Neutral Citation Number: [2019] EWCA Civ 2163

Case No: 2019/0582, 2019/0589 & 2019/0590

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COUTS IN MANCHESTER TECHNOLOGY AND CONSTRUCTION COURT (QBD)
HHJ STEPHEN DAVIES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE COULSON
and
SIR RUPERT JACKSON

- -

Between:

MANCHIKALAPATI & OTHERS	**Appellants in 2019/0582 Respondents in 2019/0589 & 2019/0590**
- and -	
ZURICH INSURANCE PLC (T/A ZURICH BUILDING GUARANTEE & ZURICH MUNICIPAL) AND EAST WEST INSURANCE COMPANY LTD	**Respondents in 2019/0582 Appellants in 2019/0589 & 2019/0590**

JONATHAN SELBY QC & CHARLIE THOMPSON (instructed by **WALKER MORRIS LLP**) for **MANCHIKALAPATI AND OTHERS**
NICHOLAS BAATZ QC & NICHOLAS MACIOLEK (instructed by **KENNEDYS LAW LLP**) for **ZURICH INSURANCE PLC**

Hearing dates: 15, 16 and 17 October 2019

- -

Approved Judgment

SIR RUPERT JACKSON :

1. This judgment deals primarily with the appeal in respect of the Maximum Liability Cap ('MLC'). It is in six parts, namely:

Part 1 – Introduction	Paragraphs 1 – 7
Part 2 – The facts	Paragraphs 8 – 22
Part 3 – The present proceedings	Paragraphs 23 – 31
Part 4 – The appeal to the Court of Appeal	Paragraphs 32 – 36
Part 5 – The operation of the maximum liability cap	Paragraphs 37 – 71
Part 6 – Conclusion	Paragraphs 72 – 73

Part 1: Introduction

2. This is an appeal by a group of leaseholders (whom I shall call "the claimants") against a decision that their claim under a structural defects insurance policy is limited to the total purchase price of their flats, disregarding the purchase prices of other flats in the block. The central issue in the claimants' appeal concerns the proper construction of the MLC in the policy.

3. There is a cross-appeal by the insurers on a cluster of issues in respect of which the claimants succeeded, which issues are primarily dealt with in the judgment of Coulson LJ, and a further cross-appeal on the subject of interest, dealt with in the judgment of McCombe LJ.

4. In this judgment I shall use the following abbreviations:

'CJS' means CJS Investments LLP.

'East West' means East West Insurance Company Limited.

'FML' means Freehold Managers (Nominees) Limited.

'JCS' means JCS Homes Limited.

'LHMC' means Lawrence House Management Company (City Road) Limited.

'MLC' means maximum liability cap.

'Mainstay' means Mainstay Residential Limited.

'Premier' means Premier Residential Management Limited.

'Zagora' means Zagora Management Limited.

'ZIP' means Zurich Insurance Plc.

'ZBC' means Zurich Building Control Services Limited.

'Zurich policy' means the Zurich Standard 10 New Home Structural Defects Insurance Policy.

5. A copy of the Zurich policy (omitting section 4, which is not relevant for present purposes) is attached as an appendix to this judgment.

6. There came a time when East West took over the liabilities of ZIP. So it is East West which will pay whatever is due to the claimants under the judgment of this court. Both ZIP and East West are defendants in the action and respondents to the appeal. Since ZIP was active as insurer at the relevant time, I shall refer only to ZIP in the narrative and analytical sections of this judgment. For simplicity I will avoid making repeated references to the fact that liability or concurrent liability now rests with East West.

7. After these introductory remarks I must now turn to the facts.

Part 2: The Facts

8. In 2003 JCS obtained planning permission for the construction of two blocks of flats collectively known as 'New Lawrence House' at Hulme in Manchester. In 2006 JCS obtained funding for the project from Bank of Ireland.

9. In 2007 ZIP accepted JCS as an approved builder. It was agreed that ZIP's associated company, ZBC, would provide inspection services during the construction period and that ZIP would issue Zurich policies to the purchasers of the flats. Construction started in June 2007.

10. From March 2007 onwards individuals started to buy long leases of flats in the development "off plan". The leases which they purchased were for terms of 125 years. They specified that JCS was the landlord and LHMC was the management company. Each lease contained a plan on which the area of the relevant flat was delineated by a red line. The balcony was outside that red line. The lease required the tenant to pay service charges. In return the management company covenanted to maintain the retained parts and to keep them in good and substantial repair.

11. ZIP in due course issued a Zurich policy to each leaseholder. As can be seen from the appendix, section 1 of the policy provided cover for the leaseholder during the construction period. Section 2 provided cover during the first two years post-construction. Section 3 provided cover during years 3 to 10.

12. In section 2 of the policy there are twenty-five bullet points on the right hand side of the page, listing matters not covered. I will refer to these items as 'section 2 bullet point 1', 'section 2 bullet point 2' and so on. In section 3 of the policy there are twenty-three bullet points on the right hand side of the page, listing matters not covered. I will refer to these as 'section 3 bullet point 1', 'section 3 bullet point 2' and so on.

13. I shall refer to condition 10(c) of the policy, which must be read in conjunction with the definition of 'maximum liability' in the Definitions section, as the 'maximum liability cap' or 'MLC'.

14. Flats in the new development were reserved from as early as April 2007. Following upheavals in the financial market and the property market, it became more difficult to sell flats in the new development "off plan". Nevertheless, construction work on site continued in 2008 and 2009, with some work being carried out in 2010 also. The last of the Claimants entered into their lease of a flat in October 2010. At about the same time the three individuals who controlled JCS took steps to deal with sixty-six flats which remained unsold. Those three individuals formed a limited liability partnership, CJS Investments LLP ('CJS'), in which there were three partners. CJS then bought the sixty-six remaining flats from JCS with the assistance of funding from Bank of Ireland. JCS then repaid the sums which it had borrowed from Bank of Ireland.

15. Once all sales were completed, the position was as follows. There were a hundred and four flats in the development. Twenty-six individuals, who are now claimants in the action, were the leaseholders of thirty flats. Mr Grove, who is not a claimant, was the leasehold owner of one flat. Associates of the promoters of JCS were the leasehold owners of seven flats. CJS owned the remaining sixty-six flats.

16. On 11th March 2011 JCS transferred the freehold of New Lawrence House to FML. In December 2011 LHMC was struck off the Register of Companies and dissolved.

17. On 5th July 2012 FML notified all leaseholders pursuant to clause 9.9 of the leases that it was taking over the maintenance of the development and that it was appointing Mainstay to take over the necessary management services.

18. During 2012 and 2013 it became apparent that there were serious defects in the building. On 13th March 2013 Mr Denis Tarasov, the leasehold owner of flat 41, submitted a claim to ZIP on ZIP's standard claim form. He listed the defects as follows:

> "Building was never completed to a proper manner/standard:
>
> - no glazing at top floors
> - bare wall with no rendering
> - NO COMPARTMENTATION (fire risk)
> - significant health & safety issues in the block & stairs
> - Fire risk & general risk assessment – RED
> - Unfinished ceilings with leaks entering the unit itself

- Leaking sewerage pipes into car park."

19. This was an opportune moment for FML to dispose of the freehold. On 10th April 2013 FML transferred the freehold of New Lawrence House to Zagora.

20. On 18th April 2013 Premier wrote to all leaseholders, stating that it had become managing agent of the development and urgent works were required. On the same day Mr Andrew Broadhurst of Cobe Consulting wrote to ZIP purportedly on behalf of Zagora and all tenants intimating a claim in respect of numerous defective and incomplete items in the building.

21. There was then an unfortunate dispute between the partners of CJS on the one hand and Zagora and the individual leaseholders on the other hand as to who had the right to control the development. The final decision was that Zagora and the individual leaseholders had the right to control the development: see *Sugarman v CJS* [2014] EWCA Civ 1239. Following its defeat in the Court of Appeal CJS went into administration.

22. Negotiations followed between Zagora, the leaseholders, ZIP and ZBC. Neither ZIP nor ZBC was willing to meet the costs of the substantial remedial works which were required. Accordingly Zagora and twenty-six leaseholders commenced the present proceedings.

Part 3: The Present Proceedings

23. By a claim form issued in the Technology and Construction Court at Manchester, Zagora and twenty-six individual leaseholders made claims for damages against ZIP, ZBC and East West. Zagora and the individual leaseholders sought to recover the estimated cost of remedial works and related losses on a variety of bases, including deceit by ZBC, an alleged oral agreement by ZIP to rectify and ZIP's liability under section 3 of the Zurich policy.

24. The claimants itemised the alleged defects in various Scott Schedules.

25. Most of the claimants' claims failed and are not the subject of any appeal. I shall not trace the history of the first instance proceedings (which were managed most effectively by HH Judge Stephen Davies) but will come straightaway to the claims of the twenty-six leaseholders – the claimants – which were successful.

26. After a four-week trial in October 2018 and two days of oral submissions in November 2018, HH Judge Davies gave judgment on 30th January 2019 in favour of the claimants against ZIP and East West for sums totalling £3,634,074.65. The sums awarded to each of the claimants ranged from £99,995 to £304,378.20, depending on individual circumstances. CJS, the partners of CJS and their associates could not recover against ZIP or East West, because they were responsible for the defects which were the subject of the claim.

27. I would summarise the judge's key findings as follows:

i. The structural steelwork lacks fire protection. This constitutes 'major physical damage' within clause 3.1 of Zurich policy and also 'present or imminent danger to the physical health and safety of the occupants' within clause 3.2 of the policy.

ii. The cost of fireproofing the structural steelwork is in the region of £4.734 million.

iii. However, the total purchase price of the all the claimants' flats is £3.634 million. Under the maximum liability cap the claimants' claims are limited to that sum. Therefore the claimants can only recover £3.634 million in respect of the lack of fireproofing of the structural steelwork.

iv. The claimants were entitled to recover remedial costs (limited to £3.634 million) even though they had not carried out any remedial works and regardless of whether or not they intended to carry out remedial works.

28. On the basis of those findings the other claims set out in the Scott Schedules were of academic interest only. The judge therefore dealt with those claims fairly shortly. They are related to the roof, the cladding, the basement carpark, the balconies, aspects of fire protection (other than the structural steelwork), mechanical and electrical services, lifts and other items. The judge set out his findings on individual items, but he did not quantify those claims. It appears that on the basis of the judge's findings the total cost of remedial works would be in the region of £9.7 million plus VAT: see paragraph 10.11.2 of the judgment.

29. In the course of dealing with Scott Schedule items, other than fireproofing the structural steelwork, the judge:

i. Treated as irrelevant the fact that the proceeds of the action would be used to meet adverse costs orders and to pay solicitors, funders and ATE insurers.

ii. Held that section 3 bullet point 17 did not shut out the claims under the policy on the basis that the claimants could claim against the managing agents and others.

iii. Held that both the basement and the balconies were within the policy cover.

iv. Held that condensation was within the policy cover when the proximate cause or a concurrent cause was JCS's failure to construct the building in accordance with ZIP's requirements or the Building Regulations.

v. Held that the total excess for which ZIP could claim credit (absent the MLC) was £120,889, built up as set out in paragraph 10.11.3 of the judgment.

30. In a separate judgment given on 7 February 2019 the judge awarded interest to the claimants in the sum of £699,559.30.

31. The claimants were aggrieved by the judge's decision on the operation of the maximum liability cap. Accordingly they appealed to the Court of Appeal.

Part 4: The Claimants' Appeal

32. By a notice of appeal filed on 14th March 2019 the claimants appealed against the judge's decision that their claims were limited to £3,634,074, which was the total purchase price of their flats. They contended that the phrase 'purchase price declared to us' in the definition of 'maximum liability' meant the total purchase price of all flats in New Lawrence House.

33. On 15th March 2019 ZIP and East West commenced a cross-appeal. By their appellant's notice they contended as follows:

> 1. The policy does not respond where the cost of rectification has not been incurred.
>
> 2. The policy does not respond where (as here) the proceeds of the claim will be used to meet adverse costs orders and to pay solicitors, funders and ATE Insurers, rather than to fund remedial works.
>
> 3. Section 3 bullet point 17 shuts out the claimants' claims because they have rights against the landlord, CJS and the management company.
>
> 4. The judge erred in holding that the basement was within the policy cover.
>
> 5. The judge erred in holding that the balconies were within the policy cover.
>
> 6. The judge erred in holding that damage caused by condensation was within the policy cover.
>
> 7. The judge erred in his application of the excess provisions.

34. By a separate notice of appeal, also dated 15th March 2019, ZIP and East West appealed against the judge's award of interest. They contended that there should have been no award of interest.

35. The appeal and cross-appeal were heard on 15, 16, and 17 October 2019. The hearing took three full days. Mr Jonathan Selby QC leading Mr Charlie Thompson represented the claimants. Mr Nicholas Baatz QC leading Mr Nicholas Maciolek represented ZIP and East West. I am grateful to all counsel for their clear skeleton arguments and excellent oral submissions.

36. I must now turn to the central issue in the claimants' appeal, namely the operation of the MLC.

Part 5: The Operation of the Maximum Liability Cap

37. Condition 10 of the Zurich policy provides:

> "This policy shall terminate automatically without refund of premium in the event that:
>
> …
>
> (c) We have paid Our Maximum Liability".

38. The Definitions section of the policy contains the following definition of Maximum Liability:

> "Maximum Liability:
>
> Sections 2 and 3
>
> Our maximum liability in respect of all claims under Sections 2 and 3 of this policy is as follows:
>
> (a) for a New Home which is entirely detached, the purchase price declared to Us, subject to a maximum of £25 million;
>
> (b) for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25 million.
>
> Where the combined value of all New Homes within a Continuous Structure exceeds £25 million, the total amount payable by Us in respect of all claims in relation to the New Homes and the Continuous Structure shall not exceed £25 million."

39. Thus the MLC consists of two limbs. Limb (a) specifies the cap where a new home is entirely detached. Limb (b) specifies the cap where the new home is part of a 'continuous structure'. The term 'continuous structure', as defined in the definitions section, includes a block of flats.

40. There is no dispute about the meaning of limb (a). Where the purchaser has acquired a detached new home, the cap is the purchase price of that new home subject to a maximum of £25 million.

41. Turning to limb (b), ZIP contends, and the judge held, that the cap is the purchase price of the insured's new home (or the insureds' new homes, if several insureds are claiming under the policy), subject to a maximum of £25 million. The claimants contend that the cap is the total purchase price of all new homes in the block, subject to a maximum of £25 million. The total of the purchase prices of all new flats in New Lawrence House was £10,846,076. Therefore, say the claimants, that is the cap upon their claims.

42. The judge set out his reasons for preferring ZIP's interpretation of the MLC as follows:

"7.11.4 The claimants' case is that this imposes a maximum liability of the lower of the total purchase price of all flats within the development or £25 million in relation to any claim concerning any one continuous structure i.e. any one single building and thus including, in this case, the connected blocks of flats forming part of this development. I was provided with a schedule showing that the total purchase price paid for all of the flats was only £10,846,076.65 so that, if the claimants are right, this would be the maximum liability on any one of their claims. On that basis, the effective cap is £25 million.

7.11.5 ZIP's case, in contrast, is that the definition at (b) means that there is a maximum liability in relation to any claim made by an individual leaseholder of the declared purchase price of the flat in question, with the result that the total maximum liability in this case is the total of the declared value of the 30 flats in respect of which claims are made by the individual leaseholders. On that basis, the effective cap is £3.634 million.

7.11.6 The claimants contend that ZIP's argument ignores the proviso to (b), which they say is intended to make clear that in the case of a continuous structure where there are common parts, the purchase price limit applies only to the new home itself and does not apply to claims in relation to the common parts.

7.11.7 The difficulty with the claimants' reliance on the proviso, in my view, is that the opening words to the proviso make it clear that it only applies where the combined value of all new homes within the continuous structure exceeds £25 million. The purpose of the proviso, therefore, must be to limit the total value of all claims made in relation to any one continuous structure to £25 million, even if the combined value of all of the new homes within that continuous structure exceeded £25 million and therefore, on a straightforward application of (b), the total claim could exceed £25 million.

7.11.8 Although the claimants contend that if the proviso was to be interpreted in this way it would be meaningless, in that it is difficult to imagine a continuous structure with a combined value of £25 million, that is by no means obvious. For example a similar size development with an average price per flat of £250,000 would qualify, and it would make perfect sense that this was, as its wording indicates, the intended purpose of the proviso.

7.11.9 However, the claimants also argue that on a proper interpretation of (b) the maximum amount payable only applies to the new home itself, and not to any claim in relation to the common parts. Their argument is that where a new home is part of a continuous structure there is a clear separation in the policy as between the new home itself and the common parts. Their argument is that the proviso, by referring separately to claims in relation to the

> new homes and claims in relation to the continuous structure, expressly acknowledges that claims in relation to the continuous structure, which they say can only be claims in relation to the common parts, are separate and distinct from claims in relation to the new homes themselves. Their argument is that since (b) only refers to the maximum amount payable in respect of the new home, it cannot have been intended - in direct contrast with the proviso - to cover common parts claims in relation to the continuous structure as well.
>
> 7.11.10 This is an ingenious argument, but in response, ZIP reminds me that the definition of the new home specifically includes the common parts. In other words, the common parts are not treated separately in the policy from the new home. They say that in the face of this clear definition it cannot credibly be argued that a separate approach should be adopted in relation to the construction of sub-clause (b) simply through a side-wind in the proviso. This is a powerful argument which, in my judgment, must prevail unless it can be said to be plain and obvious that clause (b) when construed with the proviso can only have the effect for which the claimant contends.
>
> 7.11.11 It cannot be said, in my view, that clause (b) when construed with the proviso does have that clear and unambiguous meaning. Indeed if one considers the definition of a continuous structure it is obviously not the same as the common parts. It is either a single building containing more than one new home (where the definition of each new home includes the common parts) or a single building containing a new home and other parts of the building used for other purposes. On either analysis the reference to continuous structures in the provision cannot be read as if it meant common parts. It seems to me that the more likely reason why the proviso makes express reference to continuous structure is to make it clear that it covers any other parts of a building not falling within the definition of new home."

43. On appeal the claimants have put their case somewhat differently. They contend that the judge's interpretation of the MLC is contrary to the natural and ordinary meaning of the words used: it is also inconsistent with the commercial purpose of the clause. ZIP on the other hand contends that the judge's interpretation of the MLC is in accordance with the language of the clause; also it makes commercial sense (ZIP's skeleton argument paragraph 34).

44. Before tackling this issue, I must identify the relevant principles of construction. Mr Baatz submitted, correctly, that the court must focus upon the language of the policy and what a reasonable person in the position of the parties would take the words used to mean. He relies upon the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, in particular at [15] – [19]. I will not recite those well-known paragraphs, but I accept that they state the general principles which we must apply.

45. Turning to insurance policies, which are one species of contractual document, Mr Baatz cites the dictum of Lindley LJ in *Cornish v Accident Insurance Co Ltd (*1889) 23 QBD 453 at 456. He also cites the Supreme Court's application of that dictum in *Impact Funding Solutions Limited v Barrington Support Services Limited* [2016] UKSC 57; [2017] AC 73. At [6] – [8] Lord Hodge JSC said:

> "6. This approach to construction is well established. The court looks to the meaning of the relevant words in their documentary, factual and commercial context: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, para 21 per Lord Clarke of Stone-cum-Ebony; *Arnold v Britton* [2015] AC 1619, para 15 per Lord Neuberger of Abbotsbury. As I see no ambiguity in the way that the Policy defined its cover and as the exclusion clause reflected what The Law Society of England and Wales as the regulator of the solicitors' profession had authorised as a limitation of professional indemnity cover, I see no role in this case for the doctrine of interpretation contra proferentem. As Lindley LJ stated in *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, 456:
>
> "… in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."
>
> 7. The extent of AIG's liability is a matter of contract and is ascertained by reading together the statement of cover and the exclusions in the Policy. An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly."

46. On the basis of these authorities Mr Baatz contends that the cover which an insurance policy provides is defined by both the insuring clauses and the exemptions: see Lord Toulson JSC in *Impact Funding* at [35]. I accept that submission.

47. We must construe the terms of the Zurich policy in accordance with established principles. It is no part of the court's function to manufacture doubts in order to construe the policy against the insurer. Nevertheless, in cases of real doubt the principles articulated by Lindley LJ in *Cornish* and by the Supreme Court in *Impact Funding* at [6] – [7] apply.

48. Mr Selby accepts that *Arnold v Britton* [15] – [19] sets out the principles of interpretation which we must apply: see paragraph 15 of his skeleton argument. He does not quarrel with the principles which Mr Baatz derives from *Impact Funding*.

49. Let me now turn to the language of the MLC. Limb (b) is not well drafted. It comprises two sentences. The first sentence is the principal provision. The second sentence (which has been referred to by both the judge and counsel as 'the proviso') qualifies the first sentence.

50. It is true, as Mr Baatz says, that the crucial phrase in the first sentence 'the purchase price declared to Us' is in the singular, not the plural. It does not say 'purchase prices'. On the other hand, the phrase at the start of the proviso, 'the combined value of all new homes' is also in the singular. It does not say 'the combined values of all new homes', which was what the draftsman intended. I conclude that the fact that 'purchase price' in the first sentence is singular, not plural, is at best a weak pointer in favour of Mr Baatz's interpretation.

51. There has been some debate about the significance of the comma in the first sentence of limb (b). I do not think that assists either party. Whichever interpretation of the first sentence of limb (b) is correct, a comma in that location is appropriate punctuation.

52. In my view the first sentence of limb (b) is ambiguous. It does not tell the reader whether the purchase price referred to is that of the individual insured's flat or of the entire block of flats. We therefore have to look at other parts of the document in order to read that sentence in context.

53. Our first port of call must be the proviso, since that qualifies the sentence which we are construing. Each party contends that the proviso only makes sense if its own interpretation of limb (b) is correct. With respect, I disagree with both parties on this point.

54. If the claimants' interpretation of the first sentence is correct, the proviso is telling us what happens if several flat owners each make claims based upon the first sentence of limb (b). Collectively, they cannot recover more than £25 million. So the proviso operates as a restriction upon the cover provided by the first sentence.

55. Assume that there are 30 flats in the block, each costing £1 million. Assume that there are three different defects jeopardising health and safety in the common parts (defect A, defect B and defect C), each of which will cost £10 million to rectify. On the claimants' interpretation of the first sentence of limb (b) tenant 1 can recover £10 million in respect of defect A, but he cannot recover more than £25 million if he claims in respect of all three defects. The effect of the proviso is that if tenant 1 sues for defect A, tenant 2 sues for defect B and tenant 3 sues for defect C, collectively they can still only recover £25 million. The proviso prevents the tenants from recovering the full £30 million by the tactic of each tenant suing for a different defect.

56. Next, let us take ZIP's interpretation of the first sentence. The first sentence means that each tenant's claim is capped by the purchase price of his flat. In my example that is £1 million. The effect of the proviso is that if all tenants make claims, their recovery is capped at the lesser of £25 million or the total of all purchase prices (in my example that amount is £30 million). Once again the proviso is operating to restrict the rights

conferred by the first sentence. It prevents the tenants from recovering the full £30 million by the expedient of all tenants combining to make claims.

57. I therefore conclude that the proviso works perfectly well, whichever interpretation of the first sentence of limb (b) is correct.

58. The next question to consider is the relationship between limb (a) and limb (b). Limb (a) deals with detached, self-contained homes. Limb (b) deals with blocks of flats and other continuous structures. It makes sense to deal with the two categories in this way. Regardless of which of the two rival interpretations of limb (b) is correct, it cannot be said that limb (b) is unnecessary or that limb (b) adds nothing to limb (a).

59. The definition of 'maximum liability' begins with a cross-reference to sections 2 and 3 of the policy. Let us therefore turn to those two sections, to see what light they shed on the interpretation of the MLC.

60. Section 3 of the policy (which applies to the present claims) provides that ZIP will pay for:

> "3.1 The reasonable cost of rectifying or repairing Major Physical Damage which is caused by a failure by the Developer to comply with the Requirements in the construction of the New Home
>
> 3.2 The reasonable cost of rectifying a present or imminent danger to the physical health and safety to the occupants caused by the failure of the Developer to comply with the Building Regulations in respect of the following: …"

61. The bullet points on the right hand side of the page set out what ZIP will not pay for. Bullet point 10 states:

> "10 Any sum above Your proportional share of the reasonable cost of repairing Major Physical Damage to Common parts"

62. When bullet point 10 is read in conjunction with the insuring clauses, the effect is clear. A leaseholder can only recover their own proportional share of the cost of repairing major physical damage in the common parts. But there is no similar limitation where there is a present or imminent danger to the health and safety of occupants. In other words, section 3 enables a single leaseholder to recover the entire cost of rectifying a present or imminent danger to the physical health and safety of the occupants. There are obvious and sensible reasons for that provision.

63. The entire cost of rectifying a present or imminent danger to the physical health and safety of occupants could substantially exceed the purchase price of an individual flat. The present case affords a good example. The flats in New Lawrence House were each purchased for about £120,000, but the cost of fireproofing the structural steelwork is £4.734 million. (i.e. about 40 times the cost of a flat).

64. If limb (b) of the MLC bears the meaning for which ZIP contends, this would undermine the provisions of section 3. It would in many cases (of which the present is an example) not be possible for a single leaseholder to recover the entire cost of rectifying a present or imminent danger to the physical health and safety of occupants.

65. In my view, the clear scheme of section 3 of the Zurich policy is a strong pointer in favour of the claimants' interpretation of limb (b) of the MLC.

66. Section 2 of the Zurich policy broadly mirrors section 3, with some necessary adjustments. In particular, clause 2.1 and section 2 bullet point 9 talk about 'Physical Damage' rather than 'Major Physical Damage'. This simply reflects the more extensive cover which is available to leaseholders in the first two years. Apart from that detail, the general point which I made about section 3 of the policy applies equally to section 2.

67. Mr Selby submitted that the Zurich policy was at the material time a standard form, widely used across the country, intended to provide peace of mind for the purchasers and mortgagees of new-build properties. No doubt that is true, but as Mr Baatz said, we cannot depart from the proper meaning of the language used, on the basis of general considerations of that nature.

68. In the present case the first sentence of limb (b) is ambiguous. It does not say whether the 'purchase price' referred to is that of the individual flat or the block of flats. This is, therefore, a case of 'real doubt' of the kind discussed in *Cornish* at 456 and *Impact Funding* at [5] – [6]. Therefore, we should construe the provision in a manner which is consistent with, not repugnant to, the purpose of the insurance contract. That points in favour of the claimants' interpretation of limb (b).

69. Let me now draw the threads together. Limb (b) of the MLC is ambiguous. In those circumstances, the court gains assistance from the surrounding provisions of the contract, in particular sections 2 and 3, to which the MLC is expressly linked. The court can also have regard to the obvious commercial purpose of the insurance policy. All these factors militate in favour of the claimants' interpretation.

70. Although the case has been presented somewhat differently on appeal from the way it was argued at first instance (a common occurrence, but one which seldom delights trial judges), I must address the judge's analysis. As to the judge's [7.11.7]-[7.11.8], I agree with him that ZIP's argument is not inconsistent with the proviso. The debate about the proviso does not, in the end, assist either party. I agree with the judge that the claimants' argument summarised in [7.11.9] fails for the reasons set out in paragraph [7.11.10]. The reasons why I prefer the claimants' interpretation of limb (b) are those set out in paragraphs 59-69 above. It does not seem that those reasons received the same emphasis at trial as they have on appeal.

71. In the result, despite the judge's careful reasoning and exegesis, I differ from his conclusion. In my view, the cap imposed by limb (b) of the MLC is the total purchase price of all flats in the block. That is £10,846,076.

Part 6: Conclusion

72. For the reasons set out in Part 5 above, I would allow the claimants' appeal. I would hold that the cap imposed by the MLC is £10,846,076, rather than the judge's figure (£3,634,074).

73. In relation to ZIP's cross-appeal on the substantive issues and interest, I agree with the conclusions which McCombe LJ and Coulson LJ have reached for the reasons stated in their respective judgments.

LORD JUSTICE COULSON:

1 Introduction

74. I agree that for the reasons set out in the judgment of Sir Rupert Jackson, the claimants' appeal on the MLC should be allowed.

75. I turn now to deal with ZIP's appeal. I consider below each of the 7 grounds of appeal against the substantive judgment for which the judge gave permission. The separate appeal on interest is dealt with in the judgment of McCombe LJ (starting at paragraph 202 below), with which I also agree.

76. ZIP's appeal is addressed in the following way. In Section 2, I make some general observations about the nature, scope and effect of ZIP's interpretation of the policy. In Section 3, I deal with ZIP's case that they are only liable for the reasonable costs of remedial work under the policy once those costs have actually been incurred. In Section 4, I address their related argument that monies which have not been spent on remedial works are not recoverable under the policy. In Section 5, I deal with ZIP's case that they have no liability under the policy until other claims against third parties have been pursued. In Sections 6 and 7 respectively, I deal with two particular aspects of this development, namely the car park and the balconies. In Section 8, I deal with ZIP's argument that they are not liable for damage due to condensation. Finally, in Section 9, I deal with the appeal in respect of the judge's findings as to the excess deductions applicable to the claimants (which fall to be deducted from any damages awarded).

2 General Observations

77. On the judge's findings, this development has suffered from major physical damage and now constitutes a present or imminent danger to the physical health and safety of the claimants. He has valued the cost of rectifying the underlying damage and defects in a sum in excess of £11 million. The policy attached as Appendix 1 is expressly designed to provide cover where there is major physical damage or an imminent threat to the health and safety of the claimants.

78. Despite this, on the numerous points of interpretation now put forward by ZIP, they maintain that they have no liability whatsoever for the sums found due by the judge. What is more, on ZIP's case, the alleged inability of the policy to respond to the major physical damage or the imminent threat to health and safety is not just the result of each of their points when taken together; no liability at all on their part is said by ZIP to be the separate result of a number of their individual points of interpretation.

79. On any view, that would be an extremely surprising result, and therefore an unusual interpretation of this policy of insurance.

80. Of course, I am mindful of Lord Neuberger's warning in ***Arnold v Britton*** [2015] UKSC 36; [2015] AC 1619, when he said:

> "[19] The third point I should mention is that commercial common sense is not be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."

81. However, the application of common sense to issues of construction is relevant in the present case at least to this extent. If it is said by an insurer that, as a matter of interpretation, a policy ostensibly designed to respond to the very events which have in fact occurred somehow does not respond at all, then that may indicate that the interpretation being urged on the court is not in accordance with its natural language.

82. In my view, that is the case here. As we shall see repeatedly throughout the following Sections of this judgment, what ZIP suggest as the proper interpretation of the words used in their own policy is, on analysis, nothing of the kind, and is instead a strained and artificial construction (often requiring the interpolation of words not present) with the result that it becomes impossible to see any circumstances in which ZIP would ever pay out under the terms of the policy.

3 Ground 1: 'Reasonable Costs'

3.1 The Issue

83. At the trial, ZIP argued that they had no liability under clauses 3.1 and 3.2 of the policy because the cost of rectification work had not yet been incurred. They said that 'the reasonable cost' at clauses 3.1 and 3.2 of the Policy should be read as meaning 'actual' or 'incurred' cost.

84. The judge rejected that submission. His conclusions were set out at Section 7.7 of his Judgment under the heading 'Indemnity only if rectification or repair works will be undertaken?' Having dealt at some length with the law, the judge said this:

> "7.7.10 There is no express provision in the policy stating that this obligation only applies either if and when rectification or repair has already taken place or if the insured can prove that he has a genuine, settled and achievable intention to reinstate, either before payment or once payment is received. The obligation is to pay the "reasonable cost" which, in my view, is neutral as to whether it is a cost already incurred or a cost to be incurred or indeed a cost which may never in fact be incurred. Unlike the professional fees cover the word "incurred" is not used. Unlike the alternative accommodation and professional fees cover there is no express proviso that the insured has first obtained ZIP's written consent to the costs being incurred.
>
> 7.7.11 Furthermore, there is no obvious reason why the provision should be construed so that any such limitation should be implied. Indeed it is far from obvious, even on ZIP's case, what should be

> implied. Is it that: (a) the cost has already been incurred or; (b) that the cost will on the balance of probabilities be incurred and, if the latter, whether it will be incurred regardless of whether or not the insurance monies are paid out or; (c) both.
>
> 7.7.12 Moreover, in my view condition 2 is wholly inconsistent with ZIP's construction. It entitles the insurer, on accepting a claim, to undertake proper repairs itself and to refuse to accept a claim if reasonable access cannot be gained within a reasonable time period. This condition, which is effectively a reinstatement option given to the insurer, would make no sense if the insurer was only liable where the works had already been undertaken...
>
> 7.7.14 In the circumstances, I reject ZIPs submission that the reference to "costs" means that the policy only responds to a claim where those costs have already been incurred or will be incurred, where the question as to whether or not those costs will be incurred must be determined by the court on the balance of probabilities. In short, I consider that the approach discussed by Christopher Clarke LJ in *Great Lakes* has no application to the facts of this case.
>
> 7.7.15 On the same basis I also reject ZIP's submission that because, it is said, the sums claimed are unreasonable and wholly disproportionate to the diminution in value of their interests in the development the claimants should be limited to the diminution in value. However, as it transpires in my view ZIP can achieve the same result by the application of what I agree, for the reasons stated below, is the correct construction of the maximum liability provision."

85. On appeal on behalf of ZIP, Mr Baatz QC maintained that the judge was wrong in reaching these conclusions, and that ZIP's liability to the claimants was only triggered when the claimants spent their own money and incurred the cost of any remedial work. I reject that submission for a number of separate reasons.

3.2 The Language of Clauses 3.1 and 3.2

86. The operative words in each clause are 'the reasonable cost of rectifying…'. There is nothing about that expression which indicates that the cost must be a cost already incurred. In order to achieve that interpretation, it is necessary to interpolate the word 'incurred' before the word 'cost'. It is not appropriate to add words which are not present to aid construction if, as here, there is a perfectly workable construction without such interpolation.

87. Ironically, the possibility of drafting a clause which does require the actual incurring of costs as a trigger for the insurer's liability was emphasised by the policies in issue in the authorities on which ZIP relied during argument. So in *Great Lakes Reinsurance (UK) SE v Western Trading Limited* [2016] EWCA Civ 1003, the Memorandum to the Policy said that "no payments … shall be made until the cost of reinstatement shall have been actually incurred". Similarly, the clause in *Sartex Quilts and Textiles Limited v*

Endurance Corporate Capital Limited [2019] EWHC 1103 (Comm) stipulated that no payment would be made "until the cost of Reinstatement has actually been incurred".

88. In other words, if an insurer wishes to limit its liability to costs actually incurred then it is entirely possible for it to do so: indeed, it is regularly done by using that very expression. But in the present case such wording has not been used and instead there is the much broader expression, 'the reasonable cost'.

89. In my view, 'the reasonable cost' is plainly used to represent the appropriate quantification of the sums which ZIP are bound to pay to those claiming under the policy. It is a means by which the precise amount due to the insured can be calculated. To that extent, of course, it is consistent with those authorities which decide that, in the usual case, the measure of damages in the case of defective work is the cost of making good the defects: see *Darlington BC v Wiltshier Northern Limited* [1995] 1 WLR 68 at 79, and contrast with *Ruxley Electronics and Construction Limited v Forsyth* [1996] A.C. 344 at 366, HL.

3.3 Clauses 3.3 and 3.4

90. Mr Baatz endeavoured to rely on the language of clauses 3.3 and 3.4 in support of his argument that 'reasonable cost' meant costs actually incurred. However, it seems to me that these clauses only confirm the opposite interpretation. There are two reasons for that.

91. First, clauses 3.3 and 3.4 demonstrate that, if the fact that costs are 'incurred' is important to the working of the policy, the policy will say so. Thus, both clauses require ZIP's consent "to such costs being incurred". The use of the word 'incurred' here only points up its absence in clauses 3.1 and 3.2.

92. Secondly, it is noteworthy that even in clauses 3.3 and 3.4, ZIP are not required to wait until the costs have actually been incurred (past tense) before they are obliged to pay out. The clauses make plain that the claimants would have to obtain ZIP's prior consent to "such costs being incurred" but that does not mean that they would have to wait until after those costs had actually been incurred before ZIP were liable to pay. Under these provisions, ZIP have to consent in principle: having done that, they are liable to pay the reasonable cost of alternative accommodation and professional fees, even if the costs themselves are yet to be incurred.

3.4 Other Parts of the Policy

93. There are other parts of the policy which confirm that reading of clauses 3.1 and 3.2. These include:

(a) Page 2 of the policy, which is concerned with what ZIP will provide under the policy, includes the promise at paragraph 4 that "if we advise that repairs are covered by the policy but the Developer unreasonably refuses to carry out the work within a reasonable period, We will pay for the work to be completed". Similarly, at paragraph 5, ZIP say that "we will cover the repair of Major Physical Damage caused by building defects in the original construction" after the first two years and until ten years after the effective date. These expressions are plainly contrary to the suggestion

that the costs have to be incurred by the leaseholders before ZIP have any liability at all.

(b) Section 1 of 'The Insurance' (page 6 of the policy), which is entitled 'What we will pay before the New Home is completed', promises to pay at a) "the reasonable cost of completing the home to the Original Specification." On any view, the expression "the reasonable cost" there cannot mean costs which have already been incurred. It must mean future cost. It would be inappropriate to give that phrase a different meaning depending on which part of the policy was being examined.

(c) Similarly, in Section 2 (page 7 of the policy), which deals with the position during the first two years, the policy envisages ZIP stepping in to the shoes of the developer where the developer has "unreasonably refused to meet such costs or to carry out repairs, as appropriate, within a reasonable period, or is in liquidation or is made bankrupt." Again, it could not be said that those costs would have had to have been incurred before ZIP met this liability.

(d) Condition 2 on page 12 of the policy is headed 'Our Rights'. This gives ZIP and the Developer the right "to have reasonable access to the New Home and shall also be entitled to remain in occupation for as long as is necessary in order to carry out proper repairs to Our satisfaction". As Mr Selby QC rightly said, such occupation could only occur if ZIP had accepted liability under the policy, which would obviously be before the works were done and before any costs had been incurred.

(e) The MLC provision itself may also be said to support the proposition that the costs do not have to be incurred before ZIP's liability under the policy is triggered. After all, the cap operates by reference to the purchase price of the properties, and not costs at all.

94. In my judgment, all these other parts of the policy not only provide no support for the contention that the words 'reasonable costs' in clauses 3.1 and 3.2 have to be construed to mean costs incurred or actual costs, they also add further support to the contrary interpretation.

3.5 Contrary to the Purpose of the Policy

94A Furthermore, in my view, Mr Baatz's interpretation of the words would defeat the purpose of the policy. Take for example clause 3.2, where ZIP are liable for the reasonable costs "of rectifying a present or imminent danger to the physical health and safety to the occupants …". On Mr Baatz's interpretation, even if there was an imminent danger that the building would collapse, the policy would not respond until tenders for the necessary remedial works had been sought, contracts let, and payments made to the contractors. In my view, that is not what the policy was there to provide for.

95. Another way in which Mr Baatz's interpretation of the clause would defeat the purpose of the policy is the dependency it creates on the financial well-being of the other leaseholders. Postulate the situation, very close to the facts of the present case, where the remedial works are too expensive for the claimants to pay for themselves, because of the large number of flats whose occupiers are not insured and who are not contributing anything by way of service charge. In those circumstances, Mr Baatz

would say that the claimants' inability to fund the works mean that the works will never take place, and that therefore ZIP have no liability at all to pay anything under the terms of the policy. Again, I consider that that is not how the policy was intended to operate. It would allow the insurers to take advantage of the leaseholders' impecuniosity to avoid liability altogether.

3.6 The Authorities

96. The final question is whether this court is constrained by the authorities to reach a different view on the wording of the policy. Having considered the authorities referred to us, I consider that they also support the conclusion that I have reached on the words in the policy, rather than undermine it.

97. The starting point is the general principle stated by Kennedy LJ in *Re: Law Guarantee Trust and Accident Society Limited, Liverpool Mortgage Insurance Co's case* [1914] 2 Ch 617 at 639 when he said:

> "How the person who receives payment of a sum of money under a contract of insurance or reinsurance or, I will add, with indemnity, deals with that sum is, in general and apart from special considerations, no concern of the party who, in fulfilment of his contract has made the payment to him".

This principle is reiterated in Volume 25 of Halsbury's Laws at paragraph 584 which states:

> "Similarly, on receiving the insurance money, the insured may do what he likes with it and he cannot be required to expend it on reinstatement unless the obligation to do so is imposed by statue or the terms of a contract".

98. There is a more detailed discussion of the cost of reinstatement at paragraph 11-031 and 11-032 of *Colinvaux's Law of Insurance* (11th edition). It is worth setting out those passages in full:

> "**11-031 Indemnity based on cost of reinstatement**. As seen from the previous paragraph, the assured may be entitled to recover an indemnity based on the cost of reinstatement even though reinstatement is never actually effected. That will be the case where the policy provides that the assured or the insurer, as the case may be, opts for indemnity on a reinstatement measure or where reinstatement is not possible. If the policy merely provides for reinstatement without any alternative, it is difficult to see why impossibility should affect the insurers' obligation to indemnify the assured on a reinstatement basis: the loss is assessed by reference to the position immediately before the occurrence of the insured peril, the obligation to pay is divorced from what actually happens to the insurance monies and the obligation on the insurers to pay the insurance proceeds cannot be regarded as frustrated in any way. The point arose in *Anderson v Commercial*

> *Union Assurance Co,* the problem in that case being planning restrictions on reinstatement. The Court of Appeal held that, given the impossibility of reinstatement, the proper approach was to construe the contract between the parties to determine whether the insurer was discharged from all liability or whether its liability reverted to payment. The court had little hesitation in holding that the latter was the proper construction. Thus, subject to the terms of the policy, the insurer will be liable on a cost of reinstatement basis even where actual reinstatement is no longer possible, as for instance where the damaged premises have been sold, or where town planning restrictions prevent rebuilding, in which case the cost is assessed on a notional reinstatement basis.
>
> The assured's recovery is limited by any terms in the policy which apply where reinstatement is not effective. Thus in *Kypris v MLC Fire & General Insurance Co Pty Ltd* reinstatement by the assured was impossible because of planning restrictions preventing rebuilding, and it was held that the assured was restricted to recovering the present value of the insured property, the sum payable in the absence of reinstatement.
>
> **11-032** It will be appreciated that, in circumstances where a policy which provides for payment by reference to the cost of reinstatement despite the fact that reinstatement is not intended or actually carried out, the figure is a notional one based on estimated rather than actual costs. Where the assured is entitled to indemnity based on the costs of reinstatement, assessment of the cost must relate to the date of the occurrence of the insured peril and not at some later date, e.g. the date on which the assured receives tenders for rebuilding, and although the policy may make express provision for assessment at a later date a policy term which provides that the insurers will pay for the cost "incurred" in repair does not oust the presumption that the policy is one of true indemnity based on costs at the time of the insured peril. It has nevertheless been suggested that where the insurer elects to pay the cost of reinstatement, the cost of the repairs should be assessed as at the date when, having regard to all the relevant circumstances, they can first reasonably be undertaken, rather than at the date of the trial of the action."

99. It is acknowledged that this passage was written before the *Great Lakes* case to which I shall refer below. It is also agreed by counsel that *Anderson v Commercial Union Insurance Co* is not authority for the proposition for which it is cited in this passage. However, those two qualifications aside, I consider that the remainder of these paragraphs are an accurate summary of the law in this area. ZIP's case (that costs have to be incurred before the policy responds) is therefore contrary to the statements of principle in *Re: Law Guarantee Trust,* Halsbury's Laws and *Colinvaux.*

100. In my view, the cases relied on by Mr Baatz in support of his contention that ZIP's liability did not crystalize until the costs had actually been incurred by the claimants

was not supported by the authorities on which he relied. Thus, in the New Zealand case of *Medical Assurance Society of New Zealand Limited v Michael Charles East and others* [2015] NZCA 250 the policy was in very different terms to that under consideration in the present case, and included an express provision giving the owner the right of election between rebuilding the building after a fire or accepting a cash settlement. Moreover, the policy was in respect of loss and damage: it was not a policy, such as the Zurich policy here, involving an express obligation on the part of the insurer to pay a certain type of cost.

101. In addition, the arguments in the New Zealand Court of Appeal all concerned the accuracy (or otherwise) of the estimated costs on which the claimants were relying. That again does not arise here because the judge has identified and declared the reasonable cost of rectification. Finally, in *Medical Assurance*, the court did not find that the money had to be spent before the policy responded: it was enough that the claimants had a liability to pay for the works for the policy to be triggered.

102. For these reasons, I think Mr Selby was right to say that *Medical Assurance* did not support Mr Baatz's interpretation of the policy in the present case.

103. In *Great Lakes*, the claimants owned a dilapidated building that was only worth £75,000. There was planning permission for conversion but, because the building was listed, that prospect was uneconomical. It was, however, insured for over £2 million. When the building was burnt to the ground, the value of the property increased (because the planning constraint had been removed) but the claimants claimed the £2 million to rebuild, even though that was far more than the building was worth in the condition in which it had been immediately prior to the fire. The insurer therefore had a strong defence on the facts, arguing that there had been no diminution in value.

104. The policy in *Great Lakes* was in different terms to the present policy, because it was again a policy to indemnify the assured against loss and damage. Moreover, as noted above, there was a memorandum which provided that the insurer's liability to reinstate would not arise until the costs had actually been incurred. Since that had not happened, the claim proceeded under the general insurance obligation. The insurer said there was no loss because there had been no diminution in value.

105. Christopher Clarke LJ said at [68], "where the insured is obliged to replace the lost property the cost of doing so is *prima facie* the measure of indemnity." He then went on to consider the issue of the claimant's intention to reinstate. He said:

> "72. I doubt whether a claimant who has no intention of using the insurance money to reinstate, **and whose property has increased in value on account of the fire,** is entitled to claim the cost of reinstatement as the measure of indemnity unless the policy so provides. In any event Mr Elkington did not seek to contend that in this case the cost of reinstatement would be recoverable if Mr Singh had no intention of doing so. The true measure of indemnity is "*a matter of fact and degree to be decided on the circumstances of each case*" per Forbes J in I; and is materially affected by the insured's intentions in relation to the property.

73. The significance of intention begs the question as to (a) what exactly is the requisite degree of intention; and (b) what safeguard, if any, is available to an insurer who pays out the cost of reinstatement to an insured who then finds that he cannot reinstate or, even if he can, in fact sells the property. Neither of these issues were the subject of submission; so that what I say on them must be regarded as tentative.

74. In *Castellain v Preston* (1883) 11 QBD 380 it was said that a tenant who is liable to replace is entitled to recover the cost of so doing from the insurers. That, no doubt assumes, that the tenant is required to fulfil his obligations and can and will do so. In *Reynolds v Phoenix Assurance* the insured recovered the cost of reinstatement before that started but there appears to have been no suggestion that the insured might not seek to reinstate or that there would be any impediment to his doing so. The problem arises in a case such as the present where there is a real possibility, which the judge's choice of the declaration route recognised, that reinstatement may not take place either because it cannot do so, e.g. as a result of planning problems, or because a markedly more attractive alternative presents itself.

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

76. As to (b) an insurer who pays out has, in general, no redress if none of the money is used in reinstatement. Once he has got it, it is for the insured to decide what to do with it: *Halsbury's Laws - Insurance* Vol 25 para 633. But I incline to the view that, in a case where, at the time of the hearing, there is a real possibility that reinstatement may not in fact occur it is open to the court to decline to make an immediate award of damages and either to make some form of declaratory relief or, alternatively to postpone assessment of the extent of indemnity (and the payment of it) until such time as it is apparent that reinstatement (i) can and (ii) will go ahead or, at least that there is a reasonable prospect that it will.

77. Whilst the insured's cause of action arises upon the happening of the insured event and is, prima facie, an obligation to pay money for the loss – *Sprung v Royal Insurance* (UK) Ltd [1997] CLC 70 - the assessment of the extent of his entitlement is invariably postponed until a later, often considerably later, date and I see nothing inconsistent with principle (which is that the insured is to receive an indemnity but no more than an indemnity) if, in an appropriate case, the court proceeds in a manner which enables the insured to recover an indemnity when those conditions are satisfied and protects the insurers against having to pay out for a reinstatement which is never going to take place. This may be particularly appropriate if there is doubt as to whether the insured can, whatever his stated intentions, lawfully reinstate." (Emphasis supplied)

106. Accordingly, *Great Lakes* was dealing with a very unusual set of facts, with a claimant whose building had increased in value (not our case at all). Moreover, even then, it does not seem to me that *Great Lakes* sets out any sort of principle that an insured always has to intend to carry out remedial works before being entitled to be paid out under the policy. Christopher Clarke LJ expressly said that his views about intention and the obligation on the part of the insured "must be regarded as tentative". Moreover, I consider that looking at the issues in the present case by reference to intention is unhelpful: the claimants in the present case doubtless intend to do the work but, in contrast to the position in *Great Lakes*, they may be unable to afford to do so. That is not an eventuality dealt with by Christopher Clarke LJ because it did not arise on the facts of *Great Lakes*.

107. I have already referred above to *Sartex*, the final case relied on by Mr Baatz. Again, that was different to this policy: the policy in *Sartex* was in respect of loss or damage and there was a reinstatement provision requiring costs actually to have been incurred. But it is worth noting that, even then, the deputy judge did not accept that *Great Lakes* was authority for the proposition that the building owner had to intend to carry out remedial works in order to recover. On the contrary, he said:

> "74. I do not read the judgment of Christopher Clarke LJ in *Great Lakes* as indicating that an indemnity on the reinstatement basis cannot be given if the remedial works are not in fact carried out. Rather, what the judgment envisages is that in determining what the appropriate measure of indemnity is in any particular case, it is necessary to look at all the circumstances, which can include the position up to the date of trial when the extent of the insured's indemnity is determined. In some circumstances, such as those in *Great Lakes*, the absence of a continuing intention to reinstate would indicate that the reinstatement basis would not be appropriate, as it would over-compensate the insured for his loss. But in other cases, that would not be so. As Forbes J said in *Reynolds v Phoenix*, the true measure of indemnity is a matter of fact and degree to be decided on the circumstances of each case.
>
> 75. Accordingly, I do not accept Endurance's submission that in order to recover on the reinstatement basis it is necessary in each case for an insured to show that it had, and continues to have at the date of trial (or the expiry of the limitation period, if earlier), a genuine, fixed and settled intention to reinstate. The relevant question to ask is what is the loss which has been suffered by the insured as a result of the fire, and what measure of indemnity fairly and fully indemnifies it for that loss."

108. Finally on this review of the authorities, Mr Selby took us to Jefford J's decision in *Hodgson v National House Building Council* [2018] EWHC 2226 (TCC). That was a decision relied on by the deputy judge in *Sartex*, and more

importantly, by Judge Davies in the present case. It was a case where the judge refused to enter summary judgment in favour of the NHBC, who argued that, because Mr Hodgson had sold his property, he had suffered no recoverable loss under the terms of the policy. One of the reasons for her decision was that it could not be said that the mere fact that Mr Hodgson had sold the property (and therefore would not carry out the remedial work) meant that he had suffered no loss. She said:

> "36. If that is wrong, then the issue between the parties is what the NHBC is now liable to pay under the Policy. There seem to me to be numerous issues that potentially arise, the end result of which is that the "no loss" defence is not one suitable for determination on a summary basis:
>
> (i) Firstly, an insurance policy may indemnify the insured against loss. Under such a policy it is a question of law and fact what loss has been suffered. The policy may by express inclusion or exclusion identify how loss is to be assessed.
>
> (ii) There is no decided authority that where the claim is in respects of defects in or damage to property, such loss cannot include the cost of remedial works if the remedial works will not be carried out. The views expressed in the *Great Lakes* case are obiter and at odds with the views expressed in a leading textbook.
>
> (iii) That conflict of view is perhaps understandable if one sees the cost of remedial works as one measure of loss. In such cases, if the remedial works are never to be carried out or are wholly disproportionate, the court may regard the cost of remedial works as an inappropriate measure. That is likely to be a question of fact and degree not suitable for determination on a summary basis.
>
> (iv) In any case, the distinguishing feature here is that the Policy does not provide for the NHBC to indemnify against loss – rather it requires the NHBC to pay the Cost as defined. In that sense, it may be distinguished from the policy in the *Great Lakes* case in which the operative insuring provision insured against loss and the reinstatement clause provided the basis on which the amount payable was to be calculated. For the reasons I have already given, it is certainly arguable that the issue in this case is not the appropriate measure of loss but what the NHBC has undertaken to pay in accordance with the definition of Cost.
>
> (v) If an Owner were paid for remedial works that were not then carried out, a future purchaser who had the benefit of the policy would not be able to make a further claim because the NHBC's liability had already been discharged. I accept that difficulties might arise where the payment for the remedial works fell between two stools – as for example where the first Owner has made a claim under the Policy which has not yet been settled, sells the property and the future purchaser also makes a claim. But it seems to me that that is a scenario

> which would need to be addressed on its own facts when it arises and the risk of that arising does not determine the construction of the Policy, at least not on a summary basis."

109. What then do I take from the authorities relied on by Mr Baatz? The answer is that there is nothing in them which detracts from the general principles of insurance law which I have set out at paragraphs 97-99 above. The cases show that, depending on the nature and the wording of the insurance policy in question, and depending on the particular facts, the question of intention to rebuild *may* be a relevant factor when assessing the precise measure of loss. The authority where the policy was closest to the policy in the present case, and where it was argued that the insured had suffered no loss at all is *Hodgson*, where the argument was rejected by Jefford J.

110. For all these reasons, therefore, it does not seem to me that the authorities undermine in any way my interpretation of clauses 3.1 and 3.2.

3.7 Conclusions

111. For the reasons set out above, I have concluded that ZIP's interpretation of clauses 3.1 and 3.2 is not in accordance with the express language of the clauses; it would require the interpolation of words which could have been but were not used; and it would deprive the policy of its purpose. My interpretation is in accordance with general principles of insurance law as noted above and is not contrary to any more recent authority. For these reasons I would reject Ground 1 of ZIP's appeal.

4 Ground 2: The Recipients of Any Monies Paid Out by ZIP

4.1 The Issue

112. ZIP complain that one of the results of the judge's judgment, when coupled with the claimants' funding arrangements, is that a proportion of any monies paid out to the claimants will go, not directly towards the costs of the remedial works, but to the claimants' lawyers and funders. To that end, Mr Baatz took the court to the funding arrangement which demonstrated, among other things, that the solicitors and the relevant lenders had a prior claim to any monies paid out by ZIP before the claimants as the leaseholders of the flats.

4.2 Not a Separate Ground of Appeal

113. It became clear as the argument on Ground 2 developed that it was not a separate ground of appeal from Ground 1. Mr Baatz agreed that this point could not affect the proper interpretation of the policy. However, he said it was an example of what could happen if the cost of the remedial work did not actually have to be incurred first. Thus, if my Lords agree with the view that I have expressed in Section 3 above, to the effect that the costs do not have to have been incurred before ZIP are liable to pay, then there is no further issue of principle to consider under Ground 2. If the claimants are entitled to be paid the reasonable costs of rectification work, then it follows from what I have said above that they are entitled, in accordance with ordinary principles of insurance law, to do what they want with the money that represents that reasonable cost.

4.3 Access to Justice

114. Mr Baatz said that this outcome "seemed unfair" but, for the reasons I have outlined above, I disagree. Moreover, there is a wider issue concerned with access to justice. Mr Baatz's submission would seek to penalise leaseholders in the position of these claimants for entering into any sort of funding arrangement in order to pursue their rights under the policy. Because ZIP said they had no liability at all until the costs had actually been incurred, Mr Baatz was in effect saying that the cost of endeavouring to get ZIP to acknowledge their liability under the policy could not in any circumstances be covered by clauses 3.1 and 3.2.

115. In my view, that would unreasonably restrict access to justice. It would penalise the claimants merely because they do not have pockets as deep as ZIP's. The whole point of the NHBC scheme, of which this Zurich policy is an indirect descendant, was to avoid just that sort of difficulty.

116. If ZIP had acknowledged their proper liabilities in 2013, when the first claims were made, then these legal and funding costs would never have been incurred. Accordingly, whilst Mr Baatz was right to say that the problems with CJS, and the significant shortfall which that has engendered, are not the responsibility of ZIP, the fact that the claimants have had to enter into these complicated funding arrangements is a direct result of ZIP's failure to acknowledge their responsibility under the terms of the policy at the outset. I do not accept that the operation of the MLC made any difference: the operation of the MLC would simply have been part of any ongoing negotiations between the claimants and ZIP; it would not have been a barrier to ZIP's admission of liability under the policy.

4.4 Conclusions

117. On analysis, Ground 2 is not a separate ground of appeal. I would in any event reject it.

5 Ground 3: 'Some Other Form Of Compensation'

5.1 The Issue

118. Bullet point 11 within the exclusions in Section 3 is in the following terms:

> "Any claim or contribution to a claim where cover is available under another insurance policy, or where some other form of compensation or damages is available to You."

119. At the trial, ZIP's principal argument about this provision was that they had no liability because the claimants had not brought claims against those responsible for the defects in the building, in particular CJS (even though CJS were in administration). The judge rejected this submission and said:

> "7.12.2 The claimants contend that even though the words "some other form of compensation or damages" are wide words, they cannot possibly extend to a right under a lease to require a tenant or a management company or a landlord to perform its obligations under that lease in relation

to repair and the like or in relation to the payment of service charge. I agree. In my view the words must be construed by reference to the whole of the clause, which provides that ZIP does not have to pay "any claim or contribution to a claim where cover is available under another insurance policy or where some other form of compensation or damages is available to you". This must mean a claim to compensation or damages which is substantially the same as the cover available under the policy. It cannot extend to a claim to enforce a right to contribution under the provisions of the lease, which is neither "compensation" nor "damages" nor is it some other form of compensation or damage of the same character as cover under another insurance policy.

7.12.3 Moreover, if it did have this effect, it would deprive what I am satisfied must have been an intended difference between major physical damage claims and present or imminent danger claims, in terms of the proportionate share limitation, of any practical effect. In my view it is proper to interpret this provision narrowly, since it operates not simply to reduce the claim against ZIP by reference to what the insured has in fact already recovered from the other source or, for example, to require the insured to take reasonable steps to obtain monies from that other source and to give credit for any recoveries secured, but to prevent the insured from bringing any claim at all where that other source is available.

7.12.4 Of course in relation to a major physical damage claim the proportionate share limitation would mean that such a claim would be circular anyway, since the tenant's claim is only for the proportionate share and he or she would still have to pay the proportionate share of the service charge in any event even if the lease provisions were enforced.

7.12.5 In relation to a present or imminent danger claim, whilst on my analysis a tenant can recover the full cost from ZIP, that does not mean that a tenant has some other form of compensation or damages available to him as against CJS or the other tenants in relation to the amount which CJS or the other tenants ought to pay in order to meet their share of the service charge obligation. Leaving aside the prior point that in my view the proper interpretation of the clause would not cover such a claim, in my view it could in any event only apply in circumstances where it can be said that it would be reasonable for someone in the position of the claimants to make such a claim instead of claiming under the insurance policy. That is because if I am wrong in my prior analysis the word "available" must connote that a reasonable assured ought, on an objective analysis, to make such a claim on the basis that it would succeed and that he or she would recover compensation or damages. That is particularly so since of course not only is there no provision for ZIP to fund any such claim but nor would the costs be covered under the policy if the claim was made but proved unsuccessful for any reason. In contrast, condition 3 of the policy entitles ZIP to "take proceedings at our own expense but in your name to secure compensation from any third party in respect of any claim accepted by us under this policy".

> 7.12.6 Here, CJS is a limited liability partnership which is in administration. It follows that it would be necessary for an individual tenant or for LHM or for Zagora to seek and obtain the agreement of the administrators to make a claim, failing which the permission of the court to bring proceedings against CJS would have to be obtained. ZIP contends that there is no good reason why an administrator should not agree or why any court should not give permission, in circumstances where the administrators have the benefit of these flats and ought to pay their fair share of the liabilities to which all flat-owners are subject. ZIP also contends that there is every reason to believe that the administrators would meet CJS' liability, in circumstances where if they did not do so it would be open to the claimants to enforce the liability by obtaining charging orders on the flats and selling them. As against this the claimants contend that given the hurdles which they would have to surmount and the risks they would have to take, all at their expense, any claim to compensation against CJS is not, in all of the circumstances, something which is reasonably available to them."

120. At the trial, Mr Baatz had also argued, albeit it seems with much less vigour, that the claimants had and should have pursued a claim for the costs of remedial works against the subsequent landlords, Zagora. The judge had not expressly dealt with this subsidiary point in his draft judgment, and so, when he received the draft, Mr Baatz asked for "clarification". The judge considered and rejected the submission in these terms:

> "7.12.8 In my view where, as I accept, there is reasonable doubt as to the availability of a realistic remedy against CJS, the tenants ought to be entitled to recover under the insurance policy in full on the basis that ZIP has its own express subrogation rights against CJS in any event. Mr Baatz invited me to clarify whether or not these findings also apply to the rights which the individual leaseholders have under the lease as against LHM (as management company) and/or Zagora (as landlord). I can confirm that they do on the basis that on my analysis of the leases the fundamental problem from a commercial perspective is that there is no basis for enforcing these liabilities unless or until either it could be said that LHM or Zagora could or should have obtained a recovery from CJS of its proportionate share or that the individual leaseholders should have advance funded that proportionate share in the hope or expectation that LHM or Zagora could then have recovered from CJS and refunded them. For the same reasons I reject any argument that the individual leaseholders have failed to act reasonably to mitigate their loss. I am not satisfied that ZIP has identified or put a case to each of the individual leaseholders and to Zagora which I am able to accept that, on a true analysis of the terms of the leases and by reference to the financial and other positions of those parties as well as LHM and CJS at the relevant times, either that it would realistically have been possible for CJS' share of the costs of the works to have been recovered from CJS or from LHM or Zagora in default or that the individual leaseholders acted unreasonably in not following these routes to recovery instead of pursuing their claims against ZIP. "

121. At the appeal hearing, Mr Baatz no longer relied on the claimants' failure to pursue a claim against CJS. Instead he suggested that the claimants should have made a claim against the architects, and that ZIP had no liability until that claim had been determined, although that submission was not ultimately pursued either. But he maintained the argument that, since on his interpretation of the lease, the claimants had a claim against the subsequent landlords under its terms, ZIP had no liability to the claimants until after that claim against the landlords had been litigated and resolved.

122. The precise nature of the purported claim against the landlords was not easy to discern. Mr Baatz's argument appeared to be that, pursuant to clause 9.9 of the lease, if the tenant paid the service charge, the landlord could step into the shoes of the management company and perform their obligations which, at clause 8.6, included their covenant to keep the buildings in good and substantial repair. It was said that this therefore gave the tenant a right to pursue the landlord for the costs of repair of the whole building if the buildings were defective and the landlord had not stepped in under clause 9.9.

123. For the reasons set out below, I reject that interpretation of bullet point 11. I am also confident that the potential claim against the landlords is not 'some other form of compensation or damages available' to the claimants.

5.2 The Language of Bullet Point 11

124. At [7.12.2] (set out at paragraph 119 above) the judge said that the 'other form of compensation or damages' had to be substantially the same as the sort of cover available under an insurance policy. In my view, that interpretation is obviously correct. The reference to 'some other form of compensation or damages' must denote an entitlement which is substantially the same as the right conferred by 'another insurance policy', not simply the possible existence of a potential claim in tort against a third party.

125. Mr Baatz spent some time arguing that this interpretation was a misapplication of the *ejusdem generis* principle because, in order to denote a genus in the first half of bullet point 11, there had to be more than just one thing, namely the reference to 'another insurance policy'. In my view that argument fails at every level.

126. First, the judge was not directly applying the e*jusdem generis* principle at all. He makes no reference to it. His interpretation is simply a function of the words used. But secondly, for the reasons pointed out in *Thorman v Dowgate Steamship Co* [1910] 1 KB 410 and *Foscolo Mango and Co v Stag Line Limited* [1931] 2 KB 48, a single species and general words may constitute a genus. This is further explained in Sir Kim Lewison's *The Interpretation of Contracts, 6th edition,* at page 418.

127. There was also some debate as to what sort of arrangement might be covered by the second half of bullet point 11 if the judge's interpretation was correct. It seems to me that 'some other form of compensation or damages' is principally aimed at statutory compensation (Mr Selby gave us some examples) or some form of performance bond or guarantee. These would provide the same high level of comfort and certainty as an insurance policy. In this way, the judge's interpretation is entirely workable.

128. Mr Baatz's interpretation effectively treated the second half of bullet point 11 as reading 'where *a claim for* some other form of compensation or damages is available to You.' He was unconcerned about any limitation imposed by the first half of the clause

('another insurance policy') and said that the second half was so wide that it could be interpreted in this way.

129. I reject that submission. It again requires the interpolation of a key word, namely 'claim', in order to give the exclusion the width that Mr Baatz desires. For the reasons that I have already given, seeking to add words which are not there is not an appropriate way of construing an insurance policy.

130. Finally, as an aid to construction of bullet point 11, it is appropriate to look at other provisions in the policy. Condition 3 is entitled 'Recoveries from Third Parties' and it provides:

> "We are entitled to take proceedings at Our own expense but in Your name, to secure compensation from any third party in respect of any claim accepted by Us under the policy."

131. This condition serves to confirm my view that the judge's interpretation of bullet point 11 was right and that Mr Baatz's interpretation goes far beyond the language used. First, Condition 3 expressly uses the word 'claim', in contra distinction to bullet point 11, which does not. Secondly, if Mr Baatz was right, and bullet point 11 should be interpreted as including 'claims', then condition 3 is rendered redundant. What would be the point of ZIP ever pursing claims against third parties at their own expense, when on their interpretation of bullet point 11, the leaseholders would have to undertake such claims, at their own expense, all the way through to resolution, before ZIP had any liability at all?

5.3 Commercial Reality

132. Standing back, there is in my judgment a manifest lack of reality in the submission that bullet point 11 requires the claimant leaseholders to pursue all other claims, of whatever kind, against any other third parties who might have some form of residual liability for the state of the building, before ZIP's own liability kicks in. Although Mr Baatz in his oral submissions concentrated on the putative claim against the landlords, as we have seen at the trial he invoked the alleged claim against the contractors, CJS, and at the appeal hearing he referred to the potential claim in tort against the architect. That is because, on his analysis, the existence of any potential third party claim, no matter how tenuous, is enough to trigger bullet point 11.

133. In my view, that is not what an insurance policy is intended to provide. It is most certainly not what this policy promised. It is no exaggeration to say that, if Mr Baatz's construction were right, this insurance policy would be worthless.

134. Accordingly, I have no doubt that, as a matter of interpretation and as a matter of common sense, ground 3 of ZIP's appeal should be rejected. However, for the avoidance of doubt, I go on to deal with two other topics relevant to Ground 3.

5.4 The Putative Claim Against The Landlords

135. In my view, the putative claim against the landlords, which was the focus of Mr Baatz's submissions in the appeal hearing, is neither 'compensation or damages', nor is it 'available' to the claimants in any event.

136. Pursuant to clause 8.6 of the lease, the management company covenanted with the tenants to keep the building in good and substantial repair, but that duty was subject to the payment of the relevant service charges. Pursuant to clause 8.12, the landlord is entitled to step in if the management company is not performing, although there is no liability under clause 8.17 where any failure is beyond the control of the management company. That step-in right is also covered by clause 7.26, although that made clear that this will only happen on payment by the tenant of the service charge. Pursuant to clause 9.9 the landlord covenanted to do anything which the management company had failed to do, but that again was based on the payment being made by the tenant in advance: it is not a free-standing duty on the part of the landlord.

137. In those circumstances, the claimants' alleged claim against the landlords is nothing like a policy of insurance or a performance bond. At its highest, it is a possible claim which is almost certainly going to founder on the same difficulties that have bedevilled this entire development, namely the failure of CJS to sell two thirds of the flats, with the consequences of under-insurance of the building as a whole, and the wholly inadequate contributions to the service charge made by the tenants. The most that the clauses of the lease appear to provide is a mechanism by which either the management company or the landlord might carry out the repairs, but only if the necessary funds are first provided by the tenants. That is plainly nothing like the certainty and comfort denoted by the phrase 'another insurance policy or some other form of compensation or damages'.

138. Moreover, I am in no doubt that no form of compensation or damages could be said to be 'available' to the claimants in these circumstances. Mr Selby took us to two landlord and tenant cases, *Yorkbook Investments v Batten* [1986] 18 HLR 25 and *Bluestorm Ltd v Portvale Holdings* [2004] 2 EGLR 38, with some similarities to the present situation, namely a dilapidated building with many tenants unwilling or unable to pay the relevant service charges. It is unnecessary to go into the detail of either of those decisions. Suffice to say that the experienced judges dealing with them did not adopt a uniform approach and emphasised the difficult legal questions that arose in those circumstances where a claim was made against the landlords.

139. Accordingly, the fact that the tenants might be able to make a claim of a type which judges have struggled to reconcile with wider principles, and which appears fraught with practical difficulties, does not seem to me to amount to compensation or damages 'available' to the claimants at all.

5.5 The Judge's Findings of Fact

140. Finally, I ought to deal with the facts. The judge rejected the suggestion that the claimants' putative claim against the landlords fell within bullet point 11 in the lengthy passages which I have cited in paragraphs 119 above. Much of that analysis is based on the judge's findings of fact. It forms no part of this appeal to suggest that the judge's conclusions on the facts, as set out in these passages, were even arguably wrong. For the reasons that I have given, I consider that they were right. That is another complete answer to Ground 3.

5.6 Conclusions

141. Accordingly, for the reasons that I have given, the sort of 'other compensation or damages' denoted by bullet point 11 is the sort of clear and all-but-certain recovery which ought to be available under an insurance policy or a performance bond. It is not a reference to the potential existence of a possible claim against third parties, let alone a provision that ZIP's liability does not crystallise until after those putative claims have been made and resolved. There is no other compensation or damages available to the claimants on the facts that would trigger this bullet point: the potential claim against the landlords is certainly not in that category. I would therefore dismiss Ground 3 of ZIP's appeal.

6 Ground 4: Car Park

6.1 The Issues

142. There are two issues in relation to the car park. The first is the claimants' contention, set out in their respondent's notice, that the judge erred in finding that the car park was not a garage. If it was a garage, it was expressly included in the list of inclusions in the part of the policy setting out what 'The New Home is'. It was therefore covered by the policy.

143. The second issue assumes that the judge was right to find that it was not a garage but part of the Common Parts (within the same definition of 'The New Home is'), ZIP then say that the judge was wrong to find that it was not excluded because it was a 'basement or semi-basement', which is part of the definition of what 'The New Home does not include...'

6.2 The Judge's Findings

144. The relevant parts of the judgment are paragraphs 7.13.1 - 17.13.3 inclusive. The judge said:

> "7.13.1 The definition of the new home makes it clear that it does not include basements and semi-basements. Whilst the car park is not a fully enclosed basement, and is open sided on one side at least, described by one of the valuers as an undercroft, it is plainly a semi-basement. Although the claimants say that it also falls within the definition of an attached or integral garage, it does not seem to me that the car parking spaces in the basement could possibly fall within that definition.
>
> 7.13.2 It follows that the real question is what happens where, as here, the basement, which is expressly included, forms part of the common parts, which are expressly included: does the inclusion or the exclusion apply? The general rule is that where an event is within the general cover but also within the exclusion from cover it is not covered. However, that general rule is inapplicable here where, as a matter of construction, the common parts fall within a list of positive inclusions rather than a statement of general cover.

> 7.13.3 In my view the inclusion prevails over the exclusion. That is because if it had been intended that, in a common parts case, basements should nonetheless be excluded it should have been expressly so provided. The two are not mutually exclusive and it cannot be said from the wording that it is plain and obvious that the basement exclusion prevails over the common parts exclusion. Apart from anything else it would be wholly unsatisfactory if there was no cover for major physical damage or present or imminent danger where a defect in a basement was a real danger not just to those using the basement for common purposes but also to the safety of occupants of the flats above. "

6.3 Was It 'a Garage'?

145. I am conscious that the judge's finding that this was not a garage might be said to be a finding of fact with which this court would not ordinarily interfere. That caution is only emphasised by the remarks of Goddard LJ in *Barnet & Block v National Parcels Insurance Company Limited* (1942) 73 Lloyd's List Law Reports, page 17 where he said that the finding that the location in question was not a garage was a question of fact and did not raise a question of law at all.

146. However, with the greatest of respect, I do not think it right to say that such a finding is entirely a matter of fact. The question in *Barnet & Block*, just as in the present case, is whether the location in question was or was not a garage within the meaning of the policy. That must be a mixed question of fact and law. That distinction is emphasised by Mr Selby, who submitted that, on this issue, the judge asked himself the wrong question. The judge said that 'the car parking spaces in the basement' were not within the definition of a garage. But as Mr Selby noted, the argument was not about the car parking spaces themselves, but about the entirety of the structure which housed them. On that basis, it might be fairer to say that the judge only asked himself part of the relevant question, and the parties need an answer to the whole question.

147. We have been shown photographs of the car park. I acknowledge that there are storerooms within this semi-basement area, as well as the structure of the car park itself. But in my view the area shown on the photographs is plainly a garage within the meaning of the policy. Unlike the location in *Barnet & Block*, which was an enclosed but unroofed yard, this was a built space with four walls, a concrete floor and a concrete roof/ceiling, primarily designed for the parked cars of the residents. The presence of storerooms and the like makes no difference to that conclusion.

148. Indeed, to put the point round the other way, if this space cannot be defined as 'a garage', then it is hard to know what can. It has every feature that one would expect to find in a large, multi-vehicle garage.

149. Accordingly, I consider that the judge asked himself the wrong question because he focused entirely on the car parking *spaces* only, and not the structure as a whole. That structure as a whole was a garage within the meaning of the policy, and I would so find.

150. What difference does that make? In my view, the fact that this area was a garage meant that it was within the definition of 'The New Home' and was therefore covered by the

insurance policy. It is to be contrasted with one of the express exclusions, namely a detached garage, which this plainly was not.

151. The fact that the New Home does not include 'a basement or semi-basement' according to the definition of 'what The New Home is' is irrelevant to this analysis. Mr Selby was right to say that those words meant that, unless the location in question was within the definition of The New Home, a basement or semi-basement would not be included, but for the reasons I have given, it was within the definition of The New home. The reference to a basement or semi-basement was not part of any positive exclusion provision. Thus, the inclusion of the garage within the express inclusions on the left-hand side of the page meant that the garage was included within the policy and was not and could not be excluded.

6.4 'Common Parts'

152. However, even if we assume that the judge was right to find expressly that the car park was a part of the Common Parts (which is not a finding which ZIP seek to challenge on appeal) I conclude that that makes no difference to the analysis.

153. The judge found that the car park was within the definition of Common Parts because it was a part of the building "for a common or general use". On that basis, the same analysis applies again. As being within the Common Parts, the car park was expressly included within the definition of The New Home on the left hand side of the page of the policy. It was not excluded. As a semi-basement it might not have been covered by the policy but, because it was included on the left-hand side of the page (as indubitably part of the Common Parts, as defined), it was within the policy.

154. In my view, this reading of the policy is also in accordance with its purpose. A provision which identified that semi-basements were outside the terms of the policy in other circumstances was clearly designed to refer to semi-basements which were not often visited (hence the exception in respect of semi-basements used for residing or sleeping purposes). This was a semi-basement that was often visited because of people going to and from their parked cars. There was therefore no sensible reason why, because it was part of the Common Parts, this car park (which was a significant part of the structure in any event) was not covered by the policy of insurance.

6.5 Conclusions

155. For the reasons set out above, Ground 4 of ZIP's appeal is rejected. Although I would reverse the judge's finding and conclude that this was a garage within the meaning of the policy, it makes no difference to the outcome because the judge reached the right conclusion, albeit via a different route.

7 Ground 5: The Balconies

7.1 The Issue

156. Almost all of the flats in the blocks had small balconies. It is common ground that these balconies were not part of the premises demised to the claimants. It appears that this was deliberate, so as to ensure that others could access the balconies, in particular to

allow access to the landlords or the managing company so as to effect any necessary maintenance or remedial work.

157. The judge's findings on this topic are set out in Section 7.14 of his judgment, entitled 'Balconies'. Of particular significance were the following findings:

> "7.14.3 However the question arises that if the balcony is not included in the demise of the lease then how does the tenant have the right to use the balcony. The answer it seems to me appears from part two of the first schedule to the lease, in which the tenant is granted the right, subject to and conditional upon paying the service charge, of "(5) all other rights easements quasi rights and quasi easements as are now enjoyed by the flat in respect of any other part of the development". Given that the individual balconies can only be accessed through the individual flats to which they relate it appears to me that they fall within this wide clause.
>
> 7.14.4 It also follows, in my view, that the balconies are included within the repairing obligation imposed upon the management company in respect of the retained parts under clause 8.6 of the lease, as well as the repairing obligation in respect of the services under clause 8.1 of and the second schedule to the lease.
>
> 7.14.5 However ZIP submits that even though on this analysis the balconies fall within the definition of the common parts under the leases they do not fall within the definition of the common parts under the insurance policy. Mr Baatz submits that to fall within the definition they must fall within the first part of the definition, namely "those parts of a multi-ownership building for a common or general use", as well as the second part, namely "for which the buyer has joint responsibility together with other buyers or lessors". Mr Selby submits that it is sufficient if they are for a common use or for a general use. He submits that where, as here, the balconies are not within the demise of the flats and where: (a) the other tenants have rights under part 2 of schedule 1 of way and entry in relation to the balconies of the other flats for the specific purposes stated therein; (b) the landlord also has a right of way for all reasonable purposes in relation to the balconies of the other flats; (c) the management company has an obligation to undertake repairs etc in relation to the balconies and the right under clause 7.8 to access the balconies through the flat to do so, those rights are sufficient to bring the balconies within the common or general use requirement.
>
> 7.14.6 I agree with Mr Selby. It is clear from the express exclusion in relation to balcony decking that it was envisaged that balconies were intended to be covered. It is also clear that the policy does not expressly provide the answer to the question – what if there are parts of a multi-ownership building which are intended to be used for the enjoyment of the individual flat-owner but which are outside the demise and within the common parts under the lease and in respect of which the other tenants and through them the management company have repairing obligations and rights? In my view it cannot, objectively, have been

> intended that these parts would fall outside the policy as being neither part of the new flat as a demise or part of the common parts. The words "common or general use" are wide words which do not require that the use must be for the purposes of sole occupation or enjoyment and in my view use as being part of the structure and common parts in respect of which there are common or general repairing and ancillary access obligations is sufficient.
>
> 7.14.7 On that basis, it seems to me that insofar as the claimants are able to make a claim in relation to the balconies under the present or imminent danger cover provided by the policy, they are able to recover the full cost of rectifying that danger without the proportional share limitation applying. It also follows, however, that insofar as the claimants are only able to make a claim in relation to the balconies under the physical damage or major physical damage cover provided by the policy, the proportional share limitation will apply to that claim, which effectively produces the same result in relation to such claims as ZIP contended for, albeit for different reasons."

158. Mr Baatz contends that the balconies were not part of the Common Parts. On that basis, he says, the balconies fell outside the policy of insurance altogether. For the reasons set out below, I reject that submission.

7.2 The Language of the Definition.

159. The Common Parts were defined in the policy as:

> "Those parts of a multi-ownership building (of which the New Home is part), for a common or general use, for which the Buyer has Joint responsibility together with other Buyers or lessors."

160. Accordingly, the question becomes whether the balconies were "for a common or general use" for which the claimants had joint responsibility. There can be no doubt that the balconies were part of the blocks of flats and the claimants (collectively) had responsibility to maintain them under the terms of their leases. Those leases also make plain that the management company and the landlords also had rights and obligations in relation to the balconies and were entitled to access to the balconies to carry out repairs and the like.

161. To come within the definition of Common Parts in the policy, the balconies must require *a* common or general use (ie just one). A common or general use in this case was the common or general use of the balconies to facilitate maintenance or for remedial work purposes. The balconies therefore fell within the definition of Common Parts, as the judge correctly found.

162. Mr Baatz was right to say that the definition of Common Parts is different as between the lease and the policy. But the differences are not significant and, for present purposes, are irrelevant. What we are concerned with is the policy and, for the reasons that I have indicated, the definition of the Common Parts plainly will include these balconies.

7.4 Evidence of Operation

163. Furthermore, the conclusion that the balconies were part of the Common Parts as defined in the policy is consistent with the evidence as to its operation in practice. The court was shown one of ZIP's Insurance Certificates provided in relation to one of these flats. It is expressly headed "For Common Parts Only". That certificate contained endorsement details which expressly "excluded balcony decking". Thus, other than the decking, which is outside the policy by operation of the Certificate, it was obviously intended that the remainder of the balconies themselves were part of the Common Parts and were treated as such for the purposes of the Zurich policy. They were therefore covered by the Insurance Certificates. In that way, the operation of the policy as a matter of fact confirmed the natural language of the definition of the Common Parts.

7.4 Conclusions

164. The judge found that the balconies were part of the Common Parts. In my view, that conclusion was in accordance with the natural language of the definition of Common Parts in the policy. Moreover, that interpretation is entirely consistent with how the insurance policy was operated. For all those reasons, therefore, Ground 5 of ZIP's appeal is refused.

8 Ground 6: Condensation

8.1 Issue

165. The relevant exclusion in Section 3 is bullet point 17 in the following terms:

> "Claims for the prevention of, or any loss caused by surface or any other form of condensation"

166. Mr Baatz submitted that, in relation to the roof, there were two causes of loss and damage: the defects in the design and construction, on the one hand, and condensation, on the other. He says that, where there are two causes of loss and damage, and one cause is excluded by the policy then, even if the other cause is covered by the policy, as a matter of law the entirety of that loss and damage must be excluded.

167. In my view, this analysis of the issue in the present case is misconceived. In order to explain why, it is necessary to set out the judge's findings and then to examine carefully the language of the policy, before turning to matters of causation.

8.2 The Judge's Findings

168. The critical findings of fact are at [10.3.2] in the following terms:

> "10.3.2 The roofing experts agreed in their joint statement that there is no VCL in the flat roof and that the omission of the VCL combined with the poor ventilation in the roof void has resulted in deterioration of the ply deck (it being common ground that there are soft spots in the ply deck in a number of locations throughout the roof) and that this (or, more specifically, the effect of the condensation which results upon the ply deck) is the primary reason why the roof finishes and construction across the entire building needs to be replaced. The claimants'

> structural and roofing experts also identify some consequential corrosion of the steelwork in the roof."

169. The reference to a VCL is a reference to a Vapour Control Layer. This is designed to ensure that the warm air generated by the flats is kept on the warm side of the insulation and does not come into contact with the cold air on the outside of the building. Condensation occurs when these two atmospheres at different temperature meet. That is what the judge said happened here, because of the absence of the VCL, aided by the defective ventilation in the roof void. Put shortly, therefore, the judge found that the condensation was due to the defective design and construction of the building.

170. There is no appeal against the judge's findings at [10.3.2] (nor could there be, since they were based on the experts' agreed statement). The question is whether, on those findings, bullet point 17 is even engaged. In my judgment, it is not. There are two reasons for that: one relating to the language of the policy and the other based on an analysis of the relevant principles of causation.

8.3 The Language of the Policy

171. Section 3 of the Policy is concerned with Major Physical Damage. That is defined as:

> "A material difference in the physical conditions of a load bearing element of the New Home from its intended physical condition which adversely affects its structural stability **or resistance to damp** and water penetration" (emphasis supplied).

172. Furthermore, clause 3.1 is a promise on the part of ZIP to pay "the reasonable cost of rectifying or repairing Major Physical Damage" and links to a failure by the Developer "to comply with the Requirements". Those Requirements are ZIP's own Technical Requirements which are in addition to the Building Regulations and which are mandatory. The court was taken to some examples of those Technical Requirements. They expressly identify the need to prevent/avoid condensation.

173. The reasonable cost of rectifying a present or imminent danger to the physical health and safety to the occupants is separately covered at clause 3.2. Those are linked to a failure to comply with the Building Regulations. One of the express references is to "site preparation and **resistance to moisture**" (emphasis supplied). Again therefore, resistance to moisture is expressly identified as being a critical element of the policy cover.

174. Accordingly, the natural reading of the policy is that defects which reduce the resistance of the building to damp and/or moisture (which must, on any view, include condensation) are the focus of sections 3.1 and 3.2 of the policy. No reading of bullet point 17 can be permissible which would have the effect of negating that central purpose of the policy.

175. So what is bullet point 17 aimed at? In my view, the answer is plain: condensation which occurs in any event. It is really no more and no less than a specific manifestation of bullet point 19, which excludes any liability to pay for the effects of wear and tear. Some condensation is inevitable in any building and damage thereby caused is not covered by the policy. But condensation as a result of a failure to comply with the

Building Regulations or ZIP's own Technical Requirements (which failure was the cause of the condensation as found by the judge) is plainly covered by the policy. In that way, the policy and the exclusion bullet point 17 can be properly read together.

176. What was this condensation: condensation as the result of the failure to comply with the Building Regulations/Technical Requirements or condensation as part of ordinary wear and tear that will always arise? The judge's findings at [10.3.2] (paragraph 168 above) make plain that it is the former. Accordingly, the exclusion does not apply and, on a natural reading of the words of the policy, the judge's approach was correct.

8.4 Causation

177. In my view, precisely the same answer is reached if the analysis is undertaken by reference to the law of causation and exclusion.

178. The judge dealt with this point as follows:

> "7.15.3 In this case, therefore, the claimants say that by parity of reasoning the proximate cause of the loss is not the mere presence of condensation, rather the effect that the condensation has upon the physical condition of the roof, itself caused by a breach of the requirements or regulations.
>
> 7.15.4 In contrast, ZIP contends that even if the claim would otherwise fall within the scope of the cover, any such claim is clearly excluded where it falls within the scope of the condensation exception. In support of its argument ZIP referred at [70] of its written closing submissions to its internal claims handling document, but it seems to me that this is plainly irrelevant to the proper construction of the insurance policy. In contrast, the ZBG technical requirements, being referred to specifically in the policy, clearly fall within the factual matrix and thus at least of potential relevance to the proper construction of the policy. They make a number of references to the need to design and construct the building in order to address the risks of condensation. It would, therefore, be surprising if a failure to comply with the ZBG requirements in such a way as to lead to condensation and to the major physical damage or present or imminent danger cover being triggered should then be excepted, but of course if the policy on its proper construction leads inexorably to that result then that result must follow, however surprising.
>
> 7.15.5 I prefer and accept the claimants' case in this respect and am satisfied that in such cases the condensation exclusion does not apply. In my view this is because whether one considers this case as being one of proximate cause or concurrent causes the position is that the failure by the developer to construct the building in accordance with the ZBG requirements or the Bldg Regs is either the proximate cause or at the very least a concurrent cause of the loss. It is the proximate cause because without the failure by the developer it would not have happened. It is the concurrent cause because even if one takes the view that the condensation itself is also a proximate cause, again without the failure by the developer the loss would not have happened. Furthermore, upon a proper

> construction of the policy the condensation exception is not an exclusion, but simply an uninsured cause, whereas the major physical damage and present or imminent danger items are insured causes. Therefore, the loss is covered."

I agree with the judge's approach and his conclusions, although I prefer to put the analysis in a slightly different form.

179. In *Leyland Shipping Co Limited v Norwich Union Fire Insurance Society Limited* [1918] AC350, Lord Shaw of Dunfermline said:

> "... the cause which is truly proximate is that which is proximate in efficiency."

In the present case, as noted above, the judge found that the proximate cause of the problems with the roof were the defects in design and construction which meant that there was no VCL and poor ventilation in the roof void.

180. What is the position when the original problem (the defects in design and construction) which is covered by the policy has physical consequences (the condensation) which are apparently excluded by the terms of the policy? The clear answer to that question was provided over 50 years ago in *Burts and Harvey Limited and another v Vulcan Boiler and General Insurance Company Limited* [1966] Lloyd's Law Reports Vol 1 Page 161. There, the policy covered sudden and accidental damage by any fortuitous cause, and then went on to exclude loss or damage resulting from, amongst other things, corrosion. The machinery broke down due to the splitting of one or more tubes in the heat exchanger. This allowed the formation of maleic acid which subsequently caused corrosion.

181. Lawton J rejected the insurer's argument that they were entitled to rely on the exclusion clause in respect of corrosion. He said:

> "... On those facts I have to ask myself whether or not the plaintiffs have proved their case, I turn to the first of the problems which arise, namely: Were the events which happened within the contingencies specified in the policy? I find that they were. The dominant or proximate cause of this accident (regarded in the sense in which Lord Shaw of Dunfermline suggested it should be regarded, in the well-known case of *Leyland Shipping Company, Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918] A.C. 350)) was, in my view, this: the splitting of one or more tubes in the heat exchanger. This splitting was the cause of all the consequent trouble. The formation of the maleic acid was a consequence of the splitting, as was the subsequent corrosion and erosion brought about by the maleic acid. It follows, therefore, that there was sudden and accidental damage by a fortuitous cause within the meaning of the policy.
>
> The fact that corrosion and erosion followed as a consequence of that cause seems to me to be irrelevant. In any event, on my view of the construction of the exclusion clause corrosion and erosion within the meaning of that clause were never intended (so I find as a matter of the

> construction of this policy in the circumstances in which it was issued) to cover other than corrosion and erosion caused in use. The exclusion clause reads as follows:
>
> It seems to me clear that what the defendants had in mind was the effect of gaseous maleic anhydride upon the tubes through which it would pass in the ordinary process of production, and they had not in mind any corrosion or erosion which was consequential upon any breakdown of the plant due to the failure of a component "

182. In my view, this is a complete answer to Mr Baatz's submissions on causation. It is often the way in defects cases that there can be damage as a result of the existence of underlying defects in the design or construction of the component or building. The damage due to those defects may take many forms, such as corrosion in *Vulcan Boiler* or condensation in the present case. But such damage is not excluded by operation of the policy because the policy must respond to the proximate cause of the damage and that was, in *Vulcan Boiler*, the deficient manufacture of the tubes and, in the present case, the absence of the VCL and the poor ventilation.

183. During the course of his submissions, Mr Baatz took us to paragraph 21 – 005 of *Macgillivray on Insurance Law* (14th edition) which encapsulates the proposition that where there are two proximate causes and one is excluded under the policy and one is not, the insured could not recover, because the insured had effectively promised that the insurers would not be liable for loss caused by the excepted peril. There are a number of cases cited to that effect including *Wayne Tank and Pump Co Limited v Employers Liability Assurance Corp. Limited* [1974] QB 57 and *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32. But for the reasons which I have explained, that analysis simply does not arise here because there were not two concurrent causes.

184. Thus, by reference to the decision in *Miss Jay Jay*, the insured cause was the rough sea but the uninsured cause were the defects in the hull. It should be noted that cover was not in fact excluded in that case because the design defects were not the sole cause of the accident (which they would have had to have been for the clause to bite). But the more important point is that the case was argued on the basis that these were two separate causes, independent of one another. That is not the case here, where the condensation was the result of the original defects in the design and construction of the building.

8.5 Conclusion

185. Accordingly, I consider that, as a matter of the language of the policy, the judge was right to find that the exclusion at bullet point 17 does not arise. Ground 6 of the appeal is rejected. In any event, as a matter of causation, there were not two concurrent causes but one proximate cause. Ground 6 fails on that ground too.

9 Excess Deductions

9.1 The Issue

186. This is a rather odd ground of appeal. In keeping with their general approach, at the trial ZIP argued that there should be scores (if not hundreds) of excess deductions from

any award of damages, because they said that there were so many separate items of claim. Although the judge reached clear views as to the extent to which he accepted that submission, ZIP say that he failed to deduct enough.

9.2 The Excess Provision

187. The excess was defined in the policy as "the first amount (Indexed), of each claim which is payable by You for which no Insurance is provided under this policy and which is specified in the Insurance Certificate." The schedule to the policy referred to the excess as relating to "each and every item of claim".

188. The words in issue therefore are the meaning of "each and every item of claim".

9.3 The Judge's Findings

189. The judge's findings on this issue are set out at [7.16.1] – [7.16.11]. He dealt with each side's competing submissions as to the excess deductions and referred to authority. His conclusions were:

> "7.16.10 It is clear, therefore, that the question is fact sensitive. In my view it must be answered, as was the question in the *Trollope & Colls* case, by adopting a sensible rather than an absurd interpretation, having regard to all of the relevant circumstances and, in particular, the cover afforded by the policy, bearing in mind the distinction between cover for an individual flat and cover for common parts.
>
> 7.16.11 In my view, the sensible approach is one which focusses on the cover given. Thus, in relation to major physical damage to common parts, there is a separate item of claim for the cost of rectification or repair for each "element" of the building caused by a failure to comply with the ZBG requirements. Where for example the element is the continuous roof or the continuous external walls then that is one item of claim even where it could be said that separate areas of the roof or the walls are affected by the same failure. The same is true where there are a number of physically separate elements which are all affected by the same failure; it is one item of claim. In relation to present or imminent danger, there is a separate item of claim for each danger caused by a failure to comply with the Bldg Regs. Thus a danger caused by the spread of fire, whether due to untreated structural steelwork or a lack of compartmentation, is one item of claim."

190. As to the judge's application of those principles to the separate items of claim, his findings are at [10.11.3] as follows:

> "10.11.3 I ought however to address the competing arguments in relation to the application of the excess. In short, I accept the claimants' analysis in their closing submissions. In my view the position is as follows:

> (1) The fire safety claims in Schedule E comprise three items of claim, namely those relating to the ability of the building structure to contain the spread of fire, those non-structural respects in which the means of escape is unsafe, and the lack of dry risers for fire service access. Since the Schedule E claims are present or imminent danger claims there are three excesses of £1,221.10 (£1,000 adjusted for inflation) each. Moreover, these claims subsume the Schedule B cladding claims which the claimants need not pursue and hence in respect of which there is no excess.
>
> (2) The roof claims in Schedule B are, save insofar as already subsumed within Schedule E and each other, two distinct claims, one relating to the roof deck and one relating to the roof parapets. Again they are both present or imminent danger claims and thus there are two excesses of £1,221.10 each.
>
> (3) The Schedule C claims. I accept the claimants' argument that there are 4 separate items of claim, items 1, 3, 5 and 6. Save for item 5 none are present or imminent danger claims with the result that there will be a separate excess of £1,221.10 for each of the claimant's flats applying to items 1, 3 and 6, thus a total excess of £3,633 per flat and a total excess under Schedule C of £111,120.10.
>
> (4) The Schedule D claims. I agree that the essential complaint is that the construction of the balconies represents a present or imminent danger and that this is one item of claim and thus that there is only one excess of £1,221.10. The cold bridging claim is subsumed within this.
>
> (5) The Schedule F claims. I agree that there are two present or imminent danger claims and hence a total excess of £1,221.10 each.
>
> (6) The Schedule G claim item 2 is one item and a section 2 claim and, hence, an excess of £100. "

191. The upshot of all this was that the judge deducted one excess only in respect of the claims based upon the imminent threat to safety, and then made a number of further excess deductions to reflect the different types of claims in respect of major physical damage.

192. ZIP now complain about this for two reasons. First, they say that the judge was wrong to identify just one excess deduction, across all claimants, in respect of the present or imminent danger claims. Secondly, they say that the judge underestimated the total number of 'each and every item of claim'. They now say that the number of relevant items should reflect the headings in the judgment (which cannot, of course, have been their case at trial).

9.3 The Law

193. Guidance can be found in the decision of this court in *Trollope & Colls Ltd v Haydon* [1977] 1 Lloyd's Law Reports 244 which was concerned with multiple excess deductions. At page 249, Cairns LJ said that the issue did not depend on how the claims were formulated, but whether the facts gave rise to one claim or more. He said:

> "If there were several defects at the same time in the same dwelling, each contributing to rendering that dwelling un-weathertight, I think it would be absurd to treat them as giving rise to several claims rather than to one."

194. He went on at page 250:

> "In my judgment, the key to the problem is that the warranty was a warranty that the dwellings and garages would remain weathertight for five years. The undertaking in par. 2 of the warranty was in effect a warranty that if during the five years any dwelling or garage ceased to be weathertight, the plaintiffs would carry out such work as was necessary to make it weathertight.
>
> In these circumstances, I consider that the expenses incurred by the plaintiffs in making weathertight any dwelling or garage which had by reason of failures or defects ceased to be weathertight would give rise to one claim against the insurers. That, in my view, is more likely to have been the intention of the parties when this endorsement was agreed to than any other construction that has been put forward."

9.4 Present or Imminent Danger

195. The judge found that only one excess was deductible in relation to all of the claimants, because only one claimant needed to pursue the claim in relation to present or imminent danger. One claim was sufficient for all the claimants to be able to recover.

196. I agree with the judge. A present or imminent danger to the occupants is exactly that: it affects everybody. One claimant could therefore pursue the claim on behalf of them all. It would be contrary to the policy to deduct an excess in relation to each separate claimant in respect of the same claim for present and imminent danger to health or safety. I also consider that that conclusion is in accordance with the approach set out in *Trollope & Colls,* above.

9.5 Major Physical Damage

197. That leaves the claims in respect of major physical damage. The judge accepted that the deductions for excess was an exercise that applied across all of the claimants. His detailed exposition is set out in the passages I have cited in paragraph 190 above.

198. The judge heard this trial over many weeks. He was very familiar with the Scott Schedules. The judgment is an eloquent testament to his industry and acumen. No reason has been put forward as to why his analysis of the individual claims for the purposes of the excess deductions was or might even arguably be wrong. They were part of the judge's careful findings of fact and cannot now be re-investigated by this

court. Moreover, I consider that the judge's consideration of this issue was entirely in line with the principle endorsed in *Trollope & Colls*.

199. The judge identified a total excess deduction of £120,889. In the circumstances of this case I consider that that was, if anything, generous to ZIP. There is no possible basis on which this court could interfere with that conclusion. Indeed, had the judge not given permission to appeal on this item, I am very clear that this court would never have done so.

200. For these reasons, Ground 7 of ZIP's appeal is rejected.

LORD JUSTICE McCOMBE:

201. The judgments of my Lords, Sir Rupert Jackson and Coulson LJ have addressed the parties' grounds of appeal and cross-appeal arising out of HH Judge Davies' principal judgment of 30 January 2019. I agree with those judgments and have nothing to add.

202. I write this judgment to address the separate appeal of ZIP and East West (collectively "ZIP") from the learned judge's judgment of 7 February 2019 ("the Interest Judgment") ([2019] EWHC 205 (TCC)) which deals with the claimants' claims to interest on the total principal sums of £3,634,074.65, as limited by the MLC which the judge found applied to their claims.

203. The judge held that, under s.35A of the Senior Courts Act 1981, the claimants should receive interest at 3.5% from 7 August 2013 to 7 February 2019, resulting in total interest of £669,559.30.

204. For reasons that I will explain, it is common ground that, in the light of the conclusion that this court has reached on the claimants' appeal, namely that the MLC does not apply in the manner contended for by ZIP, interest cannot be claimed under s.35A. Interest will only accrue upon the judgment from January/February 2019. (See Transcript, Day 3 p. 130 lines 7 to 15.) However, we have thought it right, that we should nonetheless give a short statement of the court's views on the interest point, on the assumption that the judge was right and that we are wrong on the question of the application of the MLC. The following paragraphs give my short reasons, on that hypothesis, for reaching the same conclusion as the learned judge.

205. The principal factual material giving rise to the interest claim appears in the Interest Judgment and it is not necessary, in the present circumstances, to relate much of that now.

206. As will be appreciated, the claim made at trial was for the full cost of remedial works, asserted to amount to about £10.9 million. The claim was said to include an allowance for inflation up to and including the time when the claimants expected to obtain judgment, then to receive payment and to be able to fund and execute the works. That allowance for inflation was not disputed by ZIP.

207. In such circumstances, a claim for interest was unnecessary, although an unparticularised claim for interest under the 1981 Act was included in the Particulars of Claim. That claim did not give the prescribed particulars of the date from which interest was claimed or the rate claimed, as required by the Civil Procedure Rules. In

closing submissions, the claimants stated that no interest was needed in respect of the claim as presented. By oversight, the claimants had neglected (in both pleading and argument) to make allowance for the possibility that, as the judge ultimately found, the claim might be limited by the MLC and to make an alternative claim to interest for that eventuality.

208. When the judge circulated his main judgment on 13 December 2018, it became apparent that the claimants had failed to achieve an award of the full sum claimed and were to receive only the capped sum of some £3.634 million. Thus, on 11 January 2013, in anticipation of submissions on consequential matters, the claimants notified ZIP of their intention to claim interest at 4.5% above base upon the principal judgment sum from March/April 2013. ZIP objected that it was not open to the claimants to advance this claim in the absence of it having been raised, as it should have been, either as an alternative case in the claimants' Reply or at least in the submissions at trial.

209. On 30 January 2019, the judge heard argument about the new interest claim. At that hearing, ZIP resisted the claim on two grounds: first, on the procedural basis, that it was too late to raise the claim; and secondly, on the merits.

210. The procedural objection raised technical issues as to withdrawal of admissions under the CPR Part 14 and paragraph 7.2 of the Practice Direction. It was also submitted by ZIP that the late revival of the moribund interest claim prejudiced them as they had not been able to raise with individual claimants in cross-examination matters which would have been of relevance to the claim to interest arising out of their individual circumstances.

211. The judge rejected the procedural objection both on the basis that the material provisions of CPR Part 14 were not engaged (paragraph 15 of the Interest Judgment) and on the basis that there was no unfair prejudice to ZIP in the circumstances in which the claim was ultimately made. In view of the principles upon which awards of interest are made, the judge held, no unfairness had arisen in a loss of opportunity to cross-examine; such cross-examination of individual claimants was not material to the decision and the court already had sufficient information as to the general characteristics of the claimants as a class to enable it to exercise its statutory discretion fairly.

212. On the merits of the claim, ZIP argued that an award of interest was not justified as the claim had always been to recover remedial costs and, as the claimants had incurred no costs, they had not suffered loss requiring compensation by interest: reliance was placed upon *Hunt v Optima (Cambridge) Ltd.* [2013] EWHC 1121 (TCC) (Akenhead J) and *Kazakhstan Kagazy plc v Baglan Abdullayevich Zhunus and Harbour Fund 111 LLP* [2018] EWHC 369 (Comm) (Picken J).

213. In any event, ZIP objected that the evidence did not justify a claim on the basis that the claimants had been deprived of money from July 2013 in circumstances where (i) there was no evidence of what they would have done with the money; (ii) from September 2016 they would have been obliged to pay any sums to the bank funding the litigation; and (iii) they would have been able to obtain rental income until about July 2017 when the flats had to be vacated.

214. The judge rejected these objections, on two broad bases, which in my judgment were inter-related. First, as he had held, the claimants were under no obligation to have carried out works as a precondition of recovery under the policies; and secondly, the objection ignored the principle that interest is awarded to compensate claimants for being kept out of money rather than as compensation for damage done. The judge held that the cases cited were illustrations of cases where, on the particular facts, the essence of the claims was that the claimants had incurred or would incur a liability which they had successfully claimed against the defendant but had not paid by the date of trial. At paragraph 27, the judge said:

> "27. I agree with Mr Selby that there is a real difference between the claim as presented and the claim as it has succeeded. The claim as presented was put on the basis, albeit disputed by ZIP, that the claimants could and would use the monies awarded to fund remedial works post judgment, hence the basis for the inflation claim. The claim as successful was on the basis that the policy allowed ZIP to discharge its liability by making a lump sum payment of the declared purchase price where the cost of undertaking the remedial works exceeded that sum. It therefore became irrelevant whether or not the claimants intended to or would be able to undertake remedial works. They were entitled to receive this lump sum capped payment and to do with it as they thought best. Thus, in this case the claimants were entitled to be paid the ML capped amounts regardless of whether or not they were to be used to fund repairs."

215. The judge then examined the evidence of interest rates for borrowing over the period in issue and the claimants' general circumstances, in order to assess an appropriate rate of interest. His conclusion was that 3.5% was correct over the whole period. On the facts of the case, as I have said, the judge concluded that the period over which interest should be paid was 7 August 2013 to 7 February 2019.

216. ZIP sought to appeal against the judge's findings, both in respect of the procedural objection and the objection on the merits. Four grounds of appeal were raised, some arising out of the judge's decision on merits of the claim and others on the procedural matters, including the lack of cross-examination opportunity as to the circumstances of individual claimants. Permission to appeal on the procedural matters was refused by Coulson LJ by his order of 11 April 2019. Two grounds of appeal remained. They were as follows:

> "Ground 1
>
> The Judge erred in law because on the true construction of the policies any claim for payment of the maximum liability sum was a claim for, and valued by reference to, future remedial costs and it did not change its nature because the amount of the recoverable claim for future remedial costs was limited by the maximum liability provision. The fact that the cap is fixed by reference to the purchase price of the individual flats does not alter the nature of the claim.

> Ground 2
>
> The Judge erred in law because in the alternative if there was an obligation to pay the amount of the maximum liability on the true construction of the policies any obligation to pay the maximum liability and any cause of action arising out of a failure to pay the amount of the maximum liability in respect of sums not incurred or any entitlement to interest could not arise earlier than the later of (i) the date on which a claim was made for a sum in excess of the maximum liability and/or (ii) the date on which it was alleged that any sum recovered would not in fact be spent on proposed future remedial works and/or (iii) the date on which it was established that the maximum liability amount would be reached. The Judge erred in holding that on the proper construction of the policies the claimants' cause of action for payment of the amount of the maximum liability sum arose when the right to indemnity arose which was, he said, when there had been major physical damage or a present or imminent danger to physical health and safety due to the developer's failure to comply with ZIP's technical requirements or the Building Regulations."

217. In my judgment, both these grounds can be addressed shortly.

218. In the skeleton argument for ZIP (paragraph 68) ground 1 was further expanded as follows:

> "68. The Judge's distinction between the claim as presented and the claim as successful is unsupported by the terms of the policy, see IJ paragraph 27 at A/11/11. The Judge added an alternative obligation not stipulated or defined in the policy – an obligation to pay a sum computed by reference to the Maximum Liability which was not the same as the claim for the cost of future repairs. The Judge was mistaken. On this basis he wrongly distinguished the decisions of Akenhead J in *Hunt v Optima (Cambridge) Ltd* [2013] EWHC 1121 (TCC) (at paragraphs 3 and 4), and Picken J in *Kazakhstan Kagazy plc v Baglan Abdullayevich Zhunus and Harbour Fund* 111 LLP [2018] EWHC 369 (Comm) (at paragraph 89) (MJ paragraphs 24-27)."

219. In my judgment, in paragraph 27 of the Interest Judgment (in the section dealing with the procedural objections), the judge has not added an alternative obligation or cause of action at all. He was simply addressing the question whether, in the result that he had reached on the causes of action formulated, the claimants had been "kept out of their money". The judge fully understood that the claim was for the cost of repairs, but that the claim (measured by those costs as estimated) had been artificially limited by the MLC. In any event, as he had held, and as this court will affirm, there was no obligation to lay out the sums recovered on repairs at all. In my judgment, the judge quite properly distinguished the two cases cited to him *Hunt v Optima* and *Kazakhstan Kazagy* (supra) for the reasons that he gave, to which it is not necessary to add.

220. If the claimants were to be fully compensated for a sum equivalent to the cost of repair, no question arose as to whether they were being kept out of their money. However, once that claim was to be so significantly limited, to the extent that the feasibility of the repairs became highly questionable, then obviously the question arose whether that limited sum should have been paid far earlier than in response to a judgment of the court and, if so, at what date.

221. We were referred to the judgments of Robert Goff J (as he then was) in *BP Exploration Co. (Libya) Ltd. v Hunt* [1979] 1 WLR 783 and of Langley J in *Kuwait Airways Corp and anor. v Kuwait Insurance Co SAK and ors. (No. 2)* [2000] 1 All ER (Comm) 972. Langley J succinctly summarised the principles at pp. 986g – 987e in the latter case, broadly indicating that the starting date for an award of interest is the date when the cause of action arose, and so, in indemnity insurance, at the date of the loss. Generally, where there is uncertainty as to liability and a need to investigate that, that is not a material factor in postponing the running of interest. Where the uncertainty is as to quantum, once the answer is known and it is established, not only that payment is due, but also what is due and when, then there is no reason further to postpone payment. The principles may be tempered by asking when the claimant reasonably and commercially could have expected to be paid. In answer to that, the starting date is never extended beyond the time when a reasonable investigation would have been completed, even if it would have resulted in a decision to resist the claim.

222. The judge concluded that,

> "…ZIP was obliged to investigate the claim, both as to liability and quantum, and to make payment once a reasonable time had elapsed for it to complete its investigations albeit that as a matter of contract law the cause of action accrued at an earlier date …".

On that basis, ZIP had to tender payment of the claim, capped by the MLC once it had had a reasonable time to investigate and reach a conclusion. I see no objection to that approach to the matter.

223. From then on, it became a matter for the judge to decide what was an appropriate date for the start of the interest period, on the basis of his conclusions on the primary facts as found. He reviewed the materials which were well known to him after this long trial and arrived at the dates stated in paragraph 42 of the Interest Judgment. There can be no basis for criticising his final assessment of those dates in these circumstances. He was fully versed in the circumstances in which the claims had arisen and the various stages of the disputes which he had set out in his two judgments in some detail. This court cannot sensibly second guess his evaluation of that material.

224. On the hypothesis upon which I have approached the interest question, therefore, if the MLC applied, I would have dismissed ZIP's appeal on the interest issue.

APPENDIX

Zurich Standard 10
New Home Structural Defects Insurance Policy

Welcome to Your Zurich New Home structural defects insurance policy. Problems with New Homes are rare but if You should need this insurance it is important that You understand what is and what is not covered. The policy should be accompanied by a Building Period Certificate or Insurance Certificate, or both as appropriate, and is not valid without them.

You will need to read the policy wording, the definitions and conditions, the certificates and any endorsements printed on them carefully for the full details of cover.

By way of summary, and subject to the conditions and any endorsements printed on the certificates, the policy protects You if Your Developer goes into liquidation or is made bankrupt against the loss of contract exchange deposit and the repair of certain types of damage caused by building defects in the first two years (or one year if Your New Home includes a Conversion).

If the Developer is not in liquidation or has not been made bankrupt, but nonetheless unreasonably refuses to meet its repair obligations within a reasonable period, We will help to resolve a dispute between You and the Developer by giving advice about the extent of cover available under the policy and the Developer's responsibility to rectify damage caused by defects. If We advise that repairs are covered by the policy but the Developer unreasonably refuses to carry out the work within a reasonable period, We will pay for the work to be completed.

After the first two years (or one-year if the New Home includes a Conversion) and until ten years after the Effective Date on the Insurance Certificate, We will cover the repair of Major Physical Damage caused by building defects in the original construction.

This policy is an agreement, the insurance contract, between You, the Buyer, and Us (Zurich Insurance Company), entered into by the Developer on Your behalf. It is based on the details provided to Us by the Developer and by you if you are the first Buyer. If any of those details change you must let Us know as soon as possible, otherwise it may invalidate the insurance.

The conditions that apply to all parts of this policy are listed on page 13. Please ensure you read the conditions, as well as "the Insurance" section of this policy document.

Certain words have specific meanings when they appear in this policy. These meanings are shown on page 4 under "Definitions" and appear throughout the policy in bold type.

You may only claim under this policy whilst you are the current Buyer. You are not entitled to make or continue a claim under this policy once you have sold or otherwise disposed of Your interest in the New Home.

Your Cancellation Rights
You have the right to cancel this policy, however, We are unable to return to you any premium paid to Us. Before you decide to cancel the insurance it is important to check with Your mortgage lender that you will not breach any conditions of Your loan. You may also want to consider whether cancellation could affect the ability of any subsequent Buyer to obtain a mortgage.

Definitions

Certain words have specific meanings when they appear in this policy in bold type.

These meanings are shown below.

Building Period Certificate: The certificate issued by Us when the New Home has been registered with Us prior to completion. By issuing this certificate We are confirming that cover under Section 1 of the policy is in place. Cover under the remaining sections of the policy is not in place until We have issued the Insurance Certificate.

Building Regulations: The Building Regulations that govern the construction of the New Home which were in force at the time the "notice to build" was deposited with the local authority.

Buyer/You/Your: The person/s having a freehold, commonhold, leasehold or tenancy interest in the New Home for the time being or any mortgagee in possession excluding the Developer, builder, directors, partners, and their relatives and associated companies, and all those involved with or having an interest in the construction or sale of the New Home.

Certificates: The Building Period Certificate and the Insurance Certificate.

Common Parts: Those parts of a multi- ownership building (of which the New Home is part), for a common or general use, for which the Buyer has joint responsibility together with other Buyers or lessors.

Continuous Structure: A single building containing more than one New Home, including blocks of flats and terraces, or a New Home(s) and other parts of the same building used for some other purpose(s).

Conversion: Where the New Home includes all or part of an existing structure, regardless as to whether that structure was originally intended to be used as a dwelling or not.

Developer: The person or company named in the Certificates from whom the first Buyer acquires the New Home or who undertakes the work of building the New Home for the Buyer.

Effective Date: Whichever is the later of:

(a) The date of exchange of contracts with the first Buyer as shown in the New Home conveyance documents, or where appropriate, the equivalent date in Northern Ireland (the date the Buyer's offer is accepted by the vendor) or Scotland (the completion of missives); or

(b) The date stated to be the Effective Date of the cover provided by this insurance policy on the Insurance Certificate.

Excess: The first amount (Indexed), of each claim which is payable by You for which no insurance is provided under this policy and which is specified in the Insurance Certificate.

Excessive sound transmission: Sound transmission between dwellings that exceeds the sound reduction Requirements of the Building Regulations that apply to the New Home, or in the case of a Conversion of an historic building the sound reduction specified in the "test and declare" certificate.

Home Condition Report: The report as required as part of the Home Information Pack, or any pre purchase survey report.

Indexed: Increased from 1 January 2006 to the date a claim is reported to Us in accordance with the House Rebuilding Cost Index published by the Royal Institution of Chartered Surveyors.

Insurance Certificate: The certificate issued by Us to signify acceptance of the New Home for insurance under this policy. This certificate may be endorsed to include or exclude specified items from cover by Us.

Maximum Liability:

Sections 2 and 3

Our Maximum Liability in respect of all claims under Sections 2 and 3 of this policy is as follows:

(a) for a New Home which is entirely detached, the purchase price declared to Us, subject to a maximum of £25 million;

(b) for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25 million.

Where the combined value of all New Homes within a Continuous Structure exceeds £25 million, the total amount payable by Us in respect of all claims in relation to the New Homes and the Continuous Structure shall not exceed £25 million.

Section 4

Our Maximum Liability in respect of all claims under Section 4 of this policy is as follows:

a) for a New Home which is entirely detached, the purchase price declared to Us, subject to a maximum of £20 million in respect of the Site;

b) for a New Home which is part of a Continuous Structure or forms part of a Site, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £20 million.

Where the combined value of all New Homes within a Continuous Structure or on a Site exceeds £20 million, the total amount payable in respect of all claims in relation to the New Homes, the Site and the Continuous Structure shall not exceed £20 million.

Major Physical Damage:

A material difference in the physical condition of a load bearing element of the New Home from its intended physical condition which adversely affects its structural stability or resistance to damp and water penetration.

New Home:

The property described in the Building Period Certificate and/or the Insurance Certificate.

The New Home is:

The new property or Conversion described in the Building Period Certificate and/or the Insurance Certificate, including any:

a) Common Parts, and

b) attached or integral garage, and

c) drives and paths giving access to the main and second entrance door, and

d) retaining or boundary wall but only where they form part of or provide support to the structure of the dwelling, and

e) newly constructed underground drainage systems installed by the Developer including: newly constructed pipes, channels, gullies and inspection chambers within the property described in the Insurance Certificate for which the Buyer is responsible, and

f) any security or surveillance systems installed by the Developer, and

g) in a Conversion, the existing structure of the home forming the foundations, walls, floors and roof.

Note: Footpaths and retaining or boundary walls not forming part of or providing support to the structure of the dwelling are only part of the New Home where they have been included by Us by an appropriate endorsement on the Insurance Certificate.

The New Home is *not*:

barns, stables, conservatories, decorative flooring including laminates, carpets, tiles, parquet etc, detached garages, swimming pools, swimming pool enclosures, lifts, escalators, temporary structures, other permanent outbuildings, gardens, garden structures and sheds, paths, driveways, access roads, supply pipes and cables, patios, fences, boundary and retaining walls, household appliances, electronic keys, contents, original structures and services, other items specifically excluded or not included in items (a) to (g) opposite, any cesspools, septic tanks, treatment plants, outfalls, soakaways, pumping equipment, and associated equipment and any other items not within the legal boundary of the New Home or Common Parts or any work not carried out by or on behalf of the Developer and not part of the purchase contract with the first Buyer.

The New Home does *not* include:

basements or semi-basements unless shown for residing or sleeping purposes in plans deposited with the local planning authority before the Effective Date printed on the Building Period Certificate.

Original Specification: The specification the Developer used to construct the New Home up until the date shown on the Insurance Certificate.

Physical Damage: A material difference in the physical condition of the New Home from its intended physical condition. For the avoidance of doubt, Physical Damage includes Major Physical Damage.

Requirements: The Requirements contained within the technical manual issued by Us and in force at the time when the appropriate “notice to build” in respect of the New Home was deposited with the local authority for the purposes of the Building Regulations. For the avoidance of doubt, Requirements is not to be taken to include Planning Authority conditions. As a guide you can obtain a copy of the current Requirements by contacting Zurich Insurance Company or at www.zurich.co.uk/buildingguarantee.

Site: The area within the boundary of the development registered with Us and of which the New Home is a part.

We/Our/Us: Zurich Insurance Company.

The Insurance

Section 1

What We will pay before the New Home is completed	**What We will *not* pay under Section 1**
1. We will pay where, due to the Developer's bankruptcy, liquidation or fraud, the Developer fails to complete the construction of the New Home in accordance with the Requirements and the Buyer loses a deposit paid to the Developer under the terms of the purchase contract for the New Home, We will at our sole option either: (a) pay the reasonable cost of completing the home to the Original Specification; or (b) pay to the Buyer the amount of any such lost deposit	• Any sum exceeding 10% of the purchase price declared to Us by the Developer • Claims for anything that is not part of the New Home • Any work that exceeds the Original Specification for the New Home or the Requirements • Any claim made after the legal completion of the purchase by the first Buyer of the New Home • Compensation for death, injury to the body or mental health, loss of enjoyment, use, inconvenience, income, business opportunity or inconvenience, stress or any other consequential or financial loss of any description • Any claim where We have not issued a valid Building Period Certificate

Section 2

What We will pay during the first two years after the Effective Date, or the first year after the Effective Date if the New Home is a Conversion

2. For two years after the Effective Date or one year after the Effective Date if the New Home is a Conversion, where the Buyer has made a request in writing that the Developer meet one or more of the costs listed at Sections 2.1 to 2.5 below, and the Developer unreasonably refuses to meet such costs or to carry out repairs, as appropriate, within a reasonable period, or is in liquidation or is made bankrupt We will pay:

2.1 The reasonable cost of rectifying or repairing Physical Damage caused by the Developer's failure to comply with the Requirements in the construction of the New Home

2.2 The reasonable cost of rectifying Excessive Sound Transmission through party walls or floors arising from within Continuous Structures

2.3 The reasonable cost of rectifying a present or imminent danger to the physical health and safety of the occupants caused by the failure of the Developer to comply with the Building Regulations in respect of the following:

- Structure
- Fire safety
- Site preparation and resistance to moisture
- Hygiene
- Drainage and waste disposal
- Heat-producing appliances
- Glazing - safety in relation to impact, opening and cleaning

What We will *not* pay under Section 2

- Any claim reported for the first time to the Developer or to Us more than two years after the Effective Date, or more than one year after the Effective Date if the New Home is a Conversion
- Claims for anything that is not part of the New Home
- Anything excluded by endorsement on the Insurance Certificate
- Claims for any loss that is caused by anything other than the failure by the Developer to build to the Requirements
- Any repair that exceeds the Original Specification for the New Home
- Any sum that exceeds our Maximum Liability
- Any loss resulting from flooding or a change in the water table level, including water logging of gardens
- Any sum in connection with death, injury to the body or mental health, loss of enjoyment, use, income, business opportunity, sales opportunity, or inconvenience, stress or any other consequential or financial loss of any description
- Any sum above Your proportional share of the reasonable cost of repairing Physical Damage to Common Parts
- Any claim or contribution to a claim where cover is available under another insurance policy, or where some other form of compensation or damages is available to you
- Any loss or damage caused by pollution, contamination or ionising radiation, except claims covered by Section 4
- Additional costs arising from unreasonable delays in reporting a claim either to Us or the Developer

What We will pay during the first two years after the Effective Date, or the first year after the Effective Date if the New Home is a Conversion

2.4 The reasonable cost of alternative accommodation where the New Home is not fit for habitation as a result of the carrying out of remedial works by Us covered under the terms of this policy provided that you have first obtained our written consent to such costs being incurred

2.5 Professional fees incurred in connection with Your claim, provided that you have first obtained our written consent to such costs being incurred.

What We will *not* pay under Section 2

- Any reduction in value of the New Home
- Sums in connection with or caused to or by the presence of a swimming pool, lift or lift shaft, escalator, or associated plant and equipment
- Any loss caused by storm force conditions
- Claims for the prevention of, or any loss caused by surface or any other form of condensation
- Any sums in respect of the Excess
- Claims by any person(s) other than the Buyer
- Any claim where We have not issued a valid Insurance Certificate
- Claims for wear, tear, neglect, lack of maintenance, scratching, chipping, staining, fading, efflorescence, changes in colour, opacity or texture
- Reinstatement of any areas not directly affected by Physical Damage or Major Physical Damage
- Any loss due to or arising from any alteration, modification or addition to the New Home after the date of issue of the Insurance Certificate
- Anything for which a sum of money has been withheld from the purchase price
- Any costs that have been taken into account by the Developer or by Us in connection with a claim from a previous Buyer
- Anything that you knew about when you purchased the New Home including any items mentioned in a Home Condition Report

Section 3

What We will pay from two years after the Effective Date or from one year after the Effective Date if the New Home is a Conversion, until the tenth anniversary of the Effective Date

3. From the start of the third year after the Effective Date, or the start of the second year after the Effective Date if the New Home is a Conversion, until the tenth anniversary of the Effective Date We will pay:

3.1 The reasonable cost of rectifying or repairing Major Physical Damage which is caused by a failure by the Developer to comply with the Requirements in the construction of the New Home

3.2 The reasonable cost of rectifying a present or imminent danger to the physical health and safety to the occupants caused by the failure of the Developer to comply with the Building Regulations in respect of the following:

- Structure
- Fire safety
- Site preparation and resistance to moisture
- Hygiene
- Drainage and waste disposal
- Heat-producing appliances
- Glazing - safety in relation to impact, opening and cleaning

3.3 The reasonable cost of alternative accommodation where the New Home is not fit for habitation as a result of the carrying out of remedial works by Us covered under the terms of this policy provided that you have first obtained our written consent to such costs being incurred

3.4 Professional fees incurred in connection with Your claim, provided that You have first obtained Our written consent to such costs being incurred.

What We will *not* pay under Section 3

- Any claim that could reasonably have been reported in writing to the Developer or to Us within two years of the Effective Date or within one year of the Effective Date if Your New Home is a Conversion, but was not reported to the Developer or to Us
- Claims for anything that is not part of the New Home
- Anything excluded by endorsement on the Insurance Certificate
- Claims for any loss that is caused by anything other than the failure by the Developer to build to the Requirements
- Any repair that exceeds the Original Specification for the New Home
- Reinstatement of any areas not directly affected by Physical Damage or Major Physical Damage
- Any sum that exceeds our Maximum Liability
- Any loss resulting from flooding or a change in the water table level, including water logging of gardens
- Any sum in connection with death, injury to the body or mental health, loss of enjoyment, use, income, business opportunity, or inconvenience, stress or any other consequential or financial loss of any description
- Any sum above Your proportional share of the reasonable cost of repairing Major Physical Damage to Common Parts
- Any claim or contribution to a claim where cover is available under another insurance policy, or where some other form of compensation or damages is available to You

	What We will *not* pay under Section 3 • Any loss or damage caused by pollution; contamination or ionising radiation, except claims covered by Section 4 • Additional costs arising from unreasonable delays in reporting a claim either to Us or the Developer • Any reduction in value of the New Home • Sums in connection with or caused to or by the presence of a swimming pool, lift or lift shaft, escalator, or associated plant and equipment • Any loss caused by storm force conditions • Claims for the prevention of, or any loss caused by surface or any other form of condensation • Any sums in respect of the Excess • Claims for wear, tear, neglect, lack of maintenance, scratching, chipping, staining, fading, efflorescence, changes in colour, opacity or texture • Any loss due to or arising from any alteration, modification or addition to the New Home after the date of issue of the Insurance Certificate • Anything for which a sum of money has been withheld from the purchase price • Any costs that have been taken into account by the Developer or by Us in connection with a claim from a previous Buyer • Anything that You knew about when You purchased the New Home including any items mentioned in a Home Condition Report

Conditions

The following conditions shall apply to this policy:

1. Claims Notification

On discovery of any item of claim, or on receiving a statutory notice, or an indication that such a notice is likely to be served which is likely to give rise to a claim under this insurance you shall as soon as reasonably possible:

(a) take all reasonable steps to prevent further loss; and

(b) where Section 2 applies, ensure written notice has been given to the Developer

(c) give written notice to Us; and

(d) if requested by Us and at Your expense, submit in writing full details of the claim and supply all reports, plans, certificates, specifications, quantities, statutory notices or other information and assistance as We may reasonably require to verify the claim. Where We subsequently accept the claim, We will reimburse the reasonable expenses incurred in obtaining such reports; and

(e) provide to Us professional reports at Your expense to verify the claim where it relates to the performance of central heating, sound insulation, squeaking floors. Where We subsequently accept the claim, We will reimburse the reasonable expenses incurred in obtaining such reports.

2. Our Rights

Where We accept a claim under this policy, We and the Developer and Our agents shall be entitled to have reasonable access to the New Home and shall also be entitled to remain in occupation for as long as is necessary in order to carry out proper repairs to our satisfaction. For the avoidance of doubt, where reasonable access cannot be gained to the New Home within a reasonable period of time, no claim shall be accepted.

3. Recoveries from Third Parties

We are entitled to take proceedings at Our own expense, but in Your name, to secure compensation from any third party in respect of any claim accepted by Us under this policy.

4. Abandonment

No property may be abandoned to Us.

5. Fraud

If any claim under this insurance is fraudulent in any respect, or if any fraudulent means or devices are used by You, or anyone acting on Your behalf to obtain benefit under this policy, all benefits contained in this policy shall be forfeited.

6. Retention

Any monies retained or withheld by you from the Developer under the terms of a contract or for any reason shall be taken into consideration and offset against any claim made under this insurance. We shall have the option to refuse to accept any claim under this policy until a dispute over retention monies between you and the Developer has been settled.

7. Notification of Change of Ownership

You shall notify Us of any change of ownership of the freehold, commonhold or leasehold interest in the New Home as soon as possible.

8. Limitation of Our liability

Our liability is limited to the insurance included in this policy only or as altered by endorsement. Any Site inspections or other risk control procedures adopted by Us are solely for Our benefit and do not confirm or imply that the New Home is or will be free of defects or damage.

9. Governing law and jurisdiction

This policy will be governed by English law and subject to the jurisdiction of the English Courts.

10. Termination

This policy shall terminate automatically without refund of premium in the event that:

(a) the New Home is destroyed by a cause other than that insured against in this policy; or

(b) We have accepted a claim under Section 1

	of the policy; or (c) We have paid our Maximum Liability.

Disputes between you and the Developer

Where a dispute arises between the Buyer of the New Home and the Developer, We provide a service that offers advice regarding liability and extent of cover available under this warranty policy only. This may, at our sole discretion, be based on an examination of paper submissions or a physical inspection of the works in dispute or a combination of both. Any recommendations We make are not binding on either party, however where We believe policy cover applies but the Developer refuses to do any recommended work We will arrange for it to be done under the terms of the policy.

Complaints
We endeavour to detail with all claims sympathetically. However, We recognise that disputes can arise from time to time.

If you wish to dispute a claim
If You are dissatisfied with the way in which We have dealt with a claim, We suggest You adopt the following procedure:

Stage 1
Contact the Claims manager of Building Guarantee in writing.

Stage 2
If you remain dissatisfied, short of court action, You may choose to refer any dispute or difference with regard to the policy to the Chief Executive at The Grange, Bishops Cleeve, Cheltenham, Gloucestershire, GL2 8XX.

Email: chiefexecutive@uk.zurich.com

Alternatively, if You are still unhappy with the way in which WE have dealt with Your complaint, You may have the right to ask the Financial Ombudsman Service to review Your case (see Where to get advice or assistance).

Who to contact at Zurich Financial Services

- The Claims Manager or Property Claims Manager, Zurich Insurance Company, Building Guarantee, Southwood Crescent, Farnborough, Hampshire, GU14 0NJ. Tel: 01252 377474.

Where to get advice or assistance

- Citizens Advice Bureau: See your local telephone directory for their address and telephone number.
- Financial Ombudsman Service: South Quay Plaza, 183 Marsh Wall, London E14 9SR. Tel: 0845 080 1800 Email: complaint.Info@financial-ombudsman.org.uk.

We are covered by the Financial Services Compensation Scheme (FSCS). You may be entitled to compensation should We be unable to meet our obligations. Further Information is available on www.fcs.org.uk or You may contact the FSCS on 020 7892 7300.