Neutral Citation Number: [2015] EWCA Civ 671

Case No: A2/2014/1273

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
MR JUSTICE JAY
HQ13X00738

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2015

Before :

LADY JUSTICE RAFFERTY
LORD JUSTICE KITCHIN
and
LADY JUSTICE GLOSTER

- -

Between :

MILTON FURNITURE LIMITED	**Appellant / Claimant**
- and -	
BRIT INSURANCE LIMITED	**Respondent / Defendant**

- -
- -

Mr Graham Eklund QC and Ms Amanda Savage (instructed by **Browne Jacobson LLP**) for the **Appellant/Claimant**
Mr Christopher Butcher QC and Ms Rachel Ansell QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent/Defendant**

Hearing dates: Monday 30th March 2015
Tuesday 31st March 2015

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Approved Judgment

Lady Justice Gloster

Introduction

1. This is an appeal by the claimant, Milton Furniture Limited ("Milton"), from the judgment of Mr Justice Jay dated 1 April 2014 whereby he dismissed Milton's claim against the defendant, Brit Insurance Limited ("Brit"), for an indemnity under a Commercial Combined Insurance policy ("the policy"), following a fire at premises from which Milton traded, known as Tournament Building, Smisby Road, Ashby de la Zouch, LE65 2UR ("Tournament Building"). The issue in the appeal is the construction of a general condition in the policy, namely General Condition 7 ("GC7").

2. Mr Graham Eklund QC and Ms Amanda Savage appeared on behalf of Milton. Mr Christopher Butcher QC and Ms Rachel Ansell QC appeared on behalf of Brit.

Factual background

3. Milton is a company which was incorporated in 2004. It carries on the business of hiring out furniture for use at exhibitions. The policy incepted on 17 July 2003 when the sole insured was another group company, GPE Exhibitions Ltd ("GPE"). The cover was renewed on 17 July 2004 and Milton was added to the policy on 2 December, as a result of which Brit agreed to provide Milton with cover for the period 2 December 2004 to 16 July 2005. A third group company, "thefurniturehirepeople.com" ("TFHP"), was also an insured under the terms of the policy. Fire was a specified risk, and the policy covered loss or damage to stock in trade, loss of gross profit and increased cost of working, the indemnity period being 12 months.

4. Tournament Building consisted of a large warehouse ("the Warehouse"), a two-storey office block ("the Office"), a reception area, a workshop ("the Workshop") and a dwelling house ("the House"), which was attached to the Warehouse and Office by a link building ("the Link"). Tournament Building was leased and the landlord insured the buildings. Milton insured its stock, trade fixtures and fittings, tenant's improvements and loss of gross profit under the policy. Tournament Building was one of two sets of premises named in the schedule to the policy ("the schedule"). The other set of premises specified in the schedule were in Oakenshaw, West Yorkshire ("the Oakenshaw premises")

5. Tournament Building was fitted with a Fire Alarm ("FAS") and an Intruder Alarm (referred to variously as "the IAS" or the "burglar alarm"). Both systems were monitored, or supposed to be monitored, by SECOM Plc ("SECOM"), but under separate maintenance contracts. The burglar alarm was split into three zones – "warehouse", "offices" and "house" – which could be set by separate codes or by a single master code. It was not possible to set the offices and house zones when either the Link or the House was occupied, but the judge rejected Milton's assertion that it was impractical to set the warehouse alone if the rest of the building was occupied.[1]

[1] see paragraph 24 of the judgment.

6. The claim for an indemnity under the policy arose out of a fire which was started deliberately by a person or persons unknown late in the evening of 8 April or early in the morning of 9 April 2005. There was no suggestion that any director, agent or servant of Milton was responsible for starting the fire. The judge held that the fire had been started by someone, with a degree of insider knowledge, hiding within Tournament Building prior to it being secured or was started by someone with legitimate access to the building (on the basis that there was no evidence of forced entry).

7. On the evening of Friday, 8 April 2005, Mr Michael Hyams (Milton's general manager, and together with his wife, the beneficial owner and/or controller of the group) and Mr Derren Furley (a subcontractor who worked regularly for Milton) were both present at Tournament Building. They had been working at the premises during the day and they had work to do on the following day (a Saturday). When their work was completed, Tournament Building was locked and secured. They both remained on the premises and slept there, Mr Hyams in the House and Mr Furley in the Link. On the night of the fire the burglar alarm was not set, although the FAS was turned on. Brit contends that no, or no satisfactory, explanation was given in evidence at trial as to why the burglar alarm had not been set. Milton contends that the reason was because Mr Hyams and Mr Furley were both on the premises.

8. The judge found that the burglar alarm could have been set in the Warehouse alone, as evidenced by the fact that it was set on 259 nights out of 288 nights between 1 May 2004 and 12 February 2005, even when employees of Milton were sleeping in the Link and the House. In addition, as the judge held, SECOM had stopped monitoring the burglar alarm in February 2005 because of persistent non-payment by Milton (or another group company) of its invoices.

9. Mr Furley was woken by the fire alarm. In turn he woke Mr Hyams. Three minutes after the FAS activation, SECOM telephoned Mr Hyams to inform him of the fire alarm activation.

10. Brit refused Milton’s claim to an indemnity on the basis that Milton had failed to comply with what Brit asserted were two conditions precedent set out in GC7, viz.:

    i) that the burglar alarm had to be set “out of business hours” or when the premises were “left unattended”;

    ii) that the “protections” required by the policy (i.e. the burglar alarm and the FAS) were not to be “withdrawn or varied to the detriment of the interests of Underwriters without their prior consent”.

11. Brit contended that, because the burglar alarm had not been set on the night of the fire and the burglar alarm was not being monitored, Milton was in breach of these conditions and, accordingly, Brit was entitled to decline to pay under the policy.

The relevant provisions of the policy

12. The policy provided, so far as is material, as follows:

"This Policy, the Proposal, the Schedule (including any Schedule issued in addition or substitution) and any Endorsements or Memoranda shall be considered one document and any word or expression to which a specific meaning has been attached shall bear such meaning wherever it appears.

The Insured named in the Schedule having made to Insurers a Proposal which is hereby agreed to be the basis of this Insurance are to be considered incorporated herein and having paid or agreed to pay the premium.

Section A **Protection Warranties**

Only acceptable if indicated on the Schedule

PW1 Intruder Alarm Warranty

It is a condition precedent to the liability of the Underwriters in respect of loss or damage caused by Theft and/or attempted Theft, that the Burglar Alarm shall have been put into full and proper operation whenever the premises referred to in this Schedule are left unattended and that such alarm system shall have been maintained in good order throughout the currency of this insurance under a maintenance contract with a member of NACOSS.

PW3 Protections Warranty (No 2)

It is warranted that all doors, windows and openings are protected by a NACOSS approved Direct Line, RedCARE or Dualcom alarm system.

Section B **Loss of Profits**

Definitions

Gross Profit The sum produced by adding to the Net Profit the amount of the Insured Standing Charges …

Net Profit The net trading profit (exclusive of all capital receipts and accretions and all outlay properly chargeable to capital) resulting from the business of the Insured at the premises after due provision has been made for all Standing and other Charges including depreciation, but before the deduction of any taxation chargeable on profits…

Rate of Gross Profit ["ROGP"]The rate of gross profit earned on the turnover during the financial year immediately before the date of the damage to which such adjustments shall be made as necessary to provide for the trend of the business and for variations in or special circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the damage

> would have been obtained during the relative period after the damage.
>
> General Conditions of this policy
>
> 7 The whole of the protections including any Burglar Alarm provided for the safety of the premises shall be in use at all times out of business hours or when the Insured's premises are left unattended and such protections shall not be withdrawn or varied to the detriment of the interests of Underwriters without their prior consent. [I shall refer to this provision as GC 7.]
>
> 8 The Insured shall at all times use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss, damage or liability under this policy… [I shall refer to this provision as GC 8.]
>
> 17 Provided always that the due observance and fulfilment of all conditions, provisions and endorsements of this policy shall be a condition precedent to any liability on the limb of the Underwriters under this policy… [I shall refer to this provision as GC 17.]*"*

13. There was no definition of the premises in the policy but "Building" was defined as follows:

> "Building shall be deemed to mean the buildings of the premises named in the schedule, including any other buildings, annexes, gangways, conveniences, outbuildings and extensions attached to or belonging to and used in connection with the business.".

14. PW1 and PW3 were applied to the policy in accordance with:

    i) Brit's quotation dated 2 July 2003 which referred to PW1 and PW3;

    ii) the insurance schedules for the periods commencing 17 July 2003, 17 July 2004 and the midterm adjustment (adding Milton) dated 2 December 2004;

    iii) Brit's renewal quotation sheet dated 5 July 2004, which referred to PW1 and PW3 (in addition to other, unrelated, warranties).

The issues at trial

15. By the end of the trial the main issues in the case, as summarised by the judge in paragraph 11 of the judgment, were as follows:

    i) whether GC7 was subordinate to PW1 so that, as regards the obligations therein specified, compliance with GC7 was not a condition precedent to Milton's liability;

    ii) whether PW1 qualified GC7 - as regards the obligation to ensure that the burglar alarm was in use – such that Milton's duties in that regard were the same under both provisions, and no more onerous than those set out in PW1;

iii) whether (construing GC7 on a standalone basis without reference to PW1) Milton was in breach of its obligations under the first limb of GC7 by not ensuring that the burglar alarm was in use at the material time;

iv) whether Milton was in breach of the second limb of GC7, in particular by causing or permitting the withdrawal of the monitoring of the burglar alarm;

v) if GC7 was not a condition precedent to Brit's liability, whether any breach by Milton of its obligations under GC7 was causative of the loss sustained;

vi) in the event that Brit was found liable to indemnify Milton:

a) what was the value of the stock at the time of the fire?

b) what would Milton's turnover have been?

c) what rate of gross profit should be applied?

The judge's findings

16. The judge found as follows:

i) as to issue (1): he decided issue (1) in the negative; in other words he decided that compliance with GC7 was a condition precedent to Brit's liability;

ii) as to issue (2): he decided issue (2) in the affirmative; in other words he held that PW1 qualified GC7, so that GC7 had to be "read down" so that Milton's obligations as regards the use and monitoring of the burglar alarm (but not in other respects) were no more onerous than they would have been had the claim been a theft claim and PW1 had been applicable; this meant that Milton was only required to set the burglar alarm if the premises were left unattended;

iii) as to issue (3): Milton was not in breach of its obligations under the first limb of GC7, construed on its own terms, on a standalone basis and without reference to PW1 because:

a) the composite term "out of business hours or when the Insured's premises are left unattended" should be construed so that the burglar alarm only had to be set out of business hours when Tournament Building closed for business *and* was unattended;

b) although the loss occurred outside business hours, Tournament Building as a matter of fact had not been "left unattended";

from which it followed that Milton likewise was not in breach of its obligations if GC7 fell to be construed as qualified by PW1.

iv) as to issue (4): the judge held that Milton was in breach of the second limb of GC7 because the monitoring service for the burglar alarm had been withdrawn by SECOM, as a result of non-payment of an invoice, that Milton knew the

invoice had not been paid and was reckless as to the risk that the monitoring service would be cut off; (this was the critical finding which led to the judge's conclusion that Milton was not entitled to an indemnity under the policy);

v) as to issue (5): the judge held:

a) that Milton's breach of the second limb of GC7 was not, without more, causative of any loss; but

b) on the hypothetical basis that he was wrong about his finding as to the first limb of GC7 (i.e. that GC7 was a condition precedent and that the burglar alarm did not have to be on because the premises were occupied), so that Milton was in breach of its obligation to activate the burglar alarm, breach of the first limb of GC7 was causative; (this finding was not the subject of any appeal by Milton and accordingly I do not consider it further);

vi) as to issue (6), quantum, the judge held that:

a) Milton's damaged stock was valued at £147,600;

b) Milton's loss revenue was £560,000;

c) the appropriate rate of gross profit was 10%;

d) the damages payable would have been £194,982 (plus interest).

17. Accordingly the judge dismissed Milton's claim and ordered that it should pay 66% of Brit's costs of the action. He refused permission to appeal but permission to appeal was granted by Christopher Clarke LJ on 7 August 2014.

18. Brit filed a respondent's notice on 22 August 2014 contending that the Court of Appeal ought to uphold the judge's order dismissing the claim for various different and/or additional reasons. It also indicated that it would appeal the costs order made by the judge in the event that the Court of Appeal were to uphold the judge's order for the additional reasons set out in the respondent's notice; it also indicated that, in the event that the Court of Appeal were to allow Milton's appeal, then it would contend that the judge's finding in relation to quantum was wrong.

The submissions of the parties on the appeal

19. In summary, in relation to the issues which the judge decided adversely to Milton, Mr Eklund submitted as follows:

i) As to issue (1), the judge was wrong to find that GC7 was a condition precedent to Brit's liability in relation to the burglar alarm. It was PW1 which was the condition precedent to liability in relation to the burglar alarm. That was because PW1 had been included specifically as per the terms of the quotation and the schedule and accordingly the general condition (GC7) had to be construed subject to the effect of the specific condition (PW1). GC7 was thus subordinate to PW1: see *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 (per Lord Bingham at 737F-G); Lewison's

Interpretation of Contracts, 5th Ed., paragraphs 7.05, 7.06 and 9.10; and Clarke on Insurance Contracts, 4th Ed., paragraphs 15.6 and 6B. General Condition 17 could not make GC7 a condition precedent to liability in relation to the burglar alarm because of the specific inclusion in the policy of PW1 and PW3. It was PW1 and PW3 which were the Conditions Precedent or warranties in relation to the burglar alarm and they had effect only in relation to loss or damage by theft or attempted theft.

ii) As to issue (4), the monitoring issue, in relation to the construction of the second limb of GC7, the judge was wrong to construe the words "such protections" as requiring that the whole of the protections provided by the burglar alarm (including any monitoring) had to be in place regardless of whether, at the relevant time, the burglar alarm had to be set. The phrase "such protections" should be construed as referring to relevant protections, i.e. those which had to be in use at any time. There would be no commercial purpose in requiring the whole of the alarm system to be in place and operative (including the monitoring service), if the alarm itself did not have to be set. The judge was also wrong to conclude that the phrase "to the detriment of the interests of underwriters" did not have to be concerned with the actual causal effect of the withdrawal of the relevant protection or protections. Moreover the judge failed to make any finding of specific detriment to the interest of underwriters and, even if the alarm had been activated, the lack of monitoring would have made no difference on the facts of the case.

iii) Further, also in the context of issue (4), in relation to whether there had been a breach of the second limb of GC7, the judge was wrong to apply the test of recklessness as to the risk of cessation of monitoring, in particular in circumstances where such test was not suggested by Brit. The correct test to apply was one of actual knowledge and, as the judge correctly found, there was no such actual knowledge on the part of Milton. Even if the test were one of recklessness, there was no evidential basis for the judge's finding that Milton was reckless.

iv) As to the issue of quantum, Brit needed, but did not have, permission to appeal the judge's finding. There was no prospect of disturbing the judge's assessment of the value of the stock based on Mr and Mrs Hyams' evidence as to the price they paid for the stock and on what basis. Any such appeal would have no prospect of success.

20. In relation to the issues where the judge accepted Milton's submissions, Mr Eklund supported the reasons given by the judge.

21. In summary, Mr Butcher submitted as follows:

i) The judge rightly concluded that GC7 was a condition precedent to Milton's liability (by deciding issue (1) in the negative) but wrongly concluded that the first limb of GC7 should be read subject to PW1 and "read down". The judge failed to ask himself whether the two clauses could be read together without inconsistency and should have concluded that he could give effect to both clauses.

ii) The meaning of the first limb of GC7 was plain. The burglar alarm (and other protections) had to be in use at Tournament Building at all times "out of business hours" (whether or not it was "attended") and whenever the premises were "unattended". The two requirements were clearly in the alternative. Milton maintained at trial that GC7 should not be construed in such a way that there was an obligation on it to activate the alarm in circumstances where the alarm would almost certainly have gone off by detecting the movement of persons who were legitimately in the premises. Whilst that was correct, it did not then follow that the burglar alarm only had to be set out of business hours when there was no one in the premises when the burglar alarm could be set in the Warehouse even if people were present in the House or the Link. GC7 clearly applied only to the extent possible, without requiring the insured to fulfil an impossible obligation. The court had to interpret a commercial document in light of business common sense: see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21. To the extent that GC7 could be construed as requiring the alarm to be activated in the entire premises taken as a whole, or alternatively in the entire premises to the extent that this was not impracticable due to inhabitation, the latter should be preferred as according with business common sense. The judge was wrong to find that a construction of GC7 which only required the burglar alarm and other protections to be in use outside of business hours when Tournament Building was unattended was a "reasonable interpretation" which "limits GC7 to achieve a commercially acceptable result". Such a construction ignored the express wording of the clause; it also ignored the fact that it was reasonable and commercially sensible for underwriters to require the burglar alarm to be set out of business hours or when the premises was unattended.

iii) There was no "doubt" or "uncertainty" as to the scope of the insured's obligations under the policy, if GC7 were construed as requiring the burglar alarm and other protections to be put into operation insofar as practicable outside of business hours or when the premises were left unattended.

iv) Accordingly, as the judge had found that the burglar alarm was not set "out of business hours", namely after the conclusion of Milton's business at 8:30 PM on the evening of 8 April 2005, it followed that Milton was in breach of the first limb of GC7.

v) The judge was also wrong to conclude that the mere presence of Mr Fairley and Mr Hyams in one small part of the premises meant that they were "attended". Neither could be said to be "attending to" the premises when asleep. The words "left unattended" were not capable of any precise definition. The words had to be taken in their "ordinary sense" and applied to the facts. The test of whether something has been "left unattended" was a question of fact for the court to determine in all the circumstances: see *Starfire Diamond Rings Limited v Angel* [1962] 2 Lloyd's Rep. 217.

vi) As to the correct legal test in relation to the second limb of GC7, the question of whether any, and, if so, what, knowledge on the part of the insured was necessary for the insured to be in breach of this term was simply a matter of the construction of the contract and of GC7 in particular. In the present case, whilst it might indeed be correct that a protection could not be "varied"

without some knowledge on the part of the insured, the position was different in relation to "withdrawal". If there had been a "withdrawal" of protections by such a third party, as there had been in the present case, there was a breach of GC7. There was no requirement of knowledge on the part of the insured of such "withdrawal", under the relevant Condition.

vii) If, contrary to the submissions set out above, the obligation imposed by the relevant part of the second limb of GC7 was not a strict obligation, then it was qualified only in the sense found by the judge, namely that the insured would be in breach of the condition precedent if it acted, or failed to act, in such a way that there was a real risk that the adverse consequence might flow, i.e. the cessation of the monitoring. The correct test was not, as the judge rightly found, properly described as a test of "recklessness": see *Melik & Co v Norwich Union* [1980] Lloyd's Rep 523. GC7 did not require Milton to take "reasonable precautions" against the withdrawal and variation of the protections, which was language which in some cases had been found to import a requirement of recklessness for there to be breach. The obligation was unqualified and required that the protections should not be withdrawn or varied.

viii) Furthermore, in any event Milton had the relevant knowledge irrespective of the fact that GPE, not Milton, was responsible for the payment of the SECOM July 2004 Invoice. That was because:

a) Mrs Hyams was a director of GPE and of Milton which, for present purposes, meant that Milton, therefore, had the same knowledge as GPE.

b) Milton had an obligation to comply with GC7. It cannot have complied with that obligation when it well knew that the party to whom it had delegated responsibility for the security arrangements was not carrying out those obligations.

ix) On any basis, on the evidence, Milton was in breach of the second limb of GC7.

x) If, contrary to the above submissions, the Court of Appeal were to allow the appeal, Brit would contend that the judge's finding that Milton's stock had a value of £150,000, and that the value of the damaged stock had a value of £147,600 (on the basis that 98.4% of the stock was damaged) was wrong on the evidence. The judge should have found that the damaged stock had a value of no more than £51,660.

Discussion and analysis

Issue 1

22. The first issue which arises on the appeal is whether, as Milton contends, GC7 was not a condition precedent in relation to the burglar alarm because PW1 was the condition precedent which applied in relation to the burglar alarm. I agree with the judge that, on a proper construction of the policy as a whole, there can be no doubt

that GC7 is a condition precedent which applies to the burglar alarm in the same way as it applies to the other protections provided for the safety of the premises. My reasons for this conclusion are as follows.

23. Contrary to Mr Eklund's submission, there is no reason to construe the policy as excluding GC7 from applying as a condition precedent to the burglar alarm or as subordinate to PW1. The fact that the quotation stated "Terms and Conditions: As per Wording unless indicated below", and the rubric above PW1 stated "only acceptable if indicated on the schedule", does not assist Milton in its argument as to the alleged overriding effect of PW1. Apart from the fact that the quotation did not form part of the policy, it was not "indicated" in the quotation that GC7 did not apply. The effect of the wording of the quotation therefore does no more than confirm that PW1 and GC7 both applied. Likewise, the inclusion of the words in the policy confirming that PW1 was "only acceptable if indicated on the schedule" simply confirms that PW1 would only apply if it was listed on the schedule. Those words cannot possibly be construed as excluding by implication the application of GC7. Moreover GC17 expressly states that the due observance and fulfilment of all conditions, which necessarily includes GC7, "shall be a condition precedent to any liability" on the part of Brit.

24. The authorities relied upon by Mr Eklund indeed support the well-established proposition that, where a contract is based on a standard form of contract to which the parties have added special or written (or typed) clauses, greater weight will be given to the special or written conditions, and, in the event of conflict or inconsistency between the general and special or written conditions, the latter will prevail. However in the present case it is not possible to characterise PW1 as a special, or written, clause taking precedence over GC7. PW1 and GC7 both formed part of the "standard terms" of the policy, with the parties merely selecting which terms were going to apply to the policy. In such circumstances there is no special hierarchy conferring precedence on PW1 as opposed to GC7.

25. Furthermore in my judgment (and this is a point which is also relevant to issue 2) there is no conflict or inconsistency between GC7 and PW1. In such circumstances the court has to attempt to give effect to the provisions of each clause.

26. Thus, although the language of GC7 and PW1 overlaps to a certain extent, as Mr Butcher submitted, and I accept, the two clauses are not inconsistent:

    i) GC7 applies to all claims. PW1 applies only to claims for "theft or attempted theft". As the judge held, Milton's construction would lead to the commercially unacceptable result that there would be no condition precedent to its liability as regards the non-use of the burglar alarm, or associated monitoring, unless the claim happened to be one for theft or attempted theft. That cannot have been the intention of the parties because Brit would have been in a better position if it had not insisted on the inclusion of PW1.

    ii) GC7 made it a condition precedent to underwriters' liability that all protections provided for the safety of the premises, including the burglar alarm, were in use out of business hours or when the premises were unattended. PW1 made it a condition precedent to claims for theft or attempted theft that the burglar alarm was in use when the premises was unattended. There is overlap but no

inconsistency. PW1 required the burglar alarm to be set when the premises were unattended. Subject to the argument relating to issue 2 (namely as to whether GC7 should be read down), GC7 imposed an additional requirement that the burglar alarm should also be set out of business hours.

iii) GC7 provides that it is a condition precedent to all claims that all protections provided for the safety of the premises, including the burglar alarm, are not "withdrawn or varied to the detriment of the interests of the Underwriters". There is no such requirement in PW1 but that does not lead to the conclusion that the clauses are inconsistent. It simply means that GC7 imposed a further requirement or obligation on the insured. It also demonstrates, as the judge held, that GC7 had a separate commercial purpose.

iv) Similarly, PW1 imposed an additional obligation on the insured by making it a condition precedent to any claim for "theft or attempted theft" that the burglar alarm "be maintained in good order throughout the currency of this insurance under a maintenance contract with a member of the National Approval Council for Security Systems (NACOSS)". This is not inconsistent with GC7. It simply adds an additional condition precedent to claims for "theft or attempted theft".

v) It has frequently been said that little weight should be given to an argument based on redundancy in relation to a commercial contract. Thus in *Arbuthnott v Fagan* [1996] Lloyd's Reinsurance Law Reports 135 Hoffmann LJ (as he then was) said at page 142:

"I accept that it may also mean, if one analyses the various phrases in detail, that parts of the clause overlap with the effect of other parts and are redundant. In a document like this, however, little weight should be given to an argument based on redundancy. It is a common consequence of a determination to make sure that one has obliterated the conceptual target. The draftsman wanted to leave no loophole for counter-attack by the recipient or intended recipient of a call. It is no justification for construing the language so as to apply to a situation which, on a fair reading of the general purpose of the clause, was not within the target area.";

see also per Sir Thomas Bingham MR (as he then was) on page 138 (rhc); and *Tektrol v International Insurance Co of Hanover* [2005] EWCA Civ 845 (per Buxton LJ at paragraphs 15 and 16).

27. Accordingly I would dismiss Milton's appeal in relation to issue 1, namely its challenge to the judge's conclusion that compliance with GC7 was a condition precedent to Brit's liability.

Issue 2

28. The second issue which arises on the appeal is whether the judge was right to hold that PW1 qualified GC7 with the result that GC7 had to be read down so that the insured's obligations as regards the use and monitoring of the burglar alarm (but not in other respects) were no more onerous than they would have been had the claim

been a theft claim and PW1 had been applicable, i.e. that the insured was only required to set the alarm if the premises were left unattended.

29. In my judgment, largely for the reasons advanced by Mr Butcher in argument, the judge's conclusion in relation to this issue was wrong. My reasons for differing from the judge are as follows.

30. The language of GC7 is plain. It requires the "whole of the protections including any Burglar Alarm" to be in use in two alternative eventualities: first, "at all times out of business hours", irrespective of whether the premises were unattended; and second, "at all times …..when the Insured's premises are left unattended", irrespective of whether the time of day was in or outside business hours. The two requirements are clearly in the alternative. Linguistically it is impossible to read the words "at all times out of business hours *or* when the Insured's premises are left unattended" in the conjunctive sense as meaning that the "protections" only had to be in use out of business hours *and* when the premises were left unattended.

31. If, as Mr Eklund submits, "or" is to be read as "and", the words "out of business hours or" would be superfluous. If the purpose was only to ensure that the burglar alarm was operational whenever the premises were unattended (i.e. whether in business hours or not), then the policy need only have provided that "the protections be in use at all times when the Insured's premises are left unattended." The alternative clearly has a sensible, commercial purpose, viz. to ensure that the alarm is set outside business hours (i.e. whether the premises are attended or not).

32. The judge provides no clear reasoning for his decision to "read down" the clear and express wording of GC7. In paragraph 129 of the judgment he stated that he could only accept Brit's primary submission "that PW1 should be seen as having no impact on GC7 at all…" if he considered that PW1 was to be "hermetically sealed and ring-fenced off GC7". In my view he adopted the wrong approach to the construction exercise. His task was to construe the policy as a whole and give effect to every provision so far as possible. The question he should have asked was whether the two clauses could be read together without inconsistency (i.e. whether it could be said that there was multiplicity of language, rather than inconsistency). If he had asked that question, then, for the reasons which I have already set out above, he should have concluded that there was no inconsistency between the two provisions.

33. In paragraph 130 of the judgment, the judge said that he had also "tested" Brit's primary case by considering the hypothetical case of loss or damage caused by theft or by fire and theft. He concluded that, on that hypothetical case, Milton's obligations would be more onerous under GC7 than they would be under PW1 and that that could not be regarded as a commercially sensible result because the inclusion of PW1 could not have been intended to work to Brit's potential disadvantage. He then went on in paragraph 131 to conclude that, as GC7 applied to the "subsidiary business" of the burglar alarm, whereas PW1 applied to what he considered to be the "core business" of the burglar alarm, namely the prevention of "theft or attempted theft", he could not accept that it made commercial sense to interpret GC7 "in such a way that the insured's obligations are potentially greater under that provision than they would have been had this been a theft or an attempted theft claim under PW1".

34. However, as Mr Butcher submitted, the flaw in the judge's reasoning is that the uncommercial results only arise if it is assumed, incorrectly, that compliance with PW1 is sufficient. If both clauses have to be applied (because there is no inconsistency), then the inclusion of PW1 does not work to Brit's disadvantage. Whatever the cause of loss - fire, or theft, or fire and theft - the insured will have no cover if it breached GC7. Similarly, if both clauses are applied, there is no question of Milton being under a greater obligation in the case of a claim made for a fire than in a case for an attempted theft or theft.

35. Mr Eklund placed great reliance on the fact that that GC7 should not be construed in such a way as to impose an obligation on the insured to activate the alarm in circumstances where the alarm would almost certainly have gone off by detecting the movement of persons who were legitimately in the premises. He referred to the fact that Brit was aware that Milton's employees regularly slept in the House or the Link. But in my judgment it does not follow from this proposition that, as a matter of construction, the burglar alarm only had to be set out of business hours when there was no one in any part of the premises. The practical reality was (and the evidence showed that this had frequently happened) that the burglar alarm could be set in the Warehouse even if people were present in the House or the Link.

36. I accept Mr Butcher's submission that GC7 clearly applies only to the extent possible, without requiring the insured to fulfil an impossible obligation. It is trite law that a court must interpret a commercial document in light of business common sense: see e.g. *Rainy Sky SA v Kookmin Bank* supra at paragraph 21.

37. Applying that approach, it seems to me that a purposive and commercial construction of GC7 entitles one to read the word "the premises" as including "or any part of the premises". The judge rejected any argument that "the premises" could include "part" of the premises (and indeed no argument to this effect appears to have been run by Ms Ansell at trial, who at that stage appeared on her own for Brit). At paragraph 143 of the judgment he said:

> "… Ms Ansell did not submit that the term *"premises"* in this insurance policy could be interpreted, by dint of synecdoche or otherwise, to mean, *"part of the premises"*, and I would endorse that approach. So, even on the Defendant's best case, here we have a large and complex building which could not possibly be subject to effective, active surveillance by one individual (no submission was or could be made that there would have to be a sufficient number of individuals to ensure proper surveillance). I also agree with Mr Eklund that in ordinary parlance houses or premises become unattended when their occupants leave.

38. I disagree with the suggestion that it would be necessary "by dint of synecdoche"[2] to construe the word "premises" as including, where appropriate, "part" of the premises. All that is necessary is to apply a common sense commercial construction to the policy as a whole. In the present case the schedule names two "premises", or locations, from which the insured operates, so clearly the words "the premises referred to in this Schedule" in PW1 and "the premises" in GC7 cannot be taken to mean *all* the premises specified in the schedule. For example, it could not sensibly be

[2] A synecdoche is a rhetorical trope or type of figurative speech in which a term that denotes one thing is used to refer to a related thing.

said that there would be no obligation to set the burglar alarm when the all parts of Tournament Building were unattended, simply on the grounds that the Oakenshaw premises were attended at that time. Therefore, on any basis, a practical approach has to be taken to identifying which "premises" or "part of the premises" referred to in the policy are subject to the obligation to comply with GC7 or PW1.

39. Therefore I have no difficulty, against the factual matrix of this case, in construing GC7 as requiring the alarm to be activated in all those parts of the relevant "premises" (whether Tournament Building or the Oakenshaw premises) (both outside business hours or when a relevant part of the premises is left unattended) to the extent that it is not impracticable to do so, because of the legitimate presence of persons in certain parts of the premises. That construction accords with business common sense.

40. Thus I cannot agree with the judge's reasoning that his construction of GC7, which only required the burglar alarm and other protections to be in use outside of business hours when Tournament Building was unattended, was a "reasonable interpretation" which "limits GC7 to a achieve a commercially acceptable result". Apart from the fact that such a construction, as I have already stated, ignores the express wording of the clause, it affords no weight to the fact that it was reasonable and commercially sensible for underwriters to require the burglar alarm to be set out of business hours *or* when Tournament Building was unattended. The risk of unlawful entry by an intruder is obviously increased outside business hours because there is less chance of detection. Similarly, the risk is also increased when premises are left unattended. A construction which produces the result that, provided someone was in the House out of business hours, there would be no obligation on the insured under GC7 to ensure that, so far that as the remaining parts of Tournament Building were concerned, "protections including any Burglar Alarm provided for the safety of the premises" were operational does not make any kind of commercial sense. The evidence showed that, other than the burglar alarm, "protections" included securing and locking the windows and doors of the Warehouse. Mr Butcher gave the following example of the absurdity to which the judge's construction, would lead: provided someone was present in the House, there would apparently be no obligation on the insured under GC7 to lock the doors and windows of the Warehouse out of business hours. That cannot be correct. The fact that omission might give rise to a breach of GC8 does not detract from the force of the example.

41. I accept Mr Butcher's submission that there is no "doubt" "or "uncertainty" as to the scope of the insured's obligations under the policy if GC7 is construed as requiring the burglar alarm and other protections to be put into operation insofar as practicable outside of business hours or when the relevant part of the premises are left unattended. I agree that it would make no commercial sense for the clause to require the insured to do something which was impossible or for the insured to be under no obligation to set the burglar alarm in relation to parts of the premises outside business hours or when parts of the premises were unattended, when this was entirely possible because, for example, human habitation of Tournament Building was limited to the House. It would be obvious that what the insured was required to do was to set the burglar alarm, and put the other protections into operation, in those parts of the premises where it was able to do so.

42. For the above reasons I cannot agree with the judge's conclusion that PW1 reduced or qualified the obligations imposed by GC7.

Issue 3

43. The third issue is whether Milton was in breach of the first limb of GC7.

44. It follows from my decision in relation to issue 2, namely that the correct construction of GC7 required Milton to set the burglar alarm "at all times out of business hours", that Milton was in breach of GC7. There was no dispute on the facts: the judge held that Milton's business ended at 8:30 pm on the evening of 8 April 2005; the burglar alarm had not been set on that date after close of business, even though it could have been set in those parts of Tournament Building other than the House and the Link which were occupied by Mr Hyams and Mr Furley - and in particular in the Warehouse.

45. The second aspect in relation to the first limb of GC7 was whether the Tournament Building had been "left unattended". The judge held, contrary to Brit's contentions, that the premises had not been "left unattended" because the House and the Link were occupied by Mr Hyams and Mr Furley. Even if I am wrong in my conclusion that it is legitimate to approach the question on the basis that a substantial part of the premises (viz. the Warehouse) had been left unattended, I cannot agree with the judge's application of the test of being "left unattended" to the facts of the present case. In my judgment his conclusion simply does not, on any commercial basis, reflect the reality of the situation.

46. As the judge correctly held[3], the words "left unattended" are not capable of any precise definition. The words have to be taken in their "ordinary sense" and applied to the facts. Whether it can be said that something has been "left unattended" is a question of fact for the court to determine on the particular facts and circumstances of each case: see *Starfire Diamond Rings Limited v Angel* [1962] 2 Lloyd's Rep. 217 per Lord Denning MR at page 219, per Upjohn LJ (as he then was) at ibid and per Diplock LJ (as he then was) at page 220.

47. As Mr Butcher submitted, the relevant facts in this case are:

    i) Tournament Building was a large building. The Warehouse and Workshop have a total area of 32,249 sq. ft. The Office, House and Link have a total area of 2,249 sq. ft.

    ii) On the evening of 8 April 2005 the only people in Tournament Building were Mr. Hyams and Mr. Furley. From approximately 10pm both of them were asleep; Mr. Furley in the Link and Mr. Hyams in the House.

48. The question is therefore whether the mere presence of Mr. Furley and Mr. Hyams in one small part of Tournament Building meant Tournament Building was "attended".

49. The judge considered that "little assistance was to be drawn from the motor-vehicle cases where the commercial purpose of the policy wording is to require a level and degree of actual attention".[4] He appears to have taken the view that the term "left unattended" was "broadly akin" to "left unoccupied"[5], and therefore, because Mr

[3] See paragraph 137 of the judgment.
[4] See paragraph 143 of the judgment.
[5] See paragraph 144 of the judgment.

Furley and Mr Hyams occupied the Link and the House, "the premises" had not been "left unattended", despite the fact that the two gentlemen were fast asleep. In coming to this conclusion he also appears to have relied on his view that Tournament Building was:

> "a large and complex building which could not possibly be subject to effective, active surveillance by one individual (no submission was or could be made that there would have to be a sufficient number of individuals to ensure proper surveillance)."[6]

50. In *StarFire Diamond Rings Limited supra*, Lord Denning (with whom Upjohn and Diplock LJJ agreed) stated at page 219 - in relation to a motor-vehicle- that

> "attended" meant: that there must be someone able to keep it under observation, that is, in a position to observe any attempt by anyone to interfere with it, and who is so placed as to have a reasonable prospect of preventing any unauthorised interference with it."

As the judge rightly pointed out[7], this dictum would suggest that someone attending a motor-vehicle cannot be asleep whilst doing so. However in *Plaistow Transport Limited v Graham* [1966] 1 Lloyd's List Law Reports 639, Neild J held that a lorry was not "left unattended" notwithstanding that the lorry driver was sleeping at the time goods were stolen from his lorry. In that case there was no citation of *StarFire Diamond Rings Limited supra* and there does not appear to have been any argument on the issue, the critical issues at trial apparently being the circumstances in, and the time at, which the theft occurred and whether the driver had been complicit in the theft.

51. In my judgment, on the facts of this case, it is impossible to conclude that the Tournament Building was being "attended" simply because Mr Hyams and Mr Furley were asleep in two small parts of the building, namely the House and the Link. The natural meaning of the word "attended", as Lord Denning said in *StarFire Diamond Rings Limited supra* is that someone is keeping the property under observation, and is in a position to observe any attempt by anyone to interfere with it. I accept Mr Butcher's submission that for the purposes of GC7 "attended" clearly connotes someone actually being present at the premises and "attending to them"; i.e. giving them some attention. Mr. Hyams and Mr. Furley were both asleep. Neither could be said to be "attending" to Tournament Building. In ordinary usage (contrary to the conclusion of the judge)[8] "attending" means looking after something. Neither could be said to be acting as an "attendant". Neither could be said to be giving the premises any attention at all. Nor do I agree with the judge that that the commercial purpose of the wording "left unattended" in motor insurance cases is different from the commercial purpose of the wording in property insurance cases. Obviously, in relation to large commercial premises, what actually amounts to premises being "left unattended" may be very different from what amounts to a motor-vehicle being "left unattended". But in both cases the commercial purpose of the wording is the same,

[6] See paragraph 143 of the judgment.
[7] See paragraph 138 of the judgment.
[8] See paragraph 143 of the judgment.

namely to require a level and degree of actual attention to be given to the insured property whether that be a car or a building.

52. Nor do I understand the logic of the judge's statement that, because Tournament Building was a large building which "could not possibly be subject to effective, active surveillance by one individual", this meant that Tournament Building was "attended" when two people were sleeping in two small parts of the premises. First, the statement is wrong, since there does not appear to have been any issue or evidence at trial directed to the question as to whether one security guard could have effectively patrolled the building at night; secondly, it does not follow from the proposition (even if it be true) that the building was too large to be subject to effective surveillance by one individual, that the consequence was that the premises were not "left unattended" when two people were asleep in the House and the Link; and thirdly and most importantly, if one individual had indeed been awake and carrying out regular patrols of Tournament Building, that would, or might, have amounted to "attendance".

53. Accordingly, in my judgment Brit was entitled to succeed in its defence on the additional basis that Milton was in breach of the first limb of GC7.

Issue 4

54. The issue which arises under this head is whether, as the judge found, Milton was in breach of the second limb of GC7, namely by causing or permitting the withdrawal of the burglar alarm monitoring service. In the light of my conclusion that Milton was in any event in breach of the first limb of GC7 in failing to set the burglar alarm, it is not strictly necessary to deal with this issue. However since it was the principal focus of Milton's appeal, I address the arguments presented by Mr Eklund.

55. The first point which arises relates to the construction of the second limb of GC7. As already summarised above, Mr Eklund argued that the judge was wrong to construe the second limb of GC7 and the words "such protections" as requiring that the whole of the protections provided by the burglar alarm (including any monitoring) had to be in place regardless of whether, at the relevant time, the burglar alarm had to be set. Mr Eklund submitted that the phrase "such protections" should be construed as referring to relevant protections, i.e. those which had to be in use at any time. The monitoring service would only operate when the alarm was set and there was an alarm activation. Such service could only therefore be a benefit to the interests of underwriters when the alarm had to be set and was not set. Since the judge found that, at the relevant time, the burglar alarm did not have to be set, he ought to have found that there were no protections provided by the burglar alarm (or any part of it) which underwriters could insist on at the time of the intrusion by the intruder or at the time of the fire; in such circumstances, the fact that one part of the alarm system may not have been in an operative state at the time of the intrusion or the fire was irrelevant. Mr Eklund further submitted that, on the true construction of the policy underwriters had stipulated that, during some periods, the premises would be protected by one or more human beings attending the premises and during other periods the premises would be protected by physical protections; these were two alternative stipulations; there was no hybrid requirement – it was one or the other. Mr Eklund also submitted that the judge was wrong to conclude that the phrase "to the detriment of the interests of underwriters" did not have to be concerned with the actual causative effect of the withdrawal of the relevant protection or protections on the event which occurred or its outcome; GC7

expressly referred to and required a particular effect, namely, detriment to underwriters. If "detriment" was to have any purpose or effect, it had to be concerned with the actual causative effect of the withdrawal (of monitoring) on the particular loss concerned.

56. In the light of my conclusion that Milton was obliged to set the burglar alarm, necessarily much of Mr Eklund's argument proceeds on the wrong assumption that there was no such obligation. In any event, I do not accept Milton's submissions. In my judgment the judge was correct to hold, for the reasons which he gave, that the first limb of GC7 is concerned with the circumstances in which the protections have to be used and the second limb is separately concerned with the maintenance and/or retention of the protections, regardless of actual use on a particular occasion. Moreover there is nothing in the language of GC7 which suggests that it is necessary for underwriters to establish that a breach of the second limb of GC7 (in this case the withdrawal of the monitoring) caused the loss. GC17 clearly states that compliance with the obligations imposed by GC7 is a precondition to any liability on the part of underwriters. I also do not accept that the judge's construction gives no meaning to the phrase "to the detriment of the interests of Underwriters". As he explains at paragraph 161, the purpose of the words is to exclude withdrawals or variations of a minor nature so that underwriters cannot seek to rely on minor variations so as to avoid cover. Here it was perfectly obvious that the withdrawal of the monitoring of the burglar alarm of itself adversely affected Brit's interests - it was a serious impairment of the security arrangements relating to Tournament Building, irrespective of whether there was any loss. There was no need for the judge to make any specific finding to such effect.

57. I also reject Milton's submissions that on the facts the judge should have concluded that Milton was not in breach of the obligation to maintain the monitoring facility for the burglar alarm.

58. The relevant wording of GC7 is that "such protections shall not be withdrawn or varied". The judge held as a matter of construction that this did not impose a test of strict liability, but that knowledge on the part of the insured was a requirement. He held that the insured would be in breach of the second limb of the condition precedent "if it acts or fails to act in such a way that there is a real risk that the adverse consequence might flow, namely (on facts of the instant case) the cessation of the monitoring service". He suggested that in formulating the test in this way he was following the approach adopted by Woolf J in *Victor Melik v Norwich Union* supra. He said:

> "162. Was the Claimant in breach of the second limb of GC7? The starting point is to identify the correct legal test. Mr Eklund submitted that the test was akin to recklessness; Ms Ansell's case was that the question for resolution is whether the Claimant was aware of the lack of monitoring, or if it was not aware of that fact would have been aware if it had been exercising common care.
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> 163. In Fraser v Furman [1967] 1 WLR 898 the Court of Appeal was construing policy wording which required the insured to take reasonable precautions to prevent accident or

disease. Given that the whole purpose of the insurance contract in that case was to indemnify the insured against the consequences of its own lack of care, the Court of Appeal had little difficulty in construing the policy language as requiring proof of some higher degree of culpability, namely deliberate courting of the danger, the existence of which was recognised, by failing to take measures to avert it, or by taking measures to avert it which the insurer knew to be inadequate. In Sofi v Prudential [1993] 2 Ll Rep 559, this test was interpreted as akin to recklessness in the context of property damage.

164. In Victor Melik v Norwich Union [1980] 1 Ll Rep 523, Woolf J was concerned with the construction of a stipulation which required the insured to keep the burglar alarm in efficient working order. An issue arose (although it was later conceded by the insurer during the course of the trial) as to whether, or how, the insured could be in breach of that clause if it was unaware of the defect. Woolf J therefore construed the relevant policy wording thus (page 530):

"The insertion of the word 'kept', in my view, implies within it a requirement that that before there can be in breach of that condition by an insured, he must be aware of the facts which give rise to the alarm not being in efficient working order, or if he is not aware of those facts he should at least be in a position where, exercising reasonable care, he should have known of those facts."

165. This authority was considered by Flaux J in AC Ward v Catlin [2010] Ll Rep 695. There, the policy wording was different in that it included the sentence, "All defects occurring in any protections must be promptly remedied". In the learned Judge's view, that terminology presupposed that the insured would have to have knowledge of the relevant defect before any breach of the maintenance obligation could arise. Flaux J also held that the insured would have constructive knowledge of defects that it did not in fact know about if it adopted a reckless or 'don't care' attitude towards them (see paragraph 181).

166. The policy wording in the present case is somewhat different, and arguably less favourable to the Claimant. The requirement under GC7 is not to withdraw or vary the protections. In my view, knowledge must be a requirement of this provision even though GC7 lacks the additional wording considered by Flaux J. As Woolf J pointed out in a slightly later passage on page 530, if the result were otherwise the insurer would be able to avoid liability under the policy even if the insured, through no fault of its own, was entirely unaware of the change in circumstances.

> 167. Plainly, if the insured were responsible for the withdrawal or the variation, the accompanying mental element would rarely give rise to any difficulty, but the present case is concerned with a third party, the alarm company, effectuating the act of withdrawal. The insured may have caused that to occur, but further analysis of the concomitant mental state of the Claimant is required.
>
> 168. In my judgment, an insured is in breach of the second limb of GC7 if it acts or fails to act in such a way that there is a real risk that the adverse consequence might flow, namely (on the facts of the instant case) the cessation of the monitoring service. In framing the test in that way, I am following the approach adopted by Woolf J in Victor Melik, adapting it to this slightly differently worded insurance policy. In my view, Flaux J's observations were made in a different context where the reasonable practicability obligation, or something akin to it, could only have been violated if a higher degree of culpability were established.
>
> 169. But the reality is that on either test the Claimant must be held to be in breach of the second limb of GC7…"

59. In this court[9] Mr Butcher submitted that the relevant wording of GC7 imposed a strict obligation on the insured, and that, if the monitoring protections were withdrawn by the service provider, irrespective of the knowledge of the insured, there had been no compliance with the condition precedent.

60. Mr Eklund, on the other hand, submitted that the judge had been wrong to apply the test of recklessness (as to the risk of cessation of monitoring) and that the correct test to apply was one of actual knowledge of the cessation of monitoring; as the judge had correctly found, there was no such actual knowledge; accordingly he should not have found any breach of the second limb of GC7.

61. In my judgment, Mr Butcher's approach to the construction of the second limb of GC7 is correct and the wording imposes a strict obligation on the insured. Whilst "variation" of protections necessarily implies some degree of knowledge on the part of the insured, a "withdrawal" might be effected unilaterally by a third party alarm company, irrespective of the knowledge of the insured. I see no reason why in such a case there should not be a breach of GC7. The likelihood of such protections being "withdrawn" without fault, or knowledge, on the part of the insured is for all practical purposes remote. Although one can postulate a hypothetical example where the monitoring services are "withdrawn" through no fault of, and without prior notice to,

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[9] As appears from paragraph 162 of the judgment, no such submission was made on behalf of Brit at trial. Ms Ansell's case was that the question for determination was whether Milton was aware of the lack of monitoring, or if it was not aware of that fact, would have been aware if it had been exercising common care.

the insured, for example due to the insolvency or mistake of the service provider, such a situation is unlikely to occur in practice[10] and I see no reason why the risk of such an event occurring should not be borne by the insured rather than the underwriter. The classic example of a burglar alarm being disabled by reason of the wires being cut through by a burglar is not in point on the wording of the present clause; "withdrawn" is not apt to cover such a situation.

62. The requirement in the present case is to be contrasted with the relevant wording in *Melik & Co Ltd v Norwich Union* supra where Woolf J (as he then was) held at page 530 (lhc) that a condition precedent which required a burglar alarm to be "kept in efficient working order:"

> "implies within it a requirement that before there can be a breach of that condition by an insured, he must be aware of the facts which gave rise to the alarm not being in efficient working order, or if he is not aware of those facts he should at least be in a position where exercising common care, he should have known of those facts….".

63. There is no such requirement on the insured in the present case "to keep in efficient working order". Nor did GC7 require the Appellant to take "reasonable precautions" against the withdrawal and variation of the protections, which is language which in some cases has been found to import a requirement of recklessness for there to be a breach: see e.g. *Fraser v BN Furman (Productions) Ltd (Miller Smith & Partners, third parties)* [1961] 1 WLR 898 per Diplock LJ at 906; *Sofi v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 559; *AC Ward & Son v Catlin (Five) Limited* [2009] EWHC 3122 per Flaux J at 181. The obligation in GC7 was unqualified and required that the protections should not be withdrawn or varied.

64. If I am wrong in this view, and the obligation imposed by GC7 is not a strict obligation, and some sort of mental element is required, then in my judgment the relevant test for determining whether or not Milton was in breach of GC7 is the test applied by Woolf J in *Victor Melik & Co Ltd v Norwich Union*, i.e. one of reasonable or common care, and not recklessness. In other words the relevant test would be whether Milton was aware of the facts which gave rise to the withdrawal of the monitoring service, or whether, if it was not aware of those facts, it was in a position where, exercising common care, it should have known of those facts. Although the judge said he was adapting the approach adopted by Woolf J, he appears in fact to have departed from a test based on knowledge; his formulation is based on whether the insured acts or fails to act in such a way that there is a real risk that the cessation of the monitoring service might occur. In my judgment, if knowledge is a relevant element, then the formulation of Woolf J is to be preferred. The judge's formulation does not appear to address the issue of knowledge and it is not clear whether his causative test requires negligence on the part of the insured. However, on the facts of the present case, which is the correct formulation makes little difference, since both tests were clearly satisfied.

65. On any basis Mr Eklund's submission that only actual knowledge of cessation of monitoring is sufficient to trigger non-compliance with GC7 in my judgment is

[10] A temporary suspension of the monitoring service, for example due to a power cut, would not amount to a "withdrawal".

wrong. That would entitle an insured to evade its obligations under the policy by simply not engaging with the service provider at all, so as to ensure that the insured did not obtain actual knowledge of the cessation or intended cessation.

66. The judge came to the conclusion that, whether the test as formulated by him (i.e. acting or failure to act in such a way as to give rise to a risk), or the recklessness test (i.e. whether the insured was reckless as to whether the monitoring service would be withdrawn), was the correct test to apply, on the evidence both tests were satisfied and therefore Milton was in breach of the second limb of GC7; see paragraph 169 of the judgment. I see no reason to interfere with the judge's factual findings on this issue.

67. At the hearing of the appeal Milton accepted that the judge was right to conclude on the evidence that the monitoring of the burglar alarm had ceased in February 2005 and that accordingly the alarm was not being monitored by SECOM at the date of the fire. However Mr Eklund submitted that there was no evidential basis in the correspondence or otherwise for the finding in paragraph 169 of the judgment that Milton knew SECOM would not let the situation (i.e. the non-payment of the bill) persist indefinitely; that any recklessness was as to non-payment of the invoice, and not as to the withdrawal of monitoring; that non-payment of an invoice or failing to resolve a dispute did not amount to recklessness as to the actual consequence of that failure (i.e. withdrawal of monitoring); and that not even SECOM had said that monitoring would be withdrawn after a particular date or at all if the dispute was not resolved; none of the letters in evidence suggested that there was any risk that monitoring was going to be withdrawn; on the contrary, they were only consistent with monitoring continuing, as was the attendance of the SECOM engineer in February 2005. Mr Eklund also submitted that the judge was wrong to find that it was Milton which was reckless or had the relevant knowledge; Milton had no responsibility for the payment of the SECOM invoices. The burglar alarm contract was between SECOM and GPE, not Milton. The dispute related to an invoice issued in July 2004. Milton had not been incorporated until December 2004 and did not start trading until January 2005. Accordingly, the judge had been wrong to find (at paragraph 170) that Milton "buried its head in the metaphorical sand" and "had taken this issue far too close to the wire"; Milton had no responsibility for payment of the invoice. Moreover it was GPE, not Milton, which was "clearly under pressure from its creditors"; the judge overlooked his own finding at paragraph 53 that it was GPE which was fighting off a small number of creditors at this time.

68. I do not accept these submissions. First, there is nothing in the point that it was GPE, not Milton, which had the contractual relationship with SECOM. There was no dispute that the three companies were ultimately beneficially owned or controlled by Mr and Mrs Hyams. Mrs Hyams had been responsible throughout for dealing with the SECOM correspondence and the judge rejected her evidence that she had no recollection of any final demand being sent by SECOM or that she was unaware of their having been any danger that the alarm monitoring would cease; see paragraph 53 of the judgment. She was also, as the judge held, aware of the fact that GPE was fighting off a number of creditors in 2004/2005 and "was no doubt hoping she could string matters out for as long as possible." Milton, moreover, was liable to pay GPE a monthly "recharge" in respect of costs paid by GPE in respect of the fulfilment of Milton's orders. Therefore this is not the type of case where it could possibly be argued that any knowledge acquired by Mr or Mrs Hyams in their capacity as

directors or employees of GPE was not knowledge which they also held in their capacity as directors or employees of Milton. The maintenance of the burglar alarm and the monitoring service, and the due payment of the service charges to SECOM, were clearly matters of commercial importance to Milton, as was the fact that another group company, GPE, was facing pressure from its creditors.

69. Nor is there any evidential basis upon which this court could interfere with the judge's findings of fact that, whatever the relevant test, Milton was in breach of the second limb of GC7. The judge summarised the relevant facts as found by him at paragraphs 45 to 54 and 169 to 171 of the judgment. The salient facts were:

i) In July 2004 SECOM issued an invoice ("the July 2004 invoice") in respect of the cost of SECOM providing monitoring and maintenance services for the burglar alarm between 1 August 2004 and 31 July 2005. The July 2004 invoice was never paid, whether by GPE or Milton.

ii) Brit's forensic fire investigator obtained an "Account History" from SECOM (dated 12 May 2005) which recorded that SECOM had sent a reminder letter chasing payment of the July 2004 invoice on 25 August 2004, a final demand on 14 September 2004 and a final demand with suspension notice on 13 October 2004 and had repeated the process in December 2004.

iii) The judge commented that it was surprising that none of the letters referred to in SECOM's "Account History" had been disclosed by Milton. He stated that he could not accept, and it had not been suggested, that all of these letters had been mislaid in the post.

iv) On 17 February 2005 SECOM's accounts department wrote to GPE informing it that SECOM's engineer was unable to carry out the schedule maintenance check on the alarm system when he called at the premises. The letter stated that if the maintenance was not carried out this could have an adverse effect on relevant insurance cover but gave no reason for the engineer's inability to gain access. The judge regarded Mr Hyams' evidence on the issue as "entirely unsatisfactory". He commented that, although Mr Hyams had mentioned issues over false alarms, the latter had put forward no satisfactory reason as to why the July 2004 invoice had not been paid and that there was no evidence that Milton or GPE had taken active steps to take up any false alarms dispute with SECOM. Whilst the judge appreciated that:

> "the February 2005 letter was scarcely consistent with the fact that the monitoring service (and, presumably, the maintenance of the alarm system) had already been withdrawn,"

he nonetheless found that there was no evidence that Milton had in fact been misled by the letter or that Mr and Mrs Hyams had drawn "comfort from it and/or assumed that the monitoring service had not been discontinued".

v) On 22 March 2005 a further letter was written by SECOM to GPE referring to the outstanding amount due in respect of the July 2000 invoice and stating that:

> "We do not appear to have received payment for this invoice or any reasons for withholding payment, however we understand that when our Engineer attended the property on 17. 02. 05, he was refused access as the account was in dispute.
>
> Accordingly, as have been unable to contact you by telephone, we would appreciate further details of the dispute, in order that we may try to resolve this matter as quickly as possible.
>
> Could you please write to the undersigned at the above address or alternatively contact us on [telephone number]. We look forward to hearing from you in due course."
>
> The judge accepted that this letter was not easily reconcilable with the fact that the monitoring system had already been withdrawn but then went on (as I have already stated) to reject Mrs Hyams' evidence that she had no recollection of any final demand being sent and that she was unaware of their being any danger that the alarm monitoring would cease.

70. In such circumstances, and having heard the evidence of Mr and Mrs Hyams, the judge was clearly entitled to reach the conclusions which he did in paragraphs 169 to 172, namely:

    i) that Milton knew that the July 2004 invoice had not been paid for over six months and that SECOM was not going to permit such a situation to continue indefinitely;

    ii) that Milton had not actively pursued any false alarms dispute and that there was no basis for withholding payment;

    iii) that Milton was "reckless as to the risk that the monitoring service would be cut off and rather buried its head in the metaphorical sand as regards this issue"; and that the risk was escalating as the months wore on;

    iv) that, although SECOM's post-termination correspondence was misleading, there was no evidence that Milton was in fact misled by it or that it would have done anything different had the correspondence not been raised;

    v) that Milton made no attempt to resolve the dispute or to pay the outstanding charges, instead "recklessly preferring to attempt to string matters out and to send the maintenance engineer packing"; and

    vi) that accordingly Milton was in breach of the second limb of GC7.

71. Not only were there clear evidential bases for the judge's findings, including, in particular, the evidence of Mr and Mrs Hyams, but his findings were consistent with common sense. It was the obvious consequence of not paying the July 2014 invoice that the monitoring of the burglar alarm would be withdrawn. In my judgment the judge was clearly entitled to conclude on the evidence that Milton was in breach of the second limb of GC7, even if it did not impose a strict obligation, on the basis:

i) that, if it had exercised reasonable or common care, Milton should have known that there was a risk that the monitoring service would be withdrawn; (the test articulated by Woolf J in in *Victor Melik & Co Ltd v Norwich Union*); or

ii) that Milton had acted or failed to act in such a way that there was a real risk that the monitoring service would be withdrawn; (the judge's reformulation of the test in *Melik*); or

iii) that Milton was reckless as to the actual consequences of non-payment of the invoice, and as to the risk that the monitoring service would be withdrawn, in that it failed to pay the invoice (or to contest its obligation to do so) and failed to take any action on the various letters sent by SECOM.

72. For all the above reasons I would dismiss Milton's appeal.

Issue 6

73. In the circumstances there is no need to consider Brit's application for permission to appeal the judge's decision on quantum and I do not propose to do so.

Lord Justice Kitchin:

74. I agree.

Lady Justice Rafferty:

75. I also agree.