SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] SC PER 50

A2/16

JUDGMENT OF SHERIFF GILLIAN A WADE QC

in the cause

KAVRELI GROUP LTD, a company incorporated under the Companies Acts as company number SC371635 and formerly named *inter alia* Khatri Enterprises trading as Yak and Yeti Restaurant and having a place of business at 13 Newington Road, Edinburgh and having its registered office at 79A Flat 1 Nicolson Street, Edinburgh.

Pursuer

against

AVIVA INSURANCE LIMITED, a company incorporated under the Companies Acts and having its registered office at Pitheavlis, Perth PH2 0NH

Defender

Act: - Gardiner
Alt: - Balfour

PERTH, 1 May 2019

The Sheriff having resumed consideration of the cause finds the following facts admitted or proved:-

Findings in Fact

1. The pursuer is Kavreli Group Limited; a company incorporated under the Companies Acts as company number SC371635 and having its registered office at 79A Flat 1, Nicolson Street Edinburgh, EH8 9BZ.

2. The pursuer company was originally incorporated on 22 January 2010 as Khushi Enterprises Limited conform to certificate of incorporation of a private limited company which forms number 6/2/2 of process. On that date Mr Prabesh Khatri CChetri (also known as and hereinafter referred to as "Mr Paul KC") was appointed

as a director of the company conform to Companies House Form AP01 which forms number 6/2/5 of process.

3. Subsequently the pursuer has changed its name firstly to Khatri Enterprises Ltd and then, on 16 January 2017, to Kavreli Group Limited.

4. The defender is Aviva Insurance Limited; a company incorporated under the Companies Acts as company number SC002116 and having its registered office at Pitheavlis, Perth, PH2 ONH.

5. The court has jurisdiction.

6. 5/1 of process consists of true copies of the Certificate of Employer's Liability Insurance , Statement of Fact and Policy Schedule relating to the policy number B2B/0/NU/TAK 2003338 issued by the defender in favour of the pursuer (hereinafter referred to as "the policy")

7. 6/21 of process is a true copy of the wording containing all terms and conditions relating to the policy.

8. Prior to the inception of the insurance policy which was purportedly in force at the time of the fire, Mr KC was required to complete a Statement of Fact which included a number of pertinent questions.

9. The answers to these questions would be used by the defender to determine whether an offer of cover would be made to a potential insured and if so on what terms.

10. The questions were questions which would have been asked by practically all reputable insurance companies of all prospective insured.

11. The Statement of Fact which forms part of the policy of insurance contains the following statement.

> "Please read the following information carefully. It contains material facts regarding your business and premises and your requirements in terms of policy cover. Should any of the information you provided be recorded inaccurately… then please contact us immediately.'

12. The document also contained a warning under the heading of "Important Information" that the information provided had been taken into account when calculating the premium, terms and conditions upon which the policy was based and making clear that if any of the information provided was inaccurate or untrue it could affect a potential insured's rights under the insurance policy and the insurance company may not offer protection in the event of a claim.

13. It was made clear that if a proposer was in doubt as to the materiality or relevance of any information then the appropriate course was to contact his insurance advisor.

14. It also highlighted the ongoing duty to disclose relevant information and to notify the defender if there were any inaccuracies in the documentation provided. In particular there was a warning that the proposer should not provide an answer he knew or might believe to be untrue or fail to disclose additional relevant information in response to questions on the form. Once again the warning is given that false information and failure to comply with these requirements could invalidate some or all of the policy cover.

15. The Statement of Fact included a declaration that by reading and accepting the Statement of Fact to be accurate the proposer was agreeing that the answers given to the questions are true and complete to the best of his knowledge and belief and that if true answers have not been given the insurance may not protect the proposer in the event of a claim.

16. In the "General Questions" section of the Statement of Fact the pursuer was asked to state the "Number of years trading in total". The answer which he provided was '2'.

17. In the "Risk Details" section of the Statement of Fact the pursuer was asked "Which insurer are you currently insured with?". In response the pursuer provided the answer "Other".

18. In the "Historical Questions" section of the Statement of Fact the pursuer was asked 'Have you, the proposer or any partner or director of the trade or business… ever either personally or in any business capacity…. been the subject of a County Court judgement' [sic]. The pursuer answered this in the negative.

Background

19. Mr Prabesh Khatri – CChetri (hereinafter referred to as "Mr KC") was born in Nepal in 1977. He moved to England in 1996. He is a well-educated man having studied electrical engineering, IT and aerospace engineering. Thereafter, amongst other things, he gained work experience in the restaurant trade and came to Scotland in or around 2008 by which time relatives of his were running the Namaste Kathmandu restaurant ("the Namaste Kathmandu") in Forest Road, Edinburgh.

20. The business at the Namaste Kathmandu was owned and operated by a limited company; Namaste Restaurants Ltd., company number SC338259. The directors were Mangala Basnet and her husband, Bimal Basnet. Bimal Basnet is Mr KC's cousin. Mr KC worked in the restaurant on the basis of an informal agreement the terms of which were not clear. He was, in effect, managing the restaurant. He had no shares in the company.

21. Subsequently Namaste Restaurants Ltd acquired the "China Town" restaurant which was operating from the insured premises at 13 Newington Road, Edinburgh and began trading as a Nepalese restaurant, known then as the Namaste Nepal. Mr KC began to work as the manager of the Namaste Nepal. Initially the business was owned and operated by Namaste Restaurants Ltd.

22. Street view photographs show that in April 2009 the premises at 13 Newington Road were still operating as the China Town restaurant. On record the pursuer averred that the China Town restaurant was acquired in 2010.

23. Mr KC was not credible or reliable in his assertion that he had taken over the premises to operate as a Nepalese restaurant in 2008. Even on the most generous interpretation of his evidence the very latest date that Namaste Restaurants Ltd. could have taken over the premises at 13 Newington Road and begun operating them as Namaste Nepal was August or September 2009 which was some 15-16 months before the fire at the premises.

24. There had not been a Nepalese Restaurant trading from 13 Newington Road for a period of two years prior to 12 January 2011.

25. On the 19 February 2010 Namaste Restaurants Ltd was dissolved. However the restaurant remained open and continued to trade from the insured premises. Mr KC maintained he did not initially know that Namaste Restaurants Ltd had been dissolved until he opened correspondence which alerted him to the situation some months later at which point he instructed his solicitor with a view to taking over the premises himself.

26. As there was no legal entity which was responsible for the restaurant from 19 February 2010 onwards and which could either hold the position of tenant under

the lease or employer in respect of the staff, it followed that there was no insurance cover in place for this period and the restaurant was trading without insurance.

27. Mr KC and his family members had a disagreement and as a result it was agreed that Mr KC himself would take over the restaurant which had been trading as Namaste Nepal. On legal advice Mr KC set up a limited company and became director of the Pursuer Company (then called Khushi Enterprises Ltd.) on 22nd January 2010.

28. A lease was entered into between the landlord, Mr Thomas Chun Kay Chan and Khushi Enterprises Ltd with a purported date of entry of 19 February 2010, the same date as the dissolution of Namaste Restaurants Limited, despite the fact that the lease was not actually signed by the pursuer until the 9 September 2010 and by the landlord on the 21 September 2010.

29. The pursuer company began trading from the premises as the Yak & Yeti Restaurant on the 19 October 2010.

30. There was no policy of insurance in place on that date.

The original policy of insurance in the name of Mrs KC

31. On the 6 November 2010 a policy of insurance in respect of the premises and the business was entered into which purported to be in the name of Mr KC's wife, Mrs S KC trading as the Yak & Yeti Restaurant, 13 Newington Road, Edinburgh.

32. The Statement of Fact relating to that policy is number 6/7 of process.

33. The terms and conditions of the purported policy between Mrs KC and the insured were contained within the Café, Takeaway and Restaurant Insurance Policy Wording arranged through SME insurance services.

34. On the face of the policy the insured is Mrs S KC, trading as a sole trader. However Mrs S KC is, and was at the time, employed as a nurse. She took no part in the day to day running of the restaurant at any time.

35. Mrs KC was not a director of the pursuer company at the time of the inception of this insurance policy. She was not appointed a director until 24 November 2010.

36. The initial decision to effect insurance for the business in the name of Mrs KC was deliberate. Mr KC himself had provided the information contained in the Statement of Fact to the insurance broker and claimed to have done so on behalf of his wife.

37. The insurance policy had been deliberately entered into in the name of Mrs KC because Mr KC was concerned that he did not have a good credit history whereas his wife, who was in employment and had credit cards, was more credit worthy.

38. Mr KC was therefore aware that credit worthiness was an important consideration for an insurer when effecting insurance and was likely to be material to the question of whether the defender accepted the risk.

39. Mrs S KC had no insurable interest in the business.

40. Mrs KC had not been trading in any capacity whether as a restaurant business or otherwise for two years prior to the completion of the questions in the Statement of Fact.

41. Neither Mrs KC nor anyone else had had a policy of insurance in place at the time of completion of the said questions nor could any such insurance have been in place between 19 October 2010 and 6 November 2010. This must have been known to Mr KC at the time of completion of the questions in the Statement of Fact.

42. Mr KC's representations regarding his wife's involvement in the business as a sole trader running the Yak & Yeti from the insured premises and the existing insurance arrangements were untrue.

43. This policy of insurance was void *ab initio*.

44. Between 19 October 2010 and 12 January 2011 the pursuer traded without insurance. In so far as the pursuer purported to have employees this would have resulted in a breach of the Employers' Liability (Compulsory Insurance) Act 1969.

Change in the name of the insured

45. Number 6/18 of process is a true copy of a letter sent by Mrs S KC, to her brokers, Business Line Insurance, Chase Side, London dated 1 January 2011 and received by Business Line Insurance on 11 January 2011.

46. This letter relates to the change in name of the insured party under the policy from Mrs S KC to the pursuer. The letter was in fact written by and posted by Mr KC.

47. The policy was arranged by SME Insurance Services, SME Insurance Services, Chantrell House, The Calls, Leeds, West Yorkshire LS2 7HA, hereinafter referred to as "SMEI" on behalf of the defender.

48. Number 6/22 of process is a true copy of screenshots printed from the SMEI system relating to the policy.

49. The insured premises were damaged by a fire which occurred on 12 January 2011 and which is estimated to have started at around 13:35 hours on that day.

50. The letter purporting to have been written by Mrs KC was received by Mr Gary Fitzgibbon of Business Line Insurance Services (the pursuer's broker) on the 11 January 2011.

51. On the 12 January 2011 Mr Fitzgibbon spoke with Mr KC on the telephone as evidenced by production 6/19. Mr Fitzgibbon had no recollection of the call.

52. The screenshots contained within that production confirm (i) that the change in the name of the insured on the policy from Mrs S KC to the pursuers was cleared to be sold at 14:24:47 hours on 12 January 2011 and (ii) that the request for an amendment in the name of the insured from Mrs S KC to the pursuer was confirmed at 16:50:29 hours on 12 January 2011.

53. The defender's obligation to indemnify the pursuer would have commenced at the start of and covered the whole of the 12 January 2011 and the fire therefore occurred within the period of insurance in the event that the contract of insurance is not deemed otherwise void and unenforceable.

Representations in relation to number of years trading

54. In responding "2" to the question "Number of years trading in total" Mr KC, on behalf of the pursuer, was representing that the pursuer had been trading for a period of 2 years.

55. A period of 2 years prior to 12 January 2011 is 12 January 2009.

56. The pursuer company could not have begun trading from the insured premises or anywhere else before it was incorporated on the 22nd January 2010. This was just over one year before the fire.

57. In April 2009 the premises at 13 Newington Road were trading as "China Town". The pursuer's position was that the premises began trading as a Nepalese Restaurant in September 2009 which was sometime between 15-16 months before the fire. He

was not entirely credible or consistent in this respect but this is the most generous construction of his evidence.

58. At some point during the course of 2010 the restaurant at 13 Newington Road closed down for at least one period of about 3 months for refurbishment and rebranding.

59. The pursuer then reopened the restaurant and traded as Yak and Yeti Restaurant, having a place of business at 13 Newington Road, Edinburgh EH9 1QR ('the insured premises') on the 19 October 2010.

60. Immediately prior to the restaurant opening as Yak & Yeti it had been closed for a period of between two to three and a half months for refurbishment.

61. The pursuer did not take over the business as a going concern from the previous owners. This would have required him to register for VAT which was not done.

62. The Pursuer's wife never traded from the premises as Yak & Yeti at any time.

63. Mr KC confirmed that in responding to the question with the answer "2 years" he knew and understood that the answers he gave to the questions asked by Mr Fitzgibbon about the number of years trading related at least in part to a business with a different name run by a different company which had been closed for at least 2 months. He knew and well understood that the answers he had given did not relate either to his wife or to the pursuer company.

64. The pursuer had been trading from the premises as the Yak & Yeti restaurant for no more than three months.

65. Even on the strained explanation provided by Mr KC the longest a Nepalese restaurant could have been trading was 12 to 13 months if it is accepted that the Namaste Nepal opened in September 2009 , which it is not.

66. The question in the terms posed was not ambiguous.

67. Mr Fitzgibbon did not ask a different question or ask the question in a different way than is represented in the Statement of Fact and in any event Mr KC, on behalf of the pursuer, was bound to correct the answer on receipt of the Statement of Fact in the event that he thought it was incorrect.

68. Accordingly the answer Mr KC provided on behalf of the pursuer to the question about the number of years trading was a misrepresentation irrespective of the explanation provided.

69. The introductory text to the Statement of Fact states that it contains 'material facts'. The page headed "Important Information" states that 'the information that they contain has been taken into account when calculating the premiums, terms and conditions upon which your policy is based.' Accordingly the defender considered that information provided in the Statement of Fact was material.

70. It was explained by Mr Stephen Coates , a commercial insurance underwriting manager in his report, production 6/36 of process, that the period of time for which a business has been trading is a fact which would be taken into account by a prudent insurer in deciding whether to accept risk and if so on what terms.

71. An established business is generally viewed as a better risk because if it has been running for a significant period of time it would indicate that the management has demonstrated competency in dealing with the sort of problems which may expose an insurer to risk.

72. It was therefore material to a prudent underwriter and indeed to the defender that the answer to the question about the number of years during which the pursuer company had been trading was answered correctly and honestly.

73. In providing an answer which was a misrepresentation the pursuer induced the defender to enter into the contract of insurance.

74. If the pursuer had answered the question by stating that it had been trading for less than a year then this would have generated a referral to SMEI who would have looked into the business to find out more information. In particular enquiry would have been made about the experience of those running the business. If at any time the proposer had been trading without insurance or there was any connection between the proposer and any business which had been trading without insurance that would have led to declinature of cover.

75. Had the defender been aware that Mr KC, as a director of the pursuer company, had managed the same restaurant for a company which had been dissolved and that he had been trading without insurance since 19 October 2010 insurance cover would have been declined.

76. In any event if a business had been trading for less than two years the premium loading would have been higher and even if a policy of insurance were issued the terms and conditions thereof would have been different.

77. Accordingly the misrepresentation in relation to the number of years trading was material, and it induced the defender to enter into the contract of insurance. But for this misrepresentation the defender would not have entered into the contract of insurance on the same terms and conditions and that it did.

Representations in relation to existing insurance arrangements

78. Prior to the purported policy of insurance being effected in the name of Mrs S KC there was no policy of insurance in force in respect of the restaurant.

79. From at least the 19 February 2010 when Namaste Restaurants Ltd was dissolved any restaurant trading from the premises at Newington Road must have been trading without insurance.

80. Mr KC was responsible for and managed any restaurant which continued to trade from the premises during that period. He knew or ought to have known what insurance arrangements were in place not least because he required to display the appropriate Employers' Liability Certificate at the premises.

81. At the very least the pursuer was trading between 19 October 2010 and 12 January 2011 without insurance and this is a fact about which Mr KC must have been aware when answering the question about the current insurance arrangements on behalf of the pursuer company.

82. The answer "other" was one of a number of choices from a drop down list. The other choices included a list of popular insurers.

83. The answer "other" implies that there was currently insurance in place but that the proposer does not know the name of the insurer or that the insurer's name does not appear on the list. On no reasonable construction can it be read to infer that there was no insurance in place.

84. The question is in clear and unambiguous terms. It specifically refers to current insurance and not to insurance which might historically have been in place.

85. Mr Fitzgibbon did not ask a different question from that on the Statement of Fact although he may have worded the question "which insurance company are you with at the moment?"

86. In supplying the answer "other" in relation to the question about the identity of the proposer's current insurer Mr KC on behalf of the pursuer company knowingly misrepresented the position.

87. He knew or ought to have known that from at least 19 February 2010 there was no insurance in place in respect of any restaurant operating from the premises and more particularly knew that from 19 October 2010 the pursuer company had had no insurance as he himself had purported to effect insurance in the name of his wife.

88. The correct answer to the question should have been "None". The answer provided on behalf of the pursuer was a misrepresentation.

89. Current insurance arrangements are material to a prudent insurer and indeed to the defender in this case.

90. Mr Stephen Coates confirmed that if there had been a gap in insurance provision where employees were involved this would be illegal and that an insurer would be concerned about such a state of affairs. As a result further questions would be asked before cover would be offered. Furthermore any prudent underwriter would want to know if a business has had claims or other issues.

91. In the event that the pursuer had answered the question accurately by stating that it did not have a current insurer the matter would have been referred for further consideration. In particular if the proposer had stated that it had no current insurer but claimed a two-year trading history the application would go no further because it would be apparent that the company was trading without insurance.

92. Accordingly the defender was induced to enter into the policy on the terms that it did as a result of this misrepresentation. If the pursuer had correctly stated that it did

not have a current insurer then further questions would have been asked which would inevitably have led to the cover being declined.

Representations in relation to County Court Judgements

93. In the "Historical Questions" section of the Statement of Fact the pursuer was asked "Have you or the proposer or any partner or director of the trade or business ever been either personally or in any business capacity subject of a county court judgement [sic] ?". The pursuer answered, "No".

94. The question was answered as at the 12 of January 2011. Mr KC was a director of the pursuer company at that time.

95. When Mr Paul Owens met with Mr KC on 3 June 2011 he made enquiries as to whether Mr KC had County Court Judgements (CCJs) to which Mr KC said that he thought he did. He also expanded on this admission by saying that he thought that these were in relation to an address in Reading. The reason he thought that he may have CCJs was "because he kept on getting letters."

96. Mr Paul Owens instructed an agency to carry out a search for County Court judgements against Mr KC which would have been made from the public databases of agencies such as Creditsafe.

97. This search revealed the documents which were produced at 6/33 of process. These are not themselves County Court judgements but are the product of a search for such judgements. The documents referred to a Mr Prabesh KC and refer to:

    a) an address at 80 Whitley Street, Reading , Berkshire RG2 0EQ and a sum of £4,389 on 3 November 2008,

b) an address at 2, Anthian Close, Woodley, Reading RG5 4XE dated 25 June 2007 and the first amount of £446.

98. Mr KC confirmed that these were addresses at which he had resided and that the individual referred to was himself. He also provided explanations as to how these debts may have accrued. It was clear that he was aware of these debts, that he had correspondence in relation to them and that there was a likelihood that he had County Court judgements against him as at January 2011.

99. This was further evidenced by the fact that he had concerns about his creditworthiness which prompted him to obtain insurance in his wife's name in the first instance.

100. From production 6/24 paragraph 37 it is clear that as at that date Mr KC was able to provide clear information from which it can be inferred that he knew or ought to have known that he had CCJs and precisely what they related to. He stated:

"When I lived in Reading I stayed with the landlord at a cafe called Chathen Centre Café at 78 Oxford Road, Reading. I lived above that premises. That business may have been put into my name by the landlord, Tom Sharma. I was just an employee but he put the business in my name incorrectly. I moved away from that job but was sent a council tax bill for the commercial premises which resulted in a court action. I disputed this and believe it has been resolved. I think I do have a few CC J s relating to that address in respect of council tax."

101. Mr Paul Owens confirmed that he had recorded accurately what he had been told by Mr KC.

102. In light of the evidence of Mr KC, the evidence of the statement to Mr Paul Owens, the results of the search carried out by Creditsafe, the content of the documents produced in 6/33 of process and Mr KC's knowledge of his lack of creditworthiness it is reasonable to infer that he knew or had a reasonable belief that he had CCJs as at 11 January 2011 and before.

103. In light of his knowledge, or at least reasonably held belief, that such County Court Judgements existed Mr KC's negative response to the question was a misrepresentation.

104. The misrepresentation regarding the existence of County Court judgements was material.

105. Insurers always ask questions about such judgements when determining whether or not to accept risk. This has more bearing on acceptance or otherwise of risk than on determination of the premium. If insurers are made aware that there are or may be outstanding County Court judgements further enquiry will be undertaken before cover is offered.

106. The materiality of the existence of outstanding judgements is that it is an indicator of a business which cannot honour its financial obligations. This would inform the insurer regarding the success of the business and the quality of the financial management of the owners.

107. In this particular case the only available answers were "yes" or "no". In the event that the proposer considered that he may have had CCJs the appropriate response would have been "yes" and the matter would have been referred for further consideration.

108. Had the defender had available to it the information contained in production 6/33 it would have resulted in a "no quote". In other words insurance cover would have been declined.

109. Accordingly the defender was induced to enter the policy of insurance as a result of Mr KC's misrepresentation regarding the existence of the outstanding County Court judgements.

110. The answers to all three questions in issue were misrepresentations and not non-disclosures.

111. The same or similar questions regarding the trading history, existing insurance arrangements and the existence of CCJs would be asked by every insurer before offering insurance cover to a proposer.

112. The misrepresentations in relation to the number of years trading, the current insurer and the County Court judgements were all material and the defender was induced to enter the contract of insurance by virtue of each and all of the misrepresentations provided.

Loss

113. There was no credible or reliable evidence from which the court could make findings as to the amount which Mr KC had invested in the pursuer company or the restaurant or the source of any such sums.

114. There were no records kept from which the past or projected profitability of the business could be determined.

115. The pursuer lodged dormant company accounts as at 31 January 2011 (production 6/1). This entitled the company to exemption under section 480 of the Companies Act 2006 and would evidence that the company had not been trading at all in the period. This would negate any entitlement to a business interruption claim.

116. It would certainly undermine any factual basis for a claim to be made of the nature currently suggested.

117. The pursuer made no tax return (6/17) which would also support the inference that either the pursuer did not trade or that it submitted false returns. Neither position forms a sound basis for the claim now made.

118. In any event a failure to keep accurate records of stock purchases and sales receipts would constitute a breach of warranty in terms of the Special Conditions attached to the Policy and would constitute a bar to a claim for business interruption.

119. At best the hand kept vouching provided by Mr KC, which he acknowledged was incomplete, and was no more than a rough estimate which does not assist the court in making findings in fact in this regard.

120. On examination of the notebook which Mr KC claimed to have kept to record his costs and sales Mr Rowand determined that only 57% of the sales which purported to be recorded in the notebook were vouched.

121. There was no evidence to support the contention that the sales figures would have increased or the percentage increase which could have been expected.

122. Based on the vouched sales the pursuer's annual turnover would have been around £103,295 as evidenced by Mr Rowand.

123. The pursuer's rough estimate of costs as £900 per week. This is not vouched.

124. Using these figures the pursuer's gross annual profit would have been £57,305.

125. The provisions of the policy require that one must also consider what other charges and expenses have been saved as a result of the fire and on the basis of the evidence which was led from Mr KC this would have amounted to £106,887. This evidence was unchallenged.

126. The costs saved are higher than the gross profit of £57,305. Accordingly no claim for business interruption is justified.

127. Although a purported schedule of loss in support of a trade's contents claim was produced as 5/4 of process it was conceded that this was no more than a rough estimate. In any event some items on the schedule belonged to the landlords and some to Namaste Nepal Ltd. There was no vouching of values. It is impossible to make any findings in fact in this respect.

128. In any event, having regard to the findings in fact and law made no question of quantum arises.

Finds in Fact and Law

1. The pursuer, having made material misrepresentations in answer to three questions posed by the defender prior to the inception of the policy, the defender is entitled to avoid the policy *ab initio*.

2. The defender is not bound to indemnify the pursuer in terms of the policy in respect of any loss which may have been sustained as a result of the fire on the 12 January 2011.

Therefore

SUSTAINS the defender's third, fourth and fifth pleas-in -law; REPELS the pursuer's first plea in law; GRANTS decree of absolvitor; FINDS the pursuer liable to the defender in the expenses of the action as taxed; ALLOWS an account thereof to be given in and remits same when lodged to the auditor of court; CERTIFIES the cause as suitable for the instruction of junior counsel and CERTIFIES Mr G W Rowand and Mr Stephen Coates as expert witnesses.

Note

[1] This matter called before me for proof on the 12, 13 and 14h February 2019. At the end of the evidence I continued the cause until 18 March 2019 for written submissions and for a revised joint minute to be lodged. I then heard oral submissions from the pursuer on the 18 March and from the defender on the 26 March 2019.

[2] In advance of the proof there were a number of preliminary matters raised. A motion was made to take the evidence of the defender's witness, Mr Fitzgibbon, by way of a video link. This motion was granted unopposed.

[3] The pursuer sought to lodge a sixth inventory of productions, which was also unopposed, and a pen drive was lodged with the algorithm spreadsheet added by that inventory.

[4] Finally the defender sought to lodge an eighth inventory of productions which included an updated report from the defender's accountancy expert, Greg Rowand. It was submitted that as a result of a reformulation of the pursuer's business interruption claim he had required to complete a further report.

[5] This was opposed on the basis that, far from being a response of a minor nature, it undertook to deal with and comment upon 1000 pages of till receipts and card receipts from the operation of pursuer's business in the 12 weeks prior to the fire. The pursuer submitted that there was already a report which analysed four weeks' worth of the receipts but that at the time of completion of the first report the defender's expert chose not to analyse the other eight weeks. It was submitted that the second analysis raised issues about duplications in the invoices and it would be an enormous task to verify the exercise which the defender's expert had carried out.

[6] The updated report had been received by the pursuer on the previous Thursday afternoon and the pursuer's counsel had not been position to validate the analysis or to take instructions on it. It was submitted that there was no justification for it coming so late and on the basis of its lateness, the prejudice to the pursuer in not having a chance to validate its content and having regard to the date of the report, which was 11 January 2019, the motion should be refused.

[7] Despite Mr Balfour's valiant attempts to persuade me otherwise I took the view that there was merit in the opposition. Above all there had been a pre-proof hearing in the days before the proof diet and there had been no mention that any such updated or second report was anticipated.

[8] I considered that this approach was somewhat lacking in candour and observed that the point of a pre-proof hearing was to ascertain the parties' readiness for proof. The court would have expected to have been told that a substantial report of this nature could be expected. It was not, in my view, appropriate to confront the pursuer and the court with this at such short notice. For these reasons I refused the defender's motion as coming too late. The proof then commenced.

The Evidence

Mr Prabesh Khatri- CChetri (also known as Paul KC)

[9] In support of the pursuer's position only one witness was led and that was Mr KC himself. He provided some information about his background and the circumstances in which he came to be in Scotland. Throughout his evidence he presented as pleasant and courteous. However he was inclined to be somewhat evasive, especially in cross examination and I was not convinced that he was entirely credible and reliable.

[10] This was particularly so in relation to dates and explanations for the answers which he had given to the questions posed in the Statements of Facts for both the original and the subsequent insurance policies. I did not form the view that he was as naive in relation to his understanding of business as he sought to represent. On the contrary I formed the impression that in many respects he had taken a deliberate path towards achieving the insurance cover which was eventually in place at the time of the fire.

[11] In submissions it was suggested that it did not really matter to the pursuer's overall position in law what I made of Mr KC's credibility and reliability and it is fair to say that in the pursuer's written submissions his evidence is dealt with quite shortly.

[12] I do not agree with that view. I considered it important to take full account of the reasons why the answers to particular questions were given as this informed the whole approach taken to the securing of insurance cover. The reasons provided for giving particular answers to particular questions had to be assessed in the context of the application as a whole particularly when it was suggested that the questions gave rise to ambiguity. For that reason I have recorded Mr KC's evidence in some detail.

[13] Mr Khatri- Chhetri explained that he chose to use the name Paul KC because people from the United Kingdom found his Nepalese name difficult to pronounce. He had been born in Nepal and came to the United Kingdom in 1996.

[14] He had originally lived in Reading and had become involved in the restaurant industry. He had come to Edinburgh in around 2008 or 2009 and took up a position working as a manager with members of his family who owned a restaurant in Forrest Road in Edinburgh named Namaste Kathmandu. This restaurant was operated by a company named Namaste Restaurants Ltd under company number SC338259.

[15] Mr KC asserted that he had invested money in this business although he did not have shares in it. After a period of time Namaste Restaurants Limited acquired a second restaurant which had been trading as a Chinese Restaurant in Newington Road. The restaurant initially traded under the name Namaste Nepal. Mr KC initially asserted that this restaurant had begun trading as a Nepalese Restaurant in 2008 but this transpired to be incorrect. It was clear from photographs produced that the restaurant remained a Chinese Restaurant until at least April 2009.

[16] Namaste Nepal initially traded under the ostensible ownership of Namaste Restaurants Limited but there was a falling out because the owners of that company believed that it was taking customers away from Namaste Kathmandu.

[17] In an attempt to resolve the matter it was agreed that Mr KC would take over responsibility for the premises at Newington Road. He decided to rename and rebrand it as the Yak & Yeti.

[18] In a series of fairly futile attempts to gain clarity as to dates Mr KC was referred to the seventh inventory of productions for the defenders which contained a number of photographs. His evidence in this regard was neither credible nor reliable as became more obvious in cross examination.

[19] In any event he was able to confirm that in around 19 February 2010 Namaste Restaurants Ltd which owned Namaste Nepal was dissolved. According to the witness the dissolution had been in February but he did not become aware of this until August 2010. During this period the restaurant continued to trade although there was no legal entity in place to either employ staff or crucially to effect insurance including employers' liability and occupiers' liability insurance which would have been required as a matter of law.

[20] It seems that after the dissolution of the company was discovered the other family members indicated to Mr KC that he would not be able to get his money back and that he may as well take over the restaurant. From his evidence in chief it appeared that it was only after he took over the restaurant that he changed its name to the Yak & Yeti. Taking his evidence at its highest this must have been sometime after August 2010. Furthermore it appears that there was a period of closure prior to the restaurant being re-branded and renamed as Yak & Yeti.

[21] Mr KC gave varying accounts as to the timing and duration of the closure but it was clear that the restaurant must have been closed for two to three months in the period between April 2009 and October 2010.

[22] Even after the restaurant was reopened in its new guise Mr KC confessed that he found it difficult to apply for credit because he was severely overdrawn. He had discussions with his wife who was a staff nurse and had a good credit rating. She apparently agreed that in order to get round the difficulties in securing credit the restaurant could trade in her name.

[23] The witness was then taken to production 6/3 being a copy of the lease for the premises at 13 Newington Road. This lease purported to be between Thomas Chan and the pursuer company and had been signed on the 9 and 21 September 2010. There seemed to be some dubiety as to why the date of entry specified in the lease was 19 February 2010. This appeared to relate to outstanding rent which had accrued from the previous owners however the explanation provided was not entirely persuasive.

[24] There then ensued an important piece of evidence. The witness was asked when the Yak and Yeti started trading and responded, "19 October 2010". He claimed that it had only been closed for two days prior to being reopened on 19 October 2010. He said that in order

to carry out the refurbishment he borrowed money from the bank and used some money from his wife's credit card. He estimated the cost of the refurbishment to be £25-£30,000. The evidence of the date upon which the Yak and Yeti restaurant began trading under the new management of the pursuer company came specifically from Mr KC himself. Despite the fact he was not clear about most dates he was quite clear about the date upon which the restaurant commenced trading. When asked that question directly there was no dubiety in his answer.

[25] He then went on to say that there had been refurbishment work between September and October and thought that the restaurant was closed for no more than 10 days before 19 October 2010.

[26] Mr KC was then referred to the pursuer's second inventory of productions and to item 3 which was a notebook kept by Mr KC himself from 18 October 2010. He explained that this was his record of calculations and costs associated with the running of the restaurant. The notebook included weekly expenses calculations which Mr KC claimed he was able to predict from past experience. The witness explained that he had used suppliers with whom he had worked prior to the pursuer company taking over the restaurant.

[27] He went on to explain how he recorded the takings of the restaurant particularly where customers were paying with a voucher and how the tips were split between the restaurant and the staff. He explained that for every transaction there would be two receipts, one for the customer and one for the restaurant. At the end of the day he would bundle the receipts into a roll and place them in a cardboard box. He explained that the entries in the notebook and the in the pursuer's inventory of productions were only a sample of the whole. For his own purposes he copied some but not all of the receipts and invoices and the remainder were stored in a box in the premises. They had been destroyed in the fire. The

witness went on to explain that he had made attempts to obtain copies of the till receipts from the company who supply the till but that had been unsuccessful. Accordingly the records which he was able to produce were incomplete and did not provide a full picture of the takings of the restaurant during the time it had been trading.

[28] The witness's position was that prior to the fire the business was making a profit and everything was going to plan. He was also contemplating ways in which he could increase the profitability and he had planned to open for more hours and all day on a Sunday. He thought that would have increased the income from the business. But for the fire it was his plan to open all day on a Sunday from 12 PM until 10:30 PM and operate a buffet. He also anticipated that increased advertising would have increased the revenue.

[29] The witness was then taken to item 7/1 of process and confirmed that that was an insurance document purporting to be in the name of his wife. He explained that originally the insurance was taken out in his wife's name with the intention that it would be transferred into the name of the business in due course. He further explained that unless an insurance certificate was exhibited the landlord would not sign the lease. As will be seen from later evidence this explanation is not entirely plausible because the insurance was not effected until after the lease was signed.

[30] Mr KC was taken to the section which asked "Which insurer are you currently insured with?" and it was observed that he had answered 'other'. He was specifically asked who had provided that answer and he answered, 'I did'. He went on to explain that he thought the correct answer was 'other' because the pursuer company did not have any insurance at that time and he assumed that the question related to Namaste Restaurants Ltd. He went on to explain that he made this assumption because he knew that insurance was

required by the landlord and accordingly assumed that Namaste Restaurants Ltd must have had insurance with someone but he did not know who.

[31] Again I was more than a little sceptical about this answer given his earlier evidence that he was by this time well aware of the dissolution of Namaste Restaurants Ltd in February 2010.

[32] Mr KC was then taken to the section headed "General Questions" and in particular to the question regarding the number of years trading in total. It was pointed out that the answer provided was '2'. He was asked who provided that answer and he said that he did. When asked why he provided that answer he explained that he thought the question meant how many years had there been a restaurant running there. He took the view that a Nepalese restaurant had been running from the premises for two years and accordingly gave that answer.

[33] Finally in the section headed "Historical Questions" he was taken to the question which asked 'Have you ever personally or in any business capacity been subject to a county court judgement?' This question was answered in the negative. Mr KC explained that as the insurance was taken in his wife's name he gave the answer on behalf of his wife and not himself. It was put to him that Aviva now said that he had County Court judgements at the time and in response he said "I did not know that." He explained that his previous lawyer had asked him to get a credit report which was obtained 2013 and no County Court judgements had shown up. He conceded that when giving a statement to the insurance company after the fire he might have said that he "thought he had a couple" but it transpired that there were none.

[34] Mr KC was then asked about the change of the name of the insured from Mrs KC to Khushi Enterprises Ltd. His explanation for this change was somewhat difficult to follow

and I formed the view that he was being evasive. When shown the policy schedule, page 9, he denied having seen this previously. He was referred to the section headed "stock in trade" and the figure there of £2,500. The cover also appeared to refer to business interruption cover of £25,000 for 12 months.

[35] In giving his evidence regarding the fire on 11 January 2011 he said "it was very bad and sad and difficult to get your head around. It was a really, really, really stressful time". The restaurant was closed down and the next day Mr KC made a call to the insurance company because at that point he was not entirely sure that the transfer of the policy had been effected.

[36] Mr KC had attended at the property with a loss adjuster and had hoped that there would be a pay out to allow the restaurant to continue to trade but that was not to be. Mr KC said that his staff had waited 6-8 weeks before he eventually told them that it looked unlikely that the restaurant would reopen.

[37] The witness was then taken to item 11 in the defender's second inventory of productions which is a form AAO2 and was asked why the company had submitted dormant accounts for the year ending January 31 2012. Mr KC provided the explanation that he could not afford an accountant and just submitted the accounts himself.

[38] He was then taken to the defender's seventh inventory which included item 6/25 being a statement taken by a Mr Paul Owens who was investigating the claim. He was asked to explain the blanks in the statement and the fact that it was not signed. Mr KC was extremely evasive about the circumstances surrounding this statement and I formed the view that he was less than credible. This was to be confirmed in his approach to cross examination.

[39] Under reference to a notebook which he kept and formed item 3 in the pursuer's second inventory of productions he indicated that this recorded his calculation of the weekly expenses of his business. The notebook had been commenced prior to the business starting but Mr KC indicated that he was able to estimate what the costs would be from his experience in the trade. He used the names of the suppliers who had supplied the restaurant before the pursuer company took over. He estimated that the total costs would be about £900 per week and anything above that would be profit. He explained that after the restaurant opened it transpired that that prediction was accurate.

[40] He explained that for every transaction there would be two receipts. One would be kept by the restaurant and given to the customer. At the end of the day receipts were bundled up and kept in a cardboard box which had been within the restaurant when the fire broke out and accordingly had been destroyed. However Mr KC said that he took copies of some but not all of the receipts for his own calculations and to complete a business plan. He indicated that the information in his notebook was not exact but that as he did not require to give this to anybody else that did not matter. He had intended to give the receipts which were in the box in the restaurant to his accountant because these were the originals.

[41] He explained that he had tried to obtain copies of the original receipts from the till machine provider but the representative did not work for the company and he had no contacts from which the information could be obtained.

[42] Mr KC was then asked questions about his schedule of loss under reference to the pursuer's second inventory of productions,5/ 4/1. He conceded that he had selected all the items which were within the restaurant and carried out a "rough" calculation. Most of the items in the restaurant belonged to the company but a few were items belonging to the

landlord. Where Mr KC did not know the value of an item he looked it up on the Internet. The resultant document did appear to be rather rough and ready.

[43] In cross examination Mr KC conceded there was a period of closure prior to the restaurant opening as Yak & Yeti. Initially he said the closure was 7-10 days but then conceded it was a couple of months. In relation to the question of the periods of closure the witness was taken to the unsigned statement taken by Paul Owens. He initially refused to accept that any of its content was accurate and explained that there had been two periods of closure. One was when the restaurant was taken over by Namaste Restaurants and the other when the pursuer company took over. However eventually he conceded that when he told Mr Owens in June 2011 that there had been one closure of three and a half months that was more likely to be accurate.

[44] In relation to the rather strange situation regarding the dates on the lease Mr KC explained that when Namaste Nepal was dissolved there was a gap of about 6 months before it was acquired by the pursuer. The landlord had insisted that the lease be back dated to the date when Namaste Restaurants was dissolved. Mr KC said he did not know this until after the claim had been made. Again this chapter of the evidence did not have the ring of truth about it.

[45] Mr KC was then asked what entity was trading from the premises prior to the 19 October 2010. He said the restaurant was trading without a legal entity. It was pointed out that this was in stark contrast to the position in his pleadings where it was averred that:

> "In or around 2010, and unbeknownst at the time to Mr. Koc, Namaste Restaurants Ltd., was dissolved and the business was taken over by KC & Basnet Enterprises Ltd, a company in which both Mr Basnet, Mrs Basnet and Mr Koc's brother-in-law, but not Mr. Koc, were directors."

It was pointed out to him that the defender understood that that was what he had offered to prove but that he now seemed to be deviating from that position. No straight answer was obtained to this question.

[46] On the second day of the proof Mr Balfour explored with the witness his position in relation to investment in the various enterprises. The witness maintained he had invested a total of £15,000 which he had borrowed from the bank and from his wife. It appeared however that a figure of £8,000 had been suggested in the prior, albeit unsigned, statement.

[47] Mr KC also maintained that his wages had been allowed to stack up and that the accumulated, albeit unspecified, amount was invested in the business but that was not something he appeared to have mentioned earlier. He put this down to stress. He was also unclear about how and when there had been an investment of £25 -£30,000 to refurbish the restaurant and where that money had come from.

[48] In short I did not find his evidence regarding the amounts he had invested in the business nor the means by which he had secured these amounts to be either credible or reliable. I do not feel able to make any findings in fact regarding sums which he has invested based on the testimony I heard.

[49] In a very direct answer to a direct question Mr KC stated that his wife had never traded from the premises. He also candidly stated that he had a problem obtaining credit and that was why he had initially taken out the insurance in her name. He also confirmed that the lease for the premises had never been in the name of his wife.

[50] It was pointed out to him that his explanation for the need to transfer the insurance into the name of the company from his wife's name was not credible when one looked at the chronology. He appeared to be suggesting that the landlord insisted that insurance was in place before the lease was signed. However it was clear that the lease was signed in

September 2010 and the insurance in the name of Mrs KC was not effected until 6 November 2010.

[51] The witness was then interrogated in detail about why he took out insurance in the name of his wife. It was suggested to him that he intended to mislead people by pretending she was running the business when she was not. He categorically denied this and said that although his wife was not running the business she did have influence. However evidence elsewhere demonstrated that she was not a director of the pursuer company at this time.

[52] Turning to the issue of the answer he provided on behalf of his wife in relation to the question about the number of years trading he maintained that he could not recall the question he had been asked and that he may have misunderstood it in any event because he believed he had been asked how many years has your business been trading and his understanding was that there had been a business trading there for 2 years.

[53] In what I considered a crucial exchange he was asked, "Your wife had not been trading for two years". He answered this in the negative. He was then asked "And Khushi Enterprises had not been trading for two years?" he answered this in the negative. He was then asked "In fact since it changed its name to Yak and Yeti it had not been trading for 2 years" and he responded, "No, not 2 years" He then conceded that his answer related at least in part to a business with a different name, run by a different company which had been closed for 2 months.

[54] From this evidence it was very clear to me that Mr KC well understood that the answers he had given did not relate either to his wife or to the pursuer company.

[55] Under reference to a variety of photographs of Newington Road various attempt were made to establish when, at the earliest, a Nepalese rather than a Chinese Restaurant had been trading from the premises. It was finally conceded that at the earliest this was

some 15-16 months before the fire, which was substantially less than the period of 2 years appearing in the Statement of Fact.

[56] Moving on to the issue of the existing insurance at the time of completion of the proposal form the witness conceded that his wife had had no insurance. However he refused to agree that the correct answer would then have been "none". He said instead that he did not understand the question and he had replied in relation to the business that was operating from the premises at the time. Frankly this answer made no sense what so ever. He went on to say that he did not consider the question to be relevant. He denied that he knew that the business previously trading from the premises had no insurance despite previously indicating that he knew by then that Namaste Restaurants Ltd had been dissolved and could not possibly have had insurance in place.

[57] This chapter of evidence was particularly damning for the witness. He presented as evasive and uncomfortable and at some points simply dishonest.

[58] The questioning continued with the concession that Mrs KC did not have any insurance but again Mr KC refused to concede that the correct answer to the question would have been 'none'. His responses were garbled and led to the clear impression that he was simply avoiding having to answer the questions.

[59] Eventually it was established that prior to October 2010 the restaurant must have been trading without insurance and even after insurance was effected in Mrs KC's name the employees would not have had the benefit of Employer's Liability Insurance because Mrs KC was not the employer.

[60] In the passage of evidence which ensued the witness was asked about County Court Judgements which may have been in existence at the time of the inception of the insurance policy. He maintained that at the time he could not say whether or not he had County Court

Judgements and he thought "he might or he might not have them". He also eventually conceded that his knowledge in January 2011 would have been the same as his knowledge in June 2011 when he told Mr Paul Owens that he thought he had County Court Judgements registered against him.

[61] In answer to questions regarding the lodging of accounts certifying that the company was dormant for the period to 31 January 2011 he simply stated that he could not afford to have a an accountant complete the books. This was at odds with his pleadings at page 11 of the Record in which it was averred that the accountant had submitted the accounts in error.

[62] The witness was also challenged on the veracity of the figures produced in his notebook from which he purported to vouch the profits of the business. This was on the basis that even on his own admission this had been compiled from incomplete records. He did however concede that the tax return and the accounts which were submitted for the period during which the restaurant had been trading would have been a more accurate record of the success of the venture.

[63] Some considerable time was spent looking at the invoices which had been produced. The defender's counsel voiced some dubiety about the chronology in which they were presented but as no one could really speak to how that had come about no weight can be placed on this issue.

[64] In re-examination an invoice dated 26/08/09 purporting to be in respect of supplies to Namaste Nepal was discussed. The witness indicated that this confirmed his evidence that that a Nepalese Restaurant had taken over the premises by August 2009. However that is only of real relevance if it is accepted that in answering the questions on the Statement of Fact account could be taken of the time a different entity was trading from the premises.

[65] I did not find the evidence of Mr KC to be reliable and credible in relation to a number of the material facts. As I have mentioned he was evasive in relation to questions in cross examination, had given different accounts of events at different times and had given evidence on oath which was demonstrably incorrect.

[66] Despite suggestions to the contrary from the pursuer's counsel I did consider his evidence to be material to my consideration of the case as a whole.

Defence Evidence

[67] The court heard evidence from four defence witnesses

Paul Owens

[68] This witness was a claims investigator who had been tasked with looking into the claim. In particular he gave evidence about various statements he had tried to obtain from Mr KC in June 2011. He said that he found it difficult to obtain a coherent statement from Mr KC because he was unclear about dates and had changed his position in relation to a number of matters. This was not surprising having heard the witness in court.

[69] In particular he testified that what he had recorded in the handwritten and typed statements was an accurate account of what had been said to him. This was particularly relevant in relation to Mr KC having told Mr Owens that he thought he had had CCJs as at June 2011.

[70] The witness was credible and reliable and was not subjected to cross examination.

Stephen Coates

[71] Mr Coates gave expert evidence primarily to explain industry practice in relation to acceptance of risk and the issue of materiality. No objection was taken to his evidence although submissions have been made regarding his expertise.

[72] In paragraphs 1-3 of his report (production 6/36) Mr Coates provided his expertise and explained that he had had long-term involvement in the assessment and acceptance of commercial property and liability risks across a wide range of industry segments. He added that the underwriting and acceptance of risk was at the core of what did. He was asked and answered questions about industry practice, the questions usually posed in proposal forms and factors which are taken into account in the assessment of risk. He was able to provide cogent reasons for his answers.

[73] I was satisfied that he was appropriately qualified to provide the evidence which he gave, which was important in determining materiality in relation to potential misrepresentations. As he did not deviate from his written report I shall not narrate his evidence in chief further.

[74] In cross examination Mr Coates was asked about the value and use of algorithms in calculating risk and insurance premiums. He conceded that this was a complex exercise and the same pieces of information could be used in different ways not only to determine risk but also to set premiums and determine customer segments.

[75] It was put to Mr Coates that when valuing a company with a shorter trading history there would be fewer assets and therefore a lower risk in the event of an insured event arising. It was accepted that this was theoretically possible.

[76] Questions were also asked about movement of a client from one segment to another and how that may affect premiums.

[77] In my view Mr Coates made appropriate concessions which added to his credibility and reliability but the evidence elicited from him was hypothetical and did not take the pursuer further unless it was accepted that there was an onus on the defender to prove that non-disclosure of certain factors had increased the risk or the premium. As will be discussed later this was not the way in which I considered the case should be approached.

Mr Mark Williams

[78] This witness was the insurance underwriting governing manager for the defender. At the time of the inception of the policy it was his role to sit in the office with the staff and deal with referrals from brokers. He was particularly called upon to deal with anything which fell out with the questions and answers expected on the proposal forms.

[79] He was able to explain the process of securing insurance cover on behalf of a business and indicated that details would be received on line with pre-set questions and a mixture of either open fields for responses and drop down options. If the form was initially completed with all the answers a quote would be generated but if there were any issues or questions were left unanswered a referral to the underwriter would be generated.

[80] He explained that the SMEI question set was fixed and he would expect the broker to get answers to all the relevant questions. He also confirmed that if a policy were to be reissued in a different name the process would be gone through again and the question and answer process would have to be completed.

[81] He was asked about the specific questions with which the court was concerned and confirmed that the insurer would be particularly interested in the number of years a proposer had been trading because newer businesses would present a higher risk. Of particular interest were new start-up ventures because there was no history upon which

they could be assessed. He gave evidence that there were a range of available answers to the question about the number of years trading ranging from new venture to 1,2,3,4,5 years trading and so on.

[82] If a business had only been trading for a few months he would have expected the answer to be 0 or new venture. The answer 2 would have generated a premium impact but the answer of one year would have generated a referral to ascertain whether the venture would be eligible for cover. Experience within the industry had informed insurers that new ventures or start ups were being hit with claims and for that reason it was important to establish a track record.

[83] The witness was specifically asked whether it would have made any difference if the insurer had known that the business had started trading on the 19 October 2010 but in effect had had no insurance between then and the 11 January 2011. His answer was that this would have resulted in a straight declinature of cover.

[84] His answer was essentially the same in relation to the question about the existing insurer. He described the fact that a business had been trading without insurance as a "big feature". Again he was able to make plain that a referral would have been generated had the true position been known in this case and cover would have been refused.

[85] Finally with regard to the CCJs he pointed out that the question had to be answered yes or no. if the question was not answered the broker could go no further. There was no option for "I don't know". He was shown the documents at 6/33 and confirmed that if he had been aware of these at the time he would have "moved to no quote".

[86] The cross examination of this witness related initially to the process of completing the proposal form and how this would be achieved on line. There was also extensive questioning about the availability of the algorithm which had been in place at the time, its

genesis and the efforts which had been made to produce it for the purposes of the court action.

[87] The witness said that the algorithm which was in place at the time had not been archived and could not be produced. Much would be made of this in submissions in support of the contention that the defender had not proved that the non-disclosure would have affected the risk or the premium.

Mr Rowand

[88] Mr Rowand was the Chartered Accountant tasked with carrying out a forensic analysis of the reams of invoices which had been produced and the information which was presented in the notebook kept by Mr KC.

[89] No expert had been advanced by the pursuer so this was the only evidence which the court had to assist with quantification. The witness spoke to his report number 6/37 of process.

[90] It is fair to say that he, like I, had very little material to work with but he had assessed that only 57% of the sales referred to in the notebook could be vouched by the invoices. There was no accounting reason for the sampling exercise which the pursuer claimed had been undertaken in the notebook and he was left with a divergence between the sums claimed for and the sums vouched which could not be reconciled.

[91] He was cautious to say the least about the way in which the copy invoices had been produced but as no one was available to explain how these had been collated and no issue had been taken with the question of their validity with Mr KC I did not allow this to be explored further. Suffice to say the documentation was unsatisfactory in the extreme.

[92] The witness was, in my view, suitably qualified to provide the opinions in his report and I was satisfied that his methodology was logical. It is on the basis of this evidence that I have made the very limited findings in fact which related to issues of quantum.

Mr Fitzgibbon

[93] The final witness was Gary Fitzgibbon who gave evidence as an accounts executive within the insurance industry. He had been responsible for the submission of the on line form.

[94] An attempt was made to object to his evidence on the basis that the on line form itself had not been produced and that oral testimony was not best evidence. I repelled this objection on the basis that evidence had been led from other witnesses in relation to the process and Mr KC himself had spoken to how the answers had come to be included in the Statement of Fact.

[95] The witness was asked how he would frame the question posed to a potential insured and while he did not have a specific recollection of completing the proposal in relation to this case he had looked at the matter as a result of the litigation. He did not consider that he would have reworded the question or asked it in another way.

[96] He also confirmed that when the policy came to be reissued he would have gone through the questions again. When confronted with the answer to the question about the existing insurer he conceded that he had not changed that although by the time the second policy was being proposed he thought the answer should have been Aviva.

[97] Although his evidence was of some assistance in relation to the process and the way in which the questions were asked I did not find that it took the defender very much further and placed very little weight upon it.

[98] He was not subjected to cross examination.

Submissions and applicable law

[99] The Court had the benefit of very full and helpful written submissions prepared on behalf of both parties. However as both parties had adopted a different legal approach to the issue the parties required to address me further in response to the other's written submissions which gave me an opportunity to discuss further their conflicting positions.

[100] Both parties appeared to be in agreement that the onus was on the defender to prove its defence in order to avoid the contract of insurance. However their analysis and approach to the law differed.

[101] In particular the pursuer chose to analyse the case as one of non-disclosure while the defender approached it as one of misrepresentation.

[102] The pursuer's position was that the defender, having written a policy of insurance covering business interruption and trade contents loss from fire, and the pursuer's premises having suffered a devastating fire within the period of the insurance, the issue was whether the defender's defence was one which would entitle him to avoid the policy and if not how much is due to the pursuer.

[103] The pursuer's position was that the evidence of Mr KC himself was of little moment but that he presented as open and honest although struggled remembering dates and that in many respects his evidence could be explained by virtue of the fact that he was not a sophisticated businessman.

[104] Fundamentally the pursuer characterised the case as one of non-disclosure. It was submitted that it was incumbent upon the defender to prove that the pursuer had breached its duty of disclosure in respect of a number of material matters including the number of

years trading, the current insurer and the alleged existence of County Court judgements. The pursuer also referred to defences advanced on the basis of failure to keep records and accurate statements.

[105] In relation to the number of years trading, and indeed all the questions posed on the proposal form the pursuer submitted that the policy should be construed *contra proferentem*. Accordingly any ambiguity in the questions should be resolved against the defender.

[106] It was submitted that the question 'number of years trading in total' was inherently vague and did not specify whether what was being referred to was a Nepalese restaurant or, as the defender now asserts, the legal entity which was seeking insurance. It was submitted that the words 'in total' suggest the widest possible interpretation should be given to the question.

[107] It was submitted that the pursuer had answered the question thinking that it was stating the number of years that a Nepalese restaurant had been trading from the premises in total and that this was reasonable. It is further submitted that the defender must prove that the answer "2" was incorrect. The pursuer relied upon invoices which showed that a Nepalese restaurant had been trading from the premises since August 2009 (5/3/23 of process). This would indicate that a restaurant had been trading from these premises for well over a year and that it was quite reasonable for the person answering the question to round up rather than round down the period in the absence of an instruction to do otherwise.

[108] In a *prima facie* well-structured argument the pursuer submitted that even if the defender were successful in proving what it categorised as non-disclosure that would not in itself be sufficient to avoid liability as the defender must also prove that the non-disclosure was material to a prudent underwriter and also material to the actual underwriter. In this

regard the pursuer founded upon *MacGillivray on Insurance Law 14th edition 17 – 036, 17 – 087, 17 – 009 and 17 – 029*.

[109] In relation to the "prudent underwriter" test it was submitted that the non-disclosed information must have increased the risk and hence the premium which the insurer would have charged. In this regard it was submitted that the defender relied entirely on the evidence of Mr Coates but his evidence should be disregarded given that he did not have the appropriate relevant experience. He had, it was submitted, expertise in the reinsurance industry dealing with terrorism rather than small businesses.

[110] It was submitted that there was nothing within Mr Coates' evidence, even if it were accepted, to suggest that a reduction in the number of years trading would have tended to increase the risk in the ordinary sense of the word (i.e. increase the probability of a claim or else increase the loss in the event of a claim). On the contrary it was submitted that if the business had been trading for fewer years that may well in fact reduce the loss in the event of a claim because the assets of a newer business tend to be lower.

[111] In what was to become a recurring theme it was submitted that had the defender's algorithm for calculation of risk premium been made available the question could have been answered definitively by inputting the information now available and contrasting that with the information provided on behalf of the pursuer to ascertain whether it made any difference to either the risk or the premium.

[112] It was submitted that the defender's attempts to locate the algorithm which had been in operation had been less than satisfactory and the clear inference was that the defender had not tried too hard to provide this information for fear that it may not have resulted in evidence that the risk or indeed the premium would have been affected had the correct information been inputted.

[113] In this regard the pursuer's counsel was critical of the evidence of Mr Williams on the grounds that it amounted to a defensive post-mortem response. It was submitted that the defender had failed to prove that any non-disclosure on behalf of the pursuer would have had any effect on the actual underwriter. Again this related to the failure to produce the algorithm which the defender would have relied upon at the time.

[114] A further substantial criticism of the defender's position was that no evidence had been led on the effect of the supposedly non-disclosed information on the customer segment that the pursuer fell into. Mr Coates had given evidence that the profit element of the premium is generally calculated according to the customer segment and is determined separately from risk. Depending on information provided a customer may be moved from one customer segment to another with consequent effect on premium. It was submitted that the non-disclosed information might well have reduced the premium and regardless of whether or not the risk was increased the defender may well have been prepared to enter into the policy in any event.

[115] Having made these submissions they were largely repeated in relation to the representations about the current insurer and the existence of otherwise of County Court judgements. The pursuer's counsel sought to categorise these as non-disclosures rather than misrepresentations.

[116] In relation to the use of the answer 'other' in respect of the current insurance arrangements it was submitted that this was entirely a consequence of the vagueness of the proposal form. The pursuer submitted that the question was answered on the basis that Mr KC thought that what was being asked about was the insurance status of the Nepalese restaurant trading from 13 Newington Road, which was insured in the name of Mrs KC under reference to production 6/2/7.

[117] The discrepancy it was submitted arose because it was not clear from the question whether it related to the legal entity now applying for cover or the Nepalese restaurant which had been trading from the premises. It was submitted that the defender was the author of its own misfortunes in respect that it had failed to follow up the pursuer's choice of answer. In any event the defender was not able to prove whether the proposal form which had been completed online was a drop-down or a free text and sought to justify the use of the word 'other' as the most appropriate answer.

[118] It was submitted that in any event the defender knew of the pursuer's immediate insurance history because by the time of the transfer from the name of Mrs KC to the pursuer company the insurance for the premises was with the defender itself.

[119] The pursuer rehearsed his submissions in relation to materiality to the prudent underwriter and to the actual underwriter and once again submitted that the defenders had proved to establish materiality in either respect.

[120] Turning then to the question of the alleged County Court judgements the pursuer submitted that the defender had failed to prove the basic premise upon which this limb of the defence was founded. It was pursuer's position that it had never been established that Mr KC had a County Court judgement against him. The provenance of the documents produced as items 6/7/33 had not been established and the terms of the documents had not been explained.

[121] The pursuer pointed out that the defender sought to rely upon a note prepared by Mr Paul Owens and produced at 6/7/24 of process in which Mr KC said that he "may have had CCJs". It was submitted that this answer was not an admission and the answer was simply provided because Mr KC believed he had been confronted with evidence of CCJ's which was not in fact the case. Further and in any event it was submitted that even if an

inference could be drawn that Mr KC had County Court judgements outstanding at the material time it could not be proved that he knew about them and that insured was only under an obligation to disclose what he actually knew.

[122] The absence of the defender's algorithm was again referred to in relation to the issue of materiality and it was submitted that the effect on risk had not been established.

[123] Turning then to deal with what the pursuer refers to as the accurate records defence and the accurate statements defence it was submitted that the special condition only applied to business interruption claims so even in the event of a breach of Special Condition 7 it would not be fatal to the whole claim. Again the pursuer prayed in aid the *contra proferentem* rule stating that there was no proof that the defender had kept inaccurate records of the stock purchases. Stock purchases or stock had not been defined and had no meaning in the context of a restaurant. Similarly in relation to sales receipts the onus was with the defender to prove that inaccurate records had been kept. In any event the pursuer's notebook which had been produced to the court had not been challenged in terms of accuracy.

[124] I may say that this was not my understanding of the cross examination which cast significant doubt on the veracity of the information in notebook.

[125] Reference was then made to General Condition 4 of the policy which stated that 'in the event of any claim made under this policy being found to be fraudulent or intentionally exaggerated or if any false declaration or statement is made in support thereof the cover of the policy shall be immediately terminated and no compensation shall be paid.'

[126] Apart from drawing attention to changes in the amount craved over the course of the litigation there was no evidence that the sum originally sought was false.

[127] In summary the pursuer submitted that in relation to liability none of the purported defences survived analysis because the proposal form was vague and did not assist the

proposer in providing the answers. It should of course be read *contra proferentem*. In any event by the defender failing to provide the algorithm which had been sought by the pursuer the court could only speculate on the effect which the alleged non-disclosure had had on the assessment of risk and in failing to provide a determinative answer to this question the defender had failed to prove the essential requirement of materiality.

[128] Under reference to *MacGillvray on Insurance Law 14th Edition paragraph 16-011* the defender submitted that in order to succeed the defender would require to prove:

i) that the representation was untrue

ii) that the representation was material to the defender's appraisal of risk

iii) that the representation induced the defender to enter into the contract of insurance.

[129] It is fair to say that the pursuer's counsel formulated the test somewhat differently by referencing the test of materiality to the prudent underwriter and to the actual underwriter.

[130] It was a fundamental part of the pursuer's submission that even if the court is satisfied that that there has been what it categorised as "material non-disclosure" the non-disclosed information must have increased the risk and therefore the premium. Under reference to *Carter* v *Boehm* it was submitted that "the underwriter needs not be told what lessens the risqué agreed and understood to be run by the express terms of the policy." This passage was also referred to in *MacGillivray on Insurance Law 14th edition 17 -087*.

[131] It was submitted by the defender that the pursuer had "made up that test to suit its own purposes". The defender's counsel was critical of the submission that the non-disclosed information must have increased risk. It was submitted, and I accept, that this is not the test for materiality.

[132] On the contrary under reference to paragraph 16-035 and 17-036 of *MacGillivray (supra)* the position is clearly stated.

[133] A material fact is one which would be taken into account by a prudent insurer in deciding whether to accept the proposed risk and, if so, on what terms. *Pan Atlantic Insurance Co* v *Pine Top Insurance Co* 1995 1 AC 413.

[134] Paragraph 17-036 of *MacGillivray* (under reference to the above authority) states :

> "The common law test for materiality is stated in s.18 (2) of the Marine Insurance Act 1906 which provides that: "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk." The word "judgment" does not mean "final decision" but simply "formation of an opinion". Accordingly, a fact may be material although, if disclosed, it would not have led the prudent insurer to decline the risk or stipulate an increased premium. It is enough that he would rightly take it into account as a factor in coming to his decision…"

This test is actually at odds with the test proposed by the pursuer and sets a far lower bar.

[135] I accept the submission of the defender to the effect that the defender need do no more than demonstrate that a prudent underwriter would take the factor into account in coming to their decision.

[136] The pursuer sought support for his proposition in the *dictum* of Lord Mansfield in *Carter* v *Boehm* 1799 3 Burr 1905 that "The underwriter need not be told what lessens the *risqué*". However, as is pointed out in *MacGillivray* (at para 17-087), even a fact that lessens the risk does literally fall within the definition of a material fact.

[137] Furthermore the pursuer takes that passage out of context. The very case upon which he seeks to rely has provided the authoritative discussion of the duty of disclosure and has survived for more than 200 years. The duty of disclosure incumbent upon the insured exists because the insured has possession of "superior knowledge or means of discovering matters material to the proposed risk."

[138] As Lord Mansfield made clear elsewhere in his dictum:

> "although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void because the risque run is really different from the risque understood and intended to be run at the time of the agreement."

[139] To some extent the confusion in the pursuer's position may have arisen due the analysis of the case as one of non-disclosure rather than misrepresentation. It is true to say that a proposer need not disclose something that lessens the risk but that is quite different from the proposition that information is not material unless it increases the risk.

[140] It is my opinion that this is to conflate two different legal concepts the first being the duty of disclosure and the second being the test for materiality.

Discussion and decision

[141] Although this case turns on its facts to some extent it raises important issues in relation to the differing approaches which may be taken to issues of non-disclosure and material misrepresentation.

[142] The remaining issue in this dispute is whether the insurance policy which was purportedly in force at the time of the fire at the Yak and Yeti restaurant on 12 January 2011 was, as the defender contends, void *ab initio*.

[143] The pursuer's approach was predicated on three propositions:

i) The answers provided to the questions were not untrue when looked at from the perspective of the proposer because the questions were in themselves ambiguous and permitted the interpretation which the pursuer contended for.

ii) That even if the answers were incorrect the defender also had to prove the necessary requirement of materiality. That required proof that provision of the correct answers would have increased the risk and the premium.

iii) That without applying the algorithm which had been in use at the time of the policy being entered into the defender could not prove that it was induced to enter the contract on the basis of the information provided by the pursuer because it may have been the case that irrespective of the answers provided the defender would still have accepted the risk.

[144] While the pursuer's argument was superficially well constructed it was in my view fundamentally flawed in a number of respects.

a) **Alleged ambiguity of the questions**

It proceeded on the basis that the questions posed were ambiguous. However when looked at in context, as I was urged to do by the defender, it appeared to me that the interpretation which the pursuer sought to put upon the questions was strained in the extreme. In any event the pursuer's evidential position about what it thought the questions meant was internally inconsistent. When the words used in the questions are ascribed their ordinary meaning in the context of the policy it is quite clear that the answers were misleading and deliberately so.

b) **Characterisation of the answers as non-disclosures rather than misrepresentations**

The pursuer was incorrect to characterise the answers to the questions as non-disclosures. They should properly be construed as misrepresentations as the answers provided to all three questions in issue provided positive factual responses all of which can be objectively demonstrated to be untrue or incorrect.

c) **Application of the incorrect legal test for materiality, there being no requirement on the defender to prove that the misrepresentation increased the risk or the premium**

The test which the pursuer sought to apply to the determination of materiality was incorrect in law. It is too highly stated. As a result of the characterisation of the answers as non-disclosures it was argued that there was no duty to disclose something which would lessen the risk or reduce the premium. Accordingly a further quantum leap was made to assert that there was a duty on the defender to prove that the non-disclosed fact had increased the risk or the premium. That is not the test. The correct test for determination of materiality is whether the fact is one which would be taken into account by a prudent underwriter in assessing whether or not to accept the proposed risk and if so on what terms.

d) **Application of a subjective rather than an objective approach to determination of materiality as a matter of fact**

Materiality is a question of fact to be determined by the evidence. This is often achieved by the leading of expert evidence (*MacGillivray on Insurance Law 4th Edition 16-039).* This makes clear that expert evidence to the effect that the questions posed are the same or similar to those posed by practically every insurer is a strong indicator of materiality. Such expert evidence was available in this case. It is for the Court having looked at the evidence as a whole and in the context of the policy to decide whether the facts were material to a prudent underwriter. That is an objective test. It is not the subjective test contended for by the pursuer which it was argued would have required the application of the particular algorithm being used at the time by this particular insurer. In any event the pursuer proceeded on the basis of various hypotheses which were put to Mr Stephen Coates. In some respects he agreed with the propositions as being "possible." However there was no factual

basis for the hypotheses which were put and his evidence and accordingly the pursuer's submissions insofar as founded thereon were merely speculative.

e) **Confusion between the concept of assumption of risk and the increase in the value of a claim.**

The pursuer's position confused the concept of assumption of risk in the first place with the issue of increased risk or determination of the appropriate premium. The pursuer focussed on what he submitted was a requirement to establish that the risk was increased by the alleged non-disclosure or misrepresentation, in the sense of the risk of a higher pay out in the event of the insured event occurring or a requirement to pay a higher premium to secure cover. The defender's position was more fundamental in that there was evidence from Mr Williams to support the submission that had the questions been answered correctly there would have been no offer of insurance in the first place.

The alleged ambiguity of the questions and the veracity of the answers provided

[145] Dealing with each of the above reasons in turn I shall consider the alleged ambiguity in the questions and whether the answers provided could on any construction be deemed to be reasonable or correct responses.

[146] The defender in his pleading had identified three potential alleged misrepresentations.

1) In the "General Questions" section of the Statement of Fact the pursuer was asked to state the "Number of years trading in total". The answer which he had provided was '2'.

2) In the "Risk Details" section of the Statement of Fact the pursuer was asked "Which insurer are you currently insured with?". In response the pursuer provided the answer "Other".

3) In the" Historical Questions" section of the Statement of Fact the pursuer was asked 'have you the proposer or any partner or director of the trade or business… Ever either personally or in any business capacity…. been the subject of a County Court judgement [sic]. The pursuer answered this in the negative.

[147] The proof really turned on an examination of these three issues.

[148] The pursuer's approach had an initial attraction in that counsel for the pursuer had suggested a number of ways in which the questions posed could have been seen as ambiguous. The pursuer's approach was to pick at each representation individually without necessarily looking at the context of the policy overall. The pursuer's approach necessarily required Mr KC's evidence to be put to one side when he categorically stated that he had provided the answers himself. It also required that the various warnings about incorrect answers and what to do in the event of uncertainty about an answer were completely disregarded.

[149] Fundamentally the pursuer's approach also required that much of Mr KC's evidence be put to one side when determining whether the answers he had given amounted to misrepresentations and that the easily ascertainable true answers should be disregarded.

[150] It is my view that this is an artificial approach to the problem and that the interpretations and ambiguities identified by the pursuer placed too strained an interpretation on what are in fact quite straightforward questions.

[151] The defender submitted on the other hand that on any reasonable interpretation of the questions themselves it was plain that the answers were inaccurate, that they related to

material issues and the defender was induced to enter the policy as a result of these misrepresentations.

[152] As a matter of law both *Colinvaux* and *MacGillivray* state that the artificial creation of ambiguity is not permitted. In particular the parties referred to the passage in *Colinvaux* which stated:

> "the rule is an aid to the construction of ambiguous documents: it does not permit the artificial creation of an ambiguity in order to reach a particular result. Even when clauses ambiguous taken alone the *contra proferenetem* rule does not apply if its meaning becomes clear in the context of the overall policy……. The fact that clear wording might have been used is no basis for regarding the actual wording is ambiguous: that approach would entail a justifiable degree of hindsight…"

In paragraph 16-026 of *MacGillivray* it is made clear that the court will reject a meaning which even if grammatically possible is not one which can reasonably have been how the question was understood. It is stated that:

> "the cardinal principle is that a fair and reasonable construction must be placed on the question. If there is genuine ambiguity in a question put to an applicant by insurers in a proposal form or elsewhere the latter cannot rely upon the answer as a misrepresentation of fact if that answer is true having regard to the construction which a reasonable man might put on the question."

It has been made clear that the matter is to be tested objectively.

[153] The first question simply asks the proposer about the number of years trading in total. That question clearly relates to the entity which is seeking insurance. It is quite ridiculous to interpret the policy to include reference to a period in which an entirely different business was trading from the premises. The legal *persona* seeking insurance was the pursuer company. It had been incorporated in January 2010. Mr KC could not have been more clear when he answered in evidence that the Yak & Yeti Restaurant began trading on the 19 October 2010. Accordingly on any view the correct answer to the question was 3 months or less.

[154] Even taking Mr KC's evidence at its highest the very earliest the restaurant could have been trading as a Nepalese restaurant albeit being run by Namaste Restaurants Ltd was August 2009. It was effectively conceded that there had been at least one and probably two periods of closure amounting to a total of about 3 months. Accordingly even on the strained and highly convoluted explanation provided the restaurant could not have begun trading more than sixteen months prior to the fire and was closed for three of those months bringing the most favourable total time trading to 13 months. On no view would it be reasonable to round this up to two years.

[155] I reject the proposition that the *contra proferentem* rule should operate to admit this interpretation. On the contrary it is quite clear that the period was grossly over stated. This view of the evidence is endorsed when one looks at the responses which were provided in relation to the earlier policy of insurance to which I will turn in due course.

[156] Moving to the next question which relates to the current insurance. Again it is suggested this was ambiguous not so much because of the question but more because of the range of available answers. However the factual position is crystal clear. There was no insurance in place. Khushi Enterprises never had any insurance previously. Mrs KC's policy was void because she was not actually trading as a restaurant at all and had certainly never employed staff. Mr KC knew this because he was intent on changing the name of the policy holder on the grounds that the insurance should have been in the name of the company from the start. The garbled evidential excuse that Mr KC thought it was a reference to the insurance which Namaste Restaurants Ltd had in place is nonsense. He knew that entity had been dissolved almost a year previously.

[157] There is a world of difference between the word "other "and the word "none". One implies there is insurance. The other makes clear there is not. Once again I do not accept

that there was any ambiguity in the question or the range of answers and reject the evidence of Mr KC when he attempted to justify why he provided the answer he did. I would characterise this as a further misrepresentation.

[158] Finally the answer in relation to the CCJs has to be looked at in context. I do not think it was seriously suggested that the question was unclear or ambiguous. Rather the argument was that Mr KC did not know whether he had CCJs and in any event the defender had failed to prove that he had.

[159] In this regard what the court has to do is determine the matter on the balance of probabilities. It is true that no County Court Judgements were produced but that does not preclude proof by way of circumstantial evidence. In the first place there is the evidence of Mr KC himself. He said in evidence that he might or might not have had CCJs. He certainly did not deny that he had. Indeed in June 2011 he had told Paul Owens that he thought he did have CCJs and could go further and explain what they related to. He confirmed that his state of knowledge was the same in June 2011 as it was in January 2011. Therefore he at least suspected that he had CCJs and did not disclose this fact.

[160] This can be looked at in the context of his actions as at November 2010 in taking out insurance in the name of his wife because of his concerns about his creditworthiness. In my view this informs the court about his motivation and state of knowledge and supports or confirms the evidential position that he thought he had CCJs.

[161] The final and important strand of circumstantial evidence comes from the result of the credit searches which were carried out and which disclosed that there were indeed CCJs outstanding which referred to Mr KC and to addresses at which he had resided. He did not attempt to distance himself from these. Mr Owens spoke to these being the sort of

documents one would receive back from an organisation which was instructed to carry out a search.

[162] In my view, for the purposes of this action this is sufficient without the actual judgements being produced. A search in any register simply returns a register entry not the document itself. In the absence of any evidence to the contrary this seems to create a very strong presumption that there were CCJs and that Mr KC well knew not only that they existed but that they would affect his ability to obtain insurance which also goes to the next question of materiality.

[163] It was for that reason in my opinion that he deliberately sought to insure the restaurant in his wife's name at first then made a further application to change the name to that of the company. This in my view demonstrated at best a cavalier approach to his business dealings and at worst a deliberate attempt to circumvent the credit checks the defender had in place.

[164] In summary in relation to the alleged ambiguity of the questions and the veracity of the answers provided I have no hesitation in concluding that the questions were clear and could not bear the interpretations contended for.

[165] Furthermore the evidence demonstrates that the answers provided to all three questions were incorrect and amounted to misrepresentations for which there is no reasonable explanation.

Characterisation of the answers as non-disclosures rather than misrepresentations

[166] The pursuer's characterisation of the answers as non-disclosures rather than misrepresentations is more significant than it might at first appear. It is the basis for the pursuer's position on the test for materiality and the requirements of proof.

[167] However I do not accept that categorisation. The answers provided to all three questions were positive representations of fact which transpired to be inaccurate and untrue on fuller investigation. As will be seen from the findings in fact the answers, "2", "other" and "no". Should have been "3 months", "none" and "yes". It is difficult to see how this could be a non-disclosure such as leaving the question blank. They are positive assertions upon which it was known from reading the rest of the policy document that the pursuer would rely.

[168] Accordingly I am of the view that the answers were misrepresentations and I have made a finding in fact to this effect.

Application of the incorrect legal test for materiality, there being no requirement on the defender to prove that the misrepresentation increased the risk or the premium

[169] This then leads to a consideration of my next reason for rejecting the pursuer's argument. I accept the submission of the defender in relation to the test for materiality.

[170] The test advanced by the pursuer is, in my view, too highly stated and is no doubt a consequence of the pursuer's attempts to characterise the case as one of non-disclosure rather than misrepresentation.

[171] On the pursuer's analysis of the law it is submitted that the non-disclosures are not material because the defender has not discharged the onus of proving that they had the effect of increasing the risk or indeed the premium. It is further submitted that the defender's failure to provide the algorithm, which it operated at the time the cover was being sought, is fatal to this aspect of the test evidentially as it would have determined conclusively whether the correct information would have made any difference to the assessment of risk and the premium applicable.

[172] While on a view this may appear to be a cleverly constructed argument it is in my opinion flawed. In the first place I do not accept that the answers provided were indeed matters which were not disclosed and consider that they were misrepresentations. I say so for the reasons outlined above. I have made findings in fact as to the true state of affairs regarding the three matters upon which positive but inaccurate assertions of fact were made by Mr KC on behalf of the company.

[173] That being so the test for materiality of the misrepresentations is that laid down in *Pan Atlantic Insurance Co* v *Pine Top Insurance Co supra*., namely whether the fact would be taken into account by a prudent insurer in deciding whether to accept the proposed risk and if so on what terms.

Application of a subjective rather than an objective approach to determination of materiality as a matter of fact

[174] Materiality is a question of fact to be determined by the evidence. This is often achieved by the leading of expert evidence. *MacGillivray on Insurance Law 4th Edition 16-039*. This makes clear that expert evidence to the effect that the questions posed are the same or similar to those posed by practically every insurer is a strong indicator of materiality. Such expert evidence was available in this case.

[175] As discussed earlier the pursuer's approach was to classify the answers to the various questions posed as non-disclosures rather than misrepresentations and then to rely on the proposition that there is no need to disclose something which lessens the risk. Apart from the fact that there was no evidence to support the contention that the so called non-disclosed information did lessen the risk (all that was accepted was that hypothetically some

factors might have lessened the risk), what we have are answers to the questions which are demonstrably incorrect.

[176] The pursuer's submission was that there was information that may increase or decrease the risk and there were factors which would support either conclusion. It could not be conclusively stated in this case that there was evidence that the risk would have been lessened. Of course the pursuer would respond to that by arguing that the onus was on the defender and that had the algorithm been produced the answer would have been clear.

[177] In this case the court was assisted in its determination of materiality by the evidence of Mr Coates and Mr Williams. It was clear that had the questions been answered honestly no offer of insurance would have been forthcoming. In particular Mr Williams explained why the answers to the questions were of importance and I accepted his evidence in this regard.

[178] In submissions the pursuer sought to challenge the expertise of these witnesses, particularly Mr Coates, on the basis that his experience was in the field of reinsurance in relation to terrorism. However it is clear that he has many years' experience in the insurance industry. His evidence was not objected to at the time and was valuable to the court in explaining norms of practice in the insurance industry.

[179] The reliance on the absence of the algorithm and the pursuer's submission that this was fatal to proof that the defender had been induced to enter into the contract was, in my view misplaced. It is fair to say that had the algorithm which was applied at the time been available it might have informed the court further as to the effect which the incorrect answers would have had on risk and premium but that presupposes the insurer would have accepted the risk in the first place.

[180] There was clear oral testimony from credible and reliable witnesses to the effect that standing the information which ought to have been provided at the time there would have been no question of an offer of cover. Hence the issue of inducement can be proved under reference to this evidence rather than the requirement to demonstrate this by the application of the pertinent algorithm itself which would only have come into play if the risk was to be accepted.

[181] It is my view that the court is looking for evidence to support the proper legal test which is whether a factor is one which would be taken into account by a prudent insurer in deciding whether to accept the risk and if so on what terms. Evidence that most insurers, if not all, will ask the same question is evidence of materiality. That is an objective test and does not depend on analysis of the particular algorithm applied by a particular underwriter at the time.

[182] The evidential test suggested by the pursuer is incorrect as it is a subjective test looking at how this particular insurer would have proceeded if in possession of the correct answers to the questions and goes further to require that there would require to be evidence that the risk and the premiums would have to have been increased.

[183] That, as I have said, is a quantum leap and is simply an incorrect approach to the application of the evidence to the appropriate legal test.

Confusion between the concept of assumption of risk in the first place and the issue of increased risk or determination of the appropriate premium.

[184] It follows from the foregoing that the test for materiality does not require proof that the risk would be increased or that the premium would be increased.

[185] If a fact is material it requires to be disclosed even if it does lessen the risk (*MacGillivray* para 17-087).

[186] The pursuer's position proceeded on the theme that a business which had been trading for a shorter period of time would have fewer assets and would therefore constitute a lower risk. The valuation of the assets might also mean that the premium charged by the insurance company was lower. This evidence was elicited from Mr Coates on the basis that it was hypothetically or theoretically possible.

[187] However it is my view that this approach confuses the size of the claim in the event that one were to be made with the question of the risk of a claim being made in the first place. The approach of the pursuer essentially jumps over the first step of deciding whether the risk should be accepted by the insurer. The insurer first looks at the material facts to determine, with the benefit of industry experience, whether it assumes the risk and provides cover at all. If the proposal is rejected at that stage there is no question of moving to an assessment of the level of risk or the premium to be charged because the insurance company will simply not take the risk in the first place.

[188] In my opinion the pursuer's approach confused the question of the likelihood of a claim arising with the size of the claim if it did arise.

[189] Having explained my reasons for rejecting the pursuer's approach I consider it important to have regard to the significance of the original policy of insurance effected in the name of Mr KC's wife and what if anything that demonstrates.

Relevance of the original policy in the name of Mrs S KC.

[190] The pursuer did not deal in any particular detail with the earlier policy in the name of Mrs KC but it is my view that this is fundamental to determining the validity of the policy

which was ultimately in force and the candour or lack of it in Mr KC's approach to the proposal form.

[191] It is important to note that the policy which was originally taken out in the name Mrs KC must have been void *ab initio*. In the first place it is implicit in the fact that Mr KC sought to transfer the policy to the name of the pursuer company that his wife had no insurable interest. It was abundantly clear to me that Mr KC originally sought cover in the name of his wife because he was concerned about his own credit rating. This was a deliberate step and one which he admitted to having taken. He knew very well that Mrs KC was not a sole trader trading as Yak & Yeti restaurants.

[192] He invites the court to accept that he answered the questions in the original Statement of Fact on behalf of his wife therefore the answer about the CCJs was true. This position is internally inconsistent in relation to the number of years trading however. He cannot have answered some of the questions on her behalf and some on the basis of the belief he was answering in relation to a completely different business which he and not his wife had been managing at the same premises.

[193] In relation to both policies one has to bear in mind he was referring to the business trading as Yak & Yeti. That was information supplied by him. It is impossible to accept he thought this would include information about a now defunct company and a long since closed restaurant.

[194] On the basis that he knew very well that the insurance policy would be issued in her name it is impossible to accept his explanations for the answers provided to the questions about the number of years trading and the existing cover. He knew very well that she had no such cover. The only question which he answered truly and which related to his wife and not to him was that in relation to CCJ's because of course she had none. This also has the

effect of demonstrating that he knew that a credit rating including the existence of CCJ's would have an effect on his ability to secure cover.

[195] The defender's counsel referred to *MacGillivray* which states at paragraph 16-053:

> "The decoy policy.
>
> Where an insurance obtained by fraud or concealment is put forward as a decoy to induce other insurers to accept the risk, the policy obtained by such representation is voidable. In *Hanley* v *Pacific Fire & Marine Insurance Co* an applicant, in answer to the usual question, stated that he was insured elsewhere, but the insurances mentioned had been obtained by fraud and the policy obtained on the faith of them was set aside. A statement that a previous insurer covered the same risk at a particular rate carries with it an implied representation that full disclosure was made to the prior insurer."

[196] While recognising that the circumstances under consideration in this passage are different from those in the instant case, it is my opinion that the same principle would apply.

[197] The defender submitted "If the pursuer was answering the question in January 2011 as relating to the insurance taken out in Mrs KC's name in November 2010, that carried with it an implied representation that no material misrepresentations had been made on Mrs KC's behalf at that time. The policy obtained by misrepresentation in Mrs KC's name, being void *ab initio*, cannot be put forward as a decoy to induce the defender to enter into a policy with the pursuer. Accordingly, the pursuer cannot rely on the existence of the policy in Mrs KC's name as supporting the contention that there was no misrepresentation by the pursuer.".

[198] I am of the view that there is some force in that argument. The approach which Mr KC took in order to effect insurance was to approach the matter into stages. First of all he sought to overcome his own lack of creditworthiness by effecting insurance in the name of his wife who had no insurable interest, had not traded as a restaurant and had certainly not

traded as the Yak and Yeti restaurant for a period of two years prior to the inception of the policy.

[199] It was his own evidence that the restaurant was never run by Mrs KC as a sole trader. Accordingly the very premise upon which the proposal form was completed was false. She did not employ staff. The lease was not in her name and she is not referred to in any of the business documentation.

[200] He knew or ought to have known that he was completing the form on her behalf and indeed that was his evidence. That said his answers to the first two questions must have been false and this policy was void. I am in agreement with the defender's submission that Mr KC chose to mislead other parties by falsely claiming that it was Mrs KC's business in order to take advantage of her credit history. His explanation that this was an interim measure until the lease was finalised makes no sense as the policy in Mrs KC's name was taken out on 6 November 2010, two months after the lease was entered into.

[201] However by securing this policy in the first place he then wrote to the broker asking for the policy to be changed into the company name suggesting that there had been some sort of error from the outset. That representation to the broker was disingenuous. The step of taking the insurance in the name of his wife was a deliberate act on his behalf because otherwise it would have been unlikely that he could have obtained insurance. The policy of insurance issued in Mrs KC's name therefore has, in my mind, far greater significance because it was used as a stepping stone to the policy which was in effect at the time of the fire. There is no doubt that if Mr KC had simply approached Aviva seeking cover on behalf of the pursuer at the outset he would not have obtained it because he as a director of that company was aware of difficulties with his creditworthiness and was anxious not to disclose that.

[202] This approach informs the court to a significant extent about his credibility and reliability when he maintains that he answered the questions for the second time in the honest belief that his answers were true.

[203] I was satisfied on the evidence before me that when the policy was entered into the name of the pursuer on January 11, 2011 the questions in the statement of fact would have been gone over again.

[204] With the exception of the identity of the insured the answers provided in the statement of fact in the name of the pursuer, production 5/1 were the same as those provided when the policy was taken out in the name of his wife. This is a fact admitted on record. In this regard I preferred the evidence of Mr Fitzgibbon who conceded that he could not remember the particular conversation with Mr KC but was sure of the process which would have been followed.

[205] The evidence of Mr KC must be viewed with some caution for the reasons which I have given. In the first place he was very evasive in cross examination and could not provide answers to the more straightforward questions. Despite this clear statement in evidence that the Yak & Yeti opened on 19 October 2010, which is consistent with some of the other information in the case, he consistently attempted to suggest that his understanding of the question in the proposal form was whether a Nepalese restaurant had been trading from the premises at 13 Newington Road.

[206] Mr KC's evidence on the point was internally contradictory, these contradictions being identified by the defender in paragraph 17.2 1-4 of its written submissions.

[207] Furthermore it is quite clear that on the basis of his own evidence the restaurant must have traded between 19 October 2010 and 12 January 2011 without insurance because

Mrs KC, in whose name the insurance had been taken, was not an employer and had no insurable interest in the premises.

[208] In short it will be clear from the foregoing that I reject the evidence of Mr KC and consider that he was not credible and reliable in his attempts to justify the reasons for the answers he provided. His approach to securing insurance was not simply naïve but calculated in order to overcome what he perceived would be difficulties in securing cover as a result of concerns he had in relation to his creditworthiness.

[209] I do not consider that the legal test of for materiality advanced by the pursuer to be sound. There is no requirement on the defender to establish that the misrepresentation must have increased the risk and the premium.

[210] I am satisfied that the misrepresentations were material and had the defender known either that the company had been trading for only a few months, that it had previously had no insurance and had been trading without insurance and that its director had CCJs no cover would have been offered.

[211] Accordingly the defender was induced to enter the contract with the pursuer on the basis of the material misrepresentations.

Quantum

[212] That having been decided there is no need to go further and look at the question of quantum or the level of indemnity. However lest I am wrong in my views regarding liability to indemnify I consider it appropriate that I provide my views on quantum.

[213] I have made several findings in fact which are based on the analysis provided by Mr Rowand. I preferred his evidence to that of the pursuer.

[214] There was no credible or reliable evidence from which the court could make findings as to the amount which Mr KC had invested in the pursuer company or the restaurant or the source of any such sums.

[215] Fundamentally there were no records kept from which the past or projected profitability of the business could be determined with any degree of certainty. The pursuer lodged dormant company accounts as at 31st January 2011 (production 6/1). This entitled the company to exemption under section 480 of the Companies Act 2006 and would evidence that the company had not been trading at all in the period. This would negate any entitlement to a business interruption claim. It would certainly undermine any factual basis for a claim to be made of the nature currently suggested.

[216] The pursuer made no tax return (6/17) which would also support the inference that either the pursuer did not trade or that it submitted false returns. Neither position forms a sound basis for the claim now made.

[217] In any event a failure to keep accurate records of stock purchases and sales receipts would constitute a breach of warranty in terms of the Special Conditions attached to the Policy and would constitute a bar to a claim for business interruption.

[218] At best the hand kept vouching provided by Mr KC, which he acknowledged was incomplete, and was no more than a rough estimate which does not assist the court in making findings in fact in this regard.

[219] On forensic examination of the notebook which Mr KC claimed to have kept to record his costs and sales Mr Rowand determined that only 57% of the sales which purported to be recorded in the notebook were vouched. There was no evidence to support the contention that the sales figures would have increased or the percentage increase which could have been expected. Based on the vouched sales the pursuer's annual turnover would

have been around £103,295 as evidenced by Mr Rowand. The pursuer's rough estimate of costs was £900 per week. This is not vouched. Using these figures the pursuer's gross annual profit would have been £57,305.

[220] The provisions of the policy require that account must be taken of the charges and expenses which have been saved as a result of the fire and on the basis of the evidence which was led from Mr KC this would have amounted to £106,887. This evidence was unchallenged. The costs saved are higher than the gross profit of £57,305. Accordingly no claim for business interruption is justified.

[221] Although a purported schedule of loss in support of a trade's contents claim was produced as 5/4 of process it was conceded that this was no more than a rough estimate. In any event some items on the schedule belonged to the landlords and some to Namaste Nepal Ltd. There was no vouching of values. It is impossible to make any findings in fact in this respect.

Summary

1. Mr KC's answers to the questions contained in the statement of facts relating to the original policy of insurance taken out in his wife's name and in relation to the policy in the name of the pursuer were incorrect and untrue.
2. The answers were properly characterised as misrepresentations and not non-disclosures.
3. While there may be no duty to disclose matters which lessen a risk to an insurer there is a duty to disclose all material facts.
4. A fact is material if it is one which would influence a prudent insurer in assessing whether or not to assume the risk and if so on what terms.

5. Materiality is a matter of fact which can be determined by reference to expert testimony. The fact that a question is one which is asked by practically all insurers is highly indicative of materiality.

6. Whether or not a fact is material is to be decided on the evidence and is to be assessed objectively.

7. The pursuer's contention that the defender requires to prove that a fact which was not known to the insurer would have to have increased the risk or the premium is incorrect. This is not the test for materiality and there is no evidential burden upon the defender to this effect.

8. The defender has the onus of proving that the representation was untrue, was material and induced the insured to enter into the contract.

9. The evidence adduced by the defender in relation to the length of time trading, the current insurance arrangements and the existence of CCJs was sufficiently credible and reliable to enable the court to conclude that the answers provided were untrue .

10. They were not the result of ambiguity in the questions.

11. There being no ambiguity in the questions when read on their own or in the context of the policy as a whole the pursuer cannot pray in aid the *contra proferentem* rule to support an alternative interpretation or justify the answers given.

12. The evidence of Mr Coates and Mr Williams confirms that the answers to each of these three questions were material. They are questions which would have been asked of all insured seeking a policy of insurance in similar terms.

13. Had the correct answers been given to all or any of these questions the defender would not have entered into the policy of insurance with the pursuer. Cover would have been declined.

14. Accordingly the defender was induced to enter into the contract of insurance as a result of the material misrepresentations of the pursuer.

15. The policy of insurance is void *ab initio*.

16. That being so questions of quantum do not arise.

17. Had it been necessary for the court to assess quantum there would have been insufficient vouching both in terms of the quality and the quantity to enable the requisite findings in fact to be made.

18. The defender is therefore assoilzied from the craves of the writ and expenses are awarded in favour of the defender as taxed. Given the nature of the case, the novelty of the arguments advanced in relation to the legal tests to be applied and the importance to the client, the cause is certified as suitable for the employment of junior counsel.