



Neutral Citation Number: [2023] EWHC 2649 (Comm)

Case No: LM-2023-000104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 31ST October 2023

Before :

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

Between:

PROJECT ANGEL BIDCO LIMITED (IN ADMINISTRATION)

Claimant

- and -

- (1) **AXIS MANAGING AGENCY LIMITED**
(As Representative Of Syndicate 1686 At Lloyd's Of London)
- (2) **NAVIGATORS UNDERWRITING AGENCY LIMITED**
(As Representative Of Syndicate 1221 At Lloyd's Of London)
- (3) **THE MEMBERS OF LLOYD'S SYNDICATE 4444 AS
CONSTITUTED FOR THE 2019 UNDERWRITING YEAR
OF ACCOUNTING ACTING THROUGH THEIR
MANAGING AGENT CANOPIUS MANAGING AGENTS
LIMITED**
- (4) **MARKEL SYNDICATE MANAGEMENT LIMITED**
(As Representative Of Syndicate 3000 At Lloyd's Of London)
- (5) **ENDURANCE AT LLOYD'S LIMITED**
(As Representative Of Syndicate 5151 At Lloyd's Of
London)
- (6) **RENAISSANCERE SYNDICATE MANAGEMENT
LIMITED (As Representative Of Syndicate 1458 At Lloyd's
Of London)**
- (7) **ZURICH INSURANCE PLC**

Defendants

Simon Salzedo KC and Joanne Box (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Ben Quiney KC and Caroline McColgan (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 26 and 27 September 2023

Approved Judgment

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

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

HH Judge Pelling KC:

Introduction

1. This is the trial of a limited number of preliminary issues that arise in this claim by the claimant against the defendant underwriters under a Buyer Side Warranty & Indemnity Insurance Policy underwritten on their behalf and issued on 3 December 2019 (“Policy”). A warranty & indemnity policy (“W&IP”) such as the Policy is a specialist insurance product by which those acquiring a company or business can insure against the risk that the target business is not in the state warranted by the vendors and thereby was worth less than the purchase price at the date when the sale took place.
2. On 19 November 2019, the claimant had exchanged with various vendors (“Vendors”) a Share and Purchase Agreement (“SPA”) for the acquisition of the entire issued share capital of Knowsley Contractors Limited (trading as King Construction) (“Target”), which carried on business as a provider of civil engineering and general construction services mainly to local authorities and principally to Liverpool City Council. The claimant is now in administration and Target has been placed in liquidation, in each case allegedly as the result of the events alleged to entitle the claimant to claim an indemnity from the defendants under the Policy.
3. The SPA included a number of warranties including the following:

“11.1 The Company nor any person for whose acts the Company may be vicariously liable is engaged in relation to the Business in any litigation, arbitration, mediation, prosecution or other legal proceedings or alternative dispute resolution or in any proceedings or hearings before any Authority; no such matters are pending or threatened or have been settled by a deferred prosecution agreement; and so far as the Sellers are aware there are no circumstances which would give rise to any such matter.

...

11.4 The Company has not received notification that any investigation or enquiry is being or has been conducted by any Authority in respect of its affairs and so far as the Sellers are aware there are no circumstances which would give rise to any such investigation or enquiry.

11.5 So far as the Sellers are aware the Company has not committed any material breach of contract, tort, statutory duty or law which will cause material damage or material loss to the Company.

...

13.5 Bribery and corruption

(a) Neither the Company nor so far as the Sellers are aware (without having made any enquiry of a third party) any of its officers,

directors, employees any other person performing services for or on behalf of the Company (including but not limited to any agent, distributor, contractors or sub-contractors, joint venture, joint venture partner and any other person contemplated by section 8 Bribery Act 2010) (Associated Person) has at any time prior to the date of this Agreement committed any offence under the Bribery Act 2010 or any legislation or common law or regulation anywhere in the world creating offences in respect of bribery or fraudulent or corrupt acts.

(b) The Company has in place procedures details of which are set out in the Disclosure Letters in line with the guidance published by the Secretary of State under section 9 Bribery Act 2010 designed to prevent any person working for or engaged by it including its officers, directors, executives, employees, workers and Associated Persons from committing directly or indirectly offences of corruption or bribery or omitting to take actions which would facilitate or permit bribery or corruption.

(c) Neither the Company, nor, so far as the Sellers are aware (without having made any enquiry of a third party) any of its officers, directors, employees, Associated Persons, any of the Sellers nor any party connected with any of the Sellers has paid directly or indirectly to any person or any Authority or Relevant Person any sum or offered or promised or provided any tangible or intangible gift, favour, service, entertainment, education or promotional or travel expenses or anything else of value in the nature of a bribe or inducement.

For the purposes of this paragraph 13.5 Relevant Person means:

(i) an executive, official, employee or agent of a governmental department, agency or instrumentality; or

(ii) a director, officer, employee or agent of a wholly or partially government-owned or controlled company or business;

...

(d) Neither the Company nor so far as the Sellers are aware any of its officers, directors, employees or any Associated Person is or has been the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body or any customer regarding any offence or alleged offence under the Bribery Act 2010 and the Seller does not know of any such investigation, inquiry or proceedings have been threatened or being pending, and so far as the Sellers are aware, there are no circumstances which would give rise to such investigation, inquiry or proceedings.

(e) The Company maintains a record of all entertainment, hospitality and gifts given to or received from any third party.

...

(g) Neither the Sellers nor so far as the Sellers are aware any party connected with any of the Sellers have violated any applicable domestic or foreign anti-bribery, anti-corruption, money laundering or anti-terrorism Regulations.”

4. The claimant alleges that the Vendors under the SPA were in breach of the warranties referred to above as a result of [Confidential Schedule, Para 1]. These allegations are the subject of a currently ongoing police enquiry and the parties are agreed that they should be treated as confidential. They are contained in a confidential schedule to the Particulars of Claim, which is subject to a Confidentiality Ring Order made by Foxton J on 24 November 2022, prior to these proceedings being transferred from the Commercial Court to this court. It is not necessary that I reproduce those allegations made in the confidential schedule either in the body of this judgment or indeed in a confidential schedule to it.
5. The claimant alleges that as a result of the discovery of the conduct alleged, Liverpool City Council ceased or severely reduced the business it did with Target. The claimant alleges that it was caused loss and damage by reason of the alleged breaches of warranty because it received shares in Target that had a lower value than they would have had if the warranties at clauses 11.1, 11.4, 11.5 and 13.5 of the SPA had been true. It alleges the claimant paid approximately £16.65m for the shares in Target but contends that the true value of the shares was either nil or at most £5.2m and therefore that it has suffered loss in the sum of either £16.35m alternatively £11.15m. The Limit of Liability under the Policy is £5m and for that reason the claimant has limited its claim to that sum.
6. The defendants deny the facts alleged in the confidential schedule and deny that the facts alleged constitute a breach of the, or any of the SPA warranties on which the claimant relies. The defendants deny that the claimant has been caused the alleged or any loss by the alleged breaches of warranty or has suffered the or any of the loss alleged. It follows that if the claimant succeeds on the preliminary issues, there will have to be a trial of the claim including the allegations of breach of warranty alleged by the claimant. It is common ground however that if the defendants succeed, the claim must be dismissed.
7. The parties entered into negotiations leading to the Policy after exchange but before completion of the SPA. The claimant was represented in negotiations leading to the Policy principally by its broker Paragon International Insurance Brokers Limited (“Paragon”) but also its solicitors. The defendants acted by their agent and cover holder RSG Transactional Risks Europe Limited (“RSG”).
8. Aside from denying that any breach of warranty has occurred, or if it has that such breaches have caused the or any of the loss alleged, the defendants maintain that it has no liability for the claim that has been advanced by operation of the exclusion contained in clause 5.2.15 of the Policy, which provides that “(t)he Underwriters shall not be liable to pay any Loss to the extent that it arises out of...any ABC Liability”. “ABC Liability” is defined by clause 1.1 of the Policy as meaning “any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws” and “Anti-Bribery and Anti-Corruption Laws” are defined as meaning “... all laws or regulations in relation to anti-bribery, anti-corruption, anti-

money laundering, counter-terrorist financing, financial sanctions, export control or any other aspect of financial crime.”

9. Since it is common ground that if the defendants are correct in this contention then the claim must be dismissed, I directed that the following issues be tried as preliminary issues:

“(1) What is the proper construction of “ABC Liability” under the Policy?

(1.1) Are the pre-contractual negotiations pleaded at paragraphs 27(1) to (5) and 27(8) to (10) of the Defence admissible and/or relevant to the construction of “ABC Liability”?

(2) What is the proper construction of Clause 5.2.15 of the Policy?

(3) Does Clause 5.2.15 of the Policy exclude all or any of the alleged breaches of Warranties 11.1, 11.4, 11.5 and/or 13.5?

(4) Is [the Claimant] estopped by convention from contending for its construction of “ABC Liability”?”

10. No oral evidence was given during the trial, although the defendants had served witness statements from:

- i) Mr Alexander White, currently a senior underwriter and Head of Claims (Europe and United Kingdom) at RSG and, at the time material to this dispute, the project manager for the underwriting of the Policy; and
- ii) Mr George Pearce, who at the time material to this dispute was a senior underwriter at RSG and is currently one of its managing directors.

The claimant made clear that it did not wish to cross examine either of these witnesses and accordingly I directed that their statements should stand as their evidence without any need for them to attend pursuant to CPR r.32.5(1). The claimant maintains that neither statement contains anything relevant to the preliminary issues once what is properly admissible on construction issues is understood. The defendants maintain that is wrong firstly because information passed by one party to another in the course of negotiations can form part of the relevant context against which a contract is to be construed and secondly because at least some of the material is said to be relevant to the defendants' estoppel by convention case.

The Policy

11. Generally, W&IPs are underwritten on a bespoke basis and usually negotiated in parallel with the negotiations between the vendor and purchaser of the company or business concerned. In that regard at least the genesis of the Policy was unusual because the negotiations that led to it commenced only after exchange of the SPA, although before completion. The Policy was heavily negotiated between RSG on behalf of the defendants, Paragon on behalf of the claimant with the claimant's solicitors involved in at least some of the pre-contractual meetings. It was a condition

of the SPA that the Vendors had to approve the terms of the Policy before the SPA could be completed.

12. The Policy itself is structured conventionally, with a schedule, then detailed policy wording followed by various appendices including a cover spreadsheet ("Cover Spreadsheet") on which the claimant places particular reliance.
13. There is a dispute between the parties as to how the Policy should be read. The claimant maintains that the correct way in which the Policy should be read is in the order (a) Schedule; (b) Cover Spreadsheet, and (c) the exclusions whereas the defendants maintain the correct way in which the Policy should be read is in the order set out in the document. To my mind this is something of an arid debate because the person to whom the document should be taken to be addressed to is an ordinary policyholder who is taken to have read through the Policy conscientiously in order to understand what cover they were getting and if (as the claimant alleges) there is a conflict between what is set out in the Cover Spreadsheet and the terms of the exclusions, then that will be so whichever order the sections of the Policy are read. The real question is whether there is a conflict and if so how it is to be resolved as a matter of construction.
14. In so far as is material for present purposes the Policy provided as follows:

“Buyer-Side Warranty & Indemnity Insurance Policy

Project Angel

Policy Number: RSG19WI257584

Issued by RSG Transactional Risks Europe as Coverholder for and on behalf of the Underwriters

Date of Issue: 3 December 2019

Insurance Schedule

Item 1 Insured:

Project Angel Bidco Limited, a company incorporated under the laws of England and Wales with Company Number 11957072 and whose registered office is at 18 Goodlass Road, Speke, Liverpool L24 9HJ

Item 2 Acquisition Agreement:

The agreement for the sale and purchase of the entire issued share capital of the Target Group between the Insured, the Sellers, Andrew James, Re Surf Limited, M&P Doyle Properties Limited and the Target Group and dated 18 November 2019

Item 3 Policy Period: Commencement Date:

3 December 2019

Expiry Date:

1. 2 years from Completion in respect of the General Warranties ...

Item 4 Limit of Liability:

£5,000,000 in the aggregate for the Policy Period

...

Appendix A Schedule of Underwriters

Appendix B Mandatory Exclusions

Appendix C Cover Spreadsheet

...

The Coverholder has been appointed as agent of the Underwriters to issue this Policy to the Insured.

The Coverholder is not an Underwriter and is not liable to pay any Loss under this Policy.

.....

Terms and Conditions

1. Definitions and Interpretation

1.1. Definitions

In this Policy:

...

ABC Liability any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws.

Anti-Bribery and Anti-Corruption Laws

means all laws or regulations in relation to anti-bribery, anti-corruption, anti-money laundering, counter-terrorist financing, financial sanctions, export control or any other aspect of financial crime.

Breach means any of the following:

I. breach of clauses 9.1 and 9.4 of the Acquisition Agreement in respect of the General Warranties;

...

in each case in respect of any of the Insured Obligations.

...

Coverholder means RSG Underwriting Managers Europe Limited, trading as RSG Transactional Risks Europe, acting as agent for and on behalf of the Underwriters.

Cover Spreadsheet means the cover spreadsheet attached to this Policy as Appendix C

...

Excluded Insured

Obligations means:

I. a Breach of any of the Insured Obligations marked as “Excluded” in the Cover Spreadsheet; or

II. a Breach of any of the Insured Obligations marked as “Partially Covered” in the Cover Spreadsheet to the extent that such Loss arises out of that part of the Insured Obligation for which cover is not provided under this Policy.

...

Insured Obligations

means the Insured Signing Obligations and the Insured Completion Obligations

Insured Signing Obligations

means the General Warranties, Fundamental Warranties and Tax Warranties as stated on the Commencement Date (save for those warranties that expressly refer to some other date) in each case to the extent referred to in the Cover Spreadsheet as “Covered” or “Partially Covered”.

...

Loss has the meaning attributed to it in Clause 4.1.

...

1.2. Interpretation

1.2.1. The headings of this Policy do not affect its interpretation.

...

I.2.6 No party to this Policy shall have the benefit of any presumption regarding the interpretation or construction of this Policy based on which party drafted it.

....

3. Insuring provisions

3.1. Insuring clause

Subject to the terms and conditions of this Policy, the Underwriters shall, in excess of the Retention and in aggregate for the Policy Period up to the Limit of Liability, indemnify the Insured for, or pay on the Insured's behalf, any Loss covered by this Policy.

...

4. Calculation of Loss

4.1. Definition of Loss

Subject to the other provisions of this Clause 4, Loss means:

4.1.1. the amount of monies which the Insured is legally and/or contractually entitled to claim against the Sellers pursuant to the Acquisition Agreement for a Breach or would be entitled to claim in respect of such Breach if the Limitation Provisions were disregarded

...

5.2. Exclusions

The Underwriters shall not be liable to pay any Loss to the extent that it arises out of:

...

5.2.15. any ABC Liability;

...

5.3. Mandatory exclusions

The Underwriters shall not be liable to pay any Loss to the extent that it arises out of any of the matters excluded by Appendix B.

5.4. Operation of exclusions

If only part of any Loss is excluded under the provisions of this Clause 5, the Underwriters shall remain liable for that part of any Loss, which is not so excluded.

...

9. Subrogation

9.1. Right to subrogate

If the Underwriters make any payment to the Insured under this Policy then, subject to Clause 9.2, the Underwriters shall be subrogated to the Insured's and Target Group's respective rights of recovery against any person in respect of such Loss.

9.2. Subrogation against the Sellers

The Underwriters shall only be entitled to exercise rights of subrogation against the Sellers if the Loss arose in whole or part out of the Sellers' fraud or fraudulent misrepresentation.

...

11. Other provisions

...

11.2. Entire agreement

This Policy constitutes the entire agreement between the Insured and the Underwriters concerning the subject matter of this Policy and supersedes any previous agreement, oral or written, between the parties concerning the subject matter of this Policy. Nothing in this Clause shall exclude or limit any liability or any right, which any party may have, in respect of any statements made fraudulently or dishonestly prior to the Commencement Date.

...

Appendix C - Cover Spreadsheet

This Cover Spreadsheet contains a conclusive list of the Insured Obligations, being:

1. The warranties numbered 1 to 17 inclusive set out in schedule 5 of the Acquisition Agreement (the General Warranties);

...

Notwithstanding that a particular Insured Obligation is marked as “Covered” or “Partially Covered”, certain Loss arising from a Breach of such Insured Obligation may be excluded from cover pursuant to Clause 5 of the Policy.

...

Warranty	Warranty Content	Status	Comments
...
Schedule 5	Warranties		
...
11	Litigation and disputes		
11.1		Partially covered	Warranty deemed amended by addition of the wording “, so far as the Sellers are aware,” prior to the words “nor any person”.
11.2		Covered	
11.3		Covered	
11.4		Covered	
11.5		Covered	
13.5	Bribery and corruption		
13.5.a		Covered	
13.5.b		Covered	
13.5.c		Covered	
13.5.d		Covered	

13.5.e		Covered	
13.5.f		Covered	
13.5.g		Covered	
13.5.h		Covered	

Principles Applicable to the Construction of the Policy

15. The framework principles that apply to the construction of an insurance contract are those that apply to the construction of any other contract – see FCA v. Arch Insurance (UK) Limited and others [2021] UKSC 1 *per* Lords Hamblen and Leggatt (with whom Lord Reed agreed) at [47]. Those principles are now well established. In summary:

- i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 *per* Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
- ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 21;
- iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 17;
- iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 *per* Lord Clarke JSC at paragraph 23;
- v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) *per* Lord Neuberger PSC at paragraph 18;

- vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;
 - vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40;
 - viii) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11; and
 - ix) language used by the parties should not generally be treated as surplus but “(i) it is well established law that the presumption against surplusage is of little value in the interpretation of commercial contracts...” – see The Eurys [1998] 1 Lloyd’s Rep 351 per Staughton LJ (as he then was) at 357, approving Royal Greek Government v. MoT (1949) 83 Ll.L.R 228 per Devlin J (as he then was) at 235 and Chandris v. Isbrandtsen-Moller Co Inc [1951] 1 KB 240 per Devlin J at 245.
16. Specifically in relation to insurance policy exclusions, the true effect of any relevant exclusion is to be ascertained by reading together the statement of cover and the exclusions in the policy. An exclusion clause must be read in the context of the contract of insurance as a whole and in a manner that is consistent with and not repugnant to the purpose of the insurance contract – see Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57 per Lord Hodge at [7]. The *contra proferentem* principle has been expressly excluded by the parties to the Policy as a principle of construction by clause 1.2.6.
17. Specifically in relation to an alleged error in a contract, the general principle is that “the literal meaning of a provision in a contract can be corrected if it is clear both (i) that a mistake has been made, and (ii) what the provision is intended to say.” – see Chartbrook Ltd v Persimmon Homes [2009] AC 1101 per Lord Hoffmann at [22] to [25] and most recently MonSolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961 per Nugee LJ at [25]. However, because, as Lord Hoffmann put it in Chartbrook (ibid.), “... we do not easily accept that people have made linguistic mistakes

particularly in formal documents...” there is a high hurdle to be overcome before a court will conclude that it is clear a mistake has been made and typically will do so only where the clause in question is “... *an obvious nonsense* ...” – see Trillium (Prime) Property GP Ltd v Elmfield Road Ltd [2018] EWCA Civ 1556 per Lewison LJ at [15].

18. The most recent and now the leading case in this area is Britvic Plc v. Britvic Pensions Ltd [2021] ICR 1648, where Sir Geoffrey Vos MR described the issue that arose as “*beguilingly simple*” being whether the words “... *or any other rate decided by the principal employer...*” in a pension increases provision in the rules of an occupational pension scheme mean “any higher rate” or “any other rate, whether higher or lower” decided by that employer. Sir Geoffrey emphasised the nature of the hurdle that must be overcome by holding that merely to conclude there may have been a mistake is not sufficient, any more than one that is “*suspiciously likely*” or that the provision as drafted is unsatisfactory or even “... *arguably inconsistent with some of the immediately surrounding materials*”. To the contrary what was generally required was a mistake that was “... *obvious ... on the face of the document ...*” or as Coulson LJ put it in his concurring judgment there must be “... *an obvious error... where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court*”. As Nugee LJ observed in his concurring judgment, in most cases this test will be satisfied only where there has been an obvious transposition error or the language used is obviously garbled or where the language is clear but makes no rational sense or leads to an irrational outcome that could not possibly have been what was meant¹.

The Construction Issues

19. The claimant’s case is that the definition of “*ABC Liability*” contained an obvious minor error in that the first occurrence of the word “*or*” should have been “*for*”. It maintains that this can and should be corrected as a matter of construction applying the principles summarised in paragraph 17 above. It maintains that if that course is adopted, it will be entitled to recover the losses it claims to have suffered as a result of the breach of warranties it alleges have occurred. The defendants submit that the definition as drafted is effective to exclude and should be construed as excluding both losses arising from any actual or alleged non-compliance with the ABC laws as defined in the Policy and the losses claimed by the claimant to have been suffered by it as a result of the breaches of warranty on which it relies. The defendants maintain that there is no proper textual or contextual reason for construing the exclusion as only excluding “*liability for...*” actual or alleged non-compliance with the ABC laws as defined, which in any event involves re writing the parties' agreement and makes no literal sense.

Discussion

Introduction

¹ Following the circulation of this judgment in draft, entirely properly my attention was drawn to the decision of the Court of Appeal in DnaNudge Ltd v Ventura Capital GP Ltd [2023] EWCA Civ 1142 *per* Snowden LJ at [45] to [46]. That case does not decide any principle not set out in the summary in the main body of the judgment and I need say no more about that decision.

20. It is common ground that the construction exercise is a unitary exercise in which the relevant contextual and textual issues must all be considered for the purpose of ascertaining what a reasonable person with all the relevant background information that was known or reasonably available to both parties would have understood the parties to have meant. The claimant maintains that the issues that arise should be resolved by reading the Policy as a whole and in the order referred to earlier. It maintains that if that course is adopted, there is an obvious conflict between what is set out in the Cover Spreadsheet and what appears in the exclusion and thus that the exclusion should be read down in the manner for which it contends. The claimant maintains that there is no relevant factual matrix evidence that is admissible or relevant other than what appears in the body of the Policy when read as a whole and that the material relied on by the defendants is inadmissible evidence of subjective intent that depends on what was said and done in the course of the negotiations leading to the Policy that is inadmissible and should be ignored on that basis.

The factual Context Issues

21. It is necessary that I first set out the material on which the defendants seek to rely before coming to a view on the extent to which if at all it is admissible on the construction issues that rise. In doing so it is necessary to bear in mind the limits of the exclusionary rule on which the claimant relies – as to which see Chartbrook Ltd v Persimmon Homes (ibid.) *per* Lord Hoffmann at para 42:

“The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.”

22. It is not in dispute that the negotiations leading to the Policy were conducted on behalf of the claimant by Paragon (assisted by the claimant’s solicitors) and by RSG on behalf of the defendants. It is not in dispute either that an initial enquiry was made and RSG provided an indicative quotation in a document entitled “*Project Angel*” dated 20 June 2019. The indicative quotation did not include any relevant exclusions. It stated in terms that the cover holder had not “... *identified any warranties/covenants in the Acquisition Agreement that it could not provide full cover for subject to the disclosure letter satisfactorily addressing the customary specific disclosures that it would expect to see for a transaction of this nature ...*” but that was subject to sight of “... *thorough and fulsome disclosures from the Sellers ...*”; and “... *given the nature of the business and the Sellers being individuals, we would focus on financial and corporate house-keeping and need to get comfortable with how the business has been run.*”
23. Although the claimant relies on a report from Paragon that discussed the underwriting offers that had been received, in my judgment it is not entitled to. This information was not known to both parties and could not reasonably have been obtained by or on behalf of the defendants.

24. There was then a gap before negotiations resumed in November 2019 by an email from Paragon dated 19 November, which attached copies of the final form of the SPA and various other documents. The email indicated that the “*(p)lan is to put cover in place between now and completion*”. In essence Paragon sent to RSG copies of the disclosure and due diligence material it had received from the claimant and obtained access for RSG to the Virtual Data Room to which the claimant had access while carrying out its due diligence. This included disclosure given by the Vendors in respect of the SPA warranty at clause 13.5(b), which included the following:

“The Company regularly attends charity events run by the Local Authorities. The Company will make a point of spending well at the charity auctions at such events. The object of this is to ensure that the Local Authorities see that they are well supported, in the charity of their choice by the Company.

As the Buyer will be aware, local authorities, being public bodies are themselves highly regulated in the acceptance of entertainment and the Sellers understanding is that all invitations to attend functions & sports events etc will be recorded in the council’s records and attendance will be confirmed if compliant to the organisation’s rules and regulations on the anti-bribery legislation. This regulation of local authorities provides the Company with an added safeguard and comfort that its entertaining/business development activities should not be considered as contravening any law as, if the local authorities felt any such activities were improper, they would not permit their employees to attend them.”

25. Although Mr Pearce says of this that it was “... *highly unusual – particularly for a UK business. What the sellers appeared to be saying was that the target would spend generous amounts of money at charity events in order to curry favour with local government officials. This seemed to me to be flagrant evidence of bribery. In my experience, it would have led to an exclusion in any jurisdiction ...*” this is inadmissible and irrelevant to the issues that arise. First it is opinion evidence, secondly it is subjective, thirdly it was not shared with the claimant and in any event, it does not assist in resolving the construction issues that arise beyond suggesting that it was in the defendants’ interests to exclude any ABC liability of any sort whereas it was in the claimant’s interest for all such liabilities to be included within the scope of cover.
26. On 20 November 2019, the defendants sent the claimant the first set of underwriting enquiries and a first draft policy document. It is common ground that the first draft policy did not contain any provisions concerning ABC liabilities. The questions and answers did not address specifically anything concerning ABC liabilities. This resulted in a further set of underwriting questions. It was accompanied by an email from RSG which drew attention to a number of exclusions then being considered, none of which included ABC liabilities. It drew attention to RSG’s view that “... *the target is clearly a business that has not been run in a particularly sophisticated manner...*” and that “... *there are a number of issues that we are going to struggle to get our heads around in spite of the underwriting call.*” None of this material is relevant to the issues that arise even if otherwise it is admissible. The second set of questions were more specific than the first and included the question:

“Are you comfortable with the target’s ABC compliance noting that the target engages with local authorities?”

to which the claimant answered:

“No material issues were identified during the legal DD process.”

27. None of this material in my judgment impacts on the issues that arise. In particular there is nothing in the exchanges that I have referred to so far that assists in resolving the construction issues that arise. It is fair to say however that the charitable events answer referred to above was the subject of adverse comments by Mr Pearce in his private WhatsApp account with Mr Pawar of Paragon at or about the time when the second tranche of underwriting questions was sent out. These individuals had a long professional history which led them to communicate informally and occasionally inappropriately. In the course of these discussions Mr Pearce described the target as a “*dirty business*”, as the “*...worst business seen in a long time ...*” and as “*... not a good deal...*” He also referred specifically to the charitable spending answer referred to earlier. None of this is material to the issues I have to decide. It shows only that Mr Pearce was antipathetic to the underlying transaction and may have had a concern about the charitable spending answer as to which he said that “*It’s a shit show mate. Pikey owner doing tarmac for local councils.*” This was inappropriate and unprofessional. It does not assist me to resolve the issues that arise in this case. It is at best an expression of subjective opinion.
28. Following these exchanges, on 27 November 2019, there was an underwriting meeting. It was attended by representatives of the claimant, Paragon and the claimant’s solicitors on the claimant’s side and Messrs White and Pearce on behalf of RSG. The evidence as to what was said concerning this issue is limited. Mr Pearce has no recall of what was said other than that he believes the claimant was asked about ABC liability in light of the charitable giving disclosure and that the only assurance received was that the claimant was going to improve things following the acquisition – but that of course is of no comfort or relevance in respect of cover in respect of warranties as to past conduct. This recollection accords with the notes apparently taken at the meeting, which were as follows:
- “What about charity spending as disclosed in the DL? Also entertainment expenses reasonable? No concerns?
- [consider excluding ABC – note disclosure in this regard]
- ABC approach and policies will be more robust than they are now.”
29. The ABC Exclusion was introduced into the second draft of the Policy, which was issued on 28 November 2019, on the day following the underwriting meeting. It was the subject of WhatsApp messages between Mr Pawar of Paragon and Mr. Pearce. Mr. Pearce described the final version as being “*... our best foot on current responses to DD etc*”. It is not necessary that I include the various more profane statements that appear, which take matters no further.
30. I have summarised this material because the defendants rely on it. However, I should make clear that in my view none of it is admissible for present purposes, applying the

principles referred to earlier, because none of it establishes either directly or inferentially a fact which may be relevant background known to the parties. At best it shows that both parties were aware that there was an actual or potential ABC problem, the scope of which was unknown. Although the defendants maintain on the basis of this material that it was understood (indeed it was understood and agreed by the claimant) that the defendants would not provide cover for any losses arising from bribery and corruption risks, I do not agree. Looked at in isolation this material establishes only that (a) both parties were aware there was a risk of breach of the warranties that were relevant to ABC liability, the scope of which was unknown, and (b) in consequence, (i) the defendants would wish to exclude liability for any such breaches, and (ii) the claimant would want cover in respect of such risks. The question that arises (which this material is entirely irrelevant to) is the extent to which a reasonable person with all the relevant background information would conclude the parties had chosen to manage the risk.

The Textual Issues

31. In my judgment the conventional starting point is the Insuring Clause (Clause 3.1 quoted earlier). In so far as is material for present purposes, it provides that “*Subject to the terms and conditions of this Policy, the Underwriters shall ... indemnify the insured for, or pay on the insured’s behalf, any Loss covered by this Policy.*”. Two points emerge from this formulation – first the obligation to indemnify was expressly made subject to the terms and conditions of the Policy including therefore the exclusions set out in those terms and conditions. Secondly, this wording contemplates two types of loss to which the Policy would respond – direct loss suffered by the claimant insured and third party liabilities in respect of which the defendants would pay the third party on the claimant insureds behalf, subject only to the qualification contained in clause 4.1 namely that what was recoverable was confined to “... *the amount of monies which the Insured is legally and/or contractually entitled to claim against the Sellers pursuant to the Acquisition Agreement for...*” breach of the relevant warranty or warranties. As will become apparent from what I say below, the warranties to which the Policy responded covered one or other or both of these types of liabilities.
32. Clause 5.2 of the Policy sets out various exclusions. Clause 5.2 is one of the “... *terms and conditions of this Policy...*” to which the defendants’ obligation to indemnify was expressly made subject. It provides in so far as is material that “(t)he Underwriters shall not be liable to pay any Loss to the extent it arises out of ... *any ABC Liability.*” It follows that clauses 3.1, 4.1 and 5.2, when read together, provides in so far as is material that the Underwriters shall indemnify the insured for, or pay on the insured’s behalf, the amount of monies which the Insured is legally and/or contractually entitled to claim against the Vendors pursuant to the SPA for breach of the relevant warranty or warranties save to the extent it arises out of any ABC liability. In my judgment so far the effect of the Policy is entirely unequivocal and coherent. The defendants are not liable to indemnify the claimant in respect of any otherwise insured loss that arises out of any ABC liability.
33. The alleged textual difficulty on which the claimant relies arises from the contractual definition of “*ABC Liability*”. As quoted above, this phrase is defined to mean “*any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-*

Corruption Laws” and “*Anti-Bribery and Anti-Corruption Laws*” is defined to mean “*all laws or regulations in relation to anti-bribery, anti-corruption, anti-money laundering, counter-terrorist financing, financial sanctions, export control or any other aspect of financial crime*”.

34. As drafted the definition would appear to cover three different species of ABC liability being:
- i) Any liability ... in respect of Anti-Bribery and Anti-Corruption Laws;
 - ii) Any ... alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws; and
 - iii) Any ... actual ... non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws.
35. The claimant seeks to confine the scope of the exclusion to (ii) and (iii) by changing the word “or” that appears between “*any liability*” and “*actual*” in the definition of “*ABC Liability*” to “for”. In my judgment that construction is one I must reject applying the principles summarised above for the following reasons.
36. Firstly, I do not accept that the clause is inherently absurd or obvious nonsense in the absence of such a solution being adopted. In my judgment the three alternatives within the clause each make clear sense, when read together with the insuring clause and the other provisions of the agreement. As I have said earlier, the insuring clause contemplates that loss may be suffered either directly by the claimant or as a result of Target having to pay a third party. The exclusion clause that is material follows this pattern with (i) being concerned with direct loss suffered by the claimant and (ii) and (iii) with actual or potential third-party liabilities.
37. It was submitted on behalf of the claimant that the absurdity arose from the fact that on a literal construction of (i), both (ii) or (iii) would be surplus because everything within the scope of (ii) and (iii) would be covered by (i). In my judgment this submission should be rejected because it involves adopting a far too narrowly literalist approach to the issue that arises. A reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the Policy means for these purposes a reasonable person in the shoes of the claimant insured. As Lord Hamblen put it in FCA v. Arch Insurance (UK) Limited and others at [77]:

“In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis ... It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.”

In my judgment such a person would have read the word “or” as having the same meaning throughout the definition – that is as referring disjunctively to different situations, each of which came within the scope of the exclusion. Such an approach is entirely consistent with clause 5.2, which makes it clear that the insurers are not liable to meet any Loss (as defined) arising out of any ABC liability. It is consistent too with the two alternatives identified in the insuring provision (payment to the insured or payment on the insured’s behalf). As is apparent from the warranties, they refer to conduct that both damages the claimant directly or results in third party liabilities. The allegations made in the confidential schedule are capable of giving rise to both types of liability – to claims for example for [Confidential Schedule, Para.2]

38. The defendants also submitted that the construction for which the claimant contends is absurd because no relevant obligation could arise in relation to an alleged as opposed to actual non-compliance. I agree with this submission. By definition there can be no liability to make good an alleged as opposed to an actual breach. However, the construction for which the defendants contend give real meaning to the concept of alleged non-compliance. It is entirely practical and possible that an insurer would wish to indemnify or pay a third party in respect of a disputed non-compliance by a member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws without admitting that such a non-compliance had occurred or waiting for the question whether a non-compliance had occurred to be decided by a court or other tribunal. It is not absurd to refer to such non-compliance as being alleged as opposed to actual non-compliance. To the contrary I consider that is normal usage that would be understood in this way by an ordinary policyholder with all the background knowledge which would reasonably have been available to the parties when they entered into the Policy.
39. It is now necessary to consider the effect of the Appendix C Cover Spreadsheet. The claimant submits that if clause 5.2 is given the construction to which I have referred so far, it would render the Policy self contradictory and/or it would be contrary to commercial common sense or would be absurd because each of the sub-paragraphs of the clause 13.5 warranty is marked as “Covered” in the Appendix C Cover Spreadsheet. The claimant maintains that what is set out in the Cover Spreadsheet should be accorded significant weight in the construction exercise because that is what an ordinary policyholder, with all the background knowledge reasonably available to the parties when they entered into the Policy, would do. This leads to a submission that the expectation of such a reader “... *would not be that a single exclusion would sweep away entirely the cover granted under a particular section of the Cover Spreadsheet, because the transparent and internally consistent way to achieve that result would have been to mark the relevant warranties as being “Excluded”*”
40. I reject that submission for the following reasons. I do not see how an ordinary insured who is taken to have read through the Policy conscientiously in order to understand what cover they were getting could reach any conclusion concerning the effect of the Cover Spreadsheet without considering at least the definitions within clause 1 and the insuring provision in clause 3 of the terms and conditions section. That is a reason why the approach of the defendants to the order in which the Policy is to be read (referred to above) is to be preferred.

41. Within the definitions clause there is a definition of the phrase “*Excluded Insured Obligations*”. This makes clear that a Breach of any of the Insured Obligations marked as “*Excluded*” in the Cover Spreadsheet is such an obligation and a Breach of any of the Insured Obligations marked as “*Partially Covered*” is such an obligation if it arises out of that part of the Insured Obligation for which cover is not provided under this Policy. An Insured Obligation is defined as being the relevant warranties set out in the SPA “... to the extent referred to in the Cover Spreadsheet as “*Covered*” or “*Partially Covered*””. Clause 3.1 defines the obligation to indemnify as being “... in respect of any Loss covered by this Policy”. The concept of “*Loss*” is defined in clause 4 by reference to the sum that the Insured would be entitled to claim for a “*Breach*”, which is defined in clause 1 as meaning a breach of the relevant warranties “... in each case in respect of any of the Insured Obligations.”
42. In my judgment the function of the Cover Spreadsheet is to identify those obligations for which in principle cover is provided. By definition, if an obligation is not covered, then the exclusions that appear in the terms and conditions cannot apply to it. Such an exclusion can apply only to an obligation that is otherwise covered.
43. In my judgment an ordinary insured who is taken to have read through the Policy conscientiously would have no difficulty in reaching such a conclusion. It follows from the wording to which I have so far referred but in my judgment is put beyond doubt by the opening wording within Appendix C. It states expressly that the Cover Spreadsheet “... contains a conclusive list of the Insured Obligations...” As I have said already, an Insured Obligation is defined as being the obligations set out in the relevant warranties “... to the extent referred to in the Cover Spreadsheet as “*Covered*” or “*Partially Covered*””. The opening words of Appendix C conclude with the statement that “(n)otwithstanding that a particular Insured Obligation is marked as “*Covered*” or “*Partially Covered*”, certain Loss arising from a Breach of such Insured Obligation may be excluded from cover pursuant to Clause 5 of the Policy.” It necessarily follows that Loss from what would otherwise be an Insured Obligation (i.e., one marked as “*Covered*” in the Cover Spreadsheet) may nevertheless be excluded from cover by operation of clause 5 of the Policy.
44. Drawing this together, if an obligation under one of the warranties is marked as “*Excluded*” in the Cover Spreadsheet then it was not intended to and it does not come within the scope of the insuring provision. If an obligation is marked as “*Covered*” then it comes within the scope of the insuring provision but subject to it being otherwise excluded by operation of clause 5. To the extent that an obligation is “*Partially Covered*”, the limitation is set out in the Cover Spreadsheet (see e.g., 2.1.c.v) and the obligation, so qualified, comes within the scope of cover but subject to any exclusion imposed by clause 5. It follows from all this that the Policy is not self contradictory and (therefore) adopting the construction that I favour is not contrary to commercial common sense or absurd.
45. Before leaving this point, I should consider a point made by the claimant concerning the effect of the phrase “*certain loss*”. It was submitted that this concept would be understood by an ordinary insured as meaning that clause 5 operated only to exclude some losses but not all of them. In my judgment that would not have been how such an insured would have read these words on the assumption that such an insured had read through the Policy conscientiously. Such a reader would have referred to the terms of clause 5.2 and would have seen that it excluded any Loss to the extent that it

arose out of any ABC liability. The claimant submits that if the construction for which the defendants contend was correct, then the “*commercially sensible*” approach would have been to mark Warranty 13.5 as “Excluded” in the Cover Spreadsheet. I agree that this would have been a solution but that does not lead to the conclusion that the construction for which the defendants contend is wrong.

46. What is generally required before a contract is re-written in the manner suggested by the claimant is a mistake that is “... *obvious ... on the face of the document ...*” or “... *an obvious error... where something has obviously gone wrong in a description, a date, a figure or a calculation...*” – see paragraph 16 above. There is no such obvious error, nor can it be said that the language is obviously garbled either. An alternative basis for intervening is where the language is clear but makes no rational sense or leads to an irrational outcome that could not possibly have been what was meant. This is a high threshold to overcome and in my judgment it has not been overcome in the circumstances of this case.
47. Given these conclusions, it is not necessary for me to consider Issue 3 since it is agreed between the parties that if I conclude construction issues 1 and 2 as set out above then the answer to issue 3 is that clause 5.2.15 of the Policy excludes the alleged breaches of warranty.

The Estoppel Claim

48. Given the conclusions I have so far reached, it is not necessary for me to consider further the estoppel claim. It would be relevant only if I had considered the claimant’s construction argument had any merit. It does not for the reasons that I have explained.
49. Estoppel by convention may arise where parties to a transaction act on an assumed set of facts or law, the assumption being one that is communicated between them and either shared by them both or made by one and acquiesced in by the other – see Revenue and Customs Comrs v Benchdollar Ltd [2010] 1 All ER 174, per Briggs J as he then was at paragraph 52(i). The common assumption asserted by the defendants was that “... *there was an ABC risk, this should be excluded from cover, and the ABC Exclusion was operative and had the effect of excluding all losses arising from bribery and corruption, including losses arising from actual or alleged bribery and corruption.*” The key point that derives from this formulation is that the defendants do not assert a common understanding that the ABC risk was excluded but only should be excluded from cover. This is a critical difference because estoppel by convention arises where both parties have acted on an assumed state of fact or law, which may result in the parties thereafter being precluded from denying. An assumption that ABC liability should be excluded simply begs the question whether it has been. In other words, it adds nothing to the construction issues already considered. Estoppel only assists the defendants (on the counterfactual assumption they need to rely on the doctrine at all) if they can establish a common assumption that the Policy excluded all ABC risk.
50. The first time it was suggested that the ABC issue was being considered in a communication that passed between the parties’ representatives was when the second draft of the Policy was circulated on 28 November 2019, which included for the first time the ABC exclusion as clause 5.2.15. RSG inserted a note attached to the new clause 5.2.15 (which refers to “any ABC Liability”). The note stated that “... *given*

the public sector contractual counterparties and the disclosures around client entertainment and charitable donations, we are not comfortable picking up any ABC liability". Given the context and location of the note, it begs the issue that arises because the reference to "*ABC liability*" is a reference to that phrase as defined in the draft of the Policy in which the note appears. None of this is sufficient to give rise to an estoppel by convention as alleged by the defendants and I reject its case to the extent it relies on that principle. However, none of that matters given the conclusion I have reached concerning the true construction of the Policy.

Conclusion

51. In the result the defendants succeed on the construction issues but would have failed on the estoppel issues had they been material. I will hear the parties at the hand down of this judgment as to the terms of the Order required to give effect to it. If all issues that arise can be agreed between the parties before hand down I will make the Order and hand down the judgment without the need for attendance.