IN THE HIGH COURT OF JUSTICE **Claim No: HC1104182**
CHANCERY DIVISION

BETWEEN:

EUROCREST VENTURES LIMITED

Claimant

-and-

ZURICH INSURANCE PLC

Defendant

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

25 April 2012

Basis of proceedings

1. The Claimant ("Eurocrest") is the assignee of a lease expiring in 2086 of two flats (which are sub-let to residential occupants) in premises on the first floor of 581C/587 Green Lanes, London ("the Building"). The freeholder of the Building, again by assignment, is Mr Ahron Halpern. Directly below the two flats are commercial premises leased by Mr Kenroy Lamond. In June 2007 those premises were partially flooded by water leaking through the ceiling below the Eurocrest flats, a leakage which is alleged by Mr Lamond to have continued for a substantial period. He commenced proceedings in the Central London County Court against Mr Halpern, alleging breach of the covenant of quiet enjoyment in his lease, nuisance for which Mr Halpern was said to be responsible, and negligence in a number of respects. Mr Halpern denied liability and issued Part 20 proceedings against Eurocrest, claiming an indemnity against any liability to Mr Lamond which he grounded on (a) breach of the covenant in Eurocrest's lease to keep the flat in good and substantial repair, (b) breach of a duty to Mr Lamond to avoid negligently creating the alleged nuisance, (c) breach of a duty to Mr Halpern to take reasonable care to ensure that the latter was not exposed to claims arising from breach of Eurocrest's duties to Mr Lamond, and (d) the Civil Liability (Contribution) Act, 1978. Both the primary claim and the Part 20 proceedings are listed for trial in the County Court on 30 April 2012.

2. In the meantime Eurocrest has commenced the present action, using the Part 8 procedure, in which it seeks a declaration that the Defendants ("Zurich") are obliged to indemnify it against Mr Halpern's Part 20 claim in the County Court, and the matter came before me for hearing with Eurocrest being represented by Colin Wynter Q.C. and Zurich by Andrew Rigney Q.C. The primary question is whether Eurocrest is entitled to the benefit of public liability cover contained in a policy taken out by Mr Halpern with Zurich ("the policy").

The policy

3. The Schedule to the policy shows *"The Insured"* as *"A Halpern"*; *"The Business"* as *"Property Owners"*; and *"The Premises"* as "*The premises of the Insured"* (defined as including the Building among other properties). It also states that the *"Sections Covered"* are *"A. Material Damage"*, *"B. Business Interruption"*, and *"C. Property Owners' Liability"*.

4. Section C of the policy, so far as relevant, reads as follows:

> *"The Insurers agree to indemnify the Insured ... in respect of all sums which the Insured shall become legally liable to pay as compensation for:*
>
> *<u>Public liability</u>*
>
> *(a) ...*
>
> *(b) accidental loss of or damage to material property*
>
> *(c) ...*

(d) ...

occurring ... in connection with the Business of the Insured."

Since the agreement of the Insurers was *"to indemnify the Insured"* and the indemnity was in respect of the sums which *"the Insured shall become legally liable to pay*" as compensation for loss or damage occurring in connection with the Business of *"the Insured"*, and *"the Insured"* was defined in the Schedule as Mr Halpern, Eurocrest faced a serious obstacle in contending that the policy covered the liability of any person other than Mr Halpern.

5. Eurocrest's argument was based on the Certificate of Insurance issued to confirm the renewal of the policy for each policy year. Against the side-heading *"Other interest clause"* the certificate stated:

> *"It is understood and agreed that the interest of various lessees in the Property Insured may be noted at the request of the Insured but only in respect of the parts of the premises demised by the lease to the individual tenant. The Insured undertake to declare the names, nature and extent of such interests at the time of the DAMAGE."*

This alludes to and in large part repeats Clause 21 of Section A (Material Damage) of the policy which is headed *"Other interests"* and reads:

> *"It is understood and agreed that the interest of various lessees, freeholders, mortgagees or debenture holders in the Property Insured are noted at the request of the Insured. The Insured undertake to declare the names, nature and extent of such interests at the time of the DAMAGE."*

Clause 4 of Section A reads:

> *""DAMAGE" in capital letters will mean loss or destruction of or damage to the Property Insured."*

6. Mr Wynter's submission on behalf of Eurocrest was that the reference in the certificate to the possibility of noting the interest of a lessee had the consequence that the policy was concluded for its benefit (even where – as here – the interest was not in fact noted) and that that benefit extended to all three sections. On that basis, he argued, Eurocrest was enabled by section 1(1)(b) of the Contracts (Rights of Third Parties) Act 1999 to enforce the public liability cover in its own right, even though - as Mr Wynter accepted - Eurocrest was not itself an insured. That contention faced a number of difficulties.

7. Firstly, the noting of an interest means no more than recording its existence. Its practical significance is to place the insurer on notice that the beneficial owner of the proceeds of any claim made by the Insured may be other than the Insured (which may well be why in this policy there is a positive obligation on the Insured to declare the names, nature, and extent of such interests at the time the claim arises, but only then), because of their interest in the property being insured. It does not give rise to an additional and separate insurance of the lease or mortgage interest as such.

8. Secondly, as one would expect from what I have just said, the noting of lessees' interests

is concerned solely with the cover against material damage under Section A of the policy. That is clear from the side-heading, which is manifestly a reference to Clause 21 of Section A.

9. Thirdly, section 1(1)(b) of the 1999 Act does no more than give an independent right of suit to a third party where the relevant term purports to confer a benefit on him. The public liability cover of Section C is however clear that cover is only provided in respect of the liability of the Insured, namely Mr Halpern.

10. Mr Wynter emphasised the words in the certificate *"but only in respect of the parts of the premises demised by the lease to the individual tenant"* (which are not found in Clause 21). If his submission that the policy covered the public liability of a lessee had been correct, these words might have limited it to acts or omissions connected with the particular leased premises, but they provide no colour of support for the submission itself, and certainly none which surmounts the obstacles which I identified above.

The Lease

11. I should also record that Eurocrest's submissions included a reference to Clause 9(2) of its lease. The Lessor there covenanted

> *"To insured and keep insured the Building in the joint names of the Lessor, the Lessee, underlessees their mortgagees and any other interested parties request*[ed] *by the Lessee to be enclosed* [sic] *thereon ... against loss or damage by fire explosion storm tempest aircraft and risk of explosion and damage in connection with the lifts and lift apparatus and all plant associated therewith and such other risks (if any) as the Lessors or Lessees think fit in some Insurance Office of repute through the agency of the Lessors in the full reinstatement value thereof ..."*

Mr Wynter's submission, as I understood it, was that the effect of Clause 9(2) was to provide for Eurocrest to have the benefit of the policy which Mr Halpern in fact took out.

12. This argument in my view collapsed at the first fence, in that the reference to *"such other risks"* plainly refers to risks which cause loss or damage to the Buildings in addition to *"fire, explosion, storm"* etc. More fundamentally, however, it cannot alter the fact that the policy was in the event not taken out in joint names and did not purport to cover the public liability of anyone other than the Insured, Mr Halpern. That would be the case even if the lease were admissible as background or matrix evidence, but is compounded by the fact that Zurich was not shown (or even alleged) to have had knowledge of Clause 9(2).

Extent of Section C of the policy

13. A final obstacle in the way of Eurocrest's claim, and wholly ignored until I raised it in the course of Mr Wynter's submissions, would be the need to establish that Section C of the policy would cover the liability to Mr Halpern alleged by him in his Part 20 proceedings in the County Court, even if it extended to Eurocrest. For this purpose it would have to show that it was a liability to pay *"compensation for ... accidental damage to material*

property". Though on a purely literal approach these words may appear inapt to cover a situation where, as here, the claim is not brought by the owner or possessor of the property in question, my initial reaction was that a more generous interpretation might perhaps be appropriate. That inclination was reversed when I was referred to the remarks of Tuckey LJ in *Tesco Stores Ltd v Constable*, [2008] Lloyds Rep. 636 at paragraph 23. While however those observations might eliminate grounds (a) to (c) of Mr Halpern's Part 20 claim, I am much less confident about their application to ground (d), since recovery under the 1978 Act is based on showing that the defendant was (also) liable to the original claimant. Since however that point was not addressed in counsel's submissions and is not necessary for my decision, I refrain from expressing a concluded view on it.

Conclusion

14. Accordingly, I refuse the declaration sought by Eurocrest.