Neutral Citation Number: [2018] EWHC 834 (TCC)

Case No: HT-2016-000303

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/04/2018

Before :

MR JONATHAN ACTON DAVIS QC

(sitting as a Deputy High Court Judge)

- -

Between :

WHEELDON BROTHERS WASTE LIMITED **Cla**

- and -

MILLENIUM INSURANCE COMPANY LIMITED **Defe**

- -

- -

Mr Ben Quiney QC (instructed by **Trowers & Hamlins LLP**) for the **Claimant**

Mr Graham Eklund QC (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 26th - 28th February, 1st, 8th March and 19th April 2018)

- -

Judgment Approved

The Deputy Judge:

1.

On 22nd June 2014, a fire (‘the Fire”) occurred at a waste processing plant situated at Kenyon Street, Ramsbottom BL0 OAB (“the Plant”), which was owned by the Claimant, Wheeldon Brothers Waste Limited (“Wheeldon”). Wheeldon was then insured against the risk of fire by the Defendant, Millennium Insurance Company Limited (“Millennium”). Millennium has refused to indemnify Wheeldon following the Fire. Wheeldon seeks declaratory relief and an indemnity and/or damages. By an Order made at the CMC on 13th February 2017 **[A/63]** the Trial was split between liability and quantum. This Judgment is on the issue of liability.

2.

The Plant and the process at the Plant are set out by Mr James Wheeldon in his Witness Statement at paragraphs 3.1 – 4.38 **[C/16-21]**. Moreover, there is a sketch plan which I found most helpful attached to the Experts’ Joint Statement at **[B/40]**. There was no challenge to that plan. It is relied upon by both Counsel.

3.

The Plant received a variety of wastes and produces fuel. The purpose of the process is to remove non-combustible material from the waste input, such that the output can be used as a fuel in the form of Solid Recovered Fuel (“SRF”). A summary of the process is as follows:

(i)

The waste, which originates from commercial and industrial dustbins and builders’ skips comes into the Tana shredder;

(ii)

The waste proceeds along the first conveyor;

(iii)

From that conveyor the waste enters the trommel, which is a large rotating sieve;

(iv)

From the trommel, the materials board a second conveyor which is the M&K conveyor. The M&K conveyor is where the Fire originated;

(v)

The M&K conveyor takes the materials to the density separator;

(vi)

From the density separator, the materials enter the Untha granulator where they are subject to further processing;

(vii)

The Untha granulator discharges the end product into a segregated storage area.

4.

At various stages in the process, the materials are either reduced or sorted. There are magnets at various points to remove ferrous materials. There are stages when non-combustible elements are removed, whether by way of the trommel (sieving) or the density separator or the magnets.

5.

Mr Booker is the Site Manager at the Plant. In that capacity, he has direct knowledge and experience of what occurs there. At paragraphs 3.3 – 3.7 of his Second Witness Statement **[C/37]** he explains that the waste fed into the process is a mixture of combustible and non-combustible materials. Each load is different but some of the time the material is moist, having been mixed with liquids in the bins or rained upon in the builders’ skips. He says that the material at the Plant does not become a fuel until it has been through the various refining processes in the Plant, at which point the end product, Solid Recovered Fuel (“SRF”), is produced which is a fuel. He says that the incoming material is not directly incinerated. It is reduced and refined down into a separate product, namely SRF.

6.

In September 2013, Wheeldon asked M&K Quarry Plant Limited (‘the Supplier”) to design, manufacture and install a conveyor. It was to be part of the waste processing machinery at the Plant. The Supplier issued a quotation for the conveyor on 4th November 2013. The order was placed in November 2013. Installation work began on 9th January 2014. Following testing and commissioning, the conveyor was put into use.

7.

In March 2014, through its broker, RBIG, Wheeldon began to renew various insurances. The broker obtained a proposal for property insurance from Direct Insurance, acting as agents for Millennium.

8.
On 28th March 2014, Secon, surveyors for Direct Insurance, inspected the Plant to undertake a risk assessment.

9.
Sarah Woodward of Direct Insurance issued a formal proposal to the broker setting out the proposed terms of cover and a copy of Millennium's Standard Policy Conditions on 3rd April 2014 **[D/136-137]**.

10.
The Policy commenced on 8th April 2014 **[D/350-416]**.

11.
On 11th April 2014, the self-greasing UCP 211 sealed bearing located on the bottom part of the free spinning roller at the bottom end of the M&K conveyor collapsed causing the belt to misalign. That required repair works.

12.
After consultation with the Supplier, Wheeldon fitted a replacement bearing. Then they arranged for the Supplier to inspect the conveyor because they regarded that the failure had occurred due to a consequence of undue side loading.

13.
On 20th April 2014, Secon issued a Report **[D/285-322]** which was provided to Millennium. Under that Report, various risk requirements were identified.

14.
On 30th April 2014, Direct, on behalf of Millennium, issued "Contract Endorsement" No. 1 **[D/417]**. That Endorsement referred to the Secon Report and deleted two memoranda, including Memorandum 6. Memorandum 6 was replaced with the Risk Requirement No. 9.

15.
On 16th May 2014, an engineer from the Supplier attended the site. He inspected the conveyor and confirmed that the forked frame structure on which the bearing sat had spread outwards due to what seemed to be inadequate strength in the forked structure. That pushed the bearing off the roller to the point where it twisted, causing the bearing to collapse and the belt to misalign.

16.
The Supplier suggested a remedial solution. On 16th May 2014, they bolted a 6 inch long metal plate, similar to an angle iron, underneath the bearing. Moreover, they drilled and tapped the end of the roller shaft to 18mm and inserted a bolt with a large washer over the end of the bearing.

17.
On 3rd June 2014, a further collapse of the bearing occurred. The new remedial frame had otherwise seemed to work to prevent the spreading. Mr Booker of Wheeldon replaced the failed bearing with an identical bearing replacement in a standard repair.

18.
It is likely that a further collapse occurred on 21st June 2014, the day immediately preceding the Fire. That failure was not detected until after the Fire.

19.

On Saturday 21st June 2014, at approximately 3.00pm, Wheeldon employees stopped feeding materials into the process. It then ran until all the materials had travelled through the Plant. At around 4.00pm the Plant was cleaned and closed down.

20.

Mr John Wheeldon (Wheeldon's Managing Director) received an emergency telephone call at approximately 2.40am on Sunday 22nd June 2014 concerning the sounding of a fire alarm at the Plant and the arrival of the Fire Brigade.

21.

The Fire Brigade attended site. The Fire was extinguished at around 11.00am on 22nd June 2014.

22.

On 23rd and 24th June 2014, after Millennium were notified of the Fire, its forensic investigator, Mr Stephen Braund of Hawkins Associates Limited, attended the site to investigate the Fire.

23.

On 15th August 2014, Knowles, the loss adjusters for Millennium, informed Wheeldon that indemnity was to be declined on 4 grounds **[E/207 - 209]**:

(i)

Breach of Clause WA2A (storage of gas cylinders);

(ii)

Breach of Memorandum 6 (storage of combustible materials less than 6m of fixed plant)

(iii)

Breach of Memorandum 9 (storage of baled materials)

(iv)

Breach of Memorandum 11 (removal of combustible stock and/or waste).

24.

By the time of pleading, Millennium's stance had changed in that they relied upon:

(i)

A failure to comply with Risk Requirement 4 of the Secon Report, relating to the storage of combustible waste within 6m of fixed plant/machinery outside operating hours;

(ii)

Breach of Memorandum 6, relating to the storage of combustible materials within less than 6m of fixed plant outside operating hours;

(iii)

Breach of Memorandum 11, relating to the removal of combustible stock and/or waste outside operating hours;

(iv)

Breach of WA6, relating to the maintenance of the machinery;

(v)

Breach of WA7, relating to the standard of the housekeeping;

(vi)
Breach of the requirements under the Secon Report generally.

25.
Counsel agreed a List of Issues of which there are 9. During the course of this Judgment, I will provide answers to each of them.

26.
Millennium say that the Policy comprised the Policy Wording, the Schedule, Appendices and any Endorsements **[D/352]**. The Schedule, Appendices and Endorsements are at **[D/405]**, are dated 21st April 2014 and were signed on 22nd May 2014.

27.
The Schedule referred to the Endorsements applicable “as attached hereon” **[D/405]** and under Appendix A – Material Damage “as attached” **[D/406]**. The Endorsement attached to the Schedule was Contract Endorsement No. 1 (“CE1”) **[D/417]**, signed on 30th April 2014, following receipt of the Secon Risk Requirements and Recommendations Report dated 20th April 2014 (“the Secon Report”) **[D/285]**. The Secon Report was a report prepared following a survey of the risks posed by Wheeldon’s operations.

28.
CE1 had been forwarded to Wheeldon’s broker, David Cooper, on 1st May 2014 (the day after it signature) see **[E/257]**. David Cooper accepted that CE1 was effective from 30th April 2014, the date when it was signed, see his email to Susan Ward of Wheeldon dated 6th February 2015 **[E/252]**.

29.
CE1 required compliance with the Risk Requirements in the Secon Report, which included Risk Requirement No. 4 (“RR4”). RR4 **[D/315]** required combustible materials to be stored 6m from fixed plant and machinery.

30.
In addition, CE1 also replaced Memorandum 6 of the Policy (which required combustible wastes to be stored 6m from fixed plant and machinery). CE1 stated that Memorandum 6 was replaced by RR9. Millennium say that RR9 had nothing to do with combustible materials and was clearly a mistaken reference for RR4. Therefore, say Millennium, RR4 replaced Memorandum 6.

31.
As a result of CE1, Wheeldon was required to comply with the Secon Risk Requirements and Recommendations Report and was required to store combustible material 6m away from fixed plant and machinery outside of operating hours.

32.
In addition, WA16 **[D/399]** required Wheeldon to complete each and every survey requirements in the Secon Report within the time scale specified. Thus, say Millennium, WA16 also rendered compliance with the Secon requirements necessary. WA16 had been included in the Policy wording sent to Wheeldon’s broker on 3rd April 2014 **[D/136]** with a specific instruction to review “in particular the WA Conditions from page 41. WA16 was in the Policy wording sent before renewal, see **[D/190]**.

33.
Prior to the Policy being placed, Millennium reserved to itself the right to apply additional requirements following survey. Wheeldon’s obligation to comply with “additional requirements

following the survey" was stated by Direct in its email dated 3rd April 2014 to Wheeldon's broker **[D/136]** which email sent the renewal terms to the broker. The cover was placed by the broker on 8th April 2014 **[D/277]** without any further consideration or discussion of Millennium's right to require compliance with "additional requirements following the survey" and without any discussion of WA16.

34.
As a result of advising Wheeldon that there might be "additional requirements following the survey" and/or as a result of WA16, Millennium say that they were entitled to (i) to require compliance with the Secon Risk Requirements as it did by the terms of CE1 and (ii) vary the terms of the contract of insurance by issuing CE1 which required compliance with the Secon Risk Requirements.

35.
WA6 and WA7 **[D/391]** set out requirements in relation to machinery maintenance and cleaning and housekeeping respectively. They were included in the Policy wording **[D/182]** sent on 3rd April 2014 to the broker and in the Policy wording issued on 22nd May 2014 **[D/391]**.

36.
General Condition 6 **[D/359]** was a due observance condition.

37.
A summary of Millennium's case in respect of the requirements of the Policy is set out at paragraph 46 of its Opening. It is argued by Millennium that the Policy cover was subject to conditions precedent requiring:

(i)
Machinery to be maintained in an efficient working order in accordance with the manufacturer's specifications and guidelines and formal records of such maintenance to be kept and made available for inspection by Millennium (see WA6 on page 41 of 54 of the Policy) **[D/391]** ;

(ii)
Procedures to be in place to ensure a good level of housekeeping at all times. All areas of the site, both inside and outside, were to be cleaned-up to minimise fire risk and ensure clear access to fire-fighting appliances. Records of cleaning and housekeeping were to be kept in a log book and made available to Insurers and their representatives (see WA7 on page 41 of 54 of the Policy) [**D/391]** ;

(iii)
Each and every survey requirement was to be completed by the Insured within such time period as specified by Insurers and advised to the Insured (see WA16 on page 49 of 54 of the Policy) **[D/399]** . The time period was specified by Insurers in the Contract Endorsement No. 1 issued on 30 th April 2014 **[D/417]** , by reference to the time period/time scale referred to in the Secon "Risk Requirements and Recommendations Report";

(iv)
Additionally, as a consequence of CE1, each and every risk requirement was to be completed within the time scale provided by Secon "Risk Requirements & Recommendations Report" which required compliance with Risk Requirement 4 that combustible material be stored at least 6m from fixed plant/machinery at times outside of normal operating hours. (See Contract Endorsement No. 1 dated 30 th April 2014 and the Secon Report) **[D/417]** ;

(v)

Each and every Risk Requirement to be subject to continued compliance with the Secon Risk Requirements at all times for the duration of the Policy (see Contract Endorsement 1) **[D/417]** ;

(vi)
Memorandum 6 was replaced by Risk Requirement 4 in the Secon Report, thus confirming the requirement for combustible materials to be stored at least 6m from fixed plant/machinery at times outside of normal operating hours.

38.
The Policy provided **[D/353]**:

“This Policy consists of the **INTRODUCTION** which explains the basis on which the cover is provided and which incorporates the proposal made by the Insured.

The **Sections** of the Policy…

The **Schedule** which shows who is the Insured, the business being covered …

Any **Endorsement(s)** which might apply to the Policy or Individual Sections and which incorporate cover, amendments, extensions, limitations and such like.

INTRODUCTION [D/352]

Each Section of this Policy the Schedule the Appendix to each Section and any Endorsement(s) shall be read as one document.

Any word or expression given a specific meaning in

(1)
The Schedule any Policy Endorsement(s) or this Introduction and the General Policy Definitions Exceptions and Conditions shall have the same meaning throughout the Policy.

(2)
An individual Section its Appendix or any Section Endorsement(s) shall have only the same meaning throughout such Section Appendix or Endorsement(s).

In consideration of the payment of the premium, the Insurer will make good the Insured’s loss within the Terms Exceptions and Conditions of this Policy against the events set out in the Sections Operative and occurring in connection with the Business during the period of Insurance…

The Proposal made by the Insured is the basis and forms part of this Policy

IMPORTANT INFORMATION [D/355]

Conditions precedent to liability

The due observance and fulfilment of the Terms Exceptions and Conditions of this Policy insofar as they relate to anything to be done or complied with by the Insured and by the truth of the statements and answers in the Proposal and declaration shall be conditions precedent to any liability of the Insurer to make any payment under this Policy. This statement is also included under General Conditions, point 6 to serve as a reminder to the Insured.

GENERAL POLICY CONDITIONS [D/358]

Applicable to the whole Policy…

(6) **Conditions Precedent to Liability**

The due observance and fulfilment of the Terms Exceptions and Conditions of this Policy insofar as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the Proposal and declaration shall be conditions precedent to any liability of the Insurer to make any payment under this Policy. **[D/359]** ”

39.
Part B of the Policy contains the Schedule, Appendices and Endorsements **[D/405]**. The Endorsements are specifically referred to in and as part of the Schedule.

40.
The Schedule provided **[D/405]**:

(1)
PREMISES: … 3. The Waterside Mill, Kenyan Street, Ramsbottom, BL0 OAB;

(2)
PERIOD OF INSURANCE: From 8 th April 2014

(3)
OPERATIVE SECTIONS: Material damage – Specified Perils – Operative

(4)
ENDORSEMENTS APPLICATION: As attached hereon [D/405]

(5)
APPENDIX A: Material damage specified perils

(6)
ENDORSEMENTS APPLICABLE: As attached [D/406]

41.
In addition and attached to and forming part of the Policy were a number of Memoranda: **[D/413 – D/416]**:

(i)
Memorandum 6 provided:

“It is a condition precedent to the liability of the Insurer that combustible wastes must be stored at least 6m from any fixed plant”;

(ii)
Memorandum 11 provided:

“It is hereby warranted that all combustible stock and/or wastes are removed from picking station base and/or trommels including hopper feeds etc. when the business is closed”;

(iii)
Memorandum 15 provided:

“The following clause is added to the Policy from inception pending completion of the subjectivities as per email to local agent dated 04.04.2014 and is held on file by Direct Insurance London Market.

Co-insurance material damage/business interruption clause

In respect of All Perils and Sections Insurers' liability in respect of any damage assessed in accordance with the terms of this policy is limited to 65% of the amount assessed, it is a condition of this Policy that the balance of 35% shall remain at the Insured's risk and uninsured…

Notwithstanding the aforementioned a Minimum Contribution of £250,000 for each and every claim shall apply."

(iv)
Memorandum 16 provided: **[D/415]**

"As per Endorsement Underwriters hereby note and agree that proposal form dated: 19/3/2014" [D/83-96]

42.
CE1 **[D/417]** dated 30th April 2014 formed part of the Policy. It was referred to in the Schedule to the Policy. CE1 provided:

"It is hereby noted and agreed that the following amendments are applied to the above Policy:

Underwriters hereby note and agree the Secon Risk Requirements & Recommendations Report dated 28 th March 2014 [D/286] as enclosed and kept on file by Direct Insurance London Market.

Please note that it is a condition precedent to the liability of the Insurer that the Insured shall complete each risk requirement within the time scale provided by Secon "Risk Requirements & Recommendations Report" unless otherwise agreed by Insurers and confirmed by Direct Insurance London Market.

It is further noted that once the risk requirements have been confirmed as completed, it is a condition precedent to the liability of the Insurer that the Insured ensures continued compliance with the Secon Risk Requirements at all times for the duration of the Policy. The following warranties are hereby deleted and superseded by the Secon Risk Requirements contained within the "Risk Requirements & Recommendations Report".

Memorandum 5 – It is a condition precedent to the liability of the Insurer that all shredders and/or grinders are fitted with Fireward automatic fire suppression systems or similar - replaced by Risk Requirement No. 3.

Memorandum 6 – It is a condition precedent to the liability of the Insurer that combustible wastes must be stored at least 6m from any fixed point – replaced by Risk Requirement No. 9."

43.
The Policy also contained the following Conditions:

(i)
WA6 – Machinery Maintenance Condition Precedent [D/391]

It is a condition precedent to the liability of the Insurer that the Insured shall ensure that:

(a)
All Machinery is maintained in an efficient working order in accordance with the manufacturer's classifications and guidelines and any applicable regulations; and

(b)
Formal records of such maintenance are kept by the Insured and are made available for inspection by the Insurer;

(ii)
WA7 – Cleaning and Housekeeping Condition Precedent [D/391]

It is a condition precedent to the liability of the Insurer that the Insured shall ensure that:

(a)
Procedures are in place to ensure a good level of Housekeeping at all times;

(b)
All areas of the site, both inside and outside, to be cleaned-up to minimise the fire risk and ensure clear access to fire-fighting appliances;

(c)
A system is in place whereby designated time(s) are assigned for the work and necessary resources provided to keep the site in as clean a condition as is practicable. This work must be carried out daily or, at least, weekly;

(d)
Formal contemporaneous records of Cleaning and Housekeeping are recorded in a Log Book that covers the areas cleaned, giving date, time and signed by the responsible person;

(e)
These records are to be kept and made available to interested parties upon request, such as Insurers and their representatives;

(iii)
WA16 – Survey Condition Precedent [D/399]

It is a condition precedent to Insurer's liability that:

(a)
A survey report carried out by an authorised surveyor is received by Insurers within thirty (30 days) of the inception date; and

(b)
Following receipt of such survey report, each and every survey requirement is completed by the Insured within such time period as specified by Insurers and advised to the Insured;

(c)
The Insurer reserves the right at their sole option to request a re-survey without notice at any time during the Policy period; and

(d)
Following receipt of such survey report, each and every survey requirement is completed by the Insured within such time period as specified by Insurers and advised to the Insured.

Without prejudice to the foregoing, upon receipt of the survey the Insurer reserves the right at their sole option to amend the Policy, giving immediate notice or cancel the Policy on giving 14 days' notice.

44.
Additional subjectivities/Conditions were incorporated in the Renewal Terms **[D/140]** and expressly stated in the Policy wording as Memoranda **[D/413-D/414]**. They included:

(i)
“Combustible wastes must be stored at least 6m from any fixed plant” (Memorandum 6);

(ii)
“Warranted all combustible stock and/or wastes are removed from picking station base (Memorandum 11) and/or trommels and/or hopper feeds and balers etc. when business is closed”;

(iii)
“Fire Knock Out Warranty in mobile plant” (Memorandum 13).

45.
I heard evidence from 4 factual witnesses called by Wheeldon: Mr John Wheeldon, Managing Director of Wheeldon **[C/4-7]**, Mr James Wheeldon, a Director of Wheeldon **[C/15-35]**, Mr Martin Booker, Site Manager **[C/8-14]** and **[C/36-49]** and Noel McCloskey, Director of McCloskey Equipment Limited and the Supplier of the trommel **[C/1-3]**. Millennium called no factual evidence (save for Mr Braund who gave expert and factual evidence). Dr Paul Jowett of Burgoyne gave expert evidence on behalf of Wheeldon **[B/41-106]**. Mr Braund of Hawkins & Associates gave expert evidence on behalf of Millennium **[B/167-204]**. Additionally, there was a Joint Statement from the Experts which is at **[B1/39]**. Mr Braund’s factual evidence is at **[C/50-60]**. That evidence consisted of a description of what Mr Braund saw when he investigated the Plant in the aftermath of the Fire.

46.
My approach in this Judgment is to consider the causes and development of the Fire, to make findings in relation to the causes and development of the Fire and, finally, to interpret the conditions in the Policy relied upon by Millennium in order to consider whether or not they defeat the claim.

47.
I accept the evidence called by Wheeldon concerning the circumstances of the Fire and the post-Fire condition of the Building. In particular, when the bearing failed previously it caused a misalignment: see James Wheeldon at paragraph 7.1 **[C/24]**.

48.
Mr James Wheeldon at paragraphs 9.14 to 9.20 described the scene as follows:

“The scene inside the building was chaotic. By that point, much of the roof of the building had collapsed in or been demolished by the Fire Brigade and the floor was flooded with a swill, formed as a result of the burnt debris mixing with the residue of the water used by the Fire Brigade in extinguishing the Fire.”

“The fines were completely unburned, other than blackening on the outside of the pile due to smoke. Using the loading shovel, I then moved the fines outside into the yard.”

“The trommel fines were piled up in front of the trommel and unburned. The Conveyor wasn’t buried within the pile. There was clear space of at least a few feet between the Conveyor and the bottom edge of the pile of fines. I could see that it was safe to clear the pile away without hitting the machinery.”

49.

Further, both James Wheeldon and Martin Booker exhibited to their Statements annotated photographs taken from either the CCTV stills or Mr Braund's post-fire photographs. These describe what they show based on the witnesses' knowledge of the condition of the Plant in the period running to the Fire, the day of the Fire and what was found after the Fire **[E/258-E337]**. Those photographs show the condition of the Plant on the night of the Fire. In particular, Mr James Wheeldon exhibited photographs which showed the post-Fire condition of the Plant. He explains the effect of the fire-fighting, the condition of the building post-Fire and whether the materials shown in the pictures are consistent with the trommel fines produced by the trommel. Significantly, he says that they are inconsistent.

50.
Mr Booker's evidence was that when he arrived after the fire there were 2 feet between the foot of the pile of trammel fines and the bottom of the conveyor. He was clear that there were no trommel fines under the bottom of the conveyor. He recalled that before the Fire the bearing was not engulfed with the waste material: (see paragraph 6.1-6.10 of his first statement **[C/13]**). When pressed in cross examination (day 2 pages 97-115) Mr Booker refused to be drawn into agreeing that the pile of trommel fines was around the left hand stanchion rather than in front of it. He was emphatic that the pile was in front of the stanchion, as is consistent with what he saw after the trial.

51.
As I understood Mr Braund's explanations, by the time he concluded his evidence his explanation for the Fire was as summarised at paragraph 65 of Mr Quiney's written submissions:

(i)
The fire started as a result of the failure of the bearing.

(ii)
That caused heat by way of friction and/or hot bits of metal.

(iii)
Heat or fragments left the housing of the bearing.

(iv)
Causing material around the foot of the conveyor to catch and burn.

(v)
That material was a mound of trommel fines that effectively engulfed the left stanchion of the trommel and buried the foot of the conveyor.

(vi)
Which led to the catching of the conveyor belt and then the spread of the fire.

(vii)
The mound of trommel fines was cleared away after the fire before Mr Braund attended to take pictures, leaving behind the materials shown in the photographs [G/200-205].

(viii)
Inside the pyramid of material at the foot of the conveyor is where the evidence of the seat of the fire was found by Mr Braund.

52.
Wheeldon's case, supported by Dr Jowett (see his report at paragraphs 4.2-4.21 **[B/62-B68]**), is that:

(i)
On the 21 st or 22 nd of June 2014 a bearing failed in the conveyor.

(ii)
As a result of the failure of the bearing, the conveyor became misaligned with the trommel. That created a gap which included a void in the housing of the conveyor.

(iii)
As a result of the gap, some materials that would otherwise have passed through the trommel (i.e. not dropped through the trommel's sieve) in fact dropped through the gap at the bottom of the conveyor after the trommel. These materials either became lodged in the guarded enclosure housing the bearing or dropped below the conveyor.

(iv)
Those materials were largely combustible, in contrast to the materials that made up the trommel finds. Trommel fines are the usual materials that drop through the grill in the trommel and are deposited below the trommel. They are not combustible. They were not involved in the Fire.

(v)
As a result of the failure of the bearing, the friction caused by the failing bearing, and hot fragments being deposited on the accidental build up of materials that had fallen through the gap at the bottom of the conveyor that collected in that housing, smouldering began.

(vi)
The smoulder led to the material catching fire before 2.30am on 22nd June 2014.

(vii)
The seat of the fire was the collection of accidental material that had fallen through the gap at the bottom of the conveyor. That led to the ignition of the belt on the conveyor. The fire then spread from the belt to the fabric of the building, which led to the losses caused by the Fire.

53.
As Mr Quiney QC points out, that theory is supported by the following factors.

(i)
The bearing failed and that is likely to have caused a misalignment allowing the materials to collect. That is what happened when the bearing failed previously (see Mr James Wheeldon's evidence at paragraph 7.1 **[C/24]** and paragraph 47 above).

(ii)
There was a significant void in and around the bearing housing capable of allowing material to collect (see photographs 3-5 of Dr Jowett's report at **[B/110-113]** . Mr Booker was certain that there had been a guard around the housing and he replaced it when he had greased the bearing in the week before the Fire **[day 2/94 lines 12-24]** . The photographs after the Fire show material within the housing, although there is a solid cover to the bearing (see **[C/200-205]**).

(iii)
In the photographs taken after the fire it can be seen that the housing of the bearing has been removed, there is a significant void within, the grille at the bottom has dropped and consequently a quantity of material has been deposited and mixed with the detritus from the clean-up operation (see photograph 3 of Dr Jowett's report at **[B/100-113]**).

(iv)
That interpretation of the photographs is supported by what Mr James Wheeldon found after the fire (see paragraphs 9-14-20 **[C/28]** and paragraph 49 above).

(v)
The rubber conveyor belt was combustible and represented a significant fire load and is likely to have caused the Fire to spread (see Dr Jowett at paragraph 3.12 and 4.110 **[B/60 and B/64]**).

(vi)
The rubber conveyor slanted upwards providing an ideal route for the Fire to travel and it reached only 1.5 metres from the roof panels. The panels were likely to be combustible. They allowed the Fire to spread as it did (see Dr Jowett at paragraph 3.13 and 4.11 **[B/60 and B/64]**). This is consistent with the burn patterns in the roof (see the photograph in Dr Jowett's report at **[B/65]**).

54.
Mr Braund's theory depends upon there having been a mound of trommel fines which effectively engulfed the left stanchion of the trommel and buried the foot of the conveyor, which led to the catching of the conveyor belt and then the spread of the Fire.

55.
There are a number of difficulties with that explanation, all of which I accept. The consequence is that I am unable to accept that explanation as being the cause of the Fire. First, the photographs do not show any evidence of such a mound. The CCTV stills do not show such a mound. Mr Booker's evidence, who knew the layout of the Plant, was clear that the pile seen in the CCTV is in front of the trommel and did not abut the left stanchion. The evidence of the CCTV is that the pile of the trommel fines did not catch fire. Dr Jowett is clear on that. Mr Braund accepted that to be true **[Day 4/19-20]**.

56.
Mr Eklund QC puts huge emphasis on the presence of witness or burn marks. As is said by Mr Eklund, Dr Jowett accepted in cross examination that the witness marks on the trommel bay wall by the end of the M&K conveyor (as seen in **[H76 and H77]**) showed a pattern of burning on a slope of materials consistent with the slope which would be formed by a pile of trommel find but I cannot regard the witness or burn marks as being conclusive. They form one piece of the jigsaw only. Dr Jowett explained that to me. Mr Braund accepted that to be so **[Day 4/79]**.

57.
Where the witness or burn marks are inconsistent with other physical and witness evidence I am unable to place any reliability upon them and I do not do so. I accept Dr Jowett's evidence **[Day 3/66 lines 24-67]** that "There are witness marks. What that shows is undetermined… so it's again unclear precisely what that witness mark is showing. It's certainly a witness mark but what it shows is uncertain."

58.
Moreover, given the inconsistent presence of marks, Dr Jowett said **[Day 3/48 line 20-49]** as to the uncertainty of the witness marks in this case:

"Yes, all the photographs were taken after a lot of material has been removed. We also know that the material has been removed from within the trommel fines collection bay and there were no clear witness marks in there that showed precisely where that material was and yet the CCTV clearly shows that there was material in that bay at the time of the fire."

59.
In any event, I accept that the material which was found under the foot of the conveyor is entirely inconsistent with Mr Braund's explanation. He relies upon the material found after the Fire at the base of the Conveyor to explain the seat of the Fire. He dug into the material pyramid and it was only then that he found the evidence of the deep seated charring. That was the root from which the Fire spread. However, he had to accept that above the charring there was a layer of unburnt but combustible material **[Day 4/47-54]**. That must mean that the pile at the bottom of the conveyor after the Fire includes material added as an effect of the clear up. Had such material been present when the Fire broke out it is probable that that material would have been consumed. Second, his theory assumes that before the Fire a large amount of trommel fines were piled up in and around the area where the material shown in photographs **[G/200-205]** was later found after the Fire. If that assumption were correct, that pile of trommel fines would have buried the part of the pile where the deep seated charring was later found. If that were right, the fragments of metal from the failing bearing would not have got through the mound of trommel fines and then into the material in the photographs so as to cause the deep seated charring. Moreover, if the mound of trommel fines was involved in the Fire it would be expected that the outside of the pile found after the fire showed signs of burning. Yet it did not. Further, and in any event, the evidence is that the material found in this area after the Fire was not trommel fines.

60.
For the above reasons, I reject Mr Braund's explanation and accept that of Dr Jowett summarised at paragraph 52 above.

61.
In the light of those findings, I now consider the clauses in the Policy which Millennium rely upon to defeat the claim. Before considering the clauses themselves, I summarise my approach to their interpretation.

62.
It is common ground that the effect of a condition precedent to liability is that if there is a breach of the condition precedent, the insurer is under no liability to indemnify the insured. That is so whether or not the breach of a condition precedent is relevant to the cause of loss or not: see paragraph 10-040 of MacGillivray on Insurance Law 13th edition:

"Where there is a claim brought in respect of a loss under the policy and the insurer wishes to plead breach of warranty as a defence to it, it is no answer that the loss was not caused by or contributed to by the breach of warranty."

That statement is equally applicable to conditions precedent and liability: there is no requirement for there to be a causative link between the breach and the loss. Millennium does not have to prove that any particular breach caused the loss.

63.
Thus, as Mr Eklund QC said, the issue for the court is twofold:

(i)
As a matter of construction, what is required by the condition precedent; and

(ii)
As a matter of fact, has there been compliance.

64.
In Pilkington United Kingdom Ltd v CGU Insurance PLC [2004] 1 I&R 891 at paragraph 65, Potter LJ (with whom the rest of the court agreed) said at paragraph 65:

"as stated in MacGillivray on Insurance Law (10 th ed) at paragraph 19-35, provisions in a policy which are stated to be conditions precedent should not be treated as a mere formality which is to be evaded at the cost of a forced and unnatural construction of the words used in the policy. They should be construed fairly to give effect to the project for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology."

65.
In that context, I am reminded by Mr Quiney QC that there are 3 important general principles which relate to the interpretation of insurance contracts:

(i)
The parties should be taken to understand the nature and limits of the recycling business. "Every underwriter is presumed to be acquainted with the practice of the trade he insures and that whether it is established [the practice] or not": see Noble v. Kennaway [1780] 2 Doug 511 at 513 (relied upon by HHJ Coulson QC (as he then was) in Margate Theatre v White [2006] LLRep 93 at paragraph 34). Mr Quiney emphasises the importance of the practical effect of those words. For example, the parties must have understood that keeping the machines and buildings tidy and clean in a recycling business is different from keeping machines and buildings clean and tidy in a shop, fruit processing and/or laboratories.

(ii)
If there is ambiguity in the clauses in issue, such ambiguities should be resolved against the insurer (MacGillivray 13 th edition paragraphs 11-33-35).

(iii)
In the case of terms such as conditions precedent, the courts generally treat them as onerous or draconian terms. Thus, it is incumbent on the insurer to clearly spell out any such terms or the insured will not be bound by them (see Pratt v Aigaion Insurance [2009] 1 LL Rep at paragraph 13 per Sir Anthony Clark). I was also referred to Royal & Sun Alliance v Dornoch [2005] EWCA Civ 238 at paragraph 19:

"It is a well-established and salutary principle that a party who relies on a clause exempting him from liability can only do so if the words of the clause are clear on a fair construction of the clause…"

66.
When construing the policy the starting point is always the ordinary and natural meaning of the words objectively considered: see Arnold v Britton [2015] AC 15 1619 and Wood v Capita Insurance Services [2017] 2 WLR 1095. Lord Neuberger's summary in Arnold at 1627-1628 guides the correct approach to construction:

"15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, paragraph 14. And it does so by focusing on the meaning of the relevant words, in this case clause

3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

(1) the natural and ordinary meaning of the clause,

(2) any other relevant provisions of the lease,

(3) the overall purpose of the clause and the ease,

(4) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

(5) commercial common sense, but

(6) subjective evidence of any party’s intention.”

67.
As a further gloss, it is common ground that conditions precedent fall into two categories:

(i)
Conditions precedent which cannot be remedied and therefore cannot suspend cover (e.g. a condition precedent which required notice to be given by a particular time); and

(ii)
Those which can be remedied and therefore suspend cover until they are remedied.

68.
Millennium say, and I agree, that the conditions precedent in this case fall into both categories.

(i)
Maintenance to keep machinery in efficient working order (WA6) is a suspensive condition precedent. Even if there has been a failure to maintain machines in efficient working order, maintenance can be performed to get them into efficient working order and remedy the breach. Subsequent maintenance can keep the parts in efficient working order, such that there is no longer any breach.

(ii)
A requirement to keep formal records (WA6) is a condition precedent. Once breach exists because formal records are not produced or kept there is a breach of the condition precedent which could not be remedied.

(iii)
Cleaning (WA7) is a suspensive condition. If there had been breach in the past, the cleaning requirement is a requirement which could be remedied (because the required cleaning could be satisfied subsequently, thereby leaving the premises in the condition they should be left in.

(iv)
Risk Requirement 4 of the Secon Report is a suspensive condition. The analysis is similar to that in relation to cleaning.

(v)
Memorandum 11 is a warranty which, subject to its interpretation, requires strict compliance.

69.

In answer to issue 1, I conclude that Contract Endorsement 1, Risk Requirement 4, WA6, WA7, WA60 and Memoranda 6 and 11 are "Conditions Precedent" to liability or Millennium or, in the case of Memorandum 11, a Warranty.

70.
In answer to issue 2, I conclude that those conditions should be construed in accordance with the principles set out at paragraphs 62-66 above.

71.
Issue 3 agreed by Counsel is:

"On Risk Requirement 4 and Memorandum 6:

(a) whether the policy properly incorporates a condition precedent to liability requiring (inter alia) the Claimant not to store combustible material within 6 metres of fixed plant or machinery whether under Risk Requirement 4 of the Secon Report or Memorandum 6?

(b) alternatively to separate such material from plant or machinery with a non-combustible barrier?

Those issues give rise to two questions. First, are Risk Requirement 4 or Memorandum 6 in play at all and if so how do those clauses operate and have they been breached."

72.
Wheeldon argue that in Endorsement no. 1 **[D/417]** Millennium deleted Memorandum 6 and replaced it with Risk Requirement 9 which has nothing to do with the segregation of waste. Thus, say Wheeldon, the effect of Endorsement no. 1 is to delete Memorandum 6 and leave no active obligation under the Policy which relates to the segregation of waste.

73.
I do not accept that argument. Risk Requirement 4 is expressly incorporated as a condition precedent to liability. A similar requirement was accepted as a condition precedent to liability when accepting the renewal terms set out in the email of 3rd April 2014 **[D/136]**. That email said that there may be additional requirements if renewal terms were accepted. Renewal terms included reference to the policy wording which included WA16 which in turn permitted amendment following receipt of a survey, thereby giving contractual effect to the renewal term which specified that there might be more requirements. The further requirements were set out in the Secon Report incorporated into the contract as conditions precedent by CE1 and WA16.

74.
Memorandum 6 was stated to be a condition precedent. The reference in CE1 to its replacement by Risk Requirement 9 was a simple mistake which should be recognised as a mistake and treated as such in accordance with the guidance in paragraph 22 of Arnold v Britton (see above) such that it is replaced by Risk Requirement 4 not Risk Requirement 9.

75.
In any event, Risk Requirement 4 is incorporated as a condition precedent to liability and is effective as a condition precedent to liability to require combustible materials (including combustible waste as referred to in Memorandum 6) to be stored at least 6 metres from any fixed plant. Furthermore, General Policy Condition 6 [**D/150]** sits over the requirements emphasising that Risk Requirement 4 and Memorandum 6 are conditions precedent to liability.

76.

As to issue 3(b), Risk Requirement 4 provides “this (at least 6 metres) distance can be reduced providing a barrier/wall of non-combustible construction is installed between the machinery and storage area”.

77.
Thus, an alternative to the storage of combustible material at least 6 metres from fixed plant/ machinery is the provision of a barrier/wall of non-combustible construction between the machinery and storage areas.

78.
Issue 3(c) is that of interpretation of Risk Requirement 4. Mr Eklund QC says that the “positive obligation… to store materials more than 6 metres from fixed plant and machinery” means “that such materials had to be placed (or kept) 6 metres from fixed plant and machinery…” Mr Quiney says that definition of storage is so wide as to be meaningless. He emphasises that “storage, store or storage area denotes something deliberate. It’s a decision to keep something somewhere, to designate an area that’s intentionally – that things are intentionally placed in” **[transcript 8th March, pages 29-30]**. He contrasts storage “with simply part of the process where materials are incidentally placed from time to time and removed from time to time; for example at the beginning of the process, the waste material is placed on the floor near the first shredder and then is put within the shredder. That is not a storage area, that is just part of the process.”

79.
I accept that argument. Risk Requirement 4 applies to “storage” which import a degree of permanence and a deliberate decision to designate an area to place and keep material. In my judgment, Mr Eklund’s definition does not do justice to the language used in the Risk Requirements.

80.
Issue 3(d) is “if the above provision was incorporated and on its proper construction, was the Claimant in breach of the condition precedent”? Consideration of that sub-issue requires the Court to decide (as suggested by Mr Quiney):

(i)
Was there combustible waste?

(ii)
Was it in a storage area?

(iii)
Was it within 6 metres?

81.
Both parties agree that the sensible approach is to work with the table agreed by the experts in their Joint Statement at paragraph 2.4.11 at **[B/11]** and the sketch plan at Appendix 1 to that Joint Statement **[B/40]**.

82.
The meaning of “combustible” is not agreed. That is despite the experts agreeing at paragraph 2.11 that from a scientific perspective “a combustible material is anything that burns when ignited. This includes materials that can smoulder” **[B/5]**.

83.

As set out at paragraph 2.12 of the Joint Statement **[B/5]**, Dr Jowett considers that some materials which would not normally be considered by a lay person to be combustible would fall under the scientific definition of combustible materials. Dr Jowett contrasts examples such as paper/cardboard, which a layperson would readily identify as “combustible” because they are readily ignitable and burn readily.

84.
Mr Braund records at paragraph 2.13 of the Joint Statement **[B/6]** that the RDF feed stock material was combustible in the ordinary sense. He refers to a DEFRA definition of RDF as “residual waste which is subject to a contract with an end-user for use as fuel in an energy from waste facility”. He refers also to the World Business Council for Sustainable Development which provides the following definition of RDF: “selected waste and by-products with a recoverable calorific value [that] can be used as fuels in a cement kiln, replacing a portion of conventional fossil fuels, like coal, if they meet strict specifications”. That definition is also Mr Braund’s understanding of RDF. He considers that the entire process involved combustible materials and that none of the intermediate separation processes would have been totally effective at excluding combustible elements. He notes that RDF is a fuel, that fuels are combustible and that the RDF was processed to increase its calorific value.

85.
That opinion must be read in the light of the factual evidence from Mr Martin Booker. Mr Booker says in his second witness statement at paragraphs 3.1-3.7 **[C/36-37]** that the material fed into the process is a mixture of combustible and non-combustible material. Much of the time the material is moist, having been mixed with liquids in the bins or rained upon in the builders’ skips. Each load is different. The material at the plant does not become a fuel until it has been through the various refining processes in the Plant, at which point the end product, SRF, is produced, which is a fuel. The point of the Plant is to process the incoming material to make it into a fuel, i.e. SRF. Mr Booker says that it is inappropriate to call the shredded waste a fuel or “RDF”. The only “fuel” at the Plant is the SRF, which is the end product.

86.
As I have said, I accept Mr Booker’s evidence. I also accept, consistent with the authorities mentioned at paragraphs 64 and 65(iii) above that if the underwriters had intended “combustible” to have a meaning other than that understood by a layperson interpreting the Policy, it was for underwriters to make that express in the Policy. I find that “combustible” as used in the Policy is the meaning which would be understood by a layperson. To take the example given by the experts, a layperson would not consider diamonds and metals to be “combustible”.

87.
I have considered at paragraphs 78 and 79 above my understanding of “storage”.

88.
The third issue is whether the waste was in a storage area within 6 metres. That is a question of fact. MillenNium’s case depends in large part upon Mr Braund’s interpretation of CCTV footage.

89.
Turning then to the areas shown on **[B/40]** which I read with the table at **[B/11]**.

(i)

Area A. Mr Eklund does not argue in his Written Closing Submissions for breach of the condition precedent in area A. In any event the experts agree that there was no combustible material at the time of the fire and the area was not a storage area.

(ii)
Area B. It is common ground that there were trommel fines in the location. Both experts agree that trommel fines contain combustible materials, but as I have already set out, I accept Dr Jowett's conclusion that a layperson would conclude that the material was not combustible. Mr Eklund makes much of the witness marks at page 6 of his written closings but as I explain at paragraphs 56-58 of this Judgment I am not satisfied that the witness marks have the decisive feature which Mr Braund would have me accept.

90.
Mr James Wheeldon says at paragraphs 4.15-4.20 **[C/18-19]** that the bulk of trommel fines are materials such as glass, stone or soils. That is consistent with the function of the trommel, which is to remove small dense non-combustible elements from the processor.

91.
Moreover, samples of trommel fines do not burn when tested (see Mr James Wheeldon at paragraph 5.16 **[C/22]** and Dr Jowett at 4.53(c) **[B/77]**.

92.
Mr Braund did not carry out any tests similar to that carried out by Dr Jowett. It is unnecessary for me to criticise him for that failure and I do not do so. But the fact remains is that having discarded the overstated significance of witness marks, the only evidence before me is that of Mr James Wheeldon and Dr Jowett to the effect that trommel fines are not combustible in the ordinary or layman's meaning of that word. In any event, the pile of trommel fines removed after the fire were not burned. (see James Wheeldon at paragraph 9.11 **[C/28**]).

93.
Mr Quiney also placed some reliance upon the CCTV evidence which, he said, does not show the pile of trommel fines burning during the Fire. I was not greatly assisted by the CCTV evidence. On the material available to me I conclude that trommel fines were not combustible.

94.
It is agreed by both experts that area B outside the collection bay does not appear to be a designated storage area. Dr Jowett says that the bay directly beneath the trommel appears to be a designated storage area. But my finding as to the absence of combustibility is decisive of the issue under area B in respect of the applicability of the condition precedent.

95.
Mr Eklund does not allege breach of the condition precedent in respect of area C. In any event, the experts agree that area C is not a storage area. Mr James Wheeldon described the materials there as "heavies". His unchallenged evidence was they are non-combustible [see note 1 on his photograph at **[E/294]**.

96.
Mr Eklund does not allege a breach of the condition precedent in respect of area D. In any event the experts say that it is not known whether there were any combustible materials.

97.

Area F is the area where SRF was stored. That material is combustible. Mr Eklund argues that “the facts as agreed by the experts suffice to establish non-compliance with RR4 and therefore breach of the condition precedent to liability”.

98.
That broad assertion does not consider the segregation arrangements as they are described by the experts in their Joint Statement at paragraph 2.5.13 **[B/23]**.

99.
Mr Braund is recorded at 2.5.13(g) as considering “that in area F the steel barrier provided a degree of segregation from the fixed plant and machinery but no direct comparison with the Secon examples, owing to this steel enclosure around the conveyors shown in the Secon photograph with the concrete bollards”.

100.
That is a reference to Dr Jowett’s view which is set out at paragraph 2.5.13(f) **[B/23]**. He says that the situation “is analogous to the Secon concrete bollard example in that there are conveyors passing above what appears to be combustible materials”. I prefer the evidence of Dr Jowett. Mr Braund’s comment in the Joint Statement is not part of the conclusions to his report at **[B/201-203]**.

101.
Area G is the area near the end of the conveyor and the trommel fines bay. It is the seat of the Fire. It is agreed that combustible materials were within 6 metres of fixed plant and machinery.

102.
However, the experts agree that it was not a storage area. Mr Eklund says correctly that the issue of whether the area is used as a storage area or not is not for the experts. However, he says that what was required was that “these combustible materials should be stored (in the sense of being placed or kept) 6 metres from fixed plant and machinery”. As set out at paragraphs 78 and 79 I reject that definition of “stored” and “storage”. It appears from the evidence that materials were overspill or the result of the misalignment causing the build up in the bearing housing. That is not somewhere where materials were stored. It was an unfortunate consequence of the M&K conveyor.

103.
Area H: Mr James Wheeldon’s evidence is that the material that can be seen on the CCTV is ferrous metal not combustible material (see note 6 at **[E/264]**), which is consistent with Mr Martin Booker’s evidence at paragraph 7.1-7.6 of his second statement **[C/46-47]**, where he explains that this was probably material from the over band magnets. In the table at paragraph 2.4.11, the experts are recorded as agreeing that the material was combustible, saying “see discussion”. I cannot see any discussion of combustibility in section 25.15 of the Joint Statement at **[B/24-B/25]**.

104.
I accept the evidence from Mr James Wheeldon supported by that of Mr Martin Booker summarised at paragraph 103 above as to the nature of the material. In any event the fact that material was there does not make area H a designated storage area. Indeed, I note that at paragraph 2.5.15(c) Dr Jowett is recorded as agreeing that “it is unlikely that the area in question would be considered a “storage area…”

105.

Area I is agreed by the experts not to be a storage area. That appears to be recognised by Mr Eklund, who describes the materials as being those “which were discharged during production from the short secondary conveyor…” Mr Booker says in his second witness statement at paragraph 61-625 **[C/44-46]** that it is unlikely that there was combustible material in the area. Mr Braund’s evidence that the material is combustible is based upon the witness marks, the significance of which I do not accept. The area was not a storage area and I do not accept that the material was combustible in the sense in which I apply that word.

106.
Area J is agreed by the experts not to be a storage area. In any event, the materials are likely to be the same or similar to those in area I. I have already determined that they are not combustible materials.

107.
Area K is agreed by the experts not to be a storage area. That is consistent with the evidence provided by James Wheeldon at paragraphs 426-434 and his annotated photographs at **[E/263-264]**.

108.
Again, Mr James Wheeldon’s evidence is that the material is ferrous metal, not combustible material (see note 6 at **[E/264]**) which is consistent with Mr Martin Booker’s evidence at **[C/46-47]**, paragraphs 7.1-7.6.

109.
The area was not a storage area.

110.
Mr Eklund also relies upon photographs of the adjacent building which were taken on 23rd June 2014 (e.g. **[G/136, G/137, G/138, G/140, G/142 and G/144]**) which show, he says, considerable evidence of combustible materials being within 6 metres of fixed plant and machinery. He accepts that they show the position during the day after the Fire and therefore not after operating hours but argues that they provide ample evidence of a lack of segregation.

111.
The only evidence I have other than those photographs is of Mr James Wheeldon at paragraphs 12.1-12.4 **[C/34]** that the photographs demonstrate the aftermath of the clean up operation during work hours. The photographs say nothing about the state of the building prior to the Fire.

112.
I am unable to base any conclusion upon those photographs and I do not do so.

113.
Issue 4 reads:

“On Memorandum 11:

(a) Was the Claimant in breach of Memorandum 11 by failing to have removed combustible stock from picking stations and/or trommels whilst the business was closed?

(b) If yes, does this represent a defence for Millennium?

114.
Memorandum 11 was a warranty, requiring strict compliance. Evidence of system, complied with or otherwise, is insufficient. Mr Eklund argues that photographs after the event reveal the presence of

non-combustible material that was not removed **[G/194-197]** and that “it is likely that combustible material must also have been present”. He relies upon Dr Jowett’s concession “that it was possible that there would have been combustible materials left in the trommel and that they would have burned”: (see **[day 3/82/7-83-83]**). He then says “there is no evidence that the combustible materials were removed from the trommel”.

115.
Whilst evidence of system is insufficient, there is evidence that before the end of each day on which the Plant was running the operatives would cease feeding material into the Plant approximately one hour before work ended and that the Plant was then left running until all waste had passed through: see Mr James Wheeldon at paragraph 10.7.3 and 10.7.4 **[C/30]**. I have already found that trommel fines are not, in any event, combustible within the meaning of the policy.

116.
Mr Martin Booker was clear that he always undertook a visual inspection and required the Wheeldon employees to carry out the necessary cleaning (see **[day 2/154-157]**).

117.
Thus, whilst evidence of systems is insufficient, there is evidence that there was a system in place to comply with the warranty and that the system was kept. I accept that evidence. Mr Eklund’s submission that there is no evidence that the combustible materials were removed from the trommel fails in the light of the evidence which I have summarised. Moreover, Dr Jowett’s concession of “possibility” does not assist me at all.

118.
There was no breach of the warranty in memorandum 11.

119.
Issue 4(b) does not arise.

120.
Issue 5 reads:

“On WA6:

(a) Was the Claimant in breach of WA6 by failing to maintain all machinery in efficient working order in accordance with the manufacturer’s specifications and guidelines and/or by failing to keep formal records of all such maintenance?”

121.
The fact that the bearing failed does not lead irresistibly to the conclusion that there was a failure to maintain the machinery in efficient working order in accordance with the manufacturer’s classifications, guidelines and any applicable regulations. Mr Booker decided to repair the bearing by its replacement which was a simple procedure: see his witness statement at paragraphs 5.4.1-5.4.5 **[C/12-13]**. He followed the same process as he had seen the Supplier undertake. The repair was the replacement of the bearing rather than an attempt to repair the conveyor. When the Supplier had attended they had modified the conveyor by adding an angle iron and drilling the roller shaft (see Mr James Wheeldon at paragraphs 7.11-714 **[C/25-26]**. Those repairs did not fail on 3rd June 2014. Mr Booker had no reason to think that there was anything wrong with the conveyor’s operation beyond the need to replace a bearing.

122.
In Mr Braund's report dated 12th October 2015 **[F/23]**, he said "... it was reasonable for Wheeldon to replace the bearing for a second time and continue using the conveyor". evidence of what he did and the reasoning he applied is persuasive evidence that the machinery was maintained in accordance with WA6. His decision as to that is supported by Mr Braund. There is no evidence of any breach of WA6(a).

123.
As to the requirement for the keeping of formal records, the system of daily and weekly checklists that Wheeldon had in place reasonably covered the M&K checklists for the 10 and 50 hour checks as explained by Mr James Wheeldon at paragraph 10.15-10.29 of his witness statement **[C/31-33]**. Further, a record of the maintenance was kept both in the form of the daily and weekly checklists and in a works diary as explained by Dr Jowett at paragraphs 4.180-4.185 of his report **[B104-105]**.

124.
Mr Eklund says that what he describes as "brief manuscript notes in Mr Booker's diary" is insufficient to meet the requirement for formal records.

125.
I am unpersuaded that records maintained in the form of daily and weekly checklists supported by a works diary are insufficiently "formal". If Insurers have required records to be kept in some particular format, it was for them to prescribe that format in their draftmanship of the Policy.

126.
On the evidence before me, there is no breach of WA6. Issue 5B does not arise.

127.
Issue 6 reads:

" On WA7:

(a)
Was the Claimant in breach of WA7 by failing to have procedures in place to ensure a good level of housekeeping at all times, to keep clean all areas of the site to minimise the fire risk, to record in a log formal contemporaneous records of Cleaning and Housekeeping in a log book covering areas cleaned etc."

128.
The Claimant's evidence is that there was a good system of housekeeping in place (see the evidence of Mr James Wheeldon, paragraphs 10.1-10.9 **[C/29-33]**. It involved the operatives taking care to keep the Plant clear throughout the day and a period of at least an hour at the end of the day to clean, as explained at paragraph 10.7.2 and 10.7.3 of Mr James Wheeldon's evidence at **[C/30]**. The system was structured around daily and weekly checklists that covered all the machines (see paragraph 10.7.7 of Mr James Wheeldon's evidence at **[C/30]**). The system focussed on and considered the risks of fire giving particular care and attention to high risk areas, see Mr James Wheeldon at paragraph 10.7.5 **[C/30]**. The trommel and conveyor were inspected daily and were to be "run clean" and swept around (see paragraph 10.7.19 of Mr James Wheeldon's evidence at **[C/31-32]**. There were weekly checks that would include a "deep clean" (paragraph 10.7.20 at **[C/32]**). Wheeldon kept daily and weekly records logging the cleaning régime (see paragraph 10.7.7 of Mr James Wheeldon at **[C/30]**).

The CCTV evidence (such as it is) shows regular and effective cleaning as summarised by Mr Martin Brooker in his Second Statement at paragraphs 5.1 to 5.6.4 **[C/39-43]**.

129.
Mr Eklund says that there is no evidence of procedures to be undertaken at the end of the day to clean up combustible materials and that there is no evidence of procedures being in place to ensure the trommel fines were cleared away from the trommel bay at the end of the day. I have already found that trommel fines are not combustible within the meaning of the Policy.

130.
Mr Eklund also complains of the absence of a log book but, as summarised above, there were daily and weekly records logging the cleaning régime. Again, if Underwriters require a particular form of log to be taken, kept and produced, it was for them to define that requirement in the Policy.

131.
There was no breach of WA7. Issue 5B does not arise.

132.
Issue 7 is:

“On the SECON Report generally:

(a)
Whether the SECON Report contains “conditions precedent” or is to be construed as containing conditions precedent either:

(i)
when read on its own; and/or

(ii)
when read in conjunction with the provisions of WA16; and/or

(iii)
when read in conjunction with the provisions of Contract Endorsement 1;

(b)
Whether there was a breach of the requirements under the Secon Report generally;

(c)
If so, does this represent a defence for Millennium.”

133.
As is apparent from earlier paragraphs in this Judgment, I am of the view that compliance with the Risk Requirements in the Secon Report are conditions precedent to liability, however, there was no breach of the Risk Requirements. Issue (c) does not arise.

134.
The 8th issue reads:

“What was the legal effect of Endorsement No. 2 and in particular in the circumstances did it represent in the circumstance [sic] an estoppel or waiver preventing Millennium from relying on all or some of the defences it has raised?”

In the light of my earlier findings, this issue is of no practical relevance. However, for the sake of completeness, and in case I be wrong on any of my earlier findings, I summarise my views.

135.
Endorsement No. 2 was issued on 19th November 2014. Its only effect was to recognise from that date that the co-insurance clause did not apply. There is no evidence of any representation at the date of the Fire, there is no evidence of any reliance on CE2 by Wheeldon to the detriment of Wheeldon. There is no evidence of any waiver. I would, therefore, have determined Issue 8 in favour of Millennium.

136.
Issue 9 reads:

"The interpretation of a co-insurance clause in the Policy (Memorandum 15) and whether that clause applies?"

137.
Memorandum 15 reads:

"The following clause is added to the Policy from inception pending completion of the subjectivities as per email to local agent dated 04/04/2014 and as held on file by Direct Insurers London Market.

Co-insurance material damage/business interruption clause.

In respect of all perils and sections Insurers liability in respect of any damage assessed in accordance with the terms of this Policy is limited to 65% of the amount assessed, it is a condition of this Policy that the balance of 35% shall remain at the Insured's risk and uninsured.

Any salvage or recovery obtained whether by subrogation or otherwise after the settlement of a claim by Insurers shall be apportioned, after the deduction of expenses, 65% to Insurers and 35% to the Insured. Notwithstanding the aforementioned a Minimum Contribution of £250,000 for each and every claim shall apply.

All other terms and conditions remain unaltered."

138.
It seems to be common ground between the parties that that co-insurance clause was operative at the time of the Fire, had the effect of altering the level of cover until the Survey Requirements were satisfied, that the survey requirements included the storage of combustible material, maintenance of some equipment and the housekeeping at site, and that once the requirements had been satisfied the clause would be removed and the agreed level of cover would be restored The commercial purpose was to reduce the level of cover whilst various requirements remained unsatisfied. Last that the premium paid by Wheeldon remained the same.

139.
The email to the "local agent" is agreed by Counsel to be that at **[D/136]** which is, in fact, dated 3rd April 2014. That lists a number of "requirements" including, at paragraph 4, one requiring storage of combustible wastes at least 6m from any fixed plant. That is the only subjectivity/requirement canvassed in this Hearing and pleaded against Wheeldon. That pleading point is based upon paragraph 50 of the Defence which asserts that "the Claimant is to bear 35% of the loss, subject to a minimum contribution by the Claimant of £250,000". I understand Mr Quiney to base is argument that

only that requirement 4 has been breached because that is the only requirement/subjectivity within the Defence.

140.
Mr Quiney's primary case is that the co-insurance clause cuts across all of the alleged condition precedents and provides cover even in the event of breach. It is said "the whole point of the deal encapsulated by the clause was that it would allow cover for Wheeldon even though Millennium believed that there might be breaches of the conditions it now relies upon." Reliance is placed upon the email dated 3rd April 2014 at **[D/136-137]**.

141.
I do not read that email as having the effect asserted by Wheeldon. Nowhere does the author of the email explain that cover is provided notwithstanding breach. Indeed, I read the email as being to the opposite effect.

142.
In any event, it is the language of the Policy which is significant not any covering email.

143.
At **[D/415]** at the conclusion of Memorandum 15, appear the following words:

"All other terms and conditions remain unaltered."

144.
Those words seem to me to make clear, as is argued by Mr Eklund **[Day 5, pages 78-79]** that:

"The co-insurance works on the basis that you do have a period of time in which to undertake various requirements, which are set out in the Report and the subjectivities and if you are doing those then you are not in breach then you have the benefit of the insurance subject to the co-insurance clause. But if there is a condition precedent which is in effect at the time that the event occurs, that condition precedent reduces your cover to nil in exactly the same way that it would if the cover was for 100%".

I accept that argument.

145.
Thus, pending "completion of the subjectivities" the cover is limited as set out in Memorandum 15.

146.
The important phrase is "completion of the subjectivities", not the decision by the Insurer to issue any endorsement to the effect that it is satisfied that the subjectivities have been completed. I agree with Mr Quiney that that phrase relates to the satisfaction of the subjectivities not the formal issuing of a document saying so.

147.
With the exception of requirement 4 in the email of 3rd April 2014 **[D/137]** there was no or little evidence that the subjectivities had been completed. However, I accept Mr Quiney's pleading point summarised at paragraph 140 above. I refer to it in shorthand form as a pleading point but it is more significant than that. It was open to Millennium to have taken any point which they wished. They have raised a good number of issues. At no time, to my knowledge, have they raised any failure to comply with any of the other requirements/subjectivities in the email at **[D/136]**. There is thus no reason why Wheeldon should have called evidence that they had complied with any of the other subjectivities/

conditions. There is evidence as is plain from my earlier findings that Wheeldon had complied with subjectivity/requirement 4.

148.

Accordingly, there must be judgment for the Claimant. I invite Counsel to prepare an Order reflecting this Judgment which should include directions for the quantum hearing. In the event that agreement cannot be reached, I will give appropriate directions and deal with ancillary matters when this Judgment is handed down.