry out a valuation in respect of a property known a Chatham Place. The instruction was by Simply Bridging Limited ("Simply") on behalf o Waterman Capital Limited ("Waterman"), a funder based in the Isle of Man. In January 2014 a claim was received in respect of this valuation. Neither Simply nor Waterman were higl street banks or building societies.
>
> 5.3 In July 2012, a claim was made in respect of a valuation on behalf of Swift 1st Limited ("Swift") Swift was a sub prime lender and was not a high street bank or building society.

84. It stated that that the misrepresentations the defendant relied on were deliberate and dishonest for the reasons set out in section 6 of the letter.

> 6.1 Your client was aware in December 2012 that Markel was considering whether it would be in a position to offer terms in respect of the First Policy.
>
> 6.2 Against that background, there have been misrepresentations and/or non-disclosure by CLSL to Markel in respect of both the First Policy and the Second Policy. In each case, CLSL represented to Markel that it only undertook valuations for "*UK clearing banks or building societies*" and/or that it did not act for any *"sub-prime lenders"*.
>
> 6.3 However, contrary to the representations made to Markel, CLSL acted for UKAF in 2010 and 2011. At no stage did CLSL refer to or allude to any instructions by UKAF. Further, CLSL had acted for Simply/Waterman and Swift, but these instructions were not disclosed to Markel until claims were made.
>
> 6.4 At the renewal of the Second Policy, CLSL responded to a direct query from Markel to say that the claim by Swift was a "*historic isolated issue*". This statement was insupportable given that, by that stage, CLSL had received claims from UKAF, but had not notified Markel of the same.

6.5 CLSL was guilty of misrepresentation both in January 2013 and January 2014 (if not in earlier years also and Markel's position is reserved in relation to the same). Markel had made clear its concern regarding the sub-prime valuation business. Markel had made clear that it was only prepared to offer terms if CLSL's valuation work was limited to instructions from high street banks and building societies. CLSL was required to notify Markel of the fact it was undertaking work (or had undertaken work) for UKAF and Simply/Waterman and failed to do so. This failure was deliberate.

6.6 In response to Markel's letter dated 12 March 2015, CLSL confirmed that it had indeed acted for UKAF and Simply/Waterman. In relation to UKAF, CLSL contended that UKAF was a "*white label fund*", but did not seek to suggest that UKAF was a UK clearing bank or building society. CLSL knew UKAF was not a UK clearing bank or building society and deliberately misled Markel by refusing to disclose its instructions by UKAF. Further, in relation to Simply and Waterman, CLSL confirmed it was aware that Waterman was not a UK clearing bank or building society and accepted that it was, instead, an Isle of Man based corporate fund. Again, CLSL misled Markel by failing to disclose its instruction on behalf of Simply and Waterman.

6.7 CLSL has not established to Markel's satisfaction that the non-disclosure or misrepresentation of CLSL's clients was innocent and free from any fraudulent conduct or intent to deceive. Indeed, Markel believes that the non-disclosure and/or misrepresentations were deliberate and dishonest. Markel is not therefore obliged to waive its rights to avoid the policy.

85. The 12 March letter was a lengthy one and it is necessary to consider it in parts. It is necessary to do so because it was as I have said Mr Linsley's opportunity to explain why the defendant's concerns were misplaced and because the unsatisfactory nature of the responses are relied on by the defendant as one of the main reasons why it was entitled to reach the conclusion that it did.

86. The first part of the 12 March letter was in these terms:

> "**Policy Period January 2011 to January 2012:** In so far as your client is concerned, I note from my review of Markel's underwriting papers, that from as early as 2010 Markel made it clear to your client that the extent, if any, of valuation and survey work carried out for the sub-prime lending sector was highly material to the terms, if any, that might be offered.
>
> I refer, in particular, to Markel's email to you of 22 December 2010 which asked, amongst other things, "*Has any sub-prime work been carried out? If so how many in total; on what basis? "*. In response, by email dated 29 December 2010, the answer given was "*None, our instructions are directly from the High Street Bank lenders and the likes of Coutts, Handelsbanken, Bank of Scotland Banking Division etc* ".
>
> Subsequently, and reliant on the above referred clarification, Markel issued terms by way of email dated 30 December 2010. Ultimately the renewal took place and, as confirmed by Markel's email to you of 31 January 2011, this was "*on the basis that there is no sub-prime exposure and there won't be any going forward. Should this not be the case then we will need to have full details and our terms will not stand* ."

> In fact, it appears that your client had already and very recently carried out its first valuation for UKAF, in respect of Leaventhorpe Hall by a report dated 14 December 2010. UKAF was not a high street bank or building society and, like what appears to have been the ultimate recipient (the Connaught Fund), was patently from the sub-prime sector.
>
> **Request A:** In the circumstances, it is clear that the representations made to Markel, as contained in your email of 29 December 2010, were inaccurate. In the circumstances, I would invite your client to explain why an inaccurate answer was provided."

Mr Linsley's response was:

> "UKAF approached our company in 2010, amongst others, for panel valuation appointment, and represented themselves as the biggest principal lender (£360m) of High Street Banks 'white label funds' to the agricultural sector above the Agricultural Mortgage Corporation on term lending. Due diligence on the company website indicated nothing to the contrary at that time with their other appointed valuers including Knight Frank, Savills & Carter Jonas. At no point was the Connaught Fund ever mentioned, or indeed mentioned within the Report on Title documentation, and crucially you will note from information in the public domain on Companies House that the Connaught Fund charges were only retrospectively applied to their full loan book in late 2011/2012 as second charges, when the Connaught Fund administrators discovered that their loan advances had not in fact been secured. The Connaught Fund involvement was deliberately hidden and hence misrepresented by UKAF during this period, and again this is now well documented in the public domain."

87. That response did not attempt to grapple with the central point, which was and remains that the claimant was not a building society or a clearing bank or a high street lender but was a sub-prime lender as the defendant had clearly defined that term. It is not suggested and it was not the case that the claimant was lending as agent for any High Street bank. As Robin Simon LLP had observed in paragraph 6.6 of the Decision Letter, Mr Linsley's answer did not seek to suggest the claimant was a UK clearing bank or building society. Request B in the 12 March letter and Mr Linsley's response added nothing material.

88. Request C within the 12 March letter was in these terms:

> "**Request C:** For the avoidance of doubt, please can your client confirm that at no time was it on either the ASTL or NACFB panel and explain why, given the prior exchanges about the ASTL, they referred to the NACFB in the responses contained in your email of 23 November 2012."

Mr Linsley's response was:

> "I can confirm that at no time has this firm been on the ASTL or NACFB valuation panel. You will find a website for each upon which this information may be easily be checked upon telephone enquiry. I do not know the context of the NACFB reference mentioned above, other than to presumably confirm that the firm has not pursued any application to join that panel?"

This issue was the subject both of extensive cross examination and submissions by Mr Kramer. It is necessary to note before considering those submissions further, that this issue is not mentioned and was not relied on as a ground of avoidance in the Decision Letter. Mr Kramer submits however that the real point about ASTL is that Mr Linsley had sought the consent of the defendant before joining the ASTL panel and did not join it when his insurers informed him that he would not be covered in respect of work undertaken as a panel member. Mr Kramer submits that this is obviously inconsistent with a desire to conceal from the defendant that he was undertaking commercial work for lenders other than high Street lender, clearing banks and building societies and is consistent with a belief on the part of Mr Linsley (however misconceived) that this limitation applied only to residential valuation work. In summary therefore, Mr Kramer submits that this was a material consideration that Mr McKechnie ought to have taken into account in arriving at a conclusion. It is worth noting at this stage that this point was not one made by or on behalf of CLS either in the replies to the 12 March letter or by way of answer to the Decision Letter.

89. Returning to the 12 March letter and Mr Linsley's responses to it, Request D was in these terms:

> " … a Risk Profile bearing the date 4 January 2013 was submitted to Markel. Sections 4 & 5 of this document asked the question "Can you confirm that all lending institutions for whom the Proposer carries out survey and valuation work are either UK clearing banks or building societies and that the Proposer has not encountered any problems with any such lending institutions?" . Again, the answer given was a simple "Yes "
>
> In addition, the Risk Profile confirmed, in response to a direct request to confirm, that your client had not, in the preceding five year period, carried out either a residential valuation in excess of £1m or a commercial valuation in excess of £3m.
>
> In fact, it appears that in addition to the earlier valuations your client had carried out for UKAF, they had also undertaken a valuation on the instructions of Simply Bridging Limited on behalf of Waterman Capital Limited in March 2012 in respect of a property known as Chatham Place. Like UFAF, it was obvious that this was short term finance, that neither Simply Bridging Limited or Waterman Capital Limited were high street banks or building societies and that both were patently from the sub prime sector.

> Having regard to the above referred exchanges, I find it particularly surprising that your client accepted instructions for what was patently a short term lender and at no time informed Markel of that fact.
>
> Further, it appears that Chatham Place had been valued at £3.5m; a figure in excess of the £3m contained in the aforementioned Risk Profile
>
> **Request D:** In the circumstances, it is clear that the representations made to Markel, as contained in your email of 21 December 2012 and the Risk Profile dated 4 January 2013, were inaccurate. In the circumstances, I would invite your client to explain why inaccurate answers were provided."

90. Mr Linsley's response was:

> "Waterman Capital Isle of Man (its subsidiaries and its lending arm of Simple Bridging Ltd) are one of our corporate fund clients to whom we are national property advisers. Waterman Capital is in fact Lakshmi Mittal, Aloke Lohia and other ultra high net worth investors funds administered by the company chairman and solicitor Hassan Sayani. This is a highly valued corporate appointment which includes, in addition to advising on portfolio acquisitions and disposals, their occasional lending arm, and one cannot be separated from the other. You will note that a totally spurious notification was received on Chatham Place, not from Simple Bridging or their borrower, but the original site owner who had previously lent money to that borrower without any RICS valuation security, and sought to retrospectively pin this on the valuation which had nothing to do with him. I further note that the site is being built out by the original site owner with the units sold off plan fully corresponding to the reported valuation, and this was never a valid notification. We cannot legislate for attempted fraudulent manoeuvres from 3rd parties in this regard"

Again, Mr Kramer submits that the point concerning Waterman is one that favours his client because (a) undertaking work for that entity was consistent with a subjectively genuine belief on the part of Mr Linsley that CLS was entitled to undertake work for lenders other than building societies and clearing banks and (b) the claim by Waterman was disclosed during the renewal process and thus at a time when for all Mr Linsley and CLS's broker knew, the claim would come to the attention of those within the defendant managing the renewal application and thus was consistent with a belief on the part of Mr Linsley that CLS was entitled to undertake commercial valuation work for lenders other than building societies and clearing banks. Neither of these points were made by Mr Linsley either in his responses to the 12 March letter or by way of answer to the Decision Letter.

91. Request E concerned amongst other things the claims that CLS had received from the claimant. It was in these terms:

> "Further, at Section 8 of the Risk Profile dated 4 January 2013 your client had confirmed that it was not "aware, after enquiry, of any circumstance or incident which they have reason to suppose might afford grounds for any future claim such as would fall within the scope of the proposed insurance which has not already been advised to us". Your email of 18 December 2013 also confirmed that this answer remained correct, by the statement "no change ".
>
> In fact, your client had carried out valuations for UKAF and/or the Connaught Fund and Waterman Capital Limited, at the request of Simply Bridging Limited. Further, and again, it is noted that contrary to the representation about maximum values, your client had in the preceding five year period valued Camblesforth Hall at £4.5m, a figure far in excess of the £1m maximum residential valuation figure stated in the Risk Profile , and Chatham Place at £3.5m; a figure in excess of the £3m maximum commercial valuation figure stated in the Risk Profile.
>
> It is also clear that, contrary to the representation provided at Section 8, your client had received Preliminary Notices of Claim from UKAF on 26 June 2013 in relation to at least 6 separate valuations; Pembroke Farm, Pasture Farm, Camblesforth Hall, Leaventhorpe Hall, Aislaby Hall, land in and around Glossop, and Birks Farm. Aside from the failure to notify these matters in accordance with the requirements of the policy, it is clear that in light of the receipt of the same the representation at Section 8 was inaccurate.
>
> **Request E:** In the circumstances, it is clear that the representations made to Markel, as contained in your email of 18 December 2013 and the Risk Profile dated 4 January 2013, were inaccurate. In the circumstances, I would invite your client to explain why inaccurate answers were provided."

To which Mr Linsley responded:

> "Please refer to my previous responses re UKAF, and the fully comprehensive statements of circumstances I have already made regarding my notifications to the investigating authority Avon & Somerset Police in accordance with RICS guidance on reporting fraud and money laundering. In particular the advice received from A&S to stay on any action other than with that Authority. Should you now require further information in the form of attested witness statement, please let me know."

92. Mr Linsley did not add anything material by reference to the remaining parts of the 12 March letter. He did say however of the claimant's claims that he considered them " … *entirely spurious and quite possibly fraudulent in the same insurance context as 'crash for cash, whiplash*". The Decision letter followed as I have explained earlier.

Wednesbury Stage 1

93. Mr Kramer submits that in material respects, the defendant failed to take account of relevant facts and matters and/or took account of irrelevant facts and matters. Mr Pooles submits that on analysis this is not correct but even if it is it could have made no difference to the outcome. Mr Pooles submits that the decision taken by the defendant was one that it was fully entitled to take. As I have explained, this last point necessarily depends on whether Mr Kramer is correct in his primary submissions concerning the first stage of the Wednesbury test.

94. In essence, Mr Kramer submits that Mr McKechnie failed to take account of matters that he ought to have taken into account because:

(a) He failed to bear in mind when considering whether to avoid that it is inherently more probably that a misrepresentation has been made innocently or negligently rather than dishonestly in arriving at an evaluative conclusion based on the whole of the material that the decision maker ought to take into account;

(b) He failed to take account of the fact that Mr Linsley's conduct was consistent with a belief that the objection to sub-prime lenders did not apply to commercial as opposed to residential lenders as exemplified by:

(i) Mr Linsley informing the defendant concerning the valuations of Camblesforth Hall which were in excess the maximum permitted by the Policies. This valuation had been carried out for the claimant and Mr Linsley could only have informed the defendant because he expected that the defendant would provide cover if there was a claim, which it was submitted was consistent only with a subjective belief on the part of Mr Linsley that in principle undertaking work for the claimant was permitted;

(ii) Mr Linsley notifying the Waterman claim;

(iii) Mr Linsley seeking the agreement to CLS joining the ASTL panel before doing so; and

(iv) Mr Linsley's explanation as to why the claimant's claims were not reported to the defendant timeously was consistent with a genuine belief that in the circumstances he was not permitted to do so by reason of the on-going police investigation.

It is necessary to look at each of these points in turn.

95. In my judgment there is significant force in the submission that in arriving at a conclusion Mr McKechnie failed to approach the dishonesty issue with an open mind or bearing in mind that it was more probable that a misrepresentation has been made innocently or negligently rather than dishonestly. This was apparent from a number of answers given in the course of cross examination. So for example there was the following exchange in relation to the Waterman claim issue:

> "Q. That CLS has just notified you and therefore told you about a valuation of a non-clearing bank commercial loan of 3.5 million and that shows they are not hiding it?
>
> A. True.
>
> Q. Is this the first time you have thought of that?
>
> A. No, at the time they had obviously notified us and the notification includes details of what they were getting involved in.
>
> Q. Did you not when you saw that think, and when you came to consider whether they were fraudsters, think, "Well, they obviously were not hiding Waterman even though they never mentioned it in their answer to the risk profile and the emails, etc."?
>
> A. If you're referring to the correspondence that happened after this notification came in ...
>
> Q. No.
>
> A. You're not?
>
> Q. I am saying, when you are coming to consider whether they are a fraudster, which was a job you had to do ...
>
> A. Later down the line, yes.
>
> …
>
> Q. So, you therefore knew that - forget about UKAF for a moment and these other ones - Waterman was not being hidden by earlier answers saying, "Subprime, Northern Rock, TIUTA ..." and they did not mention Waterman, but it cannot have been a deliberate hiding because they would not have notified later?
>
> A. I think that's a fair comment." [Emphasis supplied]

I consider this exchange a telling one because it suggests that in truth Mr McKechnie had not considered this point at all. Whilst this is not a point that was made by or on behalf of CLS either in the 12 March letter or in response to the Decision letter, it is a point that was apparent simply from an objective reading of the communications between the CLS, its brokers and the defendant. It is a point that it is much more likely would have been considered by Mr McKechnie had he been approaching the issue of whether the misrepresentations and non-disclosures that were a concern were more probably made innocently or negligently rather than dishonestly. Mr McKechnie's acceptance that the point was fair comment, his comment a little later that the decision to avoid was not based on work being undertaken for Waterman alone (T3/223/19) and his acknowledgement that he had not taken into account Mr Kramer's point concerning

the relevance of the Waterman claim as part of his assessment (T3/224/15) shows entirely clearly that the point made by Mr Kramer had not been considered at all.

96. That is significant for two reasons. First it demonstrates that Mr McKechnie had not been approaching the dishonesty issue as he should have been and secondly that he recognised that the Waterman point being made by Mr Kramer was one that was material to the assessment of whether Mr Linsley had been dishonest in not disclosing the commercial work being undertaken for lenders other than clearing banks and building societies. Weight is ultimately a matter for the decision maker subject to an overall rationality assessment required at Wednesbury stage 2 but the failure to take account of a material point and to approach the material in the wrong way is a breach of the standard required by Wednesbury stage 1.

97. The failure to approach the dishonesty issue as it should have been is further illustrated when Mr McKechnie was asked about Mr Linsley's response in relation to the Waterman issue as set out in the 12 March letter:

> "But you already know that he has volunteered it on notification.
>
> A. Yes. Well, I am not sure - I accept we have the information but he has only volunteered it because he has got a claim relating to it. Now, had he not had the claim, I suspect we would never have found out.
>
> Q. The point is this: it is not whether you would have found out, it is whether he has deliberately kept it from you. That is the point you have got to get to in your investigation of the fraud. Yes?
>
> A. Okay.
>
> Q. Yes?
>
> A. Yes."

A little later in this section of the cross examination there was an exchange between Mr McKechnie and Mr Kramer concerning Mr Linsley's failure to disclose the Waterman claim in the renewal documentation as well as making a claim, with Mr Kramer suggesting that this was more consistent with sloppiness that dishonesty. It is illustrative of the same approach apparent from the earlier answers:

> "Q. … So sloppiness, carelessness, whatever you want to call it, but not deliberate, on this Waterman point alone. Yes?
>
> A. I would have to disagree with that.
>
> Q. Tell me why.
>
> A. Because everything we have seen from this insured, he has never, ever given us a clear answer to anything.

> Q. I am asking you to do your job in this situation, which is to evaluate all the evidence.
>
> A. Mm.
>
> Q. So what I am saying is I am relying on some things you know. You have got to work out: is this guy a bit messed up about his admin and does not know whether his head on, or is he a liar? That is what you have to decide. Correct?
>
> 5 A. Yes.
>
> Q. So one piece of information you have, and you have not been able to explain it any other way and you agreed with me, is that it makes no sense to notify if you are deliberately hiding the risk, because you do not think it is going to be covered, in fact you think it is going to explode your policy. Yes?
>
> A. I think the difficulty I have got with this, nothing this insured did ever made any sense."

In summary therefore, these exchanges (and another to similar effect at T3/238/5-7) show that Mr McKechnie's approach (if he had considered the point at all, which in my view he had not) would have been to dismiss it as simply showing that what Mr Linsley was doing made no sense. This reflected too in this exchange concerning the same issue:

> "A. But I think that suggests there is some logic in what the insured was doing, and I am not sure there was, ever.
>
> Q. He is a clumsy fraudster. Is that what you are saying?
>
> A. Yes."

That approach is wrong – it assumes that the real intent was dishonestly to conceal the fact that commercial valuation work was being undertaken for lenders that were not clearing banks or building societies rather than testing whether that was so by reference to conduct that was apparently inconsistent with that intent. This evidence makes it very difficult to conclude that the outcome would have been the same had this issue been approached correctly.

98. I turn next to the reporting of the claimant's claims against CLS to the defendant. As I have already noted that was an issue that Mr Linsley had been asked about in the 12 March letter and which formed part of the reasoning leading to the decision to avoid as set out in paragraphs 5.1 and 6.4 of the Decision Letter. The issue that mattered was the delay in reporting the claims, which had the effect of concealing the fact that CLS had been undertaking work for the claimant for far longer than if the claims had been reported to the defendant timeously as they should have been. Mr McKechnie was asked about his approach to this issue in the following exchange:

> "Q. As regards the explanation that the police told him to leave the matter with them for investigation and that's why he didn't

> notify you for those initial months, you didn't have any reason to doubt that, did you?
>
> A. Um, I didn't doubt what he was saying, but I don't know, that didn't in my mind mean he shouldn't have told his insurance company. Because I would have thought in those circumstances he would have wanted the backing of his insurers, rather than being left to deal with it himself. So, I hear what he was saying --
>
> Q. Yes.
>
> A. -- but to my mind all the police investigation was just noise and it didn't prevent him from notifying his insurers. He could have at least picked up the phone and spoken to his broker and said, "I've got an issue but I can't talk about it", or whatever, but he didn't do anything."

In my judgment this is significant to the issue I am now considering because it shows that the ultimate issue – whether the misrepresentations and non-disclosures relied on were dishonest – was not being approached on the basis that were more probably made innocently or negligently rather than dishonestly. The question that had to be asked was not whether the police investigation objectively prevented Mr Linsley from notifying his insurers or brokers (almost certainly it did not) but whether in fact Mr Linsley did not notify the claims for that reason. This wrong approach is reflected in the following further answers on this issue:

> "A. No, I don't think so. I appreciate we had the details, but I couldn't get away from the fact that we were dealing with a professional here. He wasn't a layman who didn't have any experience of insurance. He was a professional surveyor. Prior to, let's say, yes, prior to the summer of 2013 he'd already had previous claims with us. He was familiar with insurance. He knew what his obligations were. So, no, I didn't make any inquiries to the police, but my issue was: why did the insured not tell us? And I appreciate he's explained why, I've just not accepted it.
>
> Q. In the sense that you thought it was a bad reason or you didn't think it was his reason?
>
> A. A bit of both, I suppose. It wasn't a good reason.
>
> Q. So, it might have been his genuine reason, but not actually a very good explanation for someone like you or me.
>
> A. Yes, he obviously was told by the police whatever he was told. He understood he couldn't speak to anybody about it.
>
> Q. Yes.

> A. I suspect the police didn't mean his insurers. He obviously assumed that's what it meant, but given his experience I didn't accept that as an explanation"

This approach was confirmed by the following exchange:

> "Q. Hasn't he not just told you why he didn't tell us? Because he thinks he's told the police and he understands that they are saying leave it with us in the sense of don't tell anyone else, this is a fraud investigation, and he's taken, as you have just said to me, he's taken don't tell anyone else to mean don't tell my insurers. You might think that's not very logical for a professional person.
>
> A. Yes.
>
> Q. But that's not really the question. That's what he seems to think.
>
> A. Yes, but, as I say, as I said earlier, he's a professional surveyor. He knows about insurance. So that may be his reason, but I don't accept it."

These exchanges shows a very clear confusion between an objective assessment as to whether what Mr Linsley did was objectively justifiable with what his subjective but genuine belief was. Mr McKechnie's conclusion that Mr Linsley had "*obviously assumed*" that the police advice extended to reporting the claims to insurers or seeking advice from brokers is consistent only with that being the reason. Mr McKechnie's view as to whether that was objectively justifiable was immaterial. Thus his approach to this issue failed to give effect to the requirement that the dishonesty issue be assessed on the basis that the misrepresentations and non-disclosures were more probably made innocently or negligently rather than dishonestly and also involved taking into account something that was immaterial – Mr McKechnie's conclusion as to whether Mr Linsley's view was objectively justifiable – and a failure to take account of something that was material – namely that Mr Linsley had obviously assumed that the police advice extended to reporting the claims to insurers or seeking advice from brokers.

99. There are other examples that support the same point – that is a failure to approach the dishonesty question in the correct manner and taking into account material considerations in arriving at a conclusion as to Mr Linsley's honesty in relation to the misrepresentations and non-disclosures relied on. I have mentioned earlier in this judgment a claim by Barclays against CLS. There was a delay by Mr Linsley in dealing with it after it was passed to him by CLS's office administrator. This issue did not feature in the Decision Letter but Mr McKechnie was asked about it. The relevant cross examination covers a number of pages of transcript. However the following exchange demonstrates the problem:

> "A. … I don't think, as I say, this was at the beginning of when things started to unravel. I think this demonstrated the insured, how can I say it, I think this demonstrated the ... I think this was the first part that made me think about the insurers, I suppose for want of a better word, a moral hazard, and all the things that

> have happened since then just made me firm up on the fact that I think he's a bad moral hazard.
>
> …
>
> Q. I can see you might treat even the Barclays alone and then maybe Waterman and whatever are showing he's a shambles and you don't want to insure him because you can't trust his systems, you don't really like the way he does business.
>
> A. Yes.
>
> Q. I can understand that and I can understand you saying: I have had your police explanation and it's a bad reason in the sense of a real professional shouldn't be thinking that way. I understand that and that's what you have said.
>
> A. Yes.
>
> Q. But what I am trying to step onto is the question of whether he is, forget moral hazard, whether he is lying to you, whether he specifically lied to you in the 2013 renewal and lied to you in the 2014 renewal. And what I want to suggest to you is that anyone properly engaging with the task of investigating fraud must accept that someone who is shambolic is quite likely not to be a fraudster.
>
> A. I don't see why you can't be both.
>
> Q. He could be both. You're right, he could be. But given that it's inherently unlikely that anyone is a fraudster, most people are not, you accept?
>
> A. Mm.
>
> Q. And do you take into account that inherent unlikelihood when you are valuing it? Do you have a scepticism about the idea of fraud?
>
> A. Yes, I think you have to bear in mind we didn't come to this conclusion lightly. We took some time over it and this Barclays notification was a relatively small piece of the jigsaw that made us, you know, conclude the decision that we made."

This is significant for a number of reasons. First, as Mr Kramer suggested in the course of this part of his cross examination and Mr McKechnie appeared to accept, this approach is not consistent with that which must be taken when considering allegations of dishonesty and secondly, it was an acknowledgement that albeit to a minor extent Mr McKechnie was influenced by the late reporting of the Barclays claim. Although this is a relatively minor issue, again in my judgment this issue was immaterial to an assessment of Mr Linsley's honesty, which was the issue that had to be decided. It was

not suggested that this was reported late in order to avoid it impacting on a renewal application (as had been alleged in relation to the Waterman claim) or that it was to disguise work being undertaken for lenders other than clearing banks. The point was one that was entirely immaterial to the issue to be resolved.

100. The issues that it was submitted should have but were not taken into account at the start of this section of the judgment include ones that I have alluded to already. Of these, I need say little more about the Waterman claim. I have explained why I consider Mr McKechnie's approach demonstrates a failure to approach the dishonesty issue in the manner required by Braganza. The issue that the claimant relies on in relation to the Waterman claim is plainly material because in submitting this claim in the middle of the renewal process is not consistent with a belief that it could impact on the renewal process. This is so because although in fact it did not come to the attention of those within the defendant undertaking the renewal process, neither Mr Linsley or his brokers could have known whether that would be so or not. I fully accept that Lycetts should have referred underwriters to the claim. However, that they should have done does not lead even arguably to the conclusion that it is to be inferred that they did not do so deliberately. Further, there is no evidence of any contact between Lycetts and Mr Linsley that suggests notification of the claim should be delayed nor any evidence from which it can be inferred that was every contemplated.

101. I accept that similar considerations apply to the notification to the defendant concerning the valuations of Camblesforth Hall. There was a debate of detail during the trial as to what precisely the effect was of the information supplied but that is largely immaterial. The only reason for notifying the information was to ensure that any claim was within the scope of CLS's insurance policy. Since the valuation had been carried out for the claimant, this conduct is not consistent with Mr Linsley thinking that carrying out commercial valuation work for the claimant would not be covered. It is consistent with CLS conducting itself so as to ensure that it maintained the appropriate cover at all times.

102. Similar considerations apply to the ASTL issue referred to earlier. This panel is accepted by Mr Pooles in his oral closing submissions to be concerned with residential lending. Mr Linsley has always accepted that there was an issue concerning residential valuation work for non-high street lenders. It follows that his conduct in relation the ASTL opportunity was entirely consistent with that professed understanding.

103. This issue starts with an email of 12 January 2011 from Lycetts to the defendant by which it informed Mr Burgess that CLS:

> " … have been given the opportunity to join the Association of Short Term Lenders which will provide them with more work. Could you please confirm whether you are happy for our client to proceed, and if so, are there any PI implications?. Our client has provided the link below, which sets out the Association lender members;"

This produced a response from Mr Burgess enquiring whether panel membership would mean CLS being involved with sub-prime lenders. Lycetts responded quoting its instructions from CLS by Mr Linsley:

> "The Association of Short Term Lenders panel work does not affect maximum valuation threshold. The instructions would be predominantly for short term bridging and second charge secured loans, with the particular lenders listed on the ASTL website http://www.theastl.org/index.html.
>
> The average valuations would be low in comparison with our High Street Bank panel instructions. We would only consider taking this appointment if it did not affect our professional indemnity insurance terms and policy"

Mr Burgess's response by email of 31 January was

> "For the avoidance of doubt we are writing the risk on the basis that there is no sub-prime exposure and there won't be any going forward. Should this not be the case then we will need to have full details and our terms will not stand."

In consequence, CLS did not join the relevant panel.

104. However, Mr Kramer's submits that Mr Linsley's conduct in relation to this issue should have been taken into account in arriving at a conclusion concerning avoidance, because, as he puts it, it is "…*an independent documented test of character and approach directly relevant to the allegations made against CLS and CLS passed the test: When it occurred to CLS that [the defendant] might not be happy with work CLS wanted to do … it contacted [the defendant] before taking on the work, asked [the defendant's] view and then when [the defendant] said it did not want to write that risk CLS did not take on that work"*. This postdates the commencement of work by CLS for the claimant. Mr Kramer submits that it shows that if Mr Linsley had subjectively thought that the claimant would not be acceptable to the defendant as a lender he would have asked before undertaking the work.

105. Mr Kramer asked Mr McKechnie in cross examination whether he accepted Mr Linsley's response in relation to this issue as set out in the 12 March letter. His initial response (T4/40/24) was that he had formed no view about the response, then that he did not believe anything in Mr Linsley's responses to the letter (T4/41/5-10) before he was then taken through the emails or some of the emails referred to above and then the follow exchange took place:

> "Q. … Now, on the panel point, you have no reason to think that they joined the panel and didn't tell you?
>
> A. Based upon those emails, I'd assume they didn't, yes"

In relation to the suggestion that this was material to an assessment of dishonesty, Mr McKechnie said this:

> "Q. Does that not suggest that that's what they generally would have done if they were doing work that they thought you wouldn't like?

> A. It suggested it on this occasion, so I would then ask, if they knew they were doing something that we might have an issue with, why didn't they ask us about everything else.
>
> Q. Because they didn't think you had an issue with it. Is that not an obvious explanation?
>
> A. It could be one explanation. It doesn't mean it's the explanation.
>
> Q. Okay, but this piece of information about the ASTL panel and the way they approached it, that wasn't put forward to your superiors as a thing for them to take into account, was it? You didn't mention it?
>
> A. ASTL, the panel? No. I didn't think this - I appreciate it's in the - I think it maybe referenced in a letter but I don't think it was - I think it was a minor point. It wasn't the crux of the issue.
>
> Q. Okay. Well, you will see why I say it's quite important because it shows what sort of person we are dealing with, how they approached issues of risk and whether they hide things and it's all in their favour from this experience. You accept that?
>
> A. No."

This exchange shows that this issue was left out of account by Mr McKechnie in his assessment of dishonesty in relation to the relevant disclosures even though he was aware of the issue because he asked about it in his 12 March letter. Why he asked about the issue is unclear. It may have been because it was thought that CLS had joined the panel notwithstanding the defendant's indication that it would not cover risks arising from such work. Be that as it may, the response when read together with the emails to which Mr McKechnie was taken by Mr Kramer begs the question why Mr Linsley would dishonestly misrepresent the position in relation to the claimant whilst fully and frankly disclosing the position (after accepting instructions from the claimant) in relation to the ASTL panel opportunity.

106. It is submitted by the claimant that Mr Linsley's conduct in the invitation to join the ASTL panel is not consistent with him dishonestly hiding the fact that CLS is undertaking work for the claimant. In my judgment this is superficial and simplistic. First, by the time this issue arose, CLS was carrying out significant amount of work for the claimant. There is no evidence as to what if any amount of income would result from the ASTL panel. Secondly, being on the ASTL panel was a matter of public record because who was on the panel was apparent from its web site. That was not the case in respect of the claimant. Thirdly, the ASTL panel appears to have been concerned with residential valuations. Mr Linsley's evidence is that by this stage CLS had ceased carrying out residential valuations. It is thus unlikely that Mr Linsley would have any real interest in carrying out such work. Nonetheless weight is a matter for the decision maker. The issue is one that should have been considered because it was consistent with Mr Linsley's case that a distinction was to be drawn between residential and commercial valuation work. Nonetheless weight is a matter for the decision maker. The issue is one

that should have been considered because it was consistent with Mr Linsley's case that a distinction was to be drawn between residential and commercial valuation work.

107. I have asked myself whether I could safely conclude that the outcome would have been the same had the errors to which I have referred not been made. I am not able to reach such a conclusion. The errors to which I have referred (and in particular those concerning approach referred to at paragraph 95 and following) permeate the whole of the decision making exercise, which on analysis consisted of little more than a reference to the falsity of the representations coupled with the fact that at the time they were made, CLS was carrying out commercial valuation work for lenders other than clearing banks and building societies. Whilst I do not suggest that ultimately a defensible decision to avoid cover could not be made, in the circumstances it had to be one that considered the points relied on by Mr Kramer, considered the consistency of those points with Mr Linsley's claimed understanding that the defendant's objections to sub-prime lenders was confined to residential lending and omitted any consideration of those points that I consider were immaterial to the decision that had to be made.

108. I have considered whether notwithstanding the conclusion set out above I could safely conclude that the decision was nonetheless one that the defendant could safely arrive at. I have concluded that is not a proper outcome not least because of the conclusions I have set out in the previous paragraph. As I explained earlier it is difficult to see how a decision could be one that a decision maker was entitled to arrive at if in arriving at that decision, the decision maker has taken account of factors that should not have been considered or failed to take account of factors that ought to have been considered.

109. At the hand down of this judgment I will invite submissions from counsel as to the form of the order that should follow from these conclusions.

110. Finally I would wish to record that whilst I have been critical of the decision making in this case none of this should be read as a personal criticism of Mr McKechnie. He was placed in an invidious position because as far as I can see he was not trained in how to approach decision making of this sort nor was there any guidance for him to follow in the defendant's claims handling manual as to how issues of this sort ought to be approached. Once it is accepted that clauses such as the UND clause in this case are qualified by a Braganza duty, the decision making to be applied will need to be much more focussed than has perhaps been the case in the past.