Neutral Citation Number: [2021] EWHC 2689 (Comm)

Case No: CL-2020-000452

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2021

Before :

LIONEL PERSEY QC (SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

BERKSHIRE ASSETS (WEST LONDON) LIMITED	**Claimant**
- and -	
AXA INSURANCE UK PLC	**Defendant**

- -
- -

Patrick Lawrence QC (instructed by **Ingham Winter Green**) for the **Claimant**
Aiden Christie QC (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 21-24 June 2021

- -

Approved Judgment

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

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LIONEL PERSEY QC (SITTING AS A JUDGE OF THE HIGH COURT)

LIONEL PERSEY QC :

Introduction

1. The Claimant, Berkshire Assets (West London) Ltd. ("BAWL") seeks to recover an indemnity from the Defendant, AXA Insurance UK Plc ("AXA") pursuant to the terms of a Contractors' All Risks ("CAR") and Business Interruption ("BI") policy. AXA denies liability. It does so on the ground that BAWL failed to disclose the admitted fact that one of its directors, Michael Sherwood, was the subject of criminal charges in Malaysia at the time the policy was renewed. Had that fact been disclosed, as AXA contends it should have been, AXA says that it would not have agreed to insure BAWL in respect of CAR or BI or, indeed, any other cover. AXA says that it is therefore entitled to treat BAWL as not insured under the policy.

2. The trial lasted three and a half days. I heard evidence from six factual and two expert witnesses as follows:-

   Factual witnesses
   -Michael Sherwood. A former director of Goldman Sachs, Mr Sherwood was a director of BAWL. He gave evidence by videolink.
   -Joshua Garside. A director of BAWL.
   -Richard Gilbert. A Commercial Underwriter employed by AXA in Manchester.
   -Victoria Harris. A Central Technical Underwriter (Property) employed by AXA in London.
   -Laura Malley. A Commercial Renewals Underwriter employed by AXA in Manchester.
   -Kevin Sargant. An Assistant Property Underwriting Manager employed by AXA in London.

   Expert witnesses
   -For BAWL, Philip Foley, a director of Foley Specialities Limited.
   -For AXA, Stephen Coates, the Chief Underwriting Officer of Pool Reinsurance.

3. All of the factual witnesses gave their evidence well and were, I find, telling the truth. As for the experts, I preferred the evidence of Mr Coates. He had considerable experience (37 years) in the assessment and acceptance of commercial property and liability risks and the underwriting and acceptance of risk has always been at the core of his work. Mr Foley had considerable experience in underwriting financial institutions but he had no experience at all in CAR insurance or Delayed Start Up ("**DSU**") and had not been involved in BI insurance for very many years. It is noteworthy that Mr Lawrence QC for BAWL did not mention, let alone rely upon, Mr Foley's evidence during either his closing submissions or his reply.

The Facts

4. The facts are essentially non-controversial.

   BAWL

5. Mr Garside is a director of Paradigm Land, a property development business. In late 2016 a development opportunity at Parkview, Great West Road, Brentford ("**the**

Property") was introduced to him. This involved the conversion of an existing office block into residential apartments, together with a gym and a cinema. The project was larger than those usually undertaken by Paradigm and it was necessary for them to obtain equity and debt financing. A business partner of Mr Garside suggested that they approach Mr Sherwood, who had recently left Goldman Sachs. He viewed the Property in early 2017, said that he was interested and offered to speak to other potential investors. A few weeks later Mr Sherwood provided Paradigm with a list of investors who were willing to participate in the project.

6. BAWL was incorporated on 5 April 2017 as a joint venture vehicle to purchase and develop the Property. Mr Garside and two associates invested £2.151 million through PL Parkview Limited and another 10 investors provided the balance of the investment of £21.75 million. The two largest shareholders were Cara Investment (Klaus Schupp) and Wood Investments (Mr Sherwood) with 35.1% and 20.9% of the shares respectively. Mr Garside, Mr Schupp and Mr Sherwood were appointed as directors of BAWL.

7. Planning permission was granted for the development in October 2017 and BAWL completed the purchase of the Property in December 2017. SW4 Services Ltd ("**SW4")** had been incorporated by Mr Garside and associates to provide professional services to, inter alia, BAWL and, pursuant to a Development Management Agreement with BAWL, it provided day to day management services on BAWL's behalf. The construction work was carried out by ARJ Construction Ltd and ARJ Construction Holdings Ltd ("**ARJ**"). pursuant to a JCT Design and Build Contract concluded between BAWL and ARJ in late 2018.

8. The evidence showed that the day-to-day management of BAWL was conducted largely by Mr Garside and SW4. There were no meetings in person between the board of directors and such involvement as Mr Sherwood had was by way of informal telephone meetings, with his being involved from time to time on the financial side. He had little to no input in any other matters.

The insurance cover

9. Insurance cover for the Property and the Development was initially arranged through Metrus Limited (managers of the Property whilst it stood vacant) with Aviva Insurance Ltd. The brokers used by Metrus were Stackhouse Poland Limited. Stackhouse Poland then acted for SW4/BAWL and obtained CAR insurance for BAWL/ARJ for the period 30 November 2018 to 29 November 2019. They did so following the acceptance of a quote from AXA dated 23 November 2018. The quote contained a number of provisions, including the following:-

> "… **Important information**
>
> This quote is subject to your customer confirming the information in the quote summary is correct.
>
> If any of this information is incorrect, we reserve the right to change the terms and conditions, premium or withdraw this quote

Fair presentation of risk

Except as otherwise disclosed to us in the information presented for the risk to be insured and agree with the following statements concerning previous history …

The proposer for insurance, its partners or directors or any other person who plays a significant role in managing or organising the business activities, have not, either personally or in any business capacity, been convicted of a criminal offence or charged (but not yet tried) with a criminal offence.

NB This statement does not apply to motoring offences and/or convictions spent under the terms of the Rehabilitation of Offenders Act 1974 or any subsequent amendments to the Act …

If your customer accepts our quote they confirm that they have made a fair presentation of the risk to be insured and agree with the following statements concerning previous history …

Previous history

Except as otherwise disclosed to us in the information presented to us for the risk to be insured, we will provide cover based on the following statements being correct."

10. The quote was accepted by Mr Garside on BAWL's behalf.

11. In early 2019 Reich Insurance Brokers Limited ("**Reich**") conducted a review of BAWL's insurance policies and subsequently recommended that further insurance should be obtained for business interruption and terrorism. Reich were appointed to act on behalf of BAWL on 1 April 2019. From August 2019 there were various communications between Reich and AXA regarding the amendment of the cover. The proposal was that it be amended to include BI cover for a sum up to £7.8 million, financial loss cover in respect of delay to the works and cover for legal expenses. AXA were only prepared to grant BI cover up to £2 million, they declined to provide financial loss cover and Reich did not, in the event, pursue its request for legal expenses cover.

12. On 22 November 2019 AXA sent Reich some renewal policy documentation. This was forwarded by Reich to Mr Garside and they asked him to check all the details in the documentation attached. The policy documentation showed a renewal premium of £3,368.96 in respect of business interruption and terrorism. It also provided as follows:-

"… Important Information

- The details contained in your renewal schedule are based on the information you have provided to us …

> - You must tell us any information that may influence us in offering this renewal and the terms provided. If you are not sure if something is important or relevant you should tell your insurer adviser about it. Relevant information is something that could affect our decision to renew your policy or affect the terms of your policy.
>
> - You must make a fair presentation of the risk and if you do not tell us about any changes, or fail to advise us of any inaccuracies or omissions, your policy may not protect you in the event of a claim ..."

13. On 29 November 2019 Reich replied to AXA and asked them to go ahead with the renewal. This they did and the premium was debited from Reich's account. The renewal had been carried out on Mr Garside's instructions. He said, and I accept, that when asked by Reich to inform them about any material changes that could affect the risk he understood this to mean the Development and in particular the construction works. It did not occur to him that he would need to check that his co-directors had or had not been charged or convicted with a criminal offence. He therefore made no enquiries with them although now understands that he should have done. He did not at the time have any idea that Mr Sherwood had been charged in Malaysia.

The charges

14. On 9 August 2019 the Attorney General as Public Prosecutor in Malaysia filed four criminal charges against Mr Sherwood and sixteen other individuals. Mr Sherwood became aware of them shortly thereafter. The charges were never in fact served upon him.

15. The charges against Mr Sherwood were brought by the Malaysian Public Prosecutor under section 367(1) of the *Capital Markets and Services Act 2007* ("**CMSA**"). This provides as follows:-

> "… Where an offence has been committed against this Act or any regulations made there under by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances ..."

16. The charges were accompanied by a Media Release issued by the Malaysian Attorney General which stated that criminal charges under section 179(c) of the CMSA had been filed against three Goldman Sachs subsidiaries and their key employees Tim Leissner and Roger Ng, together with Jasmine Loo Ai Swan of 1MDB and Low Taek

Jo in December 2018. One of those subsidiaries was Goldman Sachs International ("**GSI**"), of which Mr Sherwood had been a director at the material time. These 2018 charges had been filed in relation to a scheme to defraud the Government of Malaysia and purchasers of three bonds with a face value of US$6.5 million that had been underwritten by Goldman Sachs and issued by subsidiaries of 1MDB as result of the commission and abetting of false or misleading statements to dishonestly misappropriate billions from the bond proceeds. The later charges against Mr Sherwood and the other directors were brought under section 367 of the CMSA by reason of their being those who exercised or ought to have exercised decision-making authority over the transactions of the Goldman Sachs companies and under section 179(c) of the CMSA which provided that

> "… 179. It shall be unlawful for any person, directly or indirectly in connection with subscription, purchase or sale of any securities –
>
> …
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements, made in the light of the circumstances under which they were made, not misleading …"

17. The Attorney General said that he would be seeking custodial sentences and criminal fines against the accused given the severity of the scheme to defraud, the fraudulent misappropriation of billions in bond proceeds, the lengthy period over which the offences were planned and executed, the number of Goldman Sachs subsidiaries, officers and employees involved and the relative value of the fees and commissions paid to Goldman Sachs for their multiple roles played in arranging, structuring, underwriting and selling the three bonds.

The claim and its denial

18. On 1 January 2020 there was an escape of water through a sprinkler pipe at the Property. This was discovered on 2 January 2020. A substantial amount of damage was caused to around 40 completed or partially completed apartments and also to communal areas. Through Reich BAWL and ARJ made claims against AXA under the CAR and BI policies. On 20 February 2020 Reich emailed AXA and advised that they had been advised that Mr Sherwood had been charged but not prosecuted in Malaysia and that they had been advised that he could in theory be placed under prosecution as being a director of the firm as per the laws and customs of Malaysia.

19. On 6 March 2020 AXA's solicitors, Kennedys, wrote to Reich in order to detail the concerns that AXA had regarding BAWL's claims and to invite their views on those concerns. They said that it appeared that BAWL had not made a fair presentation of the risk to AXA and that, had the true position been known, AXA would not have entered into the variation and/or renewal of the Policy. They set out AXA's

understanding that Goldman Sachs had withheld Mr Sherwood's bonus as a result of his alleged involvement in a US$4.3 billion fraud. He must, they said, have been on notice at the time that the Policy was incepted and, if so, this was a circumstance that should have been disclosed. In addition and/or in any event it was clear that on or about 9 August 2019 Mr Sherwood was charged in connection with a $4.3 billion fraud and that this was plainly a material fact which should have been disclosed at the time of the variation and renewal of the Policy. Kennedys advised that no final decision to avoid the policy had yet been made and invited Reich to provide their views. Crawford & Company Adjusters (UK) Ltd. ("**Crawford**") wrote to BAWL, c/o Reich, in similar terms on 9 March 2020.

20. Mr Sherwood's solicitors, Ashurst LLP ("**Ashurst**"), wrote to BAWL on 13 March 2020 in order to deal with the letters from Kennedys and Crawford. They made it clear that, first, Mr Sherwood was not involved in the planning, approval or execution of the transactions which had given rise to the charges against Goldman Sachs and employees in Malaysia and, secondly, that Mr Sherwood faced no allegations of personal involvement in fraud or any other wrongdoing. The charges that he faced were solely in his capacity as a director of one of the Goldman Sachs subsidiaries charged with a failure to make proper disclosure of information about the underlying transactions. They said that there were strong grounds for suspecting that the Malaysian proceedings were politically and commercially motivated and intended to pressure Goldman Sachs into a commercial settlement.

21. Then, on 18 March 2020, BAWL's solicitors, Ingram Winter Green LLP ("**IWP**"), wrote to Kennedys. They asserted that there had been no failure to disclose any material circumstance. They attached the letter from Ashurst and repeated that there was no allegation of dishonesty against Mr Sherwood. The charges against Mr Sherwood were not relevant because they did not give rise to the slightest element of moral hazard.

22. Kennedys responded to IWG's letter on 14 April 2020. They said that they were firmly of the view that the charges against Mr Sherwood were material to the risk, that they should have been disclosed at renewal and, had they been so disclosed, underwriters would have declined to provide cover to BAWL. They contended that although the charges did not include a specific allegation of dishonesty against GSI or Mr Sherwood they clearly arose from a dishonest and fraudulent scheme of huge scale in which an important role was played by GSI and/or related Goldman Sachs companies. The criminal charges against Mr Sherwood were material as being indicative of poor moral standing and given that the charges related to a multi-million dollar fraud, whether or not that fraud directly involved Mr Sherwood, AXA was firmly of the view that had they been disclosed then they would have declined to continue cover under the CAR Policy and would not have entered into any further contracts of insurance. They summarised AXA's position as being that the Policy was to be treated as if it had been renewed on different terms with the effect that, first, BAWL was not an insured under the CAR policy, although ARJ was an insured, and secondly, that there was no BI cover from the date of inception of the Policy. This action was then commenced by BAWL.

Discontinuance of the charges in Malaysia

23. On 9 October 2020 the Public Prosecutor of Malaysia issued a letter of release in which he confirmed that the proceedings and process against Mr Sherwood had been discontinued. This followed a settlement agreement between Goldman Sachs, the Malaysian Government and 1MDB. Pursuant to that settlement Goldman Sachs paid a total settlement of US$3.9 billion to the Malaysian Government. It also paid substantial sums to the US and UK authorities by way of fines.

The Issues

24. The parties have agreed that the two principal issues that I have to determine are as follows:-
(1) Was the fact that Mr Sherwood had been charged with the Charges a material circumstance for the purposes of the duty of fair presentation?

(2) If it was, and if it had been adequately disclosed, would the AXA have agreed to insure the BAWL in respect of business interruption, or at all, under the renewed Policy?

25. AXA accept that the burden of proof is upon them in relation to both issues.

The Law

The Insurance Act 2015

26. This case is concerned with the duty of fair presentation under section 3(1) of the *Insurance Act 2015* ("**the 2015 Act**") which provides that

> "… Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk ..."

A fair presentation of the risk is defined in section 3(3)(a) and 3(4)(a) as follows:

> "… 3(3) A fair presentation of the risk is one —
>
> (a) which makes the disclosure required by subsection (4) ...
>
> … 3(4) The disclosure required is as follows, ... —
>
> (a) disclosure of every material circumstance which the insured knows or ought to know, ..."

Materiality

27. Material circumstance is defined by section 7 as follows:-

> "… 7(3) A circumstance ... is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.
>
> (4) Examples of things which may be material circumstances are— ...

> (c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question ..."

28. Mr Christie QC for AXA submitted that a number of important principles relevant to material circumstances are well established by authority and that there is no reason to suppose that the *2015 Act* has resulted in any change to them. I agree. In proposing the legislation which became the 2015 Act the Law Commission stated that the concepts of "material circumstance" and "prudent insurer" were intentionally taken from the existing statute and that they would expect the existing case law to continue to be used to interpret them: *Law Commission Report* of July 2014 on *'Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment'*, Law Com No. 353, §7.25.

29. The principles are as follows:-

(1) The materiality of a particular fact is a question of fact and is to be determined by the circumstances of each case;

(2) Materiality is to be tested at the time of placement and not by reference to subsequent events: Versloot Dredging v HDI Gerling Industrie Versicherung (The DC Merwestone) [2017] AC 1, per Lord Sumption at §32;

(3) Facts raising doubts as to the risk are sufficient to be material. It is not necessary for the facts to be shown, with hindsight, to have actually affected the risk: The Dora [1989] 1 Lloyd's Rep. 69, per Phillips J at 93;

(4) The overall effect of the 'prudent insurer' test is that whether there has been a fair presentation of the risk remains to be assessed principally from the perspective of an insurer.

(5) A circumstance does not have to be decisive for the hypothetical prudent insurer in determining whether to take the risk or on what terms. This is reflected in the wording of section 7: "judgement" does not mean 'final decision', but simply the 'formation of an opinion'. It is enough that the circumstance is one which the prudent insurer would rightly take into account as a factor in coming to his decision: see MacGillivray on Insurance Law (14th Ed.), §17-036.

Inducement

30. Section 8(1) of the 2015 Act provides as follows:

> "… The insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer—
>
> (a) would not have entered into the contract of insurance at all, or
> (b) would have done so only on different terms ..."

31. This is a question of fact.

"Moral hazard"

32. There was considerable debate between the parties as to whether the charges against Mr Sherwood amounted to a moral hazard that BAWL was required to disclose because it was a material circumstance. BAWL submitted that the charges did not constitute a "moral hazard". AXA submitted that they clearly did.

33. I will consider the parties' respective submissions on the facts at a later stage in this judgment. It is, however, first necessary for me to consider the legal position.

34. The first question is what constitutes a moral hazard in law. BAWL submits that moral hazard is concerned with something that should have been but was not disclosed which indicates a propensity to act dishonestly on the part of the assured or on the part of somebody who was closely involved in the management of the assured's affairs. Put shortly, they submit that moral hazard is all about honesty and dishonesty, but that it is not the case that any instance of prior dishonesty has to be disclosed. AXA does not agree with this. They contend that moral hazard might include a wide range of adverse factors, including dishonesty, incompetence and carelessness.

35. A number of definitions of moral hazard were cited to me, including the following:-

(1) *Halsbury's Laws*, vol. 60 at §39

"… Any fact is material which leads to the inference that the particular proposer is a person, or one of a class of persons, whose proposal for insurance ought to be subjected to special consideration before it can be decided whether it should be accepted at all or accepted at the normal rate. This is usually referred to as the 'moral hazard' ..."

"(2) *MacGillivray* (above) at §17:

"… Facts may be material if they suggest that the integrity of the proposer for insurance is open to doubt, or that his motive in seeking cover is not merely the prudent one of covering himself against losses which might occur in the ordinary course of events ... The phrase 'moral hazard' is used to describe circumstances, invariably involving dishonesty on the part of the insured, which give rise to a concern that there will be dishonesty in the reporting and presentation of claims."

(3) In *Locker and Woolf v. Western Australian Insurance Co.*[1936] 1 KB 408 at 414, Slesser LJ observed as follows:

"… It is elementary that one of the matters to be considered by an insurance company in entering into contractual relations with a proposed insurer is the question of the moral integrity of the proposer - what has been called the moral hazard ..."

(4) *McDonald-Eggers, Good Faith in Insurance Contracts* at §15-26

> "… 'Moral hazard' is a loaded term. In this context, it refers to the prospect of the assured himself acting in a way which would add to the risk to be insured in that a loss may be sustained through the fraudulent design of the assured, whether in the procurement of the loss or the fabrication or exaggeration of a claim; indeed, it might also refer, in the broad sense, to the unacceptability of contracting with dishonest assureds. The term may also refer to the prospect of fraud by another person that may cause loss to the assured; usually, such a person is intimately associated with the interest insured, such as the alter ego or a director of the assured, servants or agents of the assured (including an insurance broker), the master or manager of a ship, the manager of a business or a warehouseman..."

36. It appears from the above that there is no settled definition of moral hazard. This is unsurprising in circumstances where each case will necessarily depend upon its own facts. It is preferable, in my view, for the Court to rely upon the statutory definition of material circumstance in section 7(3)(4) of the 2015 Act when considering the facts of the particular case before it.

37. It is well established that a charge of a criminal offence will often constitute a material circumstance. The position is summarised in *MacGillivray* (above) at §17-061

> "... If at the time of placement the insured is under investigation for, or has been charged with, an offence which he knows he did not commit and of which he is subsequently acquitted, the investigation or allegation are nonetheless material and should be disclosed. Given that the criterion of materiality is what would influence the prudent underwriter when assessing the risk, that the prudent underwriter is entitled to take into account facts raising doubts about the risk, and that no underwriter called as an expert witness would be likely to say that he would pay no attention to a recent allegation involving serious dishonesty, this is not surprising. ...
>
> The duty to act in good faith does not preclude an insurer from avoiding the insurance for non-disclosure of an allegation of criminality even when the insured has been acquitted. The risk of injustice is outweighed by the imperative that the fair transfer of risk to an insurer must depend upon equality of information and by the undesirable consequences of requiring insurers to establish that an allegation was well-founded as a condition of avoidance.
>
> The risk of injustice is said to be diminished by the right of the insured to present exculpatory evidence to the underwriter

> when disclosing the allegation made against him, but it has been doubted whether this would achieve anything other than in exceptional cases where a slim file of documents produced by the broker demonstrated conclusively that the allegation was false. ...
>
> ... because the test of materiality was an objective one, the courts were able to set limits on what constituted 'moral hazard'. There was room for a test of proportionality, having regard to the nature of the risk and the moral hazard under consideration, while the undisclosed allegation may be too old or insufficiently serious to be material."

38. The editors of *MacGillivray* relied on the following authorities in support of their summary of the relevant principles.

(1) *March Cabaret Club v. London Assurance* [1975] 1 Lloyd's Rep. 169 a claim under property damage insurance, involving non-disclosure by a director of the insured of an offence of handling stolen goods worth c. £20,000 for which he was charged in the year before the insurance contract (and for which he was later found guilty and fined), in which May J. held that the offence was a material fact. He added, obiter:

> "… Had it been material I would have been prepared to hold in this case that in any event [the director] ought to have disclosed the fact of his arrest, charge and committal for trial at the date of renewal, even though in truth he was innocent ..."

(2) In *Reynolds v. Phoenix Assurance Co* [1978] 1 Lloyd's Rep 440 Forbes J. took a contrary view, holding that the non-disclosure by an insured of a conviction 11 years before of an offence of receiving two stolen tractor batteries worth £10-12 for which he had been fined was not a material fact. He declined to follow the dictum of May J. in *March Cabaret Club* (above), holding that an allegation of conspiracy to defraud, which had not been pursued and which he was satisfied was without any sound basis, was not a material fact, on the grounds that the submission that an untrue allegation must be disclosed was devoid of any merit. There is no reason to doubt Forbes J.'s finding in relation to a conviction long before of an offence involving low value (indeed, under current legislation, the conviction would be treated as spent). However, his reasoning on the allegation of conspiracy to defraud has not been followed in more recent cases.

(3) *The Dora* (above) concerned a claim on yacht insurance. Underwriters avoided liability relying, inter alia, upon the non-disclosure of the fact that charges of smuggling goods worth $6,000 had been made against employees of the insured with responsibilities including care of the yacht. Those charges were later resolved without convictions by the payment of administrative penalties. Phillips J. held that smuggling on that scale was sufficiently significant to be material, that the charges should have been disclosed whether or not they were well founded, and that the availability of an administrative penalty procedure had no effect upon the materiality

of the charges. After considering the judgments *in March Cabaret Club* and *Reynolds*, he preferred the reasoning of May J., and added:

> "… When accepting a risk underwriters are properly influenced not merely by facts which, with hindsight, can be shown to have actually affected the risk but with facts that raise doubts as to the risk ..."

(4) *Brotherton v. Aseguradora Colseguros* (No. 2) [2003] EWCA Civ 705, 1 Lloyd's Rep. IR 746 concerned a claim involving undisclosed allegations made in the press and on national television in Colombia of serious impropriety against the president and other officers of the insured. Moore-Bick J had held that pleading in a Defence that the allegations were unfounded was irrelevant and should be struck out. The Court of Appeal upheld his decision. The leading judgment of Mance LJ included the following:

> "… 21. ... As a matter of principle, ... it is difficult to see any reason why, if the evidence satisfies the court that a prudent underwriter would have regarded information suggesting the possibility of moral hazard as material ..., that should not suffice. In my view that is the basic legal position.
>
> 22. However, the authorities grapple understandably with some hard cases. First, what if at the time of placing the insured himself is under investigation for, or has been charged with, an offence which he knows that he did not commit, and of which he is subsequent to the placing indeed acquitted? Forbes J in Reynolds and Fisher J in Gate v Sun Alliance Insurance ... thought that this could not be material. May J in March Cabaret and Phillips J as he was in The Dora held, after hearing underwriting evidence, that it could be, on the basis, as Phillips J put it, that:
>
> When accepting a risk underwriters are properly influenced not merely by facts which, with hindsight, can be shown to have actually affected the risk but with facts that raise doubts about the risk.
>
> I add however that, in this situation, the issues of both materiality and inducement would in all likelihood fall to be judged on the basis that, if there had been disclosure, it would have embraced all aspects of the insured's knowledge, including his own statement of his innocence and such independent evidence as he had to support that by the time of placing. This might itself throw a different light on the answer to one or both of the issues of materiality and inducement. That would of course be a matter of fact and evidence ..."

Buxton LJ agreed, and added as follows:

> "… 39. First, it is agreed on all sides that materiality is to be judged at the time of accepting the risk. Materiality depends on the effect of the circumstance on the decision of a prudent underwriter. I do not see how that effect can be sensibly judged in any particular case except in the context of the circumstances that existed at the time of acceptance of the risk. It seems self-evident that a prudent underwriter will or at least may be affected by rumour or allegations about matters that are material to the risk. ...
>
> 40. Secondly, it is necessary to examine further the proposition that if the rumour proves to be false the underwriter has lost nothing in writing the policy, because he has written the risk that he thought he was writing. He has however lost the opportunity to take an informed decision at the time of placement. ... Here again, it is the position of the underwriter at the date of the proposal that is crucial.
>
> 41. Thirdly, great difficulty is caused when the underwriter discovers the undisclosed allegations, and wishes to rescind. On the appellant's argument, he cannot safely do so unless he satisfies himself that the allegations are accurate or, perhaps, not plainly untrue ... That would seem to be a complete departure from the important requirement of certainty in insurance dealings. In each case the underwriter, even though he complains of non-disclosure of a matter that on the facts known at the date of placement was material, has to await a trial in order to determine whether he is on risk. That, unsatisfactory, position is the direct outcome of moving the decision on materiality from the date of placement to a later occasion ..."

(5) In *North Star Shipping v. Sphere Drake Insurance* [2005] 2 Lloyd's Rep. 76 Colman J. held that underwriters were entitled to avoid policies in circumstances where there had been a failure to disclose a number of pending criminal proceedings involving allegations of dishonesty against the two brothers who owned and managed the insured companies, even though these were eventually either set aside or resulted in acquittals. These were material facts. The Court of Appeal (reported at [2006] 2 Lloyd's Rep. 183) upheld his decision, holding, per Waller LJ, that the allegations were material facts. What was material was a matter of evidence to be given by underwriters. It was not open to the assured to argue that there might be a distinction between allegations which related to the risk and allegations which bore no relation to the risk.

39. I consider that the principles established in the above cases do support the passages from *MacGillivray* that I have cited in paragraph 37 above.

40. There was some debate between the parties as to the nature of the evidence that the Court was entitled to take into account when considering materiality. Mr Lawrence QC submitted on behalf of BAWL that such evidence would include all of that

evidence which was or would have been available to the assured at the time of placing the insurance. He relied upon *Brotherton* and more recent cases in support of this submission. Mr Christie QC submitted that there was no principle of law to this effect, and that one simply had to look at the charges and ask if they were material to be disclosed or not. He contended that the passage in *Brotherton* on which Mr Lawrence QC relied was quite a tentative observation. I accept Mr Lawrence QC's submission on this point – the Court is entitled to take into account all of the evidence that was, or would have been, available to the assured at the time the insurance was placed. In my judgment the passage at paragraph 22 of Mance LJ's judgment was intended to, and does, represent the law. It was the judgment of the Court and it has received direct or indirect support in two subsequent authorities, the *North Star Shipping* case (above) and *Norwich Union Insurance Ltd v Meisels* [2007] Lloyd's Rep IR 69 at §11.

41. In fact, however, this debate does not really take matters much further in the context of the present dispute. This is because AXA did not deny cover immediately upon appreciating that there had been a failure to disclose the charges against Mr Sherwood. As my summary of the facts shows above, they gave BAWL an opportunity to respond and that opportunity was taken up by Mr Sherwood's solicitors, Ashurst, as well as by IWG. AXA's denial of cover was made after they had received and had taken into account all of that which BAWL and Mr Sherwood had to say.

E: The issues decided

Issue 1: Materiality

42. The first question for me to determine is whether the charges against Mr Sherwood should have been disclosed by BAWL. Mr Lawrence QC submits that they did not need to be disclosed because Mr Sherwood was not charged with any offence involving dishonesty. Mr Christie QC did not accept this.

43. It was submitted on behalf of BAWL that there were two points of law that needed to be considered. First, that the criminal charges against Mr Sherwood did not involve allegations of deceit or dishonesty. Secondly, that the Court had to take into account all of the points that BAWL would have made had they appreciated that they were under a duty to disclose. I accept that on careful analysis and with the benefit of argument from leading counsel that it was not necessary for the Malaysian prosecutors to allege that Mr Sherwood was guilty of deceit or dishonesty. I also find that there was no deceit or dishonesty on his part. I will take into account all of the points that were made on BAWL and Mr Sherwood's behalf.

44. It is in my view necessary to consider the matter from the point of view of a reasonable insurer in the position of AXA at the time that the decision would have been made had BAWL given full disclosure. I received evidence from AXA on this as well as from the experts. I will not refer to the evidence of Mr Foley, because I am satisfied that he had no relevant experience in this field of insurance and his evidence was not relied upon by Mr Lawrence QC in either his closing submissions or his reply.

45. The evidence from AXA was given by Ms Victoria Harris and by Mr Kevin Sargant. Ms Harris is a Central Property Underwriter (Property) who works from AXA's office at Old Broad Street in London. On 8 August 2019 she was asked by Mr Gilbert whether AXA would be prepared to cover BAWL for BI. She explained that AXA is not keen to write delay in start-up cover ("**DSU**") and that she was concerned at the indemnity limit of £7.8 million. She advised Mr Gilbert that she would consider the provision of Advanced Loss of Rent cover with a £2 million cap. She heard nothing further from Mr Gilbert. This was not unusual. Her role was to advise underwriters about the cover that AXA were prepared to provide and upon what terms. It was the task of the underwriters to seek to negotiate cover within those parameters.

46. Ms Harris next heard about the matter after AXA had avoided liability under the policy. She was asked to explain what she would have done had she been aware of the criminal charges against Mr Sherwood before the policy was renewed. She said that she would have investigated the charges online. From this she would have learned that the charges were criminal in nature and that they were serious, with Mr Sherwood being implicated in a multi-billion dollar fraud and, if convicted, facing a prison sentence of up to 10 years and large fines. These would, she said, have been of huge concern to her. She was aware of AXA's Practice Note on "disclosure of previous insurance, financial or criminal matters" dated 7 June 2018. This provided, inter alia, as follows:

> "… if the client does disclose matters that fall within the negative criteria set out in the standard Quote letter or Proposal Form, the risk will not be acceptable to us and should be declined. It is essential that we adopt a uniform approach where matters are disclosed in order that we can demonstrate our philosophy and apply the appropriate remedy should a non-disclosure situation arise. Where matters are disclosed the standard position is as follows:
>
> NB. if for Commercial reasons, underwriters wish to consider writing a risk which falls within the negative criteria detailed below, this must be referred to CCU or TC with a full rationale as detailed in section 4 below.
>
> The statements apply to:
>
> (a) the proposer for insurance;
> (b) its partners or directors or any other person who plays a significant role in managing or organising the business activities …"

47. Ms Harris said in her witness statement that the effect of the Practice Note was primarily that, if criminal charges were disclosed, the risk should be declined. Had she known about the charges against Mr Sherwood she was in no doubt that she would have regarded them as material and immediately declined the request for BI cover and would also have wanted AXA to come off cover for the whole project.

48. Ms Harris was cross-examined on the basis that had she been aware that the charges against Mr Sherwood did not indicate any form of dishonesty or impropriety on his

part and that he was prosecuted simply and solely on the basis that his directorship of Goldman Sachs exposed him to a strict liability in respect of the matters charged the position would have been squarely within the scope of paragraph 4.2 of the Practice Note. This provided as follows:-

> " … 4.2 Other special circumstances There may be situations where it is felt that there are special or extenuating circumstances surrounding the matter disclosed where the client's moral hazard is not in question. If Branches feel this is the case and wish to proceed with an enquiry the matter must be referred to CCU immediately on disclosure. This also applies in any situation where disclosures are made prior to a mid-term alteration or renewal of business ..."

Ms Harris said that she would not in that event be comfortable about making the decision personally and would refer it upwards.

49. Mr Sargant was the Assistant Property Underwriting Manager employed by AXA at their Old Broad Street office. He was a co-author of the Practice Note. He had no involvement in the placing of the insurance but the matter was referred to him after the incident. He considered that there was a material non-disclosure and said that in light of this, and after reviewing the correspondence about it from the solicitors for BAWL and Mr Sherwood, he took the decision to decline all cover for DSU/BI and to remove BAWL from CAR cover as from renewal. He said in evidence that if AXA had been given full details at the time of renewal they would simply have declined to provide cover given the numbers involved, the fact that it was outside AXA's strategy to write risk for customers who have been charged with or convicted of a criminal offence and they were not experts in Malaysian law.

50. Both parties relied upon the evidence of Mr Coates, the expert retained on behalf of AXA. I find that the evidence that he gave, both in writing and to me, was fair and balanced.

51. Mr Coates' evidence was, in summary, that:-

(1) If it turned out that the charges against Mr Sherwood were entirely unconnected to any allegations of personal wrongdoing and had been brought purely by virtue of his senior position within Goldman Sachs then there would no issue of moral hazard;

(2) He nevertheless considered that the charges were material circumstances that it was obligatory to disclose to the insurer. He said that it was a material circumstance even if it was being asserted by the insured that there was no moral hazard.

> "… Because it's still a criminal charge with a very complicated set of circumstances that whilst Reich could have presented the picture as you described it, at that time, that wasn't proven. It was still a criminal charge and the underwriting will need to be convinced that that in fact was the correct interpretation of what was going on, because underwriters get told lots of -- very frequently that criminal charges have been brought but he is innocent or they're going to be dropped or whatever, so he is

> going to have to find a way of validating the story that he is being told in some shape or form, as well as other things like "Well, what is the role of Mr Sherwood in this business? ..."

52. Although Mr Coates was asked several times about this he was consistent in his opinion that the charges should have been disclosed.

53. I find that the charges should have been disclosed. They were material circumstances within the meaning of the Act. I accept that AXA were not in a position to determine whether or not the allegations were entirely unconnected to any allegations of personal wrongdoing. Nor were they bound simply to accept the assertions made on behalf of BAWL. It is, in my judgment, important to recognise that AXA could not be expected at that time to resolve the issue of whether the charges against Mr Sherwood did or did not involve allegations of deceit or dishonesty. They were not under an obligation to BAWL to carry out a detailed check into, or analysis of, the nature of those charges. Furthermore, as Kennedys said in their letter dated 14 April 2020, the charges clearly arose from a dishonest and fraudulent scheme of huge scale in which GSI and/or related Goldman Sachs companies played an important role. I must, as the authorities show, test materiality as at the date of placement. Facts raising doubt as to the risk are sufficient to be material. It is not the task of this Court to form its own view, with the benefit of hindsight and three and half days of evidence and argument.

Issue 2: Inducement

54. BAWL submitted that AXA had not shown that, but for BAWL's failure to disclose the charges, it would not have entered into the policy at all. Mr Lawrence QC submitted that AXA's position should be viewed with scepticism because (1) they would not have wanted to alienate Reich, a substantial broker which had just started to act for BAWL; and that (2) Mr Sherwood's background and career was material in a positive way because it would mean that the financial position of BAWL would have been looked at with the eagle eye of a former CEO of Goldman Sachs; and (3) it must be considered whether it would have been desirable for AXA to take a step which would have had extremely unfortunate consequences for Mr Sherwood personally. I do not consider that there is anything in these points. Had any of these matters been of such concern to AXA then one wonders why they did in fact avoid liability under the policy.

55. Mr Lawrence QC submitted that AXA's case on inducement was bound to fail because, if there had been disclosure, it would have established that Mr Sherwood was not in fact, when the matter was properly understood, on the receiving end of an allegation of fraud. This he said would have been an end to the enquiry and it is the end to AXA's case on inducement. I disagree.

56. BAWL relied heavily upon the evidence of Ms Harris as the hypothetical decision-taker. She, it was submitted, wrongly treated Mr Sherwood as having been implicated in the fraud. Although she said that she might have discussed the matter with either the senior casualty underwriter for the North or her line manager neither of them was in fact called to give evidence. And it was further submitted that she did not adequately address those facts that would have been before her had she dealt with

matters at the time. The upshot of all this was, BAWL submitted, that there was no evidence upon which a finding of inducement could be made.

57. It was common ground that AXA's branch office had no authority to write the risk under the Practice Note. If the charges had been disclosed to them and the exculpatory matters upon which BAWL rely had been referred to London then I am satisfied that AXA would have declined the risk, as they did when it was in fact referred to them. There is no reason to suppose that any different considerations would, or may, have been taken into account if disclosure had been given at the outset or that the conclusions of the underwriting team would have been any different. Mr Sargant said that he was not aware of any prior case in which a case had been referred to the central underwriting team. Although he accepted that there would have been a discretion to decide to cover notwithstanding the existence of criminal charges, it would have been outside AXA's underwriting strategy if they had made that decision.

58. I should for completeness mention that BAWL relied upon the fact that other underwriters were prepared to cover Mr Sherwood following disclosure of the charges to them. I do not regard this of assistance in my consideration of the issues in this case. The insurance policies were different in nature from the policy under consideration here. I am concerned with AXA's conduct in relation to the cover which they provided.

Conclusion

59. I find, for the reasons given above, that the claim fails. I invite the parties to agree a draft order for me to approve.