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[2015] Vol. 1 INSURANCE AND REINSURANCE PLUS 11

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

8-10, 14, 16-17, 22-24 July; 30 October 2014

TED BAKER PLC AND ANOTHER
v
AXA INSURANCE UK PLC AND OTHERS

[2014] EWHC 3548 (Comm)

Before Mr Justice EDER

Insurance (business interruption) – Claims cooperation clause – Requirement for assured to submit proofs as might reasonably be required by insurers – Whether clause broken – Effect of breach – Burden of proof – Effect of per loss deductible – Calculation of loss of gross revenue.

This was a claim by the claimants (TB) for business interruption losses under successive policies subscribed to by the defendant insurers for the period 2004 to 2008.

TB was a wholesaler and retailer of fashion clothing and accessories, mainly imported from China. On 9 December 2008 TB received an anonymous telephone call stating that a member of staff was stealing stock from its main warehouse, located in North London and known as the Ted Baker Distribution Centre (TBDC). The employee was subsequently identified as Joseph Okyere-Nsiah (JON). Police investigation showed that the thefts had been going on for the period 2004 to 2008. The present claim was for business interruption losses from some 500 thefts over five years under the successive insurance policies in force in that period.

The policies were more or less in the same form. The Claims Conditions set out a list of obligations on TB, and Claims Condition 3 stated that: "No claim under the Policy shall be payable unless the terms of this condition have been complied with ..." General Condition 15 stated that: "It is a condition precedent to any liability on the part of the Company under this Policy that a) the terms hereof so far as they relate to anything to be done or complied with by the Insured are duly and faithfully observed and fulfilled by the Insured and by any other person who may be entitled to be indemnified under this Policy ..."

The Business Interruption All Risks section of the policy set out the insuring provisions. The policy covered loss of gross turnover due to reduction in turnover and increased cost of working during the indemnity period. The sum could be adjusted by reference to the trends of the business. The Business Interruption All Risks cover excluded consequential loss arising directly or indirectly from "(d) disappearance unexplained or inventory shortage misfiling or misplacing of information ..."

The Business Interruption section contained Special Conditions. Special Condition 2, headed "Claims Conditions" stated:

"(a) In the event of any loss destruction or damage in consequence of which a claim is or may be made under this Section the Insured shall

– notify the Company immediately

– deliver to the Company at the Insureds expense within 7 days of its happening full details of loss destruction or damage caused by riot civil commotion strikers locked-out workers persons taking part in labour disturbances or malicious persons

– with due diligence carry out and permit to be taken any action which may be reasonably practicable to minimise or check any interruption of or interference with the Business or to avoid or diminish the loss

(b) In the event of a claim being made under this Section the Insured at their own expense shall

(i) – (not later than 30 days after the expiry of the Indemnity Period or within such further time as the Company may allow) deliver to the Company in writing particulars of their claim together with details of all other insurances covering property used by the Insured at the Premises for the purpose of the Business or any part of it or any resulting consequential loss ...

(ii) – deliver to the Company such books of account and other business books vouchers invoices balance sheets and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim ..

(c) If the terms of this condition have not been complied with

– no claims under this Section shall be payable ..."

On or about 12 December 2008 TB informed its brokers of the discovery of JON's thieving activities, and on the same day the insurers were notified of a claim for theft of stock under their fidelity policy. On 18 December 2008 there was an initial meeting attended by TB and the insurers' loss adjusters represented by, amongst others, Mr Coonan. That was followed by an email from Mr Coonan dated 29 December 2008 in which he asked TB to provide various information and documents falling into seven classes:

"1. Copy of Mr Okyere-Nsiah's employment file and details of any references obtained.

2. Copies of the results of physical stock takes undertaken from 2000-2008.

3. Details of computerised registration systems and records of shortages during the period 2000-2008.

4. Breakdown of shortages by item description and cost value.

5. Performance of each stock item, confirming whether or not there was unsatisfied demand for these items or where replacement garments were obtained from stock stores, ensuring that no loss of sales resulted.

6. Confirmation that there was unsatisfied demand for stock where it is your client's intention to pursue a claim for loss of gross profit.

7. Copies of your clients' profit and loss accounts for 2005, 2006, 2007 and if available 2008 together with management accounts for the same period."

Following various emails and meetings, on 17 February 2009, Mrs Stone of the brokers sent an email to Mr Coonan attaching what she described as "headline details" of claims for loss of stock and loss of profits for the years 2005 to 2008 as it was TB's belief that the thefts commenced in 2005. It was common ground that this email constituted particulars of claim. By an email to Mrs Stone dated 24 March 2009, Mr Coonan stating that he had issued a further report to insurers and was awaiting instructions. He added that the information provided in the stock and loss of profit documents was "entirely speculative regarding frequency and size of thefts and not supported by factual information", and that: "I note that your client is not prepared to undertake the exhaustive reviews and analysis of stock shortage and claim reconciliation information at this stage until such time as agreement in principle that liability is accepted has been provided."

After further conversations and emails, on 28 May 2009, the insurers denied cover for employee theft. Proceedings were commenced on 23 February 2010. In *Ted Baker plc v Axa Insurance UK plc* [2013] Lloyd's Rep IR 174, Eder J ruled on a trial of preliminary issues that employee theft was within the scope of cover. In October 2012 TB added a claim for losses occurring in 2004. In the present trial on the substance of the claims, three issues arose for determination.

(1) The insurers contended that TB failed to provide certain information and documentation as required under the terms of the policies with the result that TB was debarred from advancing any claim at all. The insurers asserted the following breaches. (a) Breach of the Business Interruption Section, Special Claims Condition 2(b)(i), in that TB failed to deliver to the insurers any "particulars of claim" until the email of 17 February 2009, so that no claim could be made in respect of any incident of theft occurring before 18 January 2008. Further, the particulars in that email were limited to 2005 to 2008, thereby precluding any claim in respect of any incident of theft which occurred in 2004. (b) Breach of BI Section, Special Claims Condition 2(b)(ii) and/or (d), in that TB failed to deliver to the insurers relevant information and documents thereby precluding any claim at all. The insurers contended that compliance with the Special Claims Condition was a condition precedent to liability by virtue of Special Claims Condition 2(c), Claims Condition 2 and General Condition 15. TB accepted that the Claims Conditions were conditions precedent, but denied breach and asserted in the alternative that the insurers were themselves prevented from relying upon any breach of the terms by reason of agreement, waiver or estoppel by convention.

(2) As regards quantum, the insurers sought to put TB to proof that the thefts occurred, that the sums sought represented the loss and that the claims fell above the each and every loss deductible of £5,000.

(3) The insurers argued that if TB succeeded on any part of the claim, the insurers were entitled to return certain premium rebates.

Held, by QBD (Comm Ct) (EDER J) that TB's claims under the policies would be dismissed.

(1) The claims were defeated by the Claims Conditions.

(a) The claim in respect of 2004 was defeated by Claims Condition 2(b)(i). The words "in the event of a claim being made under this Section" did not override the requirement in Special Claims Condition 2(b)(i) for TB to deliver to the insurers "particulars of claim" not later than 30 days after the expiry of the indemnity period or within such further time as the insurers might allow. They were not to be construed as meaning that the obligation was triggered only where there was a claim under the section. "Headline details" were provided by Mrs Stone to Mr Coonan in the email dated 17 February 2009 and that email was properly to be characterised as the delivery of particulars of claim. It would then have been open to the insurers to pull the shutters down in respect of at least any incidents of theft prior to 30 days after the expiry of all previous indemnity periods, namely, any claim in respect of any incident of theft which occurred before 18 January 2008. But they did not do so. On the contrary, it was plain that in the course of the meeting in December 2008 with Mr Coonan and in Mr Coonan's email dated 29 December 2008, Mr Coonan was, in effect, seeking, at the very least, further information in respect of TB's claims. That was consistent only with the defendants "allowing" TB to produce their "particulars of claim" (*see* paras 101, 102 and 103);

Roper v Lendon (1859) 1 E & E 825, Cassel v Lancashire & Yorkshire Accident Insurance Co (1885) 1 TLR 495, Welch v Royal Exchange Assurance (1938) 62 Ll L Rep 83; [1939] 1 KB 294, Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd [1953] 2 Lloyd's Rep 355, Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 & 3) [2001] Lloyd's Rep IR 667, The Star Sea [2001] Lloyd's Rep IR 247; [2003] 1 AC 469, Royal & Sun Alliance Insurance plc v Dornoch [2005] Lloyd's Rep IR 544, Shinedean Ltd v Alldown Demolition (London) Ltd [2006] Lloyd's Rep IR 846, Diab v Regent Insurance Co [2007] 1 WLR 797, referred to.

(b) TB was in breach of Special Claims Condition 2(b)(ii) – the obligation to deliver "such books of account ... and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim ..." – but only in respect of its failure to comply with Mr Coonan's request to provide information in his Category 7, namely "Copies of your clients' profit and loss accounts for 2005, 2006, 2007 and if available 2008 together with management accounts for the same period".

(i) It was common ground that the Category 7 information sought by Mr Coonan had been "reasonably required" (*see* para 107).

(ii) However, it did not necessarily follow that information requested was reasonably required in circumstances where insurers in effect (wrongly) denied liability. Generally speaking, it might be perfectly reasonable for insurers to reserve their position pending receipt of further documents/information, and a requirement by insurers that the insured should deliver such documents/information might be entirely "reasonable" because a review of such documents or information by insurers was necessary in order to decide, for example, whether cover existed or not. However, in the present case, unless and until the insurers were prepared to confirm at the very least that "employee theft" was an insured peril, the requirement to deliver Categories 2 to 6 of the documents was not "reasonable" having regard, in particular, to the time and expense that would have to be incurred by TB in complying with such requirement (*see* para 108).

(c) There was no agreement, waiver or estoppel to prevent reliance on the Claims Conditions;

Heisler v Anglo-Dal [1954] 2 Lloyd's Rep 5; [1954] 1 WLR 1273, *Barrett Brothers (Taxis) Ltd v Davies* [1966] 2 Lloyd's Rep 1; [1966] 1 WLR 1334, *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, *The Indian Endurance* [1998] 1 Lloyd's Rep 1; [1998] AC 878, *Kier Construction Ltd v Royal Insurance (UK) Ltd* (1992) 30 Con LR 45, *The Star Sea* [2001] Lloyd's Rep IR 247; [2003] 1 AC 469, *HIH Casualty and General Insurance v Ltd AXA Corporate Solutions* [2003] Lloyd's Rep IR 1, *Drake Insurance plc v Provident Insurance plc* [2004] Lloyd's Rep IR 277; [2004] QB 601, *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2007] Lloyd's Rep IR 173; [2006] 1 WLR 1492, *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] Lloyd's Rep IR 489, *Lexington Insurance Co v Multinacional de Seguros SA* [2009] Lloyd's Rep IR 1, *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, *The Copa Casino* [2012] Lloyd's Rep IR 67, *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm), referred to.

(i) The suggestion of any agreement, waiver or estoppel which might operate to preclude the defendants from asserting a breach with regard to any claim in 2004 was quite hopeless, if only because there was never any suggestion of any such claim until well after the commencement of proceedings (*see* para 128).

(ii) There was no agreement that TB was not required to provide the Category 7 documents required by Mr Coonan. Although Mr Coonan, by his email of 24 March 2009, agreed or represented that the obligation to do so was "parked" pending the resolution of liability in principle, the agreement or estoppel related only to the additional work specified in that email. There was never any unequivocal representation that TB were not required to deliver the documents/information in Category 7 of Mr Coonan's original shopping list, as that did not involve the additional cost of any accountants (*see* paras 129 and 131).

(iii) Insofar as there was a relationship of utmost good faith between the parties, it did not extend to any general duty positively to warn TB that it needed to comply with policy terms, and there was no evidence that TB had been "hoodwinked" or that the insurers' silence had been deliberate (*see* para 126);

Drayton v Martin [1996] FCA 1504, Diab v Regent Insurance Co [2007] 1 WLR 797, D A Constable Syndicate 386 v Auckland District Law Society Inc [2010] NZCA 237; [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850, Dragages et Travaux Publics (HK) Ltd v RJ Wallace [2004] HKCFI 311, referred to.

(2) If quantum issues arose, TB had not proved any loss within the scope of the business interruption insurance.

(a) The principles applicable to the burden of proof were as follows.

(i) The burden always remained on a claimant in an insurance claim to establish on a balance of probabilities a relevant event caused by one or more insured perils. Nothing less would do. However, there might be different ways of satisfying the legal burden and standard of proof other than by direct evidence. That would inevitably vary from case to case (*see* paras 137 and 138);

The Popi M [1985] 2 Lloyd's Rep 1; [1985] 1 WLR 948, Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd [1998] Lloyd's Rep IR 421, Equitas v R&Q Reinsurance Co (UK) Ltd [2010] Lloyd's Rep IR 600, AXL Resources Ltd v Antares Underwriting Services Ltd [2011] Lloyd's Rep IR 598, applied.

(ii) The position was not affected by the mysterious disappearance clause (*see* para 139);

AXL Resources Ltd v Antares Underwriting Services Ltd [2011] Lloyd's Rep IR 598, applied.

(iii) Once an actionable head of loss had been established, the court would generally assess damages as best it could by reference to the materials available to it. The balance of probability test was not an appropriate yardstick to measure loss; and lack of precision as to the amount of quantum was not a bar to recovery (*see* para 146);

Equitas v R&Q Reinsurance Co (UK) Ltd [2010] Lloyd's Rep IR 600, Vasiliou v Hajigeorgiou [2010] EWCA Civ 1475, Parabola Investments Ltd v Browallia Cal Ltd [2011] QB 477, applied.

(b) On a balance of probability, the alleged losses were the result of thefts by JON. As to the amount stolen in the years 2005 to 2008, the appropriate Base Variance figure to be deducted from the losses was 0.030 per cent (*see* paras 148 and 149).

(c) As regards the deductible of £5,000 for each and every loss, the deductible was not an exclusion but rather defined the cover provided to TB. It followed that the burden of proving the number of losses fell upon TB. In the present case there was no evidence as to the number and size of the thefts committed by JON, and the claim followed on that basis as well (*see* paras 153 and 158);

Munro, Brice & Co v War Risks Association Ltd [1918] 2 KB 78, applied.

(d) On the facts TB had failed to prove that it had suffered loss of gross profit over and above the deductible. It was not possible to show that profit had been lost on any one item by reason of its theft from TB's warehouse. The model put forward by TB, which took average sales figures for TB to produce an average margin and then to make adjustments to reflect the lower probability that the stolen items would have been sold in the early weeks of any seasonal sales period, disregarded the fact that the indemnity period ran over more than one season and that further adjustments were needed. The model was insufficiently reliable to assess loss of profit (*see* paras 163 and 165);

Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] Lloyd's Rep IR 531, referred to.

The following cases were referred to in the judgment:

Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd [1953] 2 Lloyd's Rep 355;

Argo Systems FZE v Liberty Insurance (Pte) (The Copa Casino) (CA) [2011] EWCA Civ 1572; [2012] Lloyd's Rep IR 67;

AXL Resources Ltd v Antares Underwriting Services Ltd [2010] EWHC 3244 (Comm); [2011] Lloyd's Rep IR 598;

Barrett Brothers (Taxis) Ltd v Davies (CA) [1966] 2 Lloyd's Rep 1; [1966] 1 WLR 1334;

Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd (CA) [2006] EWCA Civ 50; [2007] Lloyd's Rep IR 173; [2006] 1 WLR 1492;

Cassel v Lancashire & Yorkshire Accident Insurance Co (1885) 1 TLR 495;

D A Constable Syndicate 386 v Auckland District Law Society Inc [2010] NZCA 237; [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850;

Diab v Regent Insurance Co (PC) [2006] UKPC 29; [2007] 1 WLR 797;

Dragages et Travaux Publics (HK) Ltd v RJ Wallace [2004] HKCFI 311;

Drake Insurance plc v Provident Insurance plc (CA) [2003] EWCA Civ 1834; [2004] Lloyd's Rep IR 277; [2004] QB 601;

Drayton v Martin [1996] FCA 1504;

Equitas v R&Q Reinsurance Co (UK) Ltd [2009] EWHC 2787 (Comm); [2010] Lloyd's Rep IR 600;
Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 & 3) (CA) [2001] Lloyd's Rep IR 667;
Heisler v Anglo-Dal (CA) [1954] 2 Lloyd's Rep 5; [1954] 1 WLR 1273;
HIH Casualty and General Insurance v Ltd AXA Corporate Solutions (CA) [2002] EWCA Civ 1253; [2003] Lloyd's Rep IR 1;
ING Bank NV v Ros Roca SA (CA) [2011] EWCA Civ 353;
Kier Construction Ltd v Royal Insurance (UK) Ltd (1992) 30 Con LR 45;
Kosmar Villa Holidays plc v Trustees of Syndicate 1243 (CA) [2008] EWCA Civ 147; [2008] Lloyd's Rep IR 489;
Lexington Insurance Co v Multinacional de Seguros SA [2008] EWHC 1170 (Comm); [2009] Lloyd's Rep IR 1;
Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea) (HL) [2001] Lloyd's Rep IR 247; [2003] 1 AC 469;
Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) (HL) [1990] 1 Lloyd's Rep 391;
Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd (CA) [1998] Lloyd's Rep IR 421;
Munro, Brice & Co v War Risks Association Ltd [1918] 2 KB 78;
Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531;
Parabola Investments Ltd v Browallia Cal Ltd (CA) [2010] EWCA Civ 486; [2011] QB 477;
Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2) (HL) [1998] 1 Lloyd's Rep 1; [1998] AC 878;
Rhesa Shipping Co SA v Edmunds (The Popi M) (HL) [1985] 2 Lloyd's Rep 1; [1985] 1 WLR 948;
Roper v Lendon (1859) 1 E & E 825;
Royal & Sun Alliance Insurance plc v Dornoch (CA) [2005] EWCA Civ 238; [2005] Lloyd's Rep IR 544;
Shinedean Ltd v Alldown Demolition (London) Ltd (CA) [2006] EWCA Civ 939; [2006] Lloyd's Rep IR 846;
Starbev GP Ltd v Interbrew Central European Holdings BV [2014] EWHC 1311 (Comm);
Vasiliou v Hajigeorgiou (CA) [2010] EWCA Civ 1475;
Welch v Royal Exchange Assurance (1938) 60 Ll L Rep 63; [1938] 1 KB 757; (CA) (1938) 62 Ll L Rep 83; [1939] 1 KB 294.

Stephen Cogley QC and Tim Marland, instructed by Browne Jacobson, for the claimants;
Jeremy Nicholson QC and James Medd, instructed by Kennedys, for the defendants.

Thursday, 30 October 2014

JUDGMENT

Mr Justice EDER:

Part I. Introduction

1. This is an insurance claim brought by the claimants for business interruption ("BI") losses in respect of goods allegedly stolen by an employee. The background (which I do not propose to repeat) is set out in my earlier judgment which dealt with a number of preliminary issues in relation to liability: see [2013] Lloyd's Rep IR 174. In summary, I held in favour of the claimants, ie that the relevant insurance policies covered "employee theft". A late application for permission to appeal was refused by the Court of Appeal: see [2014] EWCA Civ 134.

2. The claimants are related companies engaged in the sale and distribution of the well-known Ted Baker brand of merchandise. The first claimant is the overall holding company. However, it is common ground that it owned none of the stock which is the subject of this claim and suffered none of the losses claimed. In the course of the trial, Mr Cogley QC on behalf of the claimants accepted that it could not and did not advance any claim. The second claimant is the UK operating company. For convenience only, I shall refer to the second claimant (albeit incorrectly) as Ted Baker or TB.

Summary of TB's business operations

3. By way of further background, it is convenient to explain briefly the general nature of TB's business operations which were, in the main, uncontroversial. Subject to minor modifications, the following is a convenient summary which I have taken in large part from the parties' skeleton arguments.

4. TB's business consists of wholesale and retail sale of fashion clothing and accessories. TB orders and buys goods from overseas manufacturers, predominantly in China, which are shipped to the UK. The goods comprise mainly fashion items which are designed for one of the two retail seasons in each year, ie spring/summer ("SS") from 1 February to 31 July normally with a "sale" period from mid-June, and autumn/winter ("AW") from 1 August to 31 January with a "sale" period normally from 26 December.

5. The goods are generally ordered once, some months before the start of the season for which they have been designed. However, further orders can be placed during the season for lines which early sales indicate will be particularly popular. In addition, TB also sells perennial

items which are designed for a number of seasons. These are ordered initially and further orders are then placed as necessary to maintain stocks. The goods typically come in different styles, colours, and sizes, some also with secondary sizes (eg for trousers: leg lengths). Each item with a particular combination of style, colour, size, and any secondary size is known as a Stock Keeping Unit ("SKU") and designated with a unique alpha-numerical code. Each item of an SKU is normally labelled with a bar code reflecting the alpha-numerical code.

6. TB's main warehouse is located in north London and is known as the Ted Baker Distribution Centre ("TBDC"). On any view, it is a very busy warehouse with TB receiving up to 1,300 cartons of new stock a day during busy periods. By way of example of the volumes of stock flowing through the TBDC in 2012, TB shipped over 2,920,000 items of stock to their retail stores and 1,015,000 to their wholesale clients. The TBDC is served by road transport. The TBDC receives goods when called in from freight forwarders, stores them until required and then sends them out to TB's wholesale customers and TB's retail stores. In addition, from July 2006, TB has had another warehouse nearby known as Country Balloons. This is used to store unsold stock left over at the end of each retail season, until the next equivalent retail season, when it is sent to TB's outlet stores for sale at discounted prices.

7. TB sells goods through a range of different channels including wholesale customers, associated companies overseas, retail stores operated by TB (either occupied by TB or concessions in department stores), internet sales, outlet stores operated by TB in "factory outlet" developments and TK Maxx (a large discount retailer).

8. The TBDC despatches stock for wholesale customers before or in the early weeks of each retail season. In order to encourage sales at full retail price so far as possible, TB then stocks its retail stores as follows:

(i) Before each retail season, setting an Ideal Stock Level ("ISL") for each store for each SKU. This is generally "wide but not deep": involving stocking each store with only a limited number of each SKU for any particular style or range. It follows that, in the normal course of business, stores may run out of stock of particular SKUs and thus lose sales.

(ii) When a new style is "launched", either at the start of each retail season or during it, sending to each store an initial allocation so that it starts with its ISL and keeping the rest for replenishment during the season (Retained for Replenishment – "RfR").

(iii) During the retail season, after each trading day's sales, automatically selecting for despatch to stores items from the RfR stock to replace items sold and thus to restore ISLs.

9. Seasonal stock which is not sold at full retail price is then sold at a range of discounted prices, generally with increasing levels of discount, as follows:

(i) In seasonal sales at retail stores, towards the end of each season.

(ii) At outlet stores, during the next equivalent season (eg stock that was bought for SS2006 would be sold in the outlet stores during the spring and summer of 2007), at heavily discounted prices.

(iii) To TK Maxx, generally discounted to less than cost price.

10. Most of the stock is eventually sold, at either full retail or discounted prices. But some is not and any remaining unsold stock is disposed of by being either given to charities or destroyed ("scrappage").

11. TB has a range of computer systems for managing its business including a sophisticated merchandising and stock control system, known as "CIMS". This is operated using servers at TB's head offices and terminals at each of TB's warehouses, retails stores and outlet stores. Stock movements at the TBDC are recorded, and stock is checked, primarily using handheld scanners which read bar codes on labels.

12. Stock is checked at various different times. By way of regular stock check for audit purposes at the TBDC, a "Perpetual Inventory" or "PI" system is used, including cyclic checking of all stock in every area of the warehouse 1.6 times per year.

13. When the items of stock in any particular location are checked, CIMS identifies any differences between the physical stock checked and the information held on CIMS. There is a wide range of possible reasons for any differences including omission to check and scan some items in that location, misplacing of some items, eg in an adjacent bin or rack, incorrect labelling, errors in CIMS software and theft. Differences are investigated and, in some cases, resolved. Where the difference cannot be resolved, a PI Variance is recorded in CIMS. For the purposes of this case, PI Variances may be divided further into:

(i) "Non-zero PI Variances": PI Variances in respect of SKUs of which stock remained at the TBDC.

(ii) "Zero PI Variances": PI Variances in respect of SKUs of which stock had been exhausted at the TBDC.

14. It is common ground that there is always likely to be some variance in any distribution and retail operation of this kind ("Base Variance"), however well managed and controlled.

Thefts by Mr Joseph Okyere-Nsiah

15. In essence, it is TB's case that a substantial amount of stock held in the TBDC was stolen by Mr Joseph Okyere-Nsiah ("JON") over a number of years stretching back to 2003, although this was only discovered as a result of a tip-off in December 2008. JON was a trusted employee of TB who had worked for TB for a number of years, being promoted to Returns Manager in June 2004. During this period and at least since 2005, TB had noticed unexplained increases in the level of its PI Variances in the stock levels at the TBDC. However, TB says that there was no obvious reason for such variances. TB initially thought that these variances were caused by or

attributable to deficiencies in the CIMS system. However, this was not the case: the parties' stock control experts both agree that the CIMS system was, in fact, very good and any temporary "glitches" in that system were picked up and remedied promptly.

16. On Tuesday 9 December 2008, TB received an anonymous telephone call stating that a member of staff (subsequently identified as JON) was stealing stock at the TBDC in collusion with a TNT driver "... at a rate of six or seven boxes at a time ...", usually on a Friday between 10.00 and 11.00. After reviewing certain CCTV footage, TB duly reported this information to the police and carried out its own surveillance over a three-day period. The surveillance revealed that JON was indeed stealing stock at the TBDC with the assistance of third-party delivery drivers. In summary, it was discovered that returns of TB goods to the TBDC were delivered into the custody of JON; that he would then generally re-distribute them throughout the warehouse to their appropriate locations; that the returns sometimes built up in the area where JON worked and accordingly there were boxes of returns stored on pallets waiting for him to re-distribute around the TBDC; and that he would then place a pallet containing boxes of goods that had already been returned onto a forklift truck, drive the forklift truck up to the back of the delivery van – thereby giving the appearance that he was *receiving* returns. In fact, also on the pallet taken to the back of the delivery lorry/van were boxes containing items that he had stolen. These boxes were taken off the pallet and added onto the van. He then later, away from the TBDC, collected the boxes from the driver(s).

17. When the police attended JON's house, his wife and children were dressed in TB clothing. The house was jam packed, as was the garden shed/garage, with TB designer apparel and accessories – cufflinks, etc. These consisted of both the current season's stock and the upcoming season (approximately 50/50). The value of the stock found at the house was approximately £317,000. Some £60,000 in cash was also found at JON's house. The stock at JON's house filled 14 pallets and took a 7.5 tonne lorry to retrieve. In addition, "shopping lists" and notes found by the police indicated that JON's thieving activities dated back to at least July 2005.

18. Following arrest, JON pleaded guilty to one count of conspiracy to steal, along with two accomplices (Simon Ayi and Emmanuel Odoom), both of whom were drivers for TNT. JON's wife was charged with handling stolen goods. The period on the indictment over which the conspiracy was charged dated from the start of JON's employment and terminated upon his arrest. The two accomplice drivers pleaded guilty on a specific basis. There was no basis of plea in relation to JON although the transcript of the sentencing hearing shows that when he eventually pleaded, he was prepared to accept that the thefts had been occurring for several months prior to his arrest. The indictment, however, was not amended. He was sentenced to three years' imprisonment. He had no previous convictions.

19. Following JON's arrest, it is common ground that the PI Variances substantially reduced.

20. Many of the issues in this case turn, at least in part, on what JON actually did between 2004 to 2008, in particular, how and when he stole what stock. This is potentially important for a number of reasons, in particular: (i) to identify the amount and value of stock stolen not only over the entire period but also during particular policy years because the underwriters and their respective proportions were not always identical; and (ii) to identify the number of incidents of theft, the number of boxes taken on each occasion and the contents/value of such boxes because the policies contained an excess clause of £5,000 "each and every loss". However, JON did not give evidence resulting in much dispute between the parties in respect of such matters as referred to below.

The evidence

21. In support of its claim, TB served factual witness statements from a number of individuals who gave oral evidence (apart from those indicated):

(i) Mr Lindsay Page. He is and has been the Finance Director of TB since 1997.

(ii) Mr Laurence Connolly. He commenced employment with TB in 1996 and is the Distribution Director of the TBDC. At all material times, he has been in charge of the UK warehouse side of TB's business.

(iii) Mr John Powell. He commenced work with TB in 1998. He is the Stock Control Manager at the TBDC.

(iv) Ms Iryna Kharichkina. She commenced work with TB in 2000 and since 2004 has been the Assistant Stock Control Manager at the TBDC.

(v) Mr Dustan Steer. He commenced work with TB in 1996. At all material times, he has effectively been responsible for TB's IT team; and since March 2010 has been given the title of IT Director.

(vi) Mrs Victoria Singleton also known as Ms Tikki Godley. She commenced work at TB in 2005 as a Junior Merchandiser, being promoted to Head of Merchandising for Outlet Stores in 2010. During this period, she was an integral part of TB's merchandising team with full knowledge and understanding of TB's operation.

(vii) Ms Elaine Bray. She is an independent consultant who carried out an investigation with regard to possible stock losses from the TBDC in September 2008 and sometime during that month produced a detailed written report setting out her findings and recommendations.

(viii) Mrs Ann Stone. She is an Executive Director and Claims Advocate at Bluefin Insurance Services Ltd ("Bluefin"), TB's insurance brokers. She started work at Eagle Star Insurance Co Ltd in 1968 and thereafter has had a long and successful career in the insurance industry.

(ix) Mr Phillip Hughes. He joined TB in 2012 and is a systems accountant working for TB's finance team. He assisted KPMG in their investigations. (He did not give oral evidence.)

22. The defendants served factual witness statements from a number of witnesses who gave oral evidence:

(i) Mr Anthony Hutchins. He started work as an underwriter in 1979 and has over 34 years of experience of underwriting commercial risks for large general insurance companies including CU, CGU and CGNU/Norwich Union. He joined AXA in 2010 as Head of Commercial Property Underwriting at AXA's Head Office which is his current role.

(ii) Mrs Rosemary Woodgate. She has worked in the insurance industry for over 25 years dealing primarily with insurance claims and has worked with AXA since 1999 when it took over Guardian Insurance. She is employed within the AXA Group as a Senior Claims Technician in the Large Loss Unit ("LLU") dealing with high-value claims of at least £250,000 under commercial policies underwritten by AXA including their Commercial Combined Policy.

(iii) Mrs Dawn Devis. She has worked in the insurance industry for nearly 20 years and is currently a Senior Commercial Underwriter with AXA.

(iv) Mr John Coonan. He is a chartered loss adjuster with more than 35 years' experience of adjusting insurance claims. He has worked for Woodgate & Clark Ltd ("WC") in that capacity since he joined that company in 1995.

(v) Mrs Julie Taylor. She has worked in the insurance industry for some 25 years and is employed by AXA (Commercial Lines and Personal Intermediary) as a Large Loss Claims Technician in the LLU.

(vi) Mr Douglas Smith. He is a qualified ACII and has a long career as an underwriter. He is a currently a Senior Commercial Underwriter with AXA and has held that position for 13 years.

23. In addition to this factual evidence, the parties served reports from a number of experts who gave oral evidence:

(i) Loss adjusters

(a) Instructed by TB: Mr Damian Glynn of VRS.

(b) Instructed by defendants: Mr Harry Roberts.

(ii) Forensic accountancy and retail stock

(a) Instructed by TB: Mrs Kathryn Britten of KPMG.

(b) Instructed by defendants:

(i) Mr Richard Emery of 4Keys International.

(ii) Mrs Catherine Rawlin of RGL Forensics.

24. In addition, TB put in other written expert evidence in relation to IT.

The policies

25. As originally advanced, the claim by TB was for both loss of stock and BI losses. However, the claim for loss of stock in these proceedings was abandoned in January 2013, ie after the previous trial of preliminary issues. As now advanced, TB's claim is limited to BI losses covering a period of approximately five years under a series of insurance policies with the defendant underwriters.

26. Although the terms of cover remained broadly similar during this period, it is important to note that the identity and respective proportions of the underwriters changed from time to time. Thus, from 14 March 2004 to 22 July 2004, the underwriters were AXA (60 per cent) and NIG (40 per cent); from 23 July 2004 to 28 March 2006, the underwriters were AXA (50 per cent), NIG (30 per cent) and Fusion (20 per cent); from 29 March 2006 to 15 April 2007, the underwriters were AXA (50 per cent), NIG (25 per cent) and Tokyo Marine (25 per cent); and from 16 April 2007 to 15 April 2009, the underwriter was AXA (100 per cent).

27. I have already described the main terms of the policies in my earlier judgment. However, it is convenient to set out the terms which are directly relevant to the issues which now arise for determination:

"3 Claims Conditions

(1) In the event of any loss destruction or damage or event likely to give rise to a claim under this Policy the Insured shall

(a) notify the Company immediately

(b) notify the Police Authority immediately if it becomes evident that any loss or damage has been caused by theft or malicious persons

(c) carry out and permit to be taken any action which may be reasonably practicable to prevent further loss destruction or damage

(d) deliver to the Company at the Insureds expense

(i) full information in writing of the property lost destroyed or damaged and of the amount of loss destruction or damage ...

(iii) all such proofs and information relating to the claim as may be reasonably required ...

(2) No claim under the Policy shall be payable unless the terms of this condition have been complied with ...

15 Condition Precedent

It is a condition precedent to any liability on the part of the Company under this Policy that (a) the terms hereof so far as they relate to anything to be done or complied with by the Insured are duly and faithfully observed and fulfilled by the Insured and by any other person who may be entitled to be indemnified under this Policy (b) the statements made and the answers given in the proposal herein before referred to are true and complete

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BUSINESS INTERRUPTION

Definitions

Indemnity Period

The period beginning with the occurrence of the Incident and ending not later than the Maximum Indemnity Period thereafter during which the results of the Business shall be affected in consequence thereof

Turnover

The money paid or payable to the Insured for goods sold and delivered and for services rendered in the course of the Business at the Premises

Maximum Indemnity Period as stated in the Schedule

Uninsured Working Expenses as stated in the Schedule

Gross Profit

The amount by which

(1) the sum of the amount of the Turnover and the amounts of the closing stock and work in progress shall exceed

(2) the sum of the amount of the opening stock and work in progress and the amount of the Uninsured Working Expenses

Rate of Gross Profit

The rate of Gross Profit earned on the turnover during the financial year immediately before the date of the Incident

Annual Turnover

The Turnover during the twelve months immediately before the date of the Incident.

Standard Turnover

The Turnover during the period in the twelve months immediately before the date of the Incident which corresponds with the Indemnity Period

...

to which such adjustments shall be made as may be necessary to provide for the trend of the Business and for variations in or other circumstances affecting the Business either before or after the Incident or which would have affected the business had the Incident not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident

Basis of Loss Settlement

The undernoted terms of settlement apply only if the paragraph title appears in the Schedule to this Section

Gross Profit/Estimated Gross Profit

The insurance under this item is limited to loss of Gross Profit due to (a) Reduction in Turnover and (b) Increase in Cost of Working and the amount payable as indemnity thereunder shall be

(a) In respect of Reduction in Turnover: the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall fall short of the Standard Turnover in consequence of the Incident

(b) In respect of Increase in Cost of Working: the additional expenditure (subject to the provisions of the Uninsured Working Expenses clause) necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which but for that expenditure would have taken place during the Indemnity Period in consequence of the Incident but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided ...

less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross Profit as may cease or be reduced in consequence of the Incident

provided that if the sum insured by the item on Gross Profit be less than the sum produced by applying the Rate of Gross Profit to the Annual Turnover (or to a proportionately increased multiple thereof where the Maximum Indemnity Period exceeds twelve months) the amount payable shall be proportionately reduced ...

Additional Increased Cost of Working

The insurance under this item is limited to such further additional expenditure beyond that recoverable under paragraph (b) of any of the above items insured hereby as the Insured shall necessarily and reasonably incur during the Indemnity Period in consequence of the Incident for the sole purpose of avoiding or diminishing a reduction in Turnover or Gross Revenue.

Professional Accountants Clause

Any particulars or details contained in the Insured's books of account or other business books or documents which may be required by the Company under part (b) of Special Condition 2 for the purpose of investigating or verifying any claim hereunder may be produced by professional accountants if at the time they are regularly acting as such for the Insured and their report shall be prima facie evidence of the particulars and details to which such report relates

The Company will pay to the Insured the reasonable charges payable by the Insured to their professional accountants for producing such particulars or details or any other proofs information or evidence as may be required by the Company under part (b) of Special Condition 2 of this Section and reporting that such particulars or details are in accordance with the Insured's books of accounts or other business books or documents

provided that the sum of the amount payable under this Clause and the amount otherwise payable under the Section shall in no case exceed the liability of the Company as stated.

Special Conditions

...

2. Claims Conditions

(a) In the event of any loss destruction or damage in consequence of which a claim is or may be made under this Section the Insured shall

- notify the Company immediately

– deliver to the Company at the Insureds expense within 7 days of its happening full details of loss destruction or damage caused by riot civil commotion strikers locked-out workers persons taking part in labour disturbances or malicious persons

– with due diligence carry out and permit to be taken any action which may be reasonably practicable to minimise or check any interruption of or interference with the Business or to avoid or diminish the loss

(b) In the event of a claim being made under this Section the Insured at their own expense shall

(i) – (not later than 30 days after the expiry of the Indemnity Period or within such further time as the Company may allow) deliver to the Company in writing particulars of their claim together with details of all other insurances covering property used by the Insured at the Premises for the purpose of the Business or any part of it or any resulting consequential loss ...

(ii) – deliver to the Company such books of account and other business books vouchers invoices balance sheets and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim.

(c) If the terms of this condition have not been complied with

– no claims under this Section shall be payable ...

BUSINESS INTERRUPTION – ALL RISKS

(Exclusions)

CONSEQUENTIAL LOSS [a]rising directly or indirectly from

(d) disappearance unexplained or inventory shortage misfiling or misplacing of information ..."

The claim

28. Mr Nicholson QC on behalf of the defendants submitted that there was nothing ordinary about the present claim. In particular, he submitted that normally insurance against theft does not cover thefts by an employee: such thefts are (he said) covered if at all under fidelity or "theft by employee" insurance which never extends to BI losses. Further, he submitted that a claim for indemnity against BI losses is normally based on a single adverse event, such as a fire or flood or major burglary which is immediately known to the insured and which causes major losses of profit clearly reflected in the management and audited accounts. In contrast, he submitted that this claim is based on: (i) allegations of more than 500 incidents of theft of stock over a period of more than five years and spanning some five policy years which thefts are said to have been known to TB only towards the end of the last of these policy years; (ii) primarily a retrospective analysis of computerised stock records rather than direct evidence of theft; and (iii) allegations of losses founded not on any management or audited accounts but on elaborate calculations and a wide range of hypothetical assumptions about whether the goods said to have been stolen would otherwise have been sold and, if so, when and at what price. Be all this as it may, I have already determined that this policy covers "theft by employee" and the underwriters' belated application to appeal against that decision failed. As to the other points raised, Mr Nicholson QC may well be right that this case has features which are not "ordinary"; but I will have to deal with the claim as presented as best I can.

29. As summarised in Mr Nicholson's opening skeleton, the amounts claimed by TB for BI losses have fluctuated as follows:

(i) £3,756,397: amount first claimed, on 17 February 2009; for the years 2005 to 2008.

(ii) £5,317,966: amount first claimed in the action, on 23 February 2010; before application of policy excess.

(iii) £2,919,696: amount particularised in the action, in or about November 2010, for the policy years 2005/2006 to 2008/2009; after application of policy excess. This was followed by alternative amounts of £1,743,791 or £989,001 based on different parameters.

(iv) £1,988,000: amount put forward in re-amended particulars of claim, in draft on 4 October 2012 and final form on 13 January 2013; for the policy years 2004/2005 to 2008/2009, after application of policy excess.

30. Since then, although the pleaded amount remained at £1,988,000 until the beginning of the trial, various different figure were advanced in the reports served by Mrs Britten on behalf of TB in respect of claims for BI losses for the policy years 2004/2005 to 2008/2009 and after application of policy excess:

(i) £2,012,000 or alternatively £1,958,000: amounts calculated by Mrs Britten in her first report dated 31 January 2013.

(ii) £1,838,000: amount calculated by Mrs Britten in her second report dated 11 October 2013.

(iii) £1,530,000 alternatively £1,300,000: amounts calculated by Mrs Britten in the experts' joint statement dated 18 December 2013.

(iv) £904,000: amount calculated by Mrs Britten in her third report dated 4 April 2014.

(v) £1,453,000: amount calculated by Mrs Britten in a report dated 25 June 2014 and served very shortly before the trial. This last report was originally objected to by Mr Nicholson QC although in the event, and subject to certain conditions, that objection was abandoned.

31. Underlying these figures is a vast mass of expert evidence which depends on certain assumptions and very complicated analyses which, in turn, depend on matters which are somewhat speculative. The fluctuations in the figures are due, in part, to the fact that Mrs Britten modified her calculations in relation to certain of these assumptions and other related aspects in the run-up to the trial. This was the object of forceful criticism by Mr Nicholson QC although Mrs Britten's evidence was that she was simply fulfilling her role as an independent expert and that her fundamental views and approach to quantum of the claim remained unchanged. Mr Cogley QC submitted that the problems faced by the experts were, in large part, due to the failure of the defendants and their advisors to act reasonably from the very start and to agree at an early stage on a proper approach to quantum including agreement on appropriate assumptions. However, these criticisms were totally rejected by Mr Nicholson QC. Indeed, Mr Nicholson QC's submission was that TB's claim is totally without merit.

32. So far as necessary, I consider the particular points of dispute later in this judgment. However, at this stage, I would merely note that the costs in the case have spiralled both in absolute terms and out of all proportion to the amount now in dispute. Although the claim had reduced, until at least shortly before the trial, to some £904,000, I was told that up to 16 June 2014, excluding the costs of the appeal and ignoring the costs of this present trial, the claimants' costs were some £2.53 million and the defendants' costs some £1.8 million. Together with the costs of the present trial, I would guess that the total combined costs bill will probably exceed £5 million. Mr Cogley QC blamed this on the unreasonable conduct of the defendants and their advisors and emphasised that these costs included the costs of the previous trial on liability which the claimants won. For his part, Mr Nicholson QC submitted that the order for preliminary issues has turned out to be a hugely expensive error which did nothing to resolve the dispute and has served only to increase costs. He blamed the claimants and their advisors for failing to provide any useful quantum information and documentation until a late stage, for what he described as an unusually combative approach on their part and for a failure to recognise their duties to help the court to further the overriding objective or to cooperate in the conduct of the proceedings. Wherever the fault may lie and although I recognise that the issues in the case are, in certain respects, far from straightforward, this appalling state of affairs brings no credit to modern commercial litigation. One can only hope that this will never happen under the Jackson reforms.

The main issues

33. The parties put before the court a long list of issues. However, in very broad terms, the main issues fall under three main heads viz: (i) claims cooperation issues; (ii) quantum issues; and (iii) a claim by the defendants for the amount of certain premium rebates given to TB. This last issue only arises if TB succeeds on at least part of its claim.

A. Claims cooperation issues

34. In essence, the defendants say that TB failed to provide certain information and documentation as required under the terms of the policies with the result that TB is, in effect, debarred from advancing any claim at all. This is disputed by TB. This involves a number of issues of construction of the relevant policy wording. Alternatively, TB says that the defendants are themselves precluded from raising these complaints and, in that context, relies on a range of allegations including contractual agreement, estoppel by convention and/or acquiescence and/or representation, waiver and bad faith. These issues involve, in particular, detailed consideration of the conduct of the parties in the period immediately following the discovery of JON's actions.

B. Quantum issues

35. So far as quantum is concerned, there are three main sub-issues.

36. First, on the balance of probabilities, what items were stolen by JON – and when? TB says that the number of individual items stolen during each relevant policy period was as follows: 2004/2005: 9,685; 2005/2006: 19,018; 2006/2007: 24,269; 2007/2008: 35,049; 2008/2009: 35,529. These figures are based on an analysis of the total PI Variances less Base Variances. The defendants' pleaded case is that they do not admit that any thefts took place – apart from three incidents – and that it is for TB to prove its case. There is also a dispute as to the appropriate level of Base Variances.

37. Secondly, what is TB's loss of gross profit for each policy period? TB says that a "line by line" analysis over the thousands of individual stock lines over the years would – even if theoretically possible – be disproportionate. Instead, TB relies on a mathematical model produced by Mrs Britten of KPMG. Based on such modelling, TB say that its loss of profit for each policy year was as follows:

(i) 2004/2005: £343,374.

(ii) 2005/2006: £620,640.

(iii) 2006/2007: £880,357.

(iv) 2007/2008: £1,173,928.

(v) 2008/2009: £1,159,329.

A breakdown of these figures appears in the schedules attached as Appendix 1 to this judgment [Editors' note: Appendix 1 has been omitted from this Plus Report. It will appear in Lloyd's Law Reports: Insurance & Reinsurance, Part 5 2015.]. None of these figures is agreed by the defendants. In particular, the defendants say that Mrs Britten's model is deeply flawed for a number of reasons.

38. Thirdly, TB accepts that the profit figures identified above have to be reduced to take account of the excess of £5,000 each and every loss. However, there is a major dispute between the parties as to: (i) how this exercise should be done; and (ii) the ultimate result of applying the excess. In essence, the defendants say that although Mrs Rawlin has calculated the BI losses as £2.16 million, TB has failed to show that such losses fell above the excess. Indeed, insofar as may be necessary, the defendants say that any BI losses suffered by TB fell below this excess. On this basis, the defendants say that TB's claims fail in their entirety.

C. Claim for premium rebates

39. The defendants say that if TB succeeds on any part of its claim, they are entitled to the return of certain premium rebates.

40. Against that brief introduction, I turn to consider the two main sets of issues.

Part II. Claims cooperation issues

41. Under this head, there are a number of discrete issues which I address below. However, before doing so, it is convenient to summarise the relevant events following the discovery of the thefts and JON's arrest in December 2008 and, to the extent that they are in dispute, my conclusions in relation thereto.

42. On or about 12 December 2008, TB notified Mr Burbedge of Layton Blackham ("LB"), then their insurance brokers, of the discovery of JON's thieving activities. On that date, Mr Burbedge notified AIG of a claim for theft of stock under their fidelity policy. AIG appointed as loss adjusters ASL. By email dated that same day, ie 12 December 2008, ASL made an initial request to Mr Burbedge for information as set out in a schedule attached to that email which ASL said would be helpful in presenting the claim to insurers including a detailed description of internal controls relating to stock recording and counting and, in due course, a schedule of all the stock items thought to have been stolen. Mr Burbedge forwarded that request to Mr Page.

43. On 15 December 2008, Mr Burbedge sent an email to Gina Griffiths of Layton Blackham asking her to notify AXA of the incident. In particular, Mr Burbedge asked her to inquire whether AXA would want to appoint WC or would be happy to rely on ASL, stating: "... but bear in mind the latter will not investigate the loss of profit element unless requested as it doesn't fall within the AIG policy, although they will be able to quantify the stock and client will be able to provide evidence of the profit element on this". Later that morning, Mr Burbedge sent a further email to Gina Griffiths attaching a New Loss Instruction Form to WC. In passing, it is to be noted that it is TB's case that this email constituted "particulars of claim" within the meaning of Special Condition 2(b)(i).

44. On 18 December 2008 there was an initial meeting which took place at the TBDC attended by Messrs Page, Connolly, and Burbedge on behalf of TB; and Mr Ledger and Ms Raby of ASL and Mr Coonan of WC. The meeting lasted about one-and-a-half hours. There is a dispute between the parties as to precisely what was said and discussed at that meeting. In summary, based on the evidence of Mr Coonan and supported to some extent by Mr Coonan's near contemporaneous subsequent written "advice" dated 23 December 2008 and "Preliminary Report" dated 29 December 2008, Mr Nicholson submitted that what happened was as follows:

(i) TB's representatives indicated that on their preliminary calculations there had been stock discrepancies for 2006 to 2008 totalling £1,681,462.56 in cost value; and they handed Mr Coonan a sheet setting out those figures.

(ii) They stated that much of the stock would have been sold at full margin, and suggested that losses of profit might well be in the region of £300,000 to £500,000.

(iii) Mr Coonan asked them to provide various information and documents including detailed supporting evidence to confirm the level of shortages in the period 2000 to 2005 when no theft was suspected and 2005 to the present when it was; spreadsheets, stock accounts and reconciliations to support the figures; and a detailed breakdown of shortages including breakdowns, with evidence as to percentages of each item sold and percentages of each item unsold or sold at reduced margins.

(iv) TB's representatives said that the information for individual stock items might take some time to prepare but made no suggestion that this would be unduly onerous.

(v) There was discussion about what would be needed to justify loss of gross profit under the policy. Mr Coonan said that TB's basis of calculating loss of profit was flawed and did not take into account policy provisions; and that only where lines of stock were fully sold would they be in a position to demonstrate loss of profit.

45. In summary, Mr Page's evidence was that Mr Coonan had made it clear that he (Mr Coonan) was only attending as an "observer"; that they (ie TB) were effectively only able to have proper conversations with ASL about the stock loss claim; that TB were all in a "state of shock"; that TB had only just learnt of the thefts; that at that stage TB did not know the extent of their losses and were still pulling all the information together; that Mr Coonan was given a copy of ASL's Information Request which had detailed answers/information set out thereon by Mr Connolly; that although TB were not in a position to provide the loss adjusters with full details of the claim, the PI counts and computerised checks completed between 2006 and 2008 showed discrepancies totalling £1,681,462.56 during this period although these were "cost figures" and made no deduction for "background noise"; and that it was far too early to quantify

the BI claim as all the data was not to hand. In his statement, Mr Page said that his preliminary view was that TB would have to approach the BI claim initially on the basis that the sales performance of the stolen stock would most likely mirror the general sales and margin performance of the business although, in cross-examination, he accepted that this view would require "refinement".

46. Mr Page's evidence was that he did not recall suggesting to Mr Coonan that TB's BI losses might be in the region of £300,000 to £500,000. However, insofar as may be relevant, it seem to me likely that there must have been some discussion that likely BI losses would be of this order if only because Mr Coonan's subsequent advice a few days later to AXA suggested a reserve of £300,000; and that Mr Coonan probably indicated that he would provide a "shopping list" of further information that was required if only because that is what Mr Coonan subsequently did provide again a few days later. In the event, it seems to me unnecessary to resolve the other differences of recollection as to what happened at that meeting. However, in passing, it is to be noted that it is TB's case that if the email dated 15 December 2008 referred to above did not constitute "particulars of claim" within the meaning of Special Condition 2(b)(i), then at the conclusion of this meeting, the emails that Mr Coonan had by this stage in conjunction with the answered ASL Information Request more than satisfied that criterion.

47. On 19 December 2008 Ms Raby of ASL sent to Mr Burbedge a second request for information covering 13 separate headings – including requests for stock variance details.

48. On 23 December 2008 Mr Coonan sent his "IMMEDIATE ADVICE (CONSEQUENTIAL LOSS)" report to the defendants with various comments including "supposed cause" as "loss of gross profit due to theft of stock by employee" and a suggested reserve of £300,000. It was Mr Cogley QC's submission that the details on this document clearly show that Mr Coonan had particulars of claim; and in his limited remarks, Mr Coonan highlighted the period over which the claim ranged and (amongst other things) whether the policy should respond. He said that his "... detailed Preliminary Report will follow".

49. On 29 December 2008 Mr Coonan sent his "Preliminary Report (Consequential Loss)" to AXA. It is a relatively detailed document covering some seven pages. For present purposes, it is sufficient to note that it again refers to the "supposed cause" as "Loss of gross profit following theft by employee"; suggests a "reserve" of £300,000; contains a brief description of the TBDC, TB's business, discovery of the thefts by JON and TB's stock checking system and PI Variances; and refers to the fact that TB believes that JON had been stealing stock systematically "over the past three years". On page 5 of the report, under the heading "Nature and Extent of Damage", there is a reference to the preliminary calculations of shortages between 2006 to 2008 totalling £1,681,462.56. Further, the report states on that page that TB had suggested that its losses may well be in the region of £300,000 to £500,000 and that "... we have also requested from the Insured detailed supporting evidence to confirm both the level of shortages in the periods 2000-2005 when no theft was suspected and for the period 2005 to the present when criminal activity is suspected ...". The report goes on to state that it had been pointed out that TB's basis of calculating loss of gross profit was flawed. In addition, the report sets out certain observations on pages 6 to 7 with regard to underwriters' potential liability including a comment that TB may encounter difficulty demonstrating that any single loss exceeded the £5,000 excess.

50. A few minutes later, on 29 December 2008, Mr Coonan's secretary sent an email to Mr Burbedge, asking Mr Connolly and Mr Page to send the following information and documents:

"1. Copy of Mr Okyere-Nsiah's employment file and details of any references obtained.

2. Copies of the results of physical stock takes undertaken from 2000-2008.

3. Details of computerised registration systems and records of shortages during the period 2000-2008.

4. Breakdown of shortages by item description and cost value.

5. Performance of each stock item, confirming whether or not there was unsatisfied demand for these items or where replacement garments were obtained from stock stores, ensuring that no loss of sales resulted.

6. Confirmation that there was unsatisfied demand for stock where it is your client's intention to pursue a claim for loss of gross profit.

7. Copies of your clients' profit and loss accounts for 2005, 2006, 2007 and if available 2008 together with management accounts for the same period."

51. Mr Coonan's evidence was that this "shopping list" was substantially the same as that which he had requested during the earlier meeting on 18 December 2008. This may be right in general terms although I rather doubt that any such request was made with such specificity at the meeting if only because, if it had, one might have expected some written note at the time and Mr Page to have a recollection of such request, which he did not. However, in the event, it is unnecessary to resolve this dispute since there is no doubt that this email was sent on 29 December 2008 and, in my view, the gap between 18 and 29 December matters not.

52. Shortly thereafter, Mr Burbedge discussed the matter with Mrs Stone. She was and is a highly experienced insurance broker, specialising as "a claims advocate" in pursuing large and difficult claims against insurers. She advised that they would need to give information, as indicated in her note of discussion with him dated 31 December:

"Loss – do we need to give details of each item. – yes

Do we need to complete 2008 Pi s – yes.

Do we need to prove unsatisfied demand for LoP claim – yes."

53. On 2 January 2009 Mrs Woodgate of AXA signed off an internal Strategy Plan. There is no mention in that document of the absence of either particulars of claim or information/evidence but at this early juncture she identified the question of whether BI cover was intended, recorded that AXA was "checking with U/W" – and stated that this task was to be carried out "ASAP".

54. Meanwhile on or about 1 January 2009 it appears that Bluefin commenced operations, taking over LB's responsibilities as insurance brokers for the claimants, together with some of LB's employees, including Mr Burbedge.

55. On 6 January 2009 there were discussions at Bluefin about the claimants' claim, by emails:

(i) From Mr Burbedge to Mr Matt Harlin, Regional Director, expressing his concerns about the claim; in summary, stating that he had explained to the client (ie TB) that their Commercial Combined policy would not be expected to cover loss of profit as a result of employee theft, but there appeared to be a "typo" on AXA's printed wording which might open the door for a BI claim; that the policy did not officially cover loss of profit, but he had had an off-the-record meeting with a solicitor from Browne Jacobson; that the client had requested involvement of senior personnel at Bluefin; and that, given the size of the probable uninsured loss, it could not be ruled out that TB might at some stage come after Bluefin for compensation.

(ii) From Mr Harlin to Mr Howard Fryer, Head of Corporate, mentioning that Mr Burbedge was nervous about the claim and that there were elements which would make the experience uncomfortable for all concerned; saying that he was keen to insulate Mr Burbedge and to ensure all avenues were explored to find grounds for settlement; and suggesting the possibility of mobilising Mrs Stone.

(iii) From Mr Fryer to Mrs Stone, forwarding those emails to her.

(iv) From Mrs Stone to Mr Fryer, the bottom line of which was that she would be happy to take over the claim.

56. Mr Nicholson QC submitted that the concerns indicated in the emails forwarded to Mrs Stone were the backdrop to her involvement in the claim; and that she was brought in as a very experienced and heavyweight claims pursuer to try and get over those perceived difficulties.

57. On 12 January 2009 Mrs Stone met Mr Burbedge. During this meeting, he indicated that Mr Page had expressed unhappiness about having to provide all of the information requested not because he did not want to provide the information but because, if a lot of information was required, it would be costly and time-consuming to put it together. Mrs Stone and Mr Burbedge also discussed a "Claim Strategy", which she recorded in her contemporaneous typed-up "meeting notes" as follows:

"1. Insurer to admit liability – provide non-financial information, particularly recovery opportunities.

2. Provide outline quantum indication but park detailed quantum questions until admission of liability forthcoming. ..."

Mrs Stone also recorded, amongst other things:

"AXA – BI Claim

Not intended to cover such events xs £5k each time a BI loss occurred following theft ...

Overall

... If overcome liability hurdles – 'negotiated' amount.

Claims follows AIG claim – AIG have to admit liability first

W&C Shopping list

See 29.12.08 email"

58. On 14 January 2009 Mrs Stone undertook an analysis of the cover provided by AXA under the policy schedule for 2008/2009, and the policy wording. She noted General Conditions Clause 15 – "Everything to be done by the Insured is a CP [Condition Precedent]". As she accepted in

evidence, she was also aware, after her review and analysis, of the Special Claims Conditions in the policy wording at page 38 and the General Claims Conditions at page 6.

59. On 16 January 2009 Mrs Stone and Mr Burbedge met with Mr Page. As appears from Mr Page's manuscript note of that meeting, they discussed, amongst other things, WC's list of requirements and the claim against AXA – "Very difficult to prove". Mrs Stone advised that financial details should be "parked" until liability had been accepted. According to Mr Page, this was a suggestion that she would put to AXA which was in line with the "Claim Strategy" discussed between her and Mr Burbedge on 14 January 2009. The upshot of the meeting was agreement that Mrs Stone would help Mr Page and TB in pursuing the claims.

60. On 22 January 2009 Mrs Stone wrote to Mr Page advising about the cover provided under the various available policies. In relation to the AXA policy, she stated that she anticipated a number of challenges – including the problem that she did not believe AXA intended to cover employee theft under the theft section. She also put Mr Page on notice of the possibility of reduction in the claim in relation to premium rebates.

61. On 27 January 2009 Mrs Stone again met Mr Page to discuss details of the claims.

62. On 4 February 2009 Mr Page sent Mrs Stone draft summaries of claims. His draft indicated that any claim for cost of stock against AXA would be eliminated by the excess on each theft. Between then and 17 February 2009, Mrs Stone and Mr Page discussed the drafts and they exchanged further drafts.

63. Meanwhile, on 6 February 2009, having received none of the documentation and information requested on 18 and 29 December 2008, Mr Coonan sent a chasing email to Mr Burbedge stating: "I refer to my email dated 29 December 2008, to which I have not yet received a response. I look forward to hearing from you or your client as soon as possible with the information requested".

64. On 10 February 2009 Mrs Stone spoke to Mr Coonan on the phone asking for a meeting with Mr Coonan, Ms Raby and Mr Page to discuss the further information required. She said that she hoped she would be able to provide some response to his request for information. As to this conversation, Mr Nicholson QC relied on the fact that Mrs Stone did not suggest that such request for information was unreasonable; and Mr Cogley QC relied on the fact that there is no suggestion that Mr Coonan objected to the approach suggested by Mrs Stone nor that her proposal for a meeting to discuss Mr Coonan's request for information was in any way unusual or unreasonable.

65. On 13 February 2009 Mrs Stone sent an email to Ms Raby and Mr Coonan confirming a meeting on 2 March 2009. The email states, in particular:

"As explained, the purpose of the meeting is to provide the outstanding information previously requested to enable you to report to your principals with the aim of securing a commitment to provide indemnity. This includes ... item 1 on your 29 December email ... all items relevant to recovery possibilities will be provided ...

I shall also circulate headline claim details so you have an idea of overall quantum and how it was calculated. ...

Subsequently Lindsay can produce the more in-depth stock and financial information needed to support the claim (John the balance of your shopping list is currently parked here ...)."

In passing, I should note that Mr Cogley QC placed heavy reliance on this email as well as the fact that there was no objection or complaint made by Mr Coonan regarding this approach nor any reservation expressed by Mr Coonan in relation thereto and that Mr Coonan's conduct in attending the meeting without demur can only be regarded as acceptance by conduct of that approach, certainly at that stage.

66. On 17 February 2009 Mrs Stone sent an email to Mr Coonan attaching Mr Page's finalised drafts, which she described as "headline details" of claims for loss of stock and loss of profits. The claims were for the years 2005 to 2008 only, with explanation that TB believed the thefts commenced in 2005. The claims totalled £3,756,397 for loss of profits plus £1,435,373 for stock cost, without allowance for excesses in relation to either. It was Mr Cogley QC's submission that the contents of this email constituted further or updated "particulars of claim". As I understood it, Mr Nicholson QC accepted that this email did constitute "particulars of claim" in respect of BI losses for the years stated, ie 2005 to 2008, although they came too late. I deal with this further below.

67. On 2 March 2009, in accordance with Mrs Stone's request, an important meeting took place at TB's offices attended by Mrs Stone, Mr Burbedge, Mr Page, Ms Raby, and Mr Coonan. There are three separate contemporaneous notes of this meeting, ie Mr Burbedge's, Mrs Stone's and Mr Coonan's. In addition, each of them as well as Mr Page gave evidence both in their written witness statements and in cross-examination as to what happened at this meeting. Drawing these different pieces of evidence together, the following is a summary of my conclusions as to the discussion at that meeting:

(i) Mr Coonan asked for various documents and reiterated that the information he was seeking was largely unchanged from what he had sought in December 2008.

(ii) Neither Mr Page nor Mrs Stone said that the requests were unreasonable as such. However, Mr Page said that in the first instance AXA should confirm whether or not liability (ie for BI losses) was accepted and then TB would, if such confirmation were provided, go on to

provide all documentation that would be required in support of the figures and agree the methodology and assumptions. Although I accept that this was not an outright refusal as such, my assessment of the totality of the evidence is that, contrary to the evidence of Mr Page, this was more than a "suggestion" on his part. Rather, Mr Page was adamant that he did not have the resource to provide all the financial and stock detail requested; and he made it clear that he was not prepared to put in the time and incur the cost of obtaining and preparing such information unless he knew that AXA were, in principle, going to pay the claim. TB's representatives indicated that all necessary supporting documents, turnover records and stock reconciliation sheets would then be supplied; but producing such information would be laborious and would require the use of external resources, the cost of which they were unwilling to incur until after agreement in principle by AXA that losses of gross profits adequately demonstrated would be reimbursed. This is consistent with, for example, Mrs Stone's contemporaneous note which states: "Not prepared to do work until liability admitted", and Mr Coonan's subsequent email dated 24 March 2009.

(iii) Mrs Stone raised the question of accountant's charges. She said that TB wanted insurers to pay for KPMG to provide the information listed in items 2 to 7 of Mr Coonan's "shopping list". Mr Coonan said that in his view TB had to pay for the cost of preparing and presenting a quantified claim to AXA but that cover was available for additional costs incurred to produce particulars to verify the information. Mrs Stone argued that the costs of providing the information requested should be accepted under the policy. Mr Coonan said he did not believe the cover for accountants' fees was as broad as she was suggesting.

68. In his written statement, it was Mr Page's evidence that Mr Coonan seemed to accept his proposal, ie that AXA should first confirm in principle whether or not liability was accepted before the information requested was provided. However, I am satisfied that Mr Coonan never expressed himself in such terms. In cross-examination, Mr Page accepted that this was indeed the case although his evidence was that this was his (Mr Page's) interpretation of Mr Coonan's manner because he (Mr Coonan) did not disagree and said he was taking it to his principals. I do not accept that evidence in particular because, quite apart from Mr Coonan's own evidence, it is plain from Mrs Stone's evidence that he (Mr Coonan) did disagree. As she said in her written statement: "I would say positions did not change during the meeting as the adjusters had no authority to make decisions on liability or funding". Rather, it seems plain that the meeting ended on the basis that Mr Coonan would report back to underwriters, take further instructions and get back to her when such instructions had been obtained.

69. On 10 March 2009 AXA's underwriting department in London produced their Large Loss Advice. Mr Cogley QC relied on this document because it raises no comments on or in respect of any lack of information. Further, the observation is made that: "... this is very early days for a claim of this nature and a full investigation will be required". It also makes no mention of the coverage issues flagged up by Mrs Woodgate in the 2 January Strategy Plan referred to above but certainly foreshadows significant work in respect of the quantum of the claim.

70. On 17 March 2009 Mr Coonan provided an interim report to AXA. This is a detailed document covering some six pages. In particular, Mr Nicholson QC highlighted the following points in relation to that report:

(i) Mr Coonan referred to his requests for detailed evidence supporting loss and to the position about that indicated by TB.

(ii) Mr Coonan commented about various difficulties for TB on the claim for loss of profits.

(iii) Mr Coonan reported that TB had requested that it instruct either KPMG or other forensic accountants to present a quantified claim and that the accountants' charges be accepted under the Professional Accountant's Clause (PAC); and that he had advised TB that it was responsible for the costs of preparing and presenting a quantified claim although cover was available for additional costs for accountants to produce particulars to verify the information. He said that he did not believe the clause might be used to fund the costs of accountants investigating and presenting a quantified claim and asked whether AXA agreed.

71. Mr Cogley QC highlighted a number of other points in this report, viz Mr Coonan sought instructions from AXA on "the various liability issues discussed in our first report", asking whether AXA wished to "raise any policy point in this regard". AXA were also asked if they wished to raise any policy points in relation to the "30 day point" and the failure to seek references for JON; Mr Coonan noted that: "the Insured has indicated that it is prepared to supply us all necessary supporting documents, turnover records and stock reconciliation sheets", but that it required the use of external resources and did not wish to incur the expenditure until "it receives agreement in principle that losses of gross profit adequately demonstrated will be reimbursed". Further, Mr Cogley QC emphasised that Mr Coonan *did not* ask AXA if it wanted to raise any policy point in this regard, which can (he submitted) only be consistent with the parties' common understanding that quantum was parked pending inter alia resolution of the PAC issue, or at the absolute lowest until Mr Coonan reverted with the results of the instructions he was seeking with regard not only to liability issues but also the engagement of the PAC – on which he was to revert to Mrs Stone. Mr Cogley QC also highlighted that Mr Coonan sought consent from the underwriters for him to instruct forensic accountants – the Topping Partnership – at that stage; that it is clear that Mr Coonan needed assistance in understanding the claim or certainly would do so; and that this report, like his 29 December report, clearly indicated that what he was seeking, but what was parked pending his instructions, was "evidence" – as this word is used by him to describe that which was outstanding from his shopping list of 29 December 2008.

72. Prior to 24 March 2009 AXA prepared a memo indicating that internally they had concerns about liability/coverage issues, and under the heading Professional Accountants Clause it is recorded: "Pay for costs incurred by accountant for producing documents". The handwriting on that memo is Mrs Julie Taylor's.

73. On 24 March 2009 Mr Coonan emailed Mrs Stone noting: "I have issued a further report to Insurers and currently await instructions. I shall contact you again once these instructions are received". In addition, Mr Coonan stated that the information in the stock and loss of profit documents provided was "... entirely speculative regarding frequency and size of thefts and not supported by factual information", and then ended as follows:

"I note that your client is not prepared to undertake the exhaustive reviews and analysis of stock shortage and claim reconciliation information at this stage until such time as agreement in principle that liability is accepted has been provided."

Mrs Stone accepted in evidence that that last paragraph of the email (as quoted above) accurately acknowledged the discussion at the 2 March 2009 meeting.

74. Following receipt of Mr Coonan's interim report dated 17 March 2009, it was carefully considered by Mrs Julie Taylor, the claims handler at AXA responsible for the claim. She prepared an internal Strategy Report for consideration at the internal Strategy Meeting that (in the event) took place on 30 March 2009. Her main focus was on issues of cover; she left quantum details for Mr Coonan to pursue. As to accountants' charges, she considered the PAC and agreed with the views indicated by Mr Coonan. In the report, Mrs Taylor proposed that AXA should agree to pay for producing information to verify a quantified claim but not to put the claim together in the first place, in accordance with Mr Coonan's interpretation of the policy wording; and this was agreed at the meeting. However, it would appear that she did not relay these views to Mr Coonan. Also, she could not commit to paying any sums under the PAC whilst liability under the policy remained uncertain; and she "parked" responding to Mr Coonan on the matters he had raised for instructions until she had got legal advice from solicitors on policy indemnity.

75. On 1 April 2009 Mrs Taylor telephoned Mr Coonan and told him that Kennedys had been instructed and that she would update him in due course. As submitted by Mr Cogley QC, it would seem that this can only be a reference to the matters upon which Mr Coonan was seeking instructions and on which he had said he was going to revert to Mrs Stone. In the event, Mrs Taylor never did revert to Mr Coonan. In cross-examination, Mrs Taylor explained that this was due to the fact that she could not authorise expenditure under the PAC because she (ie AXA) had not admitted liability and was still seeking legal opinion. Further, Mrs Taylor accepted in cross-examination that she did not go back to Mr Coonan because, until AXA had received legal advice, AXA had "parked" getting back to him and "parked" the matters that he had raised and in respect of which he wanted instructions; and that these matters would remain "parked" until AXA "unparked" them. In addition, she also accepted that all the liability issues that Mr Coonan had raised in his interim report dated 17 March 2009 were also effectively "parked" until AXA had dealt with the issues then being considered by the solicitors. This evidence would seem consistent with the note of her telephone conversation with Mr Coonan. Mr Cogley QC relied heavily on this evidence; and it was his submission that thereafter the defendants never "unparked" the quantum issues. I consider this submission further below.

76. Thereafter, there were certain telephone calls between Mrs Stone and Mrs Woodgate (14 April 2009) and Mrs Taylor (16 April 2009). These were relied upon by Mr Cogley QC to support his case that all quantum issues had been "parked".

77. On 28 April 2009 Mr Coonan sent an email to Mrs Stone referring to previous correspondence, stating that insurers had carefully considered the further documents provided in support of the claim and requesting further information "... to allow it to consider all pertinent issues ...". The new set of questions from Mr Coonan all related to liability issues and were answered, in part, by Mrs Stone in her subsequent email dated 6 May 2009.

78. On 14 May 2009 Mrs Stone emailed Mr Coonan stating: "... AIG's position –their decision on liability is promised next week. No doubt it will take a little longer but it would be appreciated if their decision were also available in the near future so that we can *agree a methodology that suits both insurers for the financial substantiation required*" (emphasis added). Mr Coonan never replied to this email.

79. On 26 May 2009 AXA produced what would appear to be its final internal Strategy Plan. No quantum issues were under consideration and the AXA strategy did not change after that point.

80. On 28 May 2009 Mrs Stone telephoned WC stating that she had sent all outstanding information required to them and would like to know the present position. Prior to the point being raised in these proceedings, it would appear that neither TB nor Mrs Stone were ever told that she had not in fact sent all outstanding information and that the 29 December 2009 requests were still outstanding.

81. On the same day, AXA telephoned Bluefin setting out its position on liability, ie that there was no intention to give this cover, ie for employee theft; but there was no mention of outstanding documentation.

82. On 11 June 2009 Mrs Taylor on behalf of AXA wrote to Mrs Stone on behalf of the claimants fully reserving AXA's rights:

"1. ... AXA ... fully reserves all its rights under the Policy and at law and ... AXA's ongoing conduct of this matter, including but not limited to conduct through its adjusters, Woodgate & Clark, or others instructed by or on behalf of AXA, will be subject to that reservation.

2. ... this letter nor any conduct related to this matter shall be construed as a waiver of, nor shall AXA be estopped from asserting in the future, any rights and defences it may have under the Policy or in law. No representations, express or implied, by AXA, or its agents or its employees in respect of coverage under the Policy in respect of the Claim shall be effective unless and until communicated in writing by AXA or by any solicitors that may be instructed on their behalf. ..."

83. On 23 June 2009 Mrs Stone replied, acknowledging the letter and noting the reservation of rights.

84. On 13 July 2009 AXA notified co-insurers of the claim stating that: "If liability were to be admitted we would instruct forensic accountants to comment on the claim made".

85. On 10 August 2009, following receipt of a copy of the police report, Mr Coonan sent an email to Mrs Stone, referring to it and stating: "In the meantime, I look forward to receiving any further claim submission your client wishes to make at this stage". Mrs Stone replied on the same day, saying in summary that she was in direct correspondence with AXA regarding an admission of liability and stating: "The insured have updated their stock claim as the results of the anticipated 2008 shortfall are now available. It is down slightly to £1.674 m in total, so still exceeds the AIG policy limited. Once AXA has confirmed they are prepared to deal with this claim, I will forward the details on".

86. On 25 August 2009 AIG admitted liability under its policy. In light of that development, on the same day, Mrs Stone emailed Mrs Taylor with copy to Mr Coonan informing her of AIG's stance and reciting that AIG wished to proceed to finalise and verify the loss amount so they could proceed to settlement. The email stated: "Clearly given the work involved the Insured will not wish to undertake this exercise twice. You may deem it prudent therefore to ask John Coonan to contact me so that both adjusters can agree a 'specification' for the quantum exercise ... I look forward to hearing from you, especially as this loss was notified to AXA over eight months ago. It is time a decision on liability was available in the interests of TCF [Treating Clients Fairly]".

87. On 28 August 2009 Mrs Stone emailed Ms Raby (AIG Loss Adjuster) and copied in Mr Coonan. The email stated: "AXA are still dragging their feet but this is copied to John as I have suggested to AXA he attends too. As previously discussed, Ted Baker will not be willing to undertake this exercise twice and I shall wish to revisit the opportunities that the AIG policy presents to provide accounting assistance to the Insured. You will recall Lindsay's comments at our last meeting regarding lack of in-house resource to tackle this project ...". At the same time she suggested four different dates for the proposed meeting to which she referred.

88. On 9 September 2009 Mr Coonan emailed Mrs Taylor stating: "The Insured is reluctant to carry out necessary quantification works twice and the brokers have advised that they are pressing you and your underwriters for your own admission of liability ... Further, the brokers have asked us to confirm that we will attend a meeting arranged for 16 September at which time quantum matters and the manner in which the Insured will seek to prove its losses will be discussed. I have confirmed to the broker that I shall be pleased to attend and participate in such quantum discussions, although this involvement will be *entirely without prejudice to or admission of liability*" (emphasis added). There then appears to have been a telephone call between Mrs Taylor and Mr Coonan when she told him that his attendance was to be *not* on a "without prejudice" basis but "... as an observer only ...".

89. On 15 September 2009 Mr Coonan emailed Bluefin indicating that he would be attending the meeting but that "... Insurers have not yet provided me with further instructions and my attendance will be on an observer basis only". It is not disputed that Mr Coonan did not get any further instructions or that his attendance was indeed as observer only. However, at that meeting he was given a demonstration of TB's computer system; and after that meeting he was provided with substantial further data/information. It is not clear what, if anything, Mr Coonan did with this material.

90. Thereafter a meeting took place on 16 September 2009 at TB's offices between Mrs Stone, Mr Page, Mr Ledger and Ms Raby of ASL, and Mr Coonan. The main purpose of the meeting was to progress finalisation of the loss amount in respect of cost of stock with AIG, but Mrs Stone suggested that Mr Coonan should also attend to avoid duplication of work in that respect. Following the meeting, Mr Page emailed to Ms Raby, copied to Mr Coonan, PI reports for the seasons from spring/summer 2005 to spring/summer 2009 inclusive.

91. Mr Coonan's involvement appears to have ceased at the end of September 2009.

92. On 22 October 2009 the claimants' solicitors, Browne Jacobson, sent a letter of claim to Kennedys. On 19 November 2009 Kennedys sent a letter of response denying liability but, without prejudice to that, inviting TB to provide evidence of each theft, evidence of what was stolen and its value, and calculation by reference to the business interruption terms. There was no substantive response to that invitation. On 23 February 2010 this action was commenced against AXA.

93. Against that background, I turn to consider the various points raised by the defendants in relation to claims cooperation. In summary, these were as follows:

(i) In breach of BI Section, Special Claims Conditions 2(b)(i), TB failed to deliver to AXA any "particulars of claim" until their email dated 17 February 2009 thereby, in effect, precluding

any claim in respect of any incident of theft which occurred before 18 January 2008. Further, the particulars in that email were limited to 2005 to 2008 thereby precluding any claim in respect of any incident of theft which occurred in 2004; and/or

(ii) In breach of BI Section, Special Claims Condition 2(b)(ii) and/or (d), TB failed to deliver to AXA relevant information and documents thereby precluding any claim at all.

In support of these points, the defendants say that compliance with these conditions was a condition precedent to liability under Special Claims Condition (c) and/or Claims Conditions (2) and/or General Condition 15. (In passing, I should mention that Mr Nicholson QC originally advanced a case to the effect summarised under (i) above based on a breach of Claims Condition 3; but that was abandoned.)

94. In further support of these points, Mr Nicholson QC advanced a number of propositions as to the applicable legal principles which I would summarise as follows:

(i) Although the traditional view was that any exception clause should be construed against insurers and with "the utmost strictness", the more modern authorities favour a more balanced approach; and in any event, there is specific authority that the court should not construe a claims cooperation clause against insurers unless genuine ambiguity exists: *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 & 3)* [2001] Lloyd's Rep IR 667, per Mance LJ at para 21

(ii) Observations in *Royal & Sun Alliance Insurance plc v Dornoch* [2005] Lloyd's Rep IR 544, per Longmore LJ at page 550, para 19 that a party relying on an exemption clause can only do so if the words are clear on a fair construction of the clause, were directed to a more stringent provision than a claims cooperation clause, namely a claims control clause in a reinsurance contract.

(iii) A clause which specifies a time within which a claim is to be presented and which is expressed to be a condition precedent to the insurer's liability must be complied with strictly: *Colinvaux and Merkin's Insurance Contract Law*, looseleaf edition, volume 2 ("Colinvaux"), para C-0257; *Roper v Lendon* (1859) 1 E & E 825; *Cassel v Lancashire & Yorkshire Accident Insurance Co* (1885) 1 TLR 495; *Adamson & Sons v Liverpool and London and Globe Insurance Co Ltd* [1953] 2 Lloyd's Rep 355 at page 359. Although some doubt was expressed about such proposition by Lord Scott in *Diab v Regent Insurance Co* [2007] 1 WLR 797 at page 802, para 14E to F and page 803, para 17C-D, this was obiter and does not appear to have been followed in any subsequent authority.

(iv) The fact that it may have been impossible for the claimant to give notice within the prescribed time (eg because he did not know of the facts giving rise to his right to claim or because an injury only became apparent after the time for notice had expired) will not prevent a court from denying the right to recover under the policy: *MacGillivray on Insurance Law*, para 20-038, page 611; *Cassel* and *Adamson & Sons* cited above.

(v) If a clause does not set out the time limit by which compliance is required, the insured must comply: (a) within a reasonable time; and (b) in any event before proceedings are issued: *Chitty on Contracts*, 31st Edition, 2012, volume 1, para 21-021; *Shinedean Ltd v Alldown Demolition (London) Ltd* [2006] Lloyd's Rep IR 846; *Welch v Royal Exchange Assurance* (1938) 60 Ll L Rep 63; [1938] 1 KB 757; (CA) (1938) 62 Ll L Rep 83; [1939] 1 KB 294. As to (a), Mr Nicholson QC submitted this was trite law. As to (b), he submitted that compliance with a condition precedent is necessary before proceedings are issued – otherwise the claimant does not have a complete cause of action and the proceedings are bad ab initio; and that the issue of proceedings is a watershed at which the rights of the parties are to be assessed: "... when a writ is issued the rights of the parties are crystallised": *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] Lloyd's Rep IR 247; [2003] 1 AC 469, per Lord Hobhouse at para 75.

95. I did not understand Mr Cogley QC to dispute propositions (iii) and (iv). As to propositions (i) and (ii), Mr Cogley QC maintained that conditions precedent are to be construed strictly; and he also disputed in part proposition (v). So far as necessary and relevant, I deal with these issues below in the specific context of the points raised by Mr Nicholson QC.

96. Before turning to these specific points of construction, there is a further related but discrete point which requires mention so far as TB's claim in respect of 2004 is concerned, viz Mr Nicholson QC's submission that any such claim was, in any event, time-barred. The background to that point is somewhat convoluted. In summary, it was common ground that no such claim had been included when the present proceedings were originally initiated. However, at a hearing on 14 December 2012, TB made an application for permission to re-amend to claim £120,101 in respect of policy year 2004/2005 which was granted by Cooke J on a "provisional" basis only and without prejudice to any argument that the defendants may wish to advance at trial or earlier hearing that the amendment should not be permitted including (in effect) any argument that the claim was already time-barred as at 14 December 2012. In the event, Mr Nicholson QC did indeed submit that the claim for 2004 was already time-barred as at that date and that the amendment should not therefore be permitted. I heard argument at the beginning of the trial with regard to this point and indicated my decision, ie confirming the grant of permission, with reasons to follow in my judgment following the trial. In summary, my reasons are that although the effect of the amendment would be to add a new claim, such claim arises out of substantially the same facts as the other claims in respect of which TB had already claimed a remedy in these proceedings within the meaning of CPR 17.4 and that, as a matter of discretion, the amendment should be permitted. For present purposes, that brief statement of my reasons is, I believe, sufficient. Whilst I recognise that these conclusions are far from straightforward on the facts of the present case, I do not propose to lengthen further this judgment by considering in detail the

parties' respective arguments and the various authorities referred to in the course of argument with regard to the proper scope of CPR 17.4 and the exercise of the discretion thereunder because, for the reasons set out below, it is my conclusion that the claim advanced in respect of 2004 must be rejected in any event.

Special Claims Condition 2(b)(i)

97. I have already quoted this above but in summary it required TB to deliver to AXA "particulars of claim" not later than 30 days after the expiry of the Indemnity Period or within such further time as AXA might allow. That gives rise to a threshold question of construction: do the words at the start of Special Claims Condition (b) – "In the event of a claim being made under this Section ..." – in some way override the time limit in the first sub-clause of 30 days after expiry of the Indemnity Period or such time as AXA might allow? This is important – indeed potentially crucial – because, as is obvious, TB's claims extend over a number of years covered by a number of different policies covering successive policy periods; and the phrase "Indemnity Period" is a defined term in each of the policies which is, by virtue of such definition, limited to the Maximum Indemnity Period ("MIP") as stated in each policy schedule.

98. As to that question, Mr Nicholson QC submitted that on ordinary principles of construction of the wording as a whole, and whether or not construed against the insurers, those words do not do so for the following reasons:

(i) The obvious and natural reading of Special Claims Condition (b) is that, if a claim is made, the insured is required to have delivered or to deliver particulars within the time limit in (i). If the time limit of 30 days after Indemnity Period has expired, and further time is not allowed, the insured has not complied with the requirement.

(ii) That is strongly supported by the commercial purpose of these provisions. Claims for business interruption often involve very large sums. Insurers need to have particulars of any such claim (giving at least some indication of the amount, breakdown and basis of the claim) promptly, in order to investigate it, to consider what steps can be taken to mitigate losses, to set reserves, and if appropriate to notify reinsurers and/or make provisions for accounting purposes. Those points are specifically supported by Mr Hutchins' evidence, but they are obvious points and need no evidential support.

(iii) That interpretation is not affected by the fact that, in the highly unusual circumstances of this case, the insured did not find out there was any basis for claims until after expiry of the time limits of 30 days after Indemnity Periods. Claims for business interruption normally involve a single adverse event – such as fire, flood, or burglary – which is immediately known to the insured; which would give rise to an Indemnity Period of 12 months from that event, under this policy; and which should result in no real difficulty in providing particulars within a time limit of that period of 12 months plus 30 days.

(iv) There is no real ambiguity in Claims Condition (b) which could justify construction against the insurers.

(v) It is also interesting to compare the claimants' arguments against this interpretation with their arguments against the premium rebate counterclaim. If their arguments on the premium rebate provisions were to be correct, that provides further support for this interpretation.

99. On this basis and applying this sub-clause to the facts, Mr Nicholson QC submitted that it is clear that TB did not comply with it for the following reasons:

(i) TB did not deliver anything which could be regarded as "particulars of their claim" until 17 February 2009 – when their brokers emailed what they described as "headline details" to Woodgate & Clark. TB's suggestion that what was provided on or before the meeting on 18 December 2008 amounted to "particulars of their claim" is not tenable.

(ii) There was no allowance of any further time by or on behalf of AXA.

(iii) Therefore TB did not comply with the requirement under this sub-clause in respect of any incidents of theft before 18 January 2008: as to which the time limits of the Indemnity Periods of 12 months after each incident plus 30 days expired on dates before 17 February 2009.

(iv) Further or alternatively, the "headline details" emailed on 17 February 2009 were specifically limited to 2005 to 2008. They did not contain or indicate any claim for 2004. Indeed, no claim for 2004/2005 was suggested or put forward until October 2012, long after issue of the proceedings. Thus, a fortiori, TB did not comply with the requirement under this sub-clause in respect of any incidents of theft in 2004/2005.

100. Mr Cogley QC disputed these submissions. In particular, putting on one side the disputes as to: (i) whether TB delivered particulars of their claim (as Mr Cogley QC submitted) on 15 December 2008 or (as Mr Nicholson QC submitted) on 17 February 2009; and (ii) whether such particulars were sufficient to cover 2004, Mr Cogley QC raised two main points.

101. First, he submitted that as appears in the opening words, this sub-clause is only triggered in the circumstances there stated, ie: "In the event of a claim being made under this Section ...". Here, there was no claim "made" – nor could any claim be made – until after the thefts were discovered, ie in December 2008. Thus, Mr Cogley QC submitted, in effect, that there was and could be no obligation to deliver particulars of TB's claim before that date. Even accepting for present purposes that conditions precedent are to be construed strictly, I do not accept that submission broadly for the reasons advanced by Mr Nicholson QC and summarised above.

102. Secondly, Mr Cogley submitted that AXA had indeed allowed "further time". I accept that submission. In summary, it seems to me plain that immediately following discovery of the thefts, TB notified insurers promptly of potential claims covering at least 2005 to 2008 albeit in general terms. I am prepared to assume in favour of the defendants that TB did not at that

stage deliver to AXA in writing particulars of their claim and that it would have been open for insurers to pull the shutters down in respect of at least any incidents of theft prior to 30 days after the expiry of all previous Indemnity Periods. But they did not do so. On the contrary, it is plain that in the course of the meeting in December 2008 with Mr Coonan and in Mr Coonan's email dated 29 December 2008, Mr Coonan was, in effect seeking, at the very least, further information in respect of TB's claims. As it seems to me, that is consistent only with the defendants "allowing" TB to produce their "particulars of claim". At one stage, Mr Nicholson QC somewhat tentatively suggested that Mr Coonan had no authority to grant such "allowance" under Special Condition 2(b)(i). I do not accept that suggestion. It is, of course, right to say that no one ever made any reference to this sub-clause at that time. However, I do not consider that this is relevant to the point presently under consideration. Indeed, what is perhaps noteworthy is that it was not referred to at all by the defendants until long after the commencement of these proceedings when the defendants served their draft re-amended Defence in late 2012.

103. In due course, what was described as "headline details" were provided by Mrs Stone to Mr Coonan in the email dated 17 February 2009. In my view, that email is properly to be characterised as the delivery of particulars of claim. In that context, I would respectfully agree with the comments of the editors of *MacGillivray on Insurance Law*, 12th Edition, para 20-050:

"Sufficient particulars must be given by the assured. It is a question of fact whether particulars are sufficient, which must depend on all the circumstances of the case, such as the means of information open to the assured and, no doubt, the time within which particulars must be delivered. The phrase 'full particulars' has been said to mean 'the best particulars the assured can reasonably give', and if the assured has failed to give a detailed account of his loss when he could have done so, he will be unable to recover ... The assured will not be prevented or estopped from recovering for his loss by the fact that his particulars are inaccurate since, unless the policy otherwise provides, he is entitled to deliver further particulars or amend the original ones."

In my view, this email constituted compliance with the requirements of sub-clause 2(b)(i) within the time allowed by the defendants. Even if strictly irrelevant, it is perhaps noteworthy that the defendants did not suggest otherwise and made no complaint about any possible non-compliance with this sub-clause until late 2012.

104. However, I accept Mr Nicholson QC's narrower submission, viz that the particulars sent in the email dated 17 February 2009 made no claim in respect of 2004. Indeed, no such claim was ever suggested or put forward until October 2012, long after the issue of proceedings. In my view, contrary to Mr Cogley QC's submission, it matters not that a claim in respect of 2004 would necessarily form part of the 2004/2005 year and that the defendants were well aware that a claim for that policy year (ie relating to 2005) was being advanced. Even accepting the broad statement in *MacGillivray*, ie that an assured will not be prevented or estopped from recovering for his loss by the fact that his particulars are inaccurate, it seems to me, at least in the circumstances of the present case, that it was incumbent on TB to provide some particulars of its claim in 2004 by that date or at least shortly thereafter and, in any event, by latest the commencement of proceedings. Since it did not do so until October 2012 and given that it is common ground that compliance is a condition precedent to any recovery, it is my conclusion that such claims are, in effect, now precluded as a matter of construction of the policy by operation of this sub-clause.

Special Claims Condition 2(b)(ii)

105. Again, I have already quoted the relevant part of this sub-clause but, in essence, it required TB to deliver to AXA "such books of account ... and other documents proofs information explanation and other evidence as may be reasonably required by the Company for the purpose of investigating or verifying the claim ...". (In addition, Mr Nicholson QC relied in this context on General Conditions, Claims Conditions 1(d) which required TB to deliver to AXA "(i) full information in writing of the property lost ... and of the amount of loss ..." which was not restricted or qualified by the words "reasonably required" or any other wording; and "(iii) all such proofs and information relating to the claim as may be reasonably required". However, it seems to me that, in this context, the Special Conditions must be regarded as being the relevant conditions.)

106. In essence, Mr Nicholson QC submitted that TB was in breach of this sub-clause in failing to provide the information etc in Mr Coonan's shopping list as set out in his email dated 29 December 2008; and that, since compliance was a condition precedent to recovery, TB were, in effect, precluded from advancing any claims. This gave rise to three main issues.

A. Documents, information etc and other evidence "reasonably required"

107. Mr Nicholson QC submitted that all the information in Mr Coonan's shopping list was "reasonably required" within the meaning of this clause and, in support of that submission, he relied on the expert evidence of Mr Roberts. This was disputed, at least in part, by Mr Cogley QC and, in that context, he relied on the expert evidence of Mr Glynn. However, in relation to one of the categories of documentation requested by Mr Coonan, ie Category 7: "Copies of your clients' profit and loss accounts for 2005, 2006, 2007 and if available 2008 together with management accounts for the same period", even Mr Glynn accepted that this was reasonably requested. Indeed, it was common ground between Mr Glynn and Mr Roberts that a request for management accounts is routine for commercial claims. Further, not only is there no dispute that none of this information was delivered to AXA at any time but both experts agreed that they could see no reason why this information was not provided. I agree. Further, whatever other disputes existed between the parties with regard to other categories of information and the time and expense that might have to be incurred in providing such information, it does not seem to

me that these have any relevance to the documents in Category 7. Further, I do not consider that the disputes with regard to the PAC are relevant in this context: as submitted by Mr Nicholson QC, the PAC did not provide for any obligation on the part of insurers to pay for profit and loss accounts or management accounts.

108. As for the other categories in Mr Coonan's shopping list, I am prepared to assume in the defendants' favour that most, if not all, of the documents and information requested were "reasonably required" in an abstract sense. However, it does not seem to me that this is necessarily so in circumstances where insurers in effect (wrongly) deny liability in principle or even (wrongly) refuse to admit that "employee theft" was an insured peril, as they did in the present case. I should emphasise that I fully accept that, generally speaking, it may be perfectly "reasonable" for insurers to reserve their position pending receipt of further documents/information and that a requirement by insurers that the insured should deliver such documents/information may be entirely "reasonable" because a review of such documents/information by insurers is necessary in order to decide, for example, whether cover exists or not. In my view, that is a statement of the obvious but it is not this case. I should also make plain that I fully accept as a matter of the general law of contract that a repudiation is a thing "writ in water" and that, unless it is accepted by the innocent party, the latter will generally continue to be bound by the contract and, in particular, continue to be bound to perform that party's continuing obligations under the contract. That is, indeed, trite law. However, here the focus is one of construction of the contract and, in particular, what information may be "reasonably required" by insurers in the particular circumstances of the present case; and unless and until the defendants were prepared to confirm at the very least that "employee theft" was an insured peril, the requirement to deliver the other categories of documents (apart from Category 7 and also Category 1) was, in my judgment, not "reasonable" having regard, in particular, to the time and expense that would have to be incurred by TB in complying with such requirement.

109. It follows that I do not consider that TB was in breach of Special Claims Condition 2(b)(ii) other than in respect of Category 7.

B. Professional Accountant's Clause

110. I have already referred to the debate between the parties as to the applicability of the PAC in particular between Mrs Stone and Mr Coonan at the meeting on 2 March 2009 and thereafter. Mr Cogley QC submitted, in effect, that the defendants' refusal to accept to pay for the cost of complying with Mr Coonan's shopping list was a breach of the PAC such that the defendants could not justifiably complain about any breach by TB in failing to deliver the documents/information required. For his part, Mr Nicholson QC submitted that such reliance on the PAC was misplaced. In particular, Mr Nicholson QC submitted that the PAC was a red herring, for a number of independent reasons.

111. First, he submitted that there is a fundamental distinction between presenting a claim and producing "such particulars or details or any other proofs information or evidence as may be required by [insurers] under part (b) of Special Condition 2 ... [etc]". This distinction may be somewhat fine but it was not disputed by Mr Cogley QC. However, contrary to Mr Nicholson QC's submission, it seems to me that Mr Cogley QC was probably right in his further submission that Mr Coonan's shopping list was at least in part in respect of "evidence".

112. Secondly, Mr Nicholson QC submitted that most of the information and documentation requested was not such as to qualify for payment under the PAC and that it could and should have been provided by TB themselves without any input from external accountants. On this point, I agree with Mr Nicholson QC in relation to Category 7. However, it seems to me that assistance from external accountants would probably have been desirable, if not essential, in respect of Categories 2 to 6.

113. Thirdly, Mr Nicholson QC submitted that having asked on one occasion – the meeting on 2 March 2009 – for payment under the PAC for accountancy input on some of the proofs required, and Mr Coonan having advised that the PAC did not extend to payment for the costs of preparing and presenting a quantified claim, TB did not pursue the matter. This is only partly true; and, in my view, it does not fairly – or or at least fully – reflect the facts. In truth, it seems to me that at the meeting on 2 March 2009 and in his email dated 24 March 2009, Mr Coonan indicated that he would revert after taking instructions from insurers as stated above. But he never did revert; and thereafter the shutters effectively came down when insurers served their reservation of rights letter.

114. Fourthly, Mr Nicholson QC submitted that the fact that AXA did not respond further to the request, or confirm that it was willing to pay for accountancy input on some of the proofs required subject to liability, or pay for any such input, are all immaterial. None of those facts relieves TB from failing to provide the information and documentation requested. However, in my view, this begs an important question as to the proper scope and effect of the PAC.

115. In the event and save as stated above, I do not consider that it is necessary to resolve these issues with regard to the scope and effect of the PAC because, as I have already, concluded, I do not consider that TB was in breach of Special Claims Condition 2(b)(ii) other than in respect of Category 7; and so far as that latter category is concerned, I do not consider that the PAC has any relevance.

C. Agreement/waiver/estoppel

116. In summary, under this head, Mr Cogley QC submitted that if and to the extent that TB were in breach of any obligation in relation to the provision of documents/information etc, the defendants were in effect precluded from raising such allegations. In the very broadest terms, the main nub of Mr Cogley QC's submission was that the parties had agreed to "park" all issues

concerning quantum until the question of liability in principle was in effect agreed or settled in one way or another although he put his case not merely on the basis of some form of contractual "agreement" but also on the basis of much broader allegations including waiver, estoppel by representation and/or acquiescence and/or convention and/or bad faith.

117. This was hotly disputed by Mr Nicholson QC. In particular, he submitted that this barrage of allegations were all diffuse and lacking in any particularity and emphasised the importance of identifying the necessary ingredients in order to establish, as a matter of law, any relevant "agreement", "waiver" or "estoppel". In essence, it was his submission that none of these was established in the particular circumstances of the present case.

118. As to the law, the parties each prayed in aid a large number of authorities to support their respective cases. There was also much debate about the scope and effect of the observations of Lord Scott in *Diab v Regent Insurance*. In the event, I do not consider that it is necessary to examine these authorities in detail. For present purposes, it is, I believe, sufficient to note the following.

Agreement

119. As to "agreement", this depends on the words and conduct of the parties objectively construed. As submitted by Mr Nicholson QC, this is trite law and needs no authority.

Waiver

120. As to "waiver", Mr Nicholson submitted that waiver by election and waiver by affirmation are clearly not relevant to breaches of conditions precedent: see *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] Lloyd's Rep IR 489, at para 70, and *Lexington Insurance Co v Multinacional de Seguros SA* [2009] Lloyd's Rep IR 1 per Christopher Clarke J at paras 52 to 68. Mr Cogley QC accepted that this was so with regard to what he described as a "historic" breach of or failure to comply with a condition precedent but, as a matter of logic, he submitted that there can be no such prescription in the case of a future or anticipated failure. In summary (and with some re-ordering), I understood Mr Cogley QC's submissions to be as follows:

(i) In the present case and with regard in particular to Special Condition 2(b)(ii) – which has no temporal time limit – the time by which the condition precedent had to be complied with was by no later than the issuance of the claim form, ie February 2010 when a different regime came into play with the crystallisation of the parties' rights. In support of that submission, he relied, in particular, on *The Star Sea* [2003] 1 AC 469 per Lord Hobhouse at page 504.

(ii) The cases relied upon by Mr Nicholson QC all relate to the position once the condition precedent has not been complied with, ie they relate to the position post-non-compliance. The rationale is that election involves choosing between inconsistent rights/remedies, and communicating this in clear and unequivocal terms – as enunciated by Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 at page 398. Thus, in the present case, if the facts support a choice being made by the defendants, prior to the expiry of the period within which any "reasonable requests" had to be satisfied, then, depending on the terms of that election, it either suspended the period within which the condition precedent had to be complied with, alternatively it constitutes an election by the defendants not to rely upon any *subsequent* non-fulfilment of the condition precedent at any stage.

(iii) This distinction is supported by the observations of Longmore LJ in *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2007] Lloyd's Rep IR 173; [2006] 1 WLR 1492 when comparing waiver by election and waiver by estoppel:

"... I would myself prefer Professor Malcolm Clarke's formulation in para 26-4(c) of his *Law of Insurance Contracts*:

'Inferences from rejection. If the insurer rejects the claim altogether on another ground, such as lack of cover, the insurer does not thereby waive the possibility of pleading a breach of condition at a later stage, if that breach occurred prior to the rejection of the claim ...'

Professor Clarke cites *Welch v Royal Exchange Assurance* [1939] 1 KB 294. Spencer Bower rightly says that that case is by no means clear authority for the proposition but, in my judgment, the proposition as set out by Professor Clarke is consistent with principle and is correct in the absence of any reliance or detriment on the part of the claimant. MacGillivray, *Insurance Law*, 10th Edition, 2003, para 19-45 is to the same effect."

(iv) The unequivocal communication referred to can arise in two ways viz either: (i) by the party electing to the other party; or (ii) by objective circumstances being such that the effluxion of time by itself constitutes that communication: see *Kosmar Villa Holidays* at para 38. Here, there is not only an unequivocal communication but in any event the effluxion of time, particularly when taken in conjunction with the other factual circumstances, such that there has undoubtedly been a waiver of strict insistence upon the condition precedent under Condition 2(b)(ii) prior to its expiry.

(v) None of the cases relied upon by Mr Nicholson QC considers whether insurers are able, having rejected the claim, to "lie in wait" for an alleged *future* breach of a condition precedent.

(vi) These submissions are consistent with the principle stated in *Heisler v Anglo-Dal* [1954] 2 Lloyd's Rep 5; [1954] 1 WLR 1273:

"It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

This rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply." (Emphasis added.)

Estoppel by representation

121. As to estoppel by representation, Mr Nicholson QC submitted: (i) that this requires an unequivocal representation by words or conduct and such reliance on it by the representee that it would be inequitable for the representor to go back on it: see *Kosmar Villa Holidays* per Rix LJ at para 70; and (ii) that whether there has been an unequivocal representation by words or conduct is an objective legal concept, ie it does not depend on the representee's belief that a representation was being made to him: see *Argo Systems v Liberty Insurance* [2012] Lloyd's Rep IR 67, per Aikens LJ at para 41. In addition, Mr Nicholson QC relied heavily on the decision of the Court of Appeal in *HIH Casualty and General Insurance v Ltd AXA Corporate Solutions* [2003] Lloyd's Rep IR 1 at paras 19 to 32 with regard to both promissory estoppel of any kind and estoppel by convention, in particular for the following propositions:

(i) Waiver by estoppel (promissory estoppel) involved a clear and unequivocal representation that the insurer would not stand on its right to treat the cover as having been discharged on which the insured had relied, in circumstances in which it would be inequitable to allow the reinsurer (or insurer) to resile from its representation (para 19).

(ii) It was of the essence of this plea that the representation had to go to the willingness of the representor to forego its rights. Thus the representation must carry with it some apparent awareness of the right upon which the representor will not insist. Otherwise it goes nowhere: the representee will not understand the representation to mean that the representor is not going to insist upon his rights because he has not said or done anything to suggest that he has any (para 21).

(iii) It is not the representor's knowledge which is important but how their conduct appears to the representee (para 24).

(iv) Although a promise or representation may be made by conduct, mere inactivity will not normally suffice, since it is difficult to imagine how silence and inaction can be anything but equivocal (para 26).

(v) The only exception to this rule is where there is a duty to speak (para 26).

(vi) It is not enough to establish reliance to say that if the representator had taken the point earlier then the representee could have done something about it. The representee must show that he attached some significance to the representation alleged and acted on it (para 29).

(vii) Mere silence, inactivity or failure to take a point cannot found an estoppel by convention (para 32).

Estoppel by convention

122. As to estoppel by convention, Mr Nicholson QC submitted that the law is uncontroversial. In particular, he submitted that it was accurately summarised by Lord Steyn in *Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1998] 1 Lloyd's Rep 1 at page 10 col 2:

"... estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption ... It is not enough that each of the two parties acts on an assumption not communicated to the other."

123. Further, Mr Nicholson QC emphasised that estoppel by convention generally cannot be found in mere silence, inactivity or failure to take a point.

Estoppel by acquiescence

124. As to estoppel by acquiescence, Mr Nicholson QC submitted that this is an uncertain category of estoppel but that what is however clear is that this species of estoppel depends on there being a duty to act or speak.

125. For his part, Mr Cogley QC referred me to a large number of other additional authorities including *Barrett Brothers (Taxis) Ltd v Davies* [1966] 2 Lloyd's Rep 1; [1966] 1 WLR 1334, *Kier Construction Ltd v Royal Insurance (UK) Ltd* (1992) 30 Con LR 45, *Drake Insurance plc v Provident Insurance plc* [2004] Lloyd's Rep IR 277; [2004] QB 601, *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm) and *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353. I confess that it was not always easy to understand the precise point being advanced by reference to any particular authority but, in essence, the main points of law positively advanced by Mr Cogley QC appeared to be as follows:

(i) In the context of estoppel by representation/acquiescence, Mr Cogley QC relied heavily on the analysis of Blair J in *Starbev* to support his submission that there was, in the present case, a relationship between the parties that sufficiently engaged the duty to speak, viz the relationship of insurer and insured and the concomitant duties of good faith; and that, regardless of the general position as between insured/insurer, such duty to speak arose here on the facts of this case. Here, Mr Cogley QC submitted that, particularly in light of the evidence of Mrs Taylor, the position adopted by the defendants is such that it must follow that

they were "hoodwinking" TB and Mrs Stone into committing a breach of a condition precedent; and that this is just the sort of unsavoury and unconscionable behaviour which, on the facts of the present case, gives rise to a duty to speak.

(ii) In circumstances where an insurer (wrongly) "rejects" or "repudiates" a claim and whether or not such repudiation constitutes a repudiation of the *contract of insurance*, Mr Cogley QCsubmitted that there can be no obligation to comply with the claims conditions in relation thereto. In that context, he relied on a number of authorities mainly from foreign jurisdictions including *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237; [2010] 3 NZLR 23; [2010] 16 ANZ Ins Cas 61-850 in particular at para 84, *Diab v Regent Insurance Co*, *Drayton v Martin* [1996] FCA 1504 and *Dragages et Travaux Publics (HK) Ltd v RJ Wallace* [2004] HKCFI 311.

126. These submissions give rise to potentially difficult issues. In particular, the latter gives rise to a very difficult issue of law which has never properly been considered by an English court. The former is difficult in particular because: (i) Mr Nicholson QC submitted (rightly in my view) that insofar as AXA owed any relevant duty of good faith, it did not extend to any general duty positively to warn TB that it needed to comply with policy terms; (ii) Mr Cogley QC's submission that the defendants were "hoodwinking" Mrs Stone and TB is tantamount to an allegation of bad faith on the part of AXA but, as submitted by Mr Nicholson QC, such serious allegation was not put to Mr Coonan or any other AXA witness as, in my view, it needed to be if it was to be pursued; and (iii) there is no evidence at all to support the suggestion that it should be inferred that the defendants' silence was deliberate which was, in my view and again as Mr Nicholson QC submitted, similarly a serious allegation which needed to be put if it was to be pursued.

127. However, before even attempting to resolve the issues arising in this context, it is convenient to go back somewhat to take stock of my conclusions so far, viz for one reason or another, I have rejected the defendants' case that TB was in breach of any relevant claims cooperation clause save in respect of: (i) TB's claims in respect of 2004; and (ii) Category 7 of Mr Coonan's shopping list. As a result, the arguments with regard to waiver and estoppel are of a somewhat limited compass; and in my view, it is unnecessary to determine some of the issues referred to above.

128. As to the former, it seems to me that the suggestion of any agreement, waiver or estoppel which might operate to preclude the defendants from asserting a breach with regard to any claim in 2004 is quite hopeless if only because there was never any suggestion of any such claim until well after the commencement of proceedings.

129. As to the latter (ie Category 7), the position is more complicated. As summarised above, the strategy adopted by Mrs Stone and Mr Page was that TB were not prepared to do the additional work and to incur the additional expense in providing the documents/information in Mr Coonan's shopping list (apart from Category 1) until liability was admitted in principle. I have already rejected the suggestion that there was any blanket "agreement" to such effect by Mr Coonan at the meeting on 2 March 2009 or thereafter. However, I accept that either at that meeting or as confirmed in Mr Coonan's subsequent email dated 24 March 2009, Mr Coonan in effect agreed to take instructions with regard to paying the costs of instructing accountants to do such work – ie the work that Mr Coonan described in that email as the "exhaustive reviews and analysis of stock shortage" – or at least made a representation that that is what he would do and that he would revert once such instructions had been received. To that extent, I accept that Mr Coonan, in effect, agreed or at least represented that matters in respect of such work had to await the receipt by Mr Coonan of instructions from insurers and the communication of such instructions by Mr Coonan to Mrs Stone. As it seems to me, the highpoint of Mr Cogley QC's case is that Mr Coonan never did revert one way or another and, in my view, Mrs Stone and Mr Page reasonably assumed, in the meantime, that the need to do such work was "parked" pending a response by Mr Coonan or until, at least, the question of liability in principle had been resolved one way or another. In legal terms, there was, in my judgment, a limited agreement to such effect; alternatively an estoppel by representation to similar effect.

130. I should make plain that I reach that conclusion irrespective of any duty to speak.

131. However, in my judgment, it is important to emphasise the limited nature of such agreement or estoppel. In particular, it related only to the additional work as referred to by Mr Coonan specifically in his email dated 24 March 2009. In my judgment, there was never any unequivocal representation that TB were not required to deliver the documents/information in Category 7 of Mr Coonan's original shopping list. At the risk of repetition, the delivery of such documents/information did not involve the additional cost of any accountants. Both experts agreed that they could see no reason why this information was not delivered. Further and for the avoidance of doubt, if and to the extent that Mr Page or Mrs Stone may have thought or assumed that TB was not required to deliver such documents/information, such thinking or assumption was in my view not the result of any agreement or representation by the defendants. Moreover, there is, as I understand, no dispute that none of the documents/information in Category 7 of Mr Coonan's shopping list was ever delivered to AXA. In my judgment, this is fatal to TB's claim in these proceedings.

132. For the sake of completeness, I should mention that even if Mr Cogley QC's legal submissions as to waiver as summarised above were correct and even taking Mrs Taylor's evidence at its highest, I do not consider that such matters assist TB with regard to its failure to provide the documents/information in Category 7 for similar reasons to those stated above. Equally, quite apart from the points already mentioned, I do not consider that Mr Cogley QC's submissions based on any duty to speak avail TB with regard to the requirement to deliver the

documents/information in Category 7 in the circumstances of the present case – again for similar reasons to those stated above.

133. In light of this conclusion, it is unnecessary to consider the further arguments advanced by Mr Nicholson QC based upon AXA's reservation of rights letter dated 11 June 2009. It is also unnecessary to consider the quantum of TB's claim. However, I will address briefly the issues arising in that context and state my conclusions in relation thereto.

Part III. Quantum

134. I have already identified the main terms of the policy governing the extent and quantification of BI cover. I have also already set out a summary of the claims advanced by TB and summarised the three main issues which arise in the context of assessing quantum. However, before addressing these issues, it is necessary to consider certain matters of principle.

Burden/standard of proof

135. First, Mr Nicholson QC made a broad general submission that it is for TB to prove the facts which it contends entitle it to an indemnity – in particular, the thefts and the BI losses said to have been caused by those thefts within the scope of the policy terms. As formulated, this was disputed or at least qualified by Mr Cogley QC. In particular, he submitted that the fact that an insured peril and consequent loss may be difficult to demonstrate by *direct* evidence does not preclude the court from finding that both have occurred. In support of that submission, he relied in particular on the decision of Gross J in *Equitas v R&Q Reinsurance Co (UK) Ltd* [2010] Lloyd's Rep IR 600. In that case, actuarial models were used to demonstrate not only the extent of the loss but that the relevant insured peril had occurred. The insured peril in that case was (stripped to its barest essentials) the incurring of excess losses under contracts of retrocessional excess of loss reinsurance contracts. R&Q, the reinsurers, sought to argue that Equitas (as assignee of the rights of various Lloyd's Syndicates) was not entitled to recover anything unless Equitas could "... prove that the sums claimed are properly due, contract by contract – estimating guesswork will not do – the losses must lie where they fall" (at para 4). R&Q argued the LMX market wrongly aggregated certain losses, included irrecoverable losses, and thus the excesses in relation to the claim were "tainted" and irrecoverable. Essentially it was argued that it was impossible to replicate the losses that should properly have entered the spiral. However, Gross J concluded that the actuarial models used by Equitas were: "... both capable of making the transition from the general to the particular and do go on to provide a reasonable representation of reality. Through the use of the conservative 10th percentile approach and appropriate discounting, I am satisfied that the models furnish an acceptable, soundly based route to establishing the properly recoverable minimum losses sustained by the syndicates, having regard to the applicable burden and standard of proof. The modes therefore assist in doing practical justice in this case – a solution emphatically preferable to leaving the losses to lie crudely where they fall" (at para 135).

136. Mr Cogley QC further relied on a similar approach in the earlier case of *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421 where, in order for the claimants in that case to recover against their reinsurers, they had to satisfy the court that there had been a physical loss – ie an insured peril. In relation to one of the contracts – the "second contract" that covered "... a 12-month period within which pilferage and vandalism was undoubtedly occurring ..." – the court observed that: "... The assessment of how much occurred during this period is very much a jury question upon which one has to make up one's mind realising that one's finding of fact is based upon the balance of probabilities" (at page 438 col 1). The court felt able to make the appropriate inference in relation to the period covered by the second contract, but could not make that inference in relation to the period covered by the first and third contracts. However, Mr Cogley QC submitted that it is the approach in that case and the *Equitas* case that is important: the use of modelling, and drawing inferences, is not simply limited to pure questions of quantum. It embraces the very insured peril that gives rise to the alleged loss in the first place. A further case relied upon by Mr Cogley QC was *AXL Resources Ltd v Antares Underwriting Services Ltd* [2011] Lloyd's Rep IR 598 where Gloster J was prepared to infer, when rejecting the insurer's argument that the disappearance of ten pallets of cobalt cathode weighing 20 mt was not a missing or unexplained disappearance ("MUD"), that nevertheless the insured had demonstrated that, on the balance of probabilities, the loss was caused by theft.

137. I accept these submissions in part. As it seems to me, the burden always remains on a claimant in an insurance claim to establish on a balance of probabilities a relevant event caused by one or more insured perils. Nothing less will do. That seems trite law as was confirmed by the House of Lords in *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep 1; [1985] 1 WLR 948. In some cases, such as the present, where the court is concerned with a large number of alleged separate small losses over a period of time, the task of satisfying that burden and standard of proof may be particularly onerous. Notwithstanding, in my view, the difficulty which a claimant may face in proving on a balance of probability that an event has in fact occurred as a result of an insured peril provides no justification for watering down the legal burden and standard of proof; and I do not read the cases relied upon by Mr Cogley QC as suggesting otherwise.

138. However, what I do accept and what is certainly supported by the cases relied upon by Mr Cogley QC is that there may be different ways of satisfying the legal burden and standard of proof other than by direct evidence. This will inevitably vary from case to case. However, ultimately, in order for a claimant to succeed, the court must be satisfied on a balance of probabilities that one or more events have occurred as a result of one or more insured perils. As I say, nothing less will do.

139. For the avoidance of doubt, none of the foregoing is, in my view, affected by the MUD clause in the policy which, in effect, excludes "... consequential loss arising directly or indirectly from ... (d) disappearance unexplained or inventory shortage misfiling or misplacing of information". As stated in *Colinvaux's Law of Insurance*, 9th Edition, para 19-058:

"'Mysterious disappearance' clauses, which appear in many forms of property insurance and also in some liability policies, exempt the insurers from liability in the event that the insured subject matter is the subject of 'mysterious' or 'unexplainable' disappearance. It is unlikely that this type of wording has very much affect. If the policy is one against specific perils, the assured bears the burden of proving that the loss was proximately caused by an insured peril. An assured who is able to do so will by definition defeat the mysterious disappearance exclusion, because the disappearance has been shown not to be unexplained. Conversely an assured who is unable to identify which insured peril has caused the loss will not be able to recover anyway, so the mysterious disappearance clause adds nothing to the insurers' rights."

This passage was referred to with approval by Gloster J in *AXL Resources v Antares*. I also respectfully agree.

140. Proof of one or more events caused by an insured peril is, of course, only the first stage. Thereafter, once an actionable head of loss has been established, the court will generally assess damages as best it can by reference to the materials available to it. In that context, I accept Mr Cogley QC's two-pronged submission that: (i) the balance of probability test is not an appropriate yardstick to measure loss; and (ii) lack of precision as to the amount of quantum is not a bar to recovery as appears from the following three cases, viz:

(i) *Equitas v R&Q Reinsurance Co (UK) Ltd* [2010] Lloyd's Rep IR 600 at para 71 per Gross J:

"...Once it can be demonstrated that [...] liability does, as a matter of the balance of probabilities, fall within the cover of the policy reinsured (for instance, because the applicable excess has been exceeded), liability would be established; what thereafter remain are questions of quantum. These are questions of fact, sometimes referred to as 'jury questions': see, for example, *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1998] Lloyd's Rep IR 421, at pages 436 and following, per Hobhouse LJ (as he then was). When this stage has been reached, the court must do its best on the available evidence, bearing in mind the burden of proof resting upon Equitas and the applicable standard of proof: see too, *Chaplin v Hicks* [1911] 2 KB 786, at pages 792 and 795. But at this stage, there can be no objection in principle to Equitas seeking a recovery in a *minimum* amount, provided that the *minimum* amount is established on a balance of probabilities; the effect is simply that Equitas foregoes any attempt to recover additional sums. *The extent of losses, once liability has been established, need not be proved with scientific exactitude*. As Lord Hoffmann observed, in *Gregg v Scott* [2005] 2 AC 176, at para 69, citing from a Scottish decision itself citing a Canadian judgment: *The rule against the recovery of uncertain damages is directed against uncertainty as to cause rather than as to extent or measure*." (Emphasis added.)

(ii) Parabola Investments Ltd v Browallia Cal Ltd [2011] QB 477 per Toulson LJ:

"22. ... Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.

23. The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Limited v Simmons and Simmons* [1995] 1 WLR 1602, but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. *Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account.* (See *Davis v Taylor* [1974] AC 207, 212 (Lord Reid) and *Gregg v Scott* [2005] 2 AC 176, para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann))." (Emphasis added.)

(iii) *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 per Patten LJ:

"25...Where the quantification of loss depends upon an assessment of events which did not happen the judge is left to assess the chances of the alternative scenario he is presented with. This has nothing to do with loss of chance as such. It is simply the judge making a realistic and reasoned assessment of a variety of circumstances in order to determine what the level of loss has been."

For convenience, I propose to refer to this as the "broad" approach.

Approach to the expert evidence

141. Secondly, I should say something in general terms about the expert evidence. The written reports of the experts extended to well over 1,000 pages and can only be described as

something of a swamp. (Looking back, it seems to me that this might well have been a case where a single joint expert should have been appointed at an early stage – at least in the first instance.) The difficulty in handling such evidence and identifying relevant issues was exacerbated by the fact that a large amount of this material was a moving feast (if that is the right word) right up to – and even during – the trial. For reasons which beggar belief and putting on one side wherever the fault may lie, there was, prior to the start of the trial, no single up-to-date joint statement (or, dare I say it, a Scott Schedule) as there should have been which properly identified the areas of agreement, the areas of disagreement and the reasons for such disagreement. In my view, such a document is not only desirable but absolutely essential in a case of this kind. In these very unsatisfactory circumstances, I confess I was strongly tempted to adjourn the trial of my own motion so that the case could be put in order. However, to do so would have resulted in yet further unacceptable delays and the parties' costs bill escalating even further. It is only for these reasons that I reluctantly did not order an adjournment.

142. These difficulties were further exacerbated by the very strong clash between the expert evidence served by each of the parties in this case; and, sadly, what appeared to be some acrimony that had developed between the experts on each side. Needless to say, this court is generally much assisted by expert evidence. However, such assistance depends upon the cooperation of the experts in identifying relevant issues and explaining relevant differences in language which can be readily understood; and, without such cooperation, such assistance is severely undermined.

143. TB's main expert was Mrs Britten. There is no doubt that she is a highly skilled and experienced auditor and I was generally much impressed with her expertise in that regard. However, although she had what she described herself as "some" experience of retail accounting, she readily acknowledged that she did not claim to be an expert in the retail trade or in either retail stock or trade systems; and her experience in fashion retailing was not significant. Mr Cogley QC submitted that this was "inappropriate modesty" on her part. I do not accept that characterisation. On the contrary, in my view, Mrs Britten's limited experience of the retail trade represented a real handicap; and, inevitably, she had to rely heavily on information provided by TB.

144. Further, Mr Nicholson QC made a general submission to the effect that the court should simply reject Mrs Britten's methodology because it had all the hallmarks of being unreliable. In particular, he submitted that her methodology underwent substantial changes over the course of the litigation; that various of her assumptions worked in TB's favour; that her last report was produced in a very short space of time under significant time pressure; and that it was not only highly condensed but also difficult to understand with the appearance of "smoke and mirrors". Further, Mr Nicholson QC submitted that there were a number of specific problems with Mrs Britten's evidence including: (i) the risk from the outset of being influenced by KPMG's long-term and continuing relationship with TB; (ii) an unsatisfactory approach by her to the experts' meetings; (iii) making "strident" criticisms of Mr Emery's approach; (iv) expressing opinions on issues which were outside her expertise; and (v) an apparent reluctance during cross-examination to give straight answers. Whilst I accept certain of those criticisms, I should emphasise that I considered that Mrs Britten was plainly an honest witness who was seeking to perform her role as an independent expert as best she could; and that, having regard to all the circumstances, I do not consider that it would be right simply to reject Mrs Britten's methodology out of hand.

145. On the other side, the defendants called two main experts, Mr Emery and Mrs Rawlin who, Mr Nicholson QC submitted, approached the case with independence, objectivity and care. However, Mr Cogley QC submitted that Mr Emery did not have any, or any sufficient, relevant expertise. In particular, Mr Cogley QC submitted that Mr Emery was not a "retail stock expert" but, if anything, an expert in "inventory systems"; and in cross-examination, Mr Emery accepted that he had no expertise in actually merchandising fashion although he said that he "... worked alongside those merchandisers to make sure our systems fulfilled their needs ...". On this basis, Mr Cogley QC submitted that Mrs Britten was more of an expert on "retail stock" than Mr Emery. Further, Mr Cogley QC submitted that the shortcomings in Mr Emery's expertise are apparent from the fact that by his fourth report he entirely abandoned his previous methodology which had depended on "RfR" and that the inordinate time spent on "RfR" was an entirely wasted exercise. Mr Cogley QC also criticised Mr Emery for giving evidence outside his expertise. So far as Mrs Rawlin is concerned, Mr Cogley QC's attack was even more vigorous. In particular, he submitted that Mrs Rawlin had abdicated her responsibility to (the non-expert) Mr Emery and her evidence fell with his; that she performed no, or insufficient, "sense check" of the reams of material produced by Mr Emery; that she had no proper understanding of the policy provisions; and that her evidence was in any event of no assistance to the court in determining the issues in the case. In my view, there is some force in certain of these criticisms but the extreme nature of the attack made by Mr Cogley QC against these individuals was, in my view, unwarranted. It is fair to say that their approach was very different from Mrs Britten's and that it went through various iterations (as did Mrs Britten's) but I should emphasise that, like Mrs Britten, I considered that they were both plainly honest witnesses who were seeking to perform their role as independent experts as best they could.

146. Against that background, I approach the evidence of all three experts with considerable caution and turn to consider the three main issues that I have already identified above.

What was stolen, when and how?

147. I have already identified the figures relied upon by TB as to the total number of items allegedly stolen in each policy year based on analysis of the total PI Variances less Base Variances – see para 36 above. (Given my conclusions stated above, it would on any view be

necessary to strip out the items allegedly stolen in 2004.) As I understand, there is close but not complete agreement between the experts on the figures for the total PI Variances. However, such differences as exist are relatively minor and it seems to me reasonable to accept the figures for such total PI Variances as submitted by Mr Cogley QC. This leaves two main issues under this head.

Base Variances

148. The first issue under this head concerns Base Variances. It is common ground that some amount should be deducted for Base Variances from the total PI Variances. However, there is a difference of opinion between the quantum experts as to the appropriate size of these Base Variances. The defendants' experts used a Base Variance percentage of 0.057 per cent derived from the first full season after JON's arrest – although they think this may be an underestimate. Mrs Britten used a Base Variance percentage of 0.026 per cent derived from an average of the five seasons after JON's arrest. In support of the latter figure, Mr Cogley QC's main submission was that the latter was more reliable because it is an average calculated over a longer period. However, Mr Nicholson QC submitted that the data from the five seasons following JON's arrest are likely to be increasingly unrepresentative of circumstances during the claim period; and that, in any event, the court should be wary of placing too much reliance on statistics in respect of periods after JON's arrest in particular because: (i) other thieves will have been deterred; and (ii) there is likely to have been some tightening of security over time which would skew the figures. Thus, Mr Nicholson QC submitted that it is safer to err on the side of caution. In my view, both arguments have attraction. In particular, I readily accept that the court should be wary of placing too much reliance on statistics for the reasons given by Mr Nicholson QC but, as I say, it is common ground that some allowance has to be given for Base Variances and an average over a longer period would, in principle, seems to be the more reliable. However, the general criticism made by Mr Nicholson QC with regard to taking the Base Variance figure after JON's arrest seems to have at least some force. On that basis, it seems to me that a reasonable figure for Base Variances is one which falls somewhere between the two figures referred to above; and, doing the best I can, I would assess the appropriate Base Variance figure as 0.030 per cent.

Were the goods stolen by JON?

149. Secondly, there is an important issue concerning the *reasons* for the disappearing stock. This is important because, consistent with what I have said earlier and therefore in order to succeed, it is not sufficient for TB to say that the goods simply disappeared. Rather, TB must show on a balance of probability that the goods were lost as a result of an insured peril. In that context, it is right to say that there is only very limited direct evidence of exactly what JON stole – or when. Indeed, Mr Nicholson QC submitted that the only direct evidence was limited to three incidents of theft referred to above. Here, Mr Nicholson QC submitted that it is simply impossible to say, on a balance of probability, that JON stole the goods in question; and although he submitted that it was not for the defendants to establish on a balance of probability other possible ways in which the goods were lost, he maintained that it was certainly possible, for example, for some other thief to have stolen the goods in question – or at least some of them – and, in that context, he suggested certain ways in which such thefts might have occurred. Mr Cogley QC submitted, in effect, that it was absurd to suggest that TB had to disprove such possibility; and I accept that it is impossible to discount entirely that possibility. However, on a balance of probability, I am satisfied that the alleged losses were the result of thefts by JON. In reaching that conclusion, I bear in mind in particular: (i) the evidence of Mr Connolly with regard to the security measures in place in the TBDC which he described in paras 124 to 129 of his witness statement; (ii) the evidence of Mrs Bray that the TBDC was one of the most controlled distribution centres she had ever worked in; (iii) the attempts made over a number of years by TB to find out the reason for the losses – without success; (iv) the fact that JON was employed in an important role at the TBDC throughout the relevant period; (v) that, according to the notes found at JON's house, his thieving activities dated back to 2005; and (vi) the direct evidence with regard to JON's thieving activities in December 2008 and the hoard of stolen goods found at JON's home. I also bear in mind the fact that after JON's arrest the PI Variances substantially reduced, although I accept that this is certainly not determinative because the fact of JON's arrest might have deterred other thieves.

150. It is convenient to consider at this stage the related question of JON's modus operandi. I have identified this issue as the third main issue because it relates to the operation of the excess which is expressed in monetary terms (ie £5,000 each and every loss) and can properly only be considered *after* a calculation has been carried out as to what, if any, BI losses have been suffered. The fact that this point is fundamental is reflected in the fact that although Mrs Rawlin, the defendant' expert, calculated (in her fourth report) that total BI losses were some £2.1 million, the net recoverable loss was £nil because of the applicable excesses in each year even on the basis of TB's assumptions as to JON's modus operandi with regard to the alleged number of incidents of theft and alleged average number of boxes/items stolen in the course of each such alleged incident. In any event, it is convenient to consider this aspect at this stage albeit perhaps out of strict logical order because it is fundamental to TB's claim and is directly related to the matter just considered as to what JON stole, when and how. Further, it can be considered on the basis of TB's claimed gross BI losses; so far as TB is concerned, the position is certainly no better if Mrs Rawlin is correct in her calculations.

151. In essence, with regard to the operation of the excess of £5,000 each and every loss, TB says that a reasonable assumption is that throughout the entire period, JON stole, on average, 3.5 boxes per incident and that each box contained 68.25 items, ie an average of approximately

238 items per incident. On this assumption, TB calculates that the number of "incidents" for each policy period was as follows:

(i) 2004/2005: 42.6 incidents.

(ii) 2005/2006: 88.9 incidents.

(iii) 2006/2007: 112.1 incidents.

(iv) 2007/2008: 164.2 incidents.

(v) 2008/2009: 163.3 incidents (over some eight months).

These figures show a pattern of incidents of, on average, less than one incident per week in 2004/2005 rising to approximately two incidents per week in 2006/2007 and over four incidents per week in 2008/2009. By dividing the loss of profit figure by the calculated number of incidents, TB says that the amounts recoverable from the defendants for each of the policy periods after taking into account the excess are as follows:

Policy period	Gross loss of profit A	Number of Incidents B	Gross loss of profit per incident C (A/B)	Excess D	Net loss of profit per incident after excess E (C-D)	Overall claim F (BxE)
2004/2005	£343,374	42.6	£8,057	£5,000	£3,057	£130,228
2005/2006	£620,640	88.9	£6,980	£5,000	£1,980	£176,022
2006/2007	£880,357	112.1	£7,855	£5,000	£1,855	£207,945
2007/2008	£1,173,928	164.2	£7,147	£5,000	£2,147	£352,537
2008/2009	£1,159,329	163.3	£7,100	£5,000	£2,100	£347,130

152. In essence, the defendants say that this exercise is fundamentally flawed. In particular, the defendants say that there is no evidence to justify and no basis for assuming that the number of boxes taken was, on average, 3.5 per incident; nor that the boxes contained, on average, 68.25 items; and that, as a result, the overall calculated claim figures in column F are entirely speculative and have no real basis in fact.

153. This issue gave rise to a potentially important debate as to the burden of proof with regard to the application of the £5,000 excess. Mr Cogley QC submitted that it was for the defendants to show that the losses fell below the excess and that the assumption of an average of 3.5 boxes and 68.25 items per box in the case of each incident of theft was, in effect, no more than a concession on the part of TB. To the contrary, Mr Nicholson QC submitted that the burden was on TB to show that its losses exceeded the excess. Although no authority was cited in the course of argument, it seems to me that Mr Nicholson QC is, as a matter of principle, right on this point. In very broad terms, it is always for the claimant to prove a loss caused by an insured peril. Here, I have concluded on a balance of probability that the losses were caused by the theft by JON and, given my previous conclusion, such "employee theft" is an insured peril. I accept that, in general terms, where a policy contains an "exclusion", the burden will generally fall on the insurer to bring itself within the stipulated exclusion. However, in my view, the stipulated excess in the present case is not properly characterised as an exclusion. Rather, it seems to me to define the cover provided to TB, ie TB is only entitled to recover losses caused by an insured peril which exceed £5,000 each and every loss. For these reasons, it is my conclusion that the burden lies on TB to show on a balance of probability that the claimed losses exceed £5,000 each and every loss. (I reach this conclusion as a matter of principle and on the basis of the policy wording although I should mention that following conclusion of the argument and in the course of writing this judgment, I came across the judgment of Bailhache J in *Munro, Brice & Co v War Risks Association Ltd* [1918] 2 KB 78 which contains observations which would appear to be consistent with such conclusion albeit that the case was reversed on appeal on the facts.)

154. Against that background, it is necessary to consider whether or not TB has satisfied the burden on it in proving that the losses fell above the excess whether on a balance of probability or adopting the broad approach. The difficulty is that, in my view, the average of 3.5 boxes/68.25 items per incident advanced by TB is not based on any real evidence at all – or at least, it is based on evidence which is extremely tenuous. Mr Cogley QC submitted that the figures represented a reasonable assumption as to JON's thieving activities during the relevant period. I agree that it is a *possible* average. However, it seems to me difficult, if not impossible, to say that other figures are not equally possible and, indeed, reasonable and realistic. In that context, it seems to me important to bear in mind that even slight changes to the input assumptions produce quite significant changes to the number of incidents and, ultimately, the amounts recoverable after applying the £5,000 excess each and every loss. For example, if one were to assume that on each incident of theft, JON stole (say) three (rather than 3.5) boxes each containing (say) 50 (rather than 68.25) items, it would appear that the number of incidents in each policy period would increase dramatically by approximately 50 per cent to approximately 65, 127, 162, 234 and 237 incidents respectively in each policy period with the average number of incidents per week increasing to more than one per week in 2004/2005 and almost six incidents per week in 2008/2009. After applying the £5,000 excess to each and every incident, this would dramatically reduce the total amount recoverable and in certain policy periods extinguish any claim completely. Equally, by increasing the number of boxes assumed stolen on each incident of theft and the contents of each box, the number of incidents is reduced and the overall claim after applying the excess is increased. No doubt there are endless possible permutations. On the evidence available and within a relatively broad range, it seems to me quite impossible to say that one set of assumptions is more or less reasonable than any other set of assumptions even adopting the broad approach.

155. In support of TB's case, Mr Cogley QC emphasised three main points. First, he submitted that TB's claimed average of 3.5 boxes/68.25 items per box derives support from what was actually seen shortly before JON was arrested in December 2008 and is a smaller quantity than that indicated by the tip-off. However, be that as it may, it does not, in my view, provide any sound basis even adopting the broad approach for saying that a similar average should be extended backwards and, in particular, applied over a period of some four years extending back to the beginning of 2005. It may be that JON's modus operandi changed over that period. We simply do not know one way or another. For example, in the approach to Christmas 2008, it may be that JON decided to get greedy and take more rather than less on each observed incident of theft – or perhaps not. In my view, this is all speculation.

156. Secondly, Mr Cogley QC submitted that TB's claimed figures are consistent with what he submitted must be the inherent likelihood, viz that JON "started small and grew big". Again, this is, to my mind, somewhat speculative but I agree that that seems a most likely scenario which, as I understood, Mr Nicholson QC accepted in a general sense; and it is certainly reflected in the overall figures referred to above. However, I find it quite impossible to quantify this in terms of the number of incidents in a given period, the number of boxes taken in the course of each incident or the number of stolen items per box. For example, even assuming a general trend of "start small, grow big", it may be that in the first (say) three years, JON's modus operandi was to steal relatively fewer boxes/items on each incident of theft and that his thieving activities "grew" in the later years by taking more boxes/items on each incident of theft. Again, we simply do not know.

157. Thirdly, Mr Cogley QC submitted that it was inherently likely that JON would generally have tried to minimise the number of incidents of theft in order to avoid the risk of detection; that this suggested that JON would generally have tried to minimise the number of incidents of theft and to maximise the number of boxes and items stolen on each occasion; and that this again supported TB's claimed figures. In general, I am prepared to accept that (assuming JON acted rationally) it is inherently likely that JON would generally seek to adopt a modus operandi which would minimise the risk of detection. However, whether he would do this by minimising the number of incidents of theft or the number of boxes/items stolen on each incident of theft is, in my view, entirely speculative. For example, he might have considered (particularly in the earlier years) that the best way of avoiding detection was to pilfer a small number of boxes/items frequently rather than a larger number of boxes/items more infrequently – although I recognise that this is entirely speculative.

158. For all these reasons and even applying the broad approach stated above, it is my conclusion that the evidence fails to show that the claimed losses as calculated by TB fall above the excess of £5,000 each and every loss. It follows that I would reject TB's claim on this basis as well. Given such conclusion, the further main topic under this head, ie the calculation of the loss of gross profit, becomes entirely academic. However, I will address this briefly and, so far as necessary, state my conclusions.

Loss of gross profit

159. In considering this topic, I should start by acknowledging the very real and substantial difficulties which arise in calculating the figure for loss of gross profit in the present case. Putting on one side, for one moment, the large number of items stolen, the extended timescale (2005 to 2008, ie some four years) and also the policy wording, there are a number of points of very real difficulty in respect of which there is no single straightforward answer. Probably the biggest difficulty centres on the concept of what has been referred to as the "timing of unfulfilled demand", ie the point when, as a result of an item being stolen, there was a lost sale in a retail location. This is important – indeed crucial – because, given the nature of TB's business, the potential profit on any particular item will very much depend on the time when it will be sold if at all. For example, the profit on an individual item will depend on whether it is sold (say) at the beginning of the season (ie for the maximum retail price) or at some later stage, for example, at the end of the season during a sale (ie at a discounted price) or otherwise disposed of via some cheap outlet (ie at an even greater discount) or disposed of by way of scrappage (ie for nothing). A further related aspect is the question whether, if a particular item is not available in a particular location because it has previously been stolen, a customer might nevertheless buy an alternative item (perhaps a different style or colour). That is a highly subjective matter which is not easily susceptible of scientific analysis but depending upon the choice made by such hypothetical customer it is certainly possible that there might not be any overall net loss of profit at all. In particular, it is important to bear in mind that the thefts occurred at the TBDC, ie the warehouse, not in any retail location. Thus, if an item were stolen on (say) 1 January 2008, the potential profit lost on that particular item would have to be calculated, in theory at least, by reference to some hypothetical potential sale not on that date (1 January 2008) but on some future date. Inevitably, such exercise would need to seek to take account of matters which would (or would not) have occurred but for the theft including: (i) how long that item would have remained at the TBDC; (ii) when it would have been sent out to a particular retail location and, at that time, to which location; (iii) if and when it would have been sold; and (iv) if sold (as opposed to disposed of by way of scrappage) at what price.

160. All of this has to be fitted somehow into the policy terms. Here, Mr Nicholson QC submitted that having regard to such terms including, in particular, the Basis of Settlement provisions, TB must prove reduction in turnover by applying the rate of gross profit to the amount by which the turnover during the indemnity shall fall (ie "fell") short of the standard turnover in consequence of the thefts; and that Mrs Britten's modelling exercise does not follow the strict wording of the policy. However, Mr Cogley QC submitted that this was, in effect, too narrow a straitjacket and, in particular, that it ignored the adjustments provision in the policy

which, at the risk of repetition, provided that adjustments to certain items including the rate of gross profit and standard turnover "... shall be made as may be necessary to provide for the trend of the Business and for variations in or other circumstances affecting the Business either before or after the Incident or which would not have affected the Business had the Incident not occurred so that the figures thus adjusted shall represent *as nearly as may be reasonably practicable the results which but for the Incident would have been obtained during the relative period after the Incident*" (emphasis added). In this context, Mr Cogley QC relied upon the observations of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep IR 531 at para 45 with regard to an almost identically worded provision:

"However, without an adjustment mechanism, as provided by the Trends clause, the application of that standard formula to the facts of a given case may not give proper effect to the indemnity intended to be provided under the Business Interruption section of the policy, namely in respect of the loss resulting from the business interruption suffered in consequence of property damage which is itself the result of an insured event. The purpose of the Trends clause is to allow for an appropriate adjustment to be made to the components of the standard formula so as to give effect to the requirement that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less." (Emphasis added.)

161. On this basis, Mr Cogley QC advanced a number of submissions which I take from his written closing as follows:

(i) Adjustments provision: the adjustments provision recognises that standard turnover (defined as being in the past) and the rate of gross profit (defined as being in the past) may not reflect the period after the incident, eg if a business was declining or growing then the turnover in the previous 12 months may bear no relationship to the turnover which might have been achieved in the indemnity period "but for" the incident. Similarly, for a business with a rate of gross profit that was affected by a variation in the last financial year, the rate of gross profit may bear no relationship to that which would have been earned but for the incident. In order to obtain a result that "represents as nearly as may be reasonably practicable" the results which TB would have achieved "but for" the thefts, it is necessary to adjust the standard turnover and the rate of gross profit to reflect a "base" Turnover and a base rate of gross profit that would have been achieved but for the incidents.

(ii) Standard turnover adjustment: in the case of standard turnover, the adjustment would need to reflect the fact that the 12-month period prior to any given theft (apart from the very first one) was, amongst other things, impacted by JON's thefts which had occurred during that period. We do not know the *precise* date of any given incident, so cannot calculate the *precise* standard turnover in the 12 months that immediately precedes any incident. Therefore to arrive at an appropriate adjustment to get to a base turnover (ie one that represents, as nearly as may be reasonably practicable, the results which but for any incident would have been obtained during the relative period after the incident) it is appropriate to use (as Mrs Britten has done) as the "adjusted Standard Turnover" the (actual) turnover in the relative period (12 months) *plus* the turnover that would have been achieved on any stolen items that would, but for the incident, have been sold in that period (ie less scrappage and a proportion for sales which would be likely to have happened more than 12 months after the relevant theft).

(iii) Rate of Gross profit adjustment: the rate of gross profit as defined is the rate earned on the turnover during the financial year immediately before each incident. The rate of gross profit as defined would be the gross profit shown in the statutory financial statements of Ted Baker plc for the relevant financial years. However to arrive at a rate of gross profit which would produce a result which *represents as nearly as may be reasonably practicable* requires adjustment for the impact of several items including: (a) sales in sales channels to which the stolen items would not have gone (including wholesale, retail sales by locations serviced by warehouses other than the TBDC); (b) sales to locations other than the UK and relevant parts of Europe; (c) costs of sale which are included in the gross profit in the statutory financial statements but are not part of the policy definition of gross profit (including production and design costs, discounts and exchange differences); (d) the reduced likelihood of the sales of stolen items occurring early in the selling period for any season; (e) the impact of the thefts in each financial year; and (f) the changing profile of stocks. To arrive at an appropriate adjustment to get to a base rate of gross profit (ie one that represents, as nearly as may be reasonably practicable, the results which but for any incident would have been obtained during the relative period after the incident) to use as the "adjusted Rate of Gross Profit", it is appropriate to use (as Mrs Britten has done) a calculation which approximates as closely as possible the adjustments set out above. Mrs Britten's calculations have used as the adjusted rate of gross profit (which she calls gross margin) the rate of gross profit earned on actual turnover during the relative (12-month) period (on sales made only to the relevant channels and locations and adjusted to reflect the lower likelihood of the sales of stolen items occurring early in the selling period for any season). These adjustments in each case will represent as nearly as possible the results which but for the incident would have been obtained and there is thus no issue about compliance with the wording of the insurance.

(iv) Amount by which the turnover during the indemnity period shall fall short of the standard turnover in consequence of the incident: taking each theft in isolation: (a) in order to take account of the indemnity period, an allowance has to be made for lost sales outside the indemnity period (the "MIP" point); and (b) in order to take account of the fact that what is covered is "lost sales" (ie reduction in turnover), an allowance has to be made for items which were stolen but which would not in fact have been sold (the "scrappage" point"). Here, Mrs

Britten has calculated that an allowance of 7 per cent for these items is an appropriate allowance, indeed a generous allowance (in favour of the defendants) and has applied that reduction. The remaining 93 per cent represent lost sales and it the value of those lost sales which represents the amount by which the turnover during the indemnity period shall fall short of the standard turnover.

162. In effect, I take the above as a broad summary of TB's case based upon the modelling exercise carried out by Mrs Britten. As to the validity and general reliability of such exercise, the central issue was the methodology adopted by Mrs Britten in assessing the timing of unfulfilled demand and, in particular, her use of what was described as a "blended gross margin". In calculating lost profit, Mr Cogley QC accepted, indeed emphasised, that the starting point was that a lost sale on a particular item which had been stolen might occur at any time and he also readily accepted that the calculation of the lost profit on that item can present what he described as a "problem". However, he submitted that the claim in the present case was not for the lost profit of any particular item stolen but for the lost profit on a vast number of stolen items; and that in that context, the use of a "blended gross margin" was both justified and indeed more reliable than what he described as the more "granular" approach adopted by Mrs Rawlin and Mr Emery.

163. In essence, the modelling exercise carried out by Mrs Britten involved, as a starting point, taking the average sales figures for TB (which would produce an average margin) and then making certain adjustments to reflect the fact that (compared to actual sales) there was a lower probability that the stolen items would have been sold in the early weeks of the sales period for any season, viz: (a) to exclude any sales made prior to the start of the season – because there are unlikely to be lost sales before the start of the main selling season/de minimis; (b) to include only 35.65 per cent of the sales made in the next four weeks; (c) to include only 87.5 per cent of the sales made in the next four weeks; and (iv) to include all sales from that point. This was, submitted, Mr Cogley QC a "robust" model which took account of all contingencies. However, Mr Cogley QC (and Mrs Britten) recognised that this only produced a blended gross margin for a single season; and that, since the seasons and the policy years did not run together, in order to establish the appropriate loss of gross profit in any given policy year, it was necessary to take into account the figures for more than one season and make appropriate further adjustments.

164. I fully recognise that the work done by Mrs Britten in carrying out this modelling exercise has been very considerable; and, at first blush, I also recognise that the exercise she has carried out has some superficial attraction. However, even applying the broad approach stated above, I remain unpersuaded that it provides a sufficiently reliable or reasoned method for assessing the appropriate loss of profit in the present case. In particular, as submitted by Mr Nicholson QC, it seems to me that (apart for some "dilution" for the early part of each season), it assumes, wrongly in my view, that the (hypothetical) sales profile of the stolen items would have followed the profile of actual sales. By way of a number of homely examples, Mr Cogley QC vigorously advocated that such criticism was fundamentally flawed; and Mrs Britten herself emphasised that she had applied the "full range of discounts". However, as submitted by Mr Nicholson QC, although the latter was true in a sense, I remain unpersuaded that the stolen items would have followed the path of average items. In response, Mrs Britten sought to justify the approach that she had adopted on various different bases; and the various adjustments she had made. However, at the end of the day, I remained unpersuaded (even applying the broad approach) that the explanations proffered by her satisfactorily addressed what seems to me the main flaw in her modelling exercise.

165. In reaching this conclusion, I should make plain that I do not necessarily accept the accuracy or reliability of the exercises carried out by Mr Emery and Mrs Rawlin. In that regard, Mr Cogley QC advanced a number of criticisms with regard to what he described as their "granular" approach. I recognise the potential force of at least certain of those criticisms. However, it is unnecessary to consider them in detail because, even if certain of those criticisms are justified in whole or in part, they do not affect my overall conclusion, viz that TB has failed to establish even on the basis of the broad approach any lost profit above the excess.

166. Given this conclusion, it is unnecessary to address the other points which were the focus of debate. However, I address briefly a number of the specific points raised although I should emphasise that some of these points would only be relevant if I had accepted Mrs Britten's approach based on a blended gross margin which is not the case.

167. First, Mr Nicholson QC submitted that Mrs Britten's approach in identifying the timing of any reduction in turnover was flawed. This was very much part of Mrs Britten's blended gross margin and, if such approach were appropriate, it would be potentially important because, as submitted by Mr Nicholson QC, in order to allocate the losses to different policy years, TB must prove what loss of gross profit it sustained in each policy year, ie the focus is the particular loss "...during the Indemnity Period ..." which begins "... with the occurrence of the incident ...". The difficulty is that no one knows when the particular incidents of theft occurred. In order to meet this difficulty, TB's case involves seeking to prove this by working back from the occurrence of the PI Variances and "guessing" how long it would take for the absence of the missing item to be discovered by a PI count. Mr Nicholson QC submitted that such an exercise is "impermissibly speculative". I agree. Notwithstanding, I note that Mr Emery assessed the average at nine weeks although he acknowledged that this was "speculative". Mrs Britten opted for 15 weeks but I accept that this is equally speculative. Mr Cogley QC submitted that the impact of a different period is hard to measure and may not matter. However, Mr Nicholson QC would seem right at least to this extent – that it will affect which of some losses fall into which policy year and this will certainly matter where the underwriters are different. Other than to split the difference, ie to

say 12 weeks, I cannot identify any rational basis for arriving at an appropriate figure. In truth, it is, as I say, entirely speculative.

168. Secondly, Mr Nicholson QC submitted that Mrs Britten's approach in calculating the data by reference to "SUN" periods of four weeks was unsatisfactory. In particular, he submitted that such method of assessment is unnecessarily imprecise and leads to results which were overstated. In contrast, Mr Emery and Mrs Rawlin calculated for each week which Mr Nicholson QC submitted was more accurate. I agree that Mrs Britten's approach involves a degree of imprecision and that the approach adopted by Mr Emery and Mrs Rawlin may be more precise; but I am not persuaded that this necessarily leads to results which are significantly overstated. Given that this entire exercise is necessarily approximate, I am not persuaded that Mrs Britten's approach should on this point be rejected.

169. Thirdly, Mr Nicholson QC criticised the total 7 per cent allowance calculated by Mrs Britten for MIP and scrappage as being too low. He submitted (rightly in my view) that the application of the MIP is particularly important. Initially, it appears that Mrs Britten wrongly took no account of the MIP assuming all sales were lost within it; and I accept that her subsequent first set of calculations were flawed – as I think she did herself. On the basis of the detailed exercise carried out by Mrs Rawlin, Mr Nicholson QC submitted that a reduction of 10 per cent overall should be made to reflect sales that would have been lost outside the MIP. For the reasons given by Mrs Rawlin in the joint statement, it seems to me that that reduction of 10 per cent is likely to be more accurate and is therefore preferable. As to scrappage, the differences between the experts are relatively small. I would assess the allowance for scrappage as 3.5 per cent. Once again, it seems to me that the assessment of the proper allowance is speculative; but, if necessary, I would assess the total allowance for MIP and scrappage as 13.5 per cent.

170. Fourthly, Mr Nicholson QC disputed the deduction allowed by Mrs Britten (£10,687) in relation to sales to TK Maxx which is generally below cost price. Rather, he submitted that the figure should be as calculated by Mrs Rawlin, ie £42,761. There are two main reasons for this difference, viz: (i) the assessment of the quantity of stolen items that would have been sold to TK Maxx but for the thefts; and (ii) the rates to be applied. In my view, there are strong arguments that Mrs Britten's figure is too low and that Mrs Rawlin's figure is too high. Doing the best I can, it seems to me that, if relevant, the appropriate deduction probably lies somewhere between these two figures which I would assess at £25,000.

171. Fifthly, Mr Nicholson QC disputed a number of lesser items. As to these, I agree with Mrs Rawlin's minor deduction in respect of the French company. As to the VAT rate, the lower rate of 16 per cent proposed by Mrs Rawlin would seem appropriate.

172. What effect these adjustments might have on Mrs Britten's calculations, I do not know. In order to find out, it would no doubt be necessary to carry out further detailed calculations. However, given my earlier conclusions, I have not attempted such exercise and it seems to me futile to do so.

Part IV. Premium rebates

173. As pleaded, this was a counterclaim by AXA for repayment of some £60,473 which it repaid to TB as premium rebates in respect of three policy years (ie 2004/2005, 2006/2007 and 2006/2008) in what it says was the mistaken belief that there was a basis for these payments, ie that there were no claims for those years. In summary, the counterclaim was advanced on grounds of total failure of consideration. It was contingent upon the court concluding that the claimants were entitled to recover, pursuant to the terms of the respective policies, profits which were lost in those years. The counterclaim was disputed by TB. However, as I have concluded that TB's claims fail, this counterclaim falls away; and I say no more about it.

Part V. Conclusion

174. For one or more of the reasons stated above, it is my conclusion that the claim advanced by the claimants in these proceedings must be rejected in their entirety; and the counterclaim falls away.

175. I have to say that I do not reach this conclusion with any great enthusiasm having regard, in particular, to the facts that: (i) as I previously concluded in the earlier trial of preliminary issues, the policy covered theft by an employee; (ii) there is no doubt that TB suffered substantial losses arising out of the thefts which I have held were carried out by JON who was, of course, one of TB's employees; (iii) such losses amounted, even on the defendants' experts' evidence, to some £2.16 million; and (iv) the legal costs apparently incurred by TB were in excess of £2.5 million even before the beginning of this trial. However, having regard to the policy wording and the evidence before me, my conclusion is as stated above.

176. I would therefore invite counsel to seek to agree an order for my approval to reflect the terms of this judgment and any other consequential matters including costs. Failing agreement, I will deal with any outstanding issues.