Neutral Citation Number: [2020] EWCA Civ 308

Case No: A4/2019/1202; A4/2019/1202(C)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr David Railton QC, sitting as a Deputy High Court Judge
CL-2017-000301

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2020

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE LEGGATT
and
LORD JUSTICE DINGEMANS

- -

Between:

ENDURANCE CORPORATE CAPITAL LIMITED	**Appellant**
- and -	
SARTEX QUILTS & TEXTILES LIMITED	**Respondent**

- -
- -

Mr Jason Evans-Tovey (instructed by **DAC Beachcroft LLP**) for the **Appellant**
Mr Ben Elkington QC (instructed by **Edwin Coe LLP**) for the **Respondent**

Hearing date: 21 January 2020

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Approved Judgment

Lord Justice Leggatt:

1. The questions raised on this appeal concern the correct legal test for assessing the sum payable under a policy of insurance against property damage when there is no term of the policy which fixes the measure of loss. The main issue is whether, in order to recover the cost of reinstating damaged property under such a policy when this cost has not actually been incurred, the insured needs to show a genuine, fixed and settled intention to reinstate the property and (in the case of a building) to do so on the same site and in the same style and general shape as it was before the damage occurred.

2. The appellant insurer contends that this is a legal requirement and that, because it was not satisfied in this case, the trial judge was wrong to award damages to the insured based on the cost of reinstating buildings which were very substantially damaged by a fire at its premises and replacing plant and machinery which was destroyed by the fire. Instead, the insurer argues, the sum awarded should have been limited to the (much lower) market value of the buildings, plant and machinery damaged or destroyed.

3. The respondent insured defends the judge's decision, arguing that he applied the correct legal test and reached an unimpeachable conclusion on the facts found.

Factual background

4. The claim arises from a serious fire on 25 May 2011 at industrial premises in Rochdale known as Crossfield Works. The premises were occupied by the claimant insured, Sartex Quilts & Textiles Limited, which was preparing to use them as a factory to manufacture "shoddy hard pads". The buildings and machinery and plant were insured against property loss or damage under an insurance policy underwritten by the defendant (and appellant), Endurance Corporate Capital Limited, which I will refer to as "the insurer".

5. The driving force behind the insured's business is Mr Maqbool Ahmed. Other members of his family are also involved. The business was originally conducted as a partnership between Mr Ahmed, one of his brothers and two cousins. The four partners are the freehold owners of Crossfield Works. After the insured company was formed to carry on the business, an agreement was made in writing between the partners and the insured dated 28 April 1995 under which the partners granted the insured a licence to use Crossfield Works for no rent so long as it arranged (at its own cost) appropriate insurance cover for the buildings and contents and ensured that the premises were maintained in a good state of repair. It is on that basis that the insured has since occupied the premises.

6. The insured's main business, as its name indicates, is manufacturing quilts and textiles. This business was originally carried on at Crossfield Works. However, in 1999 the insured purchased larger premises at Castle Mill (also in Rochdale), to which its production was subsequently moved.

7. From about 2005, Mr Ahmed became interested in expanding the insured's business by manufacturing shoddy hard pads at Crossfield Works for use mainly in mattresses (as covers for springs) and also for general insulation. Shoddy hard pads are made from a mixture of shredded rags and low melt fibre. Having researched the market and

designed a production process, the insured gradually, over several years, acquired the necessary plant and machinery from the USA, Italy and Germany, as well as the UK. Much of the machinery was bought second hand and was refurbished by the insured.

8. The planned manufacturing process involved three production lines. By late 2010 most of the plant and machinery had been installed at Crossfield Works and, by the time of the fire in May 2011, one of the production lines was in operation. The other two production lines were awaiting the installation of an upgraded electricity supply before they could begin operating.

The insurance policy

9. The policy under which the claim is made covered the buildings and machinery and plant at Crossfield Works against loss, destruction or damage arising from risks that included fire for a period of 12 months from 11 November 2010. The buildings were insured for £2,020,000 and the machinery and plant for £2,500,000. The policy also provided business interruption cover in a sum of £1,000,000.

10. There was a dispute at the trial about whether it was orally agreed that the insurance would be subject to a 20% co-insurance excess. The judge found that it was and there is no appeal against this finding.

11. The policy terms are contained in a document issued on 22 December 2010. The wording is in a standard form used by the underwriting agent. The policy is divided into sections. Material damage to property is covered by Section A. The "Insuring Clause" in Section A provides:

> "Subject to the general conditions and exclusions of this Policy, and the conditions and exclusions contained in this Section, we, the Underwriters, agree to the extent and in the manner provided herein to indemnify the Insured against loss or destruction of or damage to Property caused by or arising from the Perils shown as operative in the Schedule, occurring during the period of this Policy."

The perils shown as operative in the policy Schedule included fire.

12. Condition 7 of the conditions specific to Section A provides:

> "**REINSTATEMENT BASIS**
>
> In the event of loss or damage to or destruction of Buildings, Machinery and Plant or All Other Contents, the basis upon which the amount payable hereunder is to be calculated will be the Reinstatement of the Property lost, destroyed or damaged.
>
> *Special Conditions*
>
> 1. Underwriters' liability for the repair or restoration of property damaged in part only, will not exceed the amount which would have been payable had such property been wholly destroyed.

2. No payment beyond the amount which would have been payable in the absence of this condition will be made:

   a) unless Reinstatement commences and proceeds without unreasonable delay;

   b) until the cost of Reinstatement has actually been incurred;

   c) if the Property at the time of its loss, destruction or damage is insured by any other insurance effected by the Insured, or on its behalf, which is not upon the same basis of Reinstatement."

13. Also relevant are the following general definitions:

> "**Property** means the Buildings, Machinery and Plant, Stock and All Other Contents.
>
> **Reinstatement** means:
>
> a) the rebuilding or replacement of Property lost or destroyed which, provided the Underwriters' liability is not increased, may be carried out:
>
> (i) in any manner suitable to the Insured's requirements;
>
> (ii) upon another site.
>
> b) the repair or restoration of Property damaged in either case to a condition equivalent to or substantially the same as but not better or more extensive than its condition when new."

The insurance claims

14. After the fire on 25 May 2011, the insured made claims under both the property damage and business interruption sections of the policy. The insurer accepted liability in October 2011.

15. The business interruption claim was settled in May 2013 for a sum of £657,127 (reduced from the £1,000,000 sum insured on account of under-insurance and the 20% co-insurance excess). The claim under the property damage section of the policy was not settled because the parties disagreed – as they still do – about whether the claim should be assessed on the basis of the cost of reinstatement (as the insured contends) or the diminution in the market value of the property caused by the fire (as the insurer maintains).

16. In November 2013 the insurer paid the sum of £2,141,527 to the insured in respect of the property damage claim. This was the amount for which the insurer accepted liability based on the market value of the buildings, plant and machinery (with deductions made for average and co-insurance).

17. The insured began these proceedings in May 2017 (shortly before the expiry of the limitation period) claiming additional sums alleged to be due under Section A of the policy. These sums were based on (a) the cost of reinstating the buildings severely damaged by the fire to the condition they were in immediately before the fire, using modern materials, and (b) the cost of replacing the plant and machinery – giving credit in each case for the amount already received from the insurer. The relevant figures were ultimately agreed by the parties with the assistance of expert quantity surveyors. But the proper measure of indemnity remained in dispute.

The judgment below

18. The action was tried before Mr David Railton QC, sitting as a deputy High Court judge. For reasons given in a clear and careful judgment dated 3 May 2019, the judge decided that the insured was entitled to recover the sums claimed on the reinstatement basis.

19. It was not in dispute, and the judge found as a fact, that immediately before the fire the insured intended to use Crossfield Works for the purposes of its new venture of manufacturing shoddy hard pads. The judge noted that Mr Ahmed was satisfied that the venture would be profitable and that this conclusion was confirmed by the figures for lost profits subsequently agreed in adjusting the business interruption claim. Thus, the value of the buildings, plant and machinery to the insured immediately before the fire lay in providing the location and means for pursuing this venture.

20. The judge observed that this did not mean that the insured was committed to carrying on the business for all time from Crossfield Works. It was anticipated that it would be necessary to move to bigger premises in a couple of years assuming the venture succeeded. But Crossfield Works was where the plant and machinery had been installed and where the business planned to operate.

21. At the time of the trial, almost eight years after the fire, no rebuilding work at Crossfield Works had commenced. The insured had still not replaced any of the plant and machinery nor recommenced the production of shoddy hard pads either at Crossfield Works or anywhere else. There was a factual dispute about the insured's intentions in this regard. The judge's findings on this question were, in outline, as follows:

    (1) Immediately after the fire, the insured's intention was to reinstate the manufacturing facility at the Crossfield Works site.

    (2) From mid-2011, however, the insured considered various alternative sites for the facility, including premises in Dewsbury, Bradford, Oldham and Bury. In late 2011 the insured made an offer for premises in Oldham but this was not accepted.

    (3) Between August 2012 and early 2017 the insured's focus was on the possibility of establishing the manufacturing business in Pakistan.

    (4) In 2017 the insured looked at an option of building a new facility to manufacture shoddy hard pads behind its premises at Castle Mill. Offers were made to purchase the additional land needed for this but the offers were not accepted.

(5) Concurrently with these plans for establishing a new facility to manufacture shoddy hard pads elsewhere, between late 2011 and late 2017 various proposals were considered, and some were pursued, for redeveloping the Crossfield Works site for other uses. These included plans for demolishing the remaining structures and erecting a banqueting hall and venue for Asian weddings. All these plans required buildings on the site which had Grade II listed status to be de-listed and some involved acquiring additional land adjacent to the site.

(6) The judge accepted that, if the insured had identified a different development opportunity for Crossfield Works which was likely to be supported by the local authority and which it considered to be a better use for the site, then it would probably have pursued that opportunity and established a new facility for manufacturing shoddy hard pads at another location. However, the insured gave up on these ideas after the local authority indicated in December 2017 that reconstructing Crossfield Works as a manufacturing facility was likely to be supported, whereas redeveloping it as a banqueting/wedding venue was not.

(7) In 2018 the insured put in train applications for planning permission and listed building consent to re-build the manufacturing facility at Crossfield Works and in October 2018 the insured entered into a contract with a Chinese company to purchase the necessary plant and machinery. At the time of the trial in March 2019, planning permission and listed building consent had not been granted and no arrangement had been made beyond payment of a deposit for the plant and machinery. The judge nevertheless found that it was now the insured's intention to reinstate the facility for manufacturing shoddy hard pads at Crossfield Works.

22. Overall, the judge's conclusion was that, after the fire, the insured did not have a fixed or settled intention to reinstate the manufacturing facility at the Crossfield Works site, but did at all times have a fixed intention to carry on the business of manufacturing shoddy hard pads either by reinstating the facility at the Crossfield Works site or by establishing such a facility elsewhere.

23. As regards the law, the judge identified the relevant question as being what had the insured lost as a result of the insured peril, which required the court to determine the value of the relevant property to the insured at the date of the fire. In making this determination, he saw the primary focus as being on the insured's intentions in relation to the property immediately before and at the time of the fire. However, he thought it also relevant to consider subsequent events, including the intentions of the insured after the loss, in order to decide what measure of indemnity would fairly and fully compensate (without over-compensating) the insured for that loss.

24. Approaching the matter in this way, the judge concluded that, on the facts that he had found, the reinstatement basis was the appropriate measure of indemnity, both in respect of the buildings and of the plant and machinery.

25. An issue was raised as to whether there should be a deduction from the agreed figure for reinstatement costs on account of 'betterment'. The judge found that there was not a sufficient evidential basis on which to make such a deduction.

26. In the result, judgment was given for the insured for a sum of £1,386,172 plus interest.

This appeal

27. The insurer was granted permission to appeal from the judge's decision by Males LJ on a limited basis. Permission was refused to appeal against the factual findings (summarised at paragraphs 20-23 above) which underpinned the judge's conclusion that the cost of reinstatement was the appropriate measure of indemnity. The main thrust of the grounds on which insurer was given permission to appeal is that the judge was wrong in law to assess the sum payable under the policy as the cost of reinstatement when, on the facts found, the insured did not (or did not until after the limitation period had expired) have a genuine, fixed and settled intention to reinstate the property on the Crossfield Works site and (in the case of the buildings) in the same style and general shape as they were before the fire.

28. There is an additional ground of appeal (which arises if the insurer's primary case fails) that the judge was wrong not to make any deduction for betterment.

The express terms of the policy

29. Before considering the insurer's arguments, I need to identify how the principal issue concerning the proper measure of indemnity arises under the terms of the insurance policy.

30. Condition 7 of the conditions specific to Section A (quoted in paragraph 12 above) provides that, in the event of loss or damage to or destruction of buildings or machinery and plant, "the basis upon which the amount payable hereunder is to be calculated will be the Reinstatement of the Property lost, destroyed or damaged." This is subject to two "special conditions". Where, as here, the cost of Reinstatement (as defined in the policy) has not actually been incurred, special condition 2 applies so as to limit the amount payable to "the amount which would have been payable in the absence of this condition" [i.e. Condition 7].

31. Although it has been common ground between the parties that Condition 7 is not "engaged" in this case and that the measure of indemnity is instead governed by the insuring clause of Section A, I think it important to spell out more precisely what is meant by this. It is clear from the wording of Condition 7 that the basis upon which the amount payable under Section A is to be calculated is always that set out in Condition 7 and is always – subject to the limits specified in that clause – the cost of Reinstatement (as defined in the policy) of the Property lost, destroyed or damaged.

32. Special condition 2 of Condition 7 does not create an exception to that rule. It does not provide for the amount payable under Section A to be calculated on any basis other than that set out in Condition 7 or to be anything other than the cost of Reinstatement. What it does is to set a cap on the amount payable which applies in specified circumstances. Where the cap applies, as it does here, this means that the cost of Reinstatement is not recoverable beyond the amount of the cap. But it is still the cost of Reinstatement, or part of it, which is payable, subject to the cap.

33. Properly analysed, the issue in this case concerns the amount of the cap on payment imposed by special condition 2. As mentioned, the amount of the cap is "the amount which would have been payable in the absence of [Condition 7]". To ascertain the amount of the cap, it is therefore necessary to ask what amount would have been

payable if the policy had not contained Condition 7. There is no term of the policy which specifies what amount would have been payable in that hypothetical situation. The amount of the cap must therefore be assessed by applying the principles of law which apply by default to determine what sum is payable under an insurance policy of this kind in the absence of any express contractual provision.

The general measure of loss

34. Apart from the issues about intention to reinstate which I will come to soon, the general principles which govern the assessment of loss under a policy of insurance against property damage in the absence of any different express provision are well established and are not in dispute.

35. First of all, in a case where (as here) an insurer has agreed to "indemnify" the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages: see *Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti' and 'The Padre Island')* [1991] 2 AC 1, 35; *Ventouris v Mountain (The Italia Express (No 2))* [1992] 2 Lloyd's Rep 281, 292; *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

36. The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred: see e.g. *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689. Where the breach of contract arises from loss or destruction of or damage to property (as it does where the contract is a property insurance policy), there are two distinct ways of seeking to give effect to this principle. One is to award the cost of replacing or repairing the property. The other is to award the market value of the property in its condition immediately before the damage occurred (less any residual value). Which measure is appropriate depends, at least in the first place, on the use to which the claimant was intending to put the property.

37. Where the property is a building insured against damage or destruction which the owner (or other person with an insured interest in the building) was intending to use, or continue to use, as premises in which to live or from which to carry on a business, the sum of money required to put the insured in a materially equivalent position to its position immediately before the insured peril occurred will generally be the cost of repair, if the building is damaged, or the cost of replacement, if the building is destroyed. Replacement may take the form of constructing a new building on the site of the old one or acquiring substitute premises. How more precisely the cost of repair or replacement should be calculated is a matter to which I will return.

38. Where, on the other hand, at the time when the damage occurred the insured was intending to sell the building (and the land on which it was built), the loss to the insured is appropriately measured as the amount by which the market value of the property has been reduced as a result of the damage: see e.g. *Leppard v Excess Insurance Co* [1979] 1 WLR 512.

The measure of loss in this case

39. In the present case it is not in dispute that the use to which the insured intended before the fire to put the buildings (and the plant and machinery) at the Crossfield Works site, and would have put the buildings (and plant and machinery) if the fire had not occurred, was the manufacture of shoddy hard pads.

40. There was potentially an issue as to whether the buildings should be regarded as destroyed by the fire (which was the insured's pleaded case) or as damaged rather than destroyed (as the insurer has always maintained). The distinction is not a straightforward one. It is generally understood that outside the field of marine insurance there is no concept of constructive total loss whereby property is treated as a total loss if the costs of repair would exceed its value when repaired. However, without having heard argument on the point, it seems to me that in principle a building should be regarded as destroyed if there is so little left of it that it is more economic to demolish anything that remains and erect an entirely new structure than it is to rebuild incorporating parts of the original building.

41. In this case the insured's expert quantity surveyor estimated the cost of 'reinstating' the buildings on the basis that full demolition and rebuilding was required, whereas the insurer's expert based his cost estimate on the premise that, where feasible, sections of the buildings would be retained with specific repair works undertaken. It did not become necessary to decide between these approaches, however, as the respective estimates were so close to each other that the figures were agreed. At the trial, although it does not appear that any formal concession was made, the insured does not seem to have contradicted the insurer's contention that the buildings should be regarded as damaged rather than destroyed and, while the judge did not specifically address the distinction, he described the buildings as "severely damaged" in para 2 of his judgment.

42. On this appeal, I understood it not to be disputed by the insured that the buildings were (very substantially) damaged and not destroyed. I therefore propose to proceed on that basis, as Mr Evans-Tovey for the insurer submitted that the court should do. It has been common ground throughout that the plant and machinery was totally destroyed by the fire.

43. At least *prima facie*, therefore, the appropriate measure of the insured's loss was the cost of repairing the buildings at the Crossfield Works site and of buying replacement plant and machinery.

44. The insurer argues, however, that this is not the appropriate measure of the insured's loss (in the absence of an express policy term providing for such recovery) in circumstances where the insured had not at the time of the trial actually incurred the cost of reinstating the property at the Crossfield Works site and had not, in the period following the fire, demonstrated a genuine, fixed and settled intention to do so.

Intention to reinstate

45. There is no doubt that, in general, what a insured does or does not intend to do if awarded damages, or if damages are calculated on a particular basis, is irrelevant to the question of what amount of damages the insured is entitled to receive in order to put it

in a materially equivalent position so far as money can do it to the position in which it would have been if the insured peril had not occurred.

46. A case which illustrates this point in the context of insurance against damage to buildings is *Pleasurama Ltd v Sun Alliance and London Insurance Ltd* [1979] 1 Lloyd's Rep 389. There the proper basis for assessing the amount of damage under a policy insuring a bingo hall which was severely damaged by fire was held by Parker J to be the cost of reinstatement notwithstanding that the insured had decided after the fire not to re-build the premises and to move its bingo operation elsewhere. If any further authority is needed for this principle, it is provided by the recent judgment of the Court of Appeal in *Manchikalapati v Zurich Insurance plc* [2019] EWCA Civ 2163, paras 97-99, and the authorities there cited.

47. Mr Evans-Tovey for the insurer, however, relied on two cases which – like the present case – involved claims made under policies insuring buildings which were severely damaged or destroyed by fire, and in which the question whether the insured actually intended to reinstate the buildings was regarded as relevant to the assessment of damages.

Reynolds v Phoenix

48. The first is *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440. In that case the damaged buildings were some old maltings which the insured was intending to use for storing grain and producing animal feedstuffs. Forbes J found that the cost of erecting functionally equivalent modern buildings in their place was £55,000, whereas the cost of reinstating the buildings substantially as they were before the fire (but with appropriate economies in the use of materials) was £246,883. The insurers argued that no reasonable commercial person would choose an old and inefficient building which was costly to maintain when they could have at a fraction of the cost a modern purpose-built construction which could be efficiently operated and cheaply maintained. The judge accepted that this might be so if the insured was using its own money, but considered that this was not the proper test. Rather, it was sufficient for the insured to show that it would reinstate the buildings if awarded the cost of doing so, provided this was not an eccentric or unreasonable course to pursue. On the facts the judge found that the insured genuinely intended to reconstruct the maltings if given the means to do so and that this intention was not unreasonable. He accordingly awarded the higher cost of reinstatement.

The Great Lakes case

49. The second authority relied on by Mr Evans-Tovey for the insurer, and which he put at the forefront of his submissions, is the judgment of the Court of Appeal in *Great Lakes Reinsurance (UK) SE v Western Trading Ltd* [2016] EWCA Civ 1003; [2016] Lloyd's Rep IR 643. In that case the main building insured was an old leather factory which was a listed building. It was essentially a shell, unused except for occasional storage. Next to it and also part of the insured property was a building that was derelict and awaiting demolition. Both buildings were destroyed by fire. The insured was a company controlled by the owner of the property which was employed to manage it and there was an issue at the trial as to whether this company (the claimant) had an insurable interest. The judge held that it did and, for the purposes of the issues about the proper measure of indemnity which were argued on appeal, nothing was seen as

turning on the fact that the claimant was the manager of the property rather than the owner.

50. Some six years before the fire, the insured had obtained planning and listed building consent to convert the main building into 31 residential flats as part of a larger development scheme. However, the scheme was mothballed when the housing market stalled. As a consequence of the fire, the listed status of the building was revoked. Expert evidence at the trial established that the pre-fire scheme would not have been economically viable but that a post-fire development scheme for 48 flats (which was possible because the building was de-listed) would be. As a result, the market value of the property before the fire was about £75,000 but after the fire had increased to about £500,000. The insurer argued that in these circumstances the insured had suffered no loss.

51. The insured nevertheless claimed a declaration that it was entitled to be paid the cost of reinstating the property up to the policy limit of £2,121,800. Its evidence – which the trial judge was minded to accept, although he reached no concluded view on the point – was that it intended to reinstate the property. To the argument that no one would sensibly do so, the insured replied, and the insurer's expert quantity surveyor accepted, that it would cost less to convert the reinstated shell into flats than it would to build flats from scratch from the pile of rubbish now at the site; and that developing the site in this way would enhance the overall value of the property development.

52. The policy wording was materially similar to the wording in the present case. Accordingly, to recover the cost of reinstatement when that cost had not actually been incurred, it was necessary to show that this amount would have been recoverable if the express reinstatement clause had not been incorporated in the policy. In addressing this question, Christopher Clarke LJ (with whose judgment Laws and Lewison LJJ agreed) said this (at para 72):

> "I doubt whether a claimant who has no intention of using the insurance money to reinstate, and whose property has increased in value on account of the fire, is entitled to claim the cost of reinstatement as the measure of indemnity unless the policy so provides. In any event [counsel for the claimant] did not seek to contend that in this case the cost of reinstatement would be recoverable if [the claimant] had no intention of doing so. The true measure of indemnity is "a matter of fact and degree to be decided on the circumstances of each case" per Forbes J in *Reynolds v Phoenix;* and is materially affected by the insured's intentions in relation to the property."

53. Christopher Clarke LJ went on to consider: "(a) what exactly is the requisite degree of intention; and (b) what safeguard, if any, is available to an insurer who pays out the cost of reinstatement to an insured who then… in fact sells the property." He described his remarks on these questions as "tentative", as neither question had been the subject of submissions (para 73).

54. As to (a), he said (at para 75) that:

> "it seems to me that the insured's intention needs to be not only genuine, but also fixed and settled, and that what he intends must be at least something which there is a reasonable prospect of him bringing about (at any rate if the insurance money is paid)."

As to (b), while accepting that an insurer who pays out generally has no redress if none of the money is used in reinstatement, Christopher Clarke LJ inclined to the view that where, at the time of the hearing, there is a real possibility that reinstatement may not in fact occur, it is open to the court to make an order which enables the insured to recover the cost of reinstatement only when it is apparent that it can and will go ahead.

55. The trial judge had not made, nor thought it necessary to make, any positive finding about whether the insured genuinely intended to reinstate the property if awarded damages on a reinstatement basis, as he considered that uncertainty about this could be addressed by making an appropriate declaration. The Court of Appeal upheld his approach and granted a declaration that "if the insured carries out reinstatement of the property lost then it will be entitled to be indemnified by the [insurer] for the cost of doing so, up to the limit of indemnity of £2,121,800."

Analysis of the Great Lakes case

56. Mr Evans-Tovey for the insurer relies on para 72 of the judgment in the *Great Lakes* case (quoted at paragraph 52 above) as authority for the general proposition that an insured who does not intend to reinstate damaged property if indemnified on a reinstatement basis is not entitled to claim the cost of reinstatement as the measure of indemnity unless the policy expressly so provides. He also submitted, by reference to para 75 of the judgment, that the insured's intention needs to be not only genuine, but also fixed and settled.

57. There are two immediate difficulties with this argument. The first is that the statement in para 72 of the judgment of Christopher Clarke LJ in the *Great Lakes* case suggesting the need for an intention to reinstate is expressly limited to a situation where the property has increased in value on account of the fire. Although that was, unusually, the factual situation in the *Great Lakes* case, it is not the factual situation here.

58. Mr Evans-Tovey responded by submitting that the words "and whose property has increased in value on account of the fire" in the first sentence of para 72 should be read as if in brackets and as merely alluding to the particular facts of the *Great Lakes* case rather than as an integral part of the proposition put forward. There is, however, no justification for, in effect, reading those words out of the judgment. That they were deliberately intended to qualify the statement made is confirmed – if confirmation were needed – by reading the sentence in context. At the end of the preceding paragraph Christopher Clarke LJ had referred to a Scottish case (*Keystone Properties Ltd v Sun Alliance and London Insurance plc* 1993 SC 494) and to the *Pleasurama* case as authority for the proposition that the cost of reinstatement is the primary measure of indemnity even if the insured has no intention of using the insurer's money to reinstate the property. The manifest reason for specifically limiting the statement at the start of para 72 to a case where the property has increased in value on account of the fire was to distinguish the facts of the *Great Lakes* case from that general position.

59. The second difficulty facing the insurer's reliance on the *Great Lakes* case is that the observations of Christopher Clarke LJ about the potential relevance of the insured's intention to reinstate were in any event *obiter dicta*, as the declaration actually made by the Court of Appeal did no more than give effect to the express reinstatement clause in the policy which entitled the insured to recover the cost of reinstatement when it had actually been incurred. Moreover, as made clear in para 72 of the judgment, the legal relevance of the insured's intention to reinstate was not an issue that was in dispute or on which the court heard argument, as the insured did not seek to contend that the cost of reinstatement would be recoverable if there was no intention to reinstate.

The position in principle

60. In the absence of binding authority, it is necessary to consider the position in principle. The question of whether or when an intention to cure a breach of contract by reinstating property or otherwise incurring the cost of obtaining the promised performance is not limited to the field of insurance. The question arises in various contexts and has given rise to divergent approaches: see e.g. S Rowan, "Cost of cure damages and the relevance of the injured promisee's intention to cure" (2017) 76 CLJ 616.

61. As a matter of general principle, where a claimant takes action to remedy or otherwise mitigate the adverse consequences to it of the defendant's breach of contract, it is entitled to recover the costs of that action unless it is shown that there was another, cheaper option available which it was reasonable to expect the claimant to adopt – in which case the damages are assessed as if the claimant had adopted that option. This is the general principle of mitigation.

62. The question about the relevance of intention potentially arises where, at the time when damages are assessed, the claimant has not taken any action to remedy or mitigate the effect of the breach. What remedial action, if any, the claimant intends to take is only capable of being relevant, however, if there is a dispute about what action it would be reasonable to expect the claimant to take in order to put the claimant in the same position (or, more accurately, a materially equivalent position) as if the breach of contract had not occurred. The basic compensatory principle entitles the claimant to recover the cost of taking such action. How the claimant chooses to spend the damages and whether it actually attempts to put itself in the same position as if the breach had not occurred – for example by reinstating lost, damaged or defective property – or whether the claimant does something else with the money, is – in accordance with the general principle mentioned earlier – irrelevant to the measure of compensation.

63. Cases in which there is a dispute about what action it would be reasonable to expect the claimant to take in order to remedy loss of, damage to or a defect in property for which the defendant is contractually liable are typically cases where some feature of the property which it would be expensive to reinstate has, or is said to have, particular subjective value to the claimant which it would not naturally be expected to have to other owners who intended to use the property for the same purposes. In such a case whether or not the claimant genuinely intends to reinstate this feature of the property if awarded the cost of doing so is relevant in the first place from an evidential point of view in ascertaining whether the feature does indeed have such subjective value. It may also be said to be unreasonable to require the defendant to pay the cost of reinstating a feature which is only of such subjective value if the claimant does not or will not actually incur that cost.

64. The classic case which illustrates these issues is *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, where a contract to build a swimming pool specified that the pool should have a diving area 7 feet 6 inches deep. The pool as built had an area suitable for diving but which was only 6 feet deep. The House of Lords held that the owner, Mr Forsyth, was not entitled to recover the cost of rebuilding the pool with the specified depth, as this cost would be out of all proportion to the benefit to be obtained. Lord Jauncey and Lord Lloyd considered the question whether the measure of damages was affected by whether or not Mr Forsyth intended to rebuild the pool if awarded the cost of doing so. The trial judge was not persuaded that Mr Forsyth did have such an intention but on appeal he gave an undertaking to spend the damages on rebuilding the pool if his claim succeeded. Lord Jauncey and Lord Lloyd expressed the view, albeit *obiter*, that although the court is not normally concerned with the use to which a claimant puts an award of damages, whether or not the claimant intends to adopt the more costly of two options may be relevant in assessing its reasonableness: see [1996] AC at 359 and 372-3.

65. In cases where a building is being used for commercial purposes, it seldom has features of special subjective value to the insured which it is arguably necessary to restore in order to put the insured in a materially equivalent position. That was, however, found to be so in *Reynolds v Phoenix*, referred to at paragraph 48 above. The cost claimed by the insured in that case of reinstating the old maltings which had been severely damaged by fire substantially as they were before the fire was far greater than the cost of acquiring a functionally equivalent modern building. It was in that context that Forbes J thought it relevant to take account of the fact that, as he found, the insured genuinely intended, if awarded the cost of doing so, to reinstate the premises in their previous condition.

66. By contrast, in *Exchange Theatre Ltd v Iron Trades Mutual Insurance Co Ltd* [1983] 1 Lloyd's Rep 674 a Victorian hall, used by the insured as a bingo hall, club and discotheque, was seriously damaged by fire. As the character and heritage of the building was not of particular value to the insured, the appropriate measure of loss was held to be the cost of an equivalent modern replacement building.

67. In the *Great Lakes* case, the buildings destroyed by fire were lying idle and the insured had previously demonstrated an intention to redevelop the site if was economically viable to do so. As mentioned earlier, the fire made such a redevelopment scheme viable and hence made the property more valuable, because it caused the property to lose its listed building status. The individual who controlled the insured claimed that he intended, if awarded the cost of doing so, to reinstate the shell of the main building both because it had emotional value for his family and (perhaps more realistically) because doing so would further increase the development value of the property. It is understandable that in these circumstances the Court of Appeal expressed doubt about whether, if the measure of damages had been at large, the insured could have recovered this cost, unless it was actually going to reinstate the property in this way. On any view, however, it seems to me that the insured could not have recovered this cost, in the absence of the express reinstatement clause, without giving credit in calculating its loss for the amount by which it was better off financially as a result of the fire.

68. The only basis on which the insured in the *Great Lakes* case was entitled to recover the cost of reinstatement without deducting its financial gain from the fire was by actually

incurring that cost and thereby satisfying the special condition in the express reinstatement clause in the policy.

The position in this case

69. In the present case no issue arises to which the intentions formed by the insured after the loss are potentially relevant. It was found as a fact that the insured was intending to use the Crossfield Works premises as a facility for manufacturing shoddy hard pads. To put the insured in a position materially equivalent to the position in which it would have been if the fire had not occurred, it was therefore necessary to award the cost of re-establishing such a facility, either by rebuilding the one that was severely damaged or by establishing a similar facility elsewhere.

70. The insured claimed the cost of reinstating the facility on the Crossfield Works site, but has not alleged that there was any feature of the original buildings which had any special subjective value and which it wanted to restore at additional cost. The sum claimed and awarded by the judge is the cost of constructing a modern building on the Crossfield Works site which is substantially similar in shape and general style to the one which was there before the fire, but using cheaper modern materials rather than original materials.

71. It has not at any stage been suggested by the insurer that there were suitable alternative premises at which the insured could have established an equivalent manufacturing facility to the one damaged by the fire at a lower cost. In particular, it has not been suggested that any of the other options considered by the insured after the fire which involved acquiring or constructing another building elsewhere is one that the insured ought reasonably to have adopted in order to mitigate its loss. Nor has it been suggested that the value of the property was increased as a result of the fire. In these circumstances the question whether the insured has intended or does now intend actually to reinstate the buildings on the Crossfield Works site and to use them to manufacture shoddy hard pads is in my view of no possible relevance to the measure of indemnity.

72. The case (and the only case) put forward by the insurer is that the appropriate measure of the insured's loss is the reduction in the market value of the Crossfield Works premises. However, in circumstances where the insured was not intending to sell the premises (and for that matter had no right to do so as it is only a licensee of the premises), I am unable to see how this could in principle be a proper basis of assessment.

73. I conclude that the judge was correct to hold that the amount which would have been payable under the policy in the absence of Condition 7 was in this case the same as the cost of reinstatement calculated in accordance with that condition.

Reinstatement on the same site and in the same shape and style

74. In view of this conclusion, it is not strictly necessary to address the grounds of appeal which contend that the judge erred in law in "adopting the wrong type, or meaning, of reinstatement for the purposes of the insuring clause". However, I propose briefly to explain why I consider those grounds to be misconceived.

75. One argument advanced on the insurer's behalf is that under the insuring clause reinstatement has its ordinary meaning and means reconstruction on site and in the same style and general shape as the original building. However, the word "reinstatement" is not used in the insuring clause (nor in any other relevant policy provision apart from Condition 7). No question therefore arises about what the word means. The only question could be whether, in the absence of any policy term fixing the measure of indemnity, there can be circumstances in which the appropriate measure is the cost of acquiring or constructing a building on another site and/or which is not in the same style and general shape as the damaged building. The answer to that question, however, is that there clearly can be such cases. An example is *Dominion Mosaics Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, where the Court of Appeal held that the claimant was entitled to recover the cost of purchasing new premises from which to carry on its business where this cost less than rebuilding and the claimant needed to carry on the business in order to avoid losing significant income and profits. Although the claim in that case was in tort rather than for breach of contract, I cannot see that this makes any difference of principle.

76. For the insurer, Mr Evans-Tovey also argued that, even if this is the position where the policy contains no reference to reinstatement, it is not the position in the present case where the policy contains an express reinstatement clause and a definition of "Reinstatement". Mr Evans-Tovey emphasised that this definition draws a distinction between property lost or destroyed and property which is damaged. Where property is destroyed, the definition of "Reinstatement" permits the rebuilding or replacement of the property to be carried out "in any manner suitable to the insured's requirements" and "upon another site". No such latitude is afforded where property is damaged. By clear implication, therefore, the "Reinstatement" of damaged buildings is limited to the repair or restoration of the buildings on the same site, substantially as they were before the damage occurred.

77. Mr Evans-Tovey further submitted that – as I have accepted – the sum payable under the policy is to be assessed on the footing that the buildings on the Crossfield Works site were severely damaged by the fire but not destroyed. Accordingly, "Reinstatement" for the purposes of Condition 7 is confined to repair or restoration of the buildings on the Crossfield Works site. He submitted that, because Condition 7 does not permit the cost of reinstatement upon another site to be recovered when the property has been damaged rather than destroyed, the parties cannot reasonably have intended the cost of reinstatement upon another site to be recoverable where the damages are at large. As it was put in the insurer's skeleton argument: "the parties are unlikely to have intended reinstatement under the insuring clause to provide the insured with more locations for reinstatement than Condition 7. That would be an unexpected and odd result." Mr Evans-Tovey made a similar submission as regards reinstatement of buildings in a different shape or general style.

78. On this basis one of the insurer's grounds of appeal is that the judge erred in "failing to appreciate and take into account that his approach to reinstatement for the purposes of the insuring clause ignored and overrode distinctions drawn by the definition of 'Reinstatement' between (a) property lost or destroyed and (b) property damaged by fire, and, as a consequence or otherwise, made reinstatement under the insuring clause more beneficial and attractive than reinstatement under Condition 7."

79. I consider this argument to be flawed for several reasons. One short reason is that the definition of "Reinstatement" does not apply to the assessment of the amount that would be payable under Section A of the policy in the absence of Condition 7 since, as already noted, the word is not used in any relevant clause other than in Condition 7. Nor is there any provision of the policy which "tempers" (as it was put by Mr Evans-Tovey) the measure of indemnity applicable in that hypothetical situation. It is contradictory to argue that Condition 7 is such a term when the test to be applied pursuant to special condition 2 is to determine what amount would be payable in the absence of Condition 7.

80. The contention that the parties cannot have intended reinstatement under the insuring clause to be more beneficial and attractive than reinstatement under Condition 7 in any case rests on false premise. As discussed earlier, the cost of reinstatement (or any other sum) can only ever be recovered under Condition 7 of Section A of the policy. Consideration of what indemnity would be recoverable under the policy in the absence of Condition 7 merely sets a cap on the sum payable in accordance with that clause: it does not permit a better or more beneficial measure of indemnity.

81. Finally, all the arguments advanced by the insurer on these issues are in fact beside the point. This is because the insured has never claimed damages based on the cost of 'reinstating' the damaged buildings on another site or in a different shape or general style: it is has only ever claimed the cost of reconstructing the damaged buildings on the Crossfield Works site substantially as they were before the fire (but using cheaper modern materials). The only relevant question, therefore, is whether this measure of indemnity would be available under the policy in the absence of Condition 7. As already discussed, there is no doubt that it would.

82. It follows that the judge was right to hold that the insured was entitled to be paid the cost of reinstatement.

Betterment

83. I turn to the insurer's alternative ground of appeal that the judge was wrong to decline to make a deduction from the cost of reinstatement to allow for 'betterment'.

84. In *Reynolds v Phoenix* [1978] 2 Lloyd's Rep 440 at 453, Forbes J said:

> "Now the principle of betterment is too well-established in the law of insurance to be departed from at this stage even though it may sometimes work hardship on the assured. It is simply that an allowance must be made because the assured is getting something new for something old. But in this class of insurance there is no automatic or accepted percentage deduction. … Taking a broad view on the evidence I have heard, the figure for deduction probably lies between and third and a quarter of the total."

85. In the present case the judge saw considerable force in an argument made by counsel for the insured at the trial that, where the insured is claiming the cost of the most reasonable and least expensive option available, any benefit derived from getting something new for something old is an unavoidable consequence of the loss, and that

in such circumstances making a deduction for betterment deprives the insured of a full indemnity. However, the judge did not consider it open to him to depart from the well-established principle applied in *Reynolds v Phoenix*.

The evidence at trial

86. The question of betterment was considered by the expert quantity surveyors instructed by each party. In their joint report the insurer's expert, Mr Taft, expressed the view that, where an old building is replaced by a new one, there will inevitably be an element of betterment. Some examples of this (such as better thermal insulation as a result of using modern materials to construct the external walls) would lead to a reduction in the overall building cost, while others (such as upgrading all glazing to double glazed units) would be likely to increase the building cost. Mr Taft also said that in this case any new structure would require minimal maintenance for the first 25 years of its lifespan, which he regarded as "a fundamental general betterment issue" when comparing such a new structure with the previous building. He said that it was extremely difficult to establish a cost differential for this general betterment. He noted that loss adjusters had calculated a range of figures for betterment, including percentage deductions of 25%, 30% or 35%, but said that he was not able to comment on whether this approach was appropriate or whether any of those percentages was the correct one to use.

87. The insured's expert, Mr Taylor, said that he broadly agreed with the principles set out by Mr Taft in relation to general betterment of a new building over an old building but that, without detailed specifications for the original building and for the new scheme, he could not provide a cost estimate for betterment in this case, and did not believe that a notional percentage was appropriate.

The judge's decision

88. As stated earlier, the judge did not consider that he had a sufficient evidential basis on which to make a deduction for betterment. He said that, in circumstances where the notional reinstatement cost had been agreed, the onus was on the insurer to identify, and justify, any particular reductions for betterment for which it contended, and it had not done so. On the evidence before him, the judge did not consider that a percentage deduction of a third or a quarter of the total (or somewhere in between) of the kind made in *Reynolds v Phoenix* was appropriate or warranted.

The insurer's case on this appeal

89. In his submissions for the insurer on this appeal, Mr Evans-Tovey maintained that the judge was not entitled to regard the evidence as insufficient and should have made an assessment of the value of betterment taking a broad brush approach and doing the best he could by reference to the material available to him. Mr Evans-Tovey submitted that in this regard the judge should have recognised that (i) the balance of probability test is not an appropriate yardstick to measure loss, and (ii) lack of precision in relation to quantum is not a bar to recovery – referred to as the "broad" approach in *Ted Baker plc v Axa Insurance UK plc (No 2)* [2014] EWHC 3548 (Comm), para 140 and [2017] EWCA Civ 4097, para 104. He further submitted that it was wrong to treat the absence of detailed specifications as a reason for not making some deduction, as this would be to allow the insured to benefit from its own inaction and delay in reinstating the buildings.

The relevant principles

90. In considering whether a deduction should be made for 'betterment', I think it necessary to distinguish between different senses of that term. One form of betterment arises where an insured, rather than seeking simply to reinstate property substantially as it was before it was destroyed or damaged, chooses to make improvements to the property at an additional cost. In such a case the additional cost is not part of the cost of reinstatement at all and is therefore not recoverable unless it falls within some express provision of the policy.

91. It was with this type of betterment that the court was concerned in *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC); [2006] 2 All ER (Comm) 550. In that case it was held that the insured's scheme for replacing buildings largely destroyed by fire could not be characterised as a reinstatement scheme, as it included significant improvements to the property. An alternative scheme prepared by the insurer's expert was found to be a reinstatement scheme and therefore a proper basis for assessment. A further issue arose as to whether certain specific costs included in the latter scheme were nevertheless optional improvements which, if adopted, would go beyond reinstatement and in that sense constituted 'betterment'. Two examples of such betterment found by the judge (HHJ Coulson QC) were that the scheme included the costs of insulating the main roof of a barn which had not previously been insulated and of installing double glazed windows when the windows were not originally double glazed: see paras 357 and 361. These additional costs were therefore excluded from the sum awarded.

92. There is no betterment in this sense where the insured does not choose to incur additional costs in making improvements to the property which go beyond reinstatement. However, there can be betterment of a different type where the insured derives a benefit as an incidental consequence of adopting a reasonable reinstatement scheme. This may occur where, for example, the insured uses modern materials for rebuilding which cost less than materials of the kind originally used but which have advantages such as better thermal insulation. Another example would be where an old machine is destroyed of a kind which can only reasonably be replaced by buying a new machine because there is no market in which a machine of a similar age can readily be found. In the first of these examples there is no additional cost incurred by the insured and in the second example the additional cost (of a new machine over and above the likely cost of an old machine, had it been available) is unavoidable.

93. For reasons that I discussed by reference to relevant authorities in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm); [2015] 1 CLC 765, paras 66-81, in such situations a further distinction needs to be made. This is between benefits that take the form of money (or which the claimant could reasonably be expected to realise in terms of money) and other, non-pecuniary benefits.

94. As a matter of principle and authority, a deduction should be made for any money which it is shown that the insured will save or can reasonably be expected to save as a result of getting a building or other item of property which is in some respect better than the original. For example, if the insured is entitled to claim the cost of a new machine to replace one that was destroyed and the new machine is more efficient than the old one because it costs less to run, the insurer is in principle entitled to deduct the money thereby saved. That is because the financial benefit of this saving reduces the amount

of money required to put the insured into an equivalent position in money terms to the position in which it would have been if the property had not been destroyed.

95. The point is illustrated by the leading case of *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, where new steam turbines purchased by a railway company to replace those supplied by the appellants were more efficient than those they replaced and the House of Lords held that the cost savings which the railway company thereby made had to be brought into account in assessing the damages payable for the appellants' breach of contract.

96. The position is different where the benefit conferred on the claimant is non-pecuniary. In such circumstances to make a deduction for betterment from the damages awarded would be unjust, as it would force the claimant to pay for an advantage which it has not chosen and which makes it no better off in money terms. This is illustrated by *Harbutt's 'Plasticine' Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 477, where the plaintiffs' factory was destroyed by a fire caused by the defendants' breach of contract in installing faulty equipment. The plaintiffs rebuilt the factory without making any deliberate improvements. The Court of Appeal held that they were entitled to recover as damages the whole of the rebuilding cost without any deduction to reflect the benefit of having a new factory in place of the old one. The defendants did not contend that this benefit would result in any cost savings. In these circumstances, to require credit to be given for betterment would have been, as Widgery LJ observed (at p.473), "the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them".

97. Mr Evans-Tovey submitted that this principle does not apply in insurance cases where a broader approach to betterment is justified than where damages are awarded for a breach of contract or tort, as unlike the defendants in such cases the insurer is not a wrongdoer. The short answer to this argument is that, as noted earlier, a claim under an indemnity insurance policy is a claim for damages for breach of contract. It is true that the liability of the insurer is a strict one which does not depend on proof of fault. But I am not aware of any authority and can see no reason in principle which would support making the measure of damages for breach of contract depend on the character of the contractual obligation of which the defendant is in breach. In particular, it is no more just in a case where the defendant is an insurer who has promised to indemnify the claimant against loss than it is in any other breach of contract case to force the claimant to pay for a benefit which it did not choose to receive and which does not save the claimant any money.

98. It is also clear that the burden of proving that damages should be reduced on the basis that the insured will save money as a result of reinstatement lies on the contract-breaker, i.e. in this case the insurer: see *Thai Airways*, paras 83-92 (and the cases there cited).

Application to this case

99. In the present case the expert quantity surveyors agreed the likely costs of reinstating the buildings severely damaged by the fire to the condition they were in immediately before the fire using (a) original materials or (b) modern materials. The cost of using original materials was over 10% higher than the cost of using modern materials and the damages awarded were based on the latter, lower figure.

100. As mentioned, the insurer's expert, Mr Taft, gave examples of items which would be likely to increase the building cost, such as upgrading all glazing to double glazed units. If the 'reinstatement' cost estimated by the experts included the cost of upgrading from single to double glazing (and it is not clear to me from the experts' reports whether it did), then this was an optional improvement and the difference between the cost of single and double glazing could in principle have been deducted. Mr Taft also emphasised the fact that the replacement buildings would require much less maintenance than the original buildings. This would in principle give rise to a cost saving for which the insurer could have claimed credit.

101. The insurer made no attempt, however, to quantify these or any other items of betterment for which an allowance could properly have been made. In these circumstances the judge was, in my opinion, entirely justified in declining to make any deduction for betterment from the agreed cost of reinstatement.

102. This is not to suggest that precise calculation is always necessary or to cast doubt on the principle that a 'broad' approach to quantification is often appropriate. But some figure or method of estimating a figure needs to be proposed for which there is some rational or evidential basis even if it is only rough and ready. The court cannot simply make a number up.

103. In this case no evidence at all was adduced which was capable of supporting any estimate of any betterment for which a deduction could properly be made. The various percentage deductions of 25%, 30% and 35% calculated by the loss adjusters were, so far as appears, no more than arithmetical calculations of what sum would be payable if such a deduction was made: we have been shown nothing to suggest that the loss adjusters put forward any ground for adopting any of those figures. Nor is there any merit in the insurer's contention that the absence of any evidence to support its case on this issue was somehow the fault of the insured. It was open to the insurer, if it thought fit, to formulate a detailed reinstatement scheme as was done, for example, in the *Tonkin* case. Equally, there was nothing to stop the insurer's expert from, for example, making an estimate of the likely saving in maintenance costs, based on reasonable assumptions. Whether the sums potentially involved made it worthwhile to seek to quantify and claim such deductions was a choice for the insurer to make. Its failure, however, to make any attempt to quantify any relevant sum meant that no deduction for betterment could properly be made.

Conclusion

104. For these reasons, the judge's assessment of the sum payable under the policy in my view cannot be faulted, and I would dismiss the appeal.

Lord Justice Dingemans:

105. I agree.

Lord Justice McCombe:

106. I also agree.