



Case No: HQ16XO3277

Neutral Citation Number: [2019] EWHC 43 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2019

Before:

ANDREW BURROWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

Between:

PALLISER LIMITED
- and -
(1) FATE LIMITED (IN LIQUIDATION)
(2) THE NATIONAL INSURANCE AND
GUARANTEE CORPORATION LIMITED
(3) UK INSURANCE LIMITED

Claimant

Defendants

George Spalton (instructed by **Kennedys Law LLP**) for the **Claimant**
Graham Eklund QC and Carl Troman (instructed by **Plexus Law**) for the **Defendants**

Hearing dates: 3, 4, 5, 6 December 2018

JUDGMENT

ANDREW BURROWS QC:**1. INTRODUCTION**

1. On January 1, 2010, there was a fire at a ground floor restaurant at 228 York Road, London, owned and run by Fate Ltd ('Fate'). It is not in dispute that the fire was caused by the negligence of Fate. The fire destroyed the restaurant and also destroyed, or extensively damaged, the three upper floors of the building, which contained seven flats. Fate was the freehold owner of the building and the claimant, Palliser Ltd ('Palliser'), was the leaseholder of the three upper floors of the building (above the restaurant) under a 999-year lease, running from 25 March 2006, which it had been granted by Fate on 31 January 2007. At the time of the fire, Palliser was in turn letting out the seven flats.
2. Palliser brought an action in the tort of negligence against Fate in 2016 which was settled on 23 October 2017 after Fate went into liquidation. Under that settlement, judgment was entered against Fate with damages to be assessed. Following a case management conference in March 2018, the claim was allowed to be continued but as a claim under the Third Parties (Rights Against Insurers) Act 2010. Amended Particulars of Claim were served on 20 March 2018, the Second and Third Defendants' Defence was served on 14 May 2018, and an Amended Defence was served on 27 November 2018.
3. In outline, the scheme of the 2010 Act is as follows: (i) where an insured has a liability to a third party; and (ii) the insured is covered by insurance with an insurer against that liability (ie there is liability insurance); and (iii) the insured is insolvent; then (iv) the third party can claim directly against the insurer under the liability insurance policy. In this case, the third party is Palliser, the insolvent insured is Fate, and the liability insurer is The National Insurance and Guarantee Corp Ltd/UK Insurance Ltd. The relevant liability insurance, covering Fate, was a Licensed Trade (Master Chef) Insurance Policy with The National Insurance and Guarantee Corp Ltd. Nearly two years after the fire, on 6 December 2011, the latter's insurance business, including its liabilities, was transferred to UK Insurance Ltd. UK Insurance Ltd has taken on the liabilities under the policy and I shall therefore refer throughout to UK Insurance Ltd as the defendants/insurers.
4. The liability insurance section of the Licensed Trade (Master Chef) Insurance Policy was section 6 headed 'Public and Products Liability'. It is that section which is relevant for the purposes of the 2010 Act. Payments of £225,250 have been made under it by the insurers to tenants of the seven flats (ie to those to whom the flats were let by Palliser) for losses they suffered as a result of the fire. But in this action under the 2010 Act, Palliser seeks to be indemnified by the defendants under section 6 of the insurance policy for two heads of loss it has suffered as a consequence of the negligently caused fire. The first head of loss is refurbishment costs, the quantum of which has been agreed at £225,000 (inclusive of interest). The second head of loss may be described as 'lost gains' which are put on two alternative bases. The first basis, which in the Re-Amended Particulars of Claim (I allowed a minor re-amendment on this matter at the start of the trial) was referred to as the 'loss of profit' claim, is that Palliser suffered a loss of rental income on the flats from 1 January to 30 June 2010 and, more significantly thereafter, suffered loss of development profits (because it alleges it lost the opportunity to sell the seven flats and to reinvest the sale proceeds in subsequent property developments).

Palliser alleges that, on this first basis, it has suffered, and is entitled to be indemnified for, a loss of £3,803,721 (plus interest). The second alternative basis is that Palliser suffered a loss of rental income on the flats from 1 January 2010 until early 2014 (when they were let out again), the quantum of which has been agreed at £275,000 (inclusive of interest).

5. Although the 2010 Act only applies to liability insurance, it is important in seeing the full picture in this case to recognise that the Licensed Trade (Master Chef) Insurance Policy also had a section – section 9 – headed ‘Buildings’ which provided Fate with insurance cover for damage to ‘buildings at the premises’. A payment of £610,000 was paid out by the insurers to Fate under this section of the policy (as a full and final settlement under this section with Fate). This largely covered the refurbishment costs incurred by Fate but there was some shortfall because Fate had not insured the full value of the buildings (ie the sum insured was £700,000 whereas the value of the buildings was £900,000) and the insurers had therefore been entitled to apply ‘average’ to the claim.
6. Before moving to the issues in this case, I should mention two points. First, counsel for the claimant, George Spalton, submitted that, although they had done so, the insurers had actually had no legal obligation to indemnify Fate for the refurbishment of the three upper floors. This was because, on his contention, while the buildings insurance section covered the ground floor, it did not cover the upper floors. So while he accepted that, as a commercial stance, the insurers had clearly adopted a different view in making the payments, they had not been legally bound to make payment for the refurbishment of the upper floors. I shall return to this later. The second point is that Palliser’s claim for refurbishment costs arises because it took the view that, because of the delays by Fate in carrying out the refurbishment and the poor quality of some of the work, Palliser itself had to take over the refurbishment which it did in September 2013 ensuring completion of the refurbishment in late 2013/early 2014. Palliser claims indemnification of that loss under the 2010 Act and section 6 of the policy.
7. The issues that I have to decide in this case have been narrowed down to three. The first two go to liability while the third goes to quantum. They can be explained in outline as follows:
 - (i) The first issue, which for shorthand can be referred to as ‘the property not belonging to Fate’ issue, arises as follows. Applying the 2010 Act, there needs to be liability insurance covering the relevant liability to the third party (Palliser) of the insured (Fate). The relevant words in section 6 of the policy were, ‘Accidental Damage to *Property not belonging to You* or in your Charge or under Your Control or that of any Employee’ (my italics). Did Fate’s ownership of the freehold of the building mean that the upper floors were property belonging to Fate so that damage to the upper floors was not covered under section 6? If Palliser fails to satisfy me on this issue, Palliser’s claims fail in their entirety (subject to a very small portion of the refurbishment costs - agreed by the parties as being £8,500 out of the full agreed reimbursement costs of £225,000 - incurred by Palliser in refurbishing fixtures and fittings that indisputably did not belong to Fate).
 - (ii) The second issue relates only to the claim for refurbishment costs. Other than in relation to the £8,500, as just explained, it arises only if the first issue is decided in Palliser’s favour. In essence, the question here is whether, under the 999-year lease,

Palliser (as tenant) has impliedly excluded the negligence liability of Fate (as landlord) for the refurbishment of the building because Fate, as the landlord, agreed to take out buildings insurance that covered damage to the building and hence refurbishment costs. The leading case dealing with this issue in the context of landlord and tenant is *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, CA and this issue has throughout this case been referred to, for shorthand, as the ‘*Berni Inns* defence’. If successfully made out, the defence would mean that the claim for refurbishment costs under the 2010 Act would fail because the insured (Fate) would have no liability to the third party (Palliser).

(iii) The third issue goes to quantum. It arises only if the first issue (‘the property not belonging to Fate’ issue) is decided in Palliser’s favour. This third issue can be referred to for shorthand as ‘the loss of profits issue’. The question is this: has Palliser established its loss on the first basis put forward (see paragraph 4 above) so that it is entitled to damages for loss of profits (including, in particular, loss of development profits) of £3,803,721 (plus interest)? The defendants concede that if the first issue is decided in Palliser’s favour, Palliser is entitled to be indemnified for loss of rental income from 1 January 2010 to early 2014, agreed at £275,000 (inclusive of interest): but it denies that Palliser is entitled to £3,803,721 (plus interest).

2. THE FIRST ISSUE: ‘PROPERTY NOT BELONGING TO FATE’

8. Under section 6 of the Licensed Trade (Master Chef) Insurance Policy, headed ‘Public and Products Liability’ the following cover was provided to Fate by the insurers:

‘Cover

In event of the following contingencies:

a Accidental Injury to any person other than an Employee if such injury arises out of and in the course of their employment by you

b Accidental Damage to Property not belonging to you or in Your charge or under Your control or that of any Employee

... occurring in connection with the Business during the Period of Insurance and within the Territorial Limits.

We will indemnify You against the following:

I all sums which You shall become legally liable to pay for compensation and claimants’ costs and expenses in respect of any Contingency in connection with the Business

...’

The Business, as set out in the policy schedule, was ‘restaurant’, the insured was Fate Ltd, and the risk address was 228 York Rd, London.

9. The essential submissions on this issue of Mr Spalton, for Palliser, were as follows. He accepted that, at first blush, the words ‘property not belonging to’ Fate might be thought to mean that, because Fate was the freehold owner of the building, Palliser could not claim under the 2010 Act and section 6 of the policy for its losses consequent on the

damage to the upper floors. But he submitted that, looked at in context, that was not the correct interpretation. He drew a distinction between ‘not belonging to’ and ‘not owned by’ and submitted that one needed to go behind the technical legal position that Fate was the freehold owner. Palliser had a very long lease of 999 years and the essential point was that the upper floor flats were controlled by, and in the exclusive possession of, Palliser (and its own tenants) not Fate. It was that element of real control and possession, over a long period, by Palliser that meant that the property did not belong to Fate in the relevant sense. The other words in the clause - ‘or in your charge or under your control’ - conveyed the similar idea that what the clause was excluding were third party claims in relation to damage to property where the third party, not Fate, had control or possession of the property. He contrasted other clauses of section 6 (for example, in the extensions for personal liability and liability under the Defective Premises Act 1972) where the drafter had used the word ‘ownership’ and he contended that, had the parties intended ‘not belonging to’ to mean the same as ‘not owned by’, they would have used those latter words. He also submitted that some well-known tort of negligence cases, such as *Leigh & Silavan Ltd v Aliakmon Shipping Co*, *The Aliakmon* [1986] AC 785, HL, and *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86, were relevant. As I understood it, his submission was that just as those cases recognised that concepts of ownership needed to be widened to include, respectively, possessory and beneficial interests, in order to achieve justice for claimants suffering loss by another’s tortious negligence, so here one needed to go beyond a narrow and technical approach to ownership in order to achieve justice for a tort claimant. He also contended that, irrespective of how commercially the parties had subsequently viewed it, section 9 - the section for buildings - did not cover the upper floors of 228 York Rd. This was because the cover was for ‘buildings at the premises’ and the premises were defined as the premises ‘which you occupy for the purposes of the business’. He therefore argued that it was clear that the buildings insurance covered only the restaurant and not the upper floors. It followed that, unless the public liability in section 6 applied, there would be no insurance for fire damage to the upper floors and that could not have been what the parties had intended.

10. In contrast, Graham Eklund QC, who appeared with Carl Troman on behalf of the defendant insurers, submitted, in essence, that it was a straightforward matter of contractual interpretation that the public liability cover in section 6 did not cover Palliser’s loss in relation to damage to the upper floors. This was because the building was owned by Fate so that the contingency of ‘accidental damage to property not belonging to you’ did not apply. Although the upper floors were leased on a 999-year lease to Palliser, Fate remained the freehold owner. A landlord, even under a long lease, remains, Mr Eklund submitted, an owner of the property. The words ‘not belonging to you’ were synonymous with ‘not owned by you’. The fact that a tenant is given exclusive possession of property under a lease does not mean that the landlord is no longer an owner. This interpretation or construction of the lease was not only the obvious and natural meaning of the words used but was supported by looking at section 6 in the context of the whole policy of insurance. He pointed to section 9, headed ‘Buildings’, which was the section, he submitted, which provided Fate with (‘first party’) cover for damage to the building including the upper floors. Fate was legally bound under the lease with Palliser to take out such insurance. It was therefore under that section of the policy that Fate had covered damage to the building, including the upper floors. So the exclusion from section 6 of property belonging to Fate made perfect sense, in the context of damage to the building, because Fate was covering that damage

under section 9. Although on one interpretation, the wording of the buildings section might be thought to apply only to damage to the restaurant, the better interpretation was that the upper floors were also covered ie that ‘buildings at the premises’ included the upper floors. Two contextual factors, both set out in the schedule to the policy, supported that interpretation. First, the sum insured for the buildings was £700,000. Given the evidence as to the refurbishment costs in this case, it was clear that that sum was to include the upper floors and went well beyond what would be needed as buildings cover just for the restaurant. Secondly, the schedule records that, as mortgagees, HSBC Private Bank Ltd (‘HSBC’) had an interest in the insurance policy ‘in respect of the interests of Palliser Ltd’. This was in line with HSBC securing a loan to Palliser by a charge over Palliser’s interest in 228 York Rd. But the important point here is that it indicated that the parties were viewing Palliser as an interested party in the insurance policy and that can only have been on the basis that the buildings insurance covered the upper floors. As I have already indicated, it is also not in dispute that the insurers did pay out for the damage to the upper floors under the buildings section of the policy.

11. Ultimately the question that I here need to resolve is a question of contractual interpretation. I should therefore briefly set out the correct modern approach in English law to contractual interpretation (see also my summary of the law in *Harry Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) at [11]). The court must ascertain the meaning of the words used by applying an objective and contextual approach. The court must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases recognising the modern approach include *Investments Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL, especially at 912-913 (*per* Lord Hoffmann giving the leading speech), and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. The Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, clarified that the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at [14], Lord Hodge, with whom the other Supreme Court Justices agreed, said that there was no inconsistency between the approach in *Rainy Sky* and that in *Arnold v Britton*: ‘On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing.’
12. Applying that objective contextual approach and, even taking into account business common sense and purpose, I agree with Mr Eklund that the words ‘property not belonging to [Fate]’ mean that section 6 does not cover Fate’s liability in respect of the fire damage to the upper floors of 228 York Rd. While Palliser owned a lease of the upper floors, Fate was the freehold owner of the whole building. ‘Not belonging to’ and ‘not owned by’ are here synonymous. Like any other landlord, and even though the lease here was a long one, 228 York Rd ‘belonged to’ Fate as freehold owner. That interpretation is strongly reinforced by the two points made by Mr Eklund regarding the schedule (the valuation of £700,000; and the recording of HSBC’s interest); and of

course the schedule should be seen as part of the whole contract for the purposes of interpretation. That that is the correct interpretation is also supported by the consequence that section 6 and section 9 can be viewed as coherently fitting together, with cover for the buildings, including the upper floors, being dealt with in section 9 and not section 6. Although subsequent conduct of the parties is strictly speaking not relevant to interpretation (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, HL), the way in which this particular incident was dealt with – with the insurers paying out to Fate for damage to the upper floors under section 9 – is again consistent with the interpretation put forward by Mr Eklund.

13. It follows from my decision on this issue that Palliser's claims fail in their entirety (subject to a very small portion of the refurbishment costs - agreed by the parties as being £8,500 out of the full agreed refurbishment costs of £225,000 - incurred by Palliser in refurbishing fixtures and fittings that indisputably did not belong to Fate). However, I must go on to examine the next issue not only in case my decision on this first issue is overturned on any appeal, but also because the recovery of the £8,500 refurbishment costs is dependent on it.

3. THE SECOND ISSUE: 'THE *BERNI INNS* DEFENCE'

14. This is an issue that goes only to the refurbishment costs. As I have already briefly explained, one may express the central question here as being whether, under the 999-year lease, Palliser (as tenant) impliedly excluded the negligence liability of Fate (as landlord) for the refurbishment of the building because Fate agreed to take out buildings insurance that covered damage to the building and hence refurbishment costs. If negligence liability has been excluded, the Third Parties (Rights Against Insurers) Act 2010 cannot apply because the insolvent insured party (Fate) had no liability to the third party (Palliser). The leading case on this issue in the context of landlord and tenant is *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, CA. Mr Eklund submitted that the exclusion of liability defence in that case - the '*Berni Inns* defence' - applies here so that any claim for negligence by Palliser against Fate has been impliedly excluded. Mr Spalton submitted that that case is distinguishable from our case and that there is here either no implied exclusion of Fate's liability to Palliser or, if there is such an implied exclusion, that exclusion does not apply to the extent that Fate underinsured the building under section 9 of the policy. In other words, Mr Spalton submitted that the *Berni Inns* defence does not here apply because it is the landlord, as the insuring party, that has been negligent rather than the tenant, for whose benefit the insurance may arguably enure, that has been negligent: but, even if wrong about that, he submitted that the *Berni Inns* defence cannot here apply because it must be qualified in its application to the extent that the landlord has underinsured.
15. In *Mark Rowlands Ltd v Berni Inns Ltd*, the defendant was the tenant of the basement and ground floor of a building, where it ran a restaurant. The claimant was the freehold owner of the building. The building was effectively destroyed by a fire caused by the defendant's negligence. The Court of Appeal held that the contractual covenants in the lease between the defendant tenant and the claimant landlord meant that (i) the buildings insurance taken out by the landlord, in accordance with the landlord's covenant in the lease to insure the building, was intended to enure for the benefit of the tenant (as well as the landlord); and (ii) that that contractual arrangement as to buildings insurance between the parties precluded the landlord from recovering damages in an action for the tort of negligence against the tenant. The second point was regarded as

the essential one. Kerr LJ (with whom Croom-Johnson and Glidewell LJJ agreed) said the following, at 232:

'An essential feature of insurance against fire is that it covers fires caused by accident as well as by negligence. This was what the [landlord] agreed to provide in consideration of, inter alia, the insurance rent paid by the [tenant]. The intention of the parties, sensibly construed, must therefore have been that in the event of damage by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence.'

In practice, what was at issue in the case was whether the landlord's building insurers had a subrogated claim against the tenant (or, as the tenant was insured, against the tenant's liability insurers). It follows that, with respect, Kerr LJ's additional concerns (at 233) about double recovery by the landlord seem misplaced (in the light of the law on subrogation, there would in practice be no possibility of double recovery by the landlord).

16. In the context of landlord and tenant, my attention was drawn to two first instance English cases in which the *Berni Inns* case has subsequently been examined. The first was *Lambert v Keywood Ltd* [1999] Lloyd's Rep IR 80 in which *Berni Inns* was distinguished. There, in breach of a covenant in the lease, the landlord had failed to take out buildings insurance. Laws J tended to focus on the first point (i) I have set out in the last paragraph above and stressed that a bare covenant by a landlord to insure the buildings does not necessarily mean that the buildings insurance is for the benefit of the tenant. But he held that, apart from the fact that an insurance policy would not in this case have covered the fire damage because the fire had been recklessly rather than negligently caused, *Berni Inns* did not here apply because the provisions in the lease with which he was concerned were significantly different from those in that case. He said, at 83:

'there is nothing in the judgments in Rowlands to suggest that it was the court's view that a bare covenant by a landlord to effect and pay for fire insurance raises a conclusive presumption that any insurance taken out pursuant to the covenant enures for the benefit of the tenant as well as himself. Kerr LJ referred to provisions in the lease in that case which ran well beyond the bare covenant to insure: in particular, a requirement that the tenant contribute to the cost of insurance (emphatically not present in this case), a provision relieving the tenant from his repairing obligations in the event of damage to the building by fire, and an express obligation on the landlord's part to apply the insurance moneys in reinstating the premises after damage by fire.... It is plain that Kerr LJ (with whom their other Lordships agreed) took the view that the terms of the particular lease fell to be construed as demonstrating a common intention that the fire insurance was to enure for the benefit of both parties.'

17. The second case was *Frasca-Judd v Golovina* [2016] EWHC 497 (QB), [2016] 4 WLR 107, in which *Berni Inns* was applied. Here a tenant had left a cottage empty and, it was alleged, without any background heat turned on during the New Year period. The pipes had frozen leading to severe water damage to the cottage. The landlord's insurer had indemnified the landlord for its loss and issued a subrogated claim against the tenant alleging negligence and/or breach of the terms of the tenancy agreement. It was held that, even if the tenant had been negligent and/or in breach of contract by not leaving

the heat on (Holgate J found that, in fact, the tenant had left the heating on so that there was no negligence and no breach of contract), the *Berni Inns* case applied so that the landlord had no claim against the tenant. Holgate J stressed that there were a number of factors to be considered - none of which were in themselves determinative - in answering the underlying question of whether the parties' common intention in the tenancy agreement was to exonerate the tenant from liability. He said, at [48]:

'In my judgment, the following principles may be derived from the authorities: (1) The court should construe the terms of the tenancy agreement in order to determine how the parties have agreed to allocate risk between themselves; (2) A covenant by a landlord with his tenant to insure the demised premises in return for mutual obligations by the tenant is an important indicator that the parties intended that the tenant (a) need not take out insurance for the risk covered by the landlord and, (b) would not be liable for any loss or damage suffered by the landlord falling within the scope of that which the landlord has agreed to cover; (3) The strength of that indicator will depend upon the other terms of the tenancy, including whether they provide some alternative explanation for the covenant to insure; (4) The strength of that indicator is greater where the tenant is contractually obliged to pay for, or to contribute towards, the cost incurred by the landlord of insuring the premises; (5) Other relevant indicators include terms of the tenancy which relieve the tenant from repairing or other contractual obligation in the event of damage by an insured risk, or which require the landlord to lay out insurance monies on remedying damage caused by an insured risk, or which suspend the obligation to pay rent whilst damage from an insured risk prevents use of the demised premises. But the application of the principle in Rowlands does not depend upon the inclusion of all or any of these terms in the tenancy agreement; (6) Where applicable the principle in Rowlands will defeat a claim brought against the tenant in negligence even in the absence of a clause expressly exonerating the tenant from liability for negligence. I would add that Woodfall's Law of Landlord and Tenant also treats the covenants discussed in Rowlands as factors or indicators in deciding whether the court should infer that the parties' common intention was that the landlord would look to an insurance policy rather than the tenant for indemnification, rather than as prerequisites for drawing that conclusion (see paragraph 11–104).'

18. I was very briefly referred to other cases, outside the context of landlord and tenant, where a similar principle has been applied to that in the *Berni Inns* case. These included, in particular, *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 WLR 1419, and *Gard Marine and Energy Ltd v China National Chartering Co Ltd, The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793. The former was concerned with insurance for damage to a building in the context of a construction project and the latter with insurance for damage to a ship in the context of charterparties. Although their very different contexts mean that detailed examination of those cases is unnecessary, three helpful points emerge from them. The first is that one is looking to see whether the contractual arrangements between the parties are such that the parties have agreed that compensation should be dealt with by insurance payments rather than the normal rules of tort and breach of contract. In the words of Lord Hope in the *Co-operative* case at [48], '[the contractual arrangements in relation to insurance meant that] the ordinary rules for the payment of compensation for negligence and breach of contract have been eliminated.' Secondly, it may be illuminating to think in terms of whether there is a single 'fund' provided from insurance out of which the repairing of damage to the property is to be covered and which carries with it the

consequence that subrogated claims are excluded. So, for example, Lord Bingham in the *Co-operative* case, at [7], spoke of the parties being ‘indemnified by the insurers’ provision of a fund enabling [payment] for repairing the fire damage. The insurers could not then make a subrogated claim against the [payee] ...’. Thirdly, one can look at the issue in terms of whether the scheme of insurance comprises a comprehensive allocation of risk between the parties in place of litigation: see, for example, Lord Mance in the *Gard Marine* case who said, at [114], ‘The scheme... is clearly intended to be comprehensive. Whatever the causes, both repairs and total losses fall to be dealt with in accordance with its terms, rather than by litigation to establish who might otherwise be responsible for undertaking them, for bearing the risk of their occurrence or for making them good.’

19. Mr Eklund pressed upon me that, leaving aside the fact that the tenant (Palliser) was not bound to pay any sum for the insurance – the rent was a peppercorn only – the relevant covenants of the lease in our case were very similar to those in *Berni Inns*. For example, the landlord (Fate) had covenants to repair and to insure the building and there was an express covenant to use the insurance moneys for rebuilding/reinstating; and there was an exception to the tenant’s covenant to repair where the damage was caused by risks against which the landlord should have insured.
20. I agree that those are important similarities. Having said that, there is a very significant difference between our facts and the facts in *Berni Inns* (and the other two landlord and tenant cases I have referred to above). The significant difference is that in our case it is the landlord, who has been negligent, not the tenant. So it is the landlord who has taken out the buildings insurance who seeks to rely on that insurance as impliedly excluding its negligence liability to the tenant. It follows from this that the initial question being asked in those other cases of whether the insurance enures for the benefit of the person who has been negligent seems an odd question to ask in this case. Clearly the landlord (Fate) who has taken out and paid for the buildings insurance is taking out the insurance for its own benefit (albeit perhaps for the benefit of the tenant as well) and can obviously rely on it if it needs to cover refurbishment of the building because of a fire caused by its own negligence. This also explains why, this way round, it is surely irrelevant whether the tenant (here Palliser) has paid anything towards the insurance: as it is the landlord, not the tenant, who is seeking exclusion of liability, it makes no difference whether the tenant has paid towards that insurance or not.
21. However, the difficult question to answer is whether, where the landlord is providing insurance cover for the buildings, in accordance with its covenant under the lease, the tenant is impliedly excluding the landlord’s liability in negligence to the tenant for refurbishment costs incurred by the tenant. Put another way, and using the language of the more general cases touched on in paragraph 18 above, is it the case that, in respect of the landlord’s negligence, the parties have here agreed that compensation for fire damage to the building should be dealt with by the buildings insurance payments rather than the normal rules of tort; that they have looked to a single fund from which the repairing of the fire damage should be covered; and that they have provided a scheme of insurance for comprehensively allocating between them the risk of fire damage to the building in place of litigation?
22. As will become clear, I do not need to decide this. However, I make two observations about the application of the *Berni Inns* defence this way round (ie where it is the insuring landlord who has been negligent, not the tenant). First, it must be rare in

practice for this issue to arise and certainly I was not referred to any case where it has been in issue. This is because, where the landlord has taken out the buildings insurance, it will be in the landlord's interest to use the proceeds of the insurance to repair the building so as to remove any loss to the tenant that could otherwise be claimed against the landlord in the tort of negligence. The issue is therefore only likely to be raised where there is some problem with the buildings insurance (as, for example, where, as here, the landlord has underinsured). Secondly, the underlying practical issue in the *Berni Inns* and the two other landlord and tenant cases to which I was referred is whether the insurer, under the buildings insurance, has subrogation rights against the negligent tenant. But there is no question of subrogation operating in the situation with which we are dealing; ie there is no possibility of the insurer having subrogation rights against the negligent landlord who is the insured under the buildings insurance policy (as the insurer 'stands in the shoes' of the landlord, it would be suing itself which would be a nonsense).

23. However, I do not need to decide this question as to whether the *Berni Inns* defence applies this way round because, even assuming it does, I agree with Mr Spalton's alternative submission that there must be an important qualification to its application. Precisely because it is the landlord who is here negligent, and is relying on the buildings insurance as indicating that there has been an implied exclusion of its negligence liability to the tenant, the landlord must fully insure the building as required under its covenant in the lease. It cannot be correct that the tenant can be said to have impliedly excluded the landlord's liability in negligence for damage to the building where the buildings insurance is inadequate. As Mr Spalton submitted, the *reductio ad absurdum* would otherwise be that there is an implied exclusion of liability even where the landlord fails to take out any buildings insurance. It follows that this way round - in contrast to where it is the tenant who has been negligent where underinsurance by the landlord would not be detrimental to the tenant - there must be a qualification to the effect that the implied exclusion was not intended to apply to the extent that the landlord (Fate) has underinsured. In other words, even if (which I do not need to decide) the *Berni Inns* defence does apply to where it is the insuring landlord rather than the tenant who is negligent, this way round the defence is subject to the qualification that it does not apply to the extent that the landlord has underinsured. That must be the correct objective interpretation of the parties' intentions in relation to the landlord's (Fate's) covenant to insure in the lease.
24. Mr Eklund submitted that the question of underinsurance by Fate should not be regarded as affecting the *Berni Inns* defence but could simply be dealt with by the tenant (Palliser) claiming against the landlord (Fate) for breach of its covenant to insure. Although he did not put it in quite this way, his approach would have two stages. First, one would apply *Berni Inns* so that the negligence liability of Fate to Palliser would be excluded and the parties would need to rely on the insurance monies obtained by Fate under the buildings insurance. Secondly, if that left Palliser with uncompensated refurbishment costs, because Fate was underinsured, Palliser could recover its losses from Fate in a contractual claim for breach of Fate's covenant properly to insure (or perhaps properly to carry out the refurbishment). While I accept that that approach might have produced a similar end result on the facts of this case, it would not now do so because of Fate's insolvency. But in any event, as a matter of principle, even if the *Berni Inns* defence were otherwise applicable to this case, it should carry with it the

important qualification I have indicated so as to ensure that it reflects the correct analysis of what the parties impliedly agreed.

25. It follows from my acceptance of Mr Spalton's alternative submission on this second issue that because the £8,500 of refurbishment costs (incurred by Palliser) was not covered by the buildings insurance, given Fate's underinsurance of the building, Palliser succeeds in its claim for £8,500 of refurbishment costs. However, as I have already made clear (at paragraph 13 above), my decision against Palliser on the first issue above means that the claimant fails in its claim for the much larger remainder of the refurbishment costs (agreed at £216,500: ie £225,000 minus £8,500).

4. THE THIRD ISSUE: LOSS OF PROFITS

26. In the light of my decision on the first issue above, Palliser's claim for loss of profits fails. But although not necessary to do so, it is appropriate for me to go on to deal with the loss of profits issue - which was fully argued before me - in case my decision on the first issue is overturned on any appeal. I should add that it was in relation to this third issue only on which I heard evidence, which lasted more than a day. The question on this issue is this: has Palliser established its loss on the first basis on which that is put so that it is entitled to damages for loss of profits (including loss of development profits) of £3,803,721 (plus interest)?
27. Before looking at the evidence, I should make clear the relevant standard of proof that, as a matter of law, I am required to apply. This was not in dispute between the parties. The burden of proof lies on the claimant and, even though this issue goes to quantum rather than liability, the test that the claimant must satisfy can be referred to as the 'all or nothing balance of probabilities' test. Although when assessing damages resting on hypothetical events, damages can be awarded that are proportionate to the chances – one might call these 'damages for loss of a chance' or, synonymously, 'damages for the chances of loss' – such proportionate damages are inappropriate where the uncertainty is as to what *the claimant* (in contrast to a third party) would have hypothetically done. The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances. For that general distinction between past fact and future or hypothetical events, see *Mallett v McMonagle* [1970] AC 166 at 176 (*per* Lord Dilock). That there is a contrast between the test applicable to what hypothetically the claimant would have done and what hypothetically a third party would have done emerges from cases such as *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, CA, and *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch 91, at [41] - [92]. In the Court of Appeal in *Gregg v Scott* [2002] EWCA Civ 1471, [2003] Lloyd's Rep Med 105 (affirmed without discussing this point at [2005] UKHL 2, [2005] 2 AC 176), Mance LJ, as he then was, said at [71]:

'[T]he rationale of the distinction ... must, I would think, be the pragmatic consideration that a claimant may be expected to adduce persuasive evidence about his

own conduct (even though hypothetical), whereas proof of a third party's hypothetical conduct may often be more difficult to adduce.'

There is also a very helpful passage in J Edelman, *McGregor on Damages* (20th edn, 2017) at para 10-062 (the same wording was in the previous edition written by the late Harvey McGregor, *McGregor on Damages* (19th edn, 2014) at para 10-060):

'While at first glance it may seem somewhat strange to have different tests applicable to hypothetical acts of the claimant and hypothetical acts of third parties, it can be seen to make sense, with nothing at all arbitrary about it and with no need to bring in public policy to justify it. For a claimant can hardly claim for the loss of the chance that he himself might have acted in a particular way; he must show that he would have; it cannot surely be enough for a claimant to say that there was a chance that he would have so acted. The onus is on a claimant to prove his case and he therefore must be able to show how he would in fact have behaved. There is no such onus on third parties.'

In this case, the essential uncertainty on quantum that I am faced with is as to what the claimant, Palliser, would hypothetically have done had there been no fire at 228 York Rd. The 'all or nothing balance of probabilities' test therefore applies.

28. There was one witness as to fact. He was Zahid Hanif appearing on behalf of Palliser. His two witness statements are dated 31 July 2018 and 15 November 2018 respectively. There were also two expert accountancy witnesses: Greg Lacey called by Palliser (his expert report is dated 2 October 2015) and Steven Segal called by the insurers (his expert report is dated 7 October 2018). The joint statement of the experts is dated 15 November 2018.
29. It is most unsatisfactory that Mr Hanif's evidence is the only factual evidence that I heard for Palliser. Palliser is an Isle of Man company. Its sole shareholder is Mr Allana. Its directors include Sean Dowling and Ella Pinnock. Mr Hanif is not a director or shareholder or employee of Palliser. Rather he has acted as the adviser to Palliser on the purchase, sale and development of property primarily through a company of which he is the managing director, Intra Urban Developments LLP. He claimed to know the thinking of Palliser and he is the son-in-law of Mr Allana. But I had no evidence from Mr Allana (I was told that he was abroad on business at the time of this trial) and nothing from any other director, or employee, of Palliser. Given that the central question I have to determine is what Palliser would hypothetically have done at various points in time (eg in relation to 228 York Rd in June 2010) it is unfortunate that the only factual evidence I have to go on is from someone who advised Palliser but was not himself a decision-maker for Palliser.
30. What was my impression of the witnesses? Mr Hanif came across as very clever with an astute business and financial mind. He is a qualified accountant and he has previously been an investment banker. He was on top of all the material and answered the questions put to him fluently and fully. I do not accept Mr Eklund's criticism that he sometimes made speeches to support Palliser's case rather than answering the question put but I do accept that, perhaps inevitably, he saw everything through the claim that Palliser was making. Indeed it is clear that the whole of the loss of profits claim – and the details of the hypothetical sales that, it is alleged, Palliser would have undertaken – was put together by Mr Hanif (with the assistance, he told us, of an employee in his team). It follows that, while I regarded Mr Hanif as an honest witness,

his evidence was very partial to Palliser and that diminished his credibility on some issues.

31. Of the two experts, Steven Segal for the insurers was far more impressive than Greg Lacey for Palliser. In his report, the former was meticulous in scrutinising the details of Palliser's loss of profits claim. His attention to detail carried forward into his oral evidence. Although verging at times on offering expert opinion (for example, on property market matters) outside his strict role as an expert forensic accountant, he impressed me with his clarity and rigour. In contrast, Greg Lacey appeared at times to be out of his depth and, perhaps more importantly - and while I accept that this verged onto territory that he legitimately regarded as outside his expertise - he made clear that he had applied no independent judgment at all as to whether the projected forecasts of sales by Palliser bore any relation to reality. In other words, he had simply taken Mr Hanif's hypothetical projection of sales as valid and had merely checked the maths and made some basic adjustments to reach the sum of net profits. He accepted that in that important respect he was essentially 'rubber-stamping' Mr Hanif's hypothetical projections. Although he said he had asked Mr Hanif for the documents underpinning those projections, he had not been provided with any such documents. He had therefore simply taken Mr Hanif's word for the fact that those hypothetical sales represented real opportunities that other of Mr Hanif's clients had in fact taken and which Palliser would otherwise have taken. It follows from my assessment of the two experts that, in respect of any conflict between them, I prefer the evidence of Mr Segal to that of Mr Lacey.
32. The background facts on this issue, most of which were not in dispute, were as follows. As Mr Hanif emphasised, Palliser was a property development company. It was in the business of buying, developing and selling property. It was not in the business of renting property, although market conditions or other factors might dictate that it would rent out property for a period of time as it did in this case with 228 York Rd. The lease to the three upper floors of 228 York Rd was bought from Fate on 31 January 2007 and the floors were developed by Palliser to create seven flats. The first six were completed in November 2008 and the seventh in January 2009. I accept that Palliser's intention, as a property development company, was to sell those flats (or, strictly speaking, to 'sell' the long lease of those flats). But by the time the flats had been completed, the economic recession meant that there had been a very significant downturn in the property market. Palliser therefore decided to rent out the flats until the market recovered. In or around March 2009, Palliser successfully rented out all seven flats. Then on 1 January 2010 there was the fire that destroyed or damaged the flats. There was significant delay by Fate in carrying out the refurbishment which led to Palliser taking over that work in October 2013. That work was completed (on six of the seven flats) in December 2013 and on the other flat in March 2014. Palliser rented out five of the flats and tried, but failed, to sell two. They did not try to sell the others primarily because Palliser thought that the burnt out restaurant on the ground floor, which Fate had not repaired, would put off, and indeed did put off, potential buyers. It was not until the restaurant was refurbished in February 2017 that it was thought worthwhile trying to sell all the flats and then Palliser needed to take into account the rights of the tenants in some of the flats. So it was not until September 2017 that the flats were all put up for sale. Mr Hanif exhibited to his second witness statement a letter from McMillan Williams Solicitors Ltd dated 22 October 2018, who are acting for Palliser in relation to property transactions at 228 York Rd, which confirms that five of the seven flats are now moving towards exchange.

33. Although not formally a linked ‘group’ of companies, I find that Palliser, the Fairway Partnership (‘Fairway’) and the Abode Partnership (‘Abode’) worked together and were, in that sense, closely linked. As I understand it, it is not in dispute that Mr Allana was a shareholder of all three at the relevant time. I accept Mr Segal’s view that one should not be looking at Palliser’s activities in isolation from those of the other two companies. As I shall explain, it is particularly important that, as shown in the most relevant balance sheet of 31 March 2010, Palliser made a loan to Fairway of £2,786,947.
34. I now turn to examine the schedule of lost profits prepared by Mr Hanif (which was exhibit 4 to his first witness statement). This assumed a sale of 228 York Rd on 30 June 2010 and four subsequent annual sales of property investments bought and developed using the profits (along with bank loans) made from the earlier investments. According to that schedule, as at 30 June 2010, Palliser would have sold the flats at York Rd for £2,100,000. This would have given Palliser a profit of £358,245. Palliser had invested £522,526 in York Rd so that, on that sale, it would have had £880,771 to invest in new development activities. Assuming a sale of the new property investment(s) at 30 June 2011 for £1,275,000, Mr Hanif estimated the additional profit as being £450,000. Added to the £880,771, it would then have had £1,330,771 to reinvest. Assuming a sale of the new property investment(s) on 30 June 2012 for £1,275,000, Mr Hanif estimated the additional profit as being £675,000. Added to the £1,330,771, it would then have had £2,005,771 to reinvest. Assuming a sale of the new property investment(s) on 31 December 2013 for £5,250,000, Mr Hanif estimated the additional profit as being £1,250,000. Added to the £2,005,771, it would then have had £3,255,771 to reinvest. Assuming a sale of the new property investment(s) on 30 June 2015, Mr Hanif estimated the additional profit as being £2,220,000 and it would then have had £5,475,771 to reinvest. If one were to deduct the initial £522,526 that Palliser had to invest at the start, this would put their property investment profits, as at 30 June 2015, at £4,953,245. Mr Lacey took that figure, added the lost rental income from January to June 2010 (£40,829) and made a deduction for the present value of 228 York Rd (£1,190,353) to arrive at the estimated loss claimed of £3,803,721.
35. An immediate difficulty I have with that schedule is that all the estimated sales and profits appear to be pure speculation. Mr Hanif denied this and explained that that schedule was based on property developments that had actually been undertaken by other clients he advised, namely Fairway, Abode and another company called Rothery Developments. He said that they were actual opportunities that Palliser could and would have taken up had they been able to sell York Rd. But Mr Hanif did not provide the court with any documentation to prove that those other developments had occurred and that those profits had been made. He said that that was sensitive data that those other clients would not release. It followed that, as regards this absolutely central evidence on which the whole claim for loss of profits rests, he was asking the court simply to take his word for it without any supporting documentation. Not least because his evidence is given from the perspective of someone partial to Palliser I am not prepared to accept his word without more.
36. Apart from my concern that I am being asked to accept what looks to be pure speculation based on the word of a partial witness without any supporting documentary evidence (or, I might add, any truly independent supporting expert evidence), Mr Segal,

the impressive witness for the insurers, indicated that there are at least two additional specific reasons to be sceptical about the accuracy of those estimates.

37. First, there was the close relationship between Palliser and Fairway and Abode. Mr Segal's report indicates that it was those other companies, not Palliser, which at the relevant time were pushing forward with development activities. Very importantly, the most relevant balance sheet of 31 March 2010 shows that Palliser had paid out loans of £2,786,947 to Fairway and £217,543 to Abode. If Palliser had wanted to invest in further developments it could have done so by not making those loans or by calling for those loans to be repaid. That Palliser made those loans and did not call for them to be repaid indicates that, compared to Fairway and Abode, Palliser was not being seen at the relevant time as the company moving forward with development projects. As Mr Segal said, at paragraph 80 of his expert report criticising Mr Lacey's report:

'Mr Lacey ignores the group's finances and whether they could have financed the claimed developments foregone. For example, he ignores the potential for Palliser to invest the balance of proceeds from the sale of two other Palliser properties ... in late 2009 and early 2010, or the potential for funds to derive from the repayment of the Fairway loan.'

Mr Segal's report indicates that this tied in with a strategy report, dated 25 September 2009, in relation to the extension or renewal of Palliser's bank facilities with HSBC. That report reviewed the activities of Palliser, Fairway and Abode and enables one to see the development activities being undertaken three months before the fire. What it showed, according to Mr Segal's analysis, was that Fairway and Abode, but not Palliser, were pursuing development activities and that, to quote from the strategy report, 'rental income was allowing us to continue with our activities'. In other words, as Mr Segal indicates, there is evidence suggesting that, looking at the three companies together, the development activities (by, for example, Fairway) were being supported by rental income (derived, one might infer, from the rent Palliser obtained from, for example, 228 York Rd).

38. The second and linked reason why Mr Segal suggests that the court should be sceptical about Mr Hanif's estimates concerns the bank loans for Palliser from HSBC. Palliser's bank loans from HSBC had been decreasing from a high of £6M in March 2007 (see Mr Segal's report paragraph 34) to the same loan of £1,438,878 in March 2010, 2011 and 2012 (see the summary of Palliser's accounts at Appendix 4 of Mr Segal's report). As Mr Eklund put it in paragraph 19 of his closing submissions,

'Far from the Claimant having access to the lending which even on its own case it required to generate [the] profits[claimed] ...the bank was tightening the Claimant's belt.'

And as Mr Segal said in his report at paragraphs 66-67:

'[It] appears ...that the HSBC loan was renewed soon after 26 September 2009 on the basis of an advance fixed at 70% security on valuation with repayments on disposals. For the avoidance of doubt, if the loan was agreed on this basis, it means that it did not provide for Palliser to reinvest in new developments.'

He continued, in a passage which links together the two reasons for scepticism:

'If [the HSBC loan] was a development facility available for reinvestment, and there were suitable developments available, I do not see why the [balance of proceeds from the sale of two other Palliser properties] could not have been reinvested together with funds repaid to Palliser by Fairway. That this did not occur indicates that it was not a development facility and that Palliser's historic profits remained committed to Fairway and Abode's projects.'

39. There is a further point about the link between Palliser and Fairway and Abode. As I have already said, Mr Hanif explained that the schedule of development profits that he had put forward was based on property developments that had actually been undertaken by other clients he advised, namely Fairway, Abode and another company called Rothberry Developments. It follows that, if I accept (which, without the necessary underpinning documentation, I do not) that that schedule is based on actual development activities, some of the very development profits that Palliser is claiming to be a loss in this action would, on that basis, have been development profits that at least two closely linked companies had actually made. Looking at them together, the companies have made, and not lost, those development profits.
40. There is an additional point that, while perhaps less clear-cut, is consistent with my view that the claim for development profits is far too speculative to justify an award of damages. When the claim for loss was first being put forward by Kennedys, the solicitors for Palliser, they did so on the basis that the direct loss caused by the fire at 228 York Rd was the loss of rental income and it was that rental income that would have been reinvested to make additional profit, estimated at £175,926 after year 3 (see Kennedys' letter to Fate dated 26 February 2013). In other words, the solicitors for Palliser were themselves assuming that, at least until February 2013, 228 York Rd would have been rented out rather than sold.
41. For all the reasons that I have here set out in relation to this third issue, and applying the all or nothing balance of probabilities test, my conclusion is that the claimant falls a long way short of proving that, but for the fire, it would have sold 228 York Rd in June 2010 or that it would have gone on to make the profits set out in the schedule prepared by Mr Hanif. The claim, which is based on that schedule, is hopelessly speculative.
42. I have already made clear that, because of my decision on the first issue, the claim for loss of profits fails. But if I am wrong on that first issue, the claim for loss of profits in any event fails because the claimant has failed to prove its loss to the required standard. For completeness I should refer to a point made earlier that, if I am wrong on the first issue, the defendants concede that Palliser is entitled to be indemnified for loss of rental income from 1 January 2010 to early 2014, agreed at £275,000 (inclusive of interest).

5. OVERALL CONCLUSIONS

43. My overall conclusions are therefore as follows:
 - (i) On issue one – 'property not belonging to Fate' – the claimant fails. Section 6 of the insurance policy does not apply because Fate's ownership of the freehold of the building means that the upper floors were property belonging to Fate. The fire damage to the upper floors was *not* 'accidental damage to property not belonging to [Fate]'. As the Third Parties (Rights Against Insurers) Act 2010 requires the insurer to be liable to

the insured under the policy, Palliser's claims therefore fail in their entirety (subject to a very small portion of the refurbishment costs - agreed by the parties as being £8,500 out of the full agreed refurbishment costs of £225,000 (inclusive of interest) - incurred by Palliser in refurbishing fixtures and fittings that indisputably did not belong to Fate).

(ii) On issue two – ‘the *Berni Inns* defence’ – the claimant succeeds. The *Berni Inns* defence does not here apply because, even if it would otherwise apply this way round (where it is the insuring landlord who has negligently caused the fire damage not the tenant) – a difficult question which I do not need to decide – it does not apply to the extent that the landlord (Fate) underinsured the building. The claimant therefore succeeds in its claim for £8,500 of refurbishment costs (inclusive of interest). (However, my decision on the first issue means that the claimant fails in its claim for the much larger remainder of the refurbishment costs (agreed at £216,500 inclusive of interest)).

(iii) On issue three – loss of profits – the claimant fails. This is because of my decision on the first issue. But, in any event, the claim for loss of profits fails because the claimant falls a long way short of proving on the balance of probabilities that, but for the fire, it would have sold 228 York Rd in June 2010 or that it would have gone on to make the profits (of £3,803,721 plus interest) as set out in the schedule prepared by Mr Hanif.

(iv) There shall therefore be judgment for the claimant for £8,500 (inclusive of interest).

44. I would like to thank counsel on both sides for their very helpful submissions.