Neutral Citation Number: [2021] EWCA Civ 590

Case No: A4/2020/0766

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MRS JUSTICE COCKERILL
[2020] EWHC 535 (Comm)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 23/04/2021

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE ELISABETH LAING

- -

Between:

ZURICH INSURANCE PLC **Defendant/Appellant**

- and -

NIRAMAX GROUP LIMITED **Claimant/Respondent**

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- -

Graham Eklund QC and Carl Troman (instructed by **BLM**) for the **Defendant/Appellant**
Ben Elkington QC and Ben Smiley (instructed by **Edwin Coe LLP**) for the **Claimant/Respondent**

Hearing date: 15 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Friday, 23 April 2021.

Lord Justice Popplewell :

Introduction

1. The Claimant ("Niramax") is in the business of waste collection and waste recycling. On the night of 4 December 2015 a fire broke out at its main premises at Thomlinson Road in Hartlepool. The fire destroyed a number of items of mobile plant and a fixed shredding machine known as the Eggersmann plant. The mobile plant was covered by the Defendant ("Zurich") under a policy of insurance renewed on 14 December 2014 ("the Policy"). The Eggersmann plant was insured with Zurich under an extension of the Policy added on 5 September 2015. Zurich declined the claim on the grounds of non-disclosure of material facts at the renewal in December 2014, and separately when the Eggersmann plant was added to the Policy in September 2015. By the time of the trial, the principal allegation of non-disclosure related to Niramax's failure to comply with a number of risk requirements which had been imposed by its property insurer, Millennium Insurance, which had resulted in Millennium imposing special terms requiring Niramax to self-insure for 35 per cent of any loss and in any event to bear the first £250,000 of any loss. There were other allegations of non-disclosure which the Judge rejected and with which this appeal is not concerned.

2. Zurich alleged that it was entitled to avoid the Policy from renewal on 14 December 2014; or in the alternative that it was entitled to avoid the extension of the Policy when the Eggersmann plant was added. Zurich further alleged that if the non-disclosed facts had been disclosed in September 2015 it would have cancelled the Policy. After a two-week trial in the Commercial Court, Cockerill J held that there was material non-disclosure of Millennium's risk requirements and special terms; that the non-disclosure did not induce Zurich to write the Policy on the terms on which it was written at renewal on 14 December 2015; and that had the material facts been disclosed at the time of the extension of the Policy to add the Eggersmann plant, Zurich would have declined to insure the Eggersmann plant, but would not have cancelled the Policy. Accordingly, Niramax's claim succeeded in part, namely for recovery of the value of the mobile plant, found to be £419,500 for Niramax's own plant and £82,350 for hired in plant, but not the Eggersmann plant.

3. On this appeal, Zurich contends that the Judge ought to have concluded that the material non-disclosure induced the underwriting of the Policy renewal on 14 December 2014, such that the claim in respect of the mobile plant should also have been dismissed.

Narrative

4. The trial involved a number of disputed facts and issues which are no longer in issue or relevant to the appeal. The following narrative is taken from the Judge's findings.

5. Niramax is a substantial concern, whose turnover in the last financial year before the fire was £36 million with a gross profit of £9.7 million. It had carried on business for a number of years from its main premises at Thomlinson Road in Hartlepool, and additionally at two other sites in Hartlepool and at a further site on an industrial estate in Washington, near Sunderland.

6. The buildings cover was provided by Millennium for the 2014/15 year, covering both the Thomlinson Road and Washington sites, subject to survey. The survey was

undertaken on 14 February 2014 by consultants who recommended that a number of risk requirements should be imposed. The recommendations were accepted by Millennium, who imposed the requirements on 27 February 2014. There were three risk requirements for the Washington site and seven risk requirements for the Thomlinson Road site. One of the key requirements for the latter was that there should be installed an automatic fire suppression system to protect three of the fixed shredders in the building within 30 days of the survey. One of the difficulties with this requirement was that the nature of the fire suppression system required was imprecise, leaving Niramax somewhat uncertain about what was needed.

7. Niramax did not comply with all the risk requirements within the timescale required. By mid-October 2014, following further correspondence with Millennium, there were four outstanding risk requirements which had not been complied with. These were:

   (1) a requirement for the installation of the fire suppression equipment on the fixed shredders at the Hartlepool premises;

   (2) a requirement for an inspection of the electrical appliances at the Hartlepool premises and provision of an Institute of Electrical Engineers Certificate as to their condition;

   (3) a requirement that at the Washington site an automatic fire detection system be installed in areas where waste was stored;

   (4) a requirement that CCTV cameras should be installed at the Washington site outside and inside areas of the process/storage building.

   I shall refer to these as 'the Outstanding Requirements'.

8. On 22 October 2014, in the light of Niramax's failure to meet the Outstanding Requirements, Millennium imposed special terms on Niramax, requiring Niramax to self-insure for 35 per cent of any loss and to bear the first £250,000 of any loss. I shall refer to these as 'the Special Terms'.

9. At the renewal of the mobile plant Policy on 15 December 2014, all the Outstanding Requirements had been complied with by Niramax, save for that relating to the installation of the fire suppression equipment for the fixed shredders at the Hartlepool premises. The Special Terms remained in place.

10. The underwriting process at Zurich was not exhaustive. This was a type of insurance which was "commoditised and streamlined as a costs-saving exercise." There was no proposal form. There were only three inputs into a calculation of premium, namely the amount of the cover, the nature of the trade and the claims experience. This was apparently a standard approach across the industry, at which the expert underwriters giving evidence on materiality did not cavil.

11. These criteria were applied by Zurich in a computerised ratings schedule into which each of these three variables was input. The result of the input of this data into the spreadsheet was a "technical price", a "target price" and a "walkaway price". The evidence of Mr Penny, the head underwriter in the Engineering Risk Division at Zurich, was that the latter was a minimum price below which Zurich would not write the risk.

12. At the 2014/15 renewal the risk was underwritten by a junior trainee, Ms Jones. The cover sought and granted was £812,000 any one occurrence for owned plant; £150,000 any one occurrence for legal liability for loss or damage to hired in plant; and £10,000 any one occurrence for legal liability for continuing hire charges for lost or damaged hired in plant, with an indemnity period of 3 months. A rating sheet was prepopulated by the back office and populated either by Ms Jones or by a colleague, Mr Smith, or both. It resulted in a technical price of £22,379.86, a target price of £23,498.65 and a walkaway price of £21,455.41. It was a so-called "mistake" in two of the inputs into this rating sheet which lies at the heart of the arguments on the appeal, to which I shall return. Ms Jones determined that the premium which should be charged was £23,714.40, which was not itself a figure generated by the rating sheet, but was simply mathematically a 20% increase on the previous year's premium. Nevertheless, it was in line with the rating sheet figure, being above the walkaway price and slightly above the target price. She sought and was given approval to charge a 20% increase by her immediate superior Mr Trinham.

13. In September 2015, the addition of the Eggersmann plant to the Policy was underwritten by Mr Hutchinson at Zurich. The Eggersmann plant was valued at £4.2 million. The owned plant cover was therefore increased to a total of £5,012,000. The premium for the extension was £32,782.62. The Outstanding Requirements and Special Terms were not disclosed to Zurich at the time of the September extension.

The case advanced by the parties at trial

14. In relation to non-disclosure of the Outstanding Requirements and Special Terms it was Zurich's case that had they been disclosed, the risk would have been referred to Mr Penny. He provided two witness statements and was cross-examined at length at the trial. He maintained that had the disclosure been made to him at renewal in December 2014, he would not have renewed the Policy at any price. He did not suggest by way of alternative that he would have done so but at a higher premium. Nor was any such alternative case advanced by Zurich in its written or oral closing submissions. By contrast, Niramax's case was that the Policy would have been renewed on exactly the same terms had the disclosure been made. Neither side, therefore, was focussing in its conduct of the case, or in the evidence which it called or challenged, on whether a third hypothetical was the correct one, namely that Zurich would have renewed but would have charged additional premium. This is of some significance because the Judge found that this is what Zurich would have done, and it is this finding which gives rise to the appeal and the Respondent's Notice.

The Judgment

15. In relation to the calculation of the renewal premium of £23,714.40, the Judge said in paragraph 99 of her judgment that it was reached by reference to the three input criteria (which she had recorded at paragraph 25 as being standard in this market), namely the sums insured, the nature of the trade and the claims record. At paragraph 100 she said that this was a 20% increase on the premium for the previous year. She went on in that paragraph to say: "It was also not in issue that this premium was incorrectly calculated. Instead of applying a 6% rate (for waste risks) a rate of 2.25% was used, and then weighted by 40%, which self-evidently left the premium below the level it would have been if 6% had been used."

16. It is tolerably clear that in making this finding the Judge had in mind the evidence of Mr Penny, who had produced a report in March 2016, after the fire, which had stated that in both 2013 and 2014 the nature of the trade, namely that it was waste recycling, had not been taken into account in calculating the premium. In cross-examination he accepted that this was incorrect, and that in both years it had been taken into account, but in different ways for the two years. In the 2014 rating schedule a figure of 2.25% had been applied to the owned plant cover of £812,000, which Mr Penny said was the rate applicable for contractors' plant generally, whereas the rate for waste recycling was 6% and this was the figure which should have been applied; the nature of Niramax's business had, however, been taken into account at a later stage in the 2014 schedule because in a box headed "underwriter's judgment factor", a 40% uplift was applied to the technical, target and walkaway prices, the rationale for which was recorded as being "loading for trade". Mr Penny said this was not the correct place to reflect the nature of the trade. By contrast, he confirmed that the 2013 rating schedule had produced the correct pricing by applying the 6% to the owned plant cover of £812,000 and applying no such uplift. He described the 2013 rating schedule as resulting in Niramax paying the premium which Zurich thought appropriate for a waste risk. The premium charged in 2013 was in fact a 10% increase on the 2012 pricing, but it fell between the target price and walkaway price calculated in the rating schedule.

17. In addressing the law at paragraph 133 of her judgment, the Judge identified the criteria for materiality, and went on to say that an insurer can only avoid the contract of insurance if he was induced by the representation or non-disclosure to write the precise contract which was written, including as to its terms, citing *Synergy Health (UK) Ltd v CGU Insurance Plc* [2011] Lloyd's Rep. I.R. 500 per Flaux J at [185] and *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 All ER (Comm) 140 per Clarke LJ at [62] (often referred to as *Assitalia v Arig*).

18. In addressing the materiality of the non-compliance with the Outstanding Requirements and imposition of the Special Terms, the Judge concluded that there was a lack of clarity about what was required by Millennium in relation to the fire suppression systems at Hartlepool, but no lack of clarity in relation to the other risk requirements. Despite this lack of clarity in relation to the fire suppression system, Niramax demonstrated a somewhat lackadaisical approach to responding to what were plainly serious concerns on the part of the property underwriters. It let things drift and did not really attempt to comply for some months. There was no good reason why the risk requirements could not have been complied with well before Millennium was driven to impose the Special Terms. The reason for these failings on Niramax's part was an unwillingness to spend the money involved, which led to a state of drift. These failings were material to be disclosed to Zurich because the risk requirements were all about risk management and the failure to comply with them spoke to poor housekeeping which was directly relevant to the risk being written by Zurich.

19. The Judge held that had the Outstanding Requirements and Special Terms been disclosed at renewal in December 2014, Ms Jones would have referred the risk to her immediate supervisor, and it would have been referred up the chain of authority to the most senior underwriter, Mr Penny. The Judge held that if proper disclosure had been made at the time of the Eggersmann plant September 2015 extension, again the risk would have been referred up the chain of authority to Mr Penny to determine whether to write the risk and on what terms. Addressing what Mr Penny would have done in

such circumstances, she determined that in the case of the Eggersmann plant extension in September 2015 he would not have written the risk at all. In relation to the December 2014 renewal, she held that Mr Penny would have written the risk, rejecting his evidence that he would not have done so. She held that he would have thought long and hard about whether to refuse renewal, but would not have done so against a background where the assured was of longstanding, the story of the risk requirements was troubling but somewhat nuanced and the only outstanding item was one where the information given to Niramax about what was required was unclear.

20. Paragraphs 211-214 of the judgment were the focus of the submissions on the appeal. They are in the following terms:

> "211. What has troubled me is whether, against this background, the premium he imposed would have been higher. I have concluded that it would have been; that is a conclusion which appears to find support in the independent evidence. Mr Penny reviewed this risk after the event. He went on record at the time and confirmed in evidence that the underwriting of this risk over the years had been substandard. Part of this was (based on clear evidence) that the premium calculated for the 2014 renewal did not apply the rate for waste risks correctly; instead of categorising the trade as waste, with an automatic premium of 6%, it was categorised as contractor's portable plant, with a premium of 2.25%, to which a loading of 40% was applied. Further the excess of £500 was very low for a risk of this type.
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> 212. As I have indicated I reach the conclusion on the balance of probabilities that Mr Penny would have offered terms for renewal, impelled to that conclusion by a sense of fair play to a long standing assured and given the less than striking nature of the extra information. However, there were limits to Mr Penny's charity. I conclude that Mr Penny would only have underwritten the risk if it was priced at or about the correct price for the risk. (It seems likely that he might have given a little leeway to ease the transition into proper pricing). This approach dovetails exactly with both the fair approach evidenced by Mr Hutchinson and Mr Penny, and Mr Penny's evidence as to how in fact he approached the process of weeding out less desirable waste risks. One can also see something of the same in the history of the buildings cover; the move to Millennium was against a background of changed underwriting criteria by Aviva and forbidding pricing by Catlin. As such it is a conclusion which derives from independent evidence, and the test of logical self-consistency.
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> 213. As I have said above, this was not quite the case advanced for Zurich; its core case was simple – that Mr Penny would not have written the risk. However, on considering the evidence adduced this more subtle approach seems clearly indicated as the answer.
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> 214. I have included this consideration for completeness, because it forms part of the background to the next question. As I have indicated, the case was essentially put on the basis of "write or not write?", though a reference to terms was made in passing both in opening and in closing. To this binary question, the answer is "write". Doubtless the reason why the case was not really advanced on the basis of "write or not write/write on different terms" is because it is (in my view correctly) accepted by Zurich that the only change which Mr Penny would have made to the terms is not one which was related to the non-disclosed fact, but one which related

to Zurich's earlier errors. It would seem to follow that the non-disclosure would not have been causative of the different terms."

21. It was common ground that the Judge's reference in paragraph 214 to Zurich having "accepted" what she identified as the only change Mr Penny would have made to the terms was mistaken. No such acceptance was formally made, although Mr Eklund QC conceded in his submissions that such was arguably the effect of Mr Penny's evidence. Nothing turns on this because the Judge made it a finding of fact of her own by use of the expression "in my view correctly".

22. In my view, a fair reading of the judgment as a whole, and these paragraphs considered together, is that the Judge's conclusion on inducement in relation to the renewal of the Policy in December 2014 was that had the Outstanding Requirements and Special Terms been disclosed at that time, Mr Penny would have written the renewal on the same terms as Ms Jones, save that he would have corrected the mistaken 2.25% and 40% uplift by applying 6% per cent, which would have resulted in additional premium for that reason alone. Since this was an increase in premium which was unrelated to the non-disclosure but would merely have reflected correction of the error in the spreadsheet, the non-disclosure was not causative of the different terms and accordingly inducement was not made out.

The Issues

23. Zurich sought permission to appeal on two grounds in respect of what would have happened had the disclosure been made at renewal in December 2014:

    (1) Mr Penny would have refused to write the renewal at all, and the Judge was wrong to reach the contrary conclusion in paragraphs 210 and 212 of the judgment.

    (2) Alternatively, the Judge was wrong to hold that inducement had not been established, having found that an additional premium would have been charged to correct a prior undercharging of premium, as a result of which the terms of the insurance would not have been the same. There were two limbs to this argument:

        (a) inducement was established as a matter of law on the Judge's findings, because the premium would have been higher had the disclosure been made; that was sufficient to meet the causation test for inducement irrespective of the amount of the increase or the thought process by which the additional premium would have been calculated;

        (b) alternatively, the Judge was wrong to conclude on the evidence that Mr Penny would only have charged an increased premium in an amount which corrected the mistake; there was no evidential basis for such a conclusion; the Judge ought to have found that Mr Penny would have charged a higher premium by reason, at least in part, of the undisclosed circumstances, in the light of the expert evidence on their materiality.

24. The Judge refused permission to appeal on both grounds, giving a further judgment in which she observed that Zurich had not advanced a case or adduced any evidence that

disclosure would have led to the risk being written but at higher premium, as she had concluded. This was not a pleaded issue or an issue at trial and therefore aspects of the conclusion she had reached had not been explored in evidence. She reiterated her conclusion on the evidence that had Mr Penny been underwriting, a difference in terms would have been limited to Mr Penny correcting the mistake. The non-disclosure did not give rise to inducement because it was not an effective cause of the different terms, which was the test provided for in the authorities. Full disclosure would merely have afforded Mr Penny the opportunity to spot the mistake and correct it.

25. On the renewed application to this court, Phillips LJ refused permission on ground 1 and granted permission on both limbs of ground 2.

26. By a Respondent's Notice, Niramax sought to uphold the outcome of the trial on the additional ground that there was no evidence to support the Judge's finding that if Mr Penny had corrected the mistake, such correction would have led to a greater premium than that which was in fact charged at renewal.

27. Much of the skeleton arguments were taken up with the law on Zurich's limb 1. This limb of Zurich's appeal was premised on the proposition that in order to establish inducement, the relevant test of causation was a "but for" test, which was satisfied on the Judge's findings in this case: if the material facts had been disclosed the renewal would have been made at a higher premium; but for the non-disclosure it would not have been written on the cheaper terms in fact offered.

28. Niramax, on the other hand, contended that the test was that the non-disclosure had to be an effective and real and substantial cause of the different terms on which the risk would have been written if full disclosure had been made; and that the Judge was right to conclude that there was no such causation on the basis of her findings.

29. This is a pure point of law. However, the issue seemed largely to fall away as a result of Mr Eklund at the outset of his oral submissions seeking to put the appeal on a new and different basis. This was that, properly understood, the Judge had in fact made findings that Mr Penny would have charged additional premium not, or not only, to correct the "mistake", but also to reflect the increased risk which the undisclosed facts would have revealed. If this were so, the causation test for inducement would be met on the basis of an efficient cause being necessary. Mr Elkington QC challenged this factual premise as to the Judge's findings, but not the conclusion on causation for inducement if the premise were established. As a result, the point of law which was explored at length in the skeleton arguments was not developed orally. Nevertheless, Mr Eklund did not formally concede that a but for test of causation was insufficient, and it remains necessary therefore to address limb 1 in its original form, albeit that it had been dismissed from the forefront of Zurich's argument to a point at which it was barely visible in the rear-view mirror.

Limb 1

30. I have little hesitation in concluding that in order for non-disclosure to induce an underwriter to write the insurance on less onerous terms than would have been imposed if disclosure had been made, the non-disclosure must have been an efficient cause of the difference in terms. If that test of causation is not fulfilled, it is not sufficient merely

to establish that the less onerous terms would not have been imposed but for the non-disclosure. In my view that conclusion is dictated by both authority and principle.

31. As to authority, there is no need to go further back in the case law than *Pan Atlantic Insurance Ltd v Pine Top Ltd* [1995] 1 AC 501, which established the necessity to prove inducement in cases of both misrepresentation and non-disclosure, despite the absence of any such express requirement in sections 18 and 20 of the Marine Insurance Act of 1906, which in part codified the law applicable to both marine and non-marine insurance. The seminal speech of Lord Mustill contained a detailed examination of the historical development of this area of the law. He equated the test for inducement with that applicable to misrepresentation in the common law generally, both in his reasoning (see pp. 541H-542B and 549D-E) and in his conclusion at p.550D:

> "if the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract."

The rationale is that there must be some effect which the undisclosed or misrepresented facts have on the mind of the underwriter, as is clear from the passage at pp. 541H-542B.

32. The requirement in the general law of misrepresentation that there be such an effect on the mind of the representee has long been established. For example, in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 it was held that the misrepresentation must be an effective cause, although not the sole cause, of the representee acting as did, in the sense that it must influence him in his decision and be part of the cause of what he did: see per Cotton LJ at p. 480-481, Bowen LJ at p. 483 and Fry LJ at p. 485.

33. In *St Paul Fire & Marine Insurance (UK) Ltd v McConnell Dowel Constructors Ltd* [1995] 2 Lloyd's Rep 116, this Court was concerned with the test for inducement in a case of non-disclosure. Evans LJ confirmed at pp.124-5 that the test was that set out in *Edgington v Fitzmaurice*, and said that this was no different from the expression Stephenson LJ had used in *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583, 589b of "a real and substantial" cause.

34. This Court addressed the question again in the context of non-disclosure in *Assitalia v Arig*, in which Clarke LJ said at [62]:

> "In all the circumstances I would summarise the relevant principles of inducement in this context in this way. (i) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was induced to enter into the contract by a material non-disclosure or by a material misrepresentation. (ii) There is no presumption of law that an insurer or reinsurer is induced to enter in the contract by a material non-disclosure or misrepresentation. (iii) The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence from evidence from him. (iv) In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered

into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so."

35. Zurich relied in its skeleton argument on the but for formulation in the penultimate sentence. This is misplaced. The formulation in the first and last sentence of (iv) is that inducement requires an effective cause. The reference to having to satisfy "at least" the but for test is that if the latter is not satisfied it is almost inevitable that the effective cause test will not be either. I say almost inevitable because the effective cause test can exceptionally be satisfied where a but for test is not: see the discussion in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] 2 WLR 123 at paragraphs 182-185. The important point for present purposes, however, is that Clarke LJ was not equiparating the two tests, as his use of "at least" demonstrates. In many cases if an insurer cannot satisfy the effective cause test he will also be unable to satisfy the but for test; but that is not always so, as the current case demonstrates.

36. As to principle, if a non-disclosure has not had any influential effect on the mind of the insurer, in the sense that if disclosed it would not have played any part in his underwriting judgment, there is no connection at all between the wrongdoing of the assured and the terms on which the insurance is written by the insurer. It is difficult to see any justification for affording the insurer a windfall remedy in such circumstances. As Lord Mustill observed in *Pan Atlantic* at p.549C-D:

> "The existing rules, coupled with a presumption of inducement are already stern enough, and to enable an underwriter to escape liability when he has suffered no harm would be positively unjust, and contrary to the spirit of mutual good faith recognised by section 17 [of the Marine Insurance Act 1906], the more so since non-disclosure will in a substantial proportion of cases be the result of an innocent mistake."

37. I have used the expression "efficient cause", rather than "effective cause", in my formulation, not because I detect any difference between the two in this context, but because it reflects the language used in *FCA v Arch* of the difference between a but for test and what was historically called a proximate cause, in characterising the causative link between the insured peril and the loss in insurance cases.

38. Applying this test to the Judge's findings, she was right to conclude that there was no inducement. An important feature of this case is that rating the risk for the purposes of calculating premium at Zurich took no account of attitude to risk, which was what the undisclosed facts went to, save to the extent that it was reflected in the claims experience which was independently one of the criteria taken into account. It was a formulaic streamlined process based only on the amount insured, nature of the trade and claims history (on the Judge's findings). Accordingly, Niramax's attitude to risk, and therefore the undisclosed facts, was irrelevant to the rating of the risk by either Mr Penny or Ms Jones, save to the extent that they were reflected in the claims record. The non-disclosure cannot therefore have had any causative efficacy in the renewal being written on cheaper terms than would have occurred if disclosure had been made.

39. Put another way, Zurich would have priced the risk on the basis of its rating criteria, which would include a 6% rating for the waste management nature of the business. That is the effect of Mr Penny's evidence that such exercise in 2013 (which used the 6% rating) resulted in Zurich charging the appropriate premium. That was its

assessment of the correct pricing for the risk. Attitudes to risk management played no independent part in such pricing: they did not do so for Ms Jones and would not have done so for Mr Penny. If disclosed, they would not have had any influence on the mind of either Ms Jones or Mr Penny in arriving at the premium.

40. Looked at another way, Ms Jones made a mistake in reaching a premium based on the 2.25% figure (on the Judge's findings), which was not a mistake Mr Penny would have made. It was that mistake by her, not a failure by Niramax to disclose matters relevant to its attitude to risk management, which was the sole cause of the policy being written more cheaply than it would have been by Mr Penny. The non-disclosure provided the opportunity for Ms Jones to make that mistake, which would not have been made by Mr Penny to whom it would have been referred if disclosure had been made. That is what fulfils a but for test of causation. But it was Ms Jones' mistake which was the sole efficient cause of the policy being written more cheaply than it would otherwise have been priced by Zurich, through Mr Penny.

Limb 2

41. Limb 2 of the ground for which permission to appeal was given is that the Judge ought to have found that the increase in premium, had there been disclosure, would not have been limited to the correction of the mistake. This is inconsistent with the new argument raised by Mr Eklund at the hearing, which was to the effect that the Judge had so found. Accordingly, again it was not in the forefront of his argument. I can deal with it briefly.

42. Subject to the question of law as to the applicable test of causation, which I have addressed, the issue of inducement is a question of fact. An appellate court will not readily interfere with the findings of fact of a trial judge, for the well-known reasons articulated by Lewison LJ in *Fage UK Ltd v Chobani Ltd* [2014] EWCA Civ 5 at [114], all of which are applicable in this case. What Mr Penny would have done if disclosure had been made was something which the Judge was immeasurably in a better position to evaluate than is this court. This court should only interfere if the Judge's conclusions were not reasonably open to her on the evidence (see *Assetco Plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151 at [157]). Zurich falls well short of meeting this high threshold. The Judge heard extensive evidence about the insurance, the market and Zurich's practices and attitudes. Mr Penny provided two witness statements and was cross-examined at length: the transcript extends to over 200 pages. Mr Penny never suggested, as an alternative to his position that he would not have written the risk at all, that he would have written the risk but on different terms; and so did not identify what any such different terms would have been. That was no part of his evidence or Zurich's case. The Judge was entitled to reject his evidence that he would not have written the risk at all and gave cogent reasons for doing so. Permission to appeal against that finding was refused. There is simply no evidential basis for submitting that the Judge ought to have found the non-disclosure causative independently of any question of correcting a mistake. It is said that her conclusion is "implausible" given the evidence of the expert underwriters that risk management would be material to a prudent insurer in Zurich's position. Implausibility is not generally a sufficient ground for challenging a finding of fact, but in any event the Judge's finding in this respect was not implausible: it was rooted in her assessment of Mr Penny's attitudes to this longstanding client, the cogent reasons she gave as to why Mr Penny would not have refused the renewal, and the formulaic nature of the three criteria used by Zurich for calculating premium. There

is no proper basis for challenging her finding that no change would have been made to the premium by Mr Penny save insofar as necessary to correct an error which had been made by Ms Jones.

The New Ground

43. When opening the appeal Mr Eklund submitted that it was now common ground that there had been no such mistake as to the calculation of premium as the Judge held would have been corrected by Mr Penny, so as to impose a higher premium than that actually charged. This was on the basis that by the Respondent's Notice Niramax "accepted" that the correction of the figures would not have led to an increase in premium. His main submission, as I understood it, was that the Judge had held in paragraphs 211 and 212 that had disclosure been made, Mr Penny would have charged a higher premium than was in fact charged. Since this cannot have been the correcting of a mistake, as the judge erroneously thought, because it was now common ground that there was no such mistake, it follows that the Judge was finding that the nature of the risk management considerations which were not disclosed was the reason for which Mr Penny would have charged a higher premium. When it was pointed out in the course of argument that if one removed the Judge's alleged error in thinking that there was any mistake as to calculation of premium, what would be left was simply her finding that Mr Penny would have written the risk and no finding that it would have been on different terms, which would not be sufficient for Zurich to discharge the burden of establishing inducement, Mr Eklund submitted that this was a case in which the Judge had found two contributing causes which had led to the increase in premium which would have been applied, one being correction of the mistake, the other being the undisclosed facts themselves. He argued, therefore, that there was no basis on which the Judge could properly have reached the conclusion in paragraph 214 that the non-disclosure was not causative of the different terms from those which Mr Penny would have imposed, once one removed her erroneous finding that Mr Penny would only have changed the figures to correct the (non-existent) "mistake".

44. There are two answers to this new point, each of which is sufficient to defeat it.

45. The first is that, as Mr Eklund accepted, Zurich has no permission to advance this ground of appeal. No such permission has been sought and I would not myself have granted it without at the very least a precise formulation in writing, given the somewhat imprecise and changing nature of Mr Eklund's submissions on the point.

46. Secondly, it proceeds upon a misplaced analysis of the judgment in which Mr Eklund fixed upon a few individual phrases and took them in isolation. This is not an appropriate or permissible approach. I regard it as clear that, reading the relevant parts of the judgment as a whole, the Judge's conclusion and reasoning were that which I have identified earlier in this judgment, namely that had the disclosure been made, Mr Penny would have written the renewal on the same terms as Ms Jones, save that he would have corrected the mistake of the 2.25% and applied 6%, which the Judge said would have resulted in additional premium for that reason alone; and that since this was an increase in premium which was unrelated to the non-disclosure, but would merely have reflected correction of the error in the spreadsheet, the non-disclosure was not causative of the different terms and accordingly inducement was not made out. This is reinforced by what she said in her judgment refusing permission to appeal. Contrary to Mr Eklund's submission, the Judge did not find that (1) disclosure would have resulted

in an increase in premium and (2) as an additional and independent factor the premium calculation error would have been corrected. Her finding, on a fair reading, was that the only difference of approach which Mr Penny would have adopted from that of Ms Jones was to increase the premium to correct the error; and that any increase would not have been related to the non-disclosed fact. This latter was her express finding of fact in paragraph 214.

47. The Respondent's Notice point, if good, does nothing to undermine this analysis. If the Judge was wrong in concluding that the correction of the 2.25% to 6% would lead to a higher premium, the consequence is that she would have found that the premium which Mr Penny would have charged would have been no higher than that charged by Ms Jones.

Conclusion on the appeal

48. Both limbs of the ground on which permission was granted are unsound, as would be the new ground even if it had permission. That is sufficient to dispose of the appeal, but for completeness I will consider the Respondent's Notice point.

Respondent's Notice point

49. I have reached the conclusion that Niramax's point is well-founded, and that the Judge fell into error at paragraph 100 in saying that using a figure of 2.25% and then adding a weighting of 40% would "self-evidently" have left the premium below that which would have been reached if 6% had been applied. It was this conclusion which determined her finding that Mr Penny's correction of the error would have led to an increase in premium. The comparison was not between 2.25% and 6% with a 40% uplift in each case, because Mr Penny's evidence was that the correct method would have been to apply the 6% but no 40% uplift. The 40% uplift was not applied directly to the figure produced by multiplying the amount of cover by 2.25%; the rating sheet produces an initial figure by applying the 2.25% or 6% to the amount of cover; but there is then a process by which not only that input but other inputs are used to reach a technical, target and walkaway price before, in the 2014 sheet, the 40% uplift was applied to each of them. The evidence at trial was that no one was able to explain the mathematical correlation which the computer programme applied in getting from the initial figure, via the input of other variables, to the technical, target and walkaway prices. The 2013 rating sheet illustrates that there is no basis for supposing that using 6% and removing the 40% weighting would have resulted in a higher figure in 2014. On the contrary the correct inputs were made in the 2013 schedule, of 6% but no 40% uplift, applied to the same level of cover, and the result was a figure for technical, walkaway, and target premium which was *lower* than that obtained in 2014 when the 2.25% and 40% uplift were used. Because the correlation between the figure produced by applying the 6% or 2.25% and the ultimate technical, target and walkaway prices is opaque on the evidence, one cannot be sure that for 2014 it would have produced a similar figure as for 2013, because there were some differences in the inputs for other variables between the 2013 and 2014 schedules. It cannot, therefore, be ruled out that correction of the 2014 rating sheet would have produced a walkaway price above the £23,714.40 in fact charged. But that is a matter of speculation and does not undermine Mr Elkington's submission that there was no proper evidential basis for the Judge to conclude that if Mr Penny had corrected the error in the approach in the 2014 rating sheet, which is the error he identified and the Judge held he would have corrected, it

would have resulted in a higher premium than that charged by Ms Jones. That is not self-evident and there is no evidential support for it.

50. I have not overlooked the fact that in Mr Penny's evidence, following his acceptance in cross-examination that the nature of the trade had been taken into account in the 40% uplift in 2014 but ought instead to have used 6% rather than 2.25% applied to the level of cover, he volunteered the comment that this was "why his premium was lower than the previous one". It is unclear to me what this meant. It may be that "his premium" refers to the premium charged by Ms Jones because Mr Penny understood it had been a Mr Smith rather than Ms Jones who had conducted the underwriting at renewal. However, the reference to a premium "lower than the previous one" is perplexing: the 2014 rating sheet produced a higher premium than that produced by the 2013 rating sheet and higher than that actually charged in 2013. I cannot read this as a suggestion by Mr Penny that correcting the error would have produced a higher figure in the 2014 rating sheet for the technical, target and walkaway prices: it was not what he said and in any event Mr Penny was not in a position to make such an assertion because he did not understand the correlation between the figures which the computer programming in the spreadsheet applied. Nor does it appear that the Judge thought so, because her conclusion at paragraph 110 was not that it was Mr Penny's evidence that the correction would have led to a higher premium, but rather that such was self-evident. She may have assumed that it followed from the fact that 6% is more than 140% of 2.25%, but if so she was mistaken because the percentages were not being applied to the same figures.

51. This slip provides a further reason for upholding the judgment, although I should add that I have considerable sympathy for the Judge in making this slip because the way in which the evidence and argument was advanced before her avoided any real focus on this point, in contrast to the scrutiny in this court.

Conclusion

52. I would dismiss the appeal.

Lady Justice Elisabeth Laing:

53. I agree.

Lord Justice David Richards:

54. I also agree.