Neutral Citation Number: [2020] EWHC 2549(Ch)

Case No: PT-2019-000918

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY,TRUSTS AND PROBATE LIST (Ch)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 25 September 2020

Before :

MASTER TEVERSON

- -

Between :

COLT GROUP LIMITED	**Claimant**
- and -	
UNICOURT WANDSWORTH LLP	**Defendant**

- -
- -

David Halpern QC (instructed by **Boyes Turner LLP**) for the **Claimant**
Julian Greenhill QC (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendant**

Hearing dates: 21 and 22 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER TEVERSON

MASTER TEVERSON:

1. This is my reserved judgment following the trial of a Part 8 claim. The trial was conducted remotely via Skype for Business. The trial was on written evidence alone.

2. The Claimant, Colt Group Limited, is the current tenant under a lease dated 11 October 1968 ("the Lease") of premises at 289, 291, 293 and 295 Merton Road, Wandsworth ("the Property"). The Defendant, Unicourt Wandsworth LLP, is the current landlord.

3. The claim is solely for declaratory relief. The Claimant asks the Court to grant declarations determining the application of insurance moneys in the event of damage to, or destruction of, the Property. The Defendant opposes the granting of declaratory relief.

4. The Lease was made between United Service Transport Company Limited as the Landlord and Courtaulds Limited as the Tenant. The Lease was registered in the name of the Claimant, then called Colt International Group Limited, on 12 October 1984.

5. The Lease was granted for a term of 99 years from 29 September 1968 at a yearly rent of £45,000 subject to review. The term of the Lease will expire on 28 September 2067 in around 47 years from now.

6. The demised premises are described in the Lease as being 289, 291, 293 and 295 Merton Road, in the London Borough of Wandsworth. The Lease plan shows that the demised premises extend eastwards from Merton Road to Burr Road. The rear part of the premises are usually known as 65 Burr Road.

7. The premises are sub-let in two parts. The narrow strip at the western end of the premises which fronts onto Merton Road is used as a Shell petrol filling station. It is currently sub-let to H.K.S. Retail Limited under the terms of a sublease dated 21 August 2019. The remainder of the demised premises, which are shown edged blue on the filed plan, is currently sub-let to Jack Barclay Limited and is used as a car showroom. The obligations of Jack Barclay Limited are guaranteed by H R Owen plc ("HRO").

8. Clause 2 of the Lease contains Tenant's covenants so far as material to the claim in the following terms:-

   "(2)(a) To keep insured at all times throughout the said term in the names of the Landlord and the Tenants in the Commercial Union Assurance Company Limited or some other Company to be nominated from time to time by the Landlord and in the Landlord's Agency in a sum not less than the full reinstatement value (to be determined by the Tenant but not to be less than the minimum sum indicated from time to time by the Landlord)

   (i) the buildings comprised in the demised premises and all additions and fixtures of an insurable nature including additions and fixtures (other than those which the Tenant or sub-tenants are entitled to remove) made or affixed by the Tenant in accordance with the provisions of this Lease against loss or damage by fire aircraft explosion riot and civil commotion malicious damage earthquake storm tempest burst water pipes flood and impact public liability and such other risks as the Landlord shall reasonably deem expedient

(ii) (to the extent to which the same are not covered by sub-paragraph (i) of this clause) the boilers and pipes serving the demised premises against explosion and any plate glass in the demised premises against breakage through impact or otherwise

TOGETHER WITH Ten per centum of the amount insured in respect of the property and perils specified in sub-paragraph (i) hereof for architects surveyors and consulting engineers fees in relation to the reinstatement of the demised premises and two years loss of rent hereunder in respect of the demised premises

(b) To make all payments necessary to effect or continue the above insurance within seven days after the same shall have respectively become payable and produce to the Landlord or its Agent upon request the Policy of every such insurance and the receipt for each such payment and in the event of any of the demised premises or any part thereof being destroyed or damaged by any of the perils specified in this clause to rebuild or reinstate the same forthwith to the satisfaction and under the supervision of the Landlord's Surveyor all moneys received under any such insurance to be applied for that purpose and any deficiency to be made good by the Tenant

(7) (a) To repair and keep the structure exterior and interior of the demised premises .....in good and substantial repair ...

(b) In the event of the demised premises or any part thereof being destroyed to rebuild or reinstate the same as soon as permitted by law

(14) In the event of the demised premises or any part thereof being destroyed or damaged by any of the perils specified in sub-clause (2) of this clause and the insurance money under any insurance against the same effected thereon being wholly or partly irrecoverable by reason solely or in part of any act or default of the Tenant or any person deriving title under the Tenant then and in every such case the Tenant will forthwith (in addition to the said rent) pay to the Landlord the whole or (as the case may require) a fair proportion of the cost (including professional and other fees) of completely rebuilding and reinstating the same"

9. The Lease requires the Tenant to keep the Property insured in the names of the Landlord and the Tenant. The Tenant is responsible for making all payments necessary to effect and continue such insurance. In the event of the Property or any part of it being destroyed or damaged by any of the perils specified in clause 2(2), the Tenant covenants to rebuild or reinstate the Property to the satisfaction and under the supervision of the Landlord's surveyor. The Lease contains no covenant on the part of the Landlord relating to the insurance of the Property or the application of the insurance moneys.

10. I set out the background facts in order to provide the factual background to the claim. In so doing, I have found it convenient to do so by reference to the first witness statement of Jonathan Bradley Coren dated 11 December 2019. Mr Coren is the managing member of the Defendant limited liability partnership. I am not thereby to be taken as making any findings of disputed fact.

11. In 2001, Unicourt Properties Limited acquired the freehold of the premises subject to the Claimant's leasehold interest. The Defendant, Unicourt Wandsworth LLP, was registered as the proprietor of the freehold title on 19 March 2007.

12. A dispute arose between the parties concerning an adjoining property at 58 Kimber Road ("the Adjoining Property") which the Claimant also holds under a 99 year lease from the Defendant. Those dealings concerned a rent review. The details of that dispute are not material. The relevance of the dispute to this claim is only that Mr Coren makes reference to it as explaining the Defendant's reluctance to engage with the Claimant in connection with any proposal to vary the terms of the Lease.

13. On 24 July 2017, the Claimant gave notice to the Defendant of a proposed assignment of the Lease as well as of its lease of the Adjoining Property to HRO and requested consent to assign.

14. By an email sent on 29 March 2018, James Liddiard, the Claimant's Group Legal and Commercial Director informed Mr Coren that HRO's lawyers *"have asked for some comfort that, if the assignments complete, Unicourt will enter into discussions to rectify the insurance position"*. Mr Coren replied on 30 March 2018 saying: *"as a consequence of our past experience with Colt, we are not inclined to alter the status quo and therefore your proposed assignee will need to 'take a view' in light of our position"*.

15. On 10 May 2018, Mr Coren was told over the telephone by Paul Davidson of Adlers, Surveyors acting for HRO, that HRO was concerned about a possible shortfall to the lessee in the event of an insurance claim. Mr Coren initially agreed to meet with Adlers but then decided it was best for the matter to be left to the respective solicitors to sort out.

16. Mr Coren was approached again on 4 July 2018 by James Liddiard. In an email to Mr Coren, Mr Liddiard said:-

> *"Unfortunately, we appear to have reached an impasse on the insurance position, which has to be rectified prior to the completion of the proposed assignment of the headlease to HR Owen. This is the view that HR Owen have taken"*.

17. In his email, Mr Liddiard set out two insurance concerns which HRO required to be addressed. The first was that contrary to the terms of the Lease, the Property (with the exception of the petrol filling station where the occupational tenant insured) was being insured in the name of the freeholder rather than in the names of the headlessee. The second concern was that there was no obligation on the freeholder to apply any insurance proceeds to the reinstatement of the Property. It was suggested that *the freeholder could keep the money relying on the tenant to make up any shortfall in the pay-out".*

18. The first concern has been addressed. The Property is now insured in the names of the Claimant and the Defendant as composite insured. The Buildings Sum Insured is £9,791,814. The policy contains a Multiple Insured's clause. This records the parties' understanding and agreement that any payment or payments made by Insurers to any one or more of the insured parties will reduce to the extent of that payment the Insurers' liability to all such parties.

19. The second issue of concern expressed by HRO's lawyers was that insurance monies might be paid out to the Landlord and then not made available to the Tenant who was liable to rebuild or reinstate in the event of an insured peril destroying or causing damage to the Property. This concern was relayed to Mr Coren in an email from Imogen

Newport of Arthur J Gallagher, the Landlord's insurance brokers. Imogen Newport said:-

"I received a phone call earlier this week from H R Owen Broker, Heidi.

H R Owen's brokers are 'worried' that due to the composite insured set-up, that in the event of a loss Unicourt have the option of taking a cash settlement and they are then left with reinstatement for the whole site. Hence why H R Owen suggested they should insurer [sic] the whole site. However, this was subsequently not accepted by yourself, and rightly so as this would not be in line with the lease as per our previous discussions.

However, Heidi suggested that we could potential[ly] amend the composite wording to state that reinstatement would be the only recovery method rather than a cash settlement option. How does this sit with yourselves?"

20. Mr Coren replied to this email:-

"Unicourt is not prepared to alter any further wording surrounding the insurance arrangements and that we (i.e. Unicourt) have been aware from inception of our purchase, nearly 20 years ago, that we are able to take a cash settlement in the event of a claim."

21. Mr Coren's response was passed on by Gallaghers to HRO. It triggered a chain of emails passing between HRO's solicitor Susan Ryan of Ellisons to Mark Hurst of Hamlins , the solicitors then acting for the Defendant.

22. On 15 April 2019, Susan Ryan wrote:-

"*Dear Mark*

As you know, we are trying to regularise the insurance position with regard to [the Lease]

[HRO] must be able to comply with its insurance obligations (most importantly the obligation regarding reinstatement) by ensuring it receives the funds to enable it to reinstate in line with [the Lease]. As we all understand, the easiest way to achieve this would be to vary [the Lease] so the freeholder insures and the reinstatement obligation lies with the freeholder in the usual way, but the freeholder is not prepared to proceed in this way.

As a result, our respective insurance brokers have been liaising to reach a compromise on insurance wording regarding composite insurance and the payment of insurance funds to [HRO] in the event the insurance company do not pay the funds direct on reinstatement. During the course of these discussions Aston Lark have confirmed the freeholder's position (which has been relayed via Gallagher's) as follows:

> **'Unicourt is not prepared to alter any further wording surrounding the insurance arrangements and we have been aware from inception of our purchase, nearly 20 years ago, that we are able to take a cash settlement in the event of a claim.'**

It appears from this statement, that far from being an historic error in how the lease has been managed, this inherent problem is intentional on the part of the landlord. This causes me concern as if there were to be a reinstatement claim following destruction or damage, and funds were paid to the freeholder, as the tenant has the overriding obligation to reinstate, we could very feasibly have a large financial burden, and would be relying on the landlord to waive the tenant's reinstatement obligation. As you will appreciate, we cannot advise our client to proceed on this basis, as the leasehold arrangement is currently defective, and not institutionally acceptable.

To summarise, it seems the deed of variation route is not acceptable to your client and neither is the insurance solution. Please take instructions from your client as to a resolution it is prepared to accept in order to rectify the current situation."

23. By an email sent on 18 April 2019 at 12:34, Mark Hurst wrote:-

"I note your comments below. I note the comments in [bold]. I am not entirely clear as to how that conclusion is reached. The insurance provisions are in a form that I consider not to be unusual for a lease of its time. It is not accepted anything requires rectification. It is not accepted that there is any legal link between your request below and the licence to assign. Your client is free to approach mine following any assignment to discuss any variations it wishes but my client's refusal to discuss such matters now does not amount to a withholding of consent to the assignment."

"…You have asked that the policy be amended to comply with the lease terms. My client has obliged. Now you are asking for changes because you do not like the lease terms. Should the assignment not progress, that is a commercial matter entirely for your respective clients.

… The matter of insurance is one which my client will not now discuss further. When you are ready to complete the licence to assign please let me know."

24. In reply on 18 April 2019 at 14:44, Susan Ryan wrote:-

"If the wording in [bold] is not reflective of your client's position, can you please confirm the freeholder is happy to have a composite insured policy on Burr Road and Merton Road with [HRO], with payment out to [HRO] in the event of a claim, so [HRO] can reinstate in line with the lease terms."

25. Mark Hurst replied on 18 April 2019 at 14:55:-

"I am not prepared to offer any interpretation as to the lease terms. As I understand it, the insurance is now in the name of Colt with my client as composite insured. Assuming I am correct, the same arrangement would be effected should the lease be assigned to your client. I am sure your client's insurance advisers can advise as to whom insurers would make payment should there be a claim on such a policy."

26. Susan Ryan replied on 18 April 2019 at 15:23:-

"My client's insurers have advised that [HRO] would need to have a payment out provision in the event of damage or destruction to enable it to reinstate the property in

line with the lease, hence the concern with the words in italics. It is otherwise happy with the composite insured provisions."

27. On 23 April 2019, Mr Hurst replied:-

"As I have said, it is for you to decide whether or not the words in italics reflect what may legally or not (sic). From my point of view the lease is simply drawn. Tenant insures, placed by the landlord's agent and the landlord is composite insured. I would not advise my client that any change is really necessary."

28. On 28 April 2019 Mr Coren sent an email to Imogen Newport, copied to Mark Hurst, as follows:-

"I concur with Mark's view that this is a matter solely for H R Owen's and/or Colt's solicitors to advise them upon, not you and certainly not Unicourt.

The issue of a 'cash settlement' in the event that reinstatement could not be achieved was not raised by us (although we have known about since our original purchase some twenty years ago) but was raised by H R Owen's insurance brokers, when Heidi mentioned it to you in conversation. Please see below, your e-mail to Mark and me, dated 11 April 2019 with my highlighted 'blue' type."

The highlighted blue type formed part of the paragraph of Imogen Newport's email underlined as follows which read:-

"However, Heidi suggested that we could potential (sic) amend the composite wording to state that reinstatement would be the only recovery method rather than a cash settlement option. How does that sit with yourselves?"[the underlined words are the type highlighted by Mr Coren]

29. It is to be noted that in the second paragraph of his email, Mr Coren refers to a 'cash settlement' *"in the event that reinstatement could not be achieved"* when referring to the taking of a cash settlement. The taking of a cash settlement in that situation was not the concern being raised by HRO.

30. There matters stood until on 30 September 2019, the Claimant's solicitors, Boyes Turner, sent a letter before claim to the Defendant. That letter referred to the Defendant as having taken the position that *"if the Property was damaged resulting in a claim under the Policy, it would be entitled to a cash payment from the Insurer, which (contrary to Colt's view) it would not have to pass on to Colt, despite the fact that our client pays for the Insurance and has the liability to repair the Property ("**the Dispute**")*.

31. The letter before claim said that to resolve the issue the Lease *"must be rectified by way of an agreed Deed of Variation".* It said if the Claimant's position was not agreed, the Clamant *"would have no alternative but to pursue a Part 8 claim for a declaration as to the intended meaning of the insurance provision in the Lease and a declaration that the Lease is to be varied"*.

32. In response by email sent on 4 November 2019, Mr Hurst after referring to the reference in the fourth paragraph of the letter under reply to "the Dispute", said:-

"My client is wholly unaware of any dispute nor of any matter which requires rectification. You have failed to particularise and provide any supporting evidence to indicate that there is any dispute".

33. In my view, that was an unhelpful and inadequate response. The opportunity was lost to set out clearly and fully the Defendant's position. No attempt was made to take issue with the manner in which the Defendant's position was set out on behalf of the Claimant by Boyes Turner and relied upon as giving rise to "the Dispute".

34. In an email in reply dated 6 November 2019, Mr Grigg, the Claimant's solicitor set out "the Dispute". He said:-

"You have previously stated that your client's position is that the Lease entitles your client to retain sums paid out by an insurer despite the fact that our client has responsibility to reinstate the premises. The value of our client's Leasehold interest is therefore compromised by your client's stance. Your client's position would result in our client, in effect, becoming liable for the cost of part, or all, of that reinstatement, despite it being fully insured, because the insurance monies are not going to be put to that use and are instead going to be pocketed by your client".

35. The matter was then referred by Mr Hurst to his firm's property litigation department. They asked for supporting evidence of Mr Grigg's statement formulating the dispute but did not set out clearly or fully the Defendant's position. In particular, it was never made clear by Hamlins on behalf of the Defendant that the Defendant only claimed to be entitled to take up a cash settlement as an option in the event that reinstatement of the Property was not possible.

36. The claim form was issued on 11 November 2019. Paragraph 2 of the details of claim set out the declaratory relief sought by the Claimant:-

"The Claimant seeks a declaration that, in the event the Property were to suffer any damage;

(1)In the event the Landlord were to receive any payment from any insurer as a result of making any claim in respect of such damage on any insurance policy incepted pursuant to clause 2(2) of the Lease, the Landlord would be obliged to account for and pay any such monies to the Tenant to the extent that:

> *(a)They are reasonably required by the Tenant to fully fund the reinstatement of the Property pursuant to its obligations under clauses 2(2)(b), 2(7) and 2(14) of the Lease; or*
>
> *(b)They exceed the diminution in value of the Landlord's freehold reversion.*

(2)In the event the Tenant were to receive any payment from any insurer as a result of making any claim in respect of such damage on any insurance policy incepted pursuant to clause 2(2) of the Lease, the Landlord would have no claim against the Tenant in respect of such monies."

37. On 28 November 2019, Bryan Cave Leighton Paisner LLP ("BCLP") acknowledged service of the claim on the part of the Defendant. In a full and carefully prepared letter, they set out the Defendant's position. On page 2 of the letter it was stated:-

"Our client agrees that, ordinarily, monies from a relevant insurable peril will be applied to reinstatement under the Lease. Clause 2(b) of the Lease specifically provides that proceeds from insurance should be applied to rebuild or reinstate. Your client and its proposed assignee must also surely realise that in certain circumstances the parties might agree instead to take a cash settlement under an insurance policy in lieu of reinstatement. For example, if the premises were destroyed and it suited both the landlord and the tenant at a future date not to reinstate the existing premises but to redevelop them for a different future purpose. Nothing our client has said or done could reasonably be taken to suggest that our client asserted an intention, still less a right or entitlement, to obtain and keep for itself a cash payout against the will of the tenant and at the same time require reinstatement by the tenant. Inexplicably, that seems to be what your client has (wrongly) concluded ours was asserting. That is not our client's position nor has it ever been."

38. The Defendant's position was further amplified in the first witness statement of Mr Coren dated 11 December 2019. The crucial paragraphs are paragraphs 36 and 37.

In paragraph 36, Mr Coren says:-

"When I said to Imogen Newport that Unicourt had been aware from the inception of our purchase that we are able to take a cash settlement in the event of a claim, what I meant was that I had always understood that any monies received from an insurer would ordinarily only be put towards the reinstatement of the damaged property; whereas I also understood that a landlord could opt for a 'cash' settlement instead of reinstatement, provided this was agreed between the landlord, the tenant and the insurer." (underlining added).

In paragraph 37, Mr Coren says:-

"By my statement made in that email I did not mean that I was of the opinion that Unicourt was entitled to take a cash settlement without the agreement of the tenant or in circumstances in which the tenant was still obliged to reinstate the Property. That is not what I said either then, or at any other point since. I do not accept that this is a reasonable interpretation of what I said then or of the subsequent dealings between Unicourt and Colt and their respective solicitors".

39. On behalf of the Claimant, Mr Halpern QC describes these paragraphs as providing a new gloss on what had earlier been said.

40. Following the service of Mr Coren's first witness statement, Mr Grigg wrote to Ellisons, HRO's solicitors, saying they were satisfied that the Landlord had now provided "*sufficient clarity"* with regard to the Issue. He wrote:-

"We consider that it is now clear that should it ever be required, the landlord has made crystal clear that under the terms of the Lease, the tenant will receive the funds from any insurance claim to enable it to reinstate the Property in line with the provisions of the Lease".

41. Ellisons in reply expressed concern their client would not be able to rely on the witness statement in question in other proceedings without permission from the court. They suggested the Claimant proceed to seek a final order.

42. Finally, in an email sent on 5 March 2020 to the Claimant's solicitors, Ellisons stated that HRO would not proceed with the assignment without appropriate variations to the insurance provisions in the Lease. In those circumstances, the Defendant says it is pointless for the court to grant declaratory relief.

43. On 15 May 2020, the Claimant applied for permission to amend the claim form in order to revise the wording of the declarations being sought. The revised wording is:-

1)In the event of the Landlord or the Tenant or both of them receiving any payment from any insurer as a result of making any claim in respect of such damage on any insurance policy incepted pursuant to clause 2(2) of the Lease, the moneys are to be payable to the Tenant to the extent that they are reasonably required by the Tenant for the purpose of the reinstatement of the Property pursuant to its obligations under clauses 2(2)(b), 2(7) and 2(14) of the Lease and are in fact used to pay for or defray the cost of reinstatement ("the First Declaration")

If it is not possible to reinstate the Property or if the Landlord and the Tenant both agree not to reinstate the Property, the insurance moneys are payable to the Tenant alone.("the Second Declaration")

44. It was agreed by counsel that the application for permission to amend should be rolled up into the main hearing so that the court could hear argument on the issues set out in the Claimant's amendments before deciding whether or not to grant permission to amend.

45. The court's power to grant declaratory relief is founded on section 19 of the Senior Courts Act 1981 and CPR r. 40.20. That rule permits the court to make binding declarations whether or not any other relief is claimed. The power to grant a declaration is not confined to cases where the claimant has a complete and subsisting cause of action. The basis on which the court exercises its discretion was summarised by Marcus Smith J. in *The Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC (Ch):-

"[19] In this case, the only remedy sought by the Claimant is that of a declaration….

[21] The power to grant a declaration is discretionary. When considering the exercise of the discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration sought would serve a useful purpose and whether there are other special reasons why or why not the court should grant a declaration. More specifically:

(1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

(2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

(5) The court must be satisfied that all sides of the argument will be fully and properly put…

(6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue."

46. This summary follows closely the summary of the principles applicable to the granting of declaratory relief set out by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318 at paragraph 120.

47. On behalf of the Claimant, it was submitted by Mr Halpern QC that the claim must be seen in its background context. The Claimant is the tenant of a long lease with 47 years unexpired. The Claimant wishes to assign the residue of the term to HRO. HRO has raised a justifiable concern as to the application of the insurance moneys in the event of damage to, or destruction of, the Property. This, Mr Halpern QC submitted, was a concern that any well-advised potential assignee was likely to raise.

48. Mr Halpern QC submitted that if the Insurer were to pay out all or part of the insurance moneys to the Defendant, there is a real risk that the Defendant would claim to be entitled to keep such part of the money as represented its insurable interest leaving the Claimant with insufficient funds to pay for the reinstatement.

49. Mr Halpern QC submitted that in these circumstances, justice to the Claimant required the Court to grant declaratory relief. He submitted that justice to the Defendant did not point in the opposite direction. He submitted there had been statements by the Defendant, which taken in isolation, might appear to put the Claimant's mind at rest but that the Defendant had "blown hot and cold" ever since the issue was first raised. He submitted, even if there had been a clear acknowledgement by the Defendant that the Claimant had the right to use the insurance moneys for reinstatement, this would not be binding on the Defendant's successors in title.

50. On behalf of the Defendant, it was submitted by Mr Julian Greenhill QC that the court should refuse to exercise its discretion to make the First and Second Declarations for four reasons.

51. First, it was submitted there was no dispute as to the tenant's entitlement to insurance proceeds required for the purpose of reinstating the property. It was submitted that the Lease terms are clear. It was submitted that there had been a misunderstanding which had been cleared up.

52. Secondly, it was submitted that the declarations sought were divorced from any concrete facts and ought not to be granted for that reason. The declarations sought by the Claimant concern the distribution of insurance monies received by the parties or either of them in the event of a future insurance claim. It was submitted the court should not grant the declarations sought in a complete factual vacuum in circumstances in which the Lease still has over 47 years left to run.

53. Third, it was submitted that the issue would never arise in practice. It was pointed out that in correspondence, the Claimant had not taken issue with the proposition advanced on behalf of the Defendant that *"it is extremely unlikely in practice that an Insurer would ever pay a cash settlement to one party under a composite or joint insurance policy without the insurer first being provided with the written agreement of the other parties to the payment of such cash settlement"*.

54. Fourth, it was submitted the declarations would not achieve anything. It was submitted that the past comment made by Mr Coren was not impeding the assignment. HRO had made clear it was only interested in taking the Lease if the insurance covenants were varied.

55. Mr Greenhill QC submitted that there was no basis for the court to infer that Mr Coren or the Defendant had been deliberately obstructive. I was not invited by Mr Halpern QC to make any such finding and I do not do so.

56. As to the declarations sought, Mr Halpern QC made it clear the Claimant's primary concern is to obtain a declaration that, in the event the Tenant reinstates the Property, any insurance moneys paid for the purpose of reinstatement will be paid to the Tenant to pay for or defray the cost of reinstatement.

57. The law on this issue was not in dispute before me. It was agreed that if reinstatement was to take place, the Landlord would be obliged to pay over to the Tenant any insurance moneys paid out by the Insurer to cover rebuilding or reinstatement.

58. In *Mumford Hotels Ltd v Wheler and another* [1964] Ch 117, [1963] 3 All E.R. 250 the tenant covenanted to pay a yearly insurance rent equal to the premium for keeping the property insured against comprehensive risks. The landlord covenanted to keep the property adequately insured against comprehensive risks. It was held by Harman L.J. (sitting as an additional judge of the Chancery Division) that the landlord's obligation to insure, satisfied as it was at the tenant's expense, was intended to enure for the benefit of both the landlord and the tenant. It was held that the landlord was obliged to use the insurance moneys, if called upon to do so, towards the reinstatement of the property.

59. In the present case, the Tenant is required to insure in the names of the Landlord and the Tenant in a sum not less than the full reinstatement value and to make all payments necessary to effect or continue the insurance. The Tenant covenants to rebuild or reinstate in the event of the demised premises or any part being destroyed or damaged by any of the perils in respect of which the Tenant is required to effect insurance. Clause 2(2)(b) provides that all moneys received under any such insurance are to be applied for that purpose and any deficiency to be made good by the Tenant. This provision however forms part of a covenant by the tenant.

60. The absence of any express obligation in the Lease on the part of the Landlord to apply the insurance moneys towards reinstatement in the event of damage to, or destruction of the Property was a concern raised on behalf of HRO as a proposed assignee of the Lease. It was described as being "*not institutionally acceptable"*.

61. In my judgment, it was and is a legitimate concern that there is no express obligation on the Landlord corresponding to that contained in Clause 2(2)(b) on the part of the Tenant to apply all moneys received for that purpose in the reinstatement of the Property

in circumstances in which the insurance is required to be taken out in the names of the Landlord and the Tenant.

62. It may seem obvious that the Landlord could not both seek to require the Tenant to reinstate and retain the insurance moneys for its own purposes but in my view, there remains a legitimate concern that the Landlord might, as Mr Halpern submitted, seek to retain at least part of the insurance moneys as representing its insurable interest in the Property.

63. I accept that Mr Coren's response to Imogen Newport's email of 11 April 2019 falls to be read in the context of the suggestion contained in its penultimate paragraph that reinstatement would be the only recovery method rather than a cash settlement option.

64. I accept too that Mr Coren's email to Imogen Newport of 28 April 2019 refers in its second paragraph to the issue of a 'cash settlement' *"in the event that reinstatement could not be achieved"*. That was not however the situation in which concern was being raised on behalf of HRO.

65. There was in my judgment an obligation on the part of the Defendant in the correspondence that followed prior to the issue of the claim to make clear its position. It is in the nature of a misunderstanding that if it is not corrected reasonably promptly, it gives rise to a dispute. I do not consider that a party who when given a reasonable opportunity to do so, fails to make their position clear, can be heard to say there was a misunderstanding but never a dispute.

66. On behalf of the Defendant, Mr Greenhill QC submitted that whatever had happened pre-claim, the Defendant had made its position clear in response to the claim. It was submitted there was no present dispute between the parties and no need for the court to grant declaratory relief.

67. I was referred by Mr Greenhill QC to the judgment of Mr Justice Eder in *Thomas Brown Estates v Hunters Partners* [2012] EWHC 21. That case concerned the scope and operation of two franchises entered into between the claimant as franchisee and the defendant as franchisor. An issue arose as to whether the Defendant was entitled to insist on the rebranding of the name used. In between court hearings, a mediation took place. The defendant found a solution which permitted the claimant to continue to use the same name. In those changed circumstances, the judge declined to grant a declaration on the basis that any dispute had become academic and theoretical.

68. On behalf of the Claimant, Mr Halpern QC submitted that case turned very much on its own facts. He submitted that whilst there had been statements by the Defendant since the claim was issued, which taken in isolation, might appear to put the Claimant's mind at rest, the Defendant had "blown hot and cold" ever since the issue was raised.

69. *Thomas Brown Estates v Hunters Partners* demonstrates that there are circumstances in which the Court as a result of a post-claim change of situation decides in the exercise of its discretion not to grant declaratory relief. It may take the view there is no longer a present dispute and therefore there is no need in order to do justice between the parties to grant a declaration. I was not persuaded by Mr Greenhill QC's able submissions, that this was the position in the present case. In the first place, it was a professionally advised proposed assignee that has raised concerns as to the Tenant's insurance and

reinstatement obligations. Those concerns are not capable of being dispelled simply by two paragraphs in a witness statement, especially where prior to the issue of the claim, the Defendant had failed to make clear it was not asserting any entitlement to opt for a cash settlement unilaterally or where reinstatement was possible. The statement by Mr Coren in paragraph 36 of his witness statement that it is his understanding a landlord could opt for a cash settlement instead of reinstatement *"provided this was agreed between the landlord, the tenant and the insurer"*, is not in my judgment sufficient to lead the Court to decline to grant declaratory relief. As Mr Halpern QC pointed out, it does not bind successors in title. As Ellisons pointed out, it cannot be used or relied upon by HRO without the permission of the Court.

70. At the end of the oral hearing, I expressed the provisional view that the court should grant a declaration dealing with the position where the Property had been damaged or destroyed in circumstances in which rebuilding or reinstatement was possible. I remain of that view. I do not consider the fact that the issue has been raised in the absence of any insurance claim renders it academic or hypothetical. In my judgment, the issue arises out of the terms of Clause 2(2) of the Lease. It was raised in the context of a proposed assignment. Without determination of the issue, the covenant has been described as *"not institutionally acceptable"*.

71. In those circumstances, I consider it is appropriate to grant declaratory relief as to the extent of the Landlord's obligation in relation to the application of insurance moneys where reinstatement is reasonably required to take place provided that it is clear that the declaratory relief is framed in accordance with the existing obligations under the Lease and does not go beyond that.

72. I do not consider the fact that HRO is apparently unwilling to take an assignment unless the terms of the Lease are varied means that the granting of a declaration will serve no useful purpose. It is in my judgment right for the Court to grant a declaration which will have the effect of determining that the Landlord is required to pay over or account to the Tenant for insurance moneys received by the Landlord for the purpose of reinstatement.

73. As to the form of the declaration to be granted, I think it should be limited to cover the case where reinstatement is to take place and where insurance moneys are received by the Landlord from the Insurer. The position where monies are received by the Tenant is in my view already covered by clause 2(2)(b).

74. Subject to further submissions from counsel as to the form of the declaration, the form of declaration I propose to grant is:-

It is declared and determined that as a matter of general principle:-

"In the event of an insured peril destroying or causing damage to the Property, following which the Tenant is required to rebuild or reinstate the Property pursuant to clauses 2(2) and 2(7) of the Lease, any moneys paid by the insurer to the Landlord under a policy incepted pursuant to the said clause 2(2) in respect of property damage is required to be paid over to the Tenant insofar as those moneys are reasonably required for the purpose of effecting such rebuilding or reinstatement subject to the right of the Landlord to recover them in whole or in part in the event they are not in fact used to pay for or defray the cost of such rebuilding or reinstatement".

75. In formulating that declaration I have taken into account the emails sent to the Court by Mr Halpern QC on Friday 22 May 2020 and Wednesday 27 May 2020. That wording dealt with the position where reinstatement was to take place in subparagraph (1). It continued after a semi-colon *"and subject as aforesaid:- (2) Be paid to the Landlord and the Tenant each in proportion to their respective insurable interests in the Property."*. If and insofar as that wording was intended to cover the position where reinstatement is not possible, I do not for the reasons set out below consider it appropriate to grant more extended declaratory relief.

76. I do not consider it appropriate to grant declaratory relief in relation to the position where reinstatement turns out to be impossible. As part of the Claimant's application for permission to amend the Claim Form, in reliance on *In Re King Deceased* [1963] Ch 459 (CA), Mr Halpern QC sought on behalf of the Claimant a declaration that in that circumstance the insurance moneys would belong to the Tenant alone. This is not a claim that was asserted on behalf of the Claimant in pre-claim correspondence. *Re King* was referred to in the letter before claim but the passage quoted at page 492 from the judgment of Upjohn L.J. referred to the common intention of the parties where the premises could be reinstated. For that reason alone, I decline to grant the Claimant permission to amend in order to seek the Second Declaration.

77. Further, as a substantive matter, I accept the submission made on the part of the Defendant by Mr Greenhill QC that the proper application of insurance moneys where reinstatement is impossible is highly fact sensitive. In *Beacon Carpets v Kirby and another* [1984] QB 755 (CA), *In Re King* was held to be irrelevant in the circumstances before that Court, as dealing only with the rights in insurance moneys once the prime purpose of rebuilding had been wholly frustrated by the actions of a third party: see Browne-Wilkinson L.J. at 765 D-E. On the facts of that case, the Court of Appeal held that the fund should be regarded as a source of money for the parties in proportion to the value of their respective interests. In the absence of a set of concrete facts in which the issue falls to be determined, it would plainly not be right in my judgment for the court to grant the Second Declaration.

78. I will grant permission to amend the Claim Form only to the extent necessary for the purpose of granting the proposed declaration where reinstatement is to take place.

79. This judgment is to be handed down without attendances required on Friday 25 September 2020. A hearing is listed on Monday 12 October 2020 to hear consequential matters. I will extend time for seeking permission to appeal until that hearing and the time for appealing will run from the date of that hearing.

80. This judgment will be sent out in draft to counsel on Monday 21 September 2020. I would be grateful to receive any suggested typographical corrections by 4pm on Wednesday 23 September 2020.

81. I am grateful to both Mr Halpern QC and Mr Greenhill QC for their able submissions.