Neutral citation number: [2021] EWHC 2831 (Comm)

Case No: LM-2019-000175

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

THE LONDON CIRCUIT COMMERCIAL COURT (QBD)

SHORTER TRIALS SCHEME

Date: 22 October 2021

Before :

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

THE HUNTSWORTH WINE COMPANY LIMITED	**Claimant**
- and -	
LONDON CITY BOND LIMITED	**Defendant**

- -
- -

MR DANIEL BENEDYK (instructed by **KEYSTONE LAW**) for the **Claimant**

MR MARK STIGGELBOUT (instructed by **AARON & PARTNERS LLP**) for the **Defendant**

Hearing dates: 19, 20, 21 July 2021
Written Submissions from the Claimant: 6 and 20 August 2021
Written Submissions from the Defendant: 30 July 2021 and 20 August 2021

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JUDGMENT

This judgment was handed down in private at 10.00 on 22 October 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Pearce :

Note: Within this judgment, I use the electronic pagination from the trial bundle, not the typed pagination in the bottom right hand corner of the pages. As I indicated during the trial, it is inconvenient to have two separate numbering systems for the same pages in the bundle. For the sake of clarity, the electronic pages are preceded by the letter E.

A. INTRODUCTION

1. This claim relates to the theft of high quality wine owned by the Claimant and stored by the Defendant.

2. The Claimant is a wine dealership operating from a shop on Kensington Church Street. Mr Anthony ("Tuggy") Meyer owns 97.5% of the shares and is its sole director. Its business includes purchasing wine *en primeur*, that is to say buying the right to receive a certain number of bottles of a vintage wine once the wine is bottled, both on its own behalf and on behalf of customers. The wine will typically be stored in a bonded warehouse facility until it is required. This may be many years later. Duty and VAT only become payable when the wine is taken out of the bonded warehouse, an attractive feature of bonded warehousing.

3. The Defendant operates a series of bonded warehouses for the storage of alcoholic drinks in bond. For a fee, it stores alcoholic beverages in a series of warehouses. As at the time of the events with which this case is concerned, 2018, the Defendant operated warehouses at Barking, Tilbury, Glasgow, Wiltshire, Cambridgeshire (one at Linton and one at Sawston) and Burton-upon-Trent.

4. From October 2018, the Claimant stored wine at the Defendant's warehouse in Linton, Cambridgeshire ("the Warehouse", or, where it is necessary to distinguish it from other warehouses, "the Linton Warehouse"). The first consignment of the Claimant's wine that were stored there was delivered by a delivery company called Wineflow Freight Forwarding in three batches on 5 October 2018, 18 October 2018 and 2 November 2018. This wine, which included *en primeur* wine, was less valuable than other *en primeur* wine that the Claimant had stored already with EHD, another bonded warehousekeeper, at its premises in Sunbury-on-Thames. The wine delivered in October/November 2018 has been called the "Wineflow Wine" and I shall adopt that name. It was not the subject of the theft referred to below.

5. On 1 February 2019, the Defendant collected a number of wooden cases of the Claimant's higher value *en primeur* wine from EHD in Sunbury. The wine was taken first to a warehouse in Barking, known as the Olympus site, where it was stored over the weekend before being sent to the Linton

Warehouse. It arrived at the Warehouse and was stacked on shelving in a mezzanine area. This wine has been called the "Subject Wine" and again I shall adopt that name.

6. A quantity of the Subject Wine was then stolen from the Linton Warehouse, in a burglary that occurred over a period of some 6 hours and 15 minutes between 6.30pm on (Saturday) 9 February 2019 and 12.45am on (Sunday) 10 February 2019. This part of the Subject Wine has been called "the Stolen Wine", a phrase I shall yet again adopt.

7. It is the Claimant's case that the Defendant is liable for losses caused by the theft on one or more of several grounds:

   a) That the Defendant is liable as bailee since it is unable to discharge the bailee's duty to show that the loss was not caused by a failure on its part to take reasonable care of the Stolen Wine;

   b) That the Defendant is vicariously liable for the torts of one or more of its employees who were involved in assisting the theft;

   c) That the Defendant was guilty of deviation in the bailment, the result of which is to make it strictly liable for the Claimant's loss;

   d) That the Claimant entered into the contract of bailment in reliance upon fraudulent misrepresentation and/or deceit on the part of the Defendant's employees, which misrepresentation/deceit is causative of the Claimant's loss.

8. The Defendant denies liability on a series of grounds:

   a) That the theft took place notwithstanding that it took reasonable care of the Stolen Wine;

   b) That the evidence does not support the assertion that one or more of its employees were involved in the theft;

   c) That, even if the court finds that one or more of its employees were involved in the theft, the Defendant is not vicariously liable for their actions;

   d) That in any event, even if the Defendant would without more be liable, either through the want of exercise of reasonable care or vicarious liability for its employees, such liability is excluded by the terms of the contract of bailment;

   e) That even if the Defendant is liable on the grounds of want of reasonable care and /or vicarious liability for the acts of its employee(s) and the exclusion clause is not effective to exclude such liability, its liability is limited pursuant to the terms of the contract between the parties;

   f) That the Defendant cannot prove fraudulent misrepresentation and/or deceit;

g) That even if fraudulent misrepresentation and/or deceit were proved, the Claimant did not enter into the contract in reliance on them and therefore they were not causative of the Claimant's loss;

h) That even if the Claimant otherwise were able to make out actionable claims in fraudulent misrepresentation and/or deceit, such claims are time barred;

i) That the Defendant is entitled to counterclaim for duty that it has had to pay on the stolen goods.

9. There are also issues as the quantum of the Claimant's case, the value of the Stolen Wine not being admitted and the incidence of VAT being disputed.

B THE TRIAL

B1. The Conduct of the Litigation

10. The case was issued in the London Circuit Commercial Court on 5 September 2019. By order of His Honour Judge Pelling QC dated 16 July 2020, the case was transferred to the Shorter Trials Scheme.

11. The trial was listed for three days starting on 19 July 2021.

12. The Claimant called Mr Tuggy Meyer as its sole witness of fact. During the course of the trial, I was invited to rule certain passages in Mr Meyer's evidence to be inadmissible as expert opinion. For reasons given at the time, I ruled the following passages to be inadmissible on this ground:

a) Paragraph 23: the words "*including generic security information."*

b) Paragraph 24, first sentence: the words "*I know it is the absolute norm"* on the basis that, if Mr Meyer confirmed the alternative wording "*it is normal"* in evidence, I would admit the sentence as modified. He duly did so and that sentence is admitted in evidence as varied.

c) Paragraph 24, second sentence: the words "*standard known features."*

d) Paragraph 48: the words *"and from which I knew (from the things described above) to be adhering to minimum generic standards of security procedures."*

13. The Defendant relied on the following witnesses of fact, of whom all save Mr Ward gave oral evidence.

a) Mr Alfred Allington, Managing Director of the Defendant;

b) Mr Colin Harmer, Warehouse Operator for the Defendant;

c) Mr David Hogg, Sales Director of the Defendant;

d) Mr Thomas Hole, Web Designer and Developer at Stirtingale Ltd;

e) Mr John Lambourne, Cambridge Operations Manager for the Defendant;

f) Mr Steven Pattison, Security Manager for the Defendant;

g) Mr Michael Stone, Director of the Defendant;

h) Mr Peter Ward, Chief Executive of UKWA Ltd.

14. During the course of the trial, it became apparent that there was insufficient time to accommodate oral submissions in the trial estimate. I was conscious that it is important that the benefits of efficiency and economy that the shorter trials scheme can bring must not lead to corners being cut in a way that is inconsistent with the overriding objective of dealing with cases justly and at proportionate cost (as noted by Carr LJ in EMFC Loan Syndication LLP v The Resort Group plc [2021] EWCA Civ 844). Accordingly, I directed the service of written submissions from each party, with each party having the opportunity to file submissions in response to the other's. Both parties availed themselves of this, with the submissions being served during July/August 2021. In each case those written submissions refer back to the relevant party's written opening and hence I have reread those for the purpose of preparing this judgment.

15. Whilst I was engaged in drafting the judgment, I received an email sent on 3 September 2021, by which the Claimant invited my comments on whether I was willing to entertain the possibility of the admission of fresh evidence. As I indicated in a note to the parties at the time, it was a matter for the Claimant whether it made such an application, but I was not in a position to say whether the potential fresh evidence was likely to have any significance for the findings of fact that I needed to make to resolve the case. In the event, the proposed evidence would not have affected my decision for the reasons given below and I did not invite further submissions from the parties on how I should deal with the issue.

B2. The Witness Evidence in Broad Terms

16. It has been customary to commence judgments, especially in the commercial field, with warnings as to the potential unreliability of witness evidence. The judgment of Lord Leggatt in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 as further considered in Blue v Ashley [2017] EWHC 1928 provides important cautions as to the oral evidence of witnesses, in particular in commercial cases. Similar concerns have led to the adoption in the Business and Property Courts of Practice Direction 57AC "Trial Witness Statements in the Business and Property Courts," and the associated "Statement of Best Practice in Relation to Trial Witness Statements".

17. Further, in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ1413, at §48, Males LJ said:

> "*In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."*

18. That is not to say that the court may or should simply dismiss witness evidence when it is inconsistent with documents. As Floyd LJ said in Kogan v Martin [2019] EWCA Civ 1645, "*a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence.*"

19. The limits of the principles set out in Gestmin were also considered by the Court of Appeal in NatWest Markets v Bilta [2021] EWCA Civ 680:

> *"50. In a case such as the present, where the events in question took place over 9 years before the trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in Gestmin SGPS SA v Credit Suisse UK Ltd [2015] EWHC 3560 at [22] and Blue v Ashley [2017] EWHC 1928 at [68] are pertinent. It was therefore of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so.*
>
> *51. We say, "if and to the extent that it was possible to do so", because it is important to bear in mind that there may be situations in which the approach advocated in Gestmin will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented...*
>
> *52. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."*

20. I bear these matters in mind when considering the witness evidence. The factual issues in this case are in reality fairly narrow. Both sides are critical of the witnesses called by the other. In fact, whilst I saw some tendency by witnesses on both sides to play up the points they thought suited their case, and in the case of the Claimant's witness, Mr Meyer, I found some points where his evidence was probably wrong, I did not consider that any of the witnesses was trying to

mislead the court. All made sensible concessions and none seemed determine to fight their party's corner regardless of their duty to tell the truth. In that respect, the trial was by no means typical for the Circuit Commercial Court.

B3. The Issues

21. The trial bundle contained the usual list of issues prepared for case management purposes (E14). As is typical in litigation, the issues had been refined and to some extent narrowed by the time of the trial. Counsel for the Defendant summarised the issues as he saw them in his written opening. With some slight adjustment to that list, I identify the issues as follows:

a) Liability Issues on the Claim

(i) Issue 1: Was there a contract on United Kingdom Warehousekeepers' Association ("UKWA") terms with a £1,000 uplift of liability?

(ii) Issue 2: Did the Defendant fail to take reasonable care of the goods?

(iii) Issue 3: Was the theft carried out with the Defendant's employees' complicity?

(iv) Issue 4: Is the Defendant in principle vicariously liable for any complicity by its employees?

(v) Issue 5: Is the Defendant's potential liability pursuant to Issues 2 and/or 4 in principle excluded by the UKWA terms?

(vi) Issue 6: Is any exclusion of liability ineffective because of deviation from the contractual obligations?

(vii) Issue 7: Was the Claimant induced to contract by a fraudulent misrepresentation/ misstatement by the Defendant that CCTV was monitored at reasonable intervals?

(viii) Issue 8: Are the misrepresentation/misstatement claims time barred?

b) Quantum Issues on the Claim

(i) Issue 9: Is the Defendant entitled to rely on the limitation of liability?

(ii) Issue 10: What was the value of the goods stolen?

(iii) Issue 11: Is the Claimant entitled to recover VAT?

c) Issues on the Counterclaim

(i) Issue 12: Is the Claimant liable to reimburse the Defendant for excise duty?

C. THE EVIDENCE

C1. The parties' relationship

22. The Claimant had historically used a number of bonded warehouse facilities, including those of the Defendant. However, in 2018, the Claimant was using the facilities of EHD at Sunbury-on-Thames. Mr Meyer stated that, by then, he had become dissatisfied with EHD's services, largely as a result of personal issues with one of the owners of EHD.

23. In June 2018, Mr Meyer approached the Defendant with a view to transferring the Claimant's stock to one of their bonded facilities. The Defendant responded by email dated 7 June 2018, attaching a letter of the same date (E496 – E521). The letter identified that the Defendant had premises at eight locations (including Linton, of which Mr Meyer says he had not previously been aware) proposing that the Claimant's goods be held at the Global warehouse at Burton-on-Trent. It stated, "*All our sites are protected by extensive CCTV systems which cover operations on a 24/7 basis. A variety of monitoring measures are in place and are backed up by our own Company Security Manager."* This statement forms part of the Claimant's case in fraudulent misrepresentation/deceit and has been called "the Letter Representation", a term adopted here. The letter also stated that the Defendant's services are provided "*under the trading terms of the United Kingdom Warehousekeepers Association (UKWA) for warehousing and the Road Haulage Association (RHA) for distribution. In addition,* [the Defendant] *will increase our limit of liability to £1,000 per any single incident if the standard terms are lower than this amount. Copies of the UKWA & RHA Terms & Conditions are enclosed with this letter*."

24. The letter enclosed the UKWA Contract Conditions for Logistics (E508) and RHA terms and conditions (E514), as well as a specimen letter (what the Claimant has conveniently called "the Insurance Liability Letter") to be completed by the customer/bailee which acknowledges receipt of the UKWA and RHA terms and conditions of trading, acknowledges that the Defendant's services were being provided on those terms, makes reference to an uplifted level of liability of £1,000 and asserts an understanding that it is appropriate to arrange insurance to cover the value of the goods inclusive of duty "*in order to cover loss not covered by* [the Defendant's] *level of liability"* (E507). Other documents were attached for the Claimant to complete – a trade account application form, a direct debt form and an HMRC form in relation to an application for economic operation registration and identification. It is common ground that the Claimant did not complete and return any of those documents.

25. The letter of 7 June 2018 identified four ways in which an order could be placed (by email, fax, via the website of via an EDI link) and stated that "*in order to proceed with opening an account with us, we need to receive a completed application form, together with any of the following*

documents which may be applicable" – various documents are therefore listed, though the Insurance Liability Letter is not one.

26. The Claimant says that the passage from Letter Representation quoted above in relation to CCTV amounts to an assertion that CCTV at the Linton Warehouse is monitored around the clock. On behalf of the Defendant, Mr Hogg stated that he had drafted the letter in which the Letter Representation was made. It was a standard form letter, reviewed from time to time. He states that he had visited the eight sites mentioned in the letter and that each had CCTV, fire and burglar alarms. Some also had security guards. For example the Port of Tilbury has its own police force and security barriers. Mr Hogg stated that, by referring to CCTV systems which covered operations on a 24/7 basis, he did not mean to assert and was not asserting that the CCTV was being watched around the clock, but rather that the CCTV was recording what was going on, such that it could be reviewed later.

27. The UKWA Contract Conditions for Logistics (E508), enclosed with the letter state in the heading:

> *"**IMPORTANT NOTE***
>
> *CONDITION 3 LIMITS THE COMPANY'S LIABILITY. PLEASE READ IT CAREFULLY. It has been included to relieve the Customer of the additional amount that the Company would need to charge to recover insurance costs (or an amount in lieu to reflect risk) were its liability not limited as provided for in Condition 3."*

They go on, at Condition 3:

> *"**INSURANCE AND THE COMPANY'S LIABILITY***
>
> *3.1 Unless expressly agreed, the Company does not insure the Goods and the Customer shall self-insure or make arrangements to cover the Goods against all insurable risks to their full insurable value (including all duties and taxes). The insurance referred to in Condition 3.5 is insurance against the Company's potential liability for breach of its obligations and not to cover the Goods themselves against loss, damage, etc.*
>
> *3.2 Subject to Condition 3.3, the Company shall have no liability for Loss however arising.*
>
> *3.3 If and to the extent that Loss is directly caused by negligence or wilful act or default of, or breach of duty by, the Company, its employees (acting in furtherance of their duties as employees) or sub-contractors or agents (acting in furtherance of their duties as sub-contractors or agents) and subject to Conditions 3.4, 3.7 and 3.8, the Company will accept liability for Loss assessed on normal legal principles but not exceeding the Limit fixed by Condition 3.5. Any quantification of amount or value includes duties and taxes.*
>
> *3.4 In no case shall the Company be liable for any lost profit, income or savings, wasted expenditure, liquidated damages payable by or on behalf of the Customer, or indirect or consequential loss.*
>
> *3.5 In no case shall any liability of the Company (including inter alia any liability in respect of duties and taxes) exceed the Limit, fixed as follows:-*
>
> *3.5.1 The Customer may specify the Limit as an amount (in Sterling, US Dollars or Euros) per tonne weight of the Goods by notice in writing stating the Limit and the nature and maximum value of the Goods, including duty and taxes. The Limit nominated by*

the Customer shall apply in respect of any cause of action arising after the Date for so long as the nomination remains in effect. It is a condition of the contract that the Customer pays within 7 days of receipt the Company's invoices for its costs in insuring against its potential liability up to the Limit, and/or to the extent that the Company elects to carry the risk itself, its extra charge equivalent to the estimated or likely cost of such insurance.

3.5.2. If the Company having made reasonable efforts is unable to obtain insurance on reasonable terms to cover its liability up to the Limit nominated by the Customer, or if the Customer has not yet paid any invoice issued under Condition 3.5.1, the Company may give 3 working days written notice, and the Limit for causes of action arising after expiry of the notice shall be £100 sterling per tonne weight of the Goods.

3.5.3 Unless and until a higher Limit has been fixed under Condition 3.5.1 and continues in effect, the Limit shall be £100 sterling per tonne.

3.6 Without prejudice to the Company's rights under Condition 6 to be paid free from deduction or set-off, any limitation of liability on the part of the Company shall be applied to any claim by the Customer before any set off or counterclaim is asserted against money due to the Company.

3.7.1 The Company shall not be liable for any claim unless:

it has received written notice of it within 10 days of the event giving rise to the claim coming to the knowledge of the Customer or consignee; and

it has received, within 21 days of the event giving rise to the claim coming to the knowledge of the Customer or consignee, sufficient detail in writing to enable investigation. In the case of failure to deliver, time shall run from the first working day after the expected date of delivery.

3.7.2 No legal proceedings (including any counterclaim) may be brought against the Company unless they are issued and served within 9 months of the event giving rise to the claim.

3.8 The Company shall not be liable for any Loss to the extent that it is caused or contributed to by a breach of any of the Customer's obligations, or by a person for whom the Company is not responsible, or by any of the circumstances by virtue of which the Company is relieved of its obligations under Condition 8."

28. It should be noted also that clause 2.1.4, under the heading "Customer's Undertakings", states that the customer:

"will promptly after invoicing reimburse all duties, taxes and expenses that the Company may be required to pay in respect of the Goods including where the liability to pay them arises due to the fault, other act or omission of the Company or its employees or sub-contractors."

29. In an email response to the letter of 7 June 2018, Mr Meyer asked the Defendant whether it was in fact necessary to complete the paperwork – Mr Hogg on behalf of the Defendant replied that it was (E523). In fact, the Claimant did not do so.

30. Two things should be noted about the UKWA terms:

a) First, it was Mr Allington's evidence that these terms are "*standard within the warehousing industry and so create a level playing field"* (paragraph 6 of his first witness statement). These assertions were not challenged.

b) Second, Mr Meyer accepted in cross examination that he "*knew"* that the Defendant contracted on UKWA terms both because of this letter and because of communications with the Defendant in 2015 that referred to such terms. He further accepted that he was aware that clause 3.5.1 permitted the Claimant to obtain a higher limit of liability if he paid a higher cost. His recollection from reading the UKWA terms at the time (either on a website or elsewhere) was that in fact they contained two different financial limits on the liability of the warehousekeeper, albeit that he could not give the detail of these nor identify where this belief came from. He stated that he had never been told that there were circumstances in which the UKWA terms purported to exclude liability altogether.

31. Mr Meyer also accepted that, in stating in the solicitor's letter of 2 May 2019 at E990 that he had had a conversation with Mr Hogg in June 2018 during which storage at Linton was mentioned, he had got the chronology wrong. Whilst he thought that he had a phone conversation with someone from the Defendant in 2018 before the letter of 7 June 2018 was received, he had been wrong to say that the possibility of storage at Linton was raised then. Rather the discission had been about storage at the Defendant's facility in Burton-on-Trent. He accepted that the Linton Warehouse was not mentioned before the September phone call.

32. Following the communications in June 2018, Mr Meyer again contacted the Defendant in September 2018, at a time when he was about to take delivery of a consignment of stock from France as well as continuing to wish to move stock that he currently had stored with EHD. In particular, on 25 September, Mr Meyer spoke to Mr Hogg of the Defendant by telephone. The contents of this call are disputed.

33. Mr Meyer says that he had tried to call Mr Hogg earlier in the day but had left a message asking him to call back. Mr Hogg duly did so. In the call, on Mr Meyer's account, the following significant matters were mentioned:

a) Mr Hogg said that the LCB Global warehouse at Burton-on-Trent was no longer available and that any storage would need to be at the Linton Warehouse.

b) Mr Meyer, not being familiar with facility at Linton and wanting to know that it operated in the same way as the Defendant's other facilities including the Burton-on-Trent warehouse, asked about the security arrangements at Linton as well as how they handled stock.

c) Mr Hogg assured Mr Meyer that the all the arrangements at Linton were the same as at the Defendant's other facilities.

d) Mr Meyer said that he wanted to know "*from A to Z"* if Linton functioned in the same way as Tilbury and other facilities of the Defendant of which he was aware and Mr Hogg replied that it did.

e) Mr Hogg did not say that the Claimant's goods would be at risk at the Linton Warehouse or that the security arrangements there differed from those described on the Defendant's website.

34. In oral evidence, Mr Meyer added that Mr Hogg had said that the Claimant was "*in safe hands"* in going to Linton rather than Tilbury or the Global site and that they had agreed the parties were contracting on UKWA terms with a £1,000 limit. He said that he had agreed this on the assumption that Linton was a suitable bonded warehouse for high value wine and had trusted Mr Hogg. He said that the statement that the Claimant was *"in safe hands"* was the "*A to Z"* comfort that he was seeking. He added that, once he had this reassurance from Mr Hogg about the Linton Warehouse it was, in his word, "*paramount"* that he contact his insurance broker. The broker would deal with any concerns about security.

35. Mr Hogg's account of the conversation in his witness statement is:

a) Mr Meyer stated that he wished to proceed with storage with the Defendant but not at Burton-on-Trent (because of the distance from London);

b) Mr Hogg offered storage at the Linton Warehouse, with which Mr Meyer agreed;

c) There was discussion about the storage rates;

d) Mr Hogg explained that liability was limited to the first £1,000 of goods in storage and in transit, and that this was a change since the Claimant had previously used the Defendant's facilities.

e) There was no discussion about security arrangements at Linton, Mr Hogg not being aware of those arrangements and so being unable to speak about them in any event.

36. In cross examination, Mr Hogg was pushed on whether the discussion between Mr Meyer and he covered security matters. He said that, whilst Mr Meyer had asked whether the Linton Warehouse operated in the same way as other sites, they had been talking about the operational nature of the site's operation (how goods were delivered and retrieved) rather than security matters, which were outside of his knowledge. He thought he would have remembered Mr Meyer using the phrase "*A to Z*" if it had been used. He accepted that he had known that the CCTV for the Linton Warehouse was not being watched around the clock.

37. Later on the same day, Mr Hogg sent Mr Meyer an email (E608) referring to the discussion, the change of sites and stating, "*as discussed our arrangements with regard to insurance have*

changed and I can confirm that we will provide cover for up to £1,000 in respect of any claim." As the earlier letter, the email invited the Claimant to complete a letter acknowledging the limit of liability and the desirability of arranging insurance cover for the wine. Of the reference to having discussed the issue of insurance, Mr Meyer said that he did not recall insurance being discussed with Mr Hogg but that it may have been mentioned in passing. He acknowledged that it was raised in the correspondence.

38. Following these exchanges, Mr Meyer communicated with an insurance broker, Mr Steve Watts of Holgate Insurance Group. In an email dated 26 September 2018, Mr Watts stated "*I have discussed the enquiry with an insurer and they have advised that they glean from the information supplied that* [the Defendant] *insure for the goods at a rate per tonne (standard for hauliers/ warehousekeepers) and that you will need your own Goods in Transit/Storage Policy to provide cover for the full value of the goods. I have attached a questionnaire for completion in order to review further"* (E585). On 8 October 2018, Mr Meyer emailed Mr Hogg stating, amongst other things, "*I haven't yet got my separate insurance cover but have started the ball rolling with my Insurance Broker."* (E586). On 20 November 2018, Mr Watts was chasing Mr Meyer for forms relating to the insurance cover (E653). Mr Meyer states that he completed the relevant documentation and sent it to the broker. In the event, that package did not arrive and it became apparent following the theft that the Claimant did not have insurance in place in respect of the goods.

39. It should be noted that Mr Meyer said that his attention was never specifically drawn to the exclusion clause at Condition 3.2 of the UKWA standard terms. It is not highlighted in any letter and it is not the Defendant's case that Mr Meyer's attention was specifically brought to that clause.

40. As indicated above, the so-called Wineflow wine was delivered in October and November 2018. Thereafter the parties agreed that the Subject Wine would be collected from EHD's facility at Sunbury-on-Thames and transferred to the Linton warehouse. The stock was collected on Friday 1 February 2019. It was held at the Defendant's Olympus warehouse in Barking over the weekend then transferred to the Linton Warehouse on Monday 4 February 2019, safe receipt being acknowledged by email to Mr Meyer on 7 February 2019 (E708). However, at no time did the Claimant complete any of the documentation sent originally by the Defendant in June 2018, most particularly (for the purpose of the argument advanced by the Claimant), the Insurance Liability Letter.

41. Mr Hogg accepted in cross examination that he had not told Mr Meyer in their conversation about the use of Linton that goods would be transported via a Transit Warehouse such as Olympus. He

considered that there was nothing unusual or untoward in the fact that one was used here and he did not accept that it was necessary to communicate this to Mr Meyer.

C2. The Defendant's Website

42. It is common ground that, during the Claimant and the Defendant's dealings in 2018 and 2019, the following statement, which has been called the Website Representation (a term that I adopt without for the moment considering whether it amounts wholly or partially in law to a representation), appeared on the Defendant's website:

> "*Security*
>
> *With a dedicated team working under an ex senior police officer, our security is best in class. Each building is protected through integrated physical and electronic surveillance systems. All units have fire alarms which, coupled with the other protection devices, are subject to continual off site monitoring using Red Care/GSM communication technology to a central station. Data is backed up several times a day, and held off site in a separate security building."* (E1346)

43. The Particulars of Claim state that Mr Meyer read this website some time before his conversation with Mr Hogg on 25 September 2018. The wording is that he did so "*at a time thought to be a matter of days but possibly weeks or a month"* before that telephone conversation (see paragraph 56.1 of the Re-Amended Particulars of Claim). This account is verified by Mr Meyer at paragraph 60 of his witness statement, where he says that the words "*best in class"* stand out in his memory. He states that he understood "*integrated physical and electronic surveillance systems*" to include the CCTV systems and that the "*other protection devices*" must have been a reference back to the integrated systems, including the CCTV. He took "*continual offsite monitoring*" to mean "*someone looking* (sc. at a screen showing the CCTV camera images) *at least sufficiently frequently to ensure that a theft or tampering with the CCTV cannot take place."*

44. Mr Allington, the Defendant's Managing director, states that he was responsible for the Website Representation. The Claimant draws attention to the fact that, at paragraph 28 of his first statement, Mr Allington stated that the phrase "*physical and electronic surveillance*" in the second sentence of the Website Representation was a reference to the CCTV system, intruder alarm and fire alarm. Mr Allington says in his fourth witness statement that he was aware that all the Defendant's warehouses had fire and burglar alarm systems that were linked to Red Care/GSM activation monitoring. He did not understand the CCTV systems to be so connected and therefore they were not what the third sentence of the Website Representation was referring to. Whilst there were subsequent changes to the wording, Mr Allington said that these did not relate to the CCTV surveillance. Mr Allington notes that, when the Defendant had acquired the Linton Warehouse in October 2015, he was aware that those premises did not have a security guard and that the CCTV was not monitored in real time.

45. Mr Allington accepted in cross examination that the Defendant had latterly changed its statement about security so as to read, as in the document at E1578:

> "*Security*
>
> *Each warehouse is protected by integrated physical and electronic surveillance systems. All have fire and intruder alarms which are monitored off-site at a central station using Red Care GSM/communication technology. Data is backed up severe times a day and held in a separate, secure location."*

The change makes clear that it is the alarms rather than any other surveillance systems that are monitored off-site. Mr Allington accepted that this change had come about as a result of the instant litigation.

C3. Security at the Linton Warehouse

46. The Linton Warehouse is situated in a rural location. The premises can be seen in the appendices to this judgment. Appendix 1 shows an aerial view of the Warehouse and is copied from an image in the bundle. The gate to the premises is marked with a cross and the suggested point of entry with an arrow. Appendix 2 is a plan of the building. This is based on a plan from the bundle, but with the addition of markings to show:

a) the location of the steps to the mezzanine floors and an alarm beam;

b) the area where cases were left behind on the floor; and

c) the words "*directions of photos*", which refer to the direction of the photos which appear at E809 and E810.

47. It is apparent from the evidence (but is not clear from the plan at Appendix 2) that there are mezzanine floors to either side of these photos, above the shelving that is visible at ground level in those photos, but there is no mezzanine floor directly above the area where the photo was taken and the apparently abandoned wine boxes and broken bottles are visible. It is convenient for the purpose of clarity to identity these two areas of mezzanine separately – since the orientation of the plan at Appendix 2 and the photos at E809 and E810 is the same, it is easiest simply to call them the left and right mezzanines. Each mezzanine has steps down to the ground, of a kind that can be seen to the left of the photo at E807 (which shows the right mezzanine steps), but the left and right mezzanines are not directly linked so that one would have to go down to ground level in order to move from one to the other. The steps down from the right mezzanine (above which it would appear the thieves entered the Warehouse) are in the background of the photo at E810, and a person descending those steps would have their back to the camera. The Subject Wine was stored on the left mezzanine. The steps to that mezzanine are pretty much to the left of the position of the taker of the photo at E810, on the opposite side to the steps leading down from the right mezzanine and face in the opposite direction to the steps down from the right mezzanine.

48. Security at the Linton Warehouse can be summarised under four headings:

    a) The gate/fencing;

    b) The alarm system;

    c) The CCTV cameras;

    d) Physical presence on the premises.

49. When the Defendant acquired the Warehouse, Mr Allington states in paragraphs 20 to 23 of his statement that a security assessment was carried our by then Security Manager, Wilf Evans. Mr Evans took advice from specialists in terms of the suitability of CCTV, intruder alarms, motion sensors and fire alarms, ADT advising in respect of intruder alarms, Ontech in respect of CCTV and Trident Fire in respect of Fire Alarms.

50. The fencing to the site is visible from a number of the images in the trial bundle, in particular at E1237, E1238, E890 and E891. From the security camera image at E1562, one can see that a thief with a ladder enters by stepping down from the low wall that is next to the wooden fencing with barbed wire visible in E890 and E891. When cross examined about the fencing, Mr Allington said that no fence would stop a determined person from getting onto the site but that a higher fence would have made it harder. He agreed that some of the barbed wire was in a state of disrepair.

51. Mr Pattison described the fencing in cross examination as "*basic*" in nature, comprising a low boundary wall that was easy to cross and a concealed area of shrubbery. He asserted that no fencing can completely exclude the risk of thieves getting in, through accepted that the fencing here was "*particularly basic."* Mr Lambourne also accepted that the fencing was "*basic"*

52. The Warehouse had both burglar and fire alarms. Those alarms are linked to remote locations such that if activated action can be taken, as described by Mr Pattison at paragraph 9 of this statement. The burglar alarm system was as recommended by ADT. It includes motion sensors, but only confined to a small area of the Warehouse. The green line in the diagram at Appendix 2 shows the location of a motion sensor. The sensor was a single beam that runs between two units. Mr Pattison described the units as "*quite bulky*". That sensor would have caught someone who descending the steps from the right mezzanine, since it runs along the rear of the gap between the two mezzanines floors shown in photos E809 and E810. There were however no motion sensors covering the steeps leading down from the left mezzanine, the place in the roof where the thieves appear to have broken in and/or the mezzanines themselves.

53. In terms of the operation of CCTV cameras, the bundle contains an undated letter (E474) and undated quotation (E475) from Ontech. That quotation includes the following detail (emphasis in the original):

"***Cameras***

…

Specific camera locations are detailed on the plan. These have been agreed with Wilf Evans and John Lambourne. On the plan these are detailed as a red dot for the camera location, and a yellow line showing their direction of view. Any change to that detailed in the drawing needs to be agreed with us prior to installation. This is to ensure we have enough cable on site.

Recording and Playback

…

The system will come populated with 24TB raw storage for recording, if hard drive redundancy is required this will reduce to 20TB. With average motion on the site we estimate total storage to be between 30 and 60 days.

The VMS will provide motion based recording for all cameras, unless otherwise agreed.

Video playback can be initiated from any LCB site using a Windows Client software connected to the VMS.

Mobile apps are also available should you wish to view CCTV from an IOS or Android device when outside of the office."

54. Attached to the quotation is an aerial photograph of the budling with various markings, next to which is stated:

"Overview

This plan identifies proposed positions for new CCTV cameras at LCB Linton .

This plan is an "Ideal' and may not be achievable in one phase. However the end goal will always be to have a single system which will share a common platform to other LCB sites.

Cameras are referenced from a red dot with a yellow circle. Their direction of view symbolised by a yellow line.

Vulnerable doors requiring constant monitoring are solid red lines.

There is no guarantee that all positions are achievable, and underlying network structure and recording systems is not accounted for or taken into consideration at this stage.

The system will be designed in a way to accommodate relatively straight forward future expansion, and increased reliability.

Cameras will all be POE (excluding PTZ) and of HD quality with built in IR and will be a mixture of weather/vandal proof domes and bullets."

55. The photograph next to this shows solid red lines which it is agreed mark the doors adjacent to cameras 2, 3 and 4 in the diagram at Appendix 2, that is to say the two main doors to the warehouse opposite the gate to the premises and a side pedestrian door. On reviewing the photograph for the purpose of writing the judgment, I have enlarged it and noted that there appears to be a fourth red line on the photo at page E478 to which a line from camera 19A leads. This would approximately correspond with camera 19 in the diagram at Appendix 2. Nothing turns on the fact that the case may have proceeded mistakenly on the basis that the reference by Ontech at page E478 to "*vulnerable doors requiring constant monitoring*" was intended to be a reference to three rather than four locations at the Warehouse.

56. The Defendant's witnesses were cross examined about the Ontech report, with particular reference to the mention of *"constant monitoring*".

    a) Mr Allington said that he understood the Ontech document to mean that the Defendant should have cameras covering goods as they are brought into the warehouse so as to be able to demonstrate whether or not goods have been tampered with or the suchlike. He rejected the interpretation that the relevant cameras should be constantly monitored.

    b) Mr Pattison accepted that the Ontech report identified three areas with red lines that corresponded to cameras 2, 3 and 4 in the diagram at Appendix 2. He said that he interpreted the report to mean that the doors were vulnerable and therefore needed cameras constantly running so that the cameras would be monitoring the doors. (Mr Pattison stated that, whilst the cameras are constantly operating, they only in fact record footage when movement takes place. Thus for long periods they might be operating but not recording. However, he did not suggest that the reference to monitoring in respect of the particular locations was a suggestion that the cameras covering those locations should be recording constantly rather than simply when movement was identified.)

    c) Mr Lambourne interpreted the Ontech document's reference to constant monitoring as meaning that there was an ability to record the footage from the CCTV cameras.

    d) Mr Stone said that he did not believe that Ontech were recommending having the doors monitored externally and that he did not accept that the meant that any monitoring should be constant.

57. On any version of events, there is a large area of the warehouse where there were no internal CCTV cameras monitoring what was going on. Mr Allington accepted that the area of the warehouse was around 40,000 square feet, a figure drawn from the document at E472. Taking the camera positions to be indicated by the purple arcs on the diagram at Appendix 2 and the camera to be situated at the apex of each arc, the arms showing the approximate outer lines of the range of vision of the camera, the area of the warehouse the left of the left arms of the arc of vision from cameras 23 and 19 and to the right of the right arm of the arc of vision from camera 20 is not covered by any camera. Mr Allington accepted that this might be something like one quarter of the total area of the warehouse, around 10,000 square feet. Mr Pattison said that he had not considered introducing CCTV cameras to cover this area. I have noted also that the higher levels of the mezzanine areas were not covered by any cameras at all.

58. The Defendant's security system for the Linton Warehouse at the time of the theft did not involve physical presence at the building outside of working hours. There were no security personnel either onsite or visiting from time to time. Mr Allington however says that the site is now manned

constantly. Mr Lambourne describes the role of the current out of hours security guard at paragraph 35 of his statement.

59. Mr Lambourne stated that the keyholders for the Linton Warehouse were MacKinly Boosey, Keith Bowden (who on occasions handed over his keys to Colin Harmer) and himself. He understood that McKinley had set the alarm on the Friday evening, though, as noted below, Mr Harmer thought it was Keith Bowden.

60. The Defendant's witnesses refer to some large customers having had the Defendant's sites assessed by their insurers. There is no evidence as to whether this has happened in the case of the Linton Warehouse and, if so, what the result of any such assessment was. However, Mr Allington accepted that, with the benefit of hindsight, the Warehouse required more security measures. He did not accept that the Warehouse was, as counsel put to him, the "*runt*" of the Defendant's sites, nor that storage there was a less expensive site to reflect lesser security measure.

C4. Shipment of the Subject Wine

61. Mr Allington explained that the Subject Wine was collected from EHD on 1 February 2019. It was taken to the Defendant's Olympus depot and unloaded there. The wine left the Olympus warehouse and was taken to Linton on 4 February. The wine was then put away in the Linton Warehouse over the following two days, leading to a position where delivery of the wine was notified to the Defendant on 7 February.

62. The fact that the wine had first gone to the Olympus Warehouse had not been apparent from the material disclosed by the Defendant prior to service of Mr Lambourne's statement. He said that such transhipment happens on a daily basis so as to optimise the use of vehicles by filling them as full as possible. He was not aware of whether the Claimant had been told about this, but did not consider it to be the Defendant's duty to tell the Claimant about such transhipment

63. Following receipt of the wine, the Defendant generated a document which it calls a receipt advice and the Claimant calls a Manifest (the word I shall use in this judgment), in which the goods received are listed. Mr Lambourne says of this document, "*the receipt advice is automatically generated, and the warehouse staff (other than the office staff) do not have access to a copy, nor is a copy left with the stock. A copy is printed and placed in the customer's file in the office in Linton. The paperwork is stored in filing cabinet* (sic) *in the office at Linton, the office is alarmed when the warehouse is closed."*

64. It was to this issue that the Claimant's intimation of an application to adduce fresh evidence related. In brief, the Claimant contended that it could call a witness to say that the location where the Manifest was stored was readily accessible to any member of staff at any time and was neither in a locked room nor a locked filing cabinet. When an assertion such as this is put before a judge,

without even the benefit of a witness statement, still less challenge by way of cross examination, it is inevitable that the party who may be harmed by the matters asserted fears that the mere mention of them will influence the judge. I can assure the Defendant here that I am not influenced by this material. The finding below that the thieves had access to the Manifest is based on the evidence heard at trial and the inherent probabilities, not this late untested assertion.

65. After delivery of the Subject Wine, Mr Allington explained that it was stored on the mezzanine. This was in contrast to the Wineflow stock which was stored at ground level. The decision to store it on the mezzanine was that of Mr Keith Bowden, the site supervisor. Mr Allington believed the point to be that the Wineflow stock was relatively quick turnover and therefore needed to be easily accessible, whereas the Subject Wine, being held *en primeur*, was likely to be in storage for much longer and accessed much less often, hence it could be stored in a more out of the way place.

C5. The events of 9/10 February 2012

66. Responsibility for locking the warehouse on 8 February 2021 fell, according to Mr Harmer, on Mr Keith Bowden. Mr Lambourne thought that the responsibility had fallen on MacKinly Boosey. In my judgment, it is more likely that Mr Harmer (who was present on the ground) would correctly identify who it was. In point of fact, nothing turns on which of these it was.

67. Whilst neither Mr Boosey nor Mr Bowden gave evidence, the statement of Mr Harmer, in a section which was not challenged, states that on the following Monday, notwithstanding the fact that there was no padlock on the gate, the opening of the warehouse was "*as normal"* and the alarm had to be disarmed. This evidence, as well as Mr Pattison's statement at paragraph 24, supports the fact that the alarm was correctly set on the Friday evening.

68. The CCTV footage for the night of Saturday 9 February to the early hours of Sunday 10 February has been reviewed. Stills have been produced. This evidence has been summarised in a document at E1334 as follows:

18:27:54	Two people with ladders enter the site on foot opposite the main warehouse. They use paint to black out cameras 1, 2, 4, 8 and 9.
18:31:36	Two people exit the site on foot without the ladders the same way that they came in.
20:01:59	Two men enter the site on foot via the neighbouring site near the transport shed. One points out camera 7 to the other.
20:04:35	Camera 7 is covered with shrink wrap.
00:27:01	Three people walk from the direction of the corner nearest to the transport shed towards the Main Gate which is in darkness.

00:30:11 A bright light emanates from the gate probably as a result of cutting the lock.

00:32:50 One person walks back towards the warehouse.

00:33:19 A second person walks back towards the warehouse.

00:34:00 Lights are visible from a vehicle arriving and a person opens the gate. A van is driven onto site towards the corner of the warehouse. The gate is then shut.

00:35:09 A third person runs back towards the corner of the warehouse.

00:45:30 Four people run towards the gate followed by the van.

00:45:46 The gate is opened, and the van drives off. Four people go out the gate which is closed behind them and walk towards a vehicle.

This interpretation of the footage is not disputed. It should be noted that all of the account from 00:27:01 above is based on images from camera 3.

69. Taking the footage with the physical evidence visible in the photographs, and using the plan at Appendix 2 to explain the various locations, I am satisfied that the burglary took place as follows:

a) At least 5 people were involved at the site (the 4 people visible at 00:45:30 and the driver of the van);

b) Shortly before 18:30, at least two people arrived at the site and covered security cameras;

c) At some unascertainable time, some of the burglars entered the building by climbing onto the roof and cutting two holes in the area above the right mezzanine;

d) One or more of the burglars climbed down from the right mezzanine, rather than using the steps, thereby avoiding the alarm beam which passes across the bottom of the steps leading to the right mezzanine;

e) One or more of the burglars then ascended the left mezzanine and obtained access to the Claimant's wine.

f) At some point, the pile of wine boxes visible at E775 was established;

g) The wine was taken from the left mezzanine to ground level, presumably using the steps which were not secured by any alarm beam, but then passed up to the right mezzanine, using the piled up boxes, thereby avoiding the beam that crossed the foot of the steps to the right mezzanine;

h) The stolen wine was passed out through the roof and taken into the yard.

i) Just before 00:30, the lock of the main gate was broken open and a van entered the yard;

j) The wine was loaded into the van and removed by 00:45;

k) Throughout the whole burglary, none of the detectors for the alarm system were activated;

l) The only wine stolen belonged to the Claimant, albeit that not all of the Subject Wine was stolen.

Again, none of this has been disputed.

70. Mr Meyer said of the theft that the total weight of the goods stolen (which he put at 2.7 tonnes) and sheer quantity of it would have meant that equipment such as ropes and pulleys would have been required to move the wine.

71. There was some consideration in the evidence of the location and nature of the two holes found in the roof. Mr Pattison spoke in his statement of there being two holes: "*one was smaller and too small to fit through. The second was much larger and directly opposite where the stock had been stolen,"* Mr Stone added in his statement that "*there were houses on the opposite side of the smaller hole which overlooked the hole. There was a second hole, which was approximately 15 foot along and was larger, here the houses were obscured from view and it did not appear the second hole was overlooked."* In cross examination, Mr Allington was rather less convinced by the idea that the second hole had been cut because the first hole was overlooked.

72. Of the point of entry, namely through the roof above the mezzanine, Mr Allington agreed with the suggestion that this was "*just about the perfect point*" if the thieves were targeting the Subject Wine because it was out of site of the cameras but was close to the location of the wine. At a later point in the evidence, he described the location of the holes as "*close"* and "*not far off."*

73. Five propositions of what the thieves must have known were put to Mr Allington. These propositions and his replies were:

a) That the thieves knew they could access the external areas of the Warehouse without triggering alarms. He accepted this.

b) That the thieves knew that they could cut holes in the roof without triggering alarms. He did not accept this, though accepted that coming through the roof was less likely to set off an alarm.

c) That the thieves knew they could move within the Warehouse between the mezzanine levels by using boxes to stand on without triggering motions sensors. He accepted this.

d) That the thieves knew where to look for the Subject Wine. He accepted that the point of entry was not far from where the Subject Wine was stored.

e) That the thieves knew the value of the wine. He accepted that they probably knew the value of the Stolen Wine and indeed probably had a buyer for it.

Mr Allington also accepted that the thieves were probably assisted by someone who had been on the site before.

74. In opening, the Claimant said of the burglary that, "*During that (protracted) period: (a) D was not monitoring any CCTV, and had made no arrangements for CCTV to be monitored at any (let alone any reasonably adequate) interval; (b) no staff (security or otherwise) was present at the Warehouse over entire weekend; (c) the Thieves were able to gain access to external and internal areas of the Warehouse without triggering any alarms; and (d) the Thieves were able to move through the Warehouse for over six hours without triggering any sensors*." This summary seems to be entirely uncontroversial excepting that it is not clear that the burglars were moving through the property for the full 6¼ hours between their first arrival at around 18.30 and the departure of the van at 00.45 and that the assertion that the failure to arrange for monitoring of the CCTV at any point during this period was unreasonable involves a judgement value which the court needs to make. As Mr Allington accepted, no one knew what the CCTV showed until the Monday morning. He accepted that, if there had been monitoring of the CCTV cameras over the weekend, it would have been apparent that cameras 2 and 4 had been blacked out. Further, if camera 3 had been looked at during the theft, it would have been apparent what was happening, since it had continued to record and showed some of the events referred to above. Thus, monitoring of those cameras over the weekend may have allowed the Defendant to intervene so as to prevent the theft. Mr Allington accepted this.

75. On the Monday following the theft, 11 February 2019, Mr Colin Harmer opened up the premises. He states that he arrived to find that there was no padlock on the gate. Together with a colleague, Mr Manuel Vieira, he entered the premises, found the alarm to be set (which he disarmed) then, together with Mr Vieira discovered that the six wooden cases were stacked against the racking "*like steps"* and that there were two holes in the roof. Several broken cases and bottles were on the floor. This evidence confirmed that the situation was as shown in the photograph at E809 and E810.

76. The Claimant points out that the Defendant did not call as witnesses a number of its employees who worked at the warehouse, in particular:

a) Keith Bowden, the warehouse manager. He was on holiday at the time of the theft.

b) Trina Bowden, Mr Bowden's wife, who worked in the office at the Warehouse. Like Mr Bowden, she was on holiday at the time of the theft.

c) MacKinly Boosey, who was responsible for locking the warehouse and setting the alarm on the Friday night preceding the burglary and who was a keyholder along with Mr Lambourne and Mr Bowden;

d) Manuel Vieira, who attended with Mr Harmer and who first identified the theft in the circumstances referred to above.

77. Counsel for the Claimant questioned both Mr Pattison and Mr Lambourne to seek to establish whether employees of the Defendant may have been complicit in the theft.

a) Mr Pattison said in his witness statement that he had not investigated the theft because he was confident that the police were doing so. He accepted that it was possible that this was an "*inside job"*. However, he had spoken to members of staff about the theft as far as he felt able. Nothing had come to light from such discussions.

b) Mr Lambourne said that staff had been spoken to after the theft and the "*feeling"* was that no one knew anything. According to my note, he said, "*You get a feel for your staff – I don't think any of them were involved."*

78. Following the theft, the Claimant immediately began to investigate the theft. By 13 February 2019, Mr Meyer was aware of lack of monitoring of the CCTV - see his email to his insurance broker dated 13 February 2019 at E855. He later contacted a company called Mitmark with a view to investigating the circumstances of the theft. Their Managing Director, Mr Richard Q-Roberts, wrote to Mr John Lambourne of the Defendant by email dated 27 March 2019 in these terms:

> "*Good afternoon John. My name is Richard and the MD of MITMARK that advises clients on risk mitigation and loss reconciliation. We have been asked to investigate the loss of goods by Anthony MEYER at Huntsworth Wine Company Limited and behalf of a number of private high net clients.*
>
> *Our task will be to ensure that this does not happen again and also liaise with police in a private capacity to identify any persons/areas of interest with regards to the theft.*
>
> *On a separate note I am a Freeman of the Worshipful Company of Distillers and want to ensure that reputationally this matter is neutralised soonest for LCB before word spreads.*
>
> *Would we be able to visit Monday or Tuesday at your office in Linton, Cambridge CB21 4UX?"*

79. Mr Lambourne replied on 29 March 2019, declining the proposed meeting and saying, "*your client no longer stores with ourselves and therefor has no further risk with our warehouse and we are satisfied with the additional security measures we have put in place."* The email notes that the Claimant had engaged the services of a solicitor. Mr Lambourne said in cross examination that the Claimant had not contacted the Defendant to ask whether Mitmark could investigate on their behalf. He did not like the veiled threat that he saw in the Mitmark email and did not consider it to be in the best interests of the Defendant for the proposed visit to take place.

80. Mr Q-Roberts replied, "*Thank you John, this is concerning if you wish not to seek support from ourselves to protect your reputation and get a specialist company to ensure this doesn't happen again. We will inform all of our clients of this on Monday and the Worshipful Company of*

Distillers. We may insist on a visit and issue a SARF." It is not clear from the evidence what the word "SARF" is intended to refer to, though it may be an abbreviation of Subject Access Request Form or similar. In any event, this matter was not apparently taken any further by Mitmark.

C6. The Value of the Wine

81. The value of the wine is issue 10 as identified above. However, it is also relevant to the Claimant's case that the theft of the wine involved complicity by one or more of the Defendant's employees (issue 3). The Claimant contends that the wine that was stolen was selected from the greater body of wine by reference to its value as set out on the Manifest (E709 – E748). This supposes that the thieves had sight of the Manifest and is, the Claimant contends, evidence of complicity by the Defendant's employees. However, it is contended that the true value of the wine differed from the figure on the Manifest and the discrepancies between the stated value of the wines and their true value is therefore relevant to whether an inference can be drawn that the thieves had access to the Manifest. It is therefore relevant to know both what the value of the stolen and non-stolen wines as given on the Manifest was (in order to assess whether it is probable that the Manifest was used to identify the higher value wines) but also whether the targeting of wine might be demonstrated by some other knowledge of the true value of the wine, independent of the Manifest, which might be suggested if wine that had a low figure on the Manifest but a high true value was stolen or if wine that had a high figure on the Manifest but a low true value was not stolen. (Of course, whilst the valuation of the wine may assist in determining whether the thieves had access to the Manifest, it will not necessarily determine how they had obtained such access.)

82. The Defendant points out, during the hearing of its security for costs application on 6 March 2020, consequent to which the case was transferred to the Shorter Trial Scheme, HHJ Pelling QC commented that the issue of the value of the wine might not need expert evidence but rather might be addressed by looking at a price list from a wholesaler (E1108). The Claimant has not taken up this suggestion and, in the event, the Defendant says that the Claimant's figures are unreliable.

83. The Claimant's evidence as to valuation comes from paragraphs 110 to 121 of Mr Meyer's first statement (E307-309). At paragraph 112, he states that the figures set out in the documents at E1205-E1230 represent "*a detailed update to record the replacement values of each of the stolen wines*" and that this was prepared "*at the outset of this dispute."* The document is said to have been provided to the Defendant's lawyers. It states that a total of 143 cases were stolen and that the value of the wine was £124,481.89. I shall describe this as the Initial Valuation.

84. Mr Meyer goes on, at paragraph 121 of this first statement, to refer to a "*spreadsheet of replacement values*" which is in the trial bundle at E1201 – E1202. This refers to a total of 140½ cases being stolen with a value of £120,997. I shall call this the Replacement Valuation. The figures are broadly similar to those in the Initial Valuation. Similar figures appear in an email of

12 February 2019, where Mr Meyer refers to the theft of 140 cases with a replacement value of £118,705.

85. It should be noted that a further document appears at E1199-E1200 which appears to set out the alleged updated valuation of the subject wine that was not stolen. This document has not been verified by Mr Meyer. During trial, Mr Meyer stated that these figures were compiled through a wine valuation tool, Wine Searcher Pro. However, no screenshots or other documents from the website have been produced in support of the various figures advanced. There is no basis in the admissible evidence to conclude that this document represents the true up to date value of the Stolen Wine.

86. In its written opening, the Claimant referred to an updated schedule prepared shortly before trial. This appears in the trial bundle at E1390 - E1391. This document refers to a total of 142 cases being stolen, though the breakdown of 139 cases and 3 half cases, would appear to suggest the same total as that in the document at E1201 - E1202, namely 140½ cases. The document gives an updated value in June 2021 of £127,953.41. However, I note that these figures are not verified by any witness statement and again they do not have the evidential foundation to demonstrate the current value of the Stolen Wine.

87. In its opening and during the trial, the Claimant, in support of its argument that the thieves had access to the Manifest and that this showed complicity in the theft by one or more of the Defendant's employees, advanced the argument that the average price of the wine stolen vastly exceeded the average price of the wine that was recorded as having been delivered on the Manifest. This was said to have been demonstrated by the appendix to the Claimant's Re-Amended Reply and Defence to Counterclaim (E216 – E226) which purports to compare the value (or at least cost) of the stolen wine with the non-stolen wine. It is said to lead to the summary at the top of the appendix that the average cost per case of the stolen wine was £870.50 whereas the average cost of the non-stolen subject wine was £248.70.

88. This indeed is a huge discrepancy. However that appendix cannot be used in this way since it does not compare like with like, but rather confuses valuations from the Manifest with valuations from other sources. By way of example, item 1 of the Stolen Wine on the appendix (Carruades de Lafite 2010) is valued at £2,700 (E216), the same figure as in the Initial Valuation of the wine provided by the Claimant (E1206). This is more than double the valuation of this wine on the Manifest, which is £1,038.21 (E738). On the other hand, item 1 of the remainder of the Subject Wine (not stolen) on the Appendix, Chateau Guard Larose 2005, is valued at £320 (E220), the same figure as on the Manifest (E772), there being no admissible evidence of its valuation taking the approach of the Initial Valuation, namely valuing it shortly after the theft. Thus, in these examples, a stolen wine is being valued on the basis of the estimated valuation shortly after the

theft, whereas the non-stolen wine is being valued on the basis of the Manifest. As far as I can discern, the same inconsistency appears to apply to the approach in the case of other wines, rendering the appendix at E216ff unreliable if it is intended to compare the Stolen Wine with the remainder of the Subject Wine to show that the Stolen Wine was targeted for its value. This could only be done if the comparison were based on a like for like approach, consistently using either the Manifest figure (which is before the court) or the actual valuation at a set date (if there were admissible evidence of this, which there was not at trial).

89. I raised this issue with the parties at trial, since if any conclusions are to be drawn from the varying valuations of the wine, it would be necessary to have a secure baseline of figures to make the comparison. I invited the service of a further table, the purpose of which was to summarise the existing material before the court so as to show the average value of the Manifest price of the Stolen and the remainder of the Subject Wine , this being the only comparable valuation evidence that was before the court at trial. The result of my invitation was that the Claimant has served two further tables. The first ("the Comparison Table") contains a summary of comparisons of valuations of various categories of wine (Stolen Wine, remainder of Subject Wine, Wineflow wine) on the basis of the Manifest figure and what is called the Corney & Barrow average price per case as of February 2019 ("the Corney and Barrow 2019 Replacement Figure"), breaking down some of those values by vintage. The second sets out the amounts of each wine that went to the Warehouse and identifies the Manifest figure and the Corney and Barrow 2019 Replacement Figure by wine and is said to be the material underlying the Comparison Table.

90. It should be noted that the Corney and Barrow 2019 Replacement Figures differ from the Initial Valuation at E1205 – by way of example, Carruades de Lafite 2010 is said to have a 2019 replacement value of £2,800 in contrast to the figure of £2,700 referred to in the Initial Valuation and £2,750 in the original Replacement Valuation. Accordingly, even though the Corney and Barrow 2019 Replacement Figures in this document may purport to be an assertion of the true value of those wines in 2019, they cannot have been obtained by the same means (or at least applying the same date) as the figures in the Initial Valuation or the Replacement Valuation.

91. As the Defendant points out, these tables, served as part of written submissions after the conclusion of the trial, contain new information that is not in evidence, in particular as to the suggested Corney and Barrow 2019 Replacement Value of the wines that were not stolen. Counsel for the Defendant states in his responsive closing submissions that his recollection of the trial was that I had "*invited the parties to try to agree a list of valuations but specifically said that there was to be no new evidence in doing so."* To the best of my recollection this is a correct summary of what I meant. I certainly did not intend to permit the admission of further evidence on valuation, as opposed to the marshalling of the existing evidence in a more useful manner and in

any event the admission of further evidence would have required an express order permitting it. No such order has been made.

92. It follows that the only material from which a secure comparison of figures can be made in order to test the arguments about the targeting of particular wines is the Manifest figures.

C7. Excise Duty

93. Mr Allington explains the position in respect of the payment of VAT and Excise Duty in his second witness statement:

> *"3. The theft of the wine stored under bond triggered the obligation of the Defendant under the terms of its bond to pay the duty and VAT on the stolen wine to HM Revenue and Customs. On the 4th March 2019 we submitted the HMRC Form W5D (Deferment Advice for Alcohol Goods), this is required where goods are removed from an excise warehouse. It enables HMRC to debit our Deferrment* (sic) *Account by the excise duty and VAT due. HMRC debitted* (sic) *a total of £3,662.34 in excise duty and £14,285.54 in VAT via direct debit in respect of the Claimants Stolen Wine. The excise duty was collected on the 29th March 2019 and the VAT on the 15th April 2019 which are the standard collection dates.*
>
> *4. The VAT charged was reclaimed by the Defendant as input tax, but the Duty was a permanent debit to the Defendant. An invoice to the Claimant for the duty was raised on 5 March 2019 and sent to the Claimant by first class post to 108 Kensington Church Street, London W8 4BH which is the address we hold on to file for the Claimant."*

D. THE RELEVANT LAW

D1. Bailment

94. In opening submissions, the Claimant put the duties of the Defendant as bailee as being:

a) To take reasonable care of the chattel (for which the standard is higher where the bailment is for reward than where it is gratuitous);

b) To take reasonable care to see that the place where the chattel is kept is fit for the purpose of custody (and if it cannot, to take immediate steps to place the goods in a position of safety);

c) To take reasonable care to protect the chattel against any imminent danger;

d) To take reasonable precautions against acts of third parties;

e) In taking care, to use any special or professional skill that the bailee is held out to possess;

f) To redeliver the chattel in accordance with the terms of the bailment; and

g) To take all proper measures to protect the bailor's interests in the event the chattel is stolen.

95. The Claimant also points out that, where a bailed chattel is lost, the burden of proof is reversed, it falling on the bailee (at least the bailee for valuable consideration) to prove that the loss occurred notwithstanding the absence of default on its part. However it should be noted that the bailee is

not an insurer and, where the loss or damage occurred without any default on its part, no liability arises absent a special obligation in the contract of bailment.

96. As to the nature of the burden falling on the bailee, the Claimant draws attention to the decision of the Privy Council in Port Swettenham Authority v T Wu & Co [1979] AC 580. The Defendant in that case operated a shed for the storage of unloaded goods at its port. A consignment of 93 cases of pharmaceutical goods belonging to the Claimant were shipped there and, on 5 April 1970, the 93 cases were unloaded and passed into the Defendant's custody. They were stored in the shed. By 15 April 1970, 64 of the cases had disappeared. The shed was in the charge of a chief clerk who had a number of other clerks under him who worked in three shifts around the clock. It was common ground that the goods could not have been removed without the use of a vehicle. The Claimant contended that the Defendant was liable for the loss.

97. In its judgment, the Privy Council found for the Claimant stating, "*It is obvious that goods of this bulk and weight could not have been spirited out of the defendants' custody if due care for their safety had been taken by the servants into whose care the goods had been entrusted by the defendants for safe keeping"* (pp. 587H-588A). Having identified that the burden lay on the Defendant as bailee to prove that the loss was not caused by its fault (or the fault of its servants), the Privy Council went on:

> "*The Defendants have conspicuously failed to discharge the onus which lay upon them. They called only two witnesses and those witnesses knew nothing at all about the lost goods. They spoke of nothing except the nature of the system and security measures which the defendants adopted for taking are of the goods committed to their custody…Even if the system and security precautions had been perfect, the best of systems sometimes breaks down thought the human factor viz though negligence or misconduct on the part of those who are employed to work it. The defendants elected not to call as witnesses any of the men working in the shed whose duty it was to safeguard the goods – not even the man in charge of the shed. There was accordingly no evidence that these men had taken due care of the goods or that the 64 cases had not been lost as a result of their negligence or misconduct. For the reasons already stated, it seems virtually certain that the cases were stolen and could not have been stolen without the negligence or misconduct of the defendants' servants who were employed to keep them in safe custody. When a bailee puts goods which have been bailed to him in the care of his servants for safe custody, there can be not doubt that the bailee is responsible if the goods are lost through the failure of the servants to take proper care of the goods…"* (p. 591B-E)

As set out below, the Claimant contends that a similar point can be made here.

98. Deviation in bailment arises, according to Palmer on Bailment, as a difficult issue in considering whether reliance on an exclusion clause is forfeit. The principle is this stated at §13-205:

> "*Any radical departure from the terms of the bailment displaced the immunity conferred on the bailee and rendered him strictly liable for the ensuing loss. Negligence was irrelevant in this context. The only way in which the bailee could avert the legal consequences of his misconduct lay in proving that the loss must have occurred even if the deviation had not taken place, or that it was the result of the owner's default."*

The storage of goods in a different place from that agreed by the bailor is given as an example of deviation.

99. The authors of Palmer on Bailment, go on to say that the status of the deviation cases is in doubt, in particular in the context of the exclusion clause, in light of the comment of Lord Wilberforce in Photo Productions Ltd v Securicor Transport Ltd [1908] AC 827 that "*it may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons"* (p. 845F). In any event, they identify difficulties with the application of the principle in cases where there is no agreed place for storage or itinerary for the transport of the goods.

100. Closely related to the concept of deviation in bailment is what has been called the "four corners" rule. The rule is put thus in Palmer at §38-027: "*...no exclusion clause could apply unless the Defendant was endeavouring to perform or carry out his contract at the time of the breach. Any substantial or radical departure from the agreed mode of performance took the defendant outside the four corners of his contract and precluded him from relying on its protection*." Palmer identifies this as a well established principle, having led to the courts finding that the protection of an exclusion clause is lost when the bailee leaves the goods unattended for a substantial period, misdelivers them to a third party or fails to keep them on its own premises; but not if the bailee merely leaves them in an unlocked vehicle or commits some other momentary inadvertence.

101. Whilst some of the authorities cited in Palmer were decided on the basis of the now defunct doctrine of fundamental breach, there remains a class of case where the courts find that a bailee cannot rely on an exclusion clause (and by necessary extension, a limitation clause, which, as is noted in a passage from the judgment of Lord Leggatt in Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC cited below, is properly seen as a sub-species of exclusion clause) because, "*having obtained possession of the goods, he deals with them in a way that is quite alien to his contract"* (Palmer, §38-027).

D2. Standard of proof on the allegation of complicity

102. Having conceded that the burden of showing that the Defendant has discharged its duties as bailee lies on it, the Defendant correctly goes on in its written submissions to state that the burden of proving complicity by the Defendant's employees in the theft lies on the Claimant. It also asserts that this would be a finding that "*one of a very small number of individuals engaged in serious criminal wrongdoing. That is a very dangerous course and not one that the Court should reach where alternative possibilities exist which would not entail such a finding."* In the line of cases following Re B [2008] UKHL 35, the courts have made clear that, whilst there is "*only one civil standard of proof and that is proof that the fact in issue more probably occurred than not*" (per Lord Hoffman in Re B), "*cogent evidence is required to justify a finding of fraud or other*

discreditable conduct" (per Moore-Bick LJ in Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261 at §73).

103. But, as the Court of Appeal said in Bank of St Petersburg PJSC v Arkhangelsky [2020] EWCA Civ 408, the inherent unlikelihood of dishonest or fraudulent behaviour may play only a limited role in determining whether, on the facts of a particular case, dishonesty is proved. In that case, the trial judge expressly found dishonest conduct by both parties in respect of matters that were not directly in issue in the case. Thereafter, to assert that the burden of proving dishonesty on an issue in the case could only be discharged by showing the facts to be incapable of innocent explanation was, in the judgment of the then Chancellor of the High Court, "*simply wrong."*

104. Equally it would be wrong for the court here to reject a finding that employees of the Defendant were complicit in the theft simply on the ground that some other explanation for the theft might exist that did not suppose such complicity. To apply this principle would in effect be to require the Claimant to prove beyond reasonable doubt that one or more of the Defendant's employees had some involvement. That is inconsistent with the Re B and is a conclusion that I reject. Rather, the Court should look at all of the material in order to determine whether on the balance of probabilities the theft involved the complicity of the Defendant's employees.

105. On the facts of this case, it is also important to establish what complicity is proved, since the nature of the complicity is at least arguably relevant to issues 4 (vicarious liability) and 5 (the effect of the exclusion clause).

D3. Vicarious Liability

106. A company such as the Defendant can only act through its officers, employees or agents. In so far as the court is concerned with the careless performance of their duties by such people, the law of vicarious liability is straightforward. But where, as here, one is concerned also with allegations of deliberate wrongdoing, the court needs to consider the boundaries to the doctrine of vicarious liability.

107. The starting point for considering the application of the doctrine vicarious liability for the wrongful conduct of an employee is Various Claimants v Wm Morrison Supermarkets plc [2020] AC 989. Having cited the judgement of Lord Nicholls in Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366, Lady Hale, giving the judgment of the Supreme Court, went on:

> *"23. In that passage, Lord Nicholls identified the general principle ("the best general answer", as he said at para 23) applicable to vicarious liability arising out of a relationship of employment: the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment...*

24 The general principle set out by Lord Nicholls in Dubai Aluminium, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words "fairly and properly" are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent."

108. In Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd [2004] EWHC 1502, Gross J was concerned, as I am here, with a case in which employees of a warehouse who were bailees of the Claimant's goods were alleged to be complicit in the theft of those goods. Having dealt with issue relating to the probability that it was an inside job (he found that it was) he had to consider whether the Defendant warehouse was liable for the wrongdoing. In so doing, he considered several earlier cases, including:

a) Morris v C W Martin & Sons Ltd [1965] 2 All ER 725, a case involving theft of a mink stole by the employee of a cleaner to whom the fur had been entrusted for cleaning. Diplock LJ, in finding the Defendant vicarious liable for its employee's theft, said:

"*The mere fact that his employment by the defendants gave him the opportunity to steal it would not suffice … I base my decision in this case on the ground that the fur was stolen by the very servant whom the defendants as bailees for reward had employed to take care of it and to clean it."*

In the same case, Salmon LJ said:

"*A bailee for reward is not answerable for a theft by any of his servants, but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care … So in this case, if someone employed by the defendants in another depot had broken in and stolen the fur, the defendants would not have been liable. Similarly … if a clerk employed in the same depot had seized the opportunity of entering the room where the fur was kept and had stolen it, the defendants would not have been liable …*'

b) Heasmans v Clarity Cleaning Co Ltd [1987] ICR 949, in which a contractor, engaged to clean offices and entrusted with the keys to the premises, was held not to be vicariously liable for an employee's wrongful use of an office telephone to make international calls; the headnote of the decision states:

"*… before a master could be held vicariously liable at common law for the act of his servant there had to be established some nexus other than mere opportunity between the servant's tortious or criminal act and the circumstances of his employment so that it was committed in the course of the servant's employment; that the mere fact that the servant's employment had given him access to the plaintiffs' premises was not sufficient to establish such a nexus …*'

c) Lister v Hesley Hall Ltd [2001] 2 All ER 769, a case involving the abuse of children by the warden of a school boarding house that was owned and managed by the Defendant, in which case, Lord Clyde said:

> "*45. … while the employment enables the employee to be present at a particular time at a particular place, the opportunity of being present at particular premises whereby the employee has been able to perform the act in question does not mean that the act is necessarily within the scope of the employment. In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded.*
>
> *46. Among the multifarious kinds of employment one situation relevant to the present case is where the employer has been entrusted with the safekeeping or the care of some thing or some person and he delegates that duty to an employee. In this kind of case it may not be difficult to demonstrate a sufficient connection between the act of the employee, however wrong it may be, and the employment. One obvious example is (Morris v Martin) …*"
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> In his judgment in the same case, Lord Hobhouse said:
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> "59 *…Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform … If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within "the scope of his employment" and the employer is vicariously liable … 60. …the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer …*'

109. On the facts before him in the Frans Maas case, Gross J had particular regard to the evidence that staff had keys to the main door and an alarm code. He concluded that the Defendant was vicariously liable for their actions, stating:

> "*In this case, the custody of the premises cannot be divorced from the custody of the goods; indeed it seems unreal to attempt to do so. On the evidence, the employees, whether warehousemen, clerks or secretaries, were entrusted as part of their employment by the bailee with the security of the warehouse and hence the goods, by virtue of having the front door keys and knowledge of the alarm code. This feature distinguishes the present case from those concerning mere access."*

110. In Brink's Global Services Inc v Igrox Ltd [2011] IRLR 343, the Court of Appeal had to consider another case of theft by the employee of a bailee. There, the Claimant had entered into a contract for the carriage of 627 bars of silver from London to Ahmedabad. The silver bars were carried on wooden pallets that were secured in a container. The pallets had to be fumigated before the container was loaded onto the ship, for which purpose the Defendant was employed. One of its employees stole 15 of the bars during the fumigation process. In finding the Defendant vicariously liable for his actions, the Court of Appeal looked at whether his employment merely gave him the opportunity to steal the bars (which would not suffice to show vicarious liability on the authorities) or whether rather the Defendant had delegated to him in part the performance of its duty as bailee, in which case a breach of that delegated duty would give rise to vicarious liability. The employee was employed to carry out the fumigation. The theft by him of the silver from the very container that he was employed to fumigate involved sufficiently close connection to the

purpose of his employment to make it fair and just that his employer be held liable. In so holding, the Court of Appeal stated that Heasmans v Clarity Cleaning would probably have been decided differently today.

D4. Fraudulent misrepresentation/deceit

111. The Claimant in opening identified the following elements of the relevant torts:

a) A representation of fact was made by words or conduct;

b) The representation was made with the knowledge that it is or may be false, or at least made in the absence of any genuine belief that it is true;

c) The representation was made with the intention that it should be acted upon by the Claimant (or by a class of persons which includes the Claimant) in the manner which resulted in damage to it;

d) The Claimant acted upon the false statement; and

e) The Claimant suffered damage by so doing.

112. The following additional points can be drawn from the relevant authorities:

a) In determining whether an express representation has been made and if so in what terms involves the court adopting an objective test (per Coulson J in IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (Comm) at §50);

b) A half truth may amount to amount to a representation by the withholding of information which makes that which is stated false (see for example per Lord Chelmsford in Peek v Gurney (1873) LR 6 HL 377 at p.392);

c) It is not necessary to prove that the maker of the statement intended to be dishonest or had a dishonest motive; it is enough that the maker knew the statement to be untrue (or was reckless as to its truth) and intended the Claimant to act in reliance on it (per Jackson LJ in Ludsin Overseas Ltd v Eco3 Capital Ltd [2013] EWCA Civ 413, §§77-78);

d) However if the maker of the statement honestly believed in its truth, the relevant state of mind is not made out (per Lord Herschell in Derry v Peek (1889) 14 App Cas 337 at p. 374);

113. Thus, in the case of an ambiguous statement, "*the Claimant must prove: (1) the sense in which he understood the statement; (2) that in that sense it was false; and (3) that the Defendant intended him to understand it in that sense or deliberately made of use the ambiguity with the express purpose of deceiving him*" (Winfield & Jolowicz, §12-108, citing Bowen LJ in Angus v Clifford [1891] 2 Ch 449 at p. 472 where he stated that, unless the Defendant "*is conscious that it will be understood in a different manner from that in which he is honestly though blundering using it, he is not fraudulent"*).

D5. Exclusion/limitation clauses

114. The proper approach to the interpretation of limitation and exclusion clauses was considered by Lord Leggatt in the recent case of Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29. He summarised the state of the law as follows:

> *"106. … clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had at common law (or pursuant to statute).*
>
> *107. The approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) in commercial contracts has changed markedly in the last 50 years. Two forces have been at work. One has been the impact of the Unfair Contract Terms Act 1977 , which provided a direct means of controlling unreasonable exclusion clauses and removed the need for courts to resort to artificial rules of interpretation to get around them: see Lord Denning's swansong in George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] QB 284, pp296-301; and Bank of Credit and Commerce International SA v Ali [2001] UKHL 8; [2002] 1 AC 251, §§57-60 (Lord Hoffmann). This change of attitude was heralded by the decision of the House of Lords in Photo Production Ltd v Securicor Transport Ltd [1980] AC 827. The second force has been the development of the modern approach in English law to contractual interpretation, with its emphasis on context and objective meaning and deprecation of special "rules" of interpretation - encapsulated by Lord Hoffmann's announcement in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at p. 912 that "almost all the old intellectual baggage of 'legal' interpretation has been discarded".*
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> *108. The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contracts or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.*
>
> *109. The first and still perhaps the leading statement of this principle is that in Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689 ("Gilbert-Ash"). The question was whether the parties to a building contract had agreed to exclude the contractor's common law and statutory right to set off claims for breach of warranty against the price. The right allegedly excluded was thus one which would diminish the value of the claim otherwise maintainable against the contractor. Lord Diplock said (at 717H):*
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> > *"It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."*
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> *In Photo Production [1980] AC 827, pp. 850-851, Lord Diplock returned to this principle and explained its rationale more fully:*
>
> > *"Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in*

> *a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind , the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only." (Emphasis added)*
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> *110. Many further authoritative statements of this principle are quoted in Lewison, The Interpretation of Contracts, 7th ed (2020), chapter 12, section 20: …. Notable statements of the principle are also contained in several judgments of Moore-Bick LJ in the Court of Appeal. In Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75, §23 , he said:*
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> > *"The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be." ... In Seadrill at para 29, Moore-Bick LJ described the principle as "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so".*
>
> *111. To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in Canada Steamship Lines Ltd v The King [1952] AC 192, p208 , and the "contra proferentem" rule are steadily losing their last vestiges of independent authority and being subsumed within the wider Gilbert-Ash principle. As Andrew Burrows QC, sitting as a Deputy High Court Judge, said in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), §34 (iii):*
>
> > *"Applying the modern approach, the force of what was the contra proferentem rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the Stocznia case, at para 23, 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence."*
>
> *112. In Seadrill and in JP Morgan Chase Bank the obligation allegedly excluded by a clause in the contract was in each case an aspect of the obligation implied by law - originally at common law and now by section 13 of the Supply of Goods and Services Act 1982 - in a contract to supply services that the supplier will carry out the service with reasonable care and skill. In each case, applying the Gilbert-Ash principle, it was held that clear wording would be needed to exclude this obligation and that there was no such clear wording. Affirming the decision of the deputy judge in Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWCA Civ 1641 §40 , Rose LJ (with whom Baker LJ and Sir Bernard Rix agreed) said that the duty to exercise reasonable care and skill in the services provided (in that case by a bank to its customer) can "properly be described as one of the incidents which the law ordinarily attaches to the relationship" and is "a duty which is inherent in that relationship". Those descriptions well express the doctrine that many types of contract are regarded as having certain ordinary incidents, derived from the nature of the relationship they create, which inform the interpretation of the contract and which clear words are required to displace."*

115. As Lord Leggatt made clear at §107 of the judgment, the same principles apply to both limitation and exclusion clauses. Lewison on The Interpretation of Contracts speaks to like effect at §12.125, stating "*There is no rigid distinction between a clause excluding liability and a clause limiting liability."*

116. The authorities that require an onerous clause to be brought to the attention of the party whom it potentially disadvantages are consistent with the approach that the court should lean against interpreting a contract so as to restrict or exclude legal rights that the party would otherwise be entitled to rely on. Denning LJ in J Spurling Ltd v Bradshaw [1956] 1 WLR 461 at p. 466 said,:

> "*…the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient*."

In slightly less graphic terms, the authors of Chitty on Contracts (34th Edition, both here and elsewhere) at §15-012 say,

> *"Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention… The words "onerous or unusual" are not terms of art and it has been observed that the authorities "do not always agree" on whether a particular term is "onerous or unusual". The hurdle which must be overcome has, however, been described as a "high hurdle". Terms which have been held to be "onerous or unusual" include broadly worded or "blanket" exclusion clauses and clauses which require a party to pay an excessive sum of money on the occurrence of a particular event. But not all exclusion or limitation clauses should be regarded as "onerous or unusual"… Much depends on the facts and circumstances of the case so that the court must "have full regard to the context and the respective bargaining positions of the parties" (Carewatch Care Services Ltd v Focus Caring Services Ltd [2014] EWHC 2313 (Ch)* at §*84). The guiding principle may be said to be that "the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given (Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, 443)."*

117. For the purpose of its case on the limitation clause, the Claimant draws attention to the authorities on the distinction to be drawn between "wilful default" and "wilful misconduct".

a) Wilful default involves the intentional doing of acts (or omission to do acts) which involve a breach of contract with knowledge that the intentional acts or omissions amount to a breach of contract (see Re Young and Harston's Contract [1885] 31 Ch. D. 168 and Circle Freight International Ltd v Medeast Gulf Exports Ltd [1988] 2 Lloyds Rep 427).

b) In contrast "wilful misconduct" involves a greater degree of culpability involves proof that the actor knows that what they were doing (or failing to do) was wrong yet intentionally persisted regardless of the consequences (see National Semiconductors (UK) Ltd v UPS Ltd [1996] 2 Lloyd's Rep 212 at p. 214; Forder v Great Wester Railway Co [1905] 2 KB 532 at pp. 535-536; Lacey's Footwear v Bowler International [1997] 2 Lloyd's Rep 369 at p. 374).

118. The distinction is well put in two cases:

a) In TNT Global SpA v Denfleet International Ltd [2008] 1 All E.R. 97, Toulson LJ at §25 said:

> "*To establish wilful misconduct…it is not enough to show that the carrier was at fault in failing to take proper care of the goods and that the carrier's conduct was the product of a conscious decision. It has to be shown that the actor knew that his conduct was wrong or was recklessly indifferent whether it was right or wrong; and, as part of that requirement, he must have appreciated that his conduct created or might create additional risk to the goods*".

b) In De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd [2011] BLR 274, Edwards-Stuart J distinguished between three concepts in the relevant limitation clause at §206:

> *"Fraudulent misrepresentation", "wilful misconduct" and "deliberate default" are listed in descending order of culpability…This appears to me to be the case. Fraudulent misrepresentation obviously involves dishonesty. Wilful misconduct refers to conduct by a person who knows that he is committing, and intends to commit a breach of duty, or is reckless in the sense of not caring whether or not he commits a breach of duty... Deliberate default means, in my view, a default that is deliberate, in the sense that the person committing the relevant act knew that it was a default (i.e., in this case a breach of contract). I consider that it does not extend to recklessness and is therefore narrower than wilful misconduct (although the latter will embrace deliberate default)*".

119. In the event that the purported exclusion and/or limitation clauses are incorporated into the contract, are applicable to events here and are not otherwise unenforceable, the Claimant prays in aid the Unfair Contract Terms Act 1977 ("UCTA 1977"), as to which the relevant provisions are:

> *"3. Liability arising in contract.*
>
> *(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any contract term—*
>
> *(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*
>
> *(b) claim to be entitled—*
>
> *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*
>
> *(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,*
>
> *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.*
>
> *…*
>
> *11. The "reasonableness" test.*
>
> *(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.*
>
> *…*
>
> *13. Varieties of exemption clause.*

(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;

and (to that extent) [sections 2, 6 and 7] 1 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty."

E. DISCUSSION

120. This judgment deals with each of the twelve issues identified above in turn. However, because findings on issue 10, the valuation of the wine, are of relevance to arguments in respect of issue 3, employee complicity, it is taken out of numerical order and dealt with at the start.

Issue 10: Valuation of the Wine

121. I have set out above the admissible evidence on the issue of the valuation of the wine, namely the figures in the Initial Valuation and those in the Replacement Valuation. It should be noted that these figures are exclusive of VAT and excise duty.

122. I have no regard to the Corney and Barrow 2019 Replacement Figures in the additional documentation served by the Claimant since trial, on the ground that it is new material which the Claimant does not have permission to use. The Claimant's admissible evidence is limited to that either attested to by Mr Meyer (which in any event does not include the document at E1390 as I have noted above) or agreed by the Defendant. There is no agreement by the Defendant to any figures (though it does adopt certain figures for the purpose of its own argument as noted below).

123. Even on the figures in the Initial Valuation and the Replacement Valuation, the Defendant contends that even what Mr Meyer has to say as to valuation in his statement should be rejected on the following grounds:

a) The Claimant has failed to provide the underlying documentary material from which these valuation figures are drawn. Thus, even if his figures are correctly drawn from his research, they may erroneously be for example retail rather than wholesale prices;

b) HHJ Pelling QC had expressly anticipated evidence by way of wholesalers' price list yet the Claimant did not choose to follow this line of enquiry;

c) The figures provided by Mr Meyer have not been consistent. For example, he stated in an email to his insurance broker on 12 February 2019 (E831) that the value of the wine was £118,705, a different figure from that presented to the court in the document at E1201;

d) Mr Stone states the Stolen Wine to have comprised 138 cases (see paragraph 13 of his statement).

124. In my judgment, the evidence of Mr Meyer can and should be accepted on the issue of the value of the wine as of February 2019, as set out in the Replacement Valuation, namely that 140.5 cases were stolen with the value of £120,997 as set out at E1201 – E1202. I say so for the following reasons:

e) On the number of bottles, Mr Meyer has clearly investigated this theft extensively. It is probable that his considered figure of 140½ cases is correct.

f) The Claimant has adduced admissible evidence in support of that valuation;

g) In so far as there are alternative figures in the document at E1205, the Replacement Valuation, (£124,481.89) or the email at E831 (£118,705), these are only marginally different and the differences are unsurprising in an area of the market where values are likely to vary from time to time.

h) Whilst the particularisation of this valuation is not as detailed as one might have hoped, one must bear in mind that this case proceeded under the Shorter Trials Scheme, where disclosure and witness evidence are limited;

i) The Defendant whilst not admitting the Claimant's figures, has never proffered alternative figures even though it is a specialist warehouse operating in the field of wine; if the Claimant's figures were wildly inaccurate it is unlikely that the Defendant would not have identified this and brought material in support of the argument to the court's attention.

125. In addition, the Manifest is a document the authenticity of which is not in dispute which can be used as a basis for making findings as to the argument that the thieves must have acted with knowledge of that document. Further, it appears to be the case that the Manifest Valuations summarised in the Comparison Table are not disputed. Whilst I have not checked the available documentation to see whether the Comparison Table is accurate, the Defendant, who can be expected to defend its own interest carefully, either has not done so or has done so and has found nothing to which it could object. Accordingly I accept the average figures from the Manifest to be as follows:

Wine	Total Manifest Value	No. of cases	Average figure per case in Manifest
Subject Wine - Stolen	£62,493.68	139	£449.59
Subject Wine – Not Stolen	£66,563.94	254.5	£261.55

126. The Claimant's documentation also deals to some extent with the valuation of the Wineflow wine. Not only is there no admissible evidence as to the value of that wine, the exercise of comparison with the Wineflow wine is of little relevance. That wine was stored in a different area of the warehouse. The interesting point to explore is whether some of the Subject Wine (which was all stored in the same part of the warehouse) appears to have been either ignored or cherry picked based on its valuation in the Manifest.

127. It follows that the relevant findings of fact are as follows:

a) The actual value of the stolen wine at the time of the theft was £120,997;

b) The average cost of the subject wine stolen, was, according to the Manifest, £449.59 per case;

c) The average cost of the subject wine that was not stolen, was, according to the Manifest, £261.55 per case.

128. I should also record that the evidence that I have accepted supports the following figures in respect of specific wines mentioned by the parties in their submission on Issue 3:

Wine	Manifest		Replacement figure	
	Case cost	Reference	Case cost	Reference
Chateau Cos d'Estournel 2005	£1,133.14	E710	Not stolen – no figure	
Lynch Bages 2005	£480.00	E722	£1,350	E1201
Chateau Lynch Bages 2005	£377.71	E725	Not listed separately	
Lynch Bages 2007	£377.71	E726	£1,020	E1201
Chateau Lynch Bages 2006	£377.71	E726 & E728	£1,075.00	E1201
Chateau Monbrison 2006	£140.69	E728	£300	E1201
Chateau Lynch Bages 2008	£302.17	E732	£1,050.00	E1201
Chateau Lynch Bages 2009	£679.89	E740	£1,410	E1201
Pontet Canet 2009	£679.89	E741	£1,600	E1201
Chateau Lynch Bages 2010	£1,250.00	E744	£1,270	E1201
Chateau Leoville Poyferre 2010	£1,050.00	E747	Not stolen – no figure	
Chateau Cos d'Estournel 2005	£1,133.14	E710	Not stolen – no figure	
Chateau Leoville Lascases 2010	£2,250.00	E747	Not stolen – no figure	

129. I should note also that the weight of the stolen wine including packaging appears to have been around 2.5 tonnes. There is no admissible evidence as to the weight, but I bear in mind the following:

a) The appendix to the Re-Amended Reply puts the weight at 2.6312 tonnes, based on 143 cases. However the total number of referred to in the Comparison Table is 139 therefore one would expect the weight to be slightly lower.

b) 139 cases of 12 bottles of wine each containing 75cl of wine would contain 1.251 tonnes. Wine is probably of similar density to water and it accordingly this gives a rough order of the weight of the wine stolen. To this must be added the packaging, in which case it is easy to see that a figure of around 2.5 tonnes would be of the right order.

c) The Defendant in its opening states that a 12 bottle case would have a standard weight of 15.3kg, suggesting a slightly lower total weight for 140 ½ cases of about 2.15 tonnes.

d) Whilst these figures are very rough and ready, in truth marginal differences in the weight make no difference to the resolution of the case. The only issue to which this evidence goes is the limit of liability in clause 3.53 of the UKWA terms. The limit is the higher of £1,000 or £100 per tonne. There is no suggestion that the weight of the wine stolen came close to 10 tonnes and accordingly, if any limitation of liability applies, it will be the uplifted figure of £1,000 in respect of the incident.

Issue 1: Contractual Terms

130. Prior to trial, there had been some issue as to whether the bailment was the subject of contractual terms at all - see for example paragraph 16 of the Re-Amended Particulars of Claim (E59) which pleads that the Defendant was "*a non-contractual bailee for reward of the Claimant's goods that were transported and stored at the warehouse."* The basis of this plea was that the Claimant had not accepted the Defendant's contractual terms because it had signed neither the Trade Account application form nor the letter relating to insurance liability sent under cover of the letter of 7 June 2018. Given that the Claimant accepts that the Defendant was a bailee for reward, the argument that the bailment was not contractual seems, in well-worn terminology, ambitious. In the event, the point was not pursued by the Claimant at trial.

131. However, the question remains as to whether the UKWA terms were incorporated into the contract of bailment. At paragraph 14 of the Re-Amended Particulars of Claim, the Claimant pleads that:

a) The prescribed mode of acceptance of the terms of the contract proposed by the Defendant, namely the UKWA terms and the RHA terms, was signature to the Insurance Liability Letter;

b) Such signature was not forthcoming;

c) Hence the contract was not on UKWA and RHA terms.

132. The Defendant in response pleads that there was no prescribed mode of acceptance of the offer and that the offer was accepted either by the discussion of 25 September 2018 when Mr Meyer on behalf of the Claimant indicated that the Claimant would proceed with using the Defendant's services or by the subsequent consignment of wine (both Wineflow Wine and the Subject Wine) to the Defendant, in circumstances where it knew that that the Defendant's services were provided on UKWA and RHA terms, as evidenced by the Defendant's letter of 7 June 2018 referring to and containing such terms and the Claimant seeking to insure the wine on the basis of those terms, namely that the Defendant's liability for the wine was limited.

133. In cross examination, Mr Meyer accepted that he knew that the Defendant contracted on UKWA terms when he had previously dealt with them in 2015 (see for example the letter at E471) and that he knew that they did so when he resumed using their services in 2018, in light of the letter of 7 June 2018.

134. The principle of "*prescribed mode of acceptance*" is set out in Chitty on Contracts at §4-082: "*an offer which requires the acceptance to be expressed or communicated in a specified way can generally be accepted only in that way*." However there are two obvious problems with the Claimant's argument that this rule prevents the UKWA terms been incorporated here:

a) In fact, the letter of 7 June 2018 said to prescribe the method of acceptance does not do so. Whilst it did indeed contain the Insurance Liability Letter, it did not require that letter to be signed either as the mode of acceptance of the offer of the Defendant's services or as a condition of the Defendant providing those services. Accordingly the concept of acceptance by prescribed means does not apply here. I am satisfied that the Defendant's offer of the provision of services was capable of acceptance by the goods being consigned to the Defendant by the Claimant and was so accepted by this method.

b) In any event, even if there was a prescribed method of acceptance, the fact that the Claimant engaged the Defendant's services when, on Mr Meyer's own evidence, he knew that the Defendant contracted on UKWA terms leads to the conclusion that, even if, contrary to my conclusion in the previous sub-paragraph, no contract were formed by acceptance of the terms in the letter of 7 June 2018 (as varied by the conversation with Mr Hogg), this can be seen as a case of contracting by conduct, namely the Claimant consigning goods to the Defendant and the Defendant handling those goods in circumstances where the Claimant knew that the Defendant contracted on standard terms.

135. On either argument, I am satisfied that the contract between the parties was on the UKWA terms. Further, given that the contract as on the UKWA terms was set out and varied by the letter of 7 June 2018, I am satisfied that the uplift of liability applies such that limit of the Defendant's liability under clause 3.5.3 was the higher of £100 per tonne or £1,000 in respect of any single

incident. In so far as the date of conclusion of the contract matters, I conclude that agreement was reached on the relevant terms during the discussion on 25 September 2018.

Issue 2: Reasonable Care

136. Within his witness statement and to some extent in his oral evidence, Mr Meyer has sought to give evidence on the standards of security in Bonded Warehouses. It will be noted that the passages of his statement that I ruled inadmissible at the beginning of the trial relate to him expressing what amounts to expert opinion on this matter. Further, whilst Mr Meyer told the court of the opinions of other people in the trade, in particular on the issue of leaving wine stocks unmonitored, I have no sufficient detail to examine the weight that should be attached to those opinions (if any), even if such evidence were technically admissible as opinion evidence from people with relevant knowledge and hearsay under the Civil Evidence Act 1995.

137. But even in so far as his evidence is factual evidence as to what he has experienced or what others have told him, rather than expert evidence of what the relevant standards are, I have concerns about what weight I could place on what he has to say:

a) First, from the evidence that he has given, I am unclear as to whether his experiences of other Bonded Warehouses are sufficiently broad to enable me to judge what appropriate standards should be on the basis of his factual evidence– Mr Meyer himself accepted that there are probably more than 80 bonded warehouses in this country.

b) Second, it is clear from Mr Meyer's evidence that, had he been asked on the standard of surveillance in the Linton Warehouse immediately prior to the theft, he would have asserted a belief that it was being constantly monitored – hence any statement that that is normal practice in his experience is immediately undermined by the discovery that what he thought to be normal practice was not in fact being followed in one of the warehouses that he thought was following that standard; the same might be true on other cases where he believes this standard is adopted.

138. Having regard to these various issues, I am not persuaded that I should give any weight to the evidence of Mr Meyer on the issue of the appropriate standards of security, whether that evidence is opinion or factual and whether it is first hand or hearsay.

139. Equally, in so far as the Defendant's witnesses expressed views as to the adequacy of the security arrangement at the Linton Warehouse, I have disregarded their evidence as opinion evidence where it is supportive of the Defendant's case that there were no failings. However, in so far as the Defendant's witnesses accepted failings in the standard of security (and I have recorded the main examples in this judgment) and/or have seen force in the evidence that this may have been a theft committed with the complicity of the Defendant's employees, I have given what they say

some weight. I bear in mind that they are likely to have knowledge of the Warehouse itself and of the wine industry which goes beyond what I have been able to make findings on in this judgment. I have not assumed any expressions of opinion that are against the interest of their employer to be true, but in so far as they have coincided with views that I have tentatively formed on the basis of the evidence before the court, those opinions have in some cases fortified my conclusions because they are expressed by people with detailed factual knowledge of matters that may be relevant to those conclusions and because they have expressed opinions based on such knowledge which is contrary to that which they might have been expected to give if they were simply trying to avoid any blame for the theft falling on their employer. This is of less significance on issue 2 (where the burden is on the Defendant to show that the theft happened notwithstanding the exercise of reasonable care on its part) than issue 3 (where the burden lies on the Claimant to prove the complicity of the Claimant's employees).

140. In terms of securing the warehouse prior to the theft, there is no evidence to contradict that of Mr Harmer as to what he found on Monday 11 February. In particular, there is no evidence that suggests that Mr Bowden had not locked the premises and/or armed the alarm on 8 February 2021, the absence of the padlock on the gate being consistent with likely events on the ensuing evening. Accordingly, I am satisfied that the premises were secured by their being locked and alarmed in the usual way before the theft and that the Defendant discharges its duty as bailee to show the exercise of reasonable care in that respect.

141. However, in three respects I am not satisfied that the Defendant shows that the theft happened notwithstanding the exercise of reasonable care on its part.

142. The first relates to the fencing of the premises. There is no dispute that the Defendant, as a bonded warehouse, is the bailee of high value goods that are relatively portable. In such circumstances, the "basic" fencing visible on the photographs is below the standard of fencing that the bailor is entitled to expect. As I have noted in the account of the circumstances of the theft above, a thief with a ladder entered the premises by stepping down from the low wall next to the inadequate fencing. Mr Allington rightly and frankly accepted that a high fence would have made it more difficult for a thief to enter the premises. In those circumstances, I am not persuaded that the Defendant has discharged the burden upon it as bailee.

143. The second matter in respect of which I am not satisfied that the Defendant has shown the exercise of reasonable care on its part relates to the coverage of the premises by CCTV cameras and/or motion beams. I appreciate that no security system can reasonably be expected to cover every eventuality and further that the more elaborate the system, the more expensive the cost of bailment is likely to become. Nevertheless, there are large parts of the Warehouse which are not covered by any security device. A break in through the roof may not be the most likely point of entry but

it is certainly not an inconceivable way for thieves to enter in order to steal high value items. The Defendant has not persuaded me that the system in operation here was reasonable in terms of coverage of the inside of the premises or that it would have made no difference to the happening of the theft if an adequate system had been in place.

144. Third, and most importantly, the Defendant fails to show that its monitoring of the CCTV cameras that were installed was reasonable. I appreciate that there is some scope to debate precisely what the Ontech report was anticipating in respect of the monitoring of cameras. However, I am not persuaded by any of the suggested explanations on behalf of the Defendant as to why the reference to monitoring did not in fact incorporate someone looking at the footage. The use of the phrase "monitoring" is not apt to meet the recording of images. In any event, all of the CCTV cameras were present so as to record images when movement was taking place on camera so the statement that particular cameras or particular parts of the premises required "*constant monitoring*" would not distinguish those cameras covering areas that are described as "*vulnerable"* from the remainder, yet the wording of the Ontech report clearly distinguishes between those cameras in terms of the appropriate level of monitoring.

145. Further, I am struck by the fact that this was a system designed to permit remote viewing of the footage taken by the CCTV cameras, permitting the images to be accessed through Windows software or through an IOS or Android device. It would have been a straightforward exercise to have a person charged with looking at least intermittently at the footage to ensure that nothing untoward was going on. The Ontech report would appear to anticipate more than merely intermittent monitoring. The Defendant therefore fails to persuade me that in this respect the system as operated at the Warehouse was reasonable for a bailee in the position of the Defendant. It is clear from the account of this accident that there was a prolonged period of time between blacking out some of the cameras and the ultimate theft. I cannot anticipate a reasonable system of security that did not involve someone looking at footage from those at some point between their being blacked out and the end of the theft. Had they done so, there would have been an opportunity to interrupt a theft either before it happened or whilst it was in progress.

146. It follows that the Defendant is unable to show that this theft occurred notwithstanding it having taken reasonable care for the goods and the Defendant is therefore liable for the consequence of that, subject to any effective exclusion and/or limitation clause.

Issue 3: Employee Complicity

147. In respect of the issue of complicity of the Defendant's employees in the theft, I bear in mind that, unlike the issue of the exercise of reasonable care by the Defendant, the burden of proof lies upon the Claimant to show such complicity. For reasons identified above, I am satisfied that the standard of proof is the usual civil standard. I am not persuaded that a high quality of evidence is

necessary to persuade the court of wrongdoing on the part of the Defendant's employees. Rather, it requires examination of the available evidence with a view to drawing a conclusion as to whether complicity is proved on the balance of probabilities.

148. I bear in mind also that the legal test for vicarious liability identified above requires the Court to look with some care at the nature of the employee's duties and the connection between those duties and the acts which are said to give rise to vicarious liability on the part of the employer. In my judgement, this has two consequences:

a) In order to establish whether vicarious liability arises, it is necessary not simply to establish the complicity of one or more of the Defendants employees. The Claimant must also show in what way they were complicit, otherwise the court would have no basis upon which to make a finding of vicarious liability.

b) Insofar as the Claimant is not able to show that any particular employee is the person complicit in the theft, merely that one or more of the Defendants employees must have been, the Claimant could not discharge the burden of proving vicarious liability unless it shows that it is more likely than not that the relevant act was one which more likely than not had sufficient connection with the unidentified employee's duty, a burden which it would not be likely to discharge unless it showed that the relevant act would have had sufficient connection regardless of which employee(s) were complicit – in other words, it would probably have to be an act which would give rise to vicarious liability irrespective of which employee was involved and what their employment duties involved.

149. The suggested complicity of one or more of the Defendant's employees arises from the following features of the theft:

a) It happened very shortly after the Stolen Wine was delivered to the premises suggesting inside knowledge of the time of arrival;

b) It happened at a time when no personnel were on the premises, suggesting the thieves knew the working rotas of the Defendant's staff and, most particularly, that no staff were on duty at the weekend;

c) It involved the thieves being visible on cameras or blacking out the camera such that they could not be seen, suggesting knowledge that the cameras were not being monitored or at least will only be monitored intermittently such that thieves would not be seen at the time of the theft nor would the blacking out of the cameras be noticed;

d) It involved the premises being entered in a location which was close to the Subject Wine but out of sight of cameras, suggesting knowledge of the location of the wine and of the cameras;

e) It involved the selective removal of only part of the Stolen Wine, the wine removed was on average of higher value than the one left behind, suggesting knowledge of the value of which may well have come from the Manifest;

f) The thieves bypassed the motion sensor which crosses the bottom of the right mezzanine, suggesting knowledge of the presence of that motion sensor;

g) Mr Meyer was told by Detective Sergeant Barnshaw that "*he was '100% convinced that it was an inside job 'no question'.'*"

150. The first point, that the wine was stolen shortly after delivery could of course have been simple coincidence. It could hardly have been stolen before it arrived and, once it was there, it may simply have been the most immediately obvious or convenient wine to steal for thieves who were relatively opportunistic (presumably knowing that they were going to steal wine but not having identified in advance which wine to take). Even if the thieves were aware that the wine had been recently delivered, there were other means through which they could have discovered this, including from someone connected to the Claimant company itself or to the company that delivered the wine to the Linton Warehouse. On the other hand, the fact that the wine was stolen so very soon after it arrived at the Warehouse provides some, albeit weak, support for the proposition that somebody with inside knowledge provided information to the thieves.

151. The second point, that the theft took place on a weekend evening when no one was present at the premises, is not an indication of the thieves having inside information. This was a relatively sophisticated theft and it is almost inconceivable thieves had not carried out some kind of reconnaissance of the premises. If one was seeking to identify a time when the premises were unoccupied, one would doubtless look to evenings and weekends.

152. Whether the thieves knew or believed that the cameras were not being monitored, the third point, is a more complex issue. Mr Allington asserts at paragraph 20 of his witness statement that the two people who entered at 18.27 left the site and returned at 20.01. This has not been disputed and seems a sensible interpretation of the footage. I accept that it is probably correct. However the next image showing the thieves is timed at 00.27. It seems improbable that the entire theft took place in the 18 minutes between then and the van leaving at 00.45. That would not seem sufficient time for the thieves to have broken into the building at two different points, climbed down onto the right mezzanine, moved over to the left mezzanine, identified and moved the wine from the left mezzanine via ground level to the right mezzanine, got the wine out through the roof then positioned it so that it could be loaded into the van.

153. The Claimant asserts in its opening that the theft of the wine, assuming each case was taken out of the building, would have required 143 return journeys. Whilst the accuracy of this figure can be disputed, there is no doubt that there would be have needed to be a considerable number of

journeys through limited space both within the building and leaving the building through the roof, which could not have handled many people passing through at the same time.

154. I accept therefore that it is more probable than not that the Warehouse itself was entered earlier than 00.27. Given the absence of any images between 20.01 and 00.27, one cannot see when the entry actually occurred, but as I have indicated the thieves probably left the site between first blacking out the cameras and the return at 20.01. Having regard to the size of the task and the fact that there is no obvious reason for the thieves to have left the site between 20.01 and the end of the theft, it is most probable that the entry occurred on the return to the site at 20.01.

155. Thus, on the balance of probabilities there was a period of around 4¾ hours, from 20.01 to 00.45, when the thieves were on the site, the cameras were blacked out, yet no one monitored the cameras. During this period, the thieves would have been at risk of someone monitoring the cameras, identifying that a theft was taking place, and calling security officers or the police. Thus there was a very real risk of the thieves being apprehended.

156. This suggests that the thieves were confident that they would not be detected and is consistent with their knowing that the cameras were not monitored out of hours. But if this is so, one might ask why they blacked out the cameras at all and/or, having done so, left the site and returned. The first point is probably explained by the fact that some obstruction of the cameras was better than none. Whilst the thieves seem to have taken a casual attitude to the risk of identification through the cameras, given that they only identified and obstructed camera 7 on the return trip and did not take any action in respect of camera 3 at all, the fact that they blacked out five cameras on the first visit and put bubble wrap on a sixth on the second visit suggests that they felt that the cameras presented some risk to their being apprehended.

157. But the departure from and return to the site is not easily explained unless the thieves had some concern that their action in blacking out the cameras in the first place might be discovered. The most obvious explanation for this action is that they wanted to find out whether their obstruction of the cameras was discovered and therefore left long enough after blacking out the cameras to see whether it triggered any action. This tends to suggest that the thieves were not overly confident that the cameras were not being monitored.

158. One might speculate that the thieves had some reassurance about the cameras (such that they were willing to take only the relatively casual attitude to the cameras referred to above) yet were not so convinced that they were willing to assume it to be so without testing the theory by blacking out the cameras and leaving the site for a while. This is certainly plausible, but is not something about which I could have sufficient confidence to make a finding on the balance of probabilities. Thus, on analysis, the evidence on the issue of inside knowledge relating to monitoring of the

cameras is ambivalent, arguably consistent with but not positively supportive of the theory that the thieves had inside knowledge.

159. I turn to the fourth point, the location of the break in. Assuming that the thieves were targeting the Stolen Wine, the decision to enter the building where they did was distinctly convenient, since it was close to the subject wine, but out of sight of cameras. It would have been better still to enter directly over the left mezzanine, since that would have avoided the need to move the wine from the left mezzanine to ground level, then back up the right mezzanine to get it out of the premises. However, the evidence of Mr Stone as to the entry point being obscured from houses supports the inference that the thieves may have chosen the location of entry with some care. I accept Mr Stone's evidence that the entry point was a relatively well obscured place, since I see no reason for him to state that unless he both genuinely believed it to be the case and had good reason of that belief, namely what he had been told by John Lambourne and (presumably) Steve Pattison, as mistakenly referred to in paragraph 12 of his statement. Taking this evidence with that of Mr Allington and what is known about the location of the cameras, the inference that the decision to enter the building was based in part in knowledge of the location of the internal cameras is strong.

160. As to whether in fact the thieves were targeting the Stolen Wine, the opinion of the Defendant's witnesses on the whole supports the conclusion that this theft was indeed targeted.

a) Mr Allington accepted that the thieves probably knew the value of the wine and had a buyer for it, though he did not accept the proposition that the theft was targeted when it was put to him directly. Whilst his seeming inconsistency was not explored, it is possible that Mr Allington meant that the thieves knew the value of the wine as they were stealing it, perhaps by searching online, and that the availability of a buyer did not depend on particular wines being stolen. But on the whole, an acceptance that the thieves knew the value of the wine and had a buyer is at least suggestive of it being targeted.

b) Mr Pattison thought that the wine was probably targeted.

c) Mr Lambourne thought it had been targeted.

d) Mr Hogg said at one point that he thought the wine could have been targeted though at a later point said he did not think that the thieves came on site to target wine that was there. This inconsistency is difficult to understand,

161. However, this is only opinion evidence. For reasons that I have identified above in respect of issue 2, the opinion of a witness who has factual knowledge may have some evidential weight when the opinion is against the interest that the witness might be thought to favour, but it is likely to bear relatively little weight. The better points relate to the discrepancy between the value of

the wine that was stolen and the value of the remainder of the Subject Wine and the fact that only the Claimant's wine was stolen in the theft, the fifth point identified above.

162. In my findings above, I have noted that the average cost of the Stolen Wine, according to the Manifest, was £449.59 per case whereas the average cost of the remainder of the Subject Wine on the Manifest was £261.55 per case. This is supportive of the Stolen Wine being targeted, since the higher value wines were generally taken. However, as noted above, there have been attempts to look at whether the thieves may in fact have established these values from some source other than the Manifest. It is obviously possible for them to do so. Mr Meyer's own evidence on valuation is based on internet searches. However, the Claimant says that the thieves took wines on a pattern that suggested that the Manifest was the source of their knowledge of value, targeting wines that were of higher value based on the Manifest, even where Internet searches would have shown a lower value, and leaving behind wines of lower value based on the Manifest but higher value based on any internet search they could have carried out. The state of the evidence leaves me unable to reach any firm conclusion on whether, as the Claimant said in closing, the thieves left behind expensive wines as a result of mistakes on the Manifest, since the Claimant has failed to adduce admissible evidence as to the true value of the Subject Wine that was not stolen.

163. On the other hand, the Defendant did establish that the thieves stole some wine, for example Lynch-Bages 2008, which had a low cost on the Manifest (in that case, £302.17) but on Mr Meyer's evidence was in fact at the more valuable end of the range of true values (£1,050.00). Thus, the thieves cannot be said consistently to have stolen the wine of higher value from the Manifest.

164. But the average figures referred to above indicate that, on the whole, the thieves selected the wines with higher value on the Manifest. When this is coupled with the fact that the point of entry was close to the Subject Wine and that only the Claimant's wine was stolen, this tends to support the argument that the thieves had knowledge both of the location of the Subject Wine and its value. Given the fact that wines of higher value on the Manifest were stolen, it is also suggestive that they had access to the Manifest. On balance, the evidence that only the Claimants' wine was stolen and that the wine stolen had a significantly higher value on the Manifest than the wine not stolen, I conclude that it is probable that the thieves had access to the Manifest.

165. As to the source of the knowledge, it is highly likely that information as to the location of the Stolen Wine in the warehouse came from the Defendant's employees. Whilst other people who had visited the premises could have had this knowledge, they would have had little time to gain it between the arrival of the Subject Wine and the theft taking place. Equally, it is probable that information as to the location of storage cameras came from the Defendant's employees. Again other people could have had this knowledge, but it is not clear who would have been able to

supply the relevant information apart from a body such as Ontech which would have had no coincident knowledge of the arrival of the wine. If these two pieces of information, namely the location of the wine and the location of security cameras came from the Defendant's employees, it is probable that the third piece of information that they had, the Manifest showing the value of the Stolen Wine, also came from an employee of the Defendant.

166. As I have indicated above, the Defendant's evidence is that the Manifest was kept locked in an office to which members of staff other than office staff did not have access. If correct, this might seem to tend against the Manifest having come from the Defendant's employees. But there are several ways by which a copy of the Manifest in the Defendant's possession might have come into possession of the thieves, notwithstanding the system referred to in the Defendant's evidence:

a) A person who had access to the locked office and filing cabinet may have been complicit with the thieves;

b) The document may have been copied even before it was locked away;

c) The system may have failed on this occasion, such that the Manifest was left lying around when it should have been locked away.

167. I bear in mind that the Defendant did not call any of the staff from Linton apart from Mr Harmer. I consider it highly unlikely that he was in any way involved in the theft, but I am unpersuaded by the argument that the evidence of system at the Linton Warehouse excludes the possibility that some other employee was the source of the Manifest. In contrast, the only other suggested sources of the information in the Manifest were the Claimant or the carrier. The reference to the Claimant would appear in reality to mean a reference to Mr Meyer. I see no evidence to suggest that this theft is some kind of complex scam in which Mr Meyer is culpable. As for the carrier, whilst their employees may have had access to the Manifest and would have known of the time of arrival of the wine, they would not have known where the wine was stored in the warehouse. If one of the Defendant's employees provided information as to the location of the Subject Wine, it is improbable that coincidentally the carrier was the source of the Manifest.

168. On the sixth point, knowledge of the motion sensors, the most probable explanation of the thieves avoiding the motion censor at the bottom of the right mezzanine but seemingly being uncaring of there being a motion sensor at the bottom of the steps to the left mezzanine is that they were aware of the location of the sensors in advance. Such a conclusion would be consistent with other independent findings made above that the thieves were provided with information about the Warehouse from someone who had worked there. Mr Pattison volunteered the alternative suggestion that the thieves could have used torches to identify where the motion beams were. This is certainly possible, but given the evidence of a number of other pieces of inside information having been supplied to them, it seems less likely.

169. On the seventh point, the belief of DS Barnshaw, I place no reliance on the evidence adduced by the Claimant. Whilst I do not doubt that this was what Mr Meyer was told, the fact that the police did not in fact charge anyone from the Defendant in respect of the theft or even, from the information before me, interview anyone other than Mr Stone, suggests that the police officer's belief, however firm, was not based on hard evidence that could justify the prosecution of any individual. In reality, it is likely that the investigation of the circumstances of the theft both in anticipation of and during the trial of this action is likely to have been a more detailed analysis of the inherent probabilities than DS Barnshaw was able to conduct. Whilst I have no reason to doubt his policing skills, I do not consider that he was any better placed than I am to judge the likelihood of this being an "*inside job."*

170. Thus, in summary, I am satisfied that one or more employees of the Defendant supplied the thieves with the following information:

a) The time of arrival of the wine;

b) Where the wine was stored in the Warehouse;

c) The absence of any cameras covering the mezzanine floors where the wine was stored;

d) The presence of a motion sensor crossing the bottom of the steps to the right mezzanine;

e) The absence of a motion sensor crossing the bottom of the steps to the left mezzanine.

171. On the available evidence, it is not possible to say whether one or more than one employee was involved in the theft. It is unnecessary to determine that issue. However, where I refer below to the complicity of an employee, my findings would apply equally if there were several employees who were involved in the theft.

Issue 4: Vicarious liability

172. Turning to the issue of vicarious liability, the Claimant contends that this is case of clear vicarious liability of the Defendant for the acts of its employees. Within its closing submissions, it cites several authorities as well as textbooks in support of the contention, in particular paragraph 112 of the judgement of Gross J in Frans Maas.

173. The Claimant in particular rejects the suggestion that, in considering the question of whether the Defendant was vicariously liable for the acts of its employees, the court should consider whether the employee was acting "*in furtherance of their duties as employees"* (the phrase used in clause 3.3 of the UKWA conditions).

174. I agree with the Claimant's contention that it is not relevant to the argument about vicarious liability whether those complicit in the theft were acting "*in furtherance of their duties as*

employees." That is not part of the test for a finding of vicarious liability and has to be considered separately in the context of the interpretation of the exclusion/liability clauses.

175. However, in order to establish vicarious liability, the Claimant still has to show sufficient connection between the duties of the employee and the commission of the theft to make it fair and just to impose liability. Here, the Claimant is on weaker ground. It cannot establish which employee of the Defendant was responsible for the provision of information to the thieves. If, for example, the Claimant were able to show that a person entrusted with the Manifest had provided it to the thieves, that might well show sufficient connection. However, for reasons identified above, the evidence does not show this (and it might be noted that the further evidence that the Claimant would like to rely seemingly would make the point even more strongly that anyone with access to the premises, not simply someone to whom it had been entrusted, could have passed on the Manifest). Rather, this is a case in which the evidence shows that the fact of employment gave the employee the opportunity to pass on the information (including the Manifest). It would be different if this were a case where the information passed on were the direct means to commit the theft (for example codes to an alarm or keys to the premises) or involved information being passed on about the security system that had been entrusted to particular people because of their responsibilities within the Defendant company for the operation of the security system. But that cannot be shown.

176. As the Defendant puts it in closing, anyone with access to the premises could have provided the relevant information. Whilst, for reasons I have identified, it is more likely than not that in fact the information was provided by one or more of the Defendant's employees, the evidence does not lead to the conclusion that the information that was passed on had been specifically entrusted to whoever did so. For this reason, I am not satisfied that the Claimant is able to show that the Defendant is vicariously liable for the actions by one or more of its employees which contributed to the theft.

Issue 5: The Exclusion Clause

177. Given my finding on the previous issue, the significance of the exclusion clause falls away. However, clause 3.2 of the UKWA standard terms and conditions contains what the Defendant contends is a significant exclusion to its potential liability and I should deal with the issue to cover the situation if, contrary to my other findings, there were a finding that the Defendant was in breach of duty in a manner that potentially fell within the exclusion clause.

178. It is necessary to look at the interaction of clause 3.2 with clause 3.3 in order to determine how onerous it in fact is. The terms of clause 3.2 purport to exclude all liability apart from that which is encompassed by clause 3.3 (in which case the terms of that clause purport to limit the liability).

179. The Claimant contends that the effect of clause 3.3 is that the limitation of liability contained therein only applies to the Defendant's liability for its employees acts where they are "*acting in furtherance of their duties as employee*." Of course, if the relevant acts (or omissions) of employees were not in fact matters for which the Defendant was liable pursuant to the doctrine of vicarious liability, as I have found to be the case here, there would be no question of liability arising which might be the subject of limitation or exclusion. But it is at least arguable that the phrase "*acting in furtherance of their duties as employee*" is a narrower concept than that of vicarious liability, such that there could be acts for which the Defendant was liable pursuant to the doctrine of vicarious liability but which did not fall within the terms of the exclusion clause.

180. Further, the Claimant contends that the phrase "*negligence, wilful act or default"* in clause 3.3 is not wont to cover wrongful acts in the nature of theft by an employee, to which only the phrase "*wilful misconduct"* would be wont to refer.

181. Thus the Claimant identifies two reasons why, notwithstanding its case that the Defendant is vicariously liable for this theft, clause 3.3 does not apply to the circumstances of this case. If the Claimant were wrong on both of these arguments, it would appear that the theft in this case would fall within the terms of clause 3.3 and therefore the Court would not be concerned with whether clause 3.2 was enforceable, the clause 3.2 being expressly subject to clause 3.3. However, if the Claimant is right on one or both arguments, and the facts of this case do not fall within the terms of clause 3.3, clause 3.2 would on its face exclude <u>any</u> liability on the part of the Defendant even if it were vicariously liable for the theft because of the complicity of its employees. Unless there were an independent breach of the bailor's duties, such as failing to take reasonable care for the goods, the effect of clause 3.2 as contended for by the Defendant would therefore be that it would never be liable for a loss such as this. That would make the clause particularly onerous in effect.

182. In those circumstances and having regard to the authorities referred to above, I am satisfied that the Defendant cannot rely on clause 3.2 unless it can show that it was adequately brought to the Claimant's attention. However, the evidence supports the conclusion not only that there was no express attempt to draw it to the Claimant's attention, but the Defendant's communications with the Claimant in fact draw attention away from it.

    a) The very fact that the heading to the terms draws attention in an "**IMPORTANT NOTE**" (emphasis as the original) to the limitation of liability clause would tend to lead the reader of the document to think that it was the limitation of liability to which attention should be given, not a more onerous clause still by which liability was excluded in certain circumstances.

    b) The terms of the note refer to the purpose of the inclusion of the note, namely to relieve the Claimant of the additional amount it would have to pay to cover insurance costs were

there no such limitation. Yet if clause 3.2 excludes the Defendant's liability for matters other than those covered by the limitation of liability, the reasoning would apply with equal force to the exclusion. However the note does not draw attention to this by referring to the exclusion clause as opposed to the limitation of liability clause.

c) The Insurance Liability Letter refers to the uplifted level of liability of £1,000 and the advisability of insuring losses "*not covered by* [the Defendant's] *level of liability,"* Both of these relate to the limitation clause, not the exclusion clause. There is no reference to the exclusion clause at all.

183. In my judgment, the UKWA terms and the Defendant's communication of them is insufficient to draw attention to these clauses for these reasons. It follows that the Defendant's potential liability for the theft is not excluded by clause 3.2.

Issue 6: Deviation/The Four Corners Rule

184. The issue as to deviation was relatively ill-defined in advance of the trial. The Particulars of Claim pleads it in consequence of the Defendant's reliance on the limitation clause, without pleading the nature of the deviation. It is not mentioned in the original list of issues. It is raised in the Claimant's opening, again in response to the Defendant's attempt to rely on the limitation clause. The Claimant in its closing submissions contends that taking the Stolen Wine to a different warehouse amounts to deviation because the goods were being stored other than at the agreed location. The Claimant also relies on the contention (which may have been behind the original plea of deviation in the Particulars of Claim) that "*the leaving of goods unattended disapplies a limitation or exclusion clause in cases of bailment."*

185. In closing submissions, the Claimant identifies two areas of deviation from the agreed bailment:

a) Taking the Subject Wine from the premises of EHD to the Olympus warehouse from 1 to 4 February 2019, rather than straight to the Linton Warehouse;

b) Leaving the goods at Linton Warehouse *"which was woefully inadequate and insecure without anyone watching over them during the weekend"* (paragraph 70 of the Claimant's closing submissions).

186. As to the first of these, it has not been suggested that the storage of the Subject Wine at the Defendant's Olympus warehouse was in anyway causative of the theft. Assuming for the moment that the principle of deviation remains good law, the absence of any causative link between the deviation and the loss prevents it having any application here. It is not necessary to go on to consider the potentially more difficult issue as to whether, if the transhipment at the Olympus Warehouse was in some way causative of the loss, the principle of deviation remains good law and would apply in the circumstances of this case.

187. As to the second, the argument that the Defendant is strictly liable because of the inadequacies of the storage of the Subject Wine at the Linton Warehouse appears to be an attempt to resurrect the doctrine of fundamental breach which was laid to rest in Photo Productions v Securicor. Whilst, as indicated above, there are cases where the deviation from the contractual terms and/or the application of the four corners doctrine may act so as to prevent a bailee relying on an exclusion or limitation clause because they are dealing with the goods in a manner that cannot be seen as intended performance of the contract of bailment, in my judgment the actions of the Defendant here, even put at their highest, are far from this.

a) In so far as the argument is put in deviation, there was no literal deviation from the bailment in respect of the security arrangements. I am not satisfied that a deviation that arises from a failure to take security measures that were as sophisticated or effective as they could have been amounts to deviation.

b) Having rejected a finding that the Defendant was vicariously liable for the complicity of the Defendant in respect of the theft, the Claimant is limited to arguing that the want of care in the security arrangements is sufficient to meet the "four corners" doctrine. But the Defendant's care of the Claimant's goods was not outside of what it was employed to provide under the bailment. At best it was the inadequate performance of that which it was employed to provide. I am not satisfied that this could be considered as dealing with the goods in a way "*quite alien to the contract"* or otherwise to amount to performance of the contract in a way other than intended.

188. The position would have been different if I had found the Defendant to be vicariously liable for the acts of people who were party to the theft – such acts would be the clearest example of deviation and/or acting outside of the four corners of the bailment as could be conceived.

Issue 7: Fraudulent Misrepresentation/Deceit

189. The Website Representation, which was present on the Defendant's website in the same terms in the period of 2018-2019 was:

> "*Security*
>
> *With a dedicated team working under an ex senior police officer, our security is best in class. Each building is protected through integrated physical and electronic surveillance systems. All units have fire alarms which, coupled with the other protection devices, are subject to continual off site monitoring using Red Care/GSM communication technology to a central station. Data is backed up several times a day, and held off site in a separate security building."*

190. The Letter Representation is contained in the Defendant's letter of 7 April 2018 where it is stated:

> "*All our sites are protected by extensive CCTV systems which cover operations on a 24/7 basis. A variety of monitoring measures are in place and are backed up by our own Company Security Manager."*

191. The Claimant's case on issue 7 as pleaded in the Particulars of Claim is:

a) The Website Representation was a false representation of fact because it stated that the Warehouse was protected through integrated physical and electronic surveillance systems and that the protection devices at the Warehouse were subject to continual off-site monitoring, whereas in fact the CCTV system at the Warehouse, which is an integrated physical and/or electronic surveillance system was not subject to continual off-site monitoring and/or no monitoring measures were in fact in place for the CCTV cameras during the weekend in which the theft took place (paragraph 60B of the Re-Amended Particulars of Claim); and

b) The Letter Representation was a false representation because it stated that the Warehouse was protected by extensive CCTV systems which covered operations "*on a 24/7 basis"* and that a variety of monitoring measures were in place, whereas the CCTV was not subject to continual off-site monitoring. No monitoring measures were in fact in place for the CCTV cameras during the weekend in which the theft took place and/or there was not a variety of measures in place with regard to the operation of the CCTV (paragraph 60C of the Re-Amended Particulars of Claim).

192. It should be noted that the Claimant does not argue that round the clock monitoring requires a person to be in front of screen watching the images from the CCTV camera without any break at all. Rather, as is put at paragraph 24 of the Claimant's opening, that "*somebody was tasked with monitoring it at reasonable intervals whilst nobody else was on-site."*

193. On the issue of the Website Representation, the Claimant states that the wording is clear – the reference to integrated physical and/or electronic surveillance systems must include the CCTV system (as Mr Allington conceded in his first statement) yet that is not subject to continual monitoring.

194. The Defendant responds that, even if the CCTV system is properly accepted to be an "*integrated physical and electronic surveillance system,"* it cannot be what is stated to be the subject of continual off-site monitoring in the third sentence because:

a) The only things said to be monitored are "*fire alarms*" and "*other protection devices*;*"*

b) The representation is about monitoring through technology not monitoring through someone watching a screen, hence it is not apt to cover the monitoring of CCTV by watching a screen;

c) A representation that monitoring would be continuous cannot describe the kind of monitoring at reasonable intervals referred to in paragraph 24 of the Claimant's opening;

d) The monitoring is said to be by Red Care/GSM Communication Technology, which is technology relating to monitoring alarms not the viewing of CCTV feeds.

195. The Website Representation is in my judgment genuinely ambiguous. I agree with the Claimant that CCTV system falls within the meaning to the phrase "*integrated physical and electronic surveillance system"* in the second sentence. However, it is ambiguous as to whether the reference to "*fire alarms … coupled with the other protection devices*" in the third sentence covers all such integrated physical and electronic systems. Whilst one might consider CCTV to be a protection system, it is not suggested in this case that one could anticipate monitoring CCTV footage through technology. Further, whilst the casual representee might not know whether Red Care/GSM Communication technology was capable of monitoring a CCTV system, it is questionable whether they would consider that a system to be monitored by such technology was in fact a representation that the CCTV system would be monitored by being watched at regular intervals, as suggested by the Claimant.

196. In the circumstance of an ambiguous representation it is, for reasons identified above, necessary to look at the representor's state of mind to determine whether he intended the representee to understand it in a different way or deliberately used any ambiguity to deceive the representee. Having heard from Mr Allington, I can find no basis for making such a finding. I accept that he genuinely thought that the operation in respect of monitoring related to the burglar and fire alarms, not the CCTV system. He appears to have known the nature of the Red Care/GSM Communication Technology, since he makes the point in the first statement that it would not be used for the purpose of monitoring CCTV footage. From the point of view of the person who knows that fact, the Website Representation is barely capable of bearing the meaning contended for by the Claimant and I can find no basis for thinking that Mr Allington would have believed that a representee would have found it ambiguous or that he played on that ambiguity.

197. In respect of the Letter Representation, the Claimant contends that the evidence of Mr Hogg as to his intended meaning "*devastates"* the Defendant's case, in particular because Mr Hogg had visited the Linton Warehouse and therefore knew the security measures in place but had "*fudged*" a form of wording that failed to identify that different forms of security were in place at different sites. In reality, the Claimant's case is that "*the words say what they do"* and cannot be taken as amounting to anything other than an objective representation that the CCTV was being monitored around the clock.

198. The Defendant asserts that this interpretation of the Letter Representation is wrong. As to the CCTV system, it simply says that these "*cover operations on a 24/7 basis"* not that they are monitored around the clock. If, as the Defendant contends, this statement simply means that the CCTV cameras were in operation, filming events around the clock, this was indeed true. The

second sentence, that a variety of monitoring measures were in place clearly (says the Defendant) relates to security generally, not simply the CCTV, since the reference to "*a variety*" would not be apt to cover the CCTV cameras alone. Indeed there were a variety of monitoring measures in place – the fire alarms and burglar alarms were monitored by technology.

199. In my judgment, the Defendant is correct in respect of the true interpretation of the Letter Representation. On a proper reading, it cannot be taken as asserting that the CCTV cameras are being watched around the clock, even with the qualification put on that by the Claimant at paragraph 24 of the Claimant's opening. Indeed that concession rather makes the point that the words do not mean what the Claimant contend they do. If the reference to the CCTV "*covering operations on a 24/7 basis"* is supposed to mean that the cameras are being watched "*at reasonable intervals whilst nobody else was on-site",* one might wonder why those words were not used instead of the actual words used. On a proper reading, the words used in the Letter Representation mean that the Defendant had CCTV in operation at the Linton Warehouse which continually recorded what was going on but not that it was being continually (or even intermittently) monitored.

200. Even if I were wrong on this issue, the words were at best ambiguous and I would have no hesitation in rejecting the suggestion that the words used by Mr Hogg in the Letter Representation were dishonest, fraudulent or deceitful. Having heard from Mr Hogg I do not accept that he intended to make a representation that the CCTV was being monitored at all times day and night or that he played on any ambiguity in the wording. Rather, I accept his assertion that he did not believe that monitoring was taking place and was simply seeking to assert that there was some coverage by the CCTV around the clock, not necessarily continuous viewing of the CCTV images.

201. It follows that I find neither of the arguments in fraudulent misrepresentation and/or deceit to be made out on the ground that there was no relevant actionable misrepresentation. Thus far, I have not however considered how Mr Meyer understood the representations. This is academic in the light of my other findings. However, had it been necessary to make findings on this issue, I would have accepted that Mr Meyer interpreted the Letter Representation as being a statement that the Linton Warehouse CCTV system was monitored around the clock for the following reasons:

a) Whilst, as the Defendant points out, there is evidence that Mr Meyer was motivated to move goods from EHD's premises for reasons relating to cost and/or his personal relationship with one of the owners of that company, it is inherently unlikely that he would not have been concerned about the standard of security in the premises to which he was moving his goods;

b) It is apparent that, almost immediately after the theft, that Mr Meyer was expressing concern about the failure to monitor the CCTV (see, for example, the email at E855). This is strongly suggestive that he previously believed that it would be.

c) Whilst, for reasons noted below both in respect of the meeting on 25 September 2018 and in respect of the contents of the website, I had some reason to doubt the detail of Mr Meyer's recollection of two particular features of the history, this does not cause me generally to disbelieve his evidence. His case that he did in fact believe that there was round the clock monitoring was convincing.

202. On the other hand, I would not have been persuaded that Mr Meyer at the time of the bailment in fact understood the Website Representation to involve the assertion that the CCTV footage was to be monitored around the clock:

a) As the Defendant points out, the Re-Amended Particulars of Claim at paragraph 56.1 refers to Mr Meyer recalling "*a reference to CCTV being 'monitored 24/7' on the Defendant's website, which has subsequently been altered and that reference removed."* It is clear that his recollection on this issue is inaccurate. Whilst it could be the case that his inaccurate memory was caused by his having interpreted the actual wording, namely continual monitoring, to be 24/7 monitoring, the more likely explanation is that in fact his inaccurate memory was drawn from the contents of the letter together with the vague recollection that the website said something. If his recollection of the website is only vague, it is difficult to draw the conclusion that he formed a clear understanding from it.

b) As Mr Meyer accepted, the reference to Redcare/GSM monitoring system points against the reference to monitoring being a reference to a person watching the CCTV footage and towards the electronic monitoring of devices such as fire or burglar alarms. Whilst I accept that the casual representee might not have realised this (hence the finding as to ambiguity above), Mr Meyer in fact did know this to be the case, though in fairness his description in evidence was that he "*roughly*" knew what it involved. So if he had read the website in detail, such as to digest what was actually said, it is unlikely that he interpreted it to mean that the CCTV footage would be monitored continually.

c) Again as Mr Meyer accepted it was possible that he was combining his recollection of the website with the contents of the letter when he spoke of its contents. This would suggest that the website was not necessarily influential in causing him to believe that the CCTV would be monitored around the clock.

203. Since I have heard evidence and submissions on the other issues relating to this issue, it is desirable that I express my conclusions on the remaining four elements identified by the Claimant as making out the cause of action, if only briefly in respect of three of them:

a) If in fact either or both representations had been as asserted by the Claimant, each representation must have been made with the knowledge that it was false, since the Defendant's witnesses conceded that they knew that there was not continuous monitoring of the CCTV images.

b) It would be difficult to escape the conclusion that the representations asserted by the Claimant were made with the intention that the Claimant and other businesses in the wine trade would act on it by storing their goods with the Defendant, the way in which the Claimant in fact suffered damage;

c) So long as the Claimant proved that he stored the wine with the Defendant in reliance on the alleged representation(s), it would clearly prove that it had suffered damage in acting on the statement.

204. The remaining issue, as to whether the Claimant acted in reliance on either or both of the alleged misrepresentations, is however not as straightforward. In closing submissions the Defendant says that Mr Meyer accepted in cross examination that he would have stored the wine at Linton even if the letter and the website had not said what they did about security. On the other hand, the Claimant says that Mr Meyer's evidence was to the effect that the telephone conversation with Mr Hogg on 25 September 2018 was more important to him than either the website and the letter and that he relied more upon it, rather than that he placed no reliance on the website and/or the letter.

205. In fact neither appears to be an entirely accurate summary of Mr Meyer's evidence. My note is to the effect that Mr Meyer did indeed say that he would have stored goods at Linton even if the letter of 9 June 2018 had not said what it did, because he was reassured by what Mr Hogg had had to say in the conversation on 25 September 2018; but in respect of the Website Representation, I noted Mr Meyer to say that he "*relied more on what Mr Hogg said than the website."*

206. I accept the Claimant's point in closing that, so long as a statement by the representor influences the decision of the representee, it is possible to make out the case for inducement. For good reason the presumption of inducement has been described as "*very difficult to rebut*" (per Lord Clarke in Hayward v Zurich Investment Co PLC [2017] AC 142 at §30). Had I found the Website Representation to be actionable, I would have concluded that the presumption applied and that a finding of inducement was justified. However, in respect of the Letter Representation, the clear statement by Mr Meyer that he did not rely on it precludes such a finding. Unless I conclude that he did not mean what he said (which I decline to do), I would have been bound to find that there was no inducement in that regard.

207. Finally whilst dealing with inducement, this is an appropriate place to record my findings in respect of the discussion on 25 September 2018. As the case has developed before me, it appears

that nothing in fact turns on the discussions on 25 September 2018, since there is no pleaded case of misrepresentation or deceit based upon what Mr Hogg is alleged to have said. But, having heard evidence on the conversation and having noted the different accounts of the participants above, it would be unfortunate if for some reason that I cannot at the moment discern, an issue was found to turn on that discussion yet I had not made relevant findings of fact.

208. The true issue between the witnesses as to this conversation is as to whether security issues at the Linton Warehouse were part of the discussion. Having heard Mr Meyer's evidence, I have no doubt that, in discussing the use of the Linton site rather than the Burton-on-Trent site, he was concerned about security as well as other issues. I reject the Defendant's argument that Mr Meyer cannot have been concerned about security issues because he failed to put insurance in place. That failure is equally consistent with Mr Meyer's case (that an important communication went missing) or simply an administrative failure of a kind that can happen in any business. However, in respect of the key arguments that security was expressly mentioned and that Mr Meyer asked to know "*from A to Z"* if Linton functioned in the same way as Tilbury and other sites, I prefer Mr Hogg's evidence that neither of these were mentioned for the following reasons:

a) In a letter from solicitors for the Claimant to solicitors for the Defendant dated 2 May 2019, just over 8 months after the phone call, Mr Meyer's case was that the phone call had taken place in June 2018, about a year earlier. Whilst such mistakes are easy to make, it suggests that his recollection of the phone call was less than clear.

b) The letter does not contain reference to the phrase "*from A to Z*" which one would have expected if Mr Meyer had a clear recollection of this phrase at the time;

c) The September phone call was not mentioned in the Particulars of Claim, suggesting that the call was not of significance to Mr Meyer, yet if Mr Meyer remembered the use of the phrase and the discussion that he now refers to, it would have been important to advance this as part of his case;

d) Mr Hogg's account that he did not have security details in mind during their discussions is consistent with his case generally and in particular the fact that, as a sales representative, he would not know the detail of such issues.

209. Whilst I accept that comparisons were made between the Linton Warehouse and the Defendant's other facilities in that call, with the purpose of seeking to persuade Mr Meyer that the Linton Warehouse was as well suited to storing his goods as other locations, I do not accept that the question of security was specifically mentioned, nor that Mr Meyer used the phrase "*from A to Z*" in seeking to compare the warehouses.

Issue 8: Time Bar in respect of Fraudulent Misrepresentation/Deceit

210. Clause 3.7.1 of UKWA provides that " *The Company shall not be liable for any claim unless it has received written notice of it within 10 days of the event giving rise to the claim coming to the knowledge of the Customer or consignee…"* Clause 3.7.2 provides, "*No legal proceedings (including any counterclaim) may be brought against the Company unless they are issued and served within 9 months of the event giving rise to the claim."* The Defendant contends that these time bars apply as much to the claim in Fraudulent Misrepresenting and/or Deceit as it does to a claim in bailment. The causes of action were in fact first raised in the Reply on 19 November 2019, there having been no prior notice of such a case, and were not pleaded against the Defendant as giving rise to a claim until service of the Re-Amended Particulars of Claim on 22 March 2021. Thus, says the Defendant, the claims are barred both by clause 3.7.1 and by clause 3.7.2.

211. The Claimant responds that:

a) The notice of the theft itself was adequate notice under clause 3.7.1;

b) The doctrine of "relation back" applies to clause 3.7.2 such that the amended claim incorporating new causes of action are deemed to have been commenced when the claim was first issued in September 2019; and, in any event,

c) Clause 3.7.1 does not pass the test of reasonableness under UCTA 1977, which applies by virtue of Section 13 of the Act;

d) The defence of limitation could and should have been raised when the application for permission to amend so as to plead this case was made;

e) Clause 3.7 is a form of exemption clause, but such a clause cannot bar a claim based on personal fraud.

212. Given my findings on the case based on fraudulent misrepresentation and/or deceit, the argument as to the time bar is academic. However, if I had in fact concluded that the Defendant by its servants or agents was guilty of fraudulent misrepresentation and/or deceit, I would have concluded as follows on the application of Clause 3.7.1:

a) Notice of the theft is not notice of a claim in misrepresentation/deceit;

b) The events giving rise to a claim in misrepresentation and/or deceit were the making of the relevant statements, the associated entering into of the flawed transaction, namely the bailment agreement and the inaccuracy of those statements;

c) At the time of entering into the bailment agreement (which was no later than 1 February 2021, when the Defendant shipped the goods from the previous warehouse), the Claimant did not know and realistically could not have known the facts that gave rise to the putative

claim in misrepresentation/deceit, namely the alleged inaccuracy of the statements as to security;

d) The Claimant became aware of the third matter giving rise to the claim (namely the alleged inadequacy of security at the Warehouse) by, at the latest, 13 February 2019 (see Mr Meyer's email at E855);

e) Thus to comply with Clause 3.7.1, the claim needed to be notified by, at the latest 23 February 2019;

f) Notification by the Reply in November 2019 was out of time.

213. In respect of clause 3.7.2, I would have held:

a) The contract allegedly induced by the misrepresentation was entered in in the telephone conversation on 25 September 2018;

b) Thus the cause of action accrued on that date (see Green v Eadie [2012] Ch. 363);

c) Thus the claim needed to be issued by 25 June 2019;

d) In fact the claim was issued on 5 September 2019;

e) Accordingly, clause 3.7.2 would on its face operate to bar the claim.

214. However, I am satisfied that clauses 3.7.1 and 3.7.2 could not have been relied on by the Defendant if I had found deceit on the part of the Defendant, having regard to the authorities cited in Chitty on Contracts, §31-114, cross referring to §17.067, and citing HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, §§14 – 17. Even if such a clause is not objectionable as a matter of public policy, the terms of clause 3.7 are insufficiently clear and unmistakable to leave the reader in no doubt that fraud is intended to be covered. For the same reason, the clause would not have passed the test of reasonableness in the Unfair Contract Terms Act 1977.

Issue 9: Limitation of Liability

215. For reasons identified above, the Defendant is liable for losses caused by the breach of its duty to take reasonable care of the goods in so far as it fails to show that the theft happened notwithstanding the exercise of reasonable care on its part, but is not liable for losses caused by the complicity of its employee in the theft. It is the Defendant's case that such liability is limited by the terms of clause 3.3 of the UKWA Conditions as uplifted, namely £1,000 for this incident.

216. The Claimant has not seriously argued that the limitation clause does not on the face of it apply in respect of liability for the failure to exercise reasonable care. In my judgment, the Defendant is able to show:

a) That the words of Clause 3.3 clearly limit liability in respect of a want of care on the part of the Defendant or its employees;

b) That the limitation clause was adequately brought to the Claimant's attention by the letter of 7 June 2018 such that it was incorporated into the contract.

217. In any event, on Mr Meyer's evidence, he believed that the parties were contracting on such terms. It is thus common ground that these terms formed part of the contract between the parties.

218. The Claimant does however contend that the limitation clause is unreasonable under UCTA 1977, on the following grounds:

a) The UKWA terms are the Defendant's standard terms of business.

b) The Claimant and the Defendant do not have equal bargaining power and cannot renegotiate the Defendant's contractual terms.

c) The Claimant accepted what is described in the Claimant's opening as "*a clear inducement to accept these terms on the basis of the security arrangements described and prescribed to it"* which "*turned out to be thoroughly misleading."*

d) The Defendant's interpretation of the clause was not adequately brought to the Claimant's attention.

e) The limit under the clause is derisory.

219. In response, the Defendant says:

a) It is not disputed that the contract took place on the Defendant's standard terms of business such that the Act applies.

b) The UKWA terms are industry standard, as indicated by Mr Allington in his statement. This is consistent with Mr Meyer's evidence that he has extensive knowledge of the market and was aware that the Claimant contracted on such terms.

c) The fact that the Defendant's (mis)conduct may have induced to the Claimant to enter into the contract (which of course the Defendant rejects, as have I above) is not relevant to this issue.

d) The Claimant was clearly and fairly warned of the limitation clause by letter of 7 June 2018, which clearly identified the limitation of liability clause. In any event, Mr Meyer acknowledged that he understood that the Defendant contracted on such terms both from this letter and from his earlier dealings with the Defendant.

e) There is a huge disparity between the storage charges and the value of a case of wine. For example, the Defendant states that it would take more than 38 years for the storage

charges to equal the value of a case of wine worth £300. The Defendant offered the opportunity, through the UKWA terms, for the bailor to pay for a higher limit of liability, as Mr Meyer well understood. A contract on terms that a bailor pays one figure for bailment where the liability of the bailee is limited and a higher amount if the limitation is uplifted is a reasonable allocation of the risk.

220. The Defendant draws attention to the judgment of Gross J in Frans Maas where he rejected a similar argument in respect of a limitation of liability clause in the British International Freight Association (BIFA) standard terms, saying:

> *"159. In the present case: (i) the parties were of equal bargaining power; (ii) the reason that the limit under cl 27(A) is said to be derisory relates to the value of the goods lost. But, in the passage cited much earlier from Mr Harrowing's evidence, as he put it, no freight forwarder in his 'right mind' would contract on the basis of value; at the time of contracting freight forwarders may well not know the value of the goods with which they may come to deal. Accordingly, the limit in cl 27(A) is calculated in terms of weight; (iii) in any event,* [the Defendant] *could have contracted under cl 27(D) of the BIFA terms for a higher limit had it wished to do so; (iv) clauses such as cl 27(A) are commonly used by freight forwarders; see, for instance, Mr Graham's evidence, set out much earlier; (v) as evidenced by the fact that it did so,* [the Defendant] *could obtain insurance cover in respect of the goods."*

221. In my judgment, Clause 3.3 of the UKWA terms cannot be said to be unreasonable, at least in so far as they deal with the Defendant's liability on the facts of this case for breach of its duty to take reasonable care of the goods. I say so for the following reasons:

a) The evidence is that this is an industry wide term;

b) The Defendant had little way of knowing what the value of the Subject Wine was, even at the time of it being deposited with it, still less how that price might have varied with the passage of time and thus risked exposing itself to an uncertain liability if it did not apply a limit;

c) In contrast, the Claimant, which is in the business of buying and selling wine, had the information to value that wine from time to time and therefore to ensure that any insurance was suited to the value of the Subject Wine;

d) The Claimant was made well aware of the limit and indeed started the process of insuring against any greater liability;

e) There is no evidence that such insurance would not have been available had the process of obtaining insurance proceeded;

f) The Claimant had the opportunity to pay for a higher limit of liability with the Defendant but did not avail itself of that opportunity.

222. I have no hesitation in concluding that the limitation of liability clause is reasonable in so far as it applies to liability of the kind identified above in respect of a failure to take reasonable care for

the Subject Wine. The factors identified above point strongly towards such a limitation clause being a norm in this industry and that the Claimant's controlling mind was well aware of this. It had opportunities to take other steps to protect his economic interest, either by paying for an uplift of the limit or by insuring the goods. It does not matter that the failure to get insurance in place involved no fault on its part. This was clearly a fair manner in which to allocate risk between the parties.

223. If I were wrong on the issue of vicarious liability relating to complicity in the theft, the question would arise as to whether the limitation clause applied to such liability. Since I consider that the Claimant is unable to show that the complicity of the Defendant's employee involved acts sufficiently connected to their employment to justify a finding of vicarious liability, I am bound to find that the employee was not "*acting in furtherance of their duties as employee."* But had I found otherwise on the issue of vicarious liability, it does not follow that I would necessarily have found that the employee was acting in furtherance of such duties. As the Claimant points out, the phrase "*acting in furtherance of their duties as employee*" is not wont to cover the thief. So, for example, it might be argued that the thief in Brinks Global Services Inc v Igrox Ltd cited above, could not be said to have been acting in furtherance of his duties, even though his acts were sufficiently connected to his duties to give rise to a finding of vicarious liability.

224. Further, consideration would have been necessary as to whether the terms of the clause were wont to cover the deliberate acts of the Defendant's employee in assisting in a theft. This would have required consideration of the Claimant's argument as to the distinction to be drawn between the use of the phrases "*wilful default*" and "*wilful misconduct*" in such a clause, bearing in mind the Defendant's argument that this distinction misses the point where, as here, the clause refers to "*wilful act or default*", arguably covering both "*wilful default*" and "*wilful misconduct."* I see force in this argument. However, given my finding on the issue of vicarious liability, these issues are academic and need not be developed further.

Issue 11: VAT

225. Where wine is imported and held in a bonded warehouse, it is common ground that the liability to pay VAT and excise duty, which are chargeable by reason of the import, is deferred until the wine is removed from the bond. At that point, the VAT and duty become payable unless the wine is placed in another bonded warehouse, exported, removed to a duty free store or subject to some other custom process (see paragraph 2 of Mr Allington's second statement).

226. At paragraph 81.4 of the Re-Re-Amended Particulars of Claim, the Claimant claims *"damages for the difference in value between the VAT paid or payable by it or its customers (to whom the Claimant owes contractual and/or common law duties as pleaded at paragraph 79 above) upon*

purchase of the Stolen Wine, and the VAT payable by it or its customers on the sum of the replacement value of the Stolen Wine, that difference being estimated in the sum of £10,930.36."

227. The Defendant responds that upon purchase of replacement wine, that wine will either be placed in bond (in which case any VAT liability will be deferred until it is removed from bond) or will held out of bond (in which case the VAT is payable). In either event, the VAT that is payable is the same as the VAT that would have been payable on removing the Stolen Wine from bond. Accordingly, there is no loss as a result of the theft. In any event, since the Claimant is VAT registered, the Defendant contends that it could reclaim any VAT which it paid in replacing the stock as input tax.

228. It appears to me that there is no answer to these arguments. The Claimant cannot show any loss in respect of VAT.

Issue 12: Excise Duty

229. The issue as to the payment of excise duty arises on the Defendant's counterclaim. The consequence of the theft of the wine was that, since it was no longer being held in bond, duty and VAT became payable by the Defendant on the wine. The VAT was subsequently reclaimed as input tax and no loss arises. However, the duty of £3,662.34 represented a loss to the Defendant.

230. The Defendant invokes clause 2.1.4 of the UKWA terms in seeking to recover the loss from the Claimant. The Claimant's response in the Reply is essentially fourfold:

a) The incorporation of the UKWA terms is not admitted.

b) The liability to pay the duty cannot arise where the loss is due to the Defendant's own wrongdoing;

c) If the Claimant has suffered actionable loss as a result of the Defendant's torts, its loss would include any amount that it had to pay under clause 2.1.4;

d) No invoice has been raised by the Defendant.

231. Taking the issues in the same order:

a) I reject the argument that the UKWA terms were not incorporated for reasons stated above in respect of issue 1;

b) On the face of clause 2.1.4, the obligation on the Claimant to repay the duty arises even where that liability has arisen because of some wrongdoing by the Defendant. In my judgement, the Claimant cannot invoke such wrongdoing to resist a contractual liability to reimburse the Claimant.

c) I accept that, if the Claimant had a good claim against the Defendant, its loss would include any liability for duty and that thus there would be circularity in the Claimant being liable to the Defendant for this sum but thereafter being entitled to recover the sum from the Defendant.

d) The Defendant has produced a demand for the payment of the duty (E919) and has adduced evidence that it was sent to the Claimant (see paragraph 4 of Mr Allington's second witness statement). In my judgement, this is adequate invoicing to meet the requirement of clause 2.1.4.

232. It follows from this that the Defendant is entitled to judgment for the outstanding duty.

F. CONCLUSION

233. For the reasons set out above, my conclusions on the issues before the court are as follows:

Issue 1: Was there a contract on UKWA terms with a £1,000 uplift of liability? **Yes.**

Issue 2: Did the Defendant fail to take reasonable care of the goods? **Yes.**

Issue 3: Was the theft carried out with the Defendant's employees' complicity? **Yes.**

Issue 4: Is the Defendant in principle vicariously liable for any complicity by its employees? **No.**

Issue 5: Is the Defendant's potential liability pursuant to Issues 2 and/or 4 in principle excluded by the UKWA terms? **No.**

Issue 6: Is any exclusion of liability ineffective because of deviation from the contractual obligations? **No.**

Issue 7: Was the Claimant induced to contract by a fraudulent misrepresentation/ misstatement by the Defendant that CCTV was monitored at reasonable intervals? **No.**

Issue 8: Are the misrepresentation/misstatement claims time barred? **No**.

Issue 9: Is the Defendant entitled to rely on the limitation of liability? **Yes.**

Issue 10: What was the value of the goods stolen? **£120,997.**

Issue 11: Is the Claimant entitled to recover VAT? **No.**

Issue 12: Is the Claimant liable to reimburse the Defendant for excise duty? **Yes**.

234. It follows that:

a. The Claimant is entitled to judgment on the claim for the principal sum of £1,000.

b. The Defendant's counterclaim for duty succeeds and it is entitled to judgment for principal sum of £3,662.34.

APPENDIX 1 – AERIAL VIEW OF THE WAREHOUSE

For security reasons the image at this point is not displayable.

APPENDIX 2 – PLAN OF THE WAREHOUSE

For security reasons the image at this point is not displayable.