OUTER HOUSE, COURT OF SESSION

[2026] CSOH 110

CA79/25

OPINION OF LORD LAKE

In the cause

P B DEVELOPMENT COMPANY LIMITED

Pursuer

against

INTACT INSURANCE UK LIMITED (formerly known as ROYAL & SUN ALLIANCE INSURANCE LIMITED)

Defender

Pursuer: Murray KC; Ledingham Chalmers LLP
Defender: Dean of Faculty KC et Breen; DAC Beachcroft Claims Scotland LLP

11 November 2026

[1] The pursuer owned and operated a restaurant in Aberdeen called Vovem Meat & Liquor. In March 2024 they entered into a contract of insurance with the defender. One of the perils covered by the contract was fire. On 26 September 2024 a fire occurred at the restaurant which caused extensive damage. The fire arose from of a piece of equipment known as an ox grill. In the joint minute of agreement this was described as, "a stainless-steel cooking appliance designed for burning solid fuel to chargrill food". To use it, a mixture of wood and charcoal was placed in a "wood -cage" to the rear and was lit. Once the fuel was burning, it was raked forward as required onto a tray above which there

was a metal grill. More wood and charcoal were raked forward as needed from the cage to the tray, and wood was also added directly to the tray. Food was placed on the grill to cook and the distance between the grill and the fuel bed on the tray could be altered by rotating a handle which lifted or lowered the grill element. The equipment was enclosed on three sides by refractory brick.

[2] Above the ox grill there was extraction equipment, which was described in a report from Stephen Andrews, an expert witness instructed by the pursuer. His description was not disputed. The first element was a stainless steel canopy over the ox grill. At the top of the canopy there were filters (sometimes referred to as baffles) and then ductwork that led eventually to the terminal riser from which the fumes were vented to the atmosphere. Rising vertically from the from the filters on the canopy, the duct almost immediately turned to the horizontal and after another short distance turned ninety degrees to the right where it was joined by another duct coming from a canopy over another cooking area. The combined duct ran for a short distance before turning another ninety degrees to the vertical and, shortly after, turning again to the horizontal.

[3] After the fire, the pursuer sought to make a claim under the policy but the defender disputed liability on the basis that the pursuer had not complied with a condition precedent in the policy. The pursuer therefore raised this action against the defender. I heard a proof before answer under exception of issues of quantum over 3 days.

[4] Initially there was a dispute between the parties as to which version of the policy schedule was incorporated into the contract between the parties. However, by the time of submissions the pursuer had changed position and agreed with the defender as to which version applied. The terms of the policy on which the dispute focuses are as follows:

(a) In the Business Combined Policy Schedule:

"**TRA005 Kitchen condition**

This clause applies to Property Damage Insurance section in this Policy

Where cooking equipment is used at the Premises attention is drawn to the 'Kitchen Equipment' conditions detailed in 'Requirements which the Policyholder must comply with to prevent loss or Damage' section in this Policy wording"

(b) In the Business Combined Policy document:

"**Kitchen Equipment**

It is a requirement of this Insurance under Property Damage and Business Interruption Insurance by Cover 1 Fire, smoke, and explosion that where cooking equipment is used at the Business Premises

1 all cooking equipment is operated and serviced in accordance with the manufacturer's instructions

2 all cooking equipment is not left unattended whilst the heat source is operating and the power or fuel supply to such equipment is shut off outside working hours

3 all frying equipment are fitted with cooking thermostats arranged to prevent the temperature of fat rising above 205 degrees centigrade or the manufacturer's recommended temperature and such thermostats are serviced at least once in every 12 month period

4 all cooking equipment hoods grease traps filters and other grease removal devices are cleaned at least weekly

5 all extract ducting is inspected and cleaned by professional contractors with reports issued at least:
   A) once every three months if frying equipment are used more than 12 hours a day
   B) once every six months if frying equipment are used between 6 and 12 hours a day
   C) once every twelve months if the frying equipment are used up to 6 hours a day

6 all inspection and cleaning reports are kept in a safe place away from the Premises and be available for inspection

7 a minimum of one Class F fire extinguisher conforming to BS7937 and a fire blanket conforming to BS EN 1869 is located in each cooking area

> **Failure to comply with any of these requirements will result in the Company not paying the Policyholders Property Damage or Business Interruption claim.**"

The bold emphasis is in the original.

[5] It is apparent from the submissions of parties that the following issues arise:

1. Is the Kitchen Equipment clause a condition precedent to liability?
2. If it is a condition precedent, was the pursuer in breach on 26 September 2024, the date of the fire?
3. If the pursuer was in breach, does the Insurance Act 2015, section 11, apply so that the defender may not rely on non-compliance to exclude liability?
4. If the Kitchen Equipment clause is not a condition precedent but was breached, what consequence does that have?

These issues can be considered in turn.

Is the Kitchen Equipment clause a condition precedent to liability?

[6] In support of the position that the Kitchen Equipment clause was a condition precedent, counsel for the defender placed emphasis on the express statement in the policy that non-compliance would result in a claim not being paid. Reference was made to Colinvaux & Merkin, *Insurance Contract Law*, paragraph B-0101 where it is noted that if the policy specifically states that a failure to comply will give the insurer a right or entitlement to refuse to pay the claim, the condition will be treated as a condition precedent to liability. The pursuer described the defender's argument as a "two dimensional" approach. It was submitted that it was necessary to take a commercial approach to interpretation rather than a literal one and I was referred to *Sirius Insurance Co* v *FAI Insurance* [2004] UKHL 54, [2004] 1 WLR 3251, *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173,

Arbuthnott v *Fagan* [1996] LRLR 135, and *HIH Casualty & General Insurance* v *Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161. It was accepted that the use of the words "must comply" and "will result" are in general capable of constituting a condition precedent but it was suggested that it did not do so here because (i) the degree of vagueness in the terms in the second sub-paragraph suggested that it was not intended to be a strict obligation, (ii) compliance would be commercially unworkable and (iii) it was not responsive to risk in that it would apply equally to electric appliances such as ovens with thermostats and it would not be necessary to have an oven watched constantly. Also, it was not described as a condition precedent in the policy and the nature of it was such that damages would be an adequate remedy if it was breached.

[7] The words of the Kitchen Equipment clause are quite clear and I do not consider that there is any real doubt that a reasonable person reading them would have understood them as meaning that compliance was necessary if a claim is to be paid such that it is a condition precedent to liability. This is an issue of interpretation of the documents making up the contract of insurance (*HIH Casualty*, paragraph 101). The approach that should be taken by the courts to this issue has been considered in a number of authoritative cases in recent years. In *Ashtead Plant Hire* v *Granton Central Developments* 2020 SC 244, in summarising the correct approach to take to this issue, Lord Drummond Young adopted what had been said in the judgment of Lord Clarke of Stone cum Ebony in *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, paragraph 14, as follows:

> "[T]he ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant . . . . [T]he relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Although it is correct for the pursuer to note that the courts have moved away from rigid literalism, the requirement to seek a commercially sensible construction or business common sense is based on the idea that doing so is more likely to give effect to the intention of the parties. It is therefore something that can be considered along with the language. The arguments for the pursuer do not take this approach. They take no account of the language. They do not ask what a reasonable person knowing of the background circumstances would have taken them to mean.

[8] In *HIH Casualty*, Rix LJ noted that the presence or absence of the terms "warranty" or "warranted" were not conclusive (paragraph 101) to the status of a term. It does not matter that a clause is not described as a condition precedent if a reasonable person considering the terms would have understood that that is what it was. Similarly, vagueness or ambiguity about a requirement does not prevent a clause from being a condition precedent provided that when the terms are construed it is clear that that was the intention. When it comes to interpreting the obligation that is the substance of a clause, the court may have regard to the fact that in terms of the agreement it has been made a condition precedent to liability. In that context, they may seek to ensure that the clause does not flout business common sense by, for example, imposing a requirement that would deprive the contract of purpose, but I do not consider that making a term a condition precedent has this effect itself. The wording could hardly be clearer as to the consequences of non-compliance with the clause and nothing that the pursuer has said about the effect of the clause can overcome this. For completeness, I do not think that damages would be an adequate remedy for breach of the clause if it is not a condition precedent. It is material to the issue of risk of fire and therefore to the scope of the obligation that was undertaken by the defender.

If it is a condition precedent, was the pursuer in breach on 26 September 2024, the date of the fire?

[9] The pursuer submits that if the term is a condition precedent and the defender wishes to found on a breach of it to resist liability, the onus is on it to establish the breach. I agree with this. There are three components to the issue of whether there has been a breach of the clause; what is the meaning of the requirement in sub-paragraph 2 of the Kitchen Equipment condition that cooking equipment is "not left unattended", what occurred in the kitchen on 26 September 2024 and whether what happened amounts to leaving the ox grill unattended.

Meaning of "not left unattended"

[10] Mr Wisekal, an expert witness for the defender, gave evidence as to what he considered was meant by "unattended" for the purpose of the clause. He said that it depended on the nature of the appliance, the regime for cleaning, and training. He also referred to guidance entitled "RC68: Recommendations for fire safety in catering establishments" published by the Fire Protection Association for a view as to what was meant by "unattended". To the extent that this evidence was directed to have a bearing on interpretation of the clause I did not find it to be of any assistance. The issue of what it means is a matter of law and, as such, it is not something on which direct evidence from a witness – expert or otherwise – as to their view has a role to play. The publication from the Fire Protection Association is not incorporated into or referred to in the policy document and there is no evidence that it was even known to the parties when the contract of insurance was concluded. I should add that in submissions, the defender contended that the Fire Protection Association recommendations were intended for the different purpose of

demonstrating that the purpose of the condition in question was to reduce the risk of fire and demonstrate that non-compliance would increase the risk of the loss. I address that issue below.

[11] As the meaning of "left unattended" is an issue of interpretation of contract, the authorities referred to above apply. I was also referred to previous cases in which terms imposing similar obligations had been considered by the courts. In *Pratt* v *Aigaion Insurance Co SA (The Resolute)* [2008] EWCA Civ 1314, a policy term required that the owner or skipper of a boat and one crew member would be on board and in charge "at all times". A fire occurred while the vessel was docked. There was no-one on board at the time of the fire, although the intention was most of the crew would return that evening and would be taking the vessel out again the next day. In the Court of Appeal, Sir Anthony Clarke MR (as he then was) viewed this as an issue of interpretation of contract and applied the decisions as to interpretation of contracts in *Investors Compensation Scheme*, *Sirius Insurance Co*, *Charter Reinsurance* v *Fagan* [1997] AC 313, and *BCCI* v *Ali* [2001] UKHL 8, [2002] 1 AC 251. He had regard not only to the wording that had been used in the obligation but also the circumstances in which it was used. In the circumstances, he did not think that the principle that the court should be consistent in its approach to policy wording was of assistance (paragraph 23). He considered that the apparent purpose of the clause was to have someone on board who could guard against navigational hazards. Having regard to that purpose, he concluded that the clause should not be given its literal meaning and, as the vessel was in dock at the time of the fire, that there was therefore no breach.

[12] The defender referred me to *Starfire Diamond Rings* v *Angel* [1962] 2 Lloyds Rep 217 where jewellery was stolen from a car parked in a lay by. The driver of the car had walked approximately 34 meters away and behind some bushes to urinate. The policy said that the

insurers would not be liable for theft from cars left unattended. Lord Denning MR said that the term "left unattended" was not capable of precise definition and had to be approached in its ordinary sense. He said that being "attended" meant that someone was able to keep the item in question under observation and would have a reasonable prospect of preventing any unauthorised interference. He noted that the driver would not have had sight of the car as he walked away from it and while he was behind the bushes. Upjohn LJ notes that the driver was absent for about a minute and a half. All three members of the court concluded the car was unattended at the time of the theft. The defender notes that this analysis has not been challenged in 60 years and was followed in *Milton Furniture Ltd* v *Brit Insurance Ltd* [2015] EWCA Civ 671. The issue there was that there was a condition precedent requiring that a burglar alarm be put into operation whenever the premises were left unattended. The premises insured consisted of a large warehouse, a two-storey office block, a reception area, a workshop and a dwelling house attached to the warehouse and office by a link building. A fire was started at a time at which two persons were asleep on the premises – one in the house and one in the link. The alarm was not set, and one issue was whether the premises were unattended such that the contract required that it should have been. Gloster LJ adopted what had been said by Lord Denning MR in *Starfire,* that the clause required both that someone was present and giving the buildings some attention. She took account of the apparent purpose of the clause which was, "to require a level and degree of actual attention to be given to the insured property".

[13] The defender submitted that when interpreting insurance contracts, the state of the law is a matter to be taken into account and that this may mean that a word or term has a settled meaning. In this regard, I was referred to MacGillivray, *Insurance Law* (16th ed), paragraphs, 11-002 to 11-003. This notes, by reference to authority, that the person seeking

insurance is taken, "to be familiar with the basic principles of insurance law and the meaning which has been put on phrases used in insurance contracts by consistent judicial authority". Although the authority in question is from the Court of Appeal and must carry significant weight, in my view this deemed knowledge is inconsistent with both the letter and spirit of *Investors Compensation Scheme* and binding authority such as *Ashtead*. I consider that it is preferable to do as Sir Anthony Clarke MR did in the decision of the Court of Appeal in *Pratt* and apply the general rules of contract interpretation. It is not, however, necessary for me to attempt to reconcile the two approaches as, as a result of applying the principles from *Ashtead*, I reach the same conclusion as was reached in *Starfire*. In the context of insuring restaurant premises, a warranty which is specifically said to pertain to loss caused by fire, smoke, and explosion and which requires that cooking equipment is not left unattended when the heat source is operating is clearly intended to have the effect of reducing the risk of fire. To that end, stipulating that when the heat source is operational the equipment may not be left unattended can be taken to be intended to ensure that there is someone who will remain aware of what is happening and who will be in a position to intervene with a view to preventing or minimising damage if something goes wrong. In addition, for what it is worth, this is consistent with the definition of the verb "attend" in the Concise Oxford Dictionary as, "'direct ones' care to (a matter), look after, tend, guard (something)".

The warranty seeks to ensure that the equipment is looked after or tended when operating.

What took place in the kitchen

[14] Turning then to what happened in the kitchen on 26 September 2024, there were two security cameras covering the kitchen area and the footage from both was shown in the

proof which made it straightforward to determine. In general, they show an active commercial kitchen. One of the staff members can be seen lighting the ox grill. He then leaves and a colleague takes his place and can be seen tending it from time to time. He does not watch it constantly and is engaged on other duties by way of food preparation for that day. For a short period, he leaves the room. Other kitchen staff were working in the kitchen and other employees were working in the dining area. From the dining room it was possible to look across the pass on which food was sent out by the kitchen to the dining area and get a good view of the ox grill. Parties helpfully agreed what can be seen in the video footage in the following passage from the Joint Minute;

"Time	Event
11:00.16	James Blagden ('JB') loads 3 shovels of charcoal into the right Ox Grill, followed by handfuls of wood.
11.01.41	JB places a flaming blowtorch against the fuel in the Ox Grill.
11:02.20	JB leaves the kitchen and goes to the first floor.
11:04.06	Talent Emanuel ('TE') walks past the Ox Grill
11:04.40	JB returns to the kitchen and removes the blowtorch from the Ox Grill.

11:05.23	JB leaves the kitchen and goes into the restaurant. Ross Keith ('RK') is at the pass, speaking to someone in the restaurant.
11:08.44	RK walks from the pass to another part of the kitchen.
11:14.27	RK continues to work in the kitchen. He looks over his shoulder at the Ox Grill.
11:15.12	RK walks by the Ox Grill to the meat prep section. He then returns to the main kitchen prep area.
11:25.52	Kenny McKay ('KM') arrives at the pass and collects some tools, before returning to the larder area in the rear of the kitchen.
11:26.51	RK walks past the Ox Grill. At 11:27.09, he throws a piece of blue tissue roll onto the fire. He returns to the kitchen prep area.
11:32.48	RK walks to the pass and returns to the prep area.

11:32.53	Embers can be seen in the air above the ox Grill.
11:32.58	Embers can be seen in the air above the ox Grill.
11:33.08	Embers can be seen in the air above the ox Grill.
11:34.21	Camera A footage begins. Kieran Mitchell ('KAM') is standing at the pass.
11:34.22	RK approaches the Ox Grill and speaks to KAM across the pass.
11:34.41	RK begins to add wood to the Ox Grill.
11:35.29	KAM is at the chef's table in the restaurant.
11:36.29	RK completes stoking of the Ox Grill and returns to the kitchen prep area.
11:38.07	Kenny Mackay walks to the pass, turns around and walks past the Ox Grill
11:39.34	KAM leaves the restaurant and enters rear corridor.
11:41.29	Diogo Marques ('DM') enters the restaurant by the pass and walks towards the front of the restaurant.

11:41.30	RK leaves the kitchen and goes to the first floor, where he arrives at 11:42.45. He remains there for 1 min 15 s.
11:42.35	KAM enters restaurant. He collects menus and stands at the chef's table, wiping them down.
11:43.36	DM walks back through the restaurant.
11:43.49	Burning drops of fat fall from the canopy above the Ox Grill.
11:44.07	Burning drops of fat fall from the canopy above the Ox Grill.
11:44.11	RK enters kitchen
11:44.12	DM enters kitchen
11:44.14	RK enters the kitchen. He begins to spray the canopy with solution in a plastic bottle.
11:44.15	DM and RK are by the Ox Grill.
11:44.36	Kenny Mackay comes to look at the Ox Grill.
11.44.37	RK sprays the canopy with a solution in a plastic bottle. Smoke develops.
11:44.40	KAM checks the fire control panel.

11.45.03	MW arrives in the kitchen and takes a portable fire extinguisher.
11:45.09	RK uses a rake to move burning fuel around in the Ox Grill. DM leaves the kitchen
11:45.32	Martin Watson ('MW') and KM arrive at the first floor porter room with portable fire extinguishers. Smoke is issuing from the boiler room. Both use portable fire extinguishers on the fire and leave the first floor at 11:46.27.
11:46.06	Julie McConnachie called 999. A 53 second call.
11:46.25	RK removes logs from the cage at the rear of the Ox Grill
11:46.41	KM leaves the control panel and returns to the restaurant & uses his phone to call 999.
11:46.18	DM enters the restaurant from the kitchen. He walks to the fire control panel to speak to KAM.
11:47.04	MW returns to the first floor with another fire extinguisher and uses it on

	the fire in the boiler room. The smoke in the first floor substantially increases.
11:47.31	DM returns to the Ox Grill. He and RK spray the Ox Grill with water bottles.
11:48.19	RK pours a bowl of water over the fire in the Ox Grill. He and DM resume using spray bottles.
11:48.59	DM and RK evacuate the kitchen.
11:49.04	Andrew Duthie arrives on restaurant floor
11:50.08	Smoke".

[15] With the exception of Andrew Duthie and Julie McConnachie, all the persons mentioned in the summary were employees of the pursuer. In addition to this summary, the evidence of fact from people who witnessed what happened on the date of the fire may be summarised as follows:

(a) Mr Blagden was the sous chef. On the day of the fire, he left Vovem after he had lit the ox grill as he was required to work in a sister restaurant, the Howff.

(b) Talent Emmanuel was a kitchen porter and that day he cleaned the canopy and the baffle filters before any cooking started.

(c) Ross Keith was Chef de Partie and, as can be seen from the summary, he was the person who actually undertook activity in relation to the grill after Mr Blagden left. He did not spend all of this time working at the grill, however. He carried out various tasks in the kitchen. While doing some of

these, the grill would have been within his sight and at other times he looked across to it although his evidence was that it was out of his sight at other times. He accepted that at times there was no-one at or watching the grill although he said there was "nearly always" someone that could see it. There is a period of approximately 2 minutes and 45 seconds (from 11:41.30 to 11:44.14) during which he is not in the kitchen at all. He said that when he came back into the kitchen at the end of that period, Diogo Marques said he smelled smoke that was different from normal. He went to the grill to check it. In his affidavit, he said that the flames were reaching the vent and canopy filter and appeared to be inside the canopy. In his oral evidence, he said that there were flames on the canopy. He said that this was not unusual but that he thought he would be able to put them out. To that end, he sprayed the flames with water. The flames were extinguished and he thought there was not any further fire. He had worked with the grill for 4 years and did not think there was an emergency. He said that having viewed the video footage, there was nothing that would have caused him concern had he been standing at it. He did accept, however, that if someone had been at the grill and seen the burning fat falling, they could have used the fire extinguisher provided.

(d) Kenny MacKay was a prep chef. He was engaged in preparing for the upcoming meal service. He was in the kitchen for the whole of the period covered by the summary. The evidence was that he walked past the grill from time to time in the course of carrying out his work but did not have a constant direct line of sight to it.

(e) Keiran Mitchell was a Duty Manager. From 11.00am he was engaged in setting up the restaurant area. He was working in the restaurant a few meters away from the pass and, if he looked into the kitchen, had a view of the ox grill. His evidence was that he could still see the grill even if he moved further into the restaurant. He said that he did not have any concern about the flames from the grill he saw that day. He said he did not see the burning fat seen falling but, even if he had, it would not have caused him concern as it happened from time to time. He said that he observed the grill several times in the 5 minutes or so before the fire started but, in the context, I understand this as meaning 5 minutes before he became aware of the fire.

(f) Diogo Marques was also a Duty Manager. Mr Marques gave evidence that after the fire alarm had gone off and he had gone outside and seen smoke coming out of the building, he went in and joined Mr Keith in spraying water on the extraction canopy over the ox grill. This would tie in with the entry for 11:47:31 in the table above. By that time, he had been told that the fire upstairs was bad but he said that when he looked up into the canopy no fire was visible. He said that he did not see anything abnormal with the ox grill or canopy. He was aware of the fire upstairs but did not think that the grill had started it. He stated that he sprayed water to extinguish the fire at the grill as it was apparent that they would not be able to open for service because of the fire upstairs. I reject his evidence as to the reason for spraying water. He was assisting Mr Keith with what he had already started. As noted above, this was to spray the canopy in order to extinguish flames there rather than the put out the fire in the grill. The fire on the grill was extinguished later with a bowl of water.

(g) Julie McConnachie is a legal secretary who worked for a legal firm with offices next door to Vovem. She said that she saw smoke coming from the roof of the kitchen of Vovem and an orange flicker through frosted windows. As noted in the summary, she made a call to the emergency services at 11:46.06.

(h) Andrew Duthie is a solicitor who worked the same firm. He gave evidence that at 11:45 he and Ms McConnachie could see flames and black smoke coming out of the roof of the restaurant building. He went and spoke to staff in the restaurant. He said that from what they said it was apparent that they were not aware the roof was on fire.

With the exception I have noted concerning the reason for Mr Marques spraying water, I found all witnesses to be credible and reliable and accepted all the evidence that I have narrated. The issue is then whether this meant that the grill was "left unattended".

[16] Having regard to the evidence, I agree with the submission for the defender that from time to time prior to discovery of the fire, the ox grill was unattended. For the grill to be "attended" does not require that a person is standing directly in front of it giving it his or her full attention, but it does not suffice merely that there is someone in the vicinity as contended for the pursuer. A person needs to be in a position to look after or tend to the grill for them to be attending on it. No one was in such a position when Mr Martin went upstairs and the same is true when he was engaged at the prep area (11:36.29). In the period between then and the point at which Mr Keith started spraying the canopy (11:44.14), the grill was unattended. The same was the position earlier in the period between 11:14.27 and 11:34.41. I therefore conclude that the condition precedent was not complied with.

Does the Insurance Act 2015, section 11, apply so that the defender may not rely on non-compliance to exclude liability?

[17] The relevant part of section 11 of the Insurance Act 2015 is in the following terms;

> "(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following:
>
> (a) loss of a particular kind,
> (b) loss at a particular location,
> (c) loss at a particular time
>
> (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
>
> (3) The insured satisfies this subsection if it shows that the non-compliance with the term could not increase the risk of the loss which actually occurred in the circumstances in which it occurred."

[18] The pursuer submitted that it had been demonstrated that the non-attendance that amounted to non-compliance with the Kitchen Equipment clause had not increased the risk of fire in the circumstances in which it occurred. They noted that the evidence of the staff was that the flames from the fire in the grill which could be seen on the CCTV video were not unusual and would not have caused any staff member seeing them to take action. In addition, they submitted that the fire arose in concealed ducting and would not have been visible to any person attending on the ox grill. If the person attending could not see the fire, they would not be able to take action in relation to it with the result that the risk of loss would not be reduced. The defender submitted that the pursuer had not met the test in subsection (3) and argued that the fire started in the canopy rather than the duct. Had someone been in attendance at the grill, the risk of fire originating in the canopy and spreading to the ductwork would have been reduced. For the defender it was submitted that it was in this context that RC68 Recommendations for Fire Safety in Catering

Establishments is relevant as demonstrating the connection between there being a person in attendance at the equipment and the reduction of risk. It was submitted that the whole purpose of the condition was to reduce the risk of fire.

[19] Both parties noted that there was little authority on the application of section 11. The pursuer referred me to *Lonham Group Ltd* v. *Scotbeef Ltd & Anr* [2025] 1 CLC 328 but recognised that it did not address the meaning of section 11(3). The defender referred me to *Mok Petro Energy FZC* v *Argo (No. 604) Ltd* [2024] Lloyd's Rep IR 585 but recognised that the comments there were obiter. The defender also referred me to the Explanatory Notes to the 2015 Act, paragraphs 95 and 96, MacGillivray, *Insurance Law* (16th ed, at 10-123), and the Report of the Law Commission and the Scottish Law Commission, Scot Law Com No. 238, which had eventually led to the 2015 Act.

[20] I agree with the submissions that there was little that can be drawn from the material cited to me. Nothing can be taken from *Lonham Group* and there is only brief consideration of section 11 in *Mok Petro*. All that can be taken from it is that Dias J took the view that when assessing whether non-compliance increased the risk of loss that actually occurred for the purpose of subsection (3), it was not sufficient to consider only the manner of non-compliance which had actually occurred. Instead, it was necessary to consider how any breach of the clause would contribute to risk. She concluded that if the clause as a whole was capable of minimising the risk, section 11 would not preclude reliance on it (paragraphs 174 and 175).

[21] The Report of the Law Commissions had a draft Bill appended to it which did not include a clause in the terms that became section 11(3). The contents of the Report can shed little light on a clause that did not exist when it was written and I do not find them to be of

assistance. The Explanatory Notes are expressed in a very confusing manner which makes it difficult to be clear about what is intended. Paragraph 96 states,

> "A direct causal link between the breach and the ultimate loss is not required. That is, the relevant test is not whether the non-compliance actually caused or contributed to the loss which has been suffered."

The first sentence begs the question, "required for what?" It would not be in the interests of the insured seeking to establish that a clause could not be relied on to establish such a direct causal link. It might be said that it was intended to mean that the insurer does not need to prove a direct causal link to enforce a clause, but section 11 does not impose an onus on the insurer to establish anything. Despite that, the second sentence is presumably intended to make it plain that to be entitled to rely on a failure to comply with a clause, an insurer need not show that the non-compliance caused or contributed to the loss.

[22] Turning then to the words of section 11(3), the issue is whether the pursuer has established that non-compliance with paragraph 2 of the Kitchen Equipment clause could not increase the risk of the loss which actually occurred in the circumstances in which it occurred. The reference in subsection (3) to "the circumstances in which it occurred" deals with the situation in which a risk is realised but the means by which it comes about is completely different from the one the clause seeks to address. By way of illustration, an insurance policy for a building - particularly an unoccupied one – might include cover in respect of fire. A clause in the policy might require that locks of a certain quality are maintained on all doors and windows. One purpose of this clause is to prevent people gaining access to the building and then starting a fire. The clause as to locks therefore does reduce the risk. If there was a failure to have appropriate locks, but a fire started as a result of faulty electrical wiring, the non-compliance with the requirement for locks could not have increased the risk of the fire that happened. The reference to "the circumstances in which it

occurred" addresses such a situation. Here, however, no such issue arises. The risk was fire and the means by which it actually occurred was the spread of heat and/or flame from the fuel bed of the grill. In my view the condition in the Kitchen Equipment clause was directed at both the risk that actually arose and the mechanism by which it actually arose. Put in the terms of subsection 3, it cannot be said that leaving the grill unattended could not increase the risk of fire arising as a result of spread of fire from fuel in the fire bed.

[23] The parties took different positions as to where the fire started and it is appropriate in this context to refer to the expert evidence led at the proof and the conclusions that can be drawn from it. Both parties led evidence from specialist forensic fire investigators – Stephen Andrews for the pursuer and Mike Wisekal for the defenders. Their evidence was taken concurrently. Both possessed the qualifications and experience to qualify them to give skilled opinion evidence. In their evidence, it was common ground that there had been a fire in the duct that occurred when substantial deposits of grease which had built up over time were ignited. There was some dispute as to how and when ignition occurred. For the pursuer it was said that the baffle filters fitted between the canopy and the ducts leading away from them are specifically designed as fire barriers. It was contended that the fire in the duct started when the heat of gases and fumes rising into it from the ox grill caused the accumulated grease deposits to reach a temperature at which they were subject to auto ignition. It was said that this occurred between 11:36 and 11:39.

[24] For the defender, it was submitted expressly that the time of ignition was immaterial but Mr Wisekal put the time of ignition at between 11:39 and 11:43. As to how the fire started, it was contended that the fire was initiated when flames from the materials burning on the ox grill reached the canopy and damper filters. Mr Wisekal said that while the baffle filters reduce the ingress of flames, they do not prevent it. He notes the eye-witness

accounts that the flames were "sticking to" the canopy and baffles and takes this to be an indication that grease which had accumulated on them was burning. He relies also on the evidence from the witnesses that the flames seen on the CCTV footage rising from the grill are larger than normal and the evidence that they had reached the canopy. He referred to a near miss incident which had occurred the previous day when kitchen staff, concerned at flames on the canopy, sprayed them with water. He considered that this meant that on that occasion the fire had not spread from the canopy into the ductwork.

[25] The evidence from Ross Keith and Diogo Marques is consistent there being fire in the canopy. There is no other explanation for them spraying water in this area in the hope of bringing matters under control. There is no dispute that fire did end up in the ducting above the baffle filter but before that, for a while at least, I find there was fire below the baffle filters under the canopy and they were able to take action in relation to it. Had there been no fire at the canopy, I would see force in the submissions for the pursuer that having someone in attendance could not have made a difference. However, on the basis of the evidence of Mr Wisekal, Mr Keith and Mr Marques and the CCTV footage of the near miss the previous day, I conclude that the fire started under the canopy rather than in the duct. Had there been someone in attendance who had seen this at an early stage, it is likely that they would have taken action and that might have prevented the fire spreading into the duct. That being so, the pursuer has not established that breach of the Kitchen Equipment condition by having the ox grill unattended while lit could not increase the risk of fire spreading from the canopy into the duct.

If the Kitchen Equipment clause is not a condition precedent but was breached, what consequence does that have?

[26] As I have concluded that it was a condition precedent, this issue does not arise.

Disposal

[27] In the circumstances, I sustain the second, third and fourth pleas-in-law for the defender, repel the pleas for the pursuer and grant decree of absolvitor.