Neutral Citation Number: [2020] EWHC 972 (TCC)

Case No: HT-2017-000219

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
London, EC4A 1NL

Date: 24/04/2020

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

(1) 2 ENTERTAIN VIDEO LIMITED
(2) BBC STUDIOS DISTRIBUTION LIMITED
(formerly known as BBC WORLDWIDE LIMITED)
(3) DEMON MUSIC GROUP LIMITED **Claimants**
- and -
SONY DADC EUROPE LIMITED **Defendant**

- -
- -

Neil Moody QC & Daniel Crowley (instructed by **Ince Gordon Dadds LLP**) for the **Claimants**
Ben Quiney QC & Caroline McColgan (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 8th, 9th, 10th 11th 15th, 16th, 17th, 18th, 22nd, 24th, 25th, 31st July 2019

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Approved Judgment

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

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 24th April 2020 at 10:30am**"

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. On the night of Monday 8 August 2011, during the rioting and violent civil disorder that occurred across London and other cities following the shooting of Mark Duggan, a distribution warehouse in the Innova Business and Science Park, Solar Way, Enfield was attacked by a group of young men. They gained access to the warehouse by breaking through a fire door or glazed panels in the south-west corner of the building. Having looted some of the goods, they started a fire by throwing two petrol bombs inside the building and made their escape. The warehouse burned for ten days, causing the total destruction of the building, plant, equipment and stock.

2. The warehouse was owned and occupied by the defendant ("Sony"), a company providing logistics services, including warehouse storage and distribution of home entertainment media.

3. The claimants publish, market and sell pre-recorded Blu-ray discs, DVDs, CDs and other home entertainment media. The first claimant ("2E") is a subsidiary of BBC Studios Limited, the main commercial entity within the British Broadcasting Group ("the BBC") and is responsible for the BBC's video catalogue and new release stock. The second claimant ("BBC Studios") is responsible for BBC Children's video titles. The third claimant ("Demon") is owned by 2E and is responsible for CDs.

4. By a logistics services agreement dated 13 May 2011 ("the Logistics Contract") made between 2E and Sony, Sony agreed to provide logistics services for 2E and the other claimants, including storage and distribution facilities at the warehouse.

5. At the time of the fire, 2E had stock, with a sales value of approximately £40 million, stored at the warehouse.

6. Sony's insurers paid 2E the sum of £8,270,573.37 in respect of the loss of the stock.

7. On 4 August 2017, these proceedings were issued by the claimants, seeking damages for other losses suffered.

8. 2E's case is that it is entitled to recover against Sony the loss of profits, business interruption costs and increased cost of working, suffered as a result of the fire, by way of an indemnity under the Logistics Contract or as damages on one or more of the following grounds:

    i) in breach of the Logistics Contract, Sony failed to keep the goods secure at the warehouse until delivery;

    ii) in breach of the Logistics Contract, Sony failed to indemnify 2E against its losses;

    iii) in breach of its common law duty as bailee of the stock in the warehouse, Sony failed to take reasonable care to keep the goods secure and protect them against arson or other destruction;

    iv) Sony converted the goods by allowing them to be lost or destroyed;

v) in breach of the Logistics Contract and/or its common law duty in tort, Sony failed to perform the logistics services with due care and skill; it failed to take adequate steps to assess the risk and implement appropriate measures against the risk of intruders and/or fire:

a) there was poor security: the south-west corner was a weak point because there was a door that could be easily overcome and there was no continuous perimeter fence;

b) there were inadequate fire precautions for the warehouse: the building was not divided into compartments and there were no sprinklers to prevent the spread of fire.

9. Although initially 2E claimed damages of £7.45 million, it is now accepted that clause 10.4 of the Logistics Contract is an effective contractual limitation clause and damages are limited to £5 million.

10. Sony disputes the claim on the following grounds:

i) Sony took appropriate advice, and implemented reasonable and proportionate security and fire protection measures at the warehouse;

ii) The riot causing the fire and destruction of the warehouse and its contents was unforeseeable; it could not have been prevented by reasonable measures and amounted to force majeure;

iii) the Logistics Contract limits any liability to the replacement manufacturing value of the goods;

iv) the Logistics Contract excludes liability for consequential losses;

v) liability under or for breach of the Logistics Contract is subject to an overall cap of £5 million, which sum has been exceeded by the insurance payments made to 2E;

vi) the claims are statute-barred for limitation.

Background

11. The warehouse was constructed in about 2000-2001 on a site in Innova Park, a warehouse and business industrial park located a few miles outside Enfield town centre, between Enfield and Waltham Abbey, just off junction 25 of the M25 motorway.

12. The main building was constructed as a large, open plan distribution warehouse with an adjacent two-storey ancillary office building. A two-tier mezzanine, taken from other premises, was installed in the south-east corner of the warehouse. The lower level was used for packing, the middle level was used for bulk pallet storage and the upper level was used for storage. The middle and upper levels were accessible by forklift trucks or independently standing structural steel staircases.

13. Initially, the warehouse was occupied by Deluxe Media Services ("Deluxe"). In about 2002 two-tier shelving was installed at the north end of the warehouse. A single tier

mezzanine platform was installed in the north-east corner of the warehouse abutting the two-tier shelving. High bay racking was fitted along the west side of the warehouse.

14. In 2006 Sony acquired Deluxe and took over leasehold ownership and occupation of the warehouse.

15. In 2009 further internal changes were made. The single tier mezzanine platform in the north-east was extended and a larger, single tier raised mezzanine platform was added in the centre of the warehouse. The effect of these changes was to provide additional storage racking, additional working space and a platform on which an additional conveyor system was installed to facilitate increased automation.

16. The warehouse stored mainly CDs and DVDs.

17. In addition to its use as a storage facility, the warehouse was an automated distribution centre. An automated packing and dispatch system was installed, which could handle 2,000 parcels per hour. A radio frequency picking system was used whereby hand-held scanning devices were used to scan products and location codes, which were recorded on the warehouse management system ("the DCMS"). Boxes which had to be filled with a mix of orders were directed automatically to the appropriate locations in the warehouse where waiting "pickers" would locate the relevant items, place them into the boxes and send them on to the next required location.

18. Approximately 130 people were employed at the warehouse and there were a further 100 agency staff.

The Logistics Contract

19. On 13 May 2011 2E entered into the Logistics Contract with Sony for the provision of logistics services for claimants' Blu-Ray, DVD and CD business for a term of four years from 1 May 2008 until 30 April 2012 (subject to any earlier termination in accordance with the agreed terms).

20. Clause 1.1 contains the following definitions:

> ""Client's Goods" means any Units which the Client has the right to supply in the Territory and which are to be or have been supplied to the Client's Customers on behalf of the Client in accordance with this Agreement (including without limitation any "2 Entertain" "Demon Music Group" and other specially branded Units).
>
> "Client's Materials" means all items supplied by or on behalf of the Client to the Logistics Services Provider for the purpose of processing the Client's Goods.
>
> "Logistics Services" means any of the services more particularly described in the Service Level Agreements to be carried out by or on behalf the Logistics Services Provider for the Client (which shall include by way of example and without limitation, being responsible to the extent expressly set out in this Agreement, for

> warehousing, stock loss, damage, insurance, storage, pick, pack and ship, invoicing, cash collection and returns processing in relation to the Client's Goods and the Client's Materials).
>
> "Unit" means Blu-Rays, DVDs and CDs and any other similar home entertainment media now known or hereafter devised intended for final sale or supply to a domestic consumer and, where the context so admits, associated point of sale material …"

21. The Service Level Agreements set out in detail the logistics services to be provided by Sony. Sony was responsible for receiving goods from the manufacturer and storing them in the warehouse. Sony's operational services included processing orders, deliveries and returns from customers, and stock management (including inventories and records of stock). There were agreed timescales for deliveries (including new release orders). Sony's performance was judged against key performance indicators ("KPIs"). Financial services to be provided included customer query management (pricing, returns, delivery errors, credits), customer invoicing, accounting and reporting, using the Sony common distribution system ("CDS").

22. Clause 4 contains provisions for Sony to provide insurance cover in respect of its contractual obligations, including the following:

> "4.1 The Logistics Services Provider shall arrange and maintain insurance to cover its legal liabilities and the responsibilities imposed by this Agreement ("Insurance Policy") including but not limited to:
>
> "4.1.1 all risks insurance covering loss, theft, damage to and or destruction of the Units, Client's Goods and Client's Materials for their full replacement/reinstatement value while in the charge, care and control of the Logistics Services Provider with a minimum sum insured limit of ten million pounds sterling (£10,000,000);
>
> 4.1.2 public liability insurance with an adequate indemnity limit which shall be no less than 5 million pounds sterling (£5,000,000) in respect of any one claim or incident and the Insurance Policy is to include an indemnity to principals clause providing protection to the Logistics Services Provider under this Insurance Policy as a principal to this Agreement;
>
> 4.1.3 product liability insurance for five million pounds (£5,000,000) in respect of any one claim and in the aggregate. For the avoidance of doubt, such minimum insurance levels as stated in clauses 4.1.1, 4.1.2 and 4.1.3 shall not be a limit of liability under this Agreement and the Insurance Policy is to include an indemnity to principals clause providing protection to the Logistics Services Provider under this Insurance Policy as a principal to this Agreement; and

> 4.1.4 the usual Employers' Liability or Workers' Compensation insurance in compliance with any applicable statutory regulations.
>
> …
>
> 4.7. In the event that the Units and/or DVDs and/or Client's Goods and/or Client's Materials are lost, damaged or destroyed in circumstances covered by the Insurance Policy … the Logistics Services Provider will use its reasonable endeavours to promote and safeguard the interests of the client in dealings with the insuring insurance company."

23. Clause 5 sets out Sony's obligations, including at clause 5.1:

> "5.1 The Logistics Services Provider shall:
>
> 5.1.1 undertake the Logistics Services for the Client in the Territory using the Sony CDS System;
>
> 5.1.2 subject to the provisions of the Service Level Agreements, have the right to amend the Sony CDS System from time to time provided that any amendment shall not prevent full and proper performance of the Logistics Services;
>
> 5.1.3 hold the Client's Materials and Client's Goods at a secure location at the Logistics Services Provider's premises at Enfield and at the Logistics Services Provider's risk whilst in its possession until the Client's Goods are delivered to the Client's Customers, subject to the limitations set out in clause 10.
>
> 5.1.4 … raise invoices in the Client's name for all Units supplied under this Agreement, payment to be made direct to the Client by the Client's Customers;
>
> 5.1.9 use its best endeavours consistent with its good faith business judgment to provide the Logistics Services in line with the Service Level Agreement and the Key Performance Indicators contained therein throughout the Term.
>
> …
>
> 5.3 The Logistics Services Provider warrants to the Client that:
>
> …

5.3.2 the Logistics Services will be performed with due care and skill and in a timely manner by appropriately trained, qualified or experienced individuals…

…

5.4 Subject to clause 10, the Logistics Services Provider shall indemnify the Client against all costs, claims, losses and expenses whatsoever which it is reasonably foreseeable would be incurred by the Client as a direct result of any breach of the Logistics Services Provider's obligations, undertakings and warranties contained in this Agreement provided that the Client takes all steps reasonably available to it to mitigate any such costs, claims, losses or expenses which it might incur."

24. Clause 10 contains limits on Sony's liability:

"10.1 The Logistics Services Provider's liability for any loss of or damage to Client's Materials or Client's Goods shall not exceed their manufacturing replacement cost.

10.2 The Logistics Services Provider shall be entitled to an annual allowance of 0.25% of the average monthly stock holding of the Client's Goods and the Client's Material for each of stock loss and stock damage for which it will not be liable to reimburse the client. Notwithstanding this sub-clause, the Logistics Services Provider shall not be liable for any loss, damage, expense, cost or liability incurred by the Client arising from or in relation to the Logistics Services Provider's failure to provide the Logistics Services as a result of the Client's breach of this Agreement.

10.3 Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business.

10.4 Subject to clause 10.5, the aggregate liability of the Logistics Services Provider for all breaches of or in relation to its obligations under this Agreement or for any losses or liabilities which are the subject of any indemnity by the Logistics Service Provider, whether in contract, tort, for breach of statutory duty or otherwise, shall not in any event exceed the sum of £5,000,000 (five million pounds).

…

10.6 Save as otherwise provided herein, the parties exclude any other terms and conditions of whatsoever kind and any warranties statutory or otherwise whether express or implied."

25. Clause 14 contains a force majeure provision:

"14.1 Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action.

14.2 The obligations of the party affected (but not the Term) will be suspended to the extent and during the time its ability to fulfil such obligations is affected by such force majeure.

14.3 The affected party shall use all reasonable efforts to remedy the effects on its operations and resume normal operations as soon as is practicable."

26. Clause 15.1 is an entire agreement provision:

"This Agreement and the Schedules attached contains the entire understanding between the parties and supersedes all previous agreements and understandings whether oral or written and no amendment, alteration or variation to this Agreement shall be valid unless agreed in writing by the parties."

2E's business

27. By 2011, 2E had a substantial share of the DVD and Blu-Ray market in the UK by retail sales value. In the 2010/2011 financial year, 2E's gross revenue was £120 million approximately, from the sale of new releases and back catalogue items. Some ninety percent of that revenue was derived from Amazon, HMV, Tesco, Asda, Crownville, Sainsbury and Music Box Leisure.

28. 2E sold new release items (those titles just released) and catalogue items (the BBC's back catalogue of titles). Following a first broadcast run, a new release product would be made available on DVD and Blu-Ray. After one year, the title would be classified as a catalogue item. 2E's catalogue list had 2,200 live video titles and Demon's business had 1,500 titles.

29. At the time of the fire, Sony DADC Austria AG ("Sony Austria") manufactured the majority of 2E's DVDs and Sony distributed all 2E's CDs and DVDs.

30. Sales were made online, in supermarkets and through other outlets. Online sales, through Amazon and HMV, accounted for fifty-seven percent of sales. Amazon and HMV sold titles across 2E's entire range, from top new releases to back catalogue titles. Amazon and HMV's orders were usually made via the warehouse. Supermarkets focused on a limited number of titles at any one time due to limited shelf space. They generally sold top new releases and key catalogue titles. Supermarkets had their own distribution warehouses, so bulk orders from them could be delivered directly to the customer from the manufacturing plant. The other customers were small retailers with various requirements. Orders from these customers were almost always processed through the warehouse.

31. The warehouse orders were processed by Sony's distribution unit. Sony would receive 2E's goods from the manufacturer, store them at the warehouse, process orders from customers through the system, pick, pack and dispatch goods to the customer, raise invoices, collect payments, and process returns.

32. The CDS system was Sony's system used to process and track orders. Orders could be entered into the CDS system by Sony or 2E and could be received directly from customers. 2E's supply chain and sales teams could access the CDS system to enter, track and dispatch orders but only Sony could release the orders to picking after consultation with 2E and Sony managed the reverse logistics for any returns.

33. 2E maintained a release schedule, recording the planned release dates for all new release titles, including deadlines and details for production, artwork and packaging. The sales team would encourage customers to place advance orders for the new titles. The supply chain team would use the orders to decide on an initial manufacturing run to satisfy orders and allow for future replenishment. The orders were delivered into distribution some two to three weeks before the release date.

34. Campaigns were used to stimulate retail demand. Catalogue lines would be supplied at a special price to support promotions run by the retailers. They could be 2E-only campaigns or cross-industry promotions where 2E's titles would be combined with titles from other publishers. For a campaign to be successful, it was important to ensure

that product from all publishers was delivered to stores at the same time to maximise retail impact in the store.

35. The biggest-selling new titles would generally be released in autumn to coincide with the busy sales period in the run-up to Christmas. To meet the increased demand during this period, it was necessary for 2E to carry out a summer stock build programme. Each summer, 2E's supply chain team would review its catalogue with the sales team and, based on agreed forecasts for sales, a back catalogue order would be compiled. Demon would carry out a similar exercise for CDs with its manufacturer. This allowed discs, print and packaging to be ordered at advantageous prices away from the busy Christmas period when there was capacity. The aim was to have the stock to be ready and available for call off from manufacturing by beginning of September.

The fire

36. In August 2011 there was widespread civil unrest in parts of London and other cities, resulting in rioting, looting and arson attacks. On Sunday 7 August 2011 there was civil disorder in Enfield Town, including an attack on a jeweller's shop during which items of jewellery were stolen. Word was spread on social media that the events of 7 August 2011 would be repeated on 8 August 2011, including rumours that the Innova Business Park might be attacked.

37. On the night of 8 August 2011 the warehouse was attacked by a gang of local youths. The attack was captured on CCTV. The point of entry to the warehouse was the fire exit door and glass panels in the south-west corner. The boys kicked the door, threw stones and used implements (a stick and garden hoe) to break in. Access was gained in less than one minute.

38. They broke in, stole some boxes of goods and threw two petrol bombs into the aisles.

39. The fire burned for ten days. The building and its contents were a total loss.

Consequences of the fire

40. As Mr Stopher explained in his witness statement, the consequences of the fire were devastating. The warehouse was completely destroyed. 2E lost all of its stock, some 7,410,153 units. Sony lost its logistics infrastructure, including fork-lift trucks, radio frequency devices, racking and the automated dispatch system.

41. At the time, the warehouse contained all 2E's normal operating stock plus some of the summer stock build of catalogue stock. 2E lost all its catalogue of 2,200 video and 1,500 audio lines in the fire, together with stock held in the returns department at the warehouse.

42. 2E's strategy to mitigate its losses was to prioritise re-stocking new release titles as they accounted for approximately half of 2E's annual sales.

43. From as early as 10 August 2011, Sony shipped large quantities of goods direct to 2E's customers.

44. Pending the construction of a replacement warehouse, interim facilities were provided by Sony. Sony rented an Eezehaul warehouse in Sussex to store stock and a temporary

distribution facility was set up at a warehouse in Hoddesdon. These facilities were provided very shortly after the fire but did not provide the same level of logistics services that had been available at the Enfield warehouse. They had reduced capacity and there was little automation. They afforded bulk pallet picking and dispatch facilities but they did not provide the single line, multiple stock keeping unit, picking and dispatch capability provided at Enfield. There was no warehouse operating software or equipment, such as hand-held terminals and bar code locations to coordinate stock movement and picking. The site facilities were inadequate for increased numbers of staff required to work there, leading to a high turnover in staff.

45. In October 2011 a second facility was set up in Hoddesdon and an arrangement was made with Cinram for storage of limited stock. Although this alleviated capacity stress, it introduced disruption because orders were split between Cinram and Hoddesdon.

46. By the end of October 2011 2E had re-stocked all new release titles but did not have the benefit of the logistics services previously provided by the destroyed warehouse. Sony built a new replacement warehouse at Enfield but it was not completed until September 2012.

47. 2E's two biggest customers, Amazon and HMV, were most affected by the operational difficulties arising from the fire in the key peak sales period. From the time of the fire until January 2012, the average dispatch times from the point of orders being made by 2E's biggest customer, Amazon, slipped from an average of one to two days to an average of about eight days. Amazon became increasingly unhappy with the service. Between 23 November 2011 and 15 December 2011 Amazon suspended its automatic ordering system, causing a significant adverse impact on 2E's pre-Christmas sales.

48. Sony's insurers made a successful claim for compensation under the Riot (Damages) Act 1886 in respect of losses suffered as a result of the destruction of the warehouse and its contents but excluding consequential losses (including loss of profit and loss of rent): *Mitsui Sumitomo Insurance Co (Europe) Limited & Others v The Mayor's Office for Policing and Crime* [2013] EWHC 2734 (Comm); [2016] UKSC 18; [2016] Lloyd's Reports IR 411.

49. On 26 September 2011 2E made a claim for the loss of the physical stock, 7,440,314 units which would cost £8,536,254.06 to manufacture.

The Discharge and Release Agreement

50. On 8 February 2012 Sony, 2E and the insurers entered into an agreement ("the Discharge and Release Agreement"), containing the following material provisions:

> "WHEREAS
>
> A Sony and the customer entered into an agreement entitled "Agreement for the provision of logistics services" on 13th May 2011 under which Sony provides certain services ("the Distribution Agreement").
>
> B The Distribution Agreement provides, inter alia, that Sony shall bear the risk of loss of or damage to certain

products and materials (as more specifically defined in the Distribution Agreement) belonging to the Customer or in the custody or control and at the risk of the Customer on behalf of others whilst such products and materials ("Stock") are under the custody or control of Sony.

C Certain Stock was held at the risk of Sony at its Distribution Centre located at 6 Solar Way, Enfield, London ("the Warehouse") on the night of 8 August 2011 when the Warehouse was the subject of attack by persons acting riotously and tumultuously ("the Riot").

D In the course of the Riot the Warehouse was destroyed by fire and the Stock was stolen, lost or destroyed.

E Sony had insured the Stock with the Insurers pursuant to its obligations under the Distribution Agreement ("the Insurance") and the Insurers have appointed Loss Adjusters and others to investigate the physical loss of or damage to the Stock in consequence of the Riot ("the Loss") and following such investigation the insurers have agreed to indemnify Sony in respect of the Loss and to make appropriate payments in respect of the Loss.

…

H For the avoidance of doubt, this agreement is restricted to the Customer's claim for the physical loss or damage to the Stock and nothing herein is intended to prevent the Customer from recovering damages for consequential or business interruption losses whether resulting from the Riot, the Loss or otherwise.

…

J Sony, Insurers and the Customer have now agreed that the Customer's claim for the Loss is to be valued at £8,270,573.37 …("the Agreed Valuation") …

NOW IT IS HEREBY AGREED as follows:

1. Sony, Insurers and the Customer agree that the value of the Stock which was the subject of the Loss is the Agreed Valuation.

…

3. The Customer shall accept payment of the Agreed Valuation … in full and final settlement, discharge and

> release of all and any liability Sony or Insurers (including their employees, servants and agents) may have in respect of the Loss whether under the Distribution Agreement, the Insurance or howsoever such liability may arise (and whenever arising).
>
> …
>
> 5. For the avoidance of doubt, the settlement, discharge and release at clause 3 does not apply to …
>
> - any claim that Sony has under clause 5 of the Distribution Agreement,
> - any claim against Sony under clause 14 for the Distribution Agreement and
> - any claim against Sony under any other provision of the Distribution Agreement not directly relating to risk in the insurance of or liability for physical loss of or damage to the stock."

Proceedings

51. On 4 August 2017 the claimants issued proceedings, claiming damages against Sony in the sum of £7,476,404 plus interest for loss and damage arising out of damage to property caused by the fire.

52. The parties have formulated different lists of issues to be addressed but the key issues can be summarised as follows:

    i) Did Sony carry out adequate security risk assessments and take reasonable security measures at the warehouse?

    ii) Did Sony carry out adequate fire risk assessments and take reasonable fire precautions at the warehouse?

    iii) Was the fire and/or loss of the goods and/or loss of the Logistics Services caused by factors beyond the control of Sony?

    iv) Is Sony liable to 2E for breach of contract and/or as bailee and/or conversion and/or at common law?

    v) Are any of the losses claimed excluded or limited by terms of the Logistics Contract?

    vi) What is the quantum of the claimant's' recoverable losses?

Evidence

53. The following factual witnesses were called:

i) Alasdair Ogilvie, former operations director for 2E;

ii) Jemal Guerrero, assistant head of insurance at the BBC;

iii) Kevin Fouhy, managing director of Acorn Warehouse Solutions Ltd, who carried out the mezzanine extensions in 2002 and 2009;

iv) Neil Sanders, forensic investigator at Dr JH Burgoyne & Partners LLP, who carried out an investigation into the cause of the fire;

v) Michael Stopher, former senior operations manager at Sony;

vi) Ian Harper, business relationship manager, client services at Sony;

vii) Russell Taylor, chief financial officer and senior vice president of Sony;

viii) Darren Houghton, former managing director at Sony;

ix) Ben Hobby, forensic accountant with RGL Forensics, who carried out the loss adjustment of the business interruption losses suffered by 2E.

54. Civil Evidence Act notices were served in respect of the following witness statements:

i) Edward Mireku, the security officer on duty on the night of the fire;

ii) Thomas Thompson, a barman working at the Premier Inn on the night of the fire;

iii) John Rapley, security manager at the Enfield facility.

55. The experts called were:

i) Stewart Kidd, 2E's security expert;

ii) Mike O'Neill, Sony's security expert;

iii) Christopher Miers, 2E's architectural expert;

iv) Roger Jowett, Sony's architectural expert;

v) Dr David Crowder, 2E's fire engineering expert;

vi) Professor James Lygate, Sony's fire engineering expert;

vii) Gordon Hodgen, 2E's forensic accountant;

viii) Flemming Jensen, Sony's forensic accountant.

Scope of Sony's obligations

56. The Logistics Contract required Sony to:

i) hold 2E's goods at a secure location at the Enfield facility and at Sony's risk (clause 5.1.3);

ii) use its best endeavours to provide the Logistics Services in line with the Service Level Agreement (clause 5.1.4); and

iii) perform the Logistics Services with due care and skill (clause 5.3.2).

57. Although the case was pleaded by the claimants on a number of alternative bases, namely, tort, bailment and conversion, they do not have any material effect on the standard of care or nature of the duties set out in the Logistics Contract.

58. In *Sutcliffe v the Chief Constable of West Yorkshire* [1996] RTR 86 the following principles were set out regarding the obligations of bailees by Otton LJ at pp.92-93:

> "The duty is to take reasonable care, in all the circumstances, of the chattel bailed...
>
> In *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd [1975] QB 303*, it was held that the loss of, or injury to, a chattel while it is in the bailee's possession places the onus of proof on the bailee to show that it occurred without his fault. In other words, that it was not caused by any failure on his part to take reasonable care…
>
> Thus the bailee does not assume the role of an insurer …
>
> The standard of care can be high according to the value of the chattel bailed. In *British Road Services Ltd v Arthur V Crutchley & Co Ltd [1968] 1 All ER 811*, there was a theft from a warehouse of a valuable lorry load of high value, namely, whisky. It was held on appeal that the defendants' system of protection was not adequate in relation to the special risks involved and the value of the chattel bailed, and that even though they had contracted with competent third parties for the security of the warehouse during the hours of darkness the defendants had nevertheless failed to discharge the burden of proof that the loss was not due to any negligence on their part. The duty to guard against loss includes a duty to take reasonable care to prevent damage by the deliberate act of a third party. In *Lockspeiser Aircraft Ltd v Brooklands Aircraft Co Ltd, The Times, 7 March 1990* the plaintiff warehoused the prototype of an aircraft with the defendants and it was destroyed by arson when still at the defendant aircraft manufacturer's premises. Judge Hammerton QC, sitting as a judge of the Queen's Bench Division, held that the relationship of bailor and bailee existed and that the damage was 'foreseeable in nature if not in extent.' The defendant had failed to take sufficient care to prevent unauthorised entry on to the premises. I emphasise the words '*nature if not extent'*."

59. British Standards Codes of Practice are not legally binding or conclusive in respect of issues of reasonable skill and care but they reflect the consensus of professional expertise and opinion as to acceptable standards and practice for their stated application. As such they provide strong evidence as to the standard of the competent professional at their date of issue: *Ward v The Ritz Hotel* [1992] PIQR 315 per McCowan LJ at p.327.

Issue (i) Security Measures

60. 2E's case is that Sony failed to take reasonable steps to provide a secure location for 2E's goods. There was no adequate security risk assessment. The fencing protected only three sides of the building. The fire door was not a security feature and the doors and glazing were protected only by a metal grille which was inadequate. A previous break in and written warnings should have alerted Sony to the risks arising from inadequate security at that location.

61. Sony's case is that reasonable security measures were put in place to protect the warehouse from criminal attack. These included a remotely monitored intruder alarm, perimeter fencing, gravel laid externally, metal grilles on the fire doors and glazed panels, a CCTV system, external lighting, an internal access control system, a strict sign-in system for all staff, contractors and visitors, a contracted security presence, and security procedures that were regularly reviewed and updated. The attack on the warehouse was unprecedented and could not have been avoided by reasonable and proportionate precautions.

Security of the warehouse

62. The building was located on a site between Solar Way and Mollison Avenue, forming part of the Innova Park industrial estate in Enfield.

63. The eastern side and part of the southern side of the building were surrounded by perimeter fencing, which was about 8-10 feet high and comprised galvanised steel with barbed wire overhangs. There was no perimeter fence on the western side of the warehouse.

64. Access to the loading bays on the east of the building was through the main gatehouse. The gatehouse was controlled by security guards and a barrier. Drivers were required to produce security passes or provide advance notice of details for permitted entry. At night access through the gatehouse was prevented by two large gates which were locked, unless a night delivery had been arranged.

65. At the south-west corner of the building was a fire exit door and glass panelling. The door and glass panelling were fitted with wire mesh. All fire exit doors to the building were locked and bolted on the inside and could be opened only by breaking the emergency exit glass bolt on the inside.

66. The entire perimeter of the site was monitored by a CCTV system, as were the fire exits, warehouse building and main gatehouse.

67. The warehouse was fitted with an intruder and fire alarm, monitored by a third party security company, Abel Alarms. The fire alarm system panel was located in the main reception of the office block to the north of the building.

68. At the time of the incident, security guards were engaged through Profile Security Services Limited ("Profile"). Generally, six to eight guards provided cover on a shift basis between 7am and 11pm. At 11pm each night, the guards would check that each door was locked and set the intruder alarm, which would be monitored throughout the night by Abel Alarms. Security guards would unlock the doors at 7am the following morning.

69. When a delivery was due after 11pm, or during exceptionally busy periods, security guards would provide full 24-hour cover and additional picking crew members of staff might work through the night inside the warehouse. During such nights one of the guards would make four patrols of the site, following a set route and using an electronic tag to record the location and times of the checks. A second guard would remain in the security reception office.

70. Sony took over the warehouse from Deluxe in 2006. On 1 June 2006 Sony issued a security standard document, setting out security requirements to be observed by Sony:

> "Sony … must establish security perimeters at business premises under its control for physical protection, including information handling facilities and equipment. The security perimeters may consist of (1) Physical barriers such as fences, gates, exterior walls and doors; (2) Human security such as standing guard, sitting guard, moving guard and patrolling guard; and (3) Mechanical security such as entry and exit control, intruder monitoring and detection.
>
> Each security perimeter (alert line) is one of the following three:
>
> (1) First alert line: premise perimeter
>
> (2) Second alert line: building periphery
>
> (3) third alert line: room perimeter…
>
> Each security perimeter (alert line) is classified into the following three alertness levels …
>
> (1) N: Normal
>
> (2) S: Severe
>
> (3) SS: Special-Severe
>
> The alertness levels of the above security perimeters (alert lines) can be changed by the site manager's judgment, based on a documented risk/vulnerability assessment of the premise's business operation type, regional characteristics and social conditions."

71. Each year, the Federation Against Copyright Theft ("FACT") carried out a security survey at the warehouse. FACT is an organisation whose purpose is to protect the intellectual property of its members. It publishes standards which businesses must meet to demonstrate they have sufficiently high levels of security to protect the intellectual property rights of FACT members. Each year the warehouse was certified as FACT compliant.

Security breaches prior to the fire

72. During the night of 8/9 July 2007, a window was smashed at the fire exit at the south-west corner of the building during an attempted break-in. Although the incident was minor because little damage occurred and no goods were stolen, it served to highlight a vulnerable area of security at that part of the building.

73. In response to that incident, on 8 October 2007 Colin Crump, the engineering and facilities manager, produced a CAPEX report for additional security works, including an upgrade of the CCTV system and wire mesh grilles for the glazed areas on the west side of the building:

> "Since the installation of the Sony sign the site has become more likely to be broken into, simply because of the type of product that Sony manufactures and distributes. There has been at least one break in attempt, that we know of, since the sign was installed. This break in attempt was not recorded on CCTV due to a blind spot in the system and even if this had ... been caught on CCTV, the likelihood that the image would have been of any use is doubtful. This is due to the fact that the system is old, has no intelligence and images are stored on time lapse VHS cassette, which is known to be of poor quality. The proposed solution is to replace the entire CCTV system with intelligent cameras of fixed and PTZ (Pan tilt zoom) types. Perimeter lines can be set up on the fixed cameras which, when crossed, will trigger the PTZ to focus in on the object which has breached the perimeter. All images will be stored digitally on a server with built in redundancy. Steel grills will be fitted to all glazed areas on the west side of the building, which is widely considered to be the weak spot in the security of the building. The access control system will also be replaced as there will be an interface between the two systems…"

74. On 1 November 2007 burglars gained access to the service yard of the warehouse from Mollison Avenue, crossing the small River Lea by walking over plastic pallets and digging under the boundary fence. They broke the viewing panels on a loading bay and cut through part of the shutter that separates the viewing panels. They stole a flat screen TV but they were arrested during an attempted burglary elsewhere and the property was recovered.

75. By the beginning of December 2007, funding for the additional CCTV works recommended in Mr Crump's report was approved and security mesh was fitted to the glazed panels in January 2008.

76. In June 2008 Sony discovered that an employee had been diverting parcels to the employee's home address, prompting a review of security measures in place. On 26 June 2008 Mr Houghton circulated an internal email, stating:

> "As a result of the recent security breach in Enfield the following actions have been identified.
>
> 1. External Security Audit – Freight Watch Group. Colin has been in touch with them to organise an audit ASAP – once completed we will pull together an action plan based on their recommendations. It may be worthwhile to set up an annual audit going forward.
>
> 2. The manual dispatch process which was being abused by the sacked employee (process required as routes need to be changed manually due to client/customer requests) will be replaced with DHL's Intraship system …
>
> 3. A random search generator to be installed to trigger a more thorough search …
>
> 4. Our new digital security system is due to be completed in two weeks – this will ensure 100% camera coverage on the outside of the building with motion detectors
>
> 5. Site briefs have been held advising all staff of how serious the issue is …
>
> 6. 2e and DBD clients have been briefed …
>
> We are going to start testing our security measures on a regular basis by attempting to send out boxes and try to get discs out via security to ensure our new processes are robust enough. Tonight I am going to attempt to take a disc out in my laptop bag …"

77. In July 2008 FreightWatch Group Ltd, a logistics security consultancy, carried out the audit identified as one of the action items. On 12 August 2008 a bullet point summary was sent to Sony, stating that perimeter and building security were generally good but that security of bay doors could be improved, screens or grilles could be fitted to windows and motion sensors could be installed.

78. FreightWatch produced a formal report, which contained the following material findings:

> "The Sony DADC facility has a house keeping manual, which provides a brief on security, plus there are documented assignment instructions for the on-site security guards. These assignment instructions, which are site specific, were created in line with Sony DADC's requirements. However, there is no Sony DADC security policy document, which encompasses all of Sony DADC's security policies and requirements.

Documented internal security reviews/checks are not conducted at this site. However, regular checks are carried out and if something is not functioning correctly arrangements are made to have it repaired or replaced, but a check list is not used and results are not documented …

The Sony DADC site is located on the left side of the road near the top of a cul-de-sac in Innova Park…

The front of the Sony DADC site fronts onto a side road just off the main cul-de-sac road… Pedestrian access onto the Sony DADC site is possible from the side road/cul-de-sac road. It is possible to walk past two security barriers, which restrict vehicle access into the employee car park, and up to the building perimeter (*front of building and right side of building only*) plus up to a perimeter fence, which separates the car parking area from the truck yard and the left side of building/warehouse…

The metal perimeter fence, which separates the car park area from the truck yard and spans from the left side of the building to the perimeter fence along the left side of the site, is approx 2 mtrs tall and constructed from an anti-climb wire mesh fencing attached to metal columns ... There are two gates in this section of perimeter fence … although these gates are of sturdy construction, it was noted by the auditor that a simple method to breach the double gates would be to cut each of the two hinges holding up the gates. Due to the gap between the gate and the frame, access to the hinges with appropriate cutting equipment would be deemed possible…

The left side of the site perimeter is protected by a 6ft chain link fence, which is attached to metal supports. The left side of the Sony DADC side fronts onto a green area, which is covered in moderately dense undergrowth …perhaps weekly checks of the perimeter fence could be implemented …

The rear of the Sony DADC site fronts onto a neighbouring site, a Premier hotel, and is separated by a metal perimeter fence …

Although the rear perimeter fence spans from the left rear corner of the site to the right rear corner of the site (*where the Sony DADC site joins with the public footpath/road*), there is a truck entrance/exit set back from the public road at the right rear corner. This allows pedestrian/vehicle access between a section of the rear perimeter fence and the rear wall of the warehouse building. However, access from this area into the truck yard is restricted. A section of perimeter fence, two security barriers, two perimeter gates plus a security gatehouse protects the area from the side of the rear warehouse all to the rear perimeter fence blocking unrestricted access in to the truck yard …

A section of the rear warehouse wall, near the set back truck entrance/exit, is outside the perimeter fence/gate, so this section of wall becomes the perimeter. Unrestricted pedestrian/vehicle access is possible to this section of the rear warehouse wall … There are three ground level emergency/fire doors in the rear warehouse wall, one on the inside of the perimeter fence and two on the outside. Unrestricted pedestrian access up to these two emergency doors is possible. Although these emergency/fire doors are closed and secured from the inside and are fitted with alarm contacts, which are connected to the alarm system, the doors are hinged/pinned externally. It is worth reviewing, whether a break-in would be possible if the external hinge/pin was cut-off/removed or if the doors are fitted with internal security pins which secure the door to the door frame. It is recognised that once opened an alarm contact on the fire door would activate the alarm system, but at that point the criminals would be inside the warehouse and everything is hinging on an appropriate response, which may or may not occur.

The right side of the Sony DADC building/warehouse sits back approx. 50ft from the public path/road (cul-de-sac), which runs parallel to the right side of the building. There is no perimeter fence separating the site perimeter from the public path/road. Access to the building perimeter from the public path is restricted in parts by dense undergrowth/trees, a trench, a section of grass plus a section of anti-drive pebbles/stones. The pebbles/stones span out approx. 10 feet from the building wall and all along the side of the building /warehouse. However, there are a couple of sections where it is possible to easily walk from the public path /road up to the building wall and thereby along the entire building wall.

There are a number of glass panels along the right building wall, some of which are at ground level. Two of the glass panels are 3 window panes wide by 12 window panes high and do not have any doors three of the glass panels are also fitted with a ground floor emergency exit … one of the window panels, which has an emergency door … the window pane on the bottom left was used by criminals to break into the building. This window/door is located at the bottom end of the right side building wall, where it joins with the rear building wall in the area where the truck entrance is set back from the road and it is possible to approach the building perimeter. Since this break-in, wire mesh metal grills have been fitted on the inside of all ground level window panes and emergency doors. The green window film has not been replaced on the bottom left window pane and permit a view into the warehouse, but was left clear so potential criminals would see the metal grill and be discouraged from attempting to break-in. Although there is some merit in this, it is the auditor's opinion

> that it would be best to cover this window and restrict views through the window…
>
> It should be noted that during the security inspection, it was identified that 4 or 5 of the self tapping screws used to fix the metal grill to the emergency door had either been removed or loosened … regular documented checks by the security guards of all metal grills and security fittings would be recommended…"

79. The recommendations included:

> "Security Management Recommendations:
>
> - … FreightWatch recommend the creating of a site-specific security policy document, which encompasses all of Sony DADC's security policies and requirements.
>
> …
>
> Perimeter Recommendations:
>
> - … a review of the hinges on the double gates located along the perimeter fence…
> - …weekly checks of the perimeter fence …
> - …a review of the emergency/fire doors that are fitted with external hinges/pins to determine if they present a security weakness if the hinges/pins were cut-off/removed …
> - …the green film or a similar window screen be placed on the window pane used during a previous break-in to block views into the warehouse…
> - …regular documented checks of all security grills and security fittings be implemented."

80. Surprisingly, FreightWatch failed to send the report to Mr Crump at Sony until 23 December 2008. Even more surprisingly, Mr Crump did not send it on to Mr Houghton until 21 July 2009, almost one year after the audit. There is no evidence of any formal consideration of the report. There is no evidence that any new security measures were implemented as a result of the report, save that Sony introduced the recommended weekly patrols of the perimeter fence.

81. On 5 April 2010 a burglary was carried out at the warehouse, during which 1,715 Blu-ray discs of the film "Avatar" were stolen from a truck. As a result of that incident, an internal audit report was prepared by Sony. The audit identified that increased night patrols were required for trailers parked at the site overnight, CCTV needed to be upgraded and the alarm system was inadequate to provide timely alerts of an intrusion into the loading bay.

82. Further, in response to the burglary, FreightWatch were instructed to carry out a security audit. On 19 May 2010 FreightWatch produced its report, making further recommendations for improving the security for the truck yard. Those recommendations included measures to strengthen the security at gates and perimeter fencing, a review of external lighting levels and increased CCTV coverage. Corrective action was taken in line with those recommendations, included the trimming or removing of undergrowth near the boundary fence.

83. On 21 July 2010 Profile carried out a site risk assessment and survey. The report noted that intruders gained access to the facility previously: (i) at the south-west corner of the building by breaking the window and climbing into the store area; and (ii) in the loading bay area by breaking the viewing panels and climbing into the building. Vulnerable points of entry identified included the ground floor windows and fire doors on the west of the building.

84. On 26 October 2010 Profile was engaged by Sony to provide security for the warehouse, which was in place at the date of the incident on 8 August 2011.

85. Mr Rapley, the security manager of the warehouse, prepared a number of security procedure documents, which he reviewed and updated on a regular basis. However, they were focused on procedural operations at the warehouse. Although they referred to some of the security features at the site, they did not address the policy for, or adequacy of, physical security at the site.

86. The fire exits and fire doors for the warehouse were checked regularly and any faults reported. Those checks were recorded by Mr Rapley in "Health and Safety Management" documents. In the report for July 2011, he recorded that the fire doors were in good order and the fire exits were clear.

87. Insurers for 2E and for Sony visited the warehouse and carried out inspections, without raising any concerns.

Events on night of 8 August 2011

88. Mr Rapley was the security manager of the warehouse at the time of the fire. At about 5pm on the evening of 8 August 2011, Mr Crump telephoned Mr Rapley to express concern at the social unrest that had occurred during the previous few days and requested additional security cover for that night. Mr Rapley contacted Profile and arranged for one additional security guard to attend site and complete lock down, monitor the alarms and patrol the site throughout the night.

89. Edward Mireku was the Profile security guard on duty during the night of 8 August 2011. He started his shift at 5pm and intended to work until 5am the next morning. At approximately 11.20pm, when the last delivery vehicle left the service yard, Mr Mireku locked the gatehouse and went to the search area at the staff entrance to the warehouse. At 11.30pm the main doors of the warehouse were locked and the other security officers left the premises. Mr Mireku commenced a patrol of the property, following a designated route and twenty-three checkpoints. He passed the fire door at the south west corner of the warehouse between checkpoints 6 and 7, noting that it was secured.

90. Shortly after he had left that area and arrived at the next checkpoint, he heard very loud impact noises emanating from the south west corner and the intruder alarm was activated inside the building. Mr Mireku left the building using another fire escape door. Having seen a group of five or six people running away from the building, he hid in bushes along the perimeter of the yard whilst he alerted the police (at 11.44pm) and Profile (at 11.45pm) by telephone. He opened the main gates and alerted drivers sleeping in the cabins of their tractor units. They could see that the warehouse was on fire. Mr Mireku rang the emergency services and asked for police and fire fighters at 11.50pm.

91. The attack on the building was captured on CCTV. It shows a large group of fifteen to twenty young men, who approached the south west corner of the building without any attempt at stealth and broke in at the location of the fire door and glazed panels. The attack was started at 23:37:36 by one boy jumping into the air and kicking at the door. Another boy used a garden hoe to hit the façade of the warehouse in the area surrounding the door. He was joined by another boy using a stick. Others threw stones at the building. At 23:38:29 they formed an opening in the façade by force and entered the warehouse. They gained entry within one minute.

British Standard BS 8220

92. Mr Kidd and Mr O'Neill, the security expert witnesses, agreed in their joint statement that there are no rules or regulations regarding the storage of goods. However, they agreed that British Standard BS 8220-3:2004 provides guidance on the security of warehouse buildings.

93. BS 8220, "Guide for security of buildings against a crime," includes at Part 3 guidance in respect of storage, industrial and distribution premises. The following provisions are material:

> "Introduction …
>
> > Most property related crimes are committed because offenders have been given easy opportunities. Easy access to an industrial park or to a single storage premises, concealed areas, no demarcation between public and private space, and poor lighting or landscaping are all features of design which assist the criminal. Careful planning and design can remove these easy opportunities.
>
> …
>
> 4.1. Where a building does not have continuous occupancy, guardianship or natural surveillance, it should be designed to withstand attempts at illegal entry.
>
> …
>
> 5.1 Any crime prevention strategy is essentially one of risk management. Consequently, before an effective

strategy can be developed, the risk factors involved should be identified and understood. Distribution centres and storage facilities are affected by a variety of crimes. Although burglary is the most common crime, arson, criminal damage and internal theft are also prevalent.

5.2.1 To formulate a security plan, it is first necessary to complete an in-depth risk assessment to identify the vulnerability of the premises and its contents.

5.2.2 When carrying out a risk assessment the following factors should be considered:

(a) type of business;

(b) attractiveness to the criminal in terms of goods, cash and possible confidential information and data;

(c) degree of inherent security of the premises in relation to its construction;

(d) surveillance provided either by normal public activity or security patrols of the premises or its surroundings;

(e) ease of access from streets …

(f) potential escape routes and egress for the removal of stolen goods;

(g) vulnerability relative to local trends in crime …

(i) risk of arson to the premises and contents, and goods and vehicles stored in the surrounding areas;

(j) requirements of the local authority, fire authority and insurance companies…

5.2.3 The security plan should be the responsibility of a senior member of staff at the site, whose duties include an annual review of the plan … When drawing up a security plan it is important that various layers of protection are considered and that no one type of protection is relied upon to the exclusion of all others. When deciding upon types of protection to be used it is usual practice to work inwards from the perimeter of the site, considering firstly the fencing and restriction of access, then protections to the buildings and finally inner secure areas and items such as safes.

…

5.5.2 The overall strategy for preventing burglary and theft in storage, industrial and distribution premises should encompass situations when the premises are open for business and when they are closed. Measures to be taken against crime should be analysed with a view to:

a) dissuading a person from attempting to attack the building;

b) denying access should an attempt to enter the building be made;

c) slowing down or delaying the offender carrying out an attack;

d) in the event of a successful attack, increasing the chances of detection by providing appropriate signalling devices to alert law enforcement agencies.

5.5.3 All storage, industrial and distribution premises are potentially at risk from arson… The principal aim of the crime prevention strategy should be to prevent the arsonist from gaining access to the site perimeter and, if this fails, to deny access to the building or to the flammable materials. Fire-resistant materials should be considered as should fire compartmentalization in order to restrict the spread of fire. Fire alarms and extinguishing systems should also be utilized to minimize loss and damage… Automatic fire detection and extinguishing systems, e.g. sprinklers, with an automatic alarm transmission facility, conforming to relevant British Standards, should be installed to provide early warning of fire.

…

7.2 Perimeter fencing should be installed, where appropriate, to provide enhanced protection of the peripheral space around the site or building …

…

7.6 While physical protection of a building is important, unless there is a prospect of human intervention, such as that provided by security patrols, criminals can use noisy cutting equipment and drills to try to gain access to a site. The use of external and internal patrolling security staff should be considered for high-risk sites.

…

8.1 Lighting can be a deterrent to intruders and a positive aid for patrolling security staff …

9.1 Where applicable, external doors to storage, industrial or distribution premises should, as a minimum requirement, conform to the enhanced security performance standard for doors to dwellings, PAS 24-1. The number of external doors to the building should be kept to a minimum. Wherever possible, glazing should be avoided in external doors…

…

11.3 Potential intruders evaluate the possibility of gaining entry to buildings by breaking glazed panels in external windows, with the aim of gaining access to locks or other security hardware. Consequently, the less glazing in the building, the lower the risk of forced entry.

11.4.2 Security grilles and bars should preferably be fitted internally…

Internally fitted security grilles or bars should be set back not less than 50 mm from the internal surface of the wall and, if possible, grouted into the masonry at both ends, to a minimum depth of 75 mm. Bars longer than 600 mm should either be provided with cross-ties, welded at the intersections or otherwise made immovable or fitted separately into the masonry to a depth of at least 75 mm at each end and welded at intersections.

…

Retrofitting of security grilles/bars can be achieved by sinking one set of ends of a grille or bar into a cill or wall and securing the other three sides by means of welded cleats secured to the building by substantial bolted anchors, the heads or nuts of which can be welded to the metalwork of the grille.

…

14.1 CCTV can be used to aid security of a site or building and can also act as a deterrent to criminal activity…

15.1 Physical security measures can be complemented by the installation of an electronic intruder alarm system, designed to detect entry through doors, windows, and

> the shell of the building and/or movement of intruders within a building …"

Security Expert Evidence

94. Stewart Kidd was 2E's security expert. His opinion was that the speed and ease with which the intruders gained access to the interior of the building were due to the poor provision of physical security measures; principally, the lack of a continuous perimeter barrier, and weakness of the building envelope in the form of inadequate fire exit doors and low-level glazed areas.

95. He was critical of Sony's failure to employ someone with appropriate qualifications and experience to assess and advise on the necessary security provisions to be put in place. He considered that the security measures Sony had in place at the warehouse were sensible precautions but the focus was almost exclusively on the internal threat of theft of stock by staff rather than external threats. A proper risk assessment would have considered the risks of unauthorised access, burglary and arson. Mr Kidd's view was that FACT audits were carried out annually but they were primarily concerned with the protection of intellectual property rights in recorded media rather than physical intrusions into the warehouse. He considered that the FreightWatch surveys were retrospective following security breaches, rather than full security surveys, and were inadequate in that they failed to recommend extending the perimeter fencing to encompass the whole site, failed to identify the need for the replacement of the glazed fire exit doors, failed to recommend the removal of the glazing panels on the ground floor or strengthen their resistance to attack, and failed to consider the risks of and from arson.

96. In cross-examination, Mr Kidd agreed that property surveys were carried out at the warehouse by insurance companies but did not consider that those amounted to security surveys. He accepted that there were metal grilles on the fire doors and glazed panels to the south west façade but considered that the use of self-tapping screws into the aluminium frame did not provide reliable fixings.

97. Mr Kidd agreed that there were sensible security procedures in place but stated that they were focused on internal threats of theft of stock, rather than external threats of unauthorised entry to the warehouse:

> "…the strong impression I formed is that the majority of the security precautions are targeted at internal threat and not external threat."

98. Mr Kidd's opinion was that continuous perimeter fencing should have been installed. The fire exits should have been upgraded or replaced by security rated units with multi-locking points, steel facings and upgraded frames and hinges. The existing fire exit doors should have been replaced with doors certified to a minimum of LPS 1175 security rating 3 (resistance to deliberate forced entry of protected premises using bodily force and tools plus short axe, chisels, crowbar, gas torch, etc. for a duration of 20 minutes). The glazed sections should have been replaced with solid building materials at ground level or fitted with security bars or a security grille certified to a minimum of LPS 1175 security rating 3. Such measures would have acted as a severe

deterrent to the youths on 8 August 2011 as it would have made it significantly more difficult for them to enter and exit the warehouse:

> "If the site had been fully fenced and fitted with cat 3 doors, and the grilles had been of substantial construction, few of them would have got into the building, the site to begin with, some might have been deterred, and they might have given up knowing that the police were on the way after the first thump on the door."

99. In cross-examination Mr Kidd accepted that his knowledge of the construction of the fire door and grilles was limited to what could be seen in the photographs:

> "Q. But that does not help you on working out the rating?
>
> A. No…
>
> Q. You say: 'The door structure does not appear to even meet the lowest category of resistance of the Loss Prevention Standard 1175 as the door was breached in less than a minute with nothing but bodily force and improvised force.' In the absence of knowing anything about the door in particular, that is the foundation upon [which] your conclusion that the door was inadequate?
>
> A. Yes."

100. Mike O'Neill was Sony's security expert. Mr O'Neill's opinion was that the security measures taken by Sony were reasonable and proportionate. At the time of the attack the security provision at the warehouse included CCTV, external lighting, intruder alarm system, security grilles fitted behind the glazed fire doors and panels, controlled access to the building, perimeter fencing around the loading by and lorry park area and security guards. The warehouse was certified annually by FACT as having acceptable security for storing its goods. Sony reacted appropriately to the security breaches that occurred in 2007, 2008 and 2010 by carrying out internal audits or commissioning external reports.

101. Mr O'Neill's view was that the events that occurred across London in August 2011, included rioting in town centres and attacks on retail premises, were exceptional. The group of rioters who attacked the warehouse came equipped with a variety of implements and petrol bombs. They conducted their attack on the building aggressively and with no apparent stealth. He considered that all security measures must be proportionate taking into account the threat against the assets, the vulnerability of the assets, the likelihood of that threat occurring and the impact if it did occur, against the cost of the mitigation measures.

102. Mr O'Neill accepted that BS 8220 - 3:2004 is the British Standard containing appropriate guidance for the security of buildings against crime for storage, industrial and distribution premises but his view was that this is particularly useful during the design and construction or upgrading of buildings. It is not a widely known standard and he would not expect all warehouse operators to be aware of it. He did not consider that the risk of arson should be assessed by security experts; his view was that it was

properly considered as part of Sony's fire risk assessment and found to be suitable and sufficient.

103. Mr O'Neill agreed in cross-examination that a security plan was necessary but there was no evidence that Sony had such a plan:

> "Q. So, what Sony should have done is to go through an assessment process and come up with a security plan; is that right?
>
> A. Yes, I accept that …
>
> Q. Once you have a security plan, it would be good practice for it to be retained and updated from time to time, wouldn't it?
>
> A. I would accept that would be good practice, yes…
>
> Q. I think you accept that in this case Sony didn't actually have a security plan, as you described it, have they?
>
> A. I haven't seen any evidence of it. I don't know if they had one or not.
>
> Q. You have seen no evidence … of any assessments being carried out which could result in a security plan?
>
> A. No, that's correct. I haven't seen any evidence.
>
> …
>
> Q. Have you identified a risk assessment and a security plan in this case?
>
> A. No, I haven't seen any evidence of that.
>
> …
>
> Q. A security review would identify the risks and vulnerabilities n the building, wouldn't it?
>
> A. Yes, you would hope so.
>
> Q. Right. A security review would identify that the building was at risk of theft and was at risk of arson.
>
> A. Among other threats, yes.
>
> Q. Yes. And a security review carried out competently would have identified the vulnerability at the south-west corner, wouldn't it?
>
> A. Yes.

…

Q. If there was no security policy, that would be a serious failing, wouldn't it?

A. Yes, I would accept that."

104. Mr O'Neill did not consider that continuous perimeter fencing, which would have been expensive to retrofit, would have denied access to the youths; at best it would have been a deterrent and delay mechanism.

Discussion and findings on security

105. It is not in dispute that the riot gave rise to an unprecedented attack on the warehouse. However, criminal attacks on the warehouse and unauthorised entry to the building had occurred before, including a break-in at the south west corner, the point of entry on the night of the fire. The FreightWatch report identified that the south west corner of the building was particularly vulnerable to a break-in because there was public access right up to the wall of the building at that point. The glazed fire door and panels were identified as weak points in security. These matters were sufficient to put Sony on notice that a security review should be carried out, the risks should be assessed, and additional security measures introduced.

106. Although Mr Houghton stated in cross-examination that he was pretty sure that the FreightWatch report would have been discussed at the Sony UK board level and that an action plan was put in place based on the report's recommendations, there is no documentary evidence supporting his assertion. Contrary to the recommendation by FreightWatch, Sony did not create a site-specific security policy document. Although identified as a vulnerability, the perimeter fencing was not extended to provide a continuous barrier around the warehouse. There was evidence that weekly health and safety checks of the building were carried out, including checks on fire exit doors (to ensure a safe means of escape), but there is no evidence that Sony instigated regular and documented security checks on the doors (to ensure no unauthorised entry).

107. The security experts agreed that the perimeter fence was incomplete in that the perimeter fencing was not continuous around the whole site and the west side of the building was open to a public road. This was a failure on the part of Sony to comply with its global security plan and a failure to follow the guidance in BS 8220 (paragraphs 5.5.2 and 7.2).

108. The glazed fire door and panelling at the south west corner of the building was an obvious weak point, as identified by FreightWatch, Mr Crump and Profile. The fire exit door should have been a more robust door, with multi-locking points offering a higher resistance to forcible access; the glazed panels should have been fitted with security bars or grilles with a higher security rating (paragraphs 9.1, 11.3 and 11.4.2 of Part 3 of BS 8220). On the night of the attack, the fire exit door and security grilles offered almost no resistance to the short attack by youths armed with no more than a few garden implements.

109. Mr O'Neill considered that the boys obtained access to the warehouse through the glazed panels, rather than the fire exit door. That is not borne out by examination of the

CCTV footage, which shows them attacking both the glazed panels and the door, forming an opening in the façade and rushing into the building. Photographs taken after the fire show the door lying intact on the ground but with the top left-hand corner pushed in. Photographs also show the grilles detached from the door and its frame and the absence of screws but it does not indicate that the screws for the grilles must have been missing at the time of the incident. However, regardless whether the grilles were screwed in place, they were pulled away with relative ease and speed.

110. Reasonable measures that could and should have been introduced include fencing around the perimeter of the whole building, a security door at the south west corner and regular, bars and grilles on the glazed panels, if retained, and documented checks of the metal grilles to the glazed fire exit doors.

111. It is no defence for Sony to suggest that it was unaware of BS 8220. That British Standard represented the acceptable standards and practice for the security of storage, industrial and distribution premises. It was incumbent on Sony, as the provider of logistics services and operator of a distribution facility, to ensure that it was cognisant of the appropriate guidelines.

112. In my judgment, Sony failed to take reasonable measures to secure the warehouse and its contents for the following reasons.

113. Firstly, there is no evidence that Sony carried out a security risk assessment or had a site-specific security plan. Other than superficial references in the health and safety risk assessments, there was no substantive risk assessment for arson. It was not sufficient for Sony to rely on the high-level property checks carried out by insurers which were used for the purpose of renewing cover.

114. Secondly, the earlier security breaches put Sony on notice that there were vulnerabilities in its security measures, including a specific weak spot at the south west corner.

115. Thirdly, the reports prepared by FreightWatch highlighted the security weaknesses at the south west corner. Regardless of any inadequacies in recommendations by FreightWatch, Sony failed to consider the report or draw up an action plan to address the security deficiencies identified.

116. Fourthly, it would have been relatively straightforward and inexpensive for Sony to have strengthened security for the warehouse by extending the perimeter fencing to provide a continuous barrier surrounding the whole of the site, increasing the security rating of the fire exit door and installing more robust steel bars or security grilles.

117. Fifthly, unauthorised access to the warehouse was gained by a group of youths with few garden implements in less than one minute.

118. If the above security measures had been taken by Sony, it is likely that the youths would have been deterred or delayed in breaking into the warehouse on 8 August 2011. They were not organised or equipped to scale a fence, cut through bolts and bars and overcome the resistance of a security rated door. This was an opportunistic attack on an unoccupied building that was accessible from a public path. In those circumstances, any deterrence and/or delay is likely to have prevented them from continuing the attack and gaining access to the warehouse.

Issue (ii) Fire measures

119. 2E's case is that Sony failed to take reasonable fire precautions at the warehouse. There was no assessment of a fire risk or the risk of arson specifically in the context of the property risk. There was no compartmentation of the warehouse building and no sprinkler system in the racking.

120. Sony's case is that there was an adequate fire risk assessment of the warehouse and reasonable fire protection measures were put in place. The Fire Authority certified the building as complying with the Fire Safety (Regulatory Reform) Order 2005. Internal changes made to the building received Building Regulations approval and did not require the installation of sprinklers or compartmentation.

Warehouse construction and fire precautions in place

121. As originally constructed, the warehouse was a large rectangular shed with pitched roofs and an internal floor area of 15,853m^2. The building was a steel structure with steel columns inset into piers in the perimeter walls and the central valley supported by a row of columns through the centre line of the warehouse. The steel frame was fire protected by insulation inside metal cladding and at lower levels by blockwork encasement. The height to the eaves was approximately 12 metres and the height to the apex was 14.5 metres. The roof was formed from Kingspan KS1000RW steel sandwich panels containing rigid "LPC approved PIR" foam insulation. The external wall panels were 60mm thick Plastisol coated Kingspan profile composite cladding panels, with rockwool insulation and cavity barriers. The internal face of the warehouse walls was fair faced blockwork. A two-hour fire rated compartment firewall separated the warehouse space from the office.

122. Following a visit to the warehouse on 16 October 2003, then occupied by Deluxe Media Services Limited, FM Global produced a risk report:

> "At an unsprinklered distribution centre such as this one, major losses are principally going to arise out of situations involving poor emergency response procedures, inadequate ignition source control or a natural hazard.
>
> Although automatic sprinkler protection remains the best form of defence against any fire starting in a high bay warehouse such as this one, there is no doubting the fact that prevention of fires and prompt action when they do occur, can help minimise losses …"
>
> Key exposures were identified:
>
> "Automatic sprinkler protection, supplied from an adequate and reliable water supply should be installed throughout the site to current FM Global Standards.
>
> This protection system should include ceiling sprinklers for the entire site (and beneath the mezzanines) and in-rack sprinklers within the 14m high bay racking.

> Fire testing and loss experience has demonstrated that the best means of preventing a serious fire is to install automatic sprinkler protection.
>
> Sprinklers would control a fire in its early stages and would help prevent it spreading to nearby storage and exposing the building structure to intense heat and eventual collapse."

This document was produced before Sony took over the building and was not sent to Sony.

123. The internal works to the warehouse in 2002 and 2009 were carried out by Acorn Warehouse Solutions Limited. Mr Fouhy, the managing director of Acorn, explained that Acorn was a specialist in mezzanines, racking and shelving but did not hold itself out as having any specific expertise in fire precautions or fire engineering.

124. In 2009, Salus Building Control and Fire Safety Consultants Limited ("Salus") acted as the approved inspectors for the purpose of complying with the Building Regulations. For that purpose, Salus were the intermediary between Acorn and Enfield Building Control. As part of this process, a meeting took place between Messrs Crump and Skerman of Sony, Mr Turner of Acorn, Salus, Enfield Building Control and the fire officers. No notes of the meeting were produced but, as a result of the meeting, the plans for the works were revised.

125. Mr Houghton, the general manager of the warehouse at the time of the fire, stated in evidence that Sony were told by Salus that the installation of sprinklers was not legally required by the Building Regulations and that, based on the size and height of the warehouse, they didn't believe sprinklers would be effective:

> "Q. You say that the conclusions that were reached were, first of all, sprinklers would be ineffective as to the height of the warehouse because they couldn't work a low level, and, secondly, because, if there was a small fire, they might potentially cause more damage, and that's what you say were the conclusions that were reached in relation to sprinklers; is that right?
>
> A. I recall that conversation taking place, yes.
>
> Q. Did you look at whether you could have sprinklers inside the racks?
>
> A. We didn't, because we were reliant on the advice from the experts to tell us what we needed.
>
> Q. So … one thing that was simply not considered, then, is whether you could have sprinklers inside the racks; is that right?
>
> A. Yes."

126. On 21 July 2009 Salus issued a final certificate in respect of the works for the purpose of section 51 of the Building Act 1984. In its covering letter, Salus stated:

> "Now that the Final Certificate has been issued, it is a requirement of the Regulatory Reform (Fire Safety) Order 2005 to carry out a fire risk assessment. This deals with the ongoing fire safety matters within occupied premises.
>
> As part of the Building Regulation process you should have ensured that the relevant fire safety information is passed onto the end user of the building so that they are fully aware of the fire strategy adopted for the building. This will aid them in the fire risk assessment process.
>
> Should you require a detailed fire risk assessment to satisfy this legislation please contract me and I will be pleased to provide a quotation for this detailed service."

127. It is common ground that fire risk assessments were carried out by Mr Crump. The fire engineering experts agreed in their joint statement that such assessments were suitable and sufficient. The assessments included a tick against the questions:

> "Basic security against arson by outsiders appears reasonable?"

and

> "Is it considered that the premises are provided with reasonable means of escape in case of fire?"

128. Inspections were carried out by London Fire and Emergency Planning Authority ("LFEPA") in 2006 to 2008. A recurring suggestion was that the fire risk assessment should be updated but it was confirmed that the warehouse was deemed to comply with the Regulatory Reform (Fire Safety) Order 2005.

129. John Rapley, Sony's security manager, ensured that there was adequate training for staff and appropriate fire safety protocols in place.

130. At the time of the fire, there was a two storey open sided mezzanine in the south east corner of the warehouse, a single storey mezzanine in the northern part, and abutting that mezzanine, two tier shelving comprising a series of shelving racks approximately six to seven metres tall with raised access aisles/walkways at mid height. The remainder of the warehouse area on the west side was high bay racking up to eaves level accessed by guided mobile access equipment. The warehouse floor on the east side was used for ground level storage and contained the distribution conveyor equipment.

131. The single and double-tier mezzanines had the following fire protection measures. The vertical columns had one-hour fire protection provided by "Promacase" galvanised finish column casings. The underside of the chipboard mezzanine floors and the two-tier shelving were coated with a fire-retardant silver foil to provide one-hour fire protection. Smoke detectors were installed that were linked to the fire alarm system.

132. There was no compartmentation of the main warehouse.

133. The site layout plan drawing for the original construction of the building showed a possible sprinkler tank and pump room location but no sprinkler system was installed.

Expert architects' evidence

134. The key issue considered by the architectural experts was whether the warehouse complied with good practice and/or the Building Regulations and Approved Document B, in respect of protection against the risk of fire spread; in particular, whether the warehouse required compartmentation and/or should have had an automatic fire suppression system, including automatic sprinklers.

135. Chris Miers, the claimants' architect expert, and Roger Jowett, the defendant's architectural expert, agreed that the Building Regulations 2000 and Approved Document B 2006 Volume 2: Buildings other than Dwelling Houses, as amended 2007 ("the ADB") applied to the internal works carried out to the warehouse in 2009.

136. In their joint statement, the architectural experts agreed the following figures, as summarised in Tables A and B:

    i) The gross internal floor area ("GIFA") of the warehouse as originally constructed was 15,853m^2.

    ii) The total area of the warehouse at the time of the fire, including the raised mezzanines and two-tier shelving ("the galleries"), was 24,011m^2 (Mr Miers) or 23,974.67m^2 (Mr Jowett); in each case over 20,000m^2.

    iii) The total area of the galleries added was 8,158m^2 (Mr Miers) or 8,121.67m^2 (Mr Jowett); in each case more than 51% of the GIFA.

    iv) The total area of the warehouse at the time of the fire, including the mezzanines and walkways but excluding the area of the shelving, was 23,687m^2 (Mr Miers) or 23,643.39m^2 (Mr Jowett).

    v) The total area of the mezzanines and walkways added, excluding the area of the shelving, was 7,834m^2 (Mr Miers) or 7,790.39m^2 (Mr Jowett); in each case less than 49.5% of the GIFA.

137. There were two key issues of principle between the architectural experts:

    i) The first issue was whether the aggregate area of the raised mezzanines and two-tier shelving extended to more than 50% of the ground floor area of the warehouse and, therefore, the warehouse should be regarded as a multi-storey building. The difference turned on whether the two-tier shelving areas should be included in the calculation (Mr Miers' interpretation) or excluded (Mr Jowett's interpretation).

    ii) The second issue was, if the warehouse should be regarded as a single-storey building, whether it exceeded the ADB limitation of 20,000m^2 maximum of any floor area in a building that was not fitted with an automatic sprinkler system. The difference turned on whether the galleries formed part of the maximum floor area.

138. The Building Regulations (2000) set out requirements for fire safety at Schedule 1B, including the following:

> "B1. The building shall be designed and constructed so that there are appropriate provisions for the early warning of fire, and appropriate means of escape in case of fire from the building to a place of safety outside the building capable of being safely and effectively used at all material times.
>
> …
>
> B3(1) The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period."
>
> …
>
> B3(3) To inhibit the spread of fire within the building, it shall be sub-divided with fire-resisting construction to an extent appropriate to the size and intended use of the building."

139. Approved Document B 2000/2002 sets out guidance for achieving compliance with the Building Regulations:

> "The Approved Documents are intended to provide guidance for some of the more common building situations. However, there may well be alternative ways of achieving compliance with the requirements.
>
> **Thus there is no obligation to adopt any particular solution contained in an Approved Document if you prefer to meet the relevant requirement in some other way.**"

140. Section B3 of the ADB contains provisions to ensure the stability of buildings in the event of a fire, including provisions to ensure that there is a sufficient degree of fire separation within buildings and to provide automatic fire suppression where necessary.

141. Section B0.16 states:

> "Sprinkler systems installed in buildings can reduce the risk to life and significantly reduce the degree of damage caused by fire. Sprinkler protection can also sometimes be used as a compensatory feature where the provisions of this Approved document are varied in some way…"

142. Section B0.21 states:

> "The fire safety requirements of the Building Regulations should be satisfied by following the relevant guidance given in this Approved Document. However, Approved Documents are intended to provide guidance for some of the more common

> building situations and there may well be alternative ways of achieving compliance with the requirements."

143. At section B3, the material requirements of the Building Regulations 2000 include:

> "(1) The building shall be designed and constructed so that, in the event of fire, its stability will be maintained for a reasonable period.
>
> …
>
> (3) Where reasonably necessary to inhibit the spread of fire within the building, measures shall be taken, to an extent appropriate to the size and intended use of the building, comprising either or both of the following: (a) sub-division of the building with fire-resisting construction; (b) installation of suitable automatic fire suppression systems."

144. B3 Section 8 is concerned with compartmentation and states at 8.1:

> "The spread of fire within a building can be restricted by sub-dividing it into compartments separated from one another by walls and/or floors of fire-resisting construction. The object is twofold: a. to prevent rapid fire spread which could trap occupants of the building; and b. to reduce the chance of fires becoming large, on the basis that large fires are more dangerous, not only to occupants and fire and rescue service personnel, but also to people in the vicinity of the building."

145. B3 section 8.18 provides that rules set out in Table 12 for compartmentation should be applied for non-residential buildings. The effect of Table 12 is that:

i) if the warehouse were treated as a multi-storey building, the maximum permitted volume of any compartment would be 20,000m^3 (without sprinkler protection) or 40,000m^3 (if sprinkler protection provided); and

ii) if the warehouse were treated as a single storey building, the maximum permitted floor area would be 20,000m^2 unless it had the benefit of sprinkler protection.

146. The definitions at Appendix E include the following:

> "**Single storey building** A building consisting of a ground storey only… Basements are not included in counting the number of storeys in a building…
>
> **Storey** includes …
>
> b. any gallery in any other type of building if its area is more than half that of the space into which it projects; and

> **Note**: Where there is more than one gallery and the total aggregate area of all the galleries in any one space is more than half of the area of that space then the building should be regarded as being a multi storey building.
>
> **Gallery** A floor or balcony which does not extend across the full extent of a building's footprint and is open to the floor below."

147. In their joint statement, the architectural experts agreed that the mezzanines were "galleries" until the point that they were considered to be a storey (i.e. where they extended to over half of the area of the space into which they projected). Where the total aggregate area of all of the galleries was more than half of the area of the space into which they projected, the building would be regarded as a multi-storey building and compartmentation was indicated. The difference between the experts was whether the shelving area of the two-tier shelving should be included in the calculations.

148. The architectural experts also agreed that if the warehouse should be regarded as a single-storey building, and the maximum floor area included the mezzanines and two-tier shelves as galleries, the building floor area exceeded the limit set out in Table 12 for a building that did not have sprinkler protection. The difference between the experts was whether the galleries formed part of the maximum floor area.

149. Mr Miers considered that the two-tier shelving was a structure which provided shelves at two levels of access. It was formed from a steel column and beam framework which supported both the shelves and the raised floor. The gallery formed a raised floor level that was a substantial working platform and storage floor. It formed a continuous floor plate and should be measured as part of the other galleries at raised level.

150. He accepted in cross-examination that the construction of the two-tier shelving was different from the construction of the mezzanines but considered that, in practice, they formed a large, continuous, raised working platform:

> "Q. But when one looks at the two-tier shelving itself, those consist of shelves with walkways clipped on?
>
> A. …it is correct that in these shelves the structural post at the corners go all the way from top to bottom. Whereas there are other shelves which only start at what you might call the mezzanine floor level.
>
> Q. Well, they sit on the mezzanine, don't they?
>
> A. They do, absolutely… but this is just a matter of how the steel structure load is carried down to the ground level, which in my view is not relevant to the question of means of escape and fire safety. Here what we have is continuous walkways and working platforms all at one level, where the operators simply move around, and they are not considering when in fact there is no differentiation for practical purposes between one area

> of rack and another. It is all storage and racking, and people working at that level."

151. Mr Miers accepted in cross-examination that if there were no walkways and the mezzanines were constructed next to the shelving, he wouldn't include the two-tier shelving in calculation of area because they would be treated the same as the high level racking. However, once the walkways were introduced, the two-tier shelving had to be included in the gallery calculation. The walkways created a working platform which included the shelving and amounted to a gallery. He agreed that the operatives would not walk on the shelves but pointed out that shelving areas at ground and mezzanine levels were included in the calculation. The mezzanines were measured as a whole, including the racks and conveyor systems. It was artificial to distinguish between the mezzanine platform where operatives were working and the two-tier shelving where operatives were also working.

152. Mr Miers disagreed that the inclusion or exclusion of the shelving areas was a question of judgment for the designer:

> "Q. So, in working out the question as to whether or not one should include the two-tier shelving … and bearing in mind it is a different type of structure, the designer has to exercise a judgment as to whether this different structure should be considered to be part of the gallery area.
>
> A. I think one has to look at the question completely the other way round, which is: is there any justification for considering that this shelving, when you are up at that raised level, somehow should be considered differently from any other shelving, also up at that level and therefore, as per Mr Jowett, be deducted from any floor measurements…"

153. Mr Miers' assessment, based on his understanding of the ADB, was that the raised gallery formed 51% of the total floor area. Therefore, the warehouse was a multi-storey building for the purpose of the ADB and required sprinklers and/or compartmentation; alternatively, a fire-engineered alternative solution.

154. In cross-examination, Mr Miers accepted that the ADB provided guidance as to how compliance with the Building Regulations might be achieved:

> "… the industry uses them as … requirements to be met absent a strategic alternative design process, which normally, in the case of part B, would involve a fire engineered solution. In a sense, we tend to follow one of two routes; we either meet part B on the ADB route, or we meet part B by bringing in a fire engineer to effectively advise on how else we might achieve it."

155. Mr Miers had not seen evidence that in 2009 anyone considered Table 12 or prepared any details of overall area calculations. He did not consider that there was compliance

with the ADB if the calculation ignored the galleries, which had the effect of increasing the work area, thereby impacting a safe means of escape in event of fire.

156. Mr Miers accepted in cross-examination that the ADB did not contain any clear definition of the "maximum floor area" if the warehouse should be regarded as a single-storey building but maintained his view that it comprised the area within the building:

> "… that would be a normal reading of the words and, even in this table, the table differentiates between a storey and the floor area, and they use different words. If we look at the very top of the table … it says: "Floor area of any one storey". I wouldn't have a reason to start to reflect on the fact that there may be a basis for excluding the raised working platform.
>
> … the normal reading of this word, in our industry, would be to include all of the floor areas within the building, the maximum floor area, that is to say. One has to understand this is because the document is geared towards the health and safety of the building users…
>
> …a gallery is also defined as a floor … and one would expect to consider it as a floor. So, when one is therefore calculating the maximum floor area, then one would include, naturally, the gallery as part of the single storey building."

157. His opinion was that a combination of sprinklers and compartmentation was required. By introducing sprinklers, the amount of compartmentation would be reduced but both were needed.

158. Mr Jowett's opinion was that the two-tier shelving comprised two storey height shelving units, similar to the high bay racking, to which floor units could be attached. As such, it did not fall to be considered as part of the floor area of the mezzanine, or, if it did, only the floor elements of the units and galleries should be included.

159. In cross-examination, he agreed that the purpose of the ADB guidance was for life safety rather than property loss. The need for compartmentation and/or sprinklers was to ensure that people have sufficient time to escape the building in the event of a fire and to enable fire services to fight a fire without undue risk. He accepted that if people were working on a raised platform, they needed time to get down to ground floor area to escape a fire.

160. Mr Jowett included the mezzanine floor area in his calculation of the galleries, including the footprint of the shelving standing on the mezzanine floor. He also included the footprint of the walkways and raised aisles of the two-tier shelving but excluded from his calculations the footprint of that shelving.

161. The two-tier shelving was a steel framework into which steel trays were clipped. The racks were 6-7 metres tall and had a walkway clipped between them at mid height, approximately 3.3 metres above floor level. Mr Jowett's opinion was that, unlike a mezzanine, the two-tier shelving did not comprise a complete raised floor, only access aisles/walkways between the racks which continued up from the warehouse floor. For

that reason, his view was that only the raised access aisles/walkways were floor sections forming the "gallery" area; this did not include the upper part of the shelving racks that were self-supporting and a continuation of the ground floor shelving.

162. At the time of the fire, the two-tier shelving was surrounded by the mezzanine floor areas. Mr Jowett accepted that there was no obvious difference between the mezzanine floor and the walkway between the two-tier shelving but pointed out that they were structurally distinct:

> "The way it was in 2009, I think to the casual observer, as you said, any visitors to the building walking from what I have called the mezzanine, on to the aisles of the two-tier racking, would have regarded it as a continuation of the floor …
>
> You couldn't put a conveyor belt on it. It is not a floor like the mezzanine floor. It is not supported on fire protected columns. I don't think the shelving at that level had fire protection. I think only the aisles had fire protection, so it is actually different."

163. Mr Jowett agreed that, if treated as single-storey, and if the mezzanines (with or without the two-tier shelving) were included in calculating the maximum floor area for a non-sprinklered building, it would exceed 20,000 m^2. His opinion was that the mezzanines did not affect the area of the fire compartment and therefore did not fall to be included:

> "Q. Effectively, you are saying that if the mezzanine does not make the building multi-storey, then you just ignore it. You ignore its floor area for the purposes of calculating the floor area for table 12.
>
> A. What I have said in my report is that adding the mezzanines didn't actually change the area of the compartment. The compartment was contained, i.e. the compartment wall to the offices, and the external walls ... that was the whole fire compartment. And even if it had other bits of floor in it, that was still the compartment."

Discussion and finding on the ADB

164. One of the purposes of the Building Regulations 2000 and section B3 of the ADB is to inhibit rapid fire spread to allow an effective means of escape from a burning building. The identified measures by which that can be done are: (a) sub-division of the building with fire-resisting construction i.e. compartmentation; and (b) installation of suitable automatic fire suppression systems i.e. sprinklers.

165. Addressing the first architectural issue, the ADB defines 'Gallery' as "a floor or balcony which does not extend across the full extent of a building's footprint and is open to the floor below." The natural meaning of 'floor or balcony' in an industrial building is a flat surface on which it is possible for people to walk or work. The mezzanines and two-tier shelving units both fall within that definition.

166. The ADB includes illustrations from which it is reasonably clear that a mezzanine would fall within the definition of a gallery. It was common ground between the architectural experts that the whole footprint of the mezzanines would be included in the Table 12 calculation of 'storey' area regardless of the use to which they were actually put, that is, including any shelving or other fixtures. It was also common ground that there was no difference in the visual appearance or use of the mezzanines and two-tier shelving units in the warehouse.

167. The only distinction that could be drawn between the mezzanines and the two-tier shelving was the structural loading factor. The two-tier shelving was formed of shelves with aisles and walkways clipped onto them. As such, unlike the mezzanines, they were not structural elements of the building and did not require structural fire protection measures. The purpose of structural fire protection measures is to ensure that in the event of a fire the stability of the building will be maintained for a reasonable period. That is distinct from the purpose of fire inhibition measures, which are designed to ensure that in the event of a fire operatives will have sufficient time to travel the distance which is required to make their escape. The two-tier shelving units were not structural elements requiring fire protection measures. It does not follow that they were not relevant for the purpose of determining the need for fire suppression measures.

168. In practice, the mezzanines and two-tier shelving units looked the same and the raised level surfaces were used in the same way as working platforms. There is no justification for treating the two-tier shelving differently from the mezzanines. Both the mezzanines and two-tier shelving units fell within the definition of 'gallery' for the purpose of Table 12.

169. That interpretation is consistent with the approach taken by CgMs in the planning statement prepared for the replacement warehouse in 2011. In their statement, CgMs calculated the GIF of the destroyed warehouse as 23,964m^2, which the experts agreed must have included the full raised floor area, including the two-tier shelving. Although that was provided for planning purposes, which are not necessarily the same as fire purposes, it is indicative of the general practice and understanding of such calculations.

170. 'Storey' is defined as: "any gallery in any other type of building if its area is more than half that of the space into which it projects" and it is clarified that "where … the total aggregate area of all the galleries in any one space is more than half of the area of that space then the building should be regarded as being a multi storey building." It was agreed by the architectural experts that if the mezzanines and two-tier shelving, including the footprint of the shelves, were treated as galleries, the total aggregate of the all the galleries was more than half of the area of the space into which they projected and the warehouse would be regarded as a multi-storey building.

171. Table 12 stipulates that if the warehouse were treated as a multi-storey building, the maximum volume of any compartment should be 20,000m^3 (without sprinkler protection) or 40,000m^3 (if sprinkler protection provided).

172. Turning to the second architectural issue if, contrary to the above finding, the warehouse should be treated as a single-storey building, Table 12 stipulates that the maximum floor area should not exceed 20,000m^2 without sprinkler protection. There is no guidance in the ADB as to what should be included in the measurement of the

'maximum floor area'. The issue is whether the mezzanines (with or without the two-tier shelving) should be included.

173. A natural reading of "maximum floor space" is that it includes all floor space, whether at ground level or any higher levels. Table 12 does not refer to the internal ground floor area or the footprint of the building, which might exclude higher level areas. Mr Jowett agreed that the mezzanines were galleries or floors.

174. I reject Mr Jowett's opinion that the mezzanines would not affect the size of the compartment. The additional floor space created by the mezzanines increased the total area across which, and the compartment area within which, fire could spread. This was implicitly recognised by Mr Jowett in his report because he stated that when galleries were added, there would be a need to consider the potential implications for means of escape. This is self-evidently correct. As Professor Lygate set out in his report, the rate of burning in a compartment depends on the ventilation and the height of the ceiling. The lower the floor to ceiling height, generally the faster a fire will grow. Adding galleries that change the floor to ceiling height of each part will have an impact on the rate of fire spread. There is no logical argument for ignoring the mezzanines when considering whether any fire suppression measures would be required to impede the spread of the fire to protect lives.

175. For the above reasons, on a plain and ordinary reading of the ADB, the warehouse should have been treated as a multi-storey building, requiring compartmentation; if treated as a single-storey building, the maximum floor area of the warehouse was in excess of 20,000m^2 and sprinkler protection was required.

176. The ADB is not a mandatory document; it sets out guidance for achieving compliance with the mandatory Building Regulations. The ADB recognises that there may be alternative, bespoke fire engineered solutions that would meet the relevant requirements of the Building Regulations. However, in the absence of a fire engineered solution or other scientific evidence-based solution, it represents the industry standard.

177. Professor Lygate drew attention to the fact that if the internal alterations to the warehouse had been carried out in 2002, compliance would have been achieved with the ADB. That is not justification for ignoring the additional precautions imposed in 2009 based on the industry's increased understanding of the risks and available solutions, which drive revisions to the guidelines. A designer who wishes to depart from the ADB must be prepared to justify such departure. The architectural experts agreed that the Salus did not provide a fire-engineered analysis to support its submission of the plans for Building Regulation purposes.

178. In my judgment, Sony failed to take reasonable fire precautions for the following reasons.

179. Firstly, there is no evidence that Sony carried out any risk assessment for arson. Mr Houghton conceded that he was not aware that warehouses were vulnerable to arson attacks, despite this being identified in BS 8220, Part 3, paragraph 5.1 and in the LPC Design Guide for the Fire Protection of Buildings. Professor Lygate agreed that this was a significant failing and that Sony should have carried out a fire risk assessment that took account of the risk to property.

180. Secondly, Sony should have sought advice as to the appropriate fire precautions to take following the internal changes to the warehouse in 2009 but there is no evidence that proper advice was sought on this issue. Acorn were not qualified to provide such advice. LFEPA were inspectors and not concerned with property protection, only life safety. Salus acted as the approved inspector. There is evidence of some discussion with Salus regarding sprinklers but any such discussion must have been informal because it did not result in any report or notes. Sony did not engage Salus to carry out a review of the necessary and/or reasonable fire precautions and advise as to the measures that should be implemented to mitigate the risk of arson and fire damage.

181. Thirdly, the warehouse failed to comply with the ADB following the internal works in 2009. Sony seeks to rely on third parties, on the basis that Sony did not have the material expertise in this area. However, such a defence is not open to Sony in circumstances where it did not ask the right questions. Sony should have carried out a fire risk assessment for arson. If it had done so, such an assessment would have prompted it to take professional advice as to the appropriate mitigation measures. Such professional advice would have identified the relevant requirements of the ADB.

182. Fourthly, Sony failed to procure from Salus or any other consultant advice as to compliance of the warehouse alterations with the ADB concerning fire precautions. There is no evidence that any assessment or calculations were carried out by or on behalf of Sony to establish whether the works complied with the ADB and there is no evidence that any alternative fire engineering solution was considered.

Causation – fire engineering expert evidence

183. Professor Lygate, Sony's fire engineering expert, prepared a timeline of the fire from the CCTV footage and other material, which showed the following sequence of events:

    i) At 23:40:19 one of the intruders at far end of the warehouse lit a petrol bomb and threw it against the wall.

    ii) At 23:40:22 another intruder threw a petrol bomb into the racks between racks 6 and 7 numbered from the far end of the west wall.

    iii) At 23:40:23 burning could be seen in the area of the rear (south) wall behind boxes stored on wall.

    iv) There were areas of fire in the racks at 23:41:23, around a minute after ignition.

    v) Approximately 2 minutes after ignition the fire had spread through the racks.

    vi) Approximately 3 minutes after ignition, the fire had grown in size.

    vii) After approximately 4 minutes, the fire had been significantly established.

    viii) At 23:46:25, approximately 6 minutes after ignition the warehouse was smoke logged.

    ix) The London Fire Brigade were called at 23:50 hours and reached the scene at 23:57 hours. It would have been several minutes before there was any meaningful firefighting.

x) The incident was closed at 14:33 hours on 22 August 2011, 13 days later.

184. Dr Crowder, the claimants' fire engineering expert, agreed with Professor Lygate's timeline.

185. The fire engineering experts agreed that the issue as to whether the warehouse should be treated as multi-storey was a matter for the architectural experts.

186. The key issues on which the fire engineering provided opinions were:

i) if the warehouse was a multi-storey building, whether it should have been compartmented and/or had an automatic fire suppression system, including sprinklers;

ii) if the warehouse had been compartmented, what difference, if any, it would have made to the outcome;

iii) if sprinklers had been fitted, what difference, if any, it would have made to the outcome.

187. Dr Crowder's opinion was that, if the warehouse constituted a multi-storey building for the purpose of the ADB, sprinklers and compartmentation should have been provided. Professor Lygate's opinion was that the ADB 2000 version, with 2002 amendment, applied and therefore the volume and area limitations were not applicable and no compartmentation or sprinkler system was required.

188. As set out above, it is not open to Sony to rely on the superseded version of the ADB. It might have been feasible for an alternative, fire engineered solution to have been adopted, following consideration of the revised and updated ADB. But it was not reasonable for Sony to simply ignore the relevant ADB at the time of the 2009 alterations.

189. Professor Lygate accepted that if the 2009 version of the ADB applied, compartmentation was required, whether the warehouse was multi-storey or single-storey:

> "Q. You say, I think, that if the building is not multi-storey then it's your view that the mezzanine is indeed part of the internal floor area of the building and so should be counted for that purpose, don't you?
>
> A. Yes, I do.
>
> Q. It would follow therefore that, if this is not a multi-storey building, it's a single storey building, just as a simple matter of arithmetic, if you add the mezzanine and ground floor together, it exceeds more than 20,000 square metres and so it doesn't comply with the guidance in table 12 does it?
>
> A. That's correct. May I explain? The effect of that … is you need a compartment wall to divide the space.

> Q. Yes, you need a compartment wall, because you need to limit the area of the building to 20,000 square metres.
>
> A. Yes."

190. The fire engineering experts agreed that, if compartmentation was required, a single 60-minute fire resisting wall could have divided the warehouse building into two halves. However, the experts also agreed that a single 60-minute fire resisting wall would not have prevented the spread of the fire and would not have changed the outcome.

191. Dr Crowder considered that, if compartmentation were provided without sprinklers, an appropriate measure would have been the installation of 240-minute fire resisting panels, dividing the warehouse into multiple compartments, which would have confined the area lost to the compartment of fire origin. The experts agreed that the installation of a single 240-minute fire resisting wall, dividing the warehouse into two halves, would have resisted the fire and limited the loss. Dr Crowder considered that this probably would have reduced the area lost to the fire by approximately fifty percent. Professor Lygate's view was that the loss would be more modest, reduced by some 30-40%, taking account of the wider business interruption caused by the fire. I accept Professor Lygate's evidence that, even if half of the warehouse had been saved, there would have been additional costs associated with smoke damage and additional operational costs involved pending the reinstatement of the damaged parts of the structure. Therefore, it is unlikely that the losses could have been limited to 50%.

192. The requirement for a 240-minute compartment was based on guidance set out in an enhanced version of the ADB, incorporating Insurers' Requirements dated 2008, which Dr Crowder was of the view Sony should have considered. Professor Lygate disagreed that the Insurers' Requirements applied in this case as Sony's insurers did not require compliance. I accept Professor Lygate's assessment that, in this case, there is no evidence that the Insurers' Requirements were identified as necessary by Sony's insurers, or those of its clients. In those circumstances, it would be reasonable for Sony to follow the published guidance in the ADB. The Insurers' Requirements imposed a standard that was above that required by the Logistics Contract, namely, reasonable care and skill.

193. In any event, the fire engineering experts agreed that if the warehouse constituted a multi-storey building for the purpose of the ADB, it would have been impracticable to achieve compliance on the basis of compartmentation alone, given the size, layout and use of the building. In those circumstances, the most appropriate and practical solution would have been the provision of sprinklers.

194. Dr Crowder's opinion was that a sprinkler system complying with either BS EN 12845 (the current standard) or BS 5306 Part 2 (the previous standard) would have extinguished the fire or contained it to a small number of pallets close to the points of ignition until the arrival of London Fire Brigade, at which point the fire could have been extinguished with minimal risk to the fire fighters.

195. Professor Lygate agreed that any sprinkler system should comply with BS EN 12845 or BS 5306 Part 2 but his opinion was that a sprinkler system would have been overwhelmed because of the effect of the ignition source and the fact that two areas were ignited almost simultaneously. This would have had the effect of causing too

many sprinklers to open at one time, reducing the pressure and thus reducing the amount of water released and reducing their dampening effect on the fires. On that basis, Professor Lygate's opinion was that sprinklers would not have changed the outcome of the fire.

196. The experts agreed the critical aspects of any sprinkler design for the warehouse as follows:

i) the entire warehouse needed to be protected; sprinklers needed to be provided in the racks as well as at ceiling level;

ii) the rack sprinklers needed to be provided in the flue space between racks, with a design density of 7.5mm per minute, area of operation 260m^2 and up to 18 heads operating simultaneously within the racks;

iii) the ceiling sprinklers needed to be installed on a 3.7m by 3.7m grid, 1.5m from the walls;

iv) the sprinklers were required to be quick response, with a K factor of 80 or 115 (the relationship between flow and pressure) and an operating temperature of 68^0C or 74^0C;

v) the water supply would be needed for 90 minutes and the tank required a minimum volume of 225m^2.

197. In cross-examination, Dr Crowder agreed that the CCTV footage showed the fire starting with a pool of fire between the two racks and under the racks. Fire then travelled up the face of the pallets, across the racks and into the racks. From the base of the pallets the fire travelled horizontally at floor level but relatively slowly. His view was that before three minutes had elapsed, in-rack sprinklers would have been deployed, reducing the amount of energy fuelling the fire on the face and the spread of fire would have been arrested.

198. Dr Crowder relied on statistics showing that between 2010/11 and 2017/18 there were 2,800 fires in warehouses, 667 of which were started deliberately. Only 3 out of the 2,800 fires resulted in damage greater than 1,000m^2 where there were sprinklers. He accepted that the statistics could not predict what would have happened in this case but they supported his opinion that sprinklers generally work and reduce the risk of damage from a fire:

> "Sprinklers generally work, more often than not they work and they cause a dramatic lessening of risk. It goes back to the considerations that ought to have been made by designers, in a way, that why not bother with a system that has such a good track record in suppressing fires ... the point is no sprinkler was ever specified, no alternative design to what's in the approved document was ever considered, and … I do think that this fire wasn't that severe a fire and that the sprinkler system would have dealt with it."

199. In cross-examination, Professor Lygate accepted that, in the absence of compartmentation or sprinklers, a fire started in the warehouse was likely to cause a total loss of the entire building and stock. He agreed that he would expect Sony to carry out a property fire risk assessment, including an assessment of the risk of arson, and to be familiar with FPA Design Guide for warehouses and storage buildings.

200. Professor Lygate agreed that sprinklers were of value in limiting damage by fires in warehouses:

> "Q. So as a matter of generality then, the statistics show, do they, that the loss, the cost of the fire, is 80 per cent less if you have sprinklers in place?
>
> A. Generally speaking that's true.
>
> Q. But you're obviously speaking about warehouses here, because the whole article is about warehouses?
>
> A. Indeed I am…
>
> Q. …the statistics show, and I think it's a point you made in your own article, that generally speaking sprinklers are extremely efficacious in suppressing fire in warehouses?
>
> A. They are."

Discussion and findings on causation

201. The fire engineering experts agreed that Sony should have carried out or procured a fire risk assessment that considered the risk of arson and property damage. No such assessment was carried out.

202. The Building Regulations and ADB in force at the time of the 2009 internal changes to the warehouse indicated that compartmentation and/or sprinklers were required to inhibit the spread of any internal fire. No compartmentation or sprinkler system was installed and there was no fire engineering assessment to justify the omission.

203. The fire engineering experts agreed that it would have been impracticable to comply with the requirements of the ADB by compartmentation alone, having regard to the size, layout and use of the building. A 60-minute compartment wall would not have been effective in preventing the loss and I accept Professor Lygate's evidence that a 240-minute compartment wall was not a reasonable requirement in this case.

204. The fire engineering experts agreed that generally, sprinkler systems are very effective in suppressing fires and limiting the damage caused by fires in warehouses. I accept Dr Crowder's evidence that, given the slow speed at which the fire initially progressed, as shown on the CCTV footage, it is likely that the installation of a sprinkler system in the warehouse, including sprinklers within the racks, would have supressed the fire at an early stage and significantly limited the damage. The likelihood is that most of the claimants' goods and the warehouse would not have been destroyed.

Issue (iii) Force Majeure

205. Following the fire, by letter dated 12 August 2011 Darren Houghton, general manager at the warehouse, notified Alasdair Ogilvie of 2E that Sony considered the destruction of the distribution centre to be a force majeure event beyond its control. By letter dated 19 August 2011 Mr Ogilvie responded, stating that 2E was investigating the incident and reserving its position.

206. Clause 14.1 of the Logistics Contract states:

> "Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to industrial action (at either party), fire, flood, wars, armed conflict, terrorist act, riot, civil commotion, malicious damage, explosion, unavailability of fuel, pandemic or governmental or other regulatory action."

207. As set out above, it is common ground that the riots were unforeseen and unprecedented. However, the risk of intruders was foreseeable; unauthorised entry had been attempted and/or achieved during incidents that occurred prior to the riot. The risk of arson was, or should have been, foreseen, based on BS 8220 and other guidance documents available to Sony prior to the fire. Likewise, the risk of destruction of the warehouse and its stock by fire was, or should have been, foreseen.

208. For the reasons set out above, adequate security measures that could have been taken by Sony probably would have deterred or delayed the attack on the warehouse and prevented the youths from gaining entry. Reasonable fire precautions, namely, the installation of sprinklers, probably would have suppressed the fire and significantly reduced any damage to the warehouse and its stock. Therefore, the fire and resulting loss did not amount to circumstances beyond the reasonable control of Sony and it is not open to Sony to rely on clause 14.1 as a defence.

Issue (iv) - Liability

209. For the reasons set out above, Sony was in breach of the Logistics Contract in that:

i) it failed to hold 2E's goods at a secure location at the Enfield facility and at Sony's risk, in breach of clause 5.1.3;

ii) it failed to use its best endeavours to provide the Logistics Services in line with the Service Level Agreement, in breach of clause 5.1.4; and

iii) it failed to perform the Logistics Services with due care and skill, in breach of clause 5.3.2.

210. For the same reasons, Sony was in breach of its common law duty of care, its obligations as bailee of the goods and liable in respect of a claim in conversion.

Issue (v) – limitation and exclusion clauses

211. The issues that arise are:

i) whether clause 10.1 limits Sony's liability to the manufacturing replacement cost of the goods lost;

ii) whether clause 10.3 excludes the claims for lost profits and business interruption losses as consequential damages;

iii) whether the cap on damages of £5 million in clause 10.4 has been satisfied by the payment of insurance monies under the Discharge and Release Agreement;

iv) whether Sony can rely on a limitation defence.

Clause 10.1

212. Clause 10.1 states:

> "The Logistics Services Provider's liability for any loss of or damage to Client's Materials or Client's Goods shall not exceed their manufacturing replacement cost."

213. Mr Quiney QC, leading counsel for Sony, submits that clause 10.1 contains clear words, limiting any damages to the manufacturing replacement cost of the goods. Mr Moody QC, leading counsel for 2E, submits that the limitation of liability in clause 10.1 is restricted to the basis of measurement of the loss of the goods and does not affect other heads of loss, such as lost profits.

214. The words used in clause 10.1 are clear. They mean what they say. Liability for loss of the goods is limited to their manufacturing replacement cost. However, it is necessary to consider what allocation of risk is intended by this provision and what is the scope of the liability covered by clause 10.1.

215. Clause 5.1.3 imposes strict liability on Sony in respect of any loss of the goods whilst in its possession. Although the insurance obligations do not define the allocation of risk under the Logistics Contract, there is consistency between the strict liability in clause 5.1.3 and the obligation on Sony in clause 4.1.1 to maintain insurance covering loss of the goods for their full replacement/reinstatement value. If the fire had simply destroyed the goods, they could have been replaced at Sony's cost, to which the insurance would have responded. The replaced goods would have been sold through the Enfield distribution facility and generated profits for 2E. In such circumstances, 2E would be confined to its remedy under clause 10.1, namely the manufacturing replacement value of the goods lost.

216. However, in this case, the fire destroyed not only 2E's goods but also the warehouse. The fire affected Sony's ability to provide the Logistics Services, which included the automated distribution facility at Enfield, the financial services and operational services. As set out above, Sony was responsible for the fire and in breach of its obligations to provide the Logistics Services. Clause 10.1 could have stated in express terms that any and all liability would be limited to the manufacturing replacement cost of the goods. It does not do so. Clause 10.1 is simply concerned with compensation for the loss of goods; it does not provide that liability for other breaches, including any failure to provide the Logistics Services, is subject to the stated limitation.

217. It follows that clause 10.1 does not preclude a claim for lost profits and other business interruption losses, based on Sony's breaches of the Logistics Contract in failing to provide the Logistics Services.

Clause 10.3

218. Clause 10.3 states:

> "Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business."

219. Mr Moody submits that clause 10.3 does not exclude any of the claims made in this case. The words "indirect or consequential loss or damage" are a reference to losses falling within the second limb of *Hadley v Baxendale*. On a proper construction of the clause, loss of profits and business interruption losses can be recovered for breach of the Logistics Contract, because they arise directly as a result of the fire and destruction of the goods and warehouse; they are not indirect or consequential losses falling within the second limb of *Hadley v Baxendale*.

220. Mr Quiney submits that the loss of profits and business interruption losses claimed are consequential on the loss of the goods and therefore excluded by the express words of clause 10.3. Clause 10.3 must be read together with clause 10.1 and forms part of the intrinsic part of the contractual scheme of risk and liability allocation. Clause 10.1 identifies the particular loss for which Sony will be liable and defines the limit of such liability. Clause 10.3 identifies the limitations of both parties' liability in wide terms, including indirect or consequential losses.

221. The applicable legal principles of contract construction are well-established. When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It does so, having regard to the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

    (i) the natural and ordinary meaning of the clause;

    (ii) any other relevant provisions of the contract;

    (iii) the overall purpose of the clause and the contract;

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

    (v) commercial common sense; but

    (vi) disregarding subjective evidence of any party's intentions.

    See: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at paras. [8] to [15].

222. The starting point is to consider the natural and ordinary meaning of the clause. The first part of the clause states: *"Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage."* The clause is equally applicable to both parties. The exclusion covers liability for all contractual obligations in connection with performance of the Logistics Services. The exclusion is *"for any indirect or consequential loss or damage".* The direct and natural result of the fire was the destruction of the goods and the warehouse, causing lost profits and business interruption losses to the claimants. Therefore, the claims in this case do not appear to fall within the scope of the exclusion.

223. Clause 10.3 is unhappily drafted and the second part of the clause, intended to provide an indication of the categories of loss excluded, is particularly unhelpful: *"including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business".* The effect of the words in parentheses is to negate the illustration intended by the words of inclusion. The only way in which these words can be given effect is to treat the reference to *"loss of profits ..."* and following categories of loss as losses that might or might not fall within the exclusion. As such, they are of no assistance in determining whether the losses claimed in this case fall within or without the exclusion.

224. Both parties rely on the interpretation of exclusion provisions in a number of cases.

225. The rule as to recoverability of damages for breach of contract was set out in *Hadley v Baxendale* (1854) 9 Ex 341 per Alderson B at 354:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

226. In *Millar's Machinery Co Ltd v David Way and Son* (1935) 40 Com. Cas. 204 (CA) the Court of Appeal held that a clause excluding "responsibility for consequential damages" did not exclude liability for damage occurring naturally or directly, i.e. falling within the first limb of *Hadley v Baxendale*.

227. In *Saint Line Ltd v Richardsons, Westgarth and Co Ltd* [1940] 2 KB 99, when construing a clause excluding liability for "any indirect or consequential damages or claims", Atkinson J stated:

> "What does one mean by "direct damage"? Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening event or some special circumstances …I have the guidance of the Court of Appeal as to what is meant by "consequential." In *Millar's Machinery* … the Court there took it for granted that the word "consequential" meant "merely consequential" and referred to something which was not the direct and natural result of the breach.
>
> In my judgment the words "indirect or consequential" do not exclude liability for damages which are the natural result of the breaches complained of…
>
> If one takes loss of profit, it is quite clear that such a claim may very well arise directly and naturally from the breach based on delay."

228. The case of *Croudace Construction Limited v Cawoods Concrete Products Limited* [1978] 2 Lloyds Rep. 55 concerned a claim for late delivery of materials. In construing the meaning of a clause excluding liability for "any consequential loss or damage caused or arising by reason of late supply" Parker J held that the word "consequential" did not cover any loss which directly and naturally resulted in the ordinary course of events from late delivery. His decision and reasoning were upheld by the Court of Appeal.

229. In *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42 (CA), the Court of Appeal considered the meaning of a contractual limitation provision in respect of "consequential loss". Having referred to the Court of Appeal decisions in *Millar's Machinery* and *Croudace*, Waller LJ stated at p.50:

> "… Both the Millar case and the Croudace case were construing the word "consequential" in a very similar context to that which appears in this case. With Court of Appeal authority construing a phrase in a very similar context, and another Court of Appeal saying that the view previously expressed is binding in yet another similar context, it would take some radical difference in language or a radical difference in context to persuade yet a further Court of Appeal not to construe the phrase the same way ...
>
> Second, in any event once a phrase has been authoritatively construed by a court in a very similar context to that which exists in the case in point, it seems to me that a reasonable businessman must more naturally be taken to be having the intention that the phrase should bear the same meaning as construed in the case in point. It would again take very clear words to allow a court to construe the phrase differently."

230. In *Deepak Fertilisers Ltd v ICI Chemicals and Polymers Ltd* [1999] 1 Ll.Rep. 387 (CA), the Court of Appeal considered whether losses arising out of the explosion of a methanol plant in India were excluded by reason of Article 6.8 of the contract. Giving the judgment of the Court, Stuart-Smith LJ stated:

> "[88] For the purposes of this issue the critical words of Article 6.8 are:
>
> > "... and in no event shall DAVY by reason of its performance or obligation under this CONTRACT be liable ... for loss [of] anticipated profits, catalyst, raw material and products or for indirect or consequential damages."
>
> …
>
> [90] … The direct and natural result of the destruction of the plant was that Deepak was left without a Methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no more remote as losses than the cost of reconstruction. Lost profits cannot be recovered because they are excluded in terms, not because they are too remote. We consider that this Court is bound by the decision in Croudace where a similar loss was not excluded by a similar exclusion and considered to be direct loss…"

231. In *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2007] BLR 235 (CA), the Court of Appeal considered whether a clause excluding liability for "indirect or consequential loss" excluded liability for loss of profits and additional costs. It concluded that, on its facts, the lost profits and additional costs were direct or natural consequences of the breach and did not fall within the exclusion clause. Having considered the above authorities, Sedley LJ stated:

> [19]. … That the issue is still not problem-free is illustrated by the subsequent decision of Rix J (who had been overset in *Deepak Fertilisers*) in *BHP Petroleum Ltd v British Steel plc* [1999] Ll.L.R. 583, an incisive judgment which merits close reading, especially (for present purposes) in relation to the need for special knowledge (at 600-602). For the present it is sufficient to record his conclusion, in the light of the same authorities as we have been considering, that:
>
> > "...the parties are correct to agree that authority dictates that the line between direct and indirect or consequential losses is drawn along the boundary between the first and second limbs of *Hadley v Baxendale*."
>
> [20]. This conclusion has the virtue of practicality; but - as Rix J's judgment itself illustrates - it does not automatically tell one on which side the line a case falls. Although we would if necessary adopt Waller LJ's position in relation to decided cases on similar words (not forgetting the cautionary remarks of Sir George Jessel MR in *Aspden v Seddon* (1875) 10 Ch.App. 394, 397 about the risks of this mode of construction), one has to be continuously alive to differences of surrounding fact. We prefer therefore to decide this case, much as *Victoria Laundry* was decided, on the direct ground that if equipment rented out for selling drinks without defalcations turns out to be unusable and possibly dangerous, it requires no special mutually known fact to establish the immediacy both of the consequent cost of putting it where it can do no harm and - if when in use it was showing a direct profit - of the consequent loss of profit. Such losses are not embraced by the exclusion clause, read in its documentary and commercial context."

232. The above authorities are consistent with, and provide support for, my initial finding based on the plain and natural meaning of the words used in the clause, namely, that the loss of profits and business interruption costs in this case do not constitute indirect or consequential loss or damage within the meaning of clause 10.3 of the Logistics Contract.

233. Mr Quiney submits that these cases must be read in the light of *Caledonia North Sea Limited v British Telecommunications plc* [2002] BLR 139 (HL), in which Lord Hoffmann expressly reserved the question of whether the analysis in those cases was correct, and *Transfield Shipping Ltd v Mercator Shipping Ltd* [2009] 1 AC 61 (HL) in which the two-stage test in *Hadley v Baxendale* was considered, per Lord Walker:

> "[66]. In these circumstances your Lordships have to revisit some important general issues. These are all aspects of how the rule in *Hadley v Baxendale* has been developed or modified by 150 years of case law. This topic was reviewed by Robert Goff J in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175, 181-183. He observed (at p181) "
>
> > "Although the principle stated in *Hadley v Baxendale* remains the fons et origo of the modern law, the principle itself has been analysed and developed, and its application broadened, in the 20th century."
>
> After referring to the *Victoria Laundry* case and to *The Heron II*, Robert Goff J stated (at p 182):
>
> > "The general result of the two cases is that the principle in *Hadley v Baxendale* is now no longer stated in terms of two rules, but rather in terms of a single principle—though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case. This approach accords very much to what actually happens in practice; the courts have not been over-ready to pigeon-hole the cases under one or other of the so-called rules in *Hadley v Baxendale*, but rather to decide each case on the basis of the relevant knowledge of the defendant."
>
> [67]. The recognition of the rule as a single principle accords with the reality that even under the first limb, the defendant often needs some particular knowledge (for instance Mr Baxendale's firm had to know, as Lord Pearce pointed out in *The Heron II*, at p 416, that the article accepted for carriage from Gloucester to Greenwich was a broken millshaft). The degree of knowledge assumed under the first limb depends on the nature of the business relationship between the contracting parties. The different outcomes of *Hadley v Baxendale* and the *Victoria Laundry* case depended in part (though only in part) on the fact that the defendant in the latter case was an engineering company supplying a specialised boiler, and not merely a carrier of goods with which it had no particular familiarity.
>
> [68]. Another consequence of the (at least partial) assimilation of the two limbs is to raise doubt as to whether the notion of assumption of responsibility (as a precondition for liability for a larger measure of damages) is necessarily confined to second limb cases…"

234. Sony places reliance on two more recent cases. In *Star Polaris LLC v HHIC-PHIL Inc* [2016] EWHC 2941 the court was concerned with an arbitration appeal in respect of the construction of an exclusion clause. The context of the exclusion clause was

significant. The builder provided a guarantee for a period of twelve months from the date of delivery of the vessel. Article IX paragraph 3(a) provided that the builder would remedy, at its expense, any defects against which the vessel was guaranteed. The extent of the builder's liability was set out in Article IX, paragraph 4(d), which stated that such liability was limited to defects directly caused by defective materials, design error, construction miscalculation and /or poor workmanship. Article IX, paragraph 4(a) contained the following provision:

> "Except as expressly provided in this Paragraph, in no circumstances and on no ground whatsoever shall the BUILDER have any responsibility or liability whatsoever or howsoever arising in respect of or in connection with the VESSEL or this CONTRACT after the delivery of the VESSEL. Further, but without in any way limiting the generality of the foregoing the BUILDER shall have no liability or responsibility whatsoever or howsoever arising for or in connection with any consequential or special losses, damages or expenses unless otherwise stated herein".

235. Having identified the general principles as set out in the above authorities, Sir Jeremy Cooke, sitting as a Judge of the High Court, agreed with the tribunal's approach that, although the meaning of "consequential loss" in an exemption clause usually meant the exclusion of losses falling within the second limb of *Hadley v Baxendale*, in the absence of judicial consideration of the clause in question, it should be construed on its own wording in the context of the particular agreement as a whole and its particular factual background. Having considered those factors, he stated: at [39]:

> "[38] In my judgment, as in that of the Arbitrators, when Article IX.4 is properly read, the Yard's liability is limited by it and the positive obligations undertaken in Article IX.3. What Article IX.4(a) does is to make it plain that there is no liability above and beyond the express obligations undertaken by the Yard and, in particular, without prejudice to that, financial losses consequent upon physical damage are not covered by the guarantee …
>
> [39] In my judgment therefore, as in the judgment of the Arbitrators, "consequential or special losses, damages or expenses" does not mean such losses, damages or expenses as fall within the second limb of *Hadley v Baxendale* but does have the wider meaning of financial losses caused by guaranteed defects, above and beyond the cost of replacement and repair of physical damage."

236. In *Transocean Drilling UK Limited v Providence Resources plc* [2016] EWCA Civ 372 the court had to determine whether wasted spread costs incurred by Providence as a result of Transocean's breaches of contract were "consequential losses" within the meaning of clause 20. Consequential loss was defined in clause 20 of the contract as:

> "(i) any indirect or consequential loss or damages under English law, and/or

> (ii) to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use … loss of business and business interruption, loss of revenue … loss of profit or anticipated profit …
>
> … the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the COMPANY GROUP'S own consequential loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from the CONTRACTOR GROUP'S own consequential loss…"

237. The Court of Appeal held that the language of clause 20 was clear and excluded the spread costs claimed by Providence (by way of set-off) per Moore-Bick LJ:

> "[15]. The expression "consequential loss" has caused a certain amount of difficulty for English lawyers, mainly as a result of attempts to define its meaning in the interests of commercial certainty: see the line of cases that includes *Saint Line v Richardsons Westgarth & Co Ltd* [1940] 2 K.B. 99, *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (1978) 8 B.L.R. 20 and *Deepak Fertilisers Ltd v ICI Chemicals and Polymers Ltd* [1999] Lloyd's Rep. 387. It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents. The existence of that line of authority may account for the unusual terms of clause 20(i), but those cases do not fall for discussion in this case, which turns on the meaning to be given to clause 20(ii). Nor is it necessary to discuss whether the clause derogates from one or other or both limbs of the rule in *Hadley v Baxendale*, since the only question with which we are concerned is whether its language is apt to encompass the spread costs which Providence seeks to recover.
>
> …
>
> [17]. "Loss of use" naturally refers to the loss of the ability to make use of some kind of property or equipment owned or under the control of the contractor or the company, as the case may be, but in this case the parties have made it clear by the words in brackets that follow that its scope is intended to be wider than that. For example, it extends to the loss of use or cost of use of property, equipment and materials and to the loss of use or cost of use of services provided by contractors, sub-contractors and third parties. Moreover, it must be borne in mind that this forms part of the definition of losses which flow from (in this case) the contractor's breach of contract but are not the immediate consequence of it. The basis of Providence's claim to recover spread costs is that they represent the cost of goods and services

> that were obtained and paid for but were wasted as a result of the delay caused by Transocean's breach of contract. There has to be loss of some kind to engage clause 20 at all and the words "loss of use or the cost of use of property, equipment, materials and services . . . provided by contractors or subcontractors of every tier or by third parties" are plainly apt on the face of them to cover costs of that kind. Moreover, it is interesting to note the lengths to which the parties have gone to emphasise the width of the clause: twice within the same passage in brackets they have used the expression "without limitation" to make the point.
>
> …
>
> [23]. … It is not clear to me … why the nature of the clause calls for a narrow construction in order to limit its scope. Such an approach would be appropriate only if there were grounds for seeking by means of construction to reduce the scope of the clause beyond that which the parties had agreed. As I have already said, however, the court's task is not to re-shape the contract but to ascertain the parties' intention, giving the words they have used their ordinary and natural meaning."

238. I accept Mr Quiney's submission that any general understanding of the meaning of "indirect or consequential loss" must not override the true construction of that clause when read in context against the other provisions in the Logistics Contract and the factual matrix. Sony's case is that clause 10.3 must be construed on its own wording against the relevant matrix, including clause 10.1.

239. However, as set out above, I reject Sony's interpretation of clause 10.1. Contrary to the *Star Polaris* case, clause 10.1 does not attempt to define the extent of Sony's liability for all breaches under the Logistics Contract. Clause 10.1 is limited to liability for loss of, or damage to, the goods. Therefore, it does not assist in ascertaining the true meaning of clause 10.3. Contrary to the *Transocean* case, there is no definition of indirect or consequential loss in the Logistics Contract that would indicate a wider meaning than the second limb of *Hadley v Baxendale*.

240. Sony seeks to rely on an argument that 2E is estopped from arguing that the damages claimed are not excluded by the contractual regime in clause 10 by its representation in Recital H of the Discharge and Release Agreement. Recital H of the Discharge and Release Agreement provides:

> "For the avoidance of doubt, this agreement is restricted to the Customer's claim for the physical loss or damage to the Stock and nothing herein is intended to prevent the Customer from recovering damages for consequential or business interruption losses whether resulting from the Riot, the Loss or otherwise."

This argument is misconceived. The words in Recital H do not contain any understanding as to the scope of remedies available or excluded under the Logistics Contract and do not amount to a representation.

241. In conclusion, clause 10.3 is unhappily worded but its meaning is reasonably clear on these facts. The loss of profits and business interruption costs claimed in this case do not constitute indirect or consequential loss or damage within the meaning of clause 10.3 of the Logistics Contract.

Clause 10.4

242. Clause 10.4 states:

> "Subject to clause 10.5, the aggregate liability of the Logistics Services Provider for all breaches of or in relation to its obligations under this Agreement or for any losses or liabilities which are the subject of any indemnity by the Logistics Service Provider, whether in contract, tort, for breach of statutory duty or otherwise, shall not in any event exceed the sum of £5,000,000 (five million pounds). "

243. It is now common ground that clause 10.4 operates as a contractual cap on the aggregate liability of Sony for all breaches of the Logistics Contract, including loss of the goods, lost profits, business interruption losses and indemnity obligations. Thus, it limits 2E's claims to £5 million.

244. Sony's further argument is that the sum of £8,270,573.37 paid by Sony's insurers to 2E under the Discharge and Release Agreement should be brought into account in calculating the aggregate liability of Sony to 2E. On that basis, the cap would be exceeded and no further sums would be due.

245. The sums paid under the Discharge and Release Agreement were payments due under insurance effected by Sony in respect of the physical loss of the stock pursuant to its obligations under the Logistics Contract. Those sums were payable by the insurers to Sony, who had an interest in the goods as bailee, regardless of any liability on the part of Sony under the Logistics Contract.

246. It is common ground that a bailee has sufficient interest in the goods to insure against the full loss but must account to the owner of those goods any fruits of the policy over and above his own interest: *Tomlinson v Hepburn* [1966] AC 451 per Lord Reid at pp.467-468; *DG Finance v Scott* [1999] Ll.Rep. IR 387 per Hobhouse LJ at pp.391-393. Hence, Sony had an obligation, as bailee, to account to 2E for sums received from the insurers.

247. It is made clear in the recitals to the Discharge and Release Agreement that the valuation of the loss and the claim to be paid was made under the terms of the insurance policy and not by reference to any liability on the part of Sony under the Logistics Agreement.

248. Clause 3 of the Discharge and Release Agreement provided:

> "The Customer shall accept payment of the Agreed Valuation … in full and final settlement, discharge and release of all and any liability Sony or Insurers (including their employees, servants and agents) may have in respect of the Loss whether under the

> Distribution Agreement, the Insurance or howsoever such liability may arise (and whenever arising)."

This was effective to release Sony from any liability for loss of the goods under the Logistics Contract but it did not amount to an acceptance by Sony of any such liability and did not amount to acceptance that any such liability was in the sum of the agreed valuation. Therefore, it is not open to Sony to rely on the insurance payment as satisfying its aggregate liability under clause 10.4.

249. That conclusion is reinforced by Recital H and clause 5 of the Discharge and Release Agreement, which make clear that the Discharge and Release Agreement did not affect any claims 2E might have against Sony for breaches of other provisions in the Logistics Contract or consequential or business interruption losses. If the parties had understood that the insurance payment would satisfy the aggregate liability under clause 10.4, Recital H and clause 5 would have been otiose.

250. For those reasons, Sony's argument that the contractual cap has been exhausted fails.

Limitation

251. Sony argues that the claim is statute-barred for limitation because the alleged security and fire precaution failures on the part of Sony arose some time prior to the fire.

252. 2E's response is that Sony had a continuing duty in contract to ensure that the Logistics Contract was performed: *Equitas Ltd v Walsham Brothers Co Ltd* [2014] Ll.Rep. 398 per Males J at [59] – [68]. A breach of contract occurred at every successive moment in time during which the required state of affairs was not maintained. In any event, the limitation argument would not apply to the claim in tort.

253. On a plain reading of the Logistics Contract, Sony was obliged to provide the Logistics Services throughout the term of the contract. Sony's obligations in respect of security and fire precautions were continuing covenants. Mr Quiney submits that the obligation to install sprinklers in the warehouse under the Building Regulations arose only when the internal works were carried out in 2009. That is correct but thereafter Sony remained in breach of its clause 5 obligations to keep the goods in a secure location and carry out the Logistics Services with care and skill. It follows that further breaches occurred at the time of the break in and fire and the claims are not subject to a limitation defence.

Issue (vi) - Quantum

254. 2E's claim is for loss of profits, business interruption and increased cost of working from the fire, including loss of profits on the goods destroyed in the fire.

255. Gordon Hodgen, 2E's forensic accountant, and Flemming Jensen, Sony's forensic accountant, agreed in their joint statement that the loss of profits could be quantified in two different ways:

i) the quantum of loss due to the fire ("the Fire Related Basis"); or

ii) the quantum of loss flowing solely from the loss of and damage to stock in the warehouse at the time of the fire ("the Stock Loss Basis").

256. 2E's case is that the Fire Related Basis is the appropriate method of calculating damages. Sony's case is that the Stock Loss Basis is the appropriate method of calculating damages.

257. In my judgment, the Fire Related Basis is the appropriate method of assessing damages in this case. Sony was in breach of the Logistics Contract in failing to take reasonable measures to prevent the break-in at the warehouse and damage caused by the fire. The fire destroyed 2E's goods and the warehouse. 2E did not have any proprietary interest in the warehouse but Sony had a contractual obligation to keep the goods at the Enfield warehouse. Further, it was not just a storage facility; it enabled Sony to provide the automated processing and distribution services forming part of its contractual obligations. The case pleaded and argued by 2E was that the fire (and not just the loss of stock) caused its losses. The direct and natural result of Sony's breaches were the lost profits, business interruption losses and additional costs incurred by 2E.

258. The forensic accountancy experts agreed that the Fire Related Basis of assessment should put 2E in the position as if the fire had not occurred; that is, a calculation of the losses that 2E would not have suffered but for the fire. They agreed that a reasonable approach to calculating that loss would be:

    i) comparing forecast sales with actual sales, subject to testing the forecasts for accuracy;

    ii) comparing expected levels of returns with actual returns, caused by bulk stock deliveries after the fire;

    iii) using the historical levels of gross margin and royalty costs;

    iv) increased freight and handling costs during the loss period.

259. Following the fire, Jemal Guerrero, the assistant head of insurance at the BBC, instructed Clyde & Co solicitors, Gerald Williams of Fitzgerald Consulting as loss adjuster and Jamie Sparrow of C Lewis & Company as forensic accountant to compile and present the insurance claim to Travelers. Mr Ben Hobby of RGL Forensics was engaged by the insurers to carry out a loss adjustment exercise to assess the business interruption loss claim by 2E. The adjusted loss was agreed and paid to 2E in the sum of £7,476,404 less the insurance claim excess. Such an assessment by an independent third party is a good indication as to the reasonableness of the payment but the quantum remains subject to scrutiny in respect of the applicable test to determine loss and supporting evidence: *Brit Inns Ltd v BDW Trading* (2013) 145 Con LR 181 per Coulson J (as he then was) at [56]-[58].

260. Mr Hodgen's assessment of the losses on the Fire Related Basis was £8,975,366. Mr Jensen's assessment on the Fire Related Basis was £5,420,613, subsequently revised to £6,036,677.

261. It is not necessary to resolve the differences between the experts on their calculations because both assessments exceed the contractual cap of £5 million. However, for completeness, I address briefly the issues of principle between the experts on the Fire Related Basis, namely:

i) new releases;

ii) returns and markdowns; and

iii) advanced royalties.

262. Mr Hodgen's opinion was that the appropriate period of loss was the entire period over which the actual profits diverged from those that would have been achieved but for the incident. For sales, that period was August 2011 to January 2012. Mr Jensen's opinion was that the gross sales loss resulting from the fire should only be considered for the period between August and October 2011. By October 2011, any affected new release titles would have been reinstated and from 1 November 2011 the distribution of new release titles was outsourced to Cinram, alleviating the distribution constraints.

263. On this issue, the evidence of Mr Ogilvie was that:

> "… the logistics problems occurred from the date of the fire through till Christmas. The manufacturing problems occurred from the date of the fire until approximately the end of October…
>
> The vast majority of stock … was available from manufacturing by the end of October. The issues then became distribution issues. …"

His evidence as to the continuing logistics difficulties, even after some, but not all, new releases were distributed from Cinram, was supported by the decision by Amazon to switch off its automatic ordering from 23 November 2011. I am satisfied on the evidence, that 2E continued to suffer lost sales on new releases as a result of Sony's breaches, until January 2012. Therefore, the period used by Mr Hodgen in his calculation of the Fire Related Basis was correct.

264. Following the fire, some of the bigger customers agreed to increase the volume of orders with less frequent shipments in an effort to reduce the risk of stock shortages caused by distribution problems. Most customers bought on sale or return terms. The larger orders resulted in a higher level of returns. The experts agreed that calculation of the losses on a Fire Related Basis should take account of the higher level of returns, as they affected the overall sales achieved. In cross examination, Mr Jensen agreed that there was a large increase in returns in March, April and May 2012 but that he did not take account of such increased returns in his calculation of lost sales in his report because he erroneously identified what he thought were anomalies in the accounts. However, he accepted that he had failed to note that there would be a time lag between sales and returns, and he failed to note that the spreadsheets of returns included markdowns. He agreed that whether the figures represented returns or mark-downs, they would reduce the value of sales.

265. Mr Hodgen allowed for advance royalties that were wasted because the goods were not sold as a result of the fire. In cross-examination Mr Jensen accepted that potentially this would be a wasted expense but he did not have sufficient information to assess the loss. I accept the figures produced by Mr Hodgen for this wasted expense, following his interrogation and analysis of the RGL loss adjustment exercise.

266. If, contrary to my finding, the Fire Related Basis is not the appropriate basis of assessment, damages should be assessed using the Stock Loss Basis, that is, the loss of profits that would have been earned on the stock lost in the fire, less credit for profits actually earned from replacement stock: *Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd* [2008] EWCA Civ 955 per Rix LJ at [36]-[49].

267. The forensic accountancy experts agreed that the Stock Loss Basis of assessment should include consideration of the following factors:

    i) the specific titles held within stock at the time of the fire;

    ii) the saleability of those titles;

    iii) the duration of time the titles were unavailable for sale;

    iv) when the expected sales of the affected titles would have taken place;

    v) the impact of stock being unavailable for periods when it was the most recent version and being superseded by later versions when it might have been replaced;

    vi) decisions made by customers interested in affected titles to either defer purchases or purchase an alternative title in its place;

    vii) any other loss mitigation measure adopted by the parties.

268. In calculating the Stock Loss value, the experts agreed that:

    i) the figures for the stock destroyed and sales price of such stock should be based on 2E's records;

    ii) if it were not possible to determine on a stock line by stock line basis the cost of sales and royalties saved, it would be reasonable to base them on historical levels of gross margin and royalty costs.

269. Mr Hodgen's assessment of the losses on the Stock Loss Basis was £3,642,309. Mr Jensen's assessment on the Stock Loss Basis was £1,310,186, subsequently revised to £1,283,074.

270. The differences between the experts on the Stock Loss Basis of assessment were as follows:

    i) methodology and time period for assessment;

    ii) credit for sales unrelated to stock lost in the fire;

    iii) returns and markdowns.

271. Mr Hodgen considered that the loss of profits should be the loss flowing from the loss of the stock in the warehouse at the time of the fire and as a result of the fire; the time period for the loss would be from the date of the fire until the date when actual sales were back in line with forecast sales, such that there was no ongoing loss of sales as a

result of the fire. Mr Jensen considered that the loss of profits should be the loss directly flowing from the loss of the stock in the warehouse at the time of the fire; the affected time period should be limited to the period during which the stock was unavailable and that sales losses did not continue beyond the date when stocks either were or could have been replaced.

272. Mr Ogilvie's evidence was that by the end of August 2011 the top new release titles had been replaced. Because almost all of the new release titles were not planned to be sold until November 2011, they were not affected by the loss of any stock in the fire.

273. Further, Mr Ogilvie's evidence was that by the end of October 2011 the stock lost in the fire had been replaced:

> "A. By the end of October, the stock problems were mostly resolved, to a large extent, and the problems then continued to be distribution. But they were problems on both stock and distribution in the period between the fire and the end of October…
>
> Q. You say: "Please note we are now at a point where we are not tracking lines as we are in virtual normal supply situation regarding incoming stock." So, this is consistent with that you were saying, that pretty much towards the end of October you had most of the stock rebuilt after – that was destroyed during the fire.
>
> A. We had completed the manufacturing element of the recovery, yes."

274. In cross-examination, Mr Hodgen accepted that this evidence showed that the summer build stock was replaced by mid-end October 2011:

> "Q. … we know that the majority of the summer stock rebuild had actually come into the warehouse prior to the fire, don't we?
>
> A. Yes.
>
> Q. So if you're asking what was in the warehouse at the time of the fire and what was the position in mid-October, when you say, as Mr Ogilvie does and Mr Hobby says, that it's back up to the same level, that considers the summer rebuild, doesn't it?
>
> A. But there would still be normal production in September – the rest of August, September and October that would not – that would effectively have just gone to replace the summer build rather than being the additional stock that they needed.

> Q. The whole point about the summer rebuild is you're freeing up capacity in September and October, November, to do the new releases.
>
> A. Yes.
>
> Q. So the stock in the warehouse at the time of the fire is likely to reflect what they were anticipating to have, say, at mid-October.
>
> A. It's an opportunity when things are relatively quiet to build up the stock. It doesn't necessarily give you all you will need for later. It seems a very sensible approach to adopt you know, to a seasonal business.
>
> Q. You accepted that they are prioritising the summer rebuild, their top lines, yes?
>
> A. That would make sense and I think they did do that.
>
> Q. They do that, and so you've accepted that upon the re-stock post-fire they're going to be focusing on the same lines.
>
> A. Yes.
>
> Q. So when Mr Ogilvie tells us that by the time of mid-October, end of October, they're back to where they would have been, that takes into account the fact that they were already prioritising the top lines and then prioritising again the rebuild. So there's not going to be any material difference between what could have been on the notional October date without the fire, and what actually was in there post-fire?
>
> A. If we're talking about the lines that they prioritised for a place, then I would probably agree with you… "

275. Thus, on the evidence, 2E achieved full mitigation of the lost stock in the fire by end October 2011. Thereafter, sales losses were caused by disruption to logistics flowing from the loss of the Enfield distribution facility. I accept Mr Jensen's approach to the Stock Loss Basis, namely, that there was no impact on sales post end October 2011.

276. Mr Jensen accepted in cross-examination that he wrongly failed to offset losses against gains, when assessing lost sales against forecasts, subject to a cap at the value of the stock lost in the fire. He accepted that it was not appropriate to include in his calculations a credit for increased sales of stock not in the warehouse at the time of the fire. As a result, he under-estimated the true difference between forecast and actual sales.

277. Mr Jensen accepted that he should have accounted for mark-downs and returns in his assessment on the Stock Loss Basis as above.

Conclusion

278. In conclusion, for the reasons set out above:

i) Sony failed to carry out adequate security risk assessments and take reasonable security measures at the warehouse;

ii) Sony failed to carry out adequate fire risk assessments and take reasonable fire precautions at the warehouse;

iii) The fire, loss of the stock and loss of the Logistics Services were caused by Sony's said failures and did not amount to force majeure;

iv) Sony is liable to 2E for breach of the Logistics Contract; further, Sony is liable for loss of the goods as bailee and/or in conversion and/or at common law;

v) Sony's losses are not excluded or limited by the terms of the Logistics Contract, save that clause 10.4 imposes a contractual cap of £5 million;

vi) The claimants are entitled to damages against Sony, limited to the contractual cap of £5 million plus interest.