

**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 (KBD)**  
**HIS HONOUR JUDGE PELLING KC, SITTING AS A JUDGE OF THE HIGH COURT**  
**[2023] EWHC 1207 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Monday 16<sup>th</sup> December 2024

Before:

**LORD JUSTICE POPPLEWELL**  
**LORD JUSTICE PHILLIPS**  
and  
**LORD JUSTICE SNOWDEN**

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Between:

**SKY UK LIMITED**  
**MACE LIMITED**  
- and -

**Claimants/  
Appellants**

**(1) RIVERSTONE MANAGING AGENCY LIMITED**  
**(2) THE UNDERWRITING MEMBERS OF LLOYD'S  
SYNDICATE 3210 FOR THE 2014 YEAR OF ACCOUNT  
SUBSCRIBING TO POLICY B0509DD190814**  
**(3) OLD COMPANY 18 LIMITED**  
**(4) ASPEN INSURANCE UK LIMITED**  
**(5) ROYAL & SUN ALLIANCE INSURANCE PLC**  
**(6) HSB ENGINEERING INSURANCE LIMITED**  
**(7) BERKSHIRE HATHAWAY INTERNATIONAL  
INSURANCE LIMITED**  
**(8) MSI CORPORATE CAPITAL LIMITED**

**Defendants/  
Respondents  
/Cross  
Appellants**

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**David Edwards KC, Crispin Winser KC and Simon Kerr** (instructed by **Herbert Smith  
Freehills LLP**) for the **Claimant/Appellant (705 Claim: Sky)**

**Paul Reed KC, Ebony Alleyne and James Shaw** (instructed by **Clyde & Co LLP**) for the  
**Claimant/Appellant (536 Claim: Mace)**

**Andrew Rigney KC, Simon Goldstone and Patrick Maxwell** (instructed by **DAC Beachcroft  
LLP**) for the **Defendants/Respondents/Cross Appellants (705 Claim)**

Hearing dates: 15, 16, 17 and 18 October 2024  
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## **LORD JUSTICE POPPLEWELL:**

### **Introduction**

1. This is an appeal against the Order of HHJ Pelling KC ('the Judge') dated 24 August 2023 in respect of claims made by Sky UK Limited ('Sky') and Mace Limited ('Mace') under a construction all risks policy ('the Policy') underwritten by the defendant insurers ('the Insurers'). The claims were in respect of extensive water damage to the roof of Sky's global headquarters building, known as Sky Central, built on the Sky Campus in Osterley, West London. Sky Central was constructed for Sky in 2014 to 2016 by Mace as main contractor under a JCT 2011 Design and Build Contract dated 17 March 2014 ('the construction contract'). Mace was a named insured under the Policy.
2. Section 1 of the Policy covered contract works. The Insuring Clause for section 1 provided:

"The Insurers shall, subject to the Terms of this Contract of Insurance, indemnify the Insured against physical loss or damage to Property Insured, occurring during the Period of Insurance, from any cause whatsoever ....

#### Basis of Settlement

In settlement of claims under this Section of the Contract of Insurance the Insurers shall, subject to the terms and conditions of the Contract of Insurance, indemnify the Insured on the basis of the full cost of repairing, reinstating or replacing property lost or damaged (including the costs of any additional operational testing, commissioning as a result of the physical loss or damage which is indemnifiable hereunder) even though such costs may vary from the original construction costs ...."

3. The "Property Insured" was defined as being:

"Permanent works, materials (including those supplied free to the Project by or on behalf of the Principal, provided the value is included in the Contract Works Sum Insured), temporary works, equipment, machinery, supplies, temporary buildings and the contents thereof, camps and the contents thereof and all other property used for or in connection with the Project."
4. The Period of Insurance was defined as comprising an "initial period" of insurance, essentially running until the completion of the works including commissioning and testing, and a "maintenance period" comprising a period of one year thereafter.

Although the terms of cover were not identical for the two periods, the parties agreed that the claim should be determined as if they were. It was common ground that the Period of Insurance for the purpose of the Insuring Clause in Section 1 ran from 1 February 2014 (commencement of the project) to 15 July 2017 (one year after completion). I shall refer to this, as the Judge and parties did, as ‘the POI’.

5. At the heart of the disputed issues was the extent of damage at the conclusion of the POI and the quantification of recoverable loss in respect of any such damage. The roof was made up of 472 individual wooden cassettes, into a substantial number of which water had entered and remained for periods during construction, leading to wetting of internal timbers and, so Sky and Mace alleged, irreversible swelling and structural decay by the end of the POI. There was a dispute as to whether this wetting was itself damage, or caused damage, during the POI. It was common ground, however, that there was damage or further damage which occurred after the POI as a result of the wetting which had occurred during the POI: in the period between expiry of the POI and trial, the condition of the timbers worsened, and the moisture spread. The parties referred to this as deterioration and development damage. For the sake of precision and clarity I will use deterioration to refer to damage or additional damage in parts of the timbers already wet or damaged, for example wetting leading to swelling or to structural decay in the wet or swollen parts of the timber; and development to refer to damage to additional parts of timbers by way of spread, for example by way of capillary migration of moisture in timbers or vapour condensing so as to wet new timbers or parts of timbers.
6. Two aspects are worth emphasising at the outset. First, the ingress of water very largely occurred during construction and therefore during the POI. There was little, if any, relevant ingress after expiry of the POI. Secondly, Insurers do not allege that Sky or Mace failed to take reasonable steps to mitigate loss, or that they in any way failed to act as prudent uninsureds. It is obvious that damage of the kind involved in this case would require some time to address and redress, first by way of investigation as to the nature and extent of the damage; then by design of a remedial scheme of works which was reasonable not only in relation to the physical state of the building but also in relation to the effect of the remedial works on what was a working building including a news studio; and finally by the implementation of such a remedial scheme. This is so irrespective of any dispute between the

parties. The issues in the appeal therefore fall to be decided on the basis that the condition of the roof at the time of trial was wholly or very largely the natural and foreseeable consequence of the ingress of water during the POI, and the cost of remedying the condition of the roof as it existed at the time of trial was not in any respect attributable to any failure on the part of Mace or Sky to act reasonably.

7. At trial Sky and Mace advanced alternative schemes for remedying the situation. Each involved substantial works to the roof. The Mace scheme involved the repair or replacement of damaged wooden components and was costed on the basis that repairs would be required to all 472 cassettes. Mace claimed its own loss by reference to this scheme ('the Mace Scheme'). Sky advanced an alternative scheme, as cheaper than the Mace Scheme, which involved the replacement of all of the 472 wooden cassettes with new metal cassettes ('the Sky Scheme'). Sky and Mace advanced their claims on the basis that they were entitled to recover the cost of addressing all damage to the roof structure, including deterioration and development damage which occurred after the expiry of the POI and up to the date on which any remedial works were completed.
8. The Insurers contended that Mace was not insured under the Policy in respect of any of the sums for which it sought indemnity and was not entitled to any relief. The Insurers' case was that Sky was entitled only to an indemnity in respect of the costs of addressing damage as it existed at the end of the POI. The Insurers put forward a costed scheme of works as a measure of such costs ('Insurers 2017 Scheme'), based on a retrospective analysis of the likely extent of such damage at the expiry of the POI carried out by the Insurers' wood science expert, Mr James Coulson. The Insurers also analysed how to address such damage as was found to be present following the completion of an extensive drying out process which took place in 2018/9 ('Insurers 2019 Scheme'). The Insurers selected that point in time because there was contemporaneous evidence of the condition of cassettes in 2018/9 in the form of photographs and moisture readings. The extent of damage had increased after the end of the POI, so the remedial works needed in 2019 would, on the Insurers' case, be greater than in July 2017. Insurers 2019 Scheme involved work to 383 of the 428 cassettes on the main roof.

9. There was a further issue as to whether a deductible (“Retained Liability”) of £150,000 “any one event” applied once to the whole of the claim or applied separately in respect of damage to each cassette.

10. The claims made by Sky and Mace were case-managed and tried together at a trial of both liability and quantum before the Judge, which took five weeks. He handed down a reserved judgment and gave three further judgments in relation to consequential applications and disputes. I shall return to aspects of the Judge’s findings in more detail, but in summary he held as follows.

(1) There was damage to the cassettes at the end of the POI. The Judge rejected the Insurers’ case that “damage” within the meaning of the Insuring Clause required a physical change which so compromises the performance of an individual cassette that, in order to perform the function for which it was intended, it required repair; in other words that it had reached a stage which impaired the structural performance and integrity of the cassette. The Judge held that there is “damage” within the meaning of the Insuring Clause if a tangible physical change has occurred to the property insured (irrespective of whether that is visible or not) which has impaired the commercial value of that property in the sense of rendering it less valuable or of less utility than would have been the case had it not sustained the damage complained of. Damage in this sense had been suffered during the POI by the wetting caused by ingress of rainwater in sufficient quantities that it would lead to lack of structural integrity and decay if left unremedied. Those consequences had already occurred to some extent in some cassettes prior to the expiry of the POI. Such damage also included a particular form of fungal growth, but not mould which was of (irrelevant) cosmetic significance only and was not deleterious to the structure of the roof or its timbers.

(2) Sky was only entitled under the policy to indemnity in respect of the cost of repair of such damage as existed at the end of the POI, not deterioration or development damage occurring thereafter. The Judge treated this issue as determined in the Insurers’ favour by the House of Lords decision in *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2009] UKHL 40 [2010] 1 AC 180 and the statements therein that in a policy covering losses

occurring during a policy period the cover does not extend to damage occurring before or after such period. The Judge distinguished passages from judgments relied on by Sky and Mace in *Knight v Faith* (1850) 15 QBD 649; *Municipal Mutual Insurance Ltd v Sea Insurance Co Ltd* [1988] Lloyd's Rep IR 421; and *Connect Shipping Inc v Sveriges Angfartygs Assurans Forening (The Renos)* [2019] UKSC 29 [2019] 4 All ER 885. For this reason the Sky and Mace Schemes addressed the wrong measure of indemnity under the Policy.

- (3) As to the extent of damage at expiry of the POI, the Insurers' primary case, based on Mr Coulson's assessment, was rejected because his opinion as to the assessment of damage existing at that time was flawed in two respects; first he had adopted an erroneous definition of what constituted damage, requiring loss of structural integrity before a timber could be categorised as damaged; and secondly he had based his assessment on incomplete evidence as to the scope of damage. Accordingly Insurers 2017 Scheme, based on Mr Coulson's assessment, was rejected.
- (4) Insurers 2019 Scheme, which treated 383 cassettes as requiring some repair, was the best approximation to the recoverable measure of loss, because although there was some deterioration of the timbers between the expiry of the POI in 2017 and the end of the drying out works in 2019, the cost of remedying the damage existing in 2019 was no greater than the cost of remedying the damage as it existed at the expiry of the POI in 2017.
- (5) However, Insurers 2019 Scheme required to be adjusted for four aspects which ought to have been taken into account. The Judge considered he needed further information to enable an adjustment to be made to the quantification, and held that if the parties could not agree the necessary adjustment in quantification (which in the event they could not), there would be a further hearing with evidence to determine it (for which the Judge gave directions).
- (6) One deductible of £150,000 applied to Sky's claim because the proximate cause of the ingress was deficient design of the works in failing to provide for a temporary roof over the cassettes during construction prior to their permanent sealing; the decision not to do so was a single event for the purpose of the Retained Liability provision.

(7) Mace was an insured under the Policy in respect of its proprietary/possessory interest in the works up to the date of Practical Completion (4 April 2016), but not thereafter. Mace was entitled to a declaration to that effect but not to a money judgment because it had made no attempt to quantify any damage at Practical Completion, and any money claim for that period would duplicate that recoverable by Sky. Insofar as it sought to recover its own investigation costs it had failed to plead or prove any referable to damage prior to Practical Completion.

11. Sky, Mace and the Insurers each bring an appeal on grounds for which they were granted permission. Those of Sky and Mace in part overlap and are in part independent.

### **The facts in some more detail**

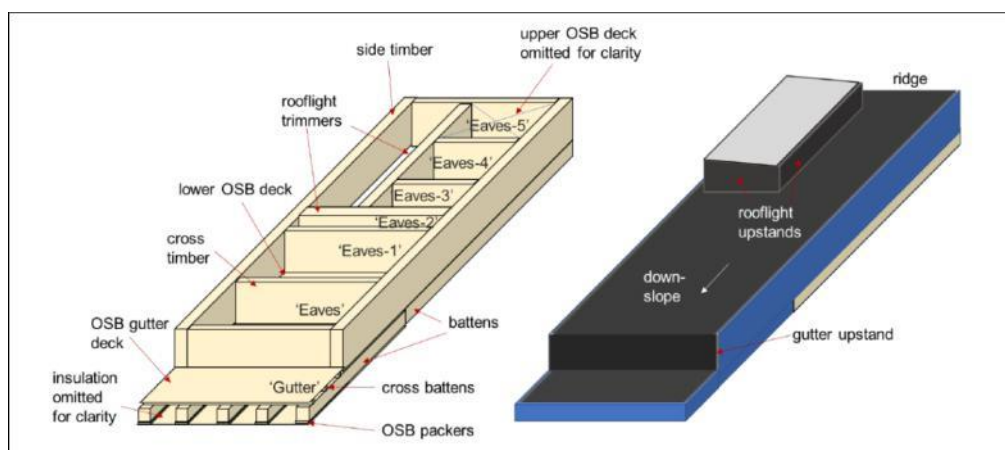
12. The Judge's judgment sets out the factual detail in admirably full and clear terms, both in respect of the undisputed background and in relation to the disputed factual issues which he had to resolve by reference to the extensive factual and expert evidence which he heard. That relieves me of the need to recite much of that detail which is not necessary for the purposes of addressing the issues which arise on the appeal. However, some further exposition is required in order to understand the arguments, in particular in relation to a number of grounds of appeal which are challenges to findings of fact. What follows in this section is a recital of facts which are not the subject of dispute or challenge in this court.

13. Sky Central has a total floor area of about 41,000 square metres set out on three floors and is the hub of Sky's business activity. Between 3,500 and 4,000 Sky employees are based in the building, which houses Sky News, Sky's Consumer Services, Legal, Finance and Technology Groups, together with Sky's technical support and one of its key data centres. It consists of open plan office space, a major events space, an innovation space, a cinema, meeting centre suite, multiple catering outlets, a high-volume catering kitchen, a convenience store and a glass-walled news studio in the atrium, suspended between the first floor and mezzanine.

14. Sky Central's roof covers an area of about 16,000 square metres and is said to be the largest timber flat roof in Europe. The roof consists of a series of glue laminated timber beams on which have been placed a total of 472 cassettes. Each cassette

measures 10.5 metres in length, 3 metres in breadth and 45 cm in depth. Each comprises a frame made of Oriented Strand Board (or OSB) on the top and bottom with the sides and cross members made of solid softwood timber. Each cassette weighs about 3.5 metric tons. The cells within the structure are filled with mineral wool insulation. Most of the cassettes have a lightwell allowing natural light to enter the building. No preservative was applied to the internal timbers because they were designed to stay dry.

15. The roof has gutters which are formed by an integral part of the cassettes themselves. There are two forms of such cassettes, those containing the perimeter gutter on the edge of the roof and those with valley guttering within the roof arrangement. There are also 44 cassettes sitting on top of the cores of the building which do not have gutters. These contain or are connected with mechanical and electrical services and are referred to as ‘plenums’.
16. The gutters are drained using a siphonic drainage system, which requires water to pool in the gutters in order to enable the syphon to form in the drainpipes, thereby allowing large quantities of rainwater to drain away at speed through a relatively small number of small diameter drain pipes located within the building. Once the cassettes had been placed on the roof and the gutters thereby formed, the gutters were designed to be made permanently weatherproof by coating them with a single Derbigum membrane, which was attached to the cassette surfaces by heating the surface of the membrane.
17. The drawing below show a typical cassette designed to form an integral part of one of the valley gutters.





18. Mace sub-contracted the design, supply and construction of the roof to Prater Limited (“Prater”). Prater in turn sub-contracted the manufacture, supply and installation of the cassette system within the roof structure to B & K Structures Limited (“BKS”). BKS in turn sub-contracted the manufacture and supply of the cassettes to Rubner Holzbau GmbH (“Rubner”). Following installation of the cassettes, permanent sealing of the roof by applying the waterproof membrane was carried out by Prater using Derbigum supplied by another manufacturer.
19. The cassettes were manufactured in Austria and delivered wrapped with weather protection materials. They were free from any internal moisture at that stage. Following delivery to a yard close to the Sky Campus, each cassette was finished by installing the roof lights and applying a temporary coating before they were shipped to the Sky Central site under weatherproof tarpaulins. They were then lifted onto the Sky Central roof using tower cranes which were connected to each cassette by four or six lifting strops which had been attached during the manufacturing process as an integral part of each cassette. After the cassette had been lifted into place the strops were cut from the cassette using a Stanley knife. The effect of this was to leave a hole in the temporary coating of the upper surface of the cassette which remained unsealed until the final roof sealing, although temporary patches with tape were applied.
20. The cassettes were installed on the roof in zones between December 2014 and May 2015. Following installation, the cassettes were left waiting for permanent waterproofing by Prater, during which they were exposed for weeks or months to substantial rainfall. This exposure to the weather could have been eliminated by use of a temporary roof structure until after application of the permanent weather proofing but no such structure was installed during the construction process, nor specified as part of the design of the roof. The rainfall during the period was such that water flowed down the sloped surface of the cassettes, over the spaces left by the severed lifting strops, and down to the gutter area where it pooled prior to the permanent sealing and connection of the gutters to the downpipes.
21. It became apparent that rainwater had entered the cassettes from an early stage after they were installed on the roof by BKS. By March 2015 standing water was found inside the gutter compartments of 27 cassettes. Some drying out works were

attempted between April and June 2015 and again between August 2015 and April 2016. It is common ground that at best these were only partially successful. Practical Completion occurred on 4 April 2016, without this issue having been resolved. No attempt was made at that stage to ascertain comprehensively the degree to which water had penetrated the cassettes or what damage had been suffered as a result. Sky Central opened with occupation by staff in August 2016. A third attempt to dry out the cassettes took place between June 2018 and August 2019. It was common ground by the end of the trial that these works arrested any further decay within the cassettes which had already been caused by the continued presence of moisture and which had not been dried out by the previously attempted drying out work.

22. The principal means by which water was able to enter resulted from the way in which the gutter sections had been constructed. In summary, construction of the gutters involved folding 3 mm thick Derbigum underlay into the 90° corners at the bottom of the upstand of the gutter leaving a gap beneath the underlay which was not made watertight until the application of the final waterproofing, which was delayed as described above. Pooling of water in the gutters during this period allowed water to enter through these gaps. Once rainwater entered the cassettes it was unable to dissipate naturally because the cassettes were not ventilated. It was this water, or water vapour resulting from it, which over time resulted in swelling of the timbers, decay and loss of strength of the roof deck. The experts agreed that irreversible swelling would take place within months of the timbers being wetted, and the Judge found that it would take of the order of 18 months for decay, other than incipient decay, to manifest itself, during which the moisture level would have to be at least 20%. Over time some of the moisture evaporated within compromised cassettes but was unable to escape which resulted in it condensing in eaves compartments above the gutter cells in the compromised cassettes resulting in mould growth and fungal decay. Another effect of the water entering the cassettes was that the insulation within the cells of the affected cassettes became soaked, causing it to compress and thereby permanently reducing its thermal performance.
23. Although the case advanced by Sky and Mace was that this mechanism was the main route by which water entered the cassettes, they also contended that there were

other subsidiary routes of water ingress. Of these the most important were the gaps in the seal of the cassettes where the lifting strops had been cut off and the holes had been sealed temporarily by tape. The claimants maintained that this was ineffective and that this permitted water running down the outside of the cassettes to enter the cassettes at eaves cells nearer to the apex of each cassette than the gutter sections. There was also said to be ingress into the plenums.

24. None of this would have occurred but for what the Judge held was a fundamental flaw in the design of the roof by failing to require the erection of a temporary roof to protect the partially installed cassettes until the gutters could be completed and the final Derbigum layer laid across the roof. The ingress of rainwater was the natural and foreseeable consequence of this design defect.

### **The grounds of appeal**

25. Sky's grounds 1 to 3 are ways of putting its argument that the Judge was wrong to treat the Policy as confined to the cost of remedying only such damage as existed at the expiry of the POI, and that he ought to have held that it covered the cost of remedying development and deterioration damage occurring after the POI. Another way of putting the argument is the subject matter of Mace's ground 4.

26. Sky's ground 4 is that the Judge erred in rejecting as a recoverable item of loss the costs of 'lifting the lid' which were a component of the Mace Scheme. The 'lid' referred to is the upper surface of the cassettes in the upslope above the gutters. These were characterised by Sky as reasonable investigation costs. The Judge rejected these costs as being recoverable essentially as a result of his conclusion that the scope of damage to which the Policy responded was only that existing at the expiry of the POI, which resulted in his characterising costs of 'lifting the lid' as "speculative opening up works".

27. Sky's ground 5 is a challenge to the Judge's finding that the extent of deterioration after the POI was "severe deterioration" and resulted in its condition over that period becoming "much worse".

28. Sky's ground 7 (it did not obtain permission to appeal on ground 6) is that the Judge failed to make findings, as he should have done, in respect of damage other than

that to the gutter timbers; and in particular damage to the plenums, damage to the upslope areas of the cassettes, in way of the lifting strop holes and the roof lights and other areas of ‘soft spots’, and damage to the insulation. This is also the gravamen of Mace’s ground 2.

29. Sky’s ground 8 is that failing to focus on these additional areas of damage led the Judge erroneously to reject the Mace Scheme, which best addressed the remediation of the insured damage.
30. Sky’s ground 9 was that if, contrary to its other grounds, Insurers 2019 scheme was the right starting point, it required adjustment not just in respect of temporary works (which was one of the areas of adjustment which the Judge treated as required) but also in relation to aspects of the permanent works. Had he done so he would not have excluded the Mace Scheme.
31. Mace’s ground 1 is that the Judge ought to have awarded it a money sum to reflect damage caused prior to the date of Practical Completion.
32. Mace’s ground 2 overlapped with Sky ground 7, relating to damage to upslope areas, plenums and insulation.
33. Mace’s ground 3 is that the Judge misunderstood various aspects of the Mace Scheme which he identified in rejecting it.
34. Mace’s ground 4 is that the Judge ought to have accepted the Mace Scheme as a form of reasonable mitigation of damage suffered at the end of the POI. This ground was also used by Mr Reed KC to advance oral submissions more widely in support of the argument that the Judge erred in principle in excluding cover for deterioration and development damage.
35. Mace’s ground 5 is that the Judge erred in rejecting Mace’s claim for its own costs, which had been pleaded and evidenced in an amount of £9,858,440 and a significant part of which, at least, were said to be costs of investigation of damage which existed at the date of Practical Completion.

36. The Insurers' ground 1 is that the Judge erred in his determination of the meaning of damage in the Insuring Clause, and accordingly erred as to the fact, alternatively extent, of damage existing at expiry of the POI.
37. The Insurers' ground 2 is that the Judge erred in misinterpreting and rejecting Mr Coulson's evidence as to the extent of damage at expiry of the POI and therefore in rejecting Insurers 2017 Scheme, on which it was based.
38. The Insurers' ground 4 (they did not obtain permission on ground 3) is that the Judge erred in directing "a second trial" of "his hybrid scheme", and that he should have assessed the value of Sky's indemnity on the basis of the evidence at trial, doing his best.
39. The Insurers' ground 5 is that the Judge erred in his construction and application of the Retained Liability provision ("£150,000 any one event") in (a) treating the relevant single event as the design decision not to use a temporary roof; and (b) in failing to identify each individual cassette as the 'part' or 'parts' of the Property Insured to which the Retained Liability applied. I shall have to return to the precise scope of this ground of appeal.

**Sky grounds 1-3 and Mace ground 4: development and deterioration damage**

*The rival arguments*

40. The rival arguments can be summarised as follows, although the summary no doubt fails to do full justice to them. The Insurers' argument, accepted by the Judge, can be simply expressed. The Insurers agreed to provide the contractual measure of indemnity, no more and no less. The cover is identified in the Insuring Clause as limited to "damage to Property Insured occurring during the Period of Insurance". Damage occurring after the POI is not covered and not within the contractual indemnity which Insurers have agreed to provide. The authorities have repeatedly emphasised the importance of the period of cover in time policies and that the cover is in respect of damage occurring during the period of cover, not that occurring before or after (see Hobhouse LJ in *Municipal Mutual v Sea Insurance* at pp 435-6 and Lords Collins and Mance in *Wasa* at [77] and [38] respectively). That was the

ratio of the decision in *Wasa* as expressed by Lord Collins at [74], with whom Lords Phillips, Walker and Brown agreed, and expressed also by Lord Brown at [13].

41. The arguments addressed on behalf of Sky and Mace changed shape over the course of the written and oral argument. These were primarily advanced by Mr Edwards KC but developed to some extent by Mr Reed. I detected five strands.

- (1) An insurance claim is an unliquidated damages claim (*Firma C-Trade S.A. v Newcastle Protection and Indemnity (The Fanti and The Padre Island)* [1991] 2 AC 1 per Lord Goff at p. 35). As such the measure of recovery is for all the loss and damage suffered by reason of the insured event of damage occurring during the POI, including compensation for loss caused thereby and thereafter as a result of deterioration or development damage.
- (2) This was the measure provided for in the Basis of Settlement clause on its proper construction, as “the full cost of repairing, reinstating or replacing property lost or damaged”.
- (3) As a matter of law, where a contract of insurance provides cover on a “losses occurring basis”, that is to say where the ‘trigger’ is something that must occur during the policy period, whether it be physical damage, bodily injury, a peril, a casualty or an event, it is a first principle that the loss is attributable to the point of time at which it first occurs (*UnipolSai Assicurazioni Spa v Covea Insurance Plc* [2024] EWCA Civ 1110 per Sir Julian Flaux C at [145]); and the whole of any damage which first occurs within the policy period but continues thereafter is treated as occurring during the policy period: *Municipal Mutual* per Hobhouse LJ at p. 432; *Wasa* per Lord Mance at [39]; *The Renos* per Lord Sumption at [10]; and *Various Eateries Trading Ltd v Allianz Insurance Plc* [2024] EWCA Civ 10 [2024] 2 All E R (Comm) 414.
- (4) Development and deterioration damage loss is recoverable as loss caused in reasonable mitigation of insured damage whilst investigating devising and implementing an appropriate scheme for remedying the insured damage. This was Mace’s Ground 4 but was not pressed by Mr Edwards in his argument and was not addressed orally by Mr Reed at all.

- (5) The uncommercial consequences of the Insurers' approach illustrated the fallacy in their argument.

*Discussion and analysis*

42. In my view Sky and Mace are right on this issue as a matter of principle and authority, which is reinforced by consideration of the commercial consequences of the rival arguments. I take each in turn.

*Principle*

43. A contract of insurance against damage to property is a contract of indemnity, which is often described as a contract to hold someone harmless. A layman might think that it involves a promise by the insurer to pay money representing the diminution in value or cost of repair of the insured damage. That is not, however, the nature of the insurer's promise. The promise is to hold the assured harmless in the sense that the insurer promises that the assured will not suffer the insured damage. It is in the nature of a warranty that the insured damage will not occur, such that the insurer is in breach of the promise the moment the damage occurs. That promise represents the insurer's primary obligation under the contract of insurance. If and when the insurer fails to perform the primary obligation, it comes under a secondary obligation to pay damages for breach of the primary obligation. This is the same secondary obligation to pay damages which applies to all contract breakers. That is why a property insurance claim is not at common law a claim to enforce a promise to pay money, as the layman might think, but has by long and well-established authority been held to be a claim for unliquidated damages: see the authorities considered by Megaw J in *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 635 at pp. 73-74 and *The Fanti* per Lord Goff at p. 35. That is why at common law the assured could not recover for losses caused by the insurer's wrongful refusal to pay a valid claim: the contract contains no primary obligation consisting of a promise to pay, and the law does not recognise a claim for damages for non-payment of damages: see *President of India v Lips Maritime Corporation* [1988] AC 395 and *Ventouris v Mountain (The Italia Express No 2)* [1992] 2 Lloyd's Rep 281. The particular injustice of assureds suffering irrecoverable loss as a result of insurers' unreasonable delay in payment of valid claims (see *Versloot Dredging BV*

*v HDI Gerling Industrie Versicherung AG* [2013] EWHC 1666 (Comm) at [163]) has been remedied by s. 13A Insurance Act 2015, which provides that it is an implied term that an insurer will pay a claim within a reasonable time, but otherwise the nature of a contract of insurance against property damage and a claim under it remains unaffected (s. 13A does not apply to the Policy in this case which was written before it came into force).

44. None of this is controversial, although it may not be widely understood. In *The Renos*, Lord Sumption JSC said at [10]:

“... A claim on an insurance policy is a claim for unliquidated damages. The obligation of the insurer is to hold the assured harmless against an insured loss, from which it follows that where the insurance is against physical damage to property the insurer is in breach of that obligation as soon as the damage occurs: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd’s Rep 65, 73-74; *Firma C-Trade SA v Newcastle Protection and Indemnity Association (“The FANTI”)* [1991] 2 AC 1, para 35 (Lord Goff of Chieveley).”

45. The consequence is that the measure of recovery in a property insurance claim is that provided for by the common law principles governing damages for breach of contract, the general object of which is to put the innocent party in the same position, so far as money can do it, as if the breach had not occurred, subject to express terms in the policy. The amount of recovery will be assessed in accordance with those common law principles, including causation, mitigation, remoteness, date of assessment and criteria for assessment such as market value or cost of repair or replacement. Again, none of this is or should be controversial. In *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2020] EWCA Civ 308 [2020] 2 All ER (Comm) 1050, Leggatt LJ said:

“34. ...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.”

46. This is, however, subject to any express policy terms to the contrary, as Leggatt LJ observed, because it is open to the parties to a contract of insurance to modify the measure of damages for which the general law provides. Policies often contain such express provisions. Common examples are limits and deductibles; valued policies on goods or hull and machinery; exclusions for certain types of loss such as ‘consequential losses’ or losses resulting from certain causes, such as those caused by defective design; provisions imposing a condition precedent to the right to damages, such as a demand or a claim in a certain form; or provisions as to repair or replacement or market value or betterment which adjust the common law principles identified in *Sartex*.

47. However such modification must be achieved by clear wording because it is a general canon of construction that parties to a contract do not intend to exclude valuable remedies for which the law provides without clear words (see *Gilbert Ash v Modern Engineering (Bristol) Ltd* [1974] AC 689 per Lord Diplock at 717 and *Stocznia Gdanska SA v Latvian Shipping Co* [2009] EWCA Civ 75 [2010] 1 QB 27 per Moore Bick LJ at [23]).

48. This is not achieved merely by the insuring clause identifying the temporal limit of the insured damage. What is required is some clear manifestation of an intention to depart from the normal remedies provided by law by way of unliquidated damages as the secondary liability for failure to prevent insured damage occurring during the policy period. Mr Rigney argued that the parties had made clear the intended measure of recovery in the Policy in this case by defining the insured damage as that occurring during the POI. That does not, however, provide the clear wording necessary to modify the common law entitlement to damages. It is to confuse ‘damage’ with ‘damages’. The Insuring Clause defines the damage to which the insurer’s primary obligation attaches, which it promises will not occur. It does not purport to define or confine the loss for which the insurer is liable in damages when in breach of promise, which is for the sum necessary to hold the assured harmless from having suffered the insured damage in the first place. If the insured damage has caused further damage, then subject to the usual principles of mitigation and remoteness etc, the insurer is liable for the loss resultant upon suffering that further damage. Nothing in the Insuring Clause defining the scope of the primary obligation is itself a definition of the measure of recovery; it is addressed to the insurer’s primary obligation in defining the damage which it promises will not occur; it is not addressed to the secondary obligation to pay unliquidated damages for that breach.
49. This points inexorably to the conclusion that the costs of remedying the foreseeable deterioration and development damage occurring after the POI which resulted from insured damage occurring during the POI is within the measure of recovery under the Policy. That is simply an application of the contractual principles governing assessment of damages.
50. Against this background I would also accept that the Basis of Settlement clause is to be construed as recognising an entitlement to the cost of remedying development and deterioration damage. This must be what is meant by “*full* cost of repairing *reinstating* or replacing property lost or damaged” in a clause which, unlike the Insuring Clause, is concerned with the measure of recovery. What is meant by “full cost of repairing [etc]” is the cost of repairs etc which are made necessary by the suffering of the insured damage, including any subsequent damage which occurs

during what may be described as a reasonable mitigation period. This is reinforced by the use of the word “reinstating” in the clause.

*The authorities*

51. This conclusion is supported by the main authorities upon which the parties relied, none of which is inconsistent with it.
52. The earliest is *Knight v Faith*, in which a vessel took the ground on the ebbing tide whilst attempting to enter Santa Cruz. She refloated on the next tide and entered harbour, where she remained for about a month, being pumped from time to time. Meanwhile the policy period had expired about a week after the grounding. The cargo was discharged and she was beached to inspect the damage, whereupon it was found that the necessary repairs could not be carried out there because there was no suitable dockyard nor workmen nor materials, and she could not safely be taken to any port where the work could be undertaken. She was then sold by the master and a claim made for a total loss by perils of the sea, which was upheld by the jury verdict. On appeal it was held that the claim for a total loss could not succeed but that there could be a claim for a partial loss.
53. There are two aspects of the case of relevance. The first is that one argument for the owners in support of the claim for a total loss was that the vessel had received her death blow from perils of the sea at the moment of grounding, during the policy period, such that she was then a total loss albeit that the damage was not ascertained until later. This argument was rejected on the facts (at p.656) on the grounds that at the time of the casualty the vessel had not “actually perished” but was in a condition where “slight repairs might have been sufficient again to fit her for navigation”.
54. The second relevant aspect of the decision was that since all the damage had occurred during the policy period, the fact that it was not ascertained until after expiry did not prevent the assured recovering for a partial loss. Much of the relevant part of the judgment of Campbell CJ is taken up with considering an argument that the decision of Lord Mansfield in *Meretony v Dunlop* was authority for a doctrine that if damage was not ascertained until after the period of insurance insurers were not liable. It was held that *Meretony*, the only account of which was contained in

another case, may well have been decided on a totally different basis and there was no such doctrine. In this context Lord Campbell CJ said at p. 667 said:

“The doctrine seems contrary to the principle of insurance law, that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk: and, if a ship, insured for time, during the time receives damage from the perils of the sea, although the amount of it be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured taking proper steps by giving notice of abandonment or by obtaining evidence of the sum which would be required to repair the damage sustained, there does not appear any good reason why they may not, according to the facts, proceed against the insurers for a total or for a partial loss.”

55. The case was therefore concerned with damage which wholly occurred during the period of insurance and at first sight is of no direct relevance to the current dispute. Its significance, however, lies in how the case, and Lord Campbell’s dictum, have been treated in subsequent authorities.
56. *Andersen v Martin* [1908] AC 334 concerned a marine policy which covered only total losses and in which the insured perils provided “warranted free from capture”, that is to say the policy excluded total losses by capture. The vessel was captured by the Japanese during the Russo-Japanese war and started to be taken to Japan to be declared Prize, but thereafter went aground causing her to become a physical total loss. It was held that she became a total loss by the excepted peril of capture occurring before the wreck, such that the claim under the policy for loss by perils of the sea failed. At p.388-9 Lord Loreburn LC supported his conclusion that the loss occurred at the moment of capture by positing a hypothetical situation in which the vessel had been insured under a time policy which expired after capture but before she was brought into port and declared prize by a Prize Court, without any intervening wreck. He opined that it would be unreasonable to conclude that the loss did not occur at the moment of capture in such circumstances because the risk would be uninsurable in the period after expiry of the policy period, save by a ruinous premium; and it would be surprising if the liability of underwriters depended upon the degree of expedition in the Prize Court process and any appeal therefrom. Again the decision is not directly in point, not involving any question of continuing damage, and its potential relevance lies only in its citation in

subsequent authority and its reference to the commercial consequences of the assured's argument.

57. *Municipal Mutual v Sea Insurance* concerned a reinsurance claim arising out of a claim by the Sunderland Port Authority against Municipal Mutual, its insurers, in respect of its liability for pilferage and vandalism damage to two excavators within its custody, for which the Port Authority had been held liable. The claim was under three facultative reinsurance policies for three successive one year periods of insurance. There were differences between the subscribing insurers for each year, in that not all the reinsurers subscribed for each year and the proportions differed, so that it mattered to decide which year's policy responded. This was not a matter which had arisen under Municipal Mutual's underlying insurance of the Port Authority which covered the whole of the three year period. Waller J held that there was an entitlement to recover in full under the reinsurance for the second year. This aspect of his decision was reversed on appeal, on the grounds that each policy only responded to loss and damage occurring during the policy year and only two thirds of the loss or damage occurred during the second year. The remainder, occurring during the first and third year fell below the deductible and so was irrecoverable from first and third year reinsurers.

58. This was a case of separate damage occurring by vandalization or pilferage at different times, not a continuing event of damage or one involving development or deterioration damage. It is therefore not directly in point. Its relevance arises out of the fact that Waller J's reasoning included reliance on an example of a fire which rages for three days and causes damage over a period which bridges the expiry of one policy and the commencement of the subsequent policy. He expressed the view that in those circumstances either the first policy alone would respond in full, as the policy during whose period the fire and damage started, or both policies would respond in full giving rise to rights of contribution between the respective insurers.

59. Hobhouse LJ, giving the leading judgment in the Court of Appeal, emphasised at p. 435-6 that it was necessary to ask whether the relevant physical loss or damage arose during the relevant period of cover and that "When the relevant cover is placed on a time basis, the stated period of time is fundamental and must be given effect to." It provides a temporal limit to the time the insurer is on cover, and the

insurer is not “on risk” thereafter. Accordingly, “the judge’s suggestion that there could or should be contribution between those signing the different slips for the different years is likewise radically mistaken”. In relation to Waller J’s fire example he said at p. 432 RHC:

“He appears to have assumed that, absent his approach to the question of construction, the assured or reinsured would in such a situation be left without cover whether before or after the end/beginning of a policy year.

In this the judge had overlooked that the problem of dates in relation to time policies is not a new one and is covered by authority: *Knight v Faith* (1850) 15 QB 649, *Anderson v Marten* [1908] AC 334. The loss is attributable to the policy year in which the loss was caused not that in which it was capable of quantification. On the judge’s example it is the earlier year which would have to bear the loss.”

60. The reference to *Knight v Faith* and *Andersen v Marten* as authority for the proposition that, in the fire example, the first year policy responds in full needs a little unpacking.

61. For most perils under a marine policy it is the peril which is a proximate cause of the damage which must occur during the policy period. It is therefore entirely in accordance with principle that damage occurring after the policy period as a result of a peril occurring during the policy period is recoverable provided there is no intervening cause. By this time *Knight v Faith* was treated as authority for that proposition in the context of a total loss because of the death blow argument, which the court in *Knight v Faith* was treated as having accepted in principle but rejected on the facts: see Arnould *Law of Marine Insurance and Average* 16<sup>th</sup> edn. (1981), and the 1997 Vol 3 update, citing also Eveleigh LJ in *Integrated Container Service Inc v British Traders Insurance Co Ltd* [1984] 1 Lloyd’s Rep 154 at 160 (each cited with approval by Rix LJ in *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd’s Rep. I.R. 696 at [47]-[48]). The current 21<sup>st</sup> edition of Arnould (2024) states at 13-08:

“The general principle, laid down in *Knight v Faith*, is clearly that the assured can recover for a loss developing after the policy expires, where the property received its “death blow” during the policy period.”

62. *Anderson v Marten* is here relevant because it determined that the total loss in that case occurred immediately upon capture, so that the subsequent wreck by perils of the sea was not a proximate cause of the loss.
63. In a marine insurance claim based on most insured perils, such as perils of the sea, the operation of the peril usually results in some immediate damage (see Arnould 21<sup>st</sup> edn. 23-06 and Lord Mance in *Wasa* at [39]). It is not necessary in such cases to distinguish between the subsequent damage being caused on the one hand by the operation of the peril and, on the other hand, by development or deterioration of existing damage; and in practice that will often not be a meaningful distinction. If there is no intervening cause there is cover. The same is true under losses occurring during cover where there has been damage prior to the expiry of the policy and no intervening cause of the damage occurring after the policy.
64. Returning then to Hobhouse LJ's treatment of the fire example in *Municipal Mutual*, the court was there concerned with a losses occurring during policy. Waller J's example was of a fire that starts and damages the insured property during the policy period, and which continues to rage unchecked until after the end of the policy period. The problem arises because neither Waller J nor Hobhouse LJ distinguished between two factual possibilities. The first, and perhaps most obvious, possibility is that the insured property continues to burn so that the condition of the affected parts of the property deteriorate further after the end of the policy period. The second possibility is that the unchecked fire spreads and causes damage to previously undamaged areas of the insured property after the end of the policy period. In either case there is no posited intervening cause. It is easy to see why in the first scenario the first insurer should be liable for the whole damage, and to that extent Hobhouse LJ's dictum clearly supports the proposition that deterioration damage is recoverable under a losses occurring during policy in the absence of an intervening cause. It is less clear that Hobhouse LJ had in mind the second possibility of developing (spreading) damage, but the fact that he did not see the need to distinguish between the two scenarios might be taken to support the proposition that developing damage should also be recoverable under a losses occurring during policy in the absence of an intervening cause.

65. In *Wasa*, the claim was for a declaration of non-liability by reinsurers (Wasa and AGF) against insurers (Lexington). It arose out of environmental pollution and contamination damage caused by an aluminium manufacturing company ('Alcoa') at 58 sites, 35 within the USA and 23 elsewhere, over the period between 1942 and 1986. Lexington, provided cover for a three year period from 1977 to 1980, and Wasa and AGF provided reinsurance cover for the same three year period. The Supreme Court of Washington determining the claim by Alcoa against Lexington held that the governing law of the insurance was Pennsylvanian law, and that under Pennsylvanian law it covered damage occurring both before and after the period of cover so long as part of the damage occurred or manifested itself during the period of cover. The reinsurance was governed by English law. The successful argument for the reinsurers was simply that under English law the reinsurance covered only damage occurring during the three year period of cover. The unsuccessful argument for the reassured was essentially that the reinsurance was on back to back terms with the insurance and the parties intended it to provide the same cover in accordance with the House of Lords decision in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852. In rejecting this argument the House of Lords held that the reinsurance fell to be applied in accordance with English law, which was crucially different from the Pennsylvanian law applicable to the underlying insurance. The way in which Pennsylvanian law differed from English law was summarised by Lord Collins as follows:

“ [57] What is unusual about this case is that the court which imposed the liability on the insurer, the Supreme Court of Washington, applied the law of a state (Pennsylvania) which is one of those states which imposes joint and several liability for the whole of the clean-up costs in environmental claims on all insurers at risk during the period when pollution occurred (which may be 50 years or more), provided that some pollution has occurred during the policy period in the relevant policy (in this case from 1977 to 1980). The reinsurance covered the same 1977 to 1980 period. It is common ground that under English law those losses would not be covered by a policy providing cover for losses occurring during that period.

[89]..... It was a decision that, provided that there was some damage in the policy period, the insured had a right to an indemnity for liability following from damage whenever it occurred.”



66. In this context Lord Collins, with whom Lords Phillips, Brown and Walker agreed said:

“58. (5) Both the insurance contract and the reinsurance contract were “losses occurring during” (or “LOD”) policies (or “occurrence policies” as they are known in the United States), which in English law means that an insurer (or reinsurer) is liable to indemnify the insured (or reinsured) in respect of loss or damage which occurs during the policy period....

(7) The effect of the decision of the Supreme Court of Washington is to impose liability on Lexington under the contract of insurance for loss and damage which occurred both before and after (as well as during) the policy period in the reinsurance contract.

(8) It is common ground that under English law an insurer (or reinsurer) would not be liable for losses occurring before and after the policy period.

74. In English law, where an insurance or reinsurance contract provides cover for loss or damage to property on an occurrence basis, the insurer (or reinsurer) is liable to indemnify the insured (or reinsured) in respect of loss and damage which occurs within the period of cover but will not be liable to indemnify the insured (or reinsured) in respect of loss and damage which occurs either before inception or after expiry of the risk. As Lord Campbell CJ said in *Knight v Faith* (1850) 15 QB 649, 667: “the principle of insurance law [is] that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk.” An early example of a “losses occurring during” insurance policy is *In re London Marine Insurance Association* (1869) LR 8 Eq 176 (Sir William James V-C). I accept that there may be scope for considerable argument as to what would constitute loss or damage within the policy period: cf *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492 (mesothelioma in the context of loss or damage [which] occurs during the currency of the policy).”

67. At [77] he quoted with approval the passage from Hobhouse LJ’s judgment in *Municipal Mutual v Sea Insurance* at pp. 435-6 in which the latter had emphasised the importance of the period of cover.

68. Lord Brown said at [13]:

“Under English law nothing could be clearer than that a contract providing cover for loss and damage occurring only during a specific three-year period could not be construed as covering in addition damage occurring before (or for that matter after) that three-year period.”

69. Lord Mance gave a substantial concurring judgment with his own reasons for allowing the appeal, which concluded at [54] by saying that he agreed with the reasoning of Lord Collins by which he reached the same conclusion. At [38] he articulated as part of his primary reasoning that the only property damage which the reinsurance covered according to English law principles was damage occurring during the three year reinsurance policy. At [39] he said:

“This construction of the slip also reflects the basic principle of English property insurance law, that “the insurer is liable for a loss actually sustained from a [peril] insured against during the continuance of the risk”: *Knight v Faith* (1850) 15 QB 649, 667 per Lord Campbell CJ. (The emphasis in that case was on the need for the peril insured against to occur during the continuance of the risk - damage materialising or developing from it after the policy period would still be covered. Usually, the occurrence of the peril and of loss concur, although one may contemplate the disposal or leakage of waste causing spreading contamination over a period.)”

70. The focus of the argument and the decision seems very much to have been on damage occurring before the policy period rather than after it. The Washington Court judgment treated it as sufficient to attach liability to insurers if damage “manifested itself” in the policy period (see p. 195G). Mr Sumption QC’s argument for Lexington was that this meant it covered damage “in being” at the time of the insurance irrespective of whether it had begun before: see p. 185G. Whilst Lord Mance said at [30] that the Washington Court judgment “appears to have been read as” rendering Lexington responsible for all damage whenever occurring, he referred to Mr Sumption’s argument, without rejecting it, that the US\$ 103m for which it had settled the claim following the Washington Court judgment could all be attributed to damage in the period of and prior to the Lexington policy, which was the necessary concomitant of his argument that the Washington Court decision was limited to liability occurring in or before the policy period. It is true that Lord Phillips at [3(iii)] and Lord Collins at [58(7)] and [89] treated the Washington decision as imposing liability for damage after as well as before the period; and Lord Collins’ statements of principle extended to damage occurring after the period of the policy (e.g. at [74]) as does Lord Brown’s at [13]. However the very fact that Lord Brown expresses himself in the way he does in the parenthesis suggests that he did not consider that the case before the House was concerned with damage suffered after the policy period.

71. But however that may be, for the purposes of the present dispute, it is critical to understand whether the House of Lords was addressing itself to a case of (a) contamination damage caused from time to time, whether continuously or continually, by fresh disposal or leakage of waste or (b) contamination caused, whether continuously or continually, by the effect solely of previous disposal or leakage of waste without further leakage or waste. Although it is not as clear as it might be, the damage in *Wasa* was, or was treated as being, the former, so that if and insofar as it was considering damage after the policy period at all, the decision was not concerned with deterioration or development damage of the kind which gives rise to the dispute in this appeal, but simply with damage which was caused separately in each calendar year as well as occurring separately in each calendar year.

72. I say that for several reasons. The Washington court judgment quoted by Lord Mance at [29] includes a quotation from the trial court's judgment distinguishing the contamination damage in that case from asbestosis: "Environmental contamination, on the other hand, is merely the sum of all its parts - each part per million of a particular contaminant that is discharged to the environment equally damages the insured property either by increasing the concentration of a particular area (if movement of the pollutant is retarded) or by increasing the size of the impacted area (if the pollutant readily migrates)". The inference is that the contamination in the case was by reason of continuous or continual infliction of damage. This explains why Lord Mance was concerned at [39] to mention the position of damage "developing" after the policy period and that one "may contemplate" the disposal or leakage of waste causing spreading contamination over a period. It was a matter of contemplation because it was not the case under consideration on the facts, and he was treating damage of that kind as something which would be covered under a losses occurring policy (a point to which I return below). That is reinforced by paragraph [10] of the judgment of Lord Sumption JSC in *The Renos*, quoted below, to the effect that loss occurs at the time of the casualty notwithstanding that it develops thereafter, absent a break in the chain of causation, and citing Lord Mance's statement at [39] of *Wasa* in support. This was part of an exposition of the principled approach to insurance claims as claims for damages. Lord Sumption had been counsel in *Wasa* and would not have expressed

himself as he did in that passage had *Wasa* been a case of continuing development damage such that the ratio of the decision would have been that development damage was *not* recoverable.

73. I therefore disagree with the Judge that *Wasa* is determinative of the issue in the Insurers' favour. If and insofar as it was addressing damage occurring after the policy period at all, it was not addressing development or deterioration damage in the sense which arises in the current dispute. What was said about 'losses occurring during' cover being limited to damage occurring during the policy period must be interpreted simply as excluding damage which did not occur, *and was not caused by damage occurring*, during the policy period, which is what the case was concerned with.

74. What Lord Mance says at [39], however, provides further support for the conclusion which I have reached about deterioration and development damage. The reference to damage "materialising *or developing*", must be interpreted as including damage which is caused by damage already suffered from the insured peril ("developing" and "spreading"). The contemplated example of leakage causing spreading damage over a period must have been intended to encompass development damage, in the sense I have been using the expression. Given that *Wasa* was concerned with a 'losses occurring during' policy, and the contemplated example is related to the kind of loss occurring in that case, Lord Mance must have been positing development damage under a 'losses occurring during' policy and treating it as covered in accordance with the principle articulated in Lord Campbell's dictum and the death blow principle for which *Knight v Faith* had come to be treated as authority, although the context in which that dictum was expressed in *Knight v Faith* was not one involving development damage.

75. In *The Renos* the court was concerned with a policy covering losses caused by perils occurring during the policy period. The particular issues as to the treatment of expenditure incurred before notice of abandonment is given are not relevant to the present dispute, but what Lord Sumption JSC, giving the leading judgment, said at [10] is important:

"10. The first point to be made is that as a general rule, the loss under a hull and machinery policy occurs at the time of the casualty and not when

the measure of indemnity is ascertained. A claim on an insurance policy is a claim for unliquidated damages. The obligation of the insurer is to hold the assured harmless against an insured loss, from which it follows that where the insurance is against physical damage to property the insurer is in breach of that obligation as soon as the damage occurs: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65, 73-74; *Firma C-Trade SA v Newcastle Protection and Indemnity Association ("The FANTI")* [1991] 2 AC 1, para 35 (Lord Goff of Chieveley). As Megaw J pointed out in the former case, at p 74, the result is that "it is not a condition precedent - it is not a fact which must exist and be pleaded - that the plaintiff has quantified the amount of his claim; or even that all the facts exist at the date of the writ which will enable the proper amount of the claim to be determined." These are "matters of evidence, not prerequisites of a cause of action." The rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss developed thereafter, unless it developed as a result of something that can be regarded as a second casualty, breaking the chain of causation between the first one and the loss. For that reason, it has been held that the fact that the policy expires before the loss has fully developed will not affect the assured's right to recover under it in full: *Knight v Faith* (1850) 15 QB 649, 667 (Lord Campbell CJ); *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2010] 1 AC 180, para 39 (Lord Mance). For the same reason, as the editors of *Arnould*, 19th ed (2018) point out at para 29.07, if a casualty occurs within the policy period, and the loss develops after its expiry into one which is constructively total, there is still a constructive total loss under the policy." (my emphasis)

76. The statement that "the rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss *developed* thereafter", and to the policy expiring "before the loss has *fully* developed", and to [39] of Lord Mance's speech in *Wasa*, all suggest that Lord Sumption was referring to development damage in the sense used in the current dispute. That too would be in accordance with the principle he articulated in the first part of the paragraph as to the nature of a property insurance claim. That is also apparent from the citation with approval of the passage in *Arnould* 19<sup>th</sup> edn. (2018) at para 29.07, which is in identical terms in the current 21<sup>st</sup> edition (2024), and provides:

"Although the notice must be justified when it is given, it is not a prerequisite of claiming for a constructive total loss that the loss should have become total or that notice of abandonment should have been given by the time that the period of the policy expires. If a casualty occurs within the policy period and the loss afterwards develops, as the result of a sequence of events following in the ordinary course upon the peril insured against, into one which is constructively total, this is as much a claim as one in respect of a casualty whereby a constructive total loss immediately arose. A characteristic example of the application of this principle is to be found in those cases of arrest or detention where it cannot immediately be said that recovery of the insured

property is unlikely, but where after a certain period has elapsed such a conclusion becomes inevitable. Where, however, the adverse change in circumstances after the policy has run off is attributable to some new event which cannot be regarded as a completion of the original casualty, this is a true case of successive losses and if the first casualty did not make the vessel a constructive total loss, there is no claim under the policy in respect of the second casualty proximately caused by perils operating after the policy has expired.”

77. Therefore what Lord Sumption said in *The Renos* at [10], with which all the Justices agreed, provides further support for my conclusion on this issue.

78. In *UnipolSai v Covea*, the court was concerned with an excess of loss reinsurance of business written by the reassured’s property department, which included business interruption cover afforded to nurseries which were affected by the COVID pandemic. The Court of Appeal upheld the decision of the arbitral tribunal and Foxton J that all loss occurring from interruption which started during the reinsurance policy period was covered, including that occurring by reason of the continued interruption occurring after expiry of the reinsurance. The case is not directly in point because it was not concerned with a claim for property damage, but the evidence was that, as a matter of market practice, in business interruption claims which were dependent on physical damage, the loss was treated as fully occurring when the damage first occurred. That was potentially relevant to whether the same approach should be taken to business interruption arising otherwise than as a result of physical damage, which was the subject matter of the dispute. There arose in argument a question as to whether the market approach in physical damage business interruption claims was a principled practice or merely a pragmatic one. At [148] Sir Julian Flaux C, giving the leading judgment, accepted the submission of counsel for the reassured that the analysis and result “accords ... with the first principles of ‘losses occurring during’ (re)insurance cover where the loss is attributable to the policy year in which it first occurs.” This obiter statement also supports the conclusion which I have reached in this case.

79. I have not derived any real assistance from any of the other authorities to which we were referred. None casts any doubt on the above analysis, but I do not regard any of them as taking the matter further.

*The commercial consequences*

80. This conclusion appears to me to accord with business common sense. Although business people might not be familiar with the juridical analysis of an insurance claim as a damages claim, I have little doubt that they would expect it to yield this result. In the context of a major construction project, if damage has occurred during the period of the policy, it will often be necessary to take some time to investigate and remedy it, which may very likely last well beyond the expiry of the period of insurance. Indeed, the damage may not even be discovered until after expiry notwithstanding that it occurred before. It would be readily foreseeable that in some circumstances the passage of time would increase the scope of the damage, whether to the already damaged part of the building (deterioration) or to some other part (development), without any fault on the part of the assured. A business person in the shoes of the assured would reasonably expect to be compensated for the consequences of the insured damage deteriorating or developing, absent a contract term excluding such recovery. Such reasonable expectation would be confounded if it is the insured not the insurer who has to bear the additional financial consequences which inevitably follow from the insured damage having occurred during the policy period. That would be regarded as the antithesis of what property insurance is for.

81. Moreover, it would have serious and unacceptable adverse consequences, because it would make deterioration and development damage occurring after the expiry of the period of insurance uninsurable under any separate and subsequent property insurance cover. If cover for the subsequent period were sought after the damage was in progress, no doubt insurers would seek to exclude it or at the least charge a prohibitively higher premium. Even if the assured were already to have taken out a policy for the subsequent period, prior to any damage occurring, it would not respond to continuing damage, because the deterioration and development damage would not be a fortuity.

82. The Insurers' case would also, as Mr Reed submitted, present assureds with an unfair and uncommercial dilemma as to whether to undertake a reasonable but time consuming and measured process of investigation and remedy, at the cost of suffering financial loss from uninsured deterioration or development damage in the meantime, or of avoiding further loss due to uninsured deterioration or development

damage by adopting an urgent solution at the risk of insurers being able to assert a failure to act reasonably in mitigation.

*Mitigation loss*

83. I should finally address the further ground advanced, that development and deterioration loss is recoverable as mitigation damage, it being caused by the passage of time during which the assured is acting reasonably in the investigation of the nature and extent of insured damage and the devising and implementing of a plan to remedy it. McGregor on Damages 22nd edn. at 10-002 to 10-005 identifies three 'rules' established by the authorities governing mitigation. The first and main rule is that a claimant must take all reasonable steps to mitigate their loss consequent upon the defendant's wrong and cannot recover damages for any such loss which they failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for reasonably avoidable loss. The corollary is identified as the second rule of mitigation, namely that where the claimant does take reasonable steps to mitigate the loss to them consequent upon the defendant's wrong, they can recover for loss incurred in so doing, even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss.

84. The second rule has been applied where the innocent party has taken some positive step to mitigate which has increased the loss. There was some discussion in the course of argument about the recoverability of 'access damage', being damage deliberately caused in order to assist in remedying insured damage. For similar reasons to those I address in relation to investigation costs under Sky's ground 4 such access damage is part of the normal measure of damages as a component of the cost of replacement or repair of the insured damage, both in principle and under the terms of the Basis of Settlement clause. It also falls within the scope of the second mitigation rule, if and insofar as it is reasonably incurred but turns out to increase the overall damage/loss. So too may investigation costs, as I discuss below.



85. Inflicting access damage involves a positive step, as does incurring investigation costs. However, the application of the second mitigation rule to deterioration and development damage over a period of time in which the assured takes no step, where the damage caused is simply the effect of the passage of time, raises the question whether the second mitigation rule can apply to loss caused by inactivity as opposed to loss caused by a positive step. I would prefer to express no concluded view on that question, on which we did not receive full argument, and which it is not necessary to decide for the purposes of the present appeal.

*Conclusion on Sky's grounds 1 to 3 and Mace's ground 4*

86. For all these reasons I would allow the appeal on these grounds (save to the extent that Mace's ground 4 is a mitigation argument). The judge fell into error in treating the deterioration and development damage which occurred after expiry of the POI as excluded from the scope of cover. This renders many of the other grounds of lesser significance.

**Sky's ground 4: lifting the lid/investigation costs**

87. This ground, as formulated, is that the Judge erred in rejecting as a recoverable item of loss the costs of 'lifting the lid' which were a component of the Mace Scheme. The 'lid' referred to is the upper surface of the cassettes in the upslope above the gutters. These were characterised by Sky as reasonable investigation costs. The Judge rejected these costs as being recoverable, essentially as a result of his conclusion that the scope of damage to which the Policy responded was only that existing at the expiry of the POI, which resulted in his characterising costs of 'lifting the lid' as "speculative opening up works". The Judge further expressed the view that costs of investigation would not be recoverable save insofar as they revealed physical damage which occurred during the period of insurance.

88. This ground is largely overtaken by my conclusion that the damages fell to be assessed by reference to deterioration and development damage after the expiry of the POI. Whether costs of 'lifting the lid' are recoverable will have to be re-examined in the light of that conclusion. However, the argument under this heading covered some wider ground which requires to be addressed.

89. I should make clear that whether investigation costs are recoverable does not depend on the damage which is revealed by the investigation. Where insured damage has occurred for which damages are recoverable under the policy of insurance, the costs of investigating the extent and nature of the damage, including any development and deterioration damage, are recoverable if they are reasonably incurred in order to determine how to remediate it. That is because they are part of the loss caused by the insured damage having happened in the first place. What is reasonable by way of investigation will be a matter of fact and degree in any given case. However, if reasonably incurred, they are not rendered irrecoverable merely because the result of the investigation may be to identify the absence of damage in certain areas. If a building suffers damage it may not only be reasonable but indeed imperative as a matter of health and safety that other parts of the building are investigated to determine whether their safety or structural integrity is impaired. That is no less reasonable simply because the result of the investigation turns out to be that they remain safe and structurally sound. The costs will be part of the costs of repairing or replacing that part of the building which is damaged because they are costs reasonably incurred in ascertaining the scope of the insured damage and therefore in remedying it. Moreover, insofar as they involve costs which increase the loss because in the event no damage is discovered, they fall within the second rule of mitigation.

90. Mr Rigney made a broader submission that the Basis of Settlement clause did not give cover for investigation costs at all: such costs would not be recoverable unless covered by a specific and separate clause providing cover. This was not what the Judge decided and I cannot accept that submission. The reasonable costs of investigating what is reasonably necessary to remedy insured damage and deterioration and development damage is self-evidently part of “the full cost of repairing or reinstating” insured damage and within the scope of the Basis of Settlement clause. It is all part of the contractual measure of damages which is necessary to put the assured in the same position as if the insured damage had not occurred. It would also be recoverable as reasonable mitigation expenditure.

91. Mr Rigney relied in particular on clause 2 to the Memoranda to Section 1 which provides:

“2. Professional Fees

The insurance in respect of the Property Insured extends to include an amount for architects' surveyors' consulting engineers' legal or other professional fees of similar nature necessarily incurred in the repair replacement or reinstatement of such Property Insured consequent upon indemnifiable physical loss or damage thereto but not for preparing any claim.

The indemnity provided by this Memorandum shall not exceed the Sub Limit stated in the Risk Details for this item.”

92. This addresses professional fees, which are one kind of investigation cost, but this is not because such fees would only be covered by reason of this clause. The words “extends to” are consistent with the clause dealing with something which is already within the scope of cover rather than that the cover is extended by the clause. Importantly, the clause serves to limit the right to recover such fees in two respects, first by excluding costs incurred in preparing a claim and secondly by applying a limit. It is therefore a clause restricting cover rather than conferring cover. This is further illustrated by comparing the language of the two clauses. Mr Rigney’s argument is that such investigation costs would not be within the words “cost of repairing, reinstating or replacing property lost or damaged” in the Basis of Settlement clause. But if so, they would equally not fall within clause 2 which is similarly expressed to apply to professional fees “incurred in the repair replacement or reinstatement” of the property. So clause 2 cannot be conferring cover which would not otherwise exist under the Basis of Settlement clause.

93. Mr Rigney also relied on General Memoranda clause 9 which relates to expenditure incurred as a result of emergency action to minimise or prevent physical loss or damage. This does not assist. It is concerned with preventative expenditure which may arise without any insured damage having yet occurred.

**Sky’s ground 5: the extent of deterioration after the POI**

94. This ground is overtaken by my conclusion that the damages fall to be assessed by reference to deterioration and development damage after the expiry of the POI.

**Sky’s grounds 7 and 8: Mace ground 2: findings in relation to damage other than that to the gutter timbers**

95. There is force in the argument, which was developed by Mr Winser KC on behalf of Sky, that there was evidence of damage in these parts of the roof and that the Judge failed to address them despite being invited to do so. Since my conclusion that the damages fell to be assessed by reference to deterioration and development damage after the expiry of the POI would require the Judge to reconsider the claim, he will be able to consider this aspect of the claim as part of that exercise, to the extent necessary.

**Sky's ground 9: adjustments to Insurers 2019 scheme**

96. This ground too is overtaken by my conclusion that the damages fell to be assessed by reference to deterioration and development damage after the expiry of the POI.

**Mace's ground 1: entitlement to a money sum judgment**

97. The Judge held that Mace had a claim in respect of its own property interest in the works up to the point of Practical Completion as a named assured. There is no appeal from that finding.

98. The Judge went on to hold that Mace was only entitled to a declaratory judgment in respect of that claim and not to a money judgement for two reasons, namely that Mace had not pleaded or proved that any of the damage for which indemnity was sought had occurred prior to Practical Completion; and that any compensation would duplicate that which would be recoverable by Sky.

99. The first cannot survive my conclusion that the measure of indemnity includes development and deterioration damage consequent on damage during the period of cover, in this case the period prior to Practical Completion. That does not require proof of any more than the fact of some damage at the date of Practical Completion. There was no real dispute about that on the evidence, given the Judge's correct interpretation of what was meant by damage, and his finding that almost all the water ingress occurred during construction. Mace had sufficiently pleaded that there was damage which had occurred prior to Practical Completion. The Insurers' point, which the Judge accepted, was that it had not pleaded a case as to the cost of rectifying *only* the damage which had occurred prior to completion. That was true but is not of relevance because the quantification of Mace's claim depends not on

the extent of damage at Practical Completion but includes the cost of remedying the development and deterioration damage to which it gave rise. The absence of identification of the precise extent of damage at Practical Completion or quantification of the cost of remedying that damage alone is not a bar to Mace's claim.

100. Moreover, if Mace has its own damages claim under the Policy in respect of its own property interest, as is now no longer in issue, it is irrelevant that it overlaps with Sky's claim. The Insurers can be liable to each individually under the composite policy, which constitutes a separate contract of insurance with each.

101. The quantum of Mace's claim will fall for re-evaluation in the light of my conclusion that the damages fall to be assessed by reference to deterioration and development damage after the date of Practical Completion.

**Mace ground 3: the Judge misunderstood various aspects of the Mace Scheme**

102. This ground too is overtaken by my conclusion that the damages fall to be assessed by reference to deterioration and development damage after the date of Practical Completion.

**Mace ground 5: Mace's claim for its own costs**

103. Mace ground 5 is that the Judge erred in rejecting Mace's claim for its own costs, which had been pleaded in an estimated amount of some £11 million and particularised in an amount of £9,858,440, a significant part of which, at least, were said to be costs of investigation of damage which existed at the date of Practical Completion. The total was broken down into over 70 individual items of expenditure itemised and commented upon at Appendix C to the third joint statement of the quantum experts. That schedule does not identify when they were incurred save to record that they were all incurred on Mace's case prior to 31 August 2022; and that of the £9.85 million, the costs verified as having been incurred prior to 31 December 2019 totalled about £659,000 of which the vast majority were "staff costs".

104. On the Judge's finding that Mace was not entitled to costs save in respect of damage existing at Practical Completion, we do not think that the Judge can properly be criticised in finding that Mace had failed to identify or prove any such costs. However, in the light of my conclusion that Mace is entitled to damages by reference to deterioration and development damage after Practical Completion, this element of its damages claim will need to be reconsidered.

**The Insurers' ground 1: the meaning of 'damage' in the Insuring Clause**

105. The primary argument advanced in ground 1 as formulated, and in the skeleton argument in support, was that in order to constitute damage within the meaning of the Insuring Clause the timbers needed to have reached a condition by which they required immediate replacement or repair because anything short of that would not be damage. Wetting which could be cured by drying out was not damage.

106. That submission is untenable in the light of authorities on the meaning of damage to which the Court drew the Insurers' attention, and which were not cited to the Judge.

107. In *R v Whitely* (1991) 3 Cr App R 25 the Court of Appeal Criminal Division was concerned with whether there was damage within the meaning of the Criminal Damage Act 1971 to computer discs on a main frame computer by the defendant hacking them so as to add, delete and modify information, which involved the modification of the magnetic particles on the discs. In holding that it did, Lord Lane CJ giving the judgment of the court, reviewed earlier authorities and summarised them as establishing that any change to the physical nature of tangible property which impaired its value or usefulness to its owner or operator constituted damage for the purposes of the Act. In *Attorney-General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259 [2023] KB 37, Lord Burnett CJ reiterated these principles at [26]-[28], emphasising that damage can be minor or transient and still come within the statute. At [29] he referred to the case of *R v Fiak* [2005] P LR 211 in which it was held that soaking a blanket and flooding three cells with water constituted damage although it was remediable. Wetting of timbers in a roof is directly analogous, even if capable of remedy by drying out.

108. Although these are authorities on the meaning of “damage” in the Criminal Damage Act, there is no reason to take a different approach as to its meaning in the Policy. This is simply the natural and ordinary meaning of the word, as appears from the citation from the Concise Oxford Dictionary 6<sup>th</sup> ed in *R v Whiteley*: “injury impairing value or usefulness.” The current online edition of the full Oxford English Dictionary has as a primary meaning: “Injury, harm; *esp.* physical injury to a thing, such as impairs its value or usefulness.”
109. Mr Rigney did not advance any argument that the meaning the word bears in this Policy should differ from its meaning in the Criminal Damage Act or suggest any reason why that should be so. Rather in oral submissions Mr Rigney focused on an alternative argument that what was necessary was a focus on the *relevant* damage. He submitted that if wetting could properly be considered damage as a result of the impairment of the commercial value of the property (which in the end he no longer challenged) that was not the relevant damage at the conclusion of the POI. It was necessary to consider the nature of Sky’s claim which was for the cost of repair and replacement, not for the costs of drying out. Therefore, it was argued, the only damage which is relevant, and which Sky had to show had occurred during the POI, is damage which required repair or replacement.
110. This way of framing the argument is flawed in two related ways. First it seeks to define “damage” by reference to the measure of damages which is payable for the failure to hold the assured harmless from suffering the damage. That is not only to put the cart before the horse but to confuse damage with damages. Secondly, it wrongly assumes that the damages claim is limited to remedying damage which has occurred prior to the expiry of the POI, whereas for the reasons I have explained the damages claim may include the cost of repair or replacement of development or deterioration damage which occurs after the POI.
111. Accordingly, the Judge made no error in treating there as having been damage as a result of wetting which occurred prior to the expiry of the POI, adopting a formulation of what is meant by damage which closely approximates to that identified in the authorities to which I have referred.

**The Insurers’ ground 2: the Judge was wrong to reject Mr Coulson’s assessment of damage at the expiry of the POI.**

112. The Insurers’ ground 2 falls away with the rejection of ground 1. It was that the Judge was wrong to reject Mr Coulson’s assessment of the damage existing at the expiry of the POI on the ground that he had adopted an erroneous definition of damage. He had indeed adopted an erroneous definition of damage, and the Judge was entitled to reject his evidence on this basis, and on the additional basis, which is not dependent on ground 1, that he based it on incomplete material.

**The Insurers’ ground 4: the Judge erred in directing a “second trial”**

113. The Insurers’ ground 4 is that the judge erred in directing “a second trial” of “his hybrid scheme”, and that he should have assessed the value of Sky’s indemnity on the basis of the evidence at trial, doing his best. This ground too is overtaken by my conclusion that the damages fell to be assessed by reference to deterioration and development damage after the expiry of the POI. That will require a further determination by the Judge, who will have to consider the scope of the hearing and any further evidence which he wishes to be addressed. Those will be case management decisions on which we do not express any views. Had the Judge’s conclusion on the measure of indemnity been upheld, I would have rejected this ground on the basis that it was a case management decision which was well within the scope of the Judge’s discretion in the light of the way the case before him unfolded.

**The Insurers’ ground 5: the Retained Liability provision**

114. The retained Liability Clause was applicable to the section 1 contract works and section 2 terrorism cover and provided as follows:

“GBP 10,000 each and every loss,

However in respect of defective design, materials or workmanship the following will apply where option is selected by the Principal: -

GBP 150,000 any one event but this will only apply to those claims which are recoverable under DE5 but not under DE3.



The first 20 per cent or GBP 10,000 of each and every loss whichever is the higher in respect of Additional Cost of Construction

The first 20 per cent or GBP 10,000 of each and every loss whichever is the higher in respect of Additional Cost of Reconstruction

The first 20 per cent or GBP 10,000 of each and every loss whichever is the higher in respect of Additional Cost of Working”

115. It was common ground that the claim was recoverable under DE5 by reason of defective design being a proximate cause, so that the relevant deductible is £150,000 any one event which Sky has elected. The Insurers’ ground 5 is that the Judge erred in his construction and application of the Retained Liability provision in (a) treating the relevant single event as the design decision not to use a temporary roof; and (b) in failing to identify each individual cassette as the ‘part’ or ‘parts’ of the Property Insured to which the Retained Liability applied.

116. ‘Any one event’ is an expression used in aggregation provisions in insurance, both for the purposes of deductibles and limits, with a well-established meaning which the parties to this policy are to be taken to have been aware of, in Sky’s case through its brokers. Authoritative statements of its meaning can be traced back to the analysis by Mr Michael Kerr QC, as he then was, in his well-known *Dawson’s Field* arbitration award (9 March 1972), which gained widespread currency and authority in the insurance markets and is available online (and quoted extensively by Rix J in the *Kuwait Airways* case). Lord Mustill said in an equally well-known passage in *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at p. 1035G-H that “... an event is something which happens at a particular time, at a particular place, in a particular way...”. The test has been applied in numerous subsequent decisions. The most recent authoritative exposition is to be found in the decision of this court in *Various Eateries Trading Ltd v Allianz Insurance plc* [2024] EWCA Civ 10 [2024] 2 All E R (Comm) 414 at [27], adopting the formulation by Butcher J in *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm) [2023] Bus LR 28, which I do not need to set out.

117. The Insurers argued before the Judge that in the Policy “event” applies to the damage suffered not the cause of the damage; and that there were as many events as there were damaged cassettes because each was intended to be hermetically sealed and there was no unity of place in treating the roof as a single place. Having

rejected the first submission, the Judge did not need to address the second and did not do so. That unity question is not before this court on this appeal either. That is because the second part of ground 5 is not addressed to the question of unities under Lord Mustill's test, but rather to the terms of General Memorandum 6 where the word 'part' is to be found. However, in the course of the appeal Mr Rigney conceded that General Memorandum 6 did not apply to the claim because it was not one where more than one Retained Liability applies. There was no ground advanced by the Insurers that if the Judge were wrong in his conclusion that event referred to the cause of damage this court should decide the unity question which the Judge did not decide. Mr Edwards did not ask the court to decide it if he were unsuccessful in upholding the Judge's decision that event referred to the cause of damage. He submitted that in that eventuality the unity issue would have to be remitted to the Judge. Ultimately Mr Rigney agreed with this. Accordingly, the only issues which fall to be decided on the appeal in relation to the Retained Liability provision are (i) whether event refers to damage or to the cause of damage, and (ii) if the latter whether the Judge erred in treating the decision not to use a temporary roof as one event.

*Damage or cause of damage as the event?*

118. In my view the Judge was correct to hold that event refers to the cause of the damage, not the damage itself. A number of considerations support that conclusion. First the important background context known to the parties includes the fact that "any one event" is a classic term for aggregation of losses by reference to the cause of the losses. The absence of any wording in the Retained Liability clause of any words of causation, such as 'arising out of', does not undermine the potency of this starting point. In *Kuwait Airways v Kuwait Insurance Co* [1996] 1 Lloyd's Rep 664 Rix J was concerned with a clause which provided for aggregation "any one occurrence, any one location" which he treated as posing the question as to whether the circumstances of the losses involved "such a degree of unity as to justify their being described as, *or arising out of*, one occurrence" (my emphasis). Occurrence is usually to be treated as synonymous with event. Secondly there is the striking contrast in the clause between the word "loss" used for the default deductible £10,000 each and every loss, and the use of the word "event" in the part of the

provision applicable to defective design where the deductible is £150,000 any one event. If, as the Insurers contend, event refers to damage, the same word “loss” would have been used in both places. Thirdly, the assured under the Policy is given an option to select the £150,000 deductible but is not bound to do so. If the option is not exercised, the £10,000 each and every loss deductible applies. If the £150,000 deductible were also applicable to each and every loss, because event connoted loss not the cause of loss, the option would be meaningless: it would never be in the assured’s interest to exercise it. Fourthly, the £150,000 deductible is specifically addressed to claims by reference to a particular cause of the loss, namely defective design. The natural reading is therefore that event is looking to the cause. As Rix J observed in the *Kuwait Airways* case at pp. 684-685 “what may be a relevant event ... must take colour from the contractual context, including the perils insured against, and must be causally relevant to the loss or losses in question”). Fifthly defective design could be expected in some cases to give rise to damage manifesting itself over a wide span of time and over a wide geographical spread so that if event were to apply to the damage there would likely be an aggregation of £150,000 deductibles which would substantially eat up the claim. It is unlikely that the parties would have intended this in a primary policy against physical damage during construction in which they had specifically agreed to design defect cover in the widest form available amongst standard clauses i.e. DE5.

119. Against this, Mr Rigney’s most powerful point relied on the terms of the 72 hour clause at paragraph 12 of the Memoranda to section 1 which provided as follows:

**72 hour clause**

For the purpose of the application of the Insured’s Retained Liability it is agreed that any damage to the Property Insured or liability for damage arising during any one period of seventy-two consecutive hours and caused by storm, tempest, flood, water damage, subsidence, collapse or earthquake shall be deemed to be a single event and therefore to constitute one occurrence. For the purpose of the foregoing the commencement of any such seventy-two hour period shall be decided at the discretion of the Insured, it being understood and agreed, however, that there shall be no overlapping in any two or more such seventy-two hour periods in the event of damage occurring over an extended period of time.

120. Mr Rigney points out that the clause is “for the purpose of the application of the Retained Liability” and it addresses what is to be a “single event”. It must therefore

be applicable to the £150,000 deductible which is the only provision in the Retained Liability clause which refers to an event. The identified event is “any damage to the Property” from the enumerated causes, storm, tempest etc., making clear that it is the damage not the cause of the damage which constitutes the event. This is, he argues, the clearest indication that event in the Retained Liability clause refers to damage not the cause of damage.

121. This is to put more weight on this clause than it will bear. It is clear that it owes its origins to aggregation provisions in catastrophe excess of loss reinsurance where the insured peril is the catastrophe, and has been transposed into this policy without any care as to its language. Thus although it purports to apply for the purposes of the Retained Liability clause it provides for something to be deemed to be a single event “and therefore an occurrence” although “occurrence” forms no part of the wording of the Retained Liability clause. It applies not only to damage but “liability for damage” which does not apply to this property damage cover in which it is difficult to see how a liability could be an event. The enumerated causes are not obviously translatable to a deductible which only applies where a different proximate cause applies namely defective design, although in theory some at least might be capable of having application as concurrent proximate causes. The reference to damage would make sense if the clause were entitled to apply to the default and other deductibles in the Retained Liability clause, so that losses from extended catastrophes are to be divided up into 72 hour periods for the purposes of the cover and the damage occurring during that period is to be the subject matter of aggregation. This involves some straining of the language of the clause, but gives it substantive content. All this suggests that the 72 hour clause cannot provide any weighty counterbalance to the natural construction of the Retained Liability clause which is that “event” looks to the cause of the loss not the loss itself when the cause of the loss is defective design, for the reasons I have identified.

122. That leaves the residual point which is whether on that construction the Judge made an error in treating the decision not to have a temporary roof as a single event. The Insurers argued in their written argument that a decision was not capable of being an event, although this was not much pressed in oral argument. I would unhesitatingly reject the argument. Whether a particular decision fulfils the unities

will be a factual evaluative assessment in each case, but a decision is clearly capable of being a happening which occurs at a particular place at a particular time in a particular way. I agree with the analysis of Butcher J in *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm) [2023] Bus LR 28, when deciding that a decision at a COBRA meeting in relation to COVID was an occurrence:

175. Stonegate contended that even if a decision was taken at COBRA on 16 March 2020, it cannot be an occurrence. It argued that "a decision is not an occurrence and a decision or plan cannot make something an occurrence which is not otherwise an occurrence". It relied on what was said in *Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] Lloyd's Rep IR 22, in particular at para 97 where David Steel J said: "A decision or a plan cannot constitute an event or occurrence. It is the promulgation and application of the programme that might."

176. For my part, I do not consider that there can be any general rule that the taking of a decision cannot be an occurrence. It might be that in a particular insurance policy the context and wording indicates that a decision will not count as an occurrence. Furthermore, in any event, whether a decision is an occurrence would depend on the facts, and, in particular, the nature of the decision and the way it was made. But it seems to me that there may be little difficulty in describing some decisions as occurrences. I would consider that to be the case, for example, in relation to a resolution of a board of directors of a company. I do not see, equally, why a decision taken in a cabinet meeting (or a COBRA meeting) cannot be an occurrence. These are matters which happen at a particular time, at a particular place, in a particular way and, as a matter of ordinary speech, can be said to have been occurrences.

177. It is clearly the case that losses will not, at least usually, flow from a decision unless it is in some way implemented or carried into effect. But if it is, then the resulting losses may, depending on the facts, be sufficiently related to that decision to satisfy the linking language of the relevant aggregation clause (whether it be "arising from", "attributable to" "connected with" or whatever). That is a matter which would depend on the facts and the precise linking language which is relevant.

178. In *Midland Mainline* David Steel J had found that there was in fact no single decision at all: see at para 90. What had happened was that there had simply been a range of measures incrementally brought into play in reaction and response to the derailment. Furthermore, what was said at para 97 was in the specific context of the construction of the Denial of Access extension, and not the construction of an aggregation clause (as David Steel J pointed out at para 74). I do not read what was said in the first sentence of para 97 as seeking to make any general statement as to what might constitute an occurrence for the purposes of aggregation provisions. If it was, it was obiter dicta, which, with respect, I do not consider to be correct."

123. The Insurers also advanced a criticism that the Judge did not identify a decision, and that he did not set out how when or by whom the decision was made. These criticisms are unfair and unfounded. The Judge did identify that the decision had been made and treated it as a proximate cause of the loss. In its Opening Submissions and Closing Submissions, Sky had set out the background to, and details of, the decision, identifying the relevant documents. The Insurers raised no issue at trial as to “how, when or by whom” the decision was made or whether the decision identified by Sky satisfied the unities. Instead, as reflected in the Judgment, they disputed only whether the decision was capable of being an “event”, contending that “event” meant event of damage, alternatively that a decision cannot, as a matter of law, be an “event”, both of which are unsound. Against this background, the Judge cannot properly be criticised for not setting out further detail.

124. The Judge applied the correct principles at [95]-[109] to the question whether the decision not to have a temporary roof was a single event. His evaluative assessment applying those principles was one to which he was entitled to come on the evidence. As this court emphasised in *Various Eateries* at [57], an appellate court should not interfere with such an evaluative assessment unless it was plainly wrong in the sense that the judge made an error of principle or reached a conclusion which was not reasonably open to him. Neither applies in this case.

## **CONCLUSION**

125. For these reasons I would allow the appeals of Sky and Mace and dismiss the appeal of the Insurers to the extent set out in my reasons. If my Lords agree, the matter will have to be remitted to the Judge.

## **LORD JUSTICE PHILLIPS :**

126. I agree.

**LORD JUSTICE SNOWDEN :**

127. I also agree.