Case No: HT-2015-000178

Neutral Citation Number: [2016] EWHC 590 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 23 March 2016

Before:

THE HON MR JUSTICE COULSON

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Between:

Mutual Energy Ltd **Cla**

- and -

(1) Starr Underwriting Agents Ltd

(2) Travellers Syndicate Management Ltd **Defe**

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Marcus Taverner QC and **Calum Lamont** (instructed by **A&L Goodbody**) for the **Claimant**

Tom Adam QC and **Nicholas Saunders** (instructed by **Clyde & Co**) for the **Defendants**

Hearing Date: 16 February 2016

Further Written Submissions: 1 March 2016

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Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1.
The claimants, whom I shall call “MEL”, own and operate the undersea Moyle Interconnector, which provides a link between the electricity systems of Northern Ireland and Scotland. The Moyle Interconnector was designed, built and installed by Nexans Norway AS, pursuant to a contract that was executed in September 1999 and completed in December 2001. Full commercial operation began in April 2002.

2.
By a contract of insurance put in place around 1 December 2009, three other insurers, together with the two defendants (whom I shall call “the Insurers”), agreed to provide insurance in respect of the Moyle Interconnector. The contract provided for the period of insurance to be from 1 December 2009

to 1 December 2011. The premium was agreed at £304,908 for year 1 (1 December 2009 to 1 December 2010) and £304,908 for year 2 (1 December 2010 to 1 December 2011).

3.
In September 2010 there was a cable failure in respect of the Moyle Interconnector which led to the renegotiation of the policy for year 2. Further sums were paid by MEL by way of a premium.

4.
On 26 June and 24 August 2011, there were two separate failures which led to a loss of power flow. The June failure involved the failure of the South cable approximately 40km from the Scottish coast. This was caused by an electrical short-circuit following a failure of the polyethylene insulation around the integrated return conductor ("IRC"). The August failure involved the North cable where the failure occurred approximately 3km from the Scottish coast. Again this was a short-circuit, again due to the failure of the polyethylene insulation around the IRC. In consequence of these failures, MEL submitted total claims to the five insurers in the sum of £45,871,541. Those claims were audited by loss adjusters appointed by the five insurers to a total figure of £41,022,504.

5.
Three insurers under the policy agreed to compromise the claims made by MEL. However, the two defendant Insurers did not do so. In consequence, these proceedings were started on 30 March 2015. MEL's claim is in the sum of £17,630,067, which is said to be the Insurers' share of the audited figure for the total loss. In February 2015, shortly before the commencement of the proceedings, the Insurers raised, for the first time, an allegation of deliberate non-disclosure on the part of MEL which, they said, entitled them to avoid the contract of insurance altogether.

6.
At a hearing on 30 October 2015, I ordered the trial of a preliminary issue concerned with the construction of the relevant clauses of the insurance policy. The preliminary issue was in the following terms:

"On the true construction of the insurance policies pleaded in the Particulars of Claim in action HT-2015-000178, and on the assumptions (which are disputed by the claimant):

(a)
That the facts and matters pleaded in the defendant's defence and counterclaim are true; and

(b)
That by their defence and counterclaim the defendants have alleged that at least one individual employed by the claimant or its agent to ensure how the state of mind alleged in paragraph 26 of the defence; then

are the defendants entitled to avoid the insurance policies ab initio?"

7.
Paragraph 26 of the defence encapsulates the Insurers' case that "'deliberate' (as opposed to 'fraudulent') non-disclosure arose where the relevant insured (here the claimant) or its agent (here NMB) was aware of information and was aware that it was not being disclosed to insurers, but held the honest but mistaken belief that it need not be disclosed." It is no part of the Insurers case that MEL did or failed to do anything in bad faith, or that they were guilty of any misrepresentation or mis-statement.

8.
So the issue between the parties is whether the reference in the policy to 'deliberate…non-disclosure' meant that the contract could be avoided in circumstances where MEL had honestly but mistakenly decided not to disclose a particular document or fact (the Insurers' case); or whether it meant that avoidance was only available if there had been a deliberate decision not to disclose a particular document or fact which MEL knew was material, such that its non-disclosure involved an element of dishonesty (MEL's case).

9.
Although at one point Mr Taverner QC, on behalf of MEL, suggested that this was a very straightforward issue, I am bound to disagree with him. The construction issue was not straightforward, in part because of the absence of any authority directly on point. But for the clear and helpful written and oral submissions provided by counsel, I suspect that I would have found the issue more difficult still. That said, when I worked through the construction exercise by reference to the guidance recently summarised by the Court of Appeal (see paragraph 14 below), I reached a clear conclusion.

10.
The structure of this Judgment is as follows. In **Section 2** below, I set out briefly the relevant facts. At **Section 3** below, I set out the relevant principles of construction. At **Section 4** below, I identify the relevant terms of the policy. Then, at **Section 5** below, I deal in detail with the principal issue between the parties, namely what, in the context of this particular policy of insurance, was meant by "deliberate or fraudulent non-disclosure". At **Section 6** below, I deal briefly with some of the other matters that arose during the course of argument. There is a short summary of my conclusions in **Section 7** below.

2. THE RELEVANT FACTS

11.
As noted in the preliminary issue itself, the facts are in dispute. It is therefore necessary for this preliminary issue to be decided against the background of assumed facts, taken from the Insurers' defence and counterclaim. Unhappily, no agreed set of assumed facts was provided to the court, either before or after the hearing. As I pointed out at the hearing, it is not appropriate for the court to go through a lengthy pleading to pick out the potentially relevant paragraphs.

12.
Doubtless prompted by that comment, after the hearing, the Insurers suggested a set of assumed facts. That is attached as Appendix 1. Although they were expressly not agreed by MEL, there is no suggestion that the matters identified are outside the defence and counterclaim. I therefore construe the contract of insurance against the background of Appendix 1, the key elements of which are as follows:

(a)
Certain problems were identified with the cables during the construction and commissioning phase (2000-2001). These included problems with the polyethylene insulation for the IRC.

(b)
Whilst it appears to be MEL's case that these matters were resolved by the time that the Moyle Interconnector was in commercial use in 2002, it is the Insurers' case that these matters were

significant and were indicative that the cables were poorly designed, manufactured and installed by Nexans.

(c)
The Insurers contend that at least one individual employed by the claimant or it agent to ensure held the state of mind alleged in paragraph 26 of the defence in relation to the 2000-2001 failures. The relevant assumed knowledge is that the individual in question was aware of information and aware that it was not being disclosed to insurers but held the honest but mistaken belief that it need not be disclosed.

(d)
The Moyle Interconnector had been working apparently satisfactorily for 8 years by the time the policy of insurance was effected.

13.
Various events have occurred since the insurance policy came into force. These include an arbitration between MEL and Nexans, to which Mr Adam QC made reference during his submissions. It appears that at least some of MEL's complaints against Nexans were similar to the complaints by the Insurers against MEL. However, for present purposes, it does not appear to me that any events that occurred after the making of the contract of insurance have any relevance to the proper construction of that contract.

3. THE RELEVANT PRINCIPLES OF CONSTRUCTION

14.
It is unnecessary for me to set out in any detail the principles of construction to which I should adhere in undertaking this exercise. That is partly because they are now so well-known. But it is also because they have recently been summarised by Christopher Clarke LJ in language that is so lucid and so concise that it is unnecessary to do anything other than set out verbatim what he said. In the case of **Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd**[2015] EWCA Civ. 839 he dealt with the principles of interpretation in the follow passages:

"28. The principles upon which contracts are to be interpreted have been stated and restated at the highest level, including most recently in **Arnold v Britton**[2015] UKSC 36. It is not necessary to review them again. The principles which, in my judgement, are most relevant for present purposes are as follows:

(i) The aim of the court is to determine what a reasonable person who had all the background knowledge which would reasonably have been available to the parties when they contracted would have understood the parties to have meant: **Rainy Sky SA v Kookmin Bank**[2011] 1 WLR 2900 [14] and the cases there cited; this exercise relates to their understanding at the time that the contract was made: **Arnold v Britton** at [19].

(ii) The exercise of construction is essentially one unitary exercise – **Rainy Sky** [21], which should be "neither uncompromisingly literal nor unswervingly purposive": per Sir Thomas Bingham MR in **Arbuthnott v Fagan** [1995] CLC 1396, 1400. It is also an iterative exercise: **Arnold** [76]. The court looks to see where different constructions lead, how they fit with other provisions in the contract (or other phrases in the same clause), what obstacles to a particular interpretation are met upon the way, and what results are reached.

(iii) In a case where, as here, parties have used language which is capable of more than one meaning, the court should consider the implications of the rival constructions: **Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd**[2001] CLC 1, 103 at [16]; and is entitled to prefer a construction which is consistent with business common sense and to reject one that is not.

29. Care must, however, be taken in using "business common sense" as a determinant of construction. What is business common sense may depend on the standpoint from which you ask the question. Further the court will not be aware of the negotiations between the parties. What may appear, at least from one side's point of view, as lacking in business common sense, may be the product of a compromise which was the only means of reaching agreement. As Nicholas Strauss QC, sitting as a Deputy High Court judge, said in **Churchill v Temple** [2010] EWHC 3369 at 37 (d):

"It is always necessary to keep in mind the position of both parties. It is not enough just to consider what the vendor may have wanted to achieve. There is also the consideration that the purchaser might not see what the vendor wants as being in his interests, and that the vendor might, as a result, find it difficult to sell, or to get his price, if he insists upon it. The resulting covenant may represent a compromise. It is therefore not surprising to find covenants which are not altogether logical from the point of view of either party, or do not entirely achieve the probable aims of either of them. See **Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd** [1990] QB 818 at 870 (C.A.)."

30. Businessmen sometimes make bad or poor bargains for a number of different reasons such as a weak negotiating position, poor negotiating or drafting skills, inadequate advice or inadvertence. If they do so it is not the function of the court to improve their bargain or make it more reasonable by a process of interpretation which amounts to rewriting it. Thus:

"A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed … The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed … when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party": **Arnold** at [20].

31. In effect a balance has to be struck between the indications given by the language and the implications of rival constructions. The clearer the language the less appropriate it may be to construe or confine it so as to avoid a result which could be characterised as unbusinesslike. The more unbusinesslike or unreasonable the result of any given interpretation the more the court may favour a possible interpretation which does not produce such a result and the clearer the words must be to lead to that result. Thus if what is prima facie the natural reading produces a wholly unbusinesslike result, the court may favour another, even if less obvious, reading. But, as Lord Neuberger observed in **Arnold v Britton** at [17] "commercial common sense and surrounding circumstances … should not be invoked to under value the importance of the language of the provision which is to be construed". It is material, however, to note that **Arnold** was a case where the interpretation argued for involved adding in the words "up to" in the relevant clause so as to constitute the sum specified a maximum and not a definition of the amount which had to be paid – a very radical change."

15.
With those principles in mind, I turn to the relevant terms of the policy.

4. THE TERMS OF THE POLICY

16.
The terms of the policy with which the preliminary issue is concerned are Clauses 5 and 6. Those Clauses were in the following terms:

“**5. Scope of Disclosure**

The Insurers acknowledge that (i) they have received adequate information in order to evaluate the risk of insuring the Company in respect of the risks hereby insured on the assumption that such information is not materially misleading, (ii) there is no information which has been relied on or is required by Insurers in respect of their decision to co-insure the Co-Insured Parties or their directors, officers, employees or agents, and (iii) no person has been authorised to make any representation on behalf of any of the Co-Insured Parties or their directors, officers, employees or agents in relation to their becoming or being co-insured under this policy. Non-disclosure or misrepresentation, negligence or breach by any one insured (or its agent) shall not be attributable to any other insured party who did not directly and actively participate in that non-disclosure or misrepresentation knowing it to be such.

6. Non-disclosure, misrepresentation and breach

Notwithstanding any other provisions of this policy:

(a)
the Insurers agree not to terminate, repudiate, rescind or avoid this insurance as against any Insured, or any cover or valid claim under it, nor to claim damages or any other remedy against any Insured or any agent of any Insured, on the grounds that the risk or claim was not adequately disclosed, or that it was in any way misrepresented, or increased, or that any term, condition or warranty was breached, or on the ground of negligence, unless deliberate or fraudulent non-disclosure or misrepresentation or breach by that Insured is established in relation thereto; and

(b)
the Insurers’ right to repudiate, avoid, rescind or terminate this contract or to treat the contract as terminated or suspended or to delay any otherwise valid claim shall be limited to those circumstances in which the contract expressly so provides, and each Insurer waives any right that it would otherwise have to do so in any other circumstances on any ground.”

17.
I consider that Clause 5 provides some context for Clause 6. I accept that Clause 6 is ‘ring-fenced’, because it makes clear that it applies “notwithstanding any other provisions of this policy”. Notwithstanding those words, however, it is always important to construe a clause, or a part of a clause, in the context of the contract as a whole. Here, Clause 5 is expressly concerned with the scope of disclosure, and is therefore relevant when construing the scope of that part of Clause 6 concerned with non-disclosure.

18.
Clause 5 includes an acknowledgement by the Insurers that they have received adequate information in order to evaluate the risk. The only qualification to that is that the information with which they have been provided “is not materially misleading”. The overall purpose of Clause 5 seems to me to limit any future argument about non-disclosure of information: were it not so, the Insurers’ express acknowledgement that they had received adequate information would be redundant.

19.

I agree with Mr Adam that Clause 6(a) is divided into three parts. The first part, from “the Insurers” down to “agent of any insured” sets out all of the remedies which the Insurers agree will not be sought against MEL. The second part, starting with “on the grounds” and ending with “ground of negligence”, sets out the causes of action which would have otherwise have given rise to those remedies. The third part, starting with the word “unless” and going to the end of the clause, coming as it does at the end of the clause, is the proviso (or carve-out) to the exclusion clause.

20.
I accept Mr Taverner’s submission that this is a very wide-ranging exclusion clause. As he submitted, it is difficult to identify any possible cause of action in the central part of the clause, or any possible remedy in the first part of the clause, which is not excluded by Clause 6(a). Thus the proper construction of the third part of Clause 6(a) – the proviso - must be approached with that width in mind.

21.
I was referred to the (very different) duties and obligations that would have applied in the absence of these Clauses. The parties were agreed that sections 17 to 20 of the Marine Insurance Act 1906 codified the common law. So, by way of example:

(a)
s.17 re-states the well-known principle that a contract of insurance is a contract “based upon the utmost good faith”;

(b)
s.18(1) provides that the assured must disclose to the insurer “every material circumstance which is known to the assured, and the assured is deemed to know every circumstances which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract;”

(c)
s.18(2) 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”;

(d)
s.19(1)(a) provides that where insurance is affected for the assured by an agent, the agent must disclose every material circumstance “which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him”; and

(e)
s.20 dealing with representations made during the negotiation of the contract of insurance, provides that these “must be true”.

There can be no doubt that these are very wide ranging obligations and that, by contrast, Clauses 5 and 6 were designed to replace or modify them with a much more limited set of obligations.

5. THE PRINCIPAL ISSUE: DELIBERATE NON-DISCLOSURE

5.1
The Principal Issue in a Nutshell

22.

MEL argue that, in the context of Clause 6(a) as a whole, “deliberate…non-disclosure” must mean a conscious decision not to disclose something to the Insurers which MEL knew that they should disclose. In other words, it imports an element of dishonesty: that the relevant person or persons at MEL knew that a particular document or fact should be disclosed to the Insurers and deliberately failed to disclose it.

23.
The Insurers argue that deliberate must be given a separate and distinct meaning from “fraudulent”, and that, because it is fraudulent non-disclosure that would involve the element of dishonesty, they say that “deliberate…non-disclosure” must encompass an honest but mistaken decision not to disclose a document or fact.

24.
I consider this central issue by reference to, first, the words used; secondly, the contractual context; and thirdly, by reference to business common sense. I then go on to consider whether there are any authorities which modify or amend the construction which I favour.

5.2
The Words Used

25.
The Oxford English Dictionary definition of ‘deliberate’ is “carefully thought out, studied, intentional, done on purpose” [1] . With that definition in mind, I consider that the expression “deliberate or fraudulent non-disclosure” suggests a situation where the insured intentionally failed to disclose something to the Insurer which he knew he should. The words used suggest that that person knew that what he was doing was wrong: that he was choosing deliberately to do it. Taken together, I consider that the four words of the proviso in Clause 6(a) suggest serious misconduct or culpability.

26.
In my view, these words do not suggest that, in order to see whether or not the proviso operates at all, the parties were obliged to comb over the circumstances in which the non-disclosure occurred, in order to see how the error came about, so as to decide if the non-disclosure was the result of an honest but mistaken decision not to disclose (in which circumstance, on their case, the Insurers would be entitled to avoid the contract); or if, for example, the non-disclosure was the result of indolence, inactivity or inadvertence, (in which case, the Insurers accept that the proviso would not apply and they would not be entitled to avoid the policy). That is the effect of the Insurers’ construction. In my judgment, that is not the obvious or logical interpretation of the words “deliberate or fraudulent non-disclosure”.

27.
There is plenty of authority to the effect that the use of the word ‘deliberate’, in the context of a ‘breach’ or ‘default’, means an intentional act; in other words, a breach or default which the relevant party knew at the time that it committed the relevant act was a breach or default. Thus in **De Beers UK Ltd v ATOS**[2010] EWHC 3276 (TCC), Edwards-Stuart J said:

“Deliberate default means, in my view, a default that is deliberate, in the sense that the person committing the relevant act knew that it was a default (i.e. in this case a breach of contract).”

28.

Similarly, in **Astra Zeneca UK Ltd v Albermarle International Corp and Another**[2001] EWHC 1574 (Comm), Flaux J was dealing with whether or not the stoppage of a shipment was a deliberate breach of contract. He found that the person involved had a mistaken view of the terms of the supply agreement and was therefore not entitled to act in the way that he did. He was in breach of contract. But the judge went on to find that it was not a deliberate breach of contract because the individual, acting on the advice of US attorneys, had wrongly believed that he was entitled to do as he was doing [2] .

29.
As Mr Adam fairly conceded, this approach to construction applies to at least some elements of this proviso. So he expressly accepted that the "deliberate…breach" referred to in the proviso would require, not only a breach of contract or warranty on the part of MEL, but a breach which MEL knew, at the time of the relevant act or omission, was a breach of the term or warranty. Only then would the Insurers be entitled to avoid for deliberate breach. In addition, I understood Mr Adam to make the same concession in respect of misrepresentation but, even if he did not, I find (for the same reasons) that a 'deliberate misrepresentation' must also involve the knowledge that what is being said or not said is a misrepresentation (and therefore a breach of duty).

30.
So if it was common ground that this kind of dishonesty (deliberately doing something you knew you should not do) was required, say, for a deliberate breach of contract, why did Mr Adam not accept that it also applied to deliberate non-disclosure? He maintained that his concession did not apply to a deliberate non-disclosure because 'breach' was, as he put it, "a loaded word" whilst 'non-disclosure' was "neutral". It was, he said, "not weighted". So he maintained that, whilst a deliberate breach of contract carried with it the element of dishonesty, a deliberate non-disclosure did not.

31.
For my part, I cannot accept that submission or that distinction. A deliberate breach or default incorporates an element of wrongdoing, but so too does deliberate non-disclosure. It is not neutral, and particularly not in the context of Clause 5, or the remainder of Clause 6 of this policy. I agree with Mr Taverner that 'non-disclosure' is used here as shorthand for a breach of MEL's common law obligation to disclose all relevant material (as defined in Section 18 of the Marine Insurance Act 1906). Indeed, earlier in Clause 6(a) there is a reference to the possibility that "the risk or claim was not adequately disclosed". Accordingly, I conclude that, in this Clause, non-disclosure means inadequate disclosure or disclosure in breach of well-known and well-understood insurance obligations. Deliberate non-disclosure thus incorporates an element of dishonest wrongdoing, just like deliberate breach; to use Mr Adam's language, they are both 'loaded' or 'freighted' words because they both involve a deliberate breach of a legal duty or obligation.

32.
Accordingly, there is no logical distinction to be drawn between a deliberate breach, on the one hand, and a deliberate non-disclosure on the other. In each case, the act or omission involves an element of culpability, of doing something which should not be done. The word 'deliberate' means that the act of non-disclosure is intentional, that the person acts in a way in which they know they should not. That knowing act or omission may be a breach of contract, or it may be a non-disclosure to the Insurers, but the effect is the same. On one analysis, that is the end of the construction issue.

33.

It seemed to me at the outset that the Insurers' best point was that, because the clause uses the words "deliberate or fraudulent non-disclosure", then the presumption against surplusage means that 'deliberate' must have a different meaning to 'fraudulent'. Thus, the argument runs, the ingredient of dishonesty is captured by the fraudulent non-disclosure, so that 'deliberate' must mean a deliberate decision not to disclose, made in the honest but mistaken belief that non-disclosure was justified. A number of points arise from this submission.

34.
First, the argument carried with it an unspoken acknowledgment that, if the words "or fraudulent" were not present, and the Clause simply referred to "deliberate non-disclosure", then, for the reasons that I have already set out at paragraphs 27-32 above, the Insurers would not be able to argue for their wide construction. On that analysis, that wide construction is a function of the contrast between 'deliberate' and 'fraudulent': if the latter carries with it a requirement for dishonesty, the former must be doing something else. Accordingly, it is a curious consequence of the Insurers' submissions that the addition of the words "or fraudulent", to what is a limited proviso, carving out a possible means of avoidance of the policy when that right is generally excluded, actually increases the Insurers' ability to avoid the contract, rather than reduce it. That does not seem to me to be a common sense interpretation of the phrase.

35.
Secondly, the presumption against surplusage, on which Mr Adam relied, is not a 'hard-edged' rule. Of course, the court should strive to give meaning to every word in the contract: see **Prestcold (Central) Ltd v Minister of Labour** [1969] 1 WLR 89. But at the same time, the court should guard against giving such a rule too much prominence in circumstances where, as we all know, some tautology, some overlapping terms, some surplusage, will often be found in commercial contracts.

36.
The current approach to the presumption against surplusage in commercial contracts can I think be summarised by reference to the observations of Gross LJ in **ENER-G Holdings PLC v Hormell**[2012] EWCA Civ 1059:

"…despite the desirability and importance of certainty, a good many commercial contracts are less tidy than might be desirable as a matter of strict theory. In this respect, commercial contracts reflect the realities of commercial life. It is thus no surprise to find in a commercial contract surplus language, for instance that which merely states the obvious".

37.
I accept Mr Adam's argument that this policy is not generally representative of what Sir Kim Lewison calls the 'torrential' style of drafting [3], but his book makes plain that the warning that "most draftsmen tend to over-egg the pudding" [4] is directly apposite to insurance policies [5].

38.
In any event, the presumption against surplusage is not ultimately of any great assistance to the Insurers. After all, since the law is that an assured cannot exclude the insurers' rights where the assured is guilty of fraud, the entire proviso (or certainly that part dealing with fraudulent non-disclosure) may be said to be unnecessary. In my view, as already noted, it is there because the draftsman wanted to emphasise the serious conduct that would be required to trigger the carve-out.

39.

Accordingly, even if I concluded that ‘deliberate’ (on the one hand), and ‘fraudulent’ (on the other), essentially meant the same thing, I would not conclude, in this case, that that was an incorrect construction of this particular Clause. For the reasons that I have given, even if that was the effect, it still seems to me to be the most appropriate construction of the words used.

40.
However, I am not persuaded that ‘deliberate’ (on the one hand), and fraudulent (on the other), necessarily mean the same thing. Mr Taverner rightly accepts that it is difficult to differentiate between them (paragraph 77 of his skeleton) but there are, so it seems to me, a number of ways in which that may be done.

41.
Conduct can be deliberate and dishonest, but not fraudulent. A breach of contract can be deliberate and made in the knowledge that it is a breach, but it may not be fraudulent. The remedy may be different, depending on which it is.

42.
Similarly, a representation may be dishonest but, if there is no intention to deceive or no intention that the misrepresentation be acted upon, then it is not fraudulent (see Clerk and Lindsell on Torts, 21st Edition, paragraph 18-30). A further example is given at paragraph 39(a) of Mr Adam’s skeleton argument, where he identifies the situation of an insured knowing that what he said was inaccurate but believing that the inaccuracy did not matter. That too would be a situation of deliberate and dishonest misrepresentation, but it would not be fraud because of the honest but mistaken belief that the inaccuracy did not matter [6] .

43.
Moreover, the guidance that I was shown from the Financial Ombudsman Service draws just this distinction. There it is said:

“It is possible to deliberately non-disclose without being fraudulent. While dishonesty is one of the essential criteria for fraud, there must also be deception, designed to obtain to which you were not entitled. For example, a customer might deliberately withhold information they are embarrassed about. Although, in doing so, they are acting dishonestly and deliberately, they are not acting fraudulently because there is no deceitful intention to obtain an advantage.”

I accept of course that this is not authority in any sense. But it is perhaps a helpful reminder that, in the real world, a sensible and workable distinction between deliberate dishonesty, on the one hand, and fraud, on the other, appears to be readily identifiable. On that basis, both words (‘deliberate’ and ‘fraudulent’) have utility, but they both involve an element of dishonesty.

44.
Finally, I should note that, in support of his proposition that deliberate just meant the intentional or conscious taking of a decision, Mr Adam relied on **Michael Van de Wiele NV v The Pensions Regulator** [2011] Pens LR 109, a decision by Warren J under s.38 of the Pensions Act 2004. This did not help me because the wording of the statute was very different to the policy here, as was the context. This remains, after all, a contract of the utmost good faith.

45.
For all these reasons, on the basis of the words used in the proviso, I conclude that “deliberate or fraudulent non-disclosure” means a deliberate decision not to disclose something which the Insured

knows should be disclosed, and does not extend to an honest mistake. In those circumstances, the exclusion would not be available to the Insurers in the circumstances set out in paragraph 26 of their defence.

5.3
The Contractual Context

46.
In my view, when the words of the proviso are seen against the background of Clause 5 and Clause 6, the conclusion which I have reached as to the meaning of “deliberate or fraudulent non-disclosure” is further confirmed.

47.
First, it is clearly relevant that, in Clause 5, the Insurers have acknowledged that they have received adequate information in order to evaluate the risk of insurance. Whilst that is on the express assumption that the information with which they have been provided “is not materially misleading”, there is no reference to any similar assumption in relation to additional information. That suggests that, as far as the Insurers were concerned, they were agreed that no further information was required.

48.
Secondly, there is the point about the first two parts of Clause 6(a). As already noted, these are very wide and embrace every likely cause of action that might arise on the part of the Insurers, and every conceivable remedy. It covers both MEL and their agents. I agree with Mr Taverner that, other than fraud – which cannot be excluded in any event – it is difficult to see what survives. There can be, for example, no remedy for MEL’s repudiatory breach of contract, nor for any negligent misstatement that they might make.

49.
Thirdly, I also agree with Mr Taverner’s submission at paragraph 54 of his skeleton argument that Clauses 5 and 6 are designed to protect MEL and its agents from claims which would normally arise from a breach of the duty to disclose material information, misrepresentation, negligence or breach of any term, condition or warranty. So in those circumstances, it is likely that any proviso to that wide-ranging exclusion clause would be of relatively narrow compass. Any other interpretation of the proviso would negate the exclusionary purpose of Clause 6 as a whole.

50.
This same conclusion can, I think, be put in a slightly different way. The proviso is a carve-out: an acknowledgement that, despite the wide range of remedies which the Insurers were accepting were not available to them, there was one type of situation which the Insurers were not prepared to forego. That was in circumstances where the non-disclosure, or the breach, or the misrepresentation, was deliberate or fraudulent. In the context, therefore, of the wide exclusion clause, it seems to me that it is a much more purposive interpretation to construe that carve-out in relatively narrow terms.

51.
A final point that also supports the view that the proviso should be given a relatively restrictive interpretation is that it does not reintroduce any claim for negligence. So, for example, any claim for negligent mis-statement would be excluded by Clause 6(a), and is not affected by the proviso at all.

52.

Mr Adam did not address the contractual context because, on any view, it could not assist his construction. In my judgment there is nothing in Clause 5 or Clause 6 which supports the Insurers' case for a wide interpretation of the carve-out. For the reasons that I have given, I consider that such an interpretation would in fact cut across and render nugatory the wide words of the exclusion in Clause 6. That is a further reason why I consider that the proper construction of "deliberate or fraudulent non-disclosure" involves a dishonest decision not to disclose.

5.4
Business Common Sense

53.
The next question concerns business common sense. This is important because Mr Adam submitted that of direct relevance to this case was Clarke LJ's observation in **Wood** (see paragraph 14 above) that "…if what is prima facie the natural reading produces a wholly unbusinesslike result, the court may favour another, even if less obvious, reading." Mr Adam said that "this was the territory we were in", because the Insurers were arguing that, even if I concluded (as I do) that MEL's interpretation was the natural reading of the words, such a conclusion would produce a wholly unbusinesslike result. Therefore, he said, I should favour the less obvious reading put forward by the Insurers. On analysis, however, I have concluded that what I consider to be the natural reading of the words produces an entirely businesslike result, whilst the interpretation put forward by the Insurers does not.

54.
If MEL are right, then they lose the benefit of the insurance if they dishonestly failed to disclose something to the Insurers which they should have disclosed. But they do not lose the benefit of the insurance if they considered the issue of disclosure and reached an honest but mistaken view that a particular document, or a particular fact, should not be disclosed. They are penalised for dishonesty, but not for an honest mistake. That seems to me to be a result that accords with commercial common sense.

55.
One of the things which has bedevilled the insurance industry is the ability of an insurer to avoid the contract of insurance altogether, simply because, at the time that the policy was being negotiated, the insured made a mistake and failed to disclose something which, with hindsight, he should have done. The difficulties created by this circumstance were addressed in the speech of Lord Hobhouse in **HIH Casualty and General Insurance Ltd v Chase Manhattan Bank and Others**[2003] UKHL 6. He said:

"86. The practical circumstance which has since been said to justify this special treatment of insurance contracts is a disparity between the knowledge of the proposer (and his agent) and the underwriter. This may well be realistic in certain classes of business and certain types of insurance. But it is not in others…

87. In such situations it becomes questionable whether it is appropriate to place on the assured the full burden of disclosure with its attendant risk of the avoidance of the policy. Clauses protective of the assured's position become appropriate…"

56.
In my view, Clause 6(a), which on my analysis, is protective of the assured's position, at least insofar as they were honest, is precisely the sort of clause which Lord Hobhouse had in mind in **HIH**.

57.
I take the view that, if the Insurers' interpretation was right, the result would be the opposite of business common sense. Mr Adam argued that, even if 'deliberate' meant 'deliberate but not dishonest', intentional non-disclosure was still required. Thus, he said, the Insurers could not rely on constructive knowledge of the need to disclose on the part of the insured: it had to be actual knowledge. He said that that was a better position for them than under the common law.

58.
Mr Adam may be right about the comparison with the common law. But I am concerned with this particular contract. And it would, I think, be a curious result if the entirety of the rigmarole of Clause 6 (which on its face looks like a very helpful clause to MEL) actually came down to relieving MEL from the risk that constructive knowledge might play a part in an allegation of non-disclosure, but otherwise leave them as exposed to the risks of non-disclosure as any assured under the common law. I consider that such a relatively minor benefit is not only not in accordance with the wide exclusionary language of Clause 6, but it is not in accordance with business common sense.

59.
There are, however, two more significant difficulties with the practicality of the position advanced by the Insurers. I have already touched on the first above. On their interpretation, the Insurers would be entitled to avoid the policy if MEL had considered the disclosure of, say, a particular document, and had concluded, entirely honestly but mistakenly, that the document did not need to be disclosed. But Insurers also accept that, on this interpretation, if that particular document was never looked for or considered at the time of disclosure, so that its non-disclosure was inadvertent, then the Insurers would not be able to rely on the carve-out to avoid the policy.

60.
In my judgment, that is an absurd result. MEL would be punished for undertaking a rigorous disclosure exercise because they had made an honest mistake in the disclosure of one material document; but they would not be penalised if they failed to go about the disclosure exercise properly, failed to consider the document in question (or indeed any documents), and simply failed to disclose the file. It cannot be right that MEL should be in a worse position because they made an honest mistake, as opposed to an inadvertent error.

61.
Examples of the absurdities produced by this approach were canvassed during the hearing. I give one of my own. One MEL employee is given file A and tasked with the job of working out which of the documents it contains need to be disclosed and which documents do not. He agonizes over each document in the file and in the end concludes that half of them should be disclosed and half of them should not. In reaching that conclusion he makes an honest mistake about some of the documents which he does not disclose. His honest mistake would, on their construction, allow the Insurers to avoid the contract.

62.
But his counterpart in the next room, with file B, buries the file inadvertently under other papers. He never considers the file and it is not disclosed before it is swept away for recycling. That would be inadvertent non-disclosure: it would certainly not be the result of a deliberate decision not to disclose the particular documents. On the Insurers' construction, in those circumstances, MEL would be entitled to rely on the insurance policy.

63.

In my judgment, this comparison makes plain that the Insurers' interpretation produces a wholly unbusinesslike result. How can it be sensible to differentiate between file A and file B in that way, and how can it be right that MEL are penalised for honesty, and not for inefficiency?

64.
The second practical difficulty arises from Mr Adam's attempt to distinguish between, for example, deliberate breach of contract (which he accepts would involve knowledge of wrongdoing) and breach of the non-disclosure obligation, which he says would not. This would be a next-to-impossible distinction to maintain in practice. How would the insured know when one set of rules applied, and when another set of rules applied?

65.
Moreover, there is often a fine line between misrepresentations, on the one hand, and non-disclosure on the other: as Lord Mustill put it in **Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd** [1995] 1 AC 501 at 549, "in practice the line between misrepresentation and non-disclosure is almost imperceptible". I cannot see how, in practice, this policy could work if dishonesty was required for a misrepresentation, but not for a non-disclosure, particularly where a non-disclosure is capable of being dressed up as a misrepresentation in any event.

66.
Accordingly, the natural meaning of the words, the contractual context, and a consideration of business common sense, all lead to the same conclusion: that MEL's interpretation of the clause is to be preferred to the interpretation advanced by the Insurers.

5.5
Other Authorities

67.
I have refereed above to some of the authorities dealing with the meaning of "deliberate". In my judgment there are no insurance authorities of any assistance on the construction issue. But I do need to address one case in particular because the Insurers placed considerable reliance upon it. The question is whether that authority should lead me to take a different view from that expressed in the preceding Sections of this Judgment.

68.
The case was **HIH**, referred to above. At first instance ([2001] 1 Lloyd's LR 30) Aikens J (as he then was) held that a particular clause did not exclude the insurers' rights to avoid the policy for negligent misstatement or fraudulent non-disclosure. In the Court of Appeal ([2001] 2 Lloyd's LR 483) Rix LJ (with whom the other two members of the Court agreed) reached the opposite view and said that the clause excluded the insurers' right to avoid for either negligent misstatement or fraudulent non-disclosure. And in the House of Lords ([2003] 2 Lloyd's LR 61) they decided (4:1) that Rix LJ was right in respect of negligent misstatement (so the insurers' right to avoid could be excluded) and Aikens J was right in respect of fraudulent non-disclosure (so the right to avoid could not be excluded).

69.
Since the contract in **HIH** did not contain the expression "deliberate or fraudulent non-disclosure", it is not easy to discern what, if anything, can be gleaned from that case to assist on the construction issue here. Even more difficult is the fact that the Insurers are relying on a passage of the judgment of Rix LJ in respect of fraudulent non-disclosure, which was the very point on which the House of Lords

disagreed with him. Despite these difficulties, in deference to the reliance placed upon the case by the Insurers, it is appropriate to set out their position and analyse it.

70.
Mr Adam drew my attention to the following passage in the judgment of Rix LJ:

“165. In this connection the next matter for consideration is what is meant by a fraudulent non-disclosure. The term has never been defined. Sometimes it is referred to as a deliberate concealment: but I am by no means sure that the two can be equated. A matter may be deliberately concealed in the honest but mistaken belief that it is not relevant or material or that enquiry of it has been waived. There may be nothing dishonest in that, but ex hypothesi the remedy of avoidance remains. In other circumstances, outside the insurance context a deliberate concealment might be described as dishonest, or at any rate extremely unattractive, and yet, in the absence of any duty to speak, cannot be additionally castigated and remedied as fraudulent. No authority has been cited for a definition of fraudulent non-disclosure: and the absence of such authority in my judgment is not a merely collateral matter but intimately connected with the current problem of asking whether it makes sense to distinguish between fraudulent and non-fraudulent non-disclosure. I am doubtful that it is. No case has been cited in which the distinction has been material to any remedy or absence of remedy under an insurance contract.”

Mr Adam maintained that this passage demonstrated that deliberate concealment did not involve dishonesty and so was different to fraudulent non-disclosure. He said this supported the Insurers’ interpretation in the present case. He went on to say that, although the was no express support for this passage in the judgment in the House of Lords, he said that there was “clues” to Lord Bingham’s support of it in his speech in this passage:

“21. …Since an agent to insure is subject to an independent duty of disclosure, the deliberate withholding from the insurer of information which the agent knows or believes to be material to the risk, if done dishonestly or recklessly, may well amount to a fraudulent misrepresentation.”

71.
I do not consider that these passages demonstrate that, as a matter of principle, deliberate non-disclosure is different to dishonest or fraudulent non-disclosure, which was what Mr Adam submitted.

72.
There is nothing in Lord Bingham’s judgment to suggest that this was a distinction with which he was ever concerned. I consider that the principles in paragraph 21 of his speech are unexceptionable and do not provide any ‘clues’ to the resolution of the issue before me.

73.
The passage in Rix LJ’s judgment noted above is, in my view, equivocal. He says that he is “not sure” that deliberate concealment and fraudulent non-disclosure are the same thing but he reaches no concluded view on the point, in part because there is no authority. He also notes that there was no case in which the distinction had been material to the remedy.

74.
Moreover, the equivocal musings of Rix LJ need to be set against the views at first instance of Aikens J (who on this point was upheld in the House of Lords) when talking about the decision of the House of Lords in **Pan Atlantic**. That was a case in which the House of Lords concluded that clauses like this were possible, but that the clause could not purport to exclude avoidance in cases of fraud by the

assured itself. In addressing this issue at paragraph 38 of his judgment, Aikens J posed the question: "would they be automatically ineffective in the case of a deliberate or 'fraudulent' non-disclosure, assuming that the duty is extant?" There is a footnote in which the learned judge said:

"If a non-disclosure is deliberate then I cannot see that the word 'fraudulent' adds anything in this context either."

75.
In other words, Aikens J was using 'deliberate' and 'fraudulent' as essentially synonymous with one another. That of course is one way in which MEL put their case before me.

76.
Accordingly, with great respect to all of the learned judges involved in **HIH**, it does not seem to me that the passages to which I have referred give any sort of clear steer on the question of construction in this case. Aikens J appears to take one view; Rix LJ appears to take another. Neither view is addressed in the House of Lords. Neither view was determinative of the issues in that case, let alone this. In addition, Rix LJ's opinion is couched in equivocal language and is based at least in part on the absence of any authority where the distinction mattered. For all those reasons, I conclude that there is nothing in **HIH** which should lead me to come to a different view to the one expressed above.

77.
In one sense, a similar state of judicial disagreement can also be found in one of the limitation cases relied on by Mr Taverner, **Williams v Fanshaw Porter and Hazelhurst**[2004] EWCA Civ. 157. In that case, the Court of Appeal was concerned with a dispute under section 32(1)(b) of the Limitation Act 1980. That is the provision extending limitation in circumstances where the facts relevant to the claimant's right of action "has been deliberately concealed from him by the defendant." The Court of Appeal considered whether or not deliberate concealment should have a narrow reading, namely that the defendant realises that the fact that he is conceding has some relevance to an actual or potential claim against him, or a wider reading which is that the fact is concealed in circumstances where the defendant did not realise that it had any relevance to any actual or potential wrongdoing.

78.
It appears that Park J at paragraph 14(iv) was of the view that the narrow interpretation was correct and that:

"…the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

That suggested an element of dishonesty, which is doubtless why MEL relied on it.

79.
However Mr Adam properly drew my attention to the fact that Mance LJ (as he then was), in the same case, identified the two competing interpretations at paragraph 37, and at paragraph 39 decided that it was not a matter which, on that appeal, needed to be decided. So, for the same reason that **HIH** was of ultimately little assistance to me, so too was **Williams** [7] . Indeed, none of the other cases cited to me seem to me to have any direct relevance to the issue of construction which I had to decide.

80.

For completeness, I should add that, after the hearing in this case, one of a number of additional matters raised by the parties in correspondence was s.8(5) of the Insurance Act2015, and whether that was of assistance on the construction issue. The Insurers said it was not; MEL indicated that it was. I did not think it was: the wording is different. Neither did I derive any assistance from s.38 of the Pensions Act 2004 (see paragraph 44 above), nor the Australian insurance regime [8] referred to by the Insurers. None of these provisions or authorities helped with the construction of these particular clauses in this particular insurance contract, and they represented a clear risk of over-complication.

6. CONCLUSIONS

81.
For the reasons that I have set out above, I conclude that MEL's interpretation of the proviso is to be preferred. In this case, "deliberate or fraudulent non-disclosure" must involve dishonesty: that a deliberate decision was taken not to disclose something which MEL knew should have been disclosed to the Insurers. MEL's decision not to disclose something which was the result of an honest but mistaken belief that the fact or document did not need to be disclosed was not enough to allow the Insurers to avoid the policy.

APPENDIX 1 – The Insurers' Suggested Assumed Facts.

The 2000-2001 Failures

1.
During manufacture of the Cables in 2000 at least four failures were identified by Nexans at the type testing stage together with other manufacturing irregularities. Furthermore, during installation of the Cables in 2001, a significant number of other incidents occurred which cumulatively suggested that there were serious doubts over the long term integrity of the cables (the "2000-2001 Failures"). These particularly concerned the polyethylene insulation for the IRC referred to above. [D&CC para 7]

2.
The 2000-2001 Failures were and are indicative that the Cables were poorly designed, manufactured and installed by Nexans. The Cables had and have significant problems in respect of:

a. their design and operational characteristics;

b. the quality of their manufacture and manner of their installation;

c. their long term integrity, such that the expected life of the IRC insulation in particular is significantly shorter than expected; and

d. their ability to withstand entirely ordinary subsea conditions during operation. [D&CC para 8]

Materiality, knowledge and disclosure of the 2000-2001 Failures

3.
The Claimant was aware of the 2000-2001 Failures from 2001 onwards and was aware (a) that they were highly suggestive of poor design, manufacture, workmanship, installation and commissioning of the cables by Nexans; and (b) that they raised doubts over the quality of design, manufacture, and installation of the cables leading to doubts over the long term integrity of the cables and their ability to withstand entirely ordinary subsea conditions. [D&CC para 27]

4.

The circumstances of the 2000-2001 Failures were material to the risks which the Claimant insured and were not disclosed before the Policy was concluded. [D&CC para 29]

5.
At least one individual employed by the Claimant or its agent to insure held the state of mind alleged in paragraph 26 of the Defence in relation to the 2000-2001 Failures. The relevant assumed knowledge is that the individual in question was aware of information and aware that it was not being disclosed to insurers but held the honest but mistaken belief that it need not be disclosed. [D&CC para 26]

6.
The Defendants were induced to enter into the Policy by the non-disclosures, since if disclosure had been made of the 2000-2001 Failures and the Claimant's concerns about the cables then the Defendants' underwriters would either have declined to write the policy at all or, if they had agreed to write it, would have done so on different terms. [D&CC para 31]

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[1] At paragraph 21 of his skeleton argument, Mr Adam relied on the fact that his definition did not require dishonesty. That is on any view a bad point: notions of dishonesty depend on what noun or verb 'deliberate' is describing. A 'deliberate' donation to charity is not dishonest. Here it is the connection between 'deliberate' and 'non-disclosure' which, on MEL's case, gives rise to the requirement for dishonesty.

[2] MEL referred to a number of other cases to support the proposition that the breach itself must be deliberate, not merely the act which constitutes the breach: **Re Mayor of London and Tubbs' Contract**(1894) 2 Ch 524, and **Re City Equitable Fire**[1925] 1 Ch 407.

[3] **The Interpretation of Contracts**, 6th edition, paragraph 7.03.

[4] **British Overseas Bank Nominees Ltd v Analytical Properties Ltd**[2015] EWCA Civ 43

[5] **Tektrol Ltd V International Insurance Co of Hanover Ltd**[2005] 2 Lloyd's Rep 701

[6] Although Mr Adam referred to **Armitage v Nurse**[1998] Ch 241, a breach of trust case, it seemed to me to be grappling with different issues. If anything, it helped MEL's position rather than the Insurers because, at page 251, Millett LJ explained that a trustee may deliberately commit a breach of trust but if they do so in the honest belief that they are acting in the interests of the beneficiaries, their conduct is not fraudulent.

[7] **Cave v Robinson**[2003] 1 AC 384, another limitation case, was also irrelevant to the construction issue which I have to decide, although I note that Lord Scott rejected the submission that some degree of unconscionability in the conduct of a defendant was necessary.

[8] **NRG Victory v Hudson**[2003] WASCA 291.