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Case No: CL-2017-000301

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

7 Rolls Buildings, Fetter Lane
London EC4A 1NL

Date: 03/05/2019

Before:

MR DAVID RAILTON QC
(sitting as a Deputy High Court Judge)

- -

Between:

SARTEX QUILTS & TEXTILES LIMITED	**Claimant**
- and –	
ENDURANCE CORPORATE CAPITAL LIMITED	**Defendant**

- -
- -

Ben Elkington QC (instructed by **Edwin Coe LLP**) for the **Claimant**
Jason Evans-Tovey (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: **25-29 March 2019**

- -

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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David Railton QC (sitting as a Deputy High Court Judge):

Introduction

1. In this action the Claimant, Sartex Quilts & Textiles Limited ("Sartex"), seeks damages and other relief arising out of a Property Loss or Damage Policy of insurance issued to it on 22 December 2010 ("the Policy") by the Defendant, Endurance Corporate Capital Limited ("Endurance"). The insurance incepted on 11 November 2010, and provided material damage cover to Sartex in respect of the buildings, plant and machinery at its manufacturing premises at Crossfield Works, Norwich Street, Rochdale ("Crossfield Works"), together with business interruption cover.

2. On 25 May 2011 there was a serious fire at Crossfield Works, involving a fatality. The buildings were severely damaged, and the plant and machinery destroyed. This led to claims being made by Sartex under the Policy. Liability under the Policy was admitted by insurers in October 2011, but (save in respect of the business interruption element of the claims), the parties since then have been unable to agree on the sums payable under the Policy.

3. There are two main issues which have arisen. The first concerns the basis of the indemnity under the Policy, in circumstances where Sartex has not to date reinstated the buildings, plant and machinery. While it is common ground that the relevant date for assessing any amount payable is the date of the fire, the parties disagree on the appropriate basis of assessment. Sartex (represented by Mr Elkington QC) contends that it is entitled to be indemnified on the reinstatement basis, alternatively that the court should declare that if it in fact reinstates, then it is entitled to be paid on such basis. Endurance (represented by Mr Evans-Tovey) contends that the indemnity should be by reference to the market value of the buildings, plant and machinery.

4. If the reinstatement basis applies, there are further issues between the parties as to whether the sum agreed between the experts as the reinstatement cost of the buildings is to be reduced for betterment, and if so, by how much. If the market value basis applies, there is also an issue as to whether Endurance can now dispute the value of the buildings at the time of the fire, and if it can, what that value was.

5. The second main issue which arises is whether the Policy was at the time of the fire subject to a 20% co-insurance provision. This had been purportedly imposed by insurers shortly before the fire, on the grounds that they were concerned about the build up of combustible stock at Crossfield Works. It is common ground that there was no contractual power in the Policy permitting insurers to impose such a term unilaterally; the issue here is whether it was in fact agreed between the parties in a call on 19 May 2011, or at a meeting on 23 May 2011. If there were no 20% co-insurance provision, a further issue arises as to whether Sartex is obliged to give credit for some or all of a sum of £1,000,000 received by it in settlement of claims it made against its broker Henderson Insurance Brokers Limited ("Henderson") in connection with the Policy.

6. The total amount which Endurance says is payable under the Policy in respect of the buildings, plant and machinery is no more than £2,141,527, being the amount it offered to Sartex in October 2012, and paid in November 2013. This is the sum which it calculated

to be payable on the market value basis of indemnity, net of average, and after deduction for the 20% co-insurance.

7. On the basis that it succeeds on each of the issues outlined above, Sartex claims that it is entitled to payment of a further sum of £2,289,697 (together with interest from the date of the fire). This further sum represents an additional £789,697 in respect of the buildings (net of average), and a further £1,500,000 in respect of plant and machinery.

8. A number of subsidiary issues were at various times raised, but it is not necessary to address them in any detail, either because they have not been pursued, they are not in the event material, or they have been agreed. These include whether Sartex's interest in the buildings, plant and machinery was sufficient to entitle it to a full indemnity; the average to be applied by reason of the under-insurance of the buildings, and the treatment of salvage. I refer to these briefly at the end of this judgment, after considering the relevant factual background, and the main issues between the parties.

9. In addition to a substantial volume of documentary evidence, I heard oral evidence from Mr Ahmed and Mr Khan (called by Sartex), and from Mr Fielder, Mr Adamson, Mr Chadwick, Mr Wilkinson and Mr Ledgerton (called by Endurance). I explain the roles of each of them in the relevant events later. Experts were instructed by both parties in the fields of quantity surveying and machinery and plant valuation, and Joint Statements were prepared by the experts in both disciplines. In view of the extent of the agreement between the experts, none of the experts was called to give oral evidence.

The factual background

10. In 1979 Mr Maqbool Ahmed, his brother Saleem Khalid, and his cousins Iftikhar Ahmed and Zulifiqar Ali ("the Partners"), started a business manufacturing home textiles, bed linen and quilts. In 1984 the Partners purchased freehold premises at Crossfield Works, and the business moved there. In 1992 the business was incorporated, and Sartex was formed.

11. By an agreement dated 28 April 1995, the Partners agreed that Sartex could use Crossfield Works for no rent so long as (amongst other things) Sartex arranged (at its cost) appropriate insurance cover for the buildings and contents, and ensured that the premises were maintained in a good state of repair. It was on that basis that Sartex occupied the premises from that date.

12. The business was successful, such that in 1999 Sartex purchased larger premises at Castle Mill, Queensway, Castleton, Rochdale ("Castle Mill"), to which it then moved the majority of its production. From around this time, Crossfield Works was used primarily for storage, and for the re-packing of linens imported from Pakistan.

13. From about 2005, Mr Maqbool Ahmed (who was the driving force behind the business), became interested in the possibility of expanding Sartex's business by manufacturing "shoddy hard pads" for use predominantly in mattresses (as covers for springs), but also for more general insulation purposes. Sartex had been producing polyester wadding for the mattress industry at Castle Mill, and Mr Ahmed's discussions with his customers had convinced him that the production of shoddy hard pads was a potentially profitable line of business for Sartex to develop at Crossfield Works.

14. Mr Ahmed then carried out detailed research into the market, and the process for producing shoddy hard pads, which are made from a mixture of shredded rags (which Sartex could obtain cheaply from charities), and low melt fibre. He designed a production process, and then over several years sourced the necessary plant and machinery from the USA, Italy, Germany as well as the UK. Much of the machinery was second hand. It was delivered to Crossfield Works, and then repaired and refurbished by Sartex.

15. By late 2010 Mr Ahmed's endeavours had resulted in most of the plant and machinery for three production lines being installed at Crossfield Works. These were (1) a Pulling Line, into which waste materials were fed and shredded into shoddy fibre, which was then baled; (2) a Needle Punch Line, in which the shoddy fibre was "carded" or "needled" to form sheets of felt shoddy, and (3) a Bonding Line, in which the shoddy fibre was mixed with low melt fibre, passed through a thermo-bonding oven, and then cut and stacked into shoddy hard pads.

16. By this time (late 2010) Sartex was purchasing substantial supplies of rag materials from Oxfam and other charities. These were being stored at Crossfield Works, next to the machinery. The Pulling Line was partly operational, and as a result Sartex had also built up a significant level of baled shoddy fibre within Crossfield Works. There was a delay in the Needle Punch and Bonding Lines becoming fully operational due to a delay in the installation of an appropriate power supply. Until the upgraded electricity supply was installed, Sartex was using a generator to power the plant and machinery.

17. It was in this context that Sartex sought insurance for Crossfield Works in November 2010. For these purposes, it used insurance brokers, Henderson, who arranged cover with Paladin Underwriting Agency Ltd ("Paladin"). Paladin was coverholder for Montpelier Syndicate 5151 at Lloyd's, and Endurance is the sole member of that syndicate.

18. The resulting insurance incepted on 11 November 2010, and was contained in the Policy issued on 22 December 2010. It will be necessary to return to the detailed terms of the insurance later, but in essence it provided material damage cover to Sartex in respect of the buildings (sum insured £2,020,000), and the plant and machinery (sum insured £2,500,000), at Crossfield Works. It also provided business interruption cover (with a loss of gross profits sum insured of £1,000,000, with a 12 month indemnity period).

19. The sums insured for the buildings, plant and machinery were based on the then estimated costs of reinstating them. The proposal for the insurance, in the form of a presentation sent to insurers on 22 October 2010, specifically identified the basis of cover sought in respect of buildings, plant and machinery as being "reinstatement". The Policy recorded that the proposal was agreed to be the basis of the contract, and to be incorporated in it.

20. The insurance was initially subject to a survey, which was duly carried out on 29 November 2010. The survey informed insurers that production had not yet started as a new electricity supply was awaited; that there was a relatively significant build-up of materials being stored on site waiting recycling, and that the premises were congested due to the delays in starting production and the build-up of materials. The survey also identified that Sartex had no firm date when production would commence.

21. The surveyor's conclusion was however that the risk was acceptable, subject to the completion of a risk improvement requirement ("RIR"), which was that Sartex review its health and safety documentation due to the change in use of Crossfield Works. Although it took longer than insurers had wanted, they considered that the RIR was satisfied by the production by Sartex of a new Fire Risk Assessment which Henderson sent insurers on 22 March 2011.

22. While the RIR was satisfied, the receipt of it triggered Mr Fielder of Paladin (the underwriter responsible for the risk) to enquire whether production had commenced, so that he could (if it had) have the site re-surveyed. This led to both Mr Fielder and the surveyor (Mr Knape) visiting Crossfield Works on 5 April 2011. Mr Fielder was concerned about the amount of stock (in particular bales of clothing) on site. Mr Ahmed informed him that the stock was going to be reduced significantly by the end of the month.

23. At Mr Fielder's request, Mr Knape visited Crossfield Works again on 11 May 2011, and informed Mr Fielder that the stock situation had not improved. At this time Mr Fielder did not consider that he could let the situation continue, and so by email to the brokers that day, he imposed a 20% co-insurance excess (subject to a minimum of £25,000), until such time as the stock was reduced to an acceptable level and the plant became operational.

24. By email to Mr Chadwick of Henderson on 13 May 2011 (written by Mr Ahmed, but sent by Sartex's internal accountant, Mr Arfat Khan), Sartex objected to the excess, saying it disagreed with the surveyor's finding, and insisting that it was recycling the stock, with only the bonding line not working. It requested that the excess be removed until a further site visit had taken place, and insurers had seen the site for themselves.

25. In Mr Fielder's absence, Mr Tierney of Henderson raised the issue with Mr Adamson (Mr Fielder's immediate superior at Paladin), as a result of which Mr Adamson agreed by email on 13 May 2011 temporarily to rescind the excess, while reserving insurers' rights to re-impose any altered terms pending establishment of the facts on site. With this in mind, a further site visit was arranged for 23 May 2011, Mr Ahmed apparently being away in the week before then.

26. On 19 May 2011, following a further review of the risk by Mr Fielder, Mr Adamson, and Mr Garrido (a representative of Montpelier, on whose behalf Paladin then acted), insurers reversed their earlier position, and decided to reimpose the 20% co-insurance provision. Mr Chadwick was informed by email that day, and immediately queried it, suggesting by email in response that matters should be left as they were until the site visit on 23 May 2011. He followed his email with a call on 19 May 2011 to Mr Adamson.

27. There is a dispute between the parties as to the upshot of that call, and of the meeting on 23 May 2011, which was attended by Mr Ahmed, Mr Chadwick, Mr Fielder and Mr Knape, and in particular as to whether the insurance was, either during the call or at the meeting, agreed to be subject to a 20% co-insurance provision. It will accordingly be necessary to consider the evidence in relation to this in more detail later.

28. The fire at Crossfield Works occurred shortly after the 23 May meeting, on 25 May 2011. The buildings were almost entirely destroyed; the plant and machinery was a total loss, and Sartex's business at the premises was effectively stopped.

29. Cunningham Lindsey ("CL") were appointed as loss adjusters on behalf of insurers. Sartex appointed Harris Balcombe LLP ("HB") to act on its behalf in connection with its claim. There were initial delays in getting access to the site (by reason of the fatality), and insurers spent some time considering the claim. In October 2011 they accepted (through CL) liability under the Policy, and proposed that CL and HB meet to progress matters, including the mitigation strategy, in respect of which CL commented that there appeared to be a lack of a definitive plan.

30. The material damage and business interruption claims then took separate courses. In October 2012 insurers wrote to Sartex summarising the position at that time in respect of the buildings, and plant and machinery, claims. Sartex had been claiming an indemnity on the reinstatement basis, in respect of which (as appears later) there were specific provisions in the Policy. Insurers were in principle prepared to meet the claim on that basis, but were not satisfied that Sartex at that stage was in fact proposing to reinstate either the buildings or the plant and machinery within the meaning of the Policy, its then proposal as to how it would do so being to purchase the fibre manufacturing business of Gohar Textile Mills (PVT) Ltd ("Gohar") in Pakistan.

31. In their letter of 10 October 2012, insurers informed Sartex that they were prepared to settle the buildings, and plant and machinery, claims "*on a reinstatement basis up to a sum of £3,492,041.41 (net of average and co-insurance) subject to the provision of documentation evidencing that reinstatement costs have actually been incurred by Sartex*". Insurers further said that in the absence of such evidence, they were prepared to offer "*an indemnity settlement in the sum of £2,141,526.98 (net of average and co-insurance)*".

32. This offer of £2,141,527 was based on insurers' then assessment of the market value of the buildings, plant and machinery, and (subject to one issue which I consider separately later), the underlying market value figures on which the offer was based are not in dispute. Insurers paid the full amount of that offer to Sartex in November 2013.

33. Little substantive progress has been made in relation to the buildings, plant and machinery claims since then. Sartex has not in fact incurred any substantial reinstatement costs, and has (over the years) had a number of different proposals as to how it would effect reinstatement, the current one being that it intends to rebuild Crossfield Works, and buy replacement plant and machinery which will be installed there.

34. Endurance contends that in the events which have happened, it is necessary for Sartex to show that it has a genuine, fixed and settled intention to reinstate, which (it contends) it cannot do – and in the absence of such, it is limited to an indemnity based on the market value of the buildings, plant and machinery. It will accordingly be necessary to consider in further detail later what Sartex has done, and proposes, in relation to the reinstatement of the buildings, plant and machinery between May 2011 and the date of trial.

35. Better progress was made in respect of the business interruption claim, which was finally settled in May 2013 in the sum of £657,127 (of which £500,000 had previously been paid by insurers in March 2012). This was a figure reduced from higher estimates of gross profits on account of under-insurance, and was further reduced to reflect the 20% co-insurance provision. It is accordingly unnecessary to consider this part of the claim in any further detail. The material relating to the calculation of the gross profits of the business is however relied on by Sartex as evidence of the profitability of the shoddy hard

pads business, and hence of the likelihood of the buildings, plant and machinery being reinstated.

36. During the process of negotiating the claim with CL, it became apparent that Sartex was under-insured, in relation to each of the buildings, plant and machinery, and business interruption insurance. That led in February 2015 to Sartex issuing proceedings against Henderson for breach of duty, in which it made claims for losses as a result of the under-insurance, and for loss caused by the imposition of the 20% co-insurance excess.

37. The proceedings against Henderson were settled before trial in September 2016 with Henderson agreeing to pay Sartex £1,000,000, inclusive of damages, interest and costs. Sartex's net recovery from the action against Henderson, after allowing for costs it had incurred of some £255,000, was approximately £745,000. As already mentioned, should it transpire that the 20% co-insurance provision does not apply, Endurance claims that Sartex is obliged to give credit in this action for some or all of the recoveries from Henderson.

The Policy terms

38. The Policy was written on Paladin's standard Recycling and Waste Management wording, and comprises a 40 page policy document, together with a 4 page Schedule. The Schedule identifies the period of insurance (from 11 November 2010 to 10 November 2011), the Proposal Information (the presentation dated 22 October 2010, and subsequent information), the location of the premises, the nature of the business, and the sums insured for the individual items of cover provided. It also identifies the insured perils (including fire), and the applicable excess, being £5,000 (although, as is common ground, under the wording the excess does not apply to fire).

39. As already referred to, the Policy contains a basis clause, providing at the start of the policy document "*that the written proposal and declaration specified in the Schedule …. is hereby agreed to be the basis of this Contract of Insurance and to be incorporated herein*". The Policy is then divided into a number of different sections, including (after a section setting out General Definitions), Section A Material Damage. The Insuring Clause in this section provides as follows:

> *Subject to the general conditions and exclusions of this Policy, and the conditions and exclusions contained in this Section, we, the Underwriters, agree to the extent and in the manner provided herein to indemnify the Insured against loss or destruction of or damage to Property caused by or arising from the Perils shown as operative in the Schedule, occurring during the period of this Policy.*
>
> *Underwriters shall not be liable for more than the Sum Insured stated in the Schedule or in the Policy in respect of each loss or series of losses arising out of one event at each location as stated in the Schedule*.

40. Under the heading "*Reinstatement Basis*", Condition 7 of Section A provides as follows:

> *In the event of loss or damage to or destruction of Buildings, Machinery and Plant or All Other Contents, the basis upon which the amount payable hereunder is to be calculated will be the Reinstatement of the Property lost, destroyed or damaged.*

Special Conditions

1. *Underwriters' liability for the repair or restoration of property damaged in part only, will not exceed the amount which would have been payable had such property been wholly destroyed.*
2. *No payment beyond the amount which would have been payable in the absence of this condition will be made:*
   a) *unless Reinstatement commences and proceeds without unreasonable delay;*
   b) *until the cost of Reinstatement has actually been incurred;*
   c) *if the Property at the time of its loss, destruction or damage is insured by any other insurance effected by the Insured, or on its behalf, which is not upon the same basis of Reinstatement.*

41. The Policy contains the following definitions:

> ***Buildings*** *means the buildings at the address(es) set out in the Schedule, including, at the same location, outbuildings, gangways, conveniences and external hoists, and any extensions communicating with any of the building(s).*
>
> ***Property*** *means the Buildings, Machinery and Plant, Stock and All Other Contents.*
>
> ***Reinstatement*** *means:*
> *a) the rebuilding or replacement of Property lost or destroyed which, provided the Underwriters' liability is not increased, may be carried out:*
> *(i) in any manner suitable to the Insured's requirements;*
> *(ii) upon another site.*
> *b) the repair or restoration of Property damaged in either case to a condition equivalent to or substantially the same as but not better or more extensive than its condition when new.*

42. The Conditions specific to Section A further include a provision in respect of average relating to buildings:

> *3. AVERAGE (FOR BUILDINGS ONLY)*
>
> *If the Sum Insured shown in the Schedule in respect of Buildings shall be less than 85% of the value of the Buildings at the time of the loss then the Insured shall be considered as being their own insurers for the difference and shall bear a rateable share of any loss occurring during such Period of Insurance in respect of such item.*

43. Further, the General Conditions of the Policy include the following provisions:

> *11. ALTERATION OF RISK*
>
> *The Underwriters shall not be liable to make any payment under this Policy if:*
> *a) any change shall be made in the Buildings, the Business or the occupancy or duties of the Insured whereby the risk of loss, destruction or damage is increased, or*

b) the Insured's interest ceases (unless the cessation is brought about by will or operation of law) except where such alteration be notified to and accepted by the Underwriters.

…

14. DUTIES OF THE INSURED

It is a condition precedent to Underwriters' liability under this Policy that the Insured shall:

a) maintain the Buildings, Machinery and Plant and equipment insured by this Policy in a satisfactory state of repair;

b) take all reasonable precautions to prevent loss or destruction or damage, accident or injury;

c) take all reasonable precautions for the safety and protection of the Property … and not do or permit anything whereby the risk of Underwriters shall be increased…

…

15. SALVAGE

On the occurrence of any loss, destruction or damage, the Insured shall give the Underwriters or their agent or representative leave and licence to enter the building where the loss, destruction or damage has occurred and take and keep possession of any of the Property hereby insured and deal with the salvage in a reasonable manner.

…

17. CANCELLATION

…This Policy may also be cancelled by or on behalf of Underwriters by 30 days' notice given in writing, and sent by registered or recorded delivery mail, to the Insured at his last known address…

The claim for reinstatement costs

44. It is common ground that the terms of Condition 7 of Section A of the Policy which provide for an indemnity to be paid on the reinstatement basis are not engaged. This is because the cost of reinstatement has not been incurred, and accordingly special condition 2(b) is not satisfied. As a result, and as provided by the opening words of special condition 2, the amount payable is "*the amount which would have been payable in the absence of this condition*". The amount payable in the absence of Condition 7 is accordingly the amount payable under the Insuring Clause in Section A, which provides that the insurers will "*indemnify the Insured against loss or destruction or damage to Property caused by or arising from*" the fire.

45. In opening Sartex's case, Mr Elkington QC argued that in the absence of Condition 7, the reinstatement basis applied by reason of (a) the proposal expressly identifying the basis of cover sought as being on the reinstatement basis, and (b) the proposal being stated in the Policy to be the basis of the contract, and to be incorporated in it. Mr Evans-Tovey objected to this, which he described as a new argument. It was not in the event pursued by Mr Elkington in closing, on the grounds that the reinstatement basis identified in the proposal was reflected in Condition 7, and so if Condition 7 did not apply, the parties were thrown back to the general terms of the Insuring Clause, without the proposal providing a fresh route to an express reinstatement measure of indemnity. I accordingly need say no more about this argument.

46. The Insuring Clause in terms provides that Sartex will be indemnified "*against loss"* caused by the fire. It is accepted by the parties that this provision permits an indemnity to be paid on either the reinstatement basis, or the market value basis (which were the two bases of indemnity in issue). But they disagree on the criteria relevant to determining which basis should apply, as well as the basis which should be applied on the facts of the present case.

47. Sartex's primary case is that it is entitled to an indemnity on the reinstatement basis because that reflects the value of the buildings, plant and machinery to it at the time of the loss. Although it has not been called upon by the Partners to reinstate the buildings, such measure also reflects (Sartex says) its obligation in relation to the buildings under the terms of the agreement between it and the Partners in 1995.

48. Sartex accepts that the insured's intentions at the time of the loss are relevant in determining the correct measure of indemnity, but (it is submitted by Sartex) only in the context of asking what the insured intended to do with the property, assuming the loss had not occurred. If the insured were (for example) seeking to sell or destroy the property at the time of the loss, then the loss will not be the cost of reinstatement, but some other measure. The question of what the insured would do after the loss, and as a result of it, is not relevant (Sartex contends), save in exceptional cases (of which this is not one).

49. In Sartex's submission, it is apparent from the steps it had taken in the years leading up to the fire in May 2011 that it considered it had identified a profitable line of business in manufacturing shoddy hard pads from Crossfield Works. It had taken years of planning, but by the time of the fire it had assembled just about all the necessary plant and machinery at Crossfield Works, and was ready to start its venture in earnest; it had a supply chain of raw materials, and it had existing customers to supply. The extent of the profit envisaged is confirmed by the material produced by various experts in connection with the business interruption claim, which estimated substantial gross profits over a 12 month period. It was, in short, says Sartex, a valuable opportunity, which it was about to exploit.

50. Its loss, accordingly, Sartex submits, is the sum that enables it to reinstate the buildings, plant and machinery at the date of the fire. It is entitled (it contends) to be paid that sum before reinstatement begins, and is not bound to use the proceeds for reinstatement. But if it does, it is not bound to reinstate the premises or the machinery in exactly the same state as they were in before the fire. It is entitled (it contends), should it so choose, to make material changes and improvements, provided always that the insurers' liability is not increased beyond what was lost in the fire.

51. Endurance accepts that under the Insuring Clause, the measure of indemnity could be the reinstatement basis, but that would only be applicable if it reflects the insured's actual loss. In Endurance's submission it is necessary to look at all the circumstances of the case in determining what the insured's actual loss is, but (if reinstatement has not taken place), the reinstatement basis will only be applicable if the insured in fact intends to reinstate the property. In this respect, the insured's intentions at the time of the loss are relevant, but so (it submits) are its intentions on a continuing basis since then, including up to the date of trial, or the end of the limitation period (if sooner).

52. In Endurance's submission, it is necessary for an insured claiming to be indemnified on the reinstatement basis (and for Sartex in the present case) to show that it had at the time

of the fire, and continues to have, a genuine, fixed and settled intention to reinstate what was lost or damaged. In this connection, it submits that in this case the relevant intention must be to reinstate at Crossfield Works (and not elsewhere), and that what is intended is a genuine reinstatement, as opposed to the erection of a materially different building.

53. On the facts, Endurance submits that Sartex cannot establish the necessary intention. It further contends that there is no real prospect of reinstatement taking place, and that on commercial grounds no-one in their right mind would reinstate. Endurance points to the fact that no reinstatement has taken place for nearly 8 years since the fire, and that in the interim Sartex has had myriad other plans for buying other premises, buying Gohar's fibre processing business in Pakistan, and using Crossfield Works for other purposes (including a function venue, or a supermarket). Such steps as have recently been taken to progress a planning application for a reinstated building at Crossfield Works, and for the purchase of replacement plant and machinery, are steps (it is suggested) taken solely for the purpose of identifying an intention to reinstate, but do not reflect a genuine intention to do so.

54. Sartex denies that events after the fire are (in this case) relevant factors in determining the correct measure of indemnity. But it also fundamentally disputes that it does not intend to reinstate the buildings, or the plant and machinery, it being its evidence (from Mr Ahmed) that it certainly intends to do so. It further contends, in the alternative, that if the factors referred to by Endurance are relevant, and if there are doubts as to whether Sartex in fact intends to reinstate the buildings or the plant and machinery, the correct course would be for there to be a declaration that if Sartex carries out the reinstatement, it would be entitled to be paid the reinstatement costs.

55. In view of these submissions, it will be necessary to consider Sartex's conduct in the period between the fire and the date of the trial, and the evidence as to its intentions to reinstate, in more detail later. But first I will consider what the correct approach is for the purposes of determining the appropriate measure of indemnity in the present case.

The relevant criteria

56. The underlying general principle is well established, and is not in dispute. Subject always to the terms of the relevant policy (and in particular any provisions as to the maximum amount recoverable), the insured is entitled to recover his actual loss, but no more than his actual loss, arising from the insured peril. The principle was stated as follows by Brett LJ in *Castellain v. Preston* (1883) 11 QBD 380, at 386:

> *In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.*

57. The relevant question is accordingly what has the insured lost as a result of the insured peril, and this requires considering the value of the relevant property (real or personal) to him at the date of the fire. As stated in Colinvaux's Law of Insurance, 11th Ed, at 11-034, "*the measure of indemnity is to be assessed by reference to the value of the property to the assured immediately before the event causing the loss*". Similarly, in Clarke, Law of Insurance Contracts (loose-leaf), at 28-2: "*The court seeks the actual monetary value of the property to the insured at the time of the loss*". Indeed, as referred to above, it is common ground between the parties that Sartex's loss is to be assessed at the date of the fire, and the reinstatement and market value figures relied on by each accordingly represent the reinstatement cost and market value of the buildings, plant and machinery, in May 2011.

58. It is apparent from the decided cases that the insured's intentions in relation to the property immediately before and at the time of the fire are important factors in determining the value of it to him at that date. If, for example, the insured had intended to sell, or demolish, the property, then it would likely have a different value to him than if he had intended to use it for manufacturing purposes.

59. In *Leppard v Excess Insurance Co. Ltd* [1979] 1 WLR 512, the insured had bought a remote country cottage from his parents-in-law in 1972 for a price of £1,500, which was the highest price they had been offered for it. The insured considered the cottage was worth substantially more, and so bought it at that price with a view to selling it later. The cottage was left empty, and was destroyed by fire in October 1975. At that time it was insured for £14,000; the cost of reinstatement was £8,694, and the market value of the property was £4,500 (less the site value of £1,500). The insured had originally put the cottage on the market for £12,500, but by the time of the fire had been willing to accept £4,000 for it.

60. The trial judge (Mars-Jones J) held that on the true construction of the policy the insured was entitled to be indemnified on the reinstatement basis, a finding which was overturned on appeal. In the absence of a contractual obligation to pay reinstatement costs, the Court of Appeal considered that the relevant question was what was the insured's real or actual loss, the amount of which (in agreement with the Judge) it considered was to be ascertained at the date of the fire. In holding that the relevant loss was the market value of the cottage at the date of the fire, Megaw LJ (with whom Geoffrey Lane and Dunn LJJ agreed), considered that certain future events after the fire could be looked at, in so far as foreseeable at the date of the fire. As he stated, at p.519H-520B:

> *Was the plaintiff's actual loss the cost of the reinstatement of the cottage? Or was it, as the defendants contend, the market value of the property as it was at the time of the fire? The defendants do not rely upon any general principle in support of their submission. They say, rightly in my judgment, that this is a question of fact, and that one must look at all the relevant facts of the particular case to ascertain the actual value of the loss at the relevant date. Of course, one is entitled to look to the future so as to bring in relevant factors which would have been foreseen at the relevant date as being likely to affect the value of the thing insured in one way or the other, if the loss of it had not occurred on that date.*

61. In *Reynolds v. Phoenix Assurance Co Ltd* [1978] 2 LLR 440, the insureds had purchased some old maltings in Suffolk in 1969 for £16,000. They were purchased for use as a grain store, and for the milling of grain and other materials for the making of animal feed

stuffs. The buildings, machinery and stock were insured for a total sum of £628,000. In November 1973 the buildings were substantially damaged by fire, with the greater part of the main maltings being destroyed. The costs of reinstating the buildings (after an allowance for betterment) was initially agreed at £243,000. That sum was in fact insufficient to enable the buildings to be reinstated, but the insureds were advised to accept it, and to put the money on deposit until sufficient interest had been accumulated to cover the balance, which would then enable them to start the works.

62. Insurers were however only willing to pay the sum of £243,000 on the condition that the rebuilding work was put in hand, as to which they offered to make an initial payment of £20,000 when the order for rebuilding was signed, and then make stage payments as the work was done. This led to an impasse between the parties, and ultimately to the litigation between them, in which various other issues, including as to non-disclosure, were raised. In relation to the amount of the indemnity payable, the insurers contended that the value of the buildings was represented by their market value at the time of the fire (which the insurers contended to be only some £25,000), or by modern replacement value, i.e. the cost of building a modern replacement (of some £55,000). The insureds contended that as there was no doubt as to their genuine intention to reinstate, the indemnity must necessarily amount to the cost of reinstatement.

63. Having referred to the general principles applicable to determining the appropriate measure of indemnity, Forbes J continued as follows (at p.451):

> *But these are all broad principles – you are not to enrich or impoverish: the difficulty lies in deciding whether the award of a particular sum amounts to enrichment or impoverishment. This question cannot depend in my view on an automatic or inevitable assumption that market value is the appropriate measure of the loss. Indeed in many, perhaps most cases, market value seems singularly inept, as its choice subsumes the proposition that the assured can be forced to go into the market (if there is one) and buy a replacement. But buildings are not like tons of coffee or bales of cloth or other commodities unless perhaps the owner is one who deals in real property. To force an owner who is not a property dealer to accept market value if he has no desire to go to market seems to me a conclusion to which one should not easily arrive. There must be many circumstances in which an assured should be entitled to say that he does not wish to go elsewhere and hence that his indemnity is not complete unless he is paid the reasonable cost of rebuilding the premises in situ. At the same time the cost of reinstatement cannot be taken as inevitably the proper measure of indemnity. There must be cases where no one in his right mind would contemplate rebuilding if he could re-establish himself elsewhere. The question of the proper measure of indemnity thus becomes a matter of fact and degree to be decided on the circumstances of each case.*

64. It is apparent from this passage that the Judge considered that events after, and as a result of, the fire could be relevant in determining the proper measure of indemnity. Indeed the reference to an assessment by someone in his right mind can only have been to the position of someone who has reviewed his available options after the fire. The Judge continued (at p.450) by considering "*what in fact is, and was, the attitude of the plaintiff towards this building*". He was satisfied that when the insureds bought the maltings, they fully intended to use them as a grain store, and for the production of cattle feed. He further found (at p.452) that they still intended to do so if the maltings were

reconstructed, and that they genuinely intended to reconstruct the maltings if they received a sum adequate to cover the cost of doing so.

65. The insurers submitted in *Reynolds v. Phoenix* that even if the insureds had a genuine intention to reinstate, that had to be reasonable, and not eccentric, and contended that if the insureds were only prepared to reinstate with insurance moneys (and not their own money), the intention would be unreasonable. The Judge rejected this contention, holding (at p.453) that he was "*satisfied that the plaintiffs do have the genuine intention to reinstate if given the insurance moneys; that this is not a mere eccentricity but arises from the fact, as I find, that they will not be properly indemnified unless they are given the means to reinstate the building substantially as it was before the fire but with appropriate economies in the use of materials*". The insureds were accordingly awarded the cost of reinstating the buildings.

66. Although it appears to have been common ground in *Reynolds v. Phoenix* that the intentions of the insured after the fire were relevant (indeed it was the insureds who were asserting the genuineness of their continuing intentions as a relevant factor), it is clear from the judgment that Forbes J accepted that the circumstances of each case may include consideration of matters arising after the fire. Indeed, when commenting (at p.445) in relation to the impasse which had arisen between the parties before the action, he remarked that "*The insurers were entitled I feel to some firm indication that the plaintiffs really did intend to rebuild at a cost of nearly £¼ million a building they had only paid £16,000 for*".

67. In *Great Lakes Reinsurance (UK) SE v. Western Trading Ltd* [2016] EWCA Civ 1003 the insured owned an old leather factory in Walsall known as the Boak. Planning permission had been granted in early 2009 to convert it into 31 residential flats, but the size of the development was restricted by its listed status, and it had not been economic to develop the building. By July 2012, when it was destroyed by fire, the building was essentially a shell, used occasionally for storage, with part of it awaiting demolition. As a result of the fire, the listed status of the building was revoked, permitting an economically viable development of 48 flats. The evidence was that before the fire the building was worth about £75,000, and after the fire (following delisting) it was worth some £500,000. The cost of reinstating the building was estimated to be £2,121,800, being the sum insured under the policy.

68. The insured claimed that it was entitled under the terms of its policy to be indemnified on the reinstatement basis, and sought a declaration to that effect. By the time of trial, no reinstatement work had been carried out, although the insured asserted that it intended to do so. The Judge (HHJ Mackie QC) considered that in the circumstances it was appropriate to make a declaration which was intended to "*remove from the [insurer] the concern about whether there was a genuine intention to reinstate or indeed that reinstatement would take place*". On appeal, the approach of making a declaration was supported, although the terms of it were altered such that it read, in revised form: "*if the [insured] carries out reinstatement of the property lost then it will be entitled to be indemnified by the [insurers] for the cost of so doing, up to the limit of indemnity of £2,121,800*".

69. In giving judgment in the Court of Appeal, Christopher Clarke LJ (with whom Lewison and Laws LJJ agreed) considered the applicable measure of indemnity under the relevant policy. The terms of that policy were similar to the terms of the Policy in the present

case, in that it contained specific provisions relating to reinstatement, including the requirement that reinstatement must be carried out with reasonable dispatch, otherwise no payment beyond the amount which would have been payable under the policy if the provision had not been incorporated would be made. As that requirement was not met, it was necessary for the court to consider the measure of indemnity under the insuring clause, which was to indemnify "*against loss of or damage to the property*".

70. Christopher Clarke LJ considered the general principles to be applied (at [69]) in the following terms:

> *69. ...where the insured is the owner of the property ... the indemnity is to be assessed by reference to the value of the property to the insured at the time of the peril. In many, perhaps most, cases of damage or destruction the insured's loss is the cost of reinstatement: Reynolds v Phoenix Assurance; Colinvaux at para 10–35; although that may not be the case if, for instance, the insured was trying to sell the property at the time of the loss, or intending to destroy it anyway: see Leppard v Excess Insurance; Colinvaux at paras 10–38 and 10–39; or if no one in his right mind would reinstate: Reynolds v Phoenix.*

71. He then considered (at [72] to [77]) the relevance of the insured's intention to reinstate, and what the position might be if there were doubts as to it:

> *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 QC 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 Reynolds v Phoenix; 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 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, eg 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, volume 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 [1999] Lloyd's Rep IR 111 – 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.*

72. It was submitted by Sartex that the approach described by Christopher Clarke LJ in the passages cited above is one that is limited to exceptional cases, including the exceptional case before him, where the property had increased in value as a result of the fire. That is certainly the context for the (albeit tentative) remarks made by Christopher Clarke LJ. It is also notable that the insured in *Great Lakes* (as in *Reynolds v. Phoenix*) was positively asserting its continuing intention as a means of encouraging the court to support an indemnity on the reinstatement basis; indeed in *Great Lakes* the insured was advancing the declaration proposed, and the protection it would give to insurers, as its primary case.

73. In *Hodgson v. NHBC* [2018] EWHC 2226 (TCC) Jefford J, in the context of a summary judgment application, remarked obiter (at [36(ii)]) that "*There is no decided authority that where the claim is in respect 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*". The leading textbook referred to was Colinvaux's Law of Insurance, 11th ed., at 11-031, where it was stated that *"subject to the terms of the policy, the insurer will be liable on the cost of reinstatement basis even where actual reinstatement is no longer possible, as for instance where the damaged premises have been sold… in which case the cost is assessed on a notional reinstatement basis."*.

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.

76. In answering that question, the primary focus is on the position as at the time of (and immediately before) the fire. If the insured intended then to use the property, as opposed (for example) to selling, or demolishing it, the appropriate measure of indemnity, and the best reflection of the value of the property to him at that time, is likely to be the reinstatement basis. But subsequent events (and not just those foreseeable at the time of the fire) may show that such measure would over-compensate the insured, in which case the court at trial is likely to consider another measure of loss to be more appropriate.

77. For similar reasons, I do not accept Sartex's submission that the intentions of the insured after the loss, and as a result of it, are only relevant in exceptional cases (such as in *Great Lakes*, where the fire increased the market value of the property). While such considerations will likely be relevant in such cases, they may also be relevant in other cases which may not otherwise be considered exceptional. As already stated, it all depends on the circumstances of each case.

The appropriate measure of indemnity

78. Immediately before the fire, it is clear that Sartex intended to use Crossfield Works for the purposes of its new venture of manufacturing shoddy hard pads. The machinery necessary for that had been acquired and refurbished over several years, and installed at the premises. Mr Ahmed was satisfied that the venture would be profitable, a conclusion confirmed by the figures subsequently produced (and agreed) in respect of the business interruption claim. The value of the buildings, plant and machinery to Sartex immediately before the fire was that of providing the location and means for pursuing the venture.

79. That does not mean that Sartex was committed to carrying on the business for all time from Crossfield Works. At the meeting on 23 May 2011 Mr Ahmed informed insurers that he was looking for a single storey warehouse to house future stock, and that he felt Sartex would need to move to bigger premises in the next couple of years. That was a reflection of the fact that Sartex needed additional storage facilities (the height of part of the buildings at Crossfield Works was not ideal for warehousing), and also of the fact that if the venture succeeded, bigger premises might in due course be necessary. While Crossfield Works was not the only location from which the business could be carried on, it was where the plant and machinery had been assembled, and where the business was planned to operate.

80. Furthermore, under the terms of its agreement with the Partners dated 28 April 1995, Sartex was under an obligation to arrange appropriate insurance cover for the buildings and contents at Crossfield Works, and to ensure that the premises were maintained in a good state of repair. While the relationship between the Partners and Sartex is such that the outcome of the present claim against insurers is likely to inform the practical ambit of the latter obligation, Sartex is nonetheless under a contractual obligation to them to repair the premises.

81. By reference to the position immediately before and at the time of the fire, I am satisfied that the appropriate measure of indemnity under the Insuring Clause in Section A of the Policy would be the reinstatement basis in relation to both the buildings, and the plant and machinery. While it would be tempting to draw support for that conclusion from the fact that insurers were themselves offering an indemnity on that basis in October 2012, it would not be right to do so: at that stage insurers were considering the position under Condition 7 of the Policy, and not under the Insuring Clause.

82. As referred to above, it is however necessary to look at all the circumstances of the case, including events after the fire, and up to the date of trial, and to determine overall whether the reinstatement basis of indemnity is the appropriate measure of indemnity (whether in respect of the buildings, the plant and machinery, or both), or whether an award on that basis now would over-compensate Sartex for its loss. In view of the range of the parties' submissions as to the relevance of these events, it is accordingly necessary to consider Sartex's intentions from time to time since May 2011 in relation to the reinstatement of its manufacturing facility at Crossfield Works or elsewhere, and its alternative plans for Crossfield Works if the manufacturing facility were re-established elsewhere.

83. Immediately after the fire, as recorded in a note made by Mr Ledgerton of CL, Mr Ahmed stated that his "*present thought is to reinstate*". There were however inevitable delays in getting access to the site following the fire, and Mr Ahmed started looking at other premises, with a view to reinstating there. In this context, it should be kept in mind that the definitions within the Policy permitted "*Reinstatement*" to be carried out (provided insurers' liability was not increased) "*in any manner suitable to the Insured's requirements*", and "*upon another site*". Endurance however contends that the sort of properties considered by Mr Ahmed following the fire show that he, and Sartex, had no real intention to reinstate. On the contrary (Endurance says), the steps taken by him indicate that he was seeking to identify other ventures which he could use the insurance proceeds to fund, while using the opportunity of the fire to redevelop the Crossfield Works for investment purposes.

84. Of the various other premises looked at by Mr Ahmed in 2011, the principal one appears to have been The Venue on Oldham Road in Manchester, which was much larger than Crossfield Works, and which had a first floor function room. An offer was made for those premises in late 2011, but was not accepted. Other premises considered included premises in Dewsbury, Bradford, Oldham and Bury. On the evidence before me I cannot conclude that any of these sites would not have been suitable for the shoddy hard pads manufacturing venture, but it seems that they would equally have been suitable for other uses.

85. In late 2011, Mr Ahmed was also looking, with Sartex's advisers, Morris Dean, at the possibility of redeveloping Crossfield Works. By this stage, access had been given to the site, and it had become apparent that the buildings had not been totally destroyed, but that

certain parts of them could be retained. It had also become apparent that relevant parts of the buildings were listed (including the facades along the side of the Rochdale canal), a fact Mr Ahmed had previously been aware of, but seemingly had not had in mind at the time the insurance was placed. Rochdale Council was sounded out about a redevelopment plan which involved acquiring some neighbouring land, and building 8 units around a central courtyard. In April 2012 the Council informed Sartex that it needed to make a planning and building consent application if the scheme were to be pursued.

86. By mid-2012 Sartex was seeking a cash settlement, which subsequently led to the offers made by insurers in October 2012 of (1) £3,492,041.41 (net of average and co-insurance), on a reinstatement basis, subject to the provision of documentation evidencing that reinstatement costs had actually been incurred, or (2) in the absence of such evidence, an indemnity settlement in the sum of £2,141,526.98 (also net of average and co-insurance). The formulation of the offer reflected the uncertainty then felt by insurers as to whether Sartex would in fact reinstate. At this stage no significant interim payment was made by insurers.

87. Between August 2012 and (it seems) early 2017, Sartex's reinstatement focus appears to have been on the possibility of reinstating in Pakistan. In this connection it entered into an agreement with Gohar in November 2012 to purchase its fibre recycling business for £5.65 million. The agreement provided for a refundable deposit of £141,250 to be paid. Endurance did not accept that the purchase of this business would constitute reinstatement, and was not willing to indemnify Sartex on that basis. The agreement was revised in November 2015, providing for payment of £3.3m on completion, and for a further £2.21m to be paid in instalments over 5 years. Insurers were informed about the proposed purchase, and were told that Sartex could not proceed unless they agreed to pay its claim on the reinstatement basis. Insurers never agreed to do so, and as a result the purchase was never made, and the prospect of doing so was abandoned in early 2017.

88. Endurance has been very sceptical about the agreements with Gohar, which it suggests were put in place simply for the purpose of trying to demonstrate an intention to reinstate. As pointed out by Mr Evans-Tovey, the arrangements with Gohar were not arm's length. For certain purposes Sartex and Gohar were portrayed as sister companies, a position which Mr Ahmed asserted was untrue, explaining that statements to that effect (made by others) on Sartex's website were just for marketing purposes. This was an unsatisfactory part of the evidence, but whether or not there were or are any overlapping owners between the two businesses, it is clear that the owners of each are part of the same extended family, and have a close working relationship.

89. This does not however mean that the agreements reached between Sartex and Gohar were never intended to be performed, or did not reflect what Sartex considered at the time to be an appropriate way of reinstating what had been lost by the fire. While reinstating abroad would appear to be novel, Sartex and its advisers considered it to be permitted under the Policy (even if the buildings had not been completely destroyed), and I am satisfied that (had Sartex had the funds to enable it to do so), it would have proceeded with reinstating the shoddy hard pad manufacturing facility in Pakistan.

90. It was while Sartex was focussing on reinstatement in Pakistan that insurers made the substantial interim payment referred to above of £2.141 million in November 2013. That payment was calculated on the market value basis of indemnity, and was used by Sartex

to meet payments on the finance it had arranged for some of the plant and machinery which had been lost in the fire (£470,000), for payments to Gohar (£121,000), for the purchase of a machine from Spain (€18,000), and for the purchase of a quilting machine from China (£35,000). After those, and other payments, Sartex has retained some £900,000, which was insufficient to enable it to purchase Gohar's fibre recycling business.

91. While Sartex's reinstatement focus was on Pakistan between 2012 and early 2017, it was also actively looking at its options in relation to Crossfield Works. These included, in 2014, the demolition of the remaining structures, and the erection of a banqueting hall and venue for Asian weddings, and in 2015, the demolition of the remaining structures and the erection of a supermarket, and function venue.

92. In May 2014 a firm of surveyors, Bolton Marshall ("BM") was instructed to apply to get the site delisted, in response to which the Council informed Sartex that it should make a pre-application submission for redevelopment. In July 2015 BM advised Sartex that such an application should be supported by a structural report, but it seems to have taken over a year for one to be produced. In response, the Council informed Sartex that any application should show how the remaining heritage assets on the site would be incorporated into a new development, which led to BM being instructed in late 2016 to prepare drawings and a planning application. At that time Sartex was considering two types of potential use: a banqueting / wedding venue, and commercial / industrial use. Detailed drawings for function venues were drawn up, which included the use of additional land next to the site.

93. By early 2017, as the prospects of effecting reinstatement in Pakistan were fading, Sartex looked at the option of rebuilding its shoddy hard pad facility behind its existing premises at Castle Mill. BM were instructed to do the work for submitting a pre-application enquiry to the Council, and offers were made to purchase the necessary additional land at Castle Mill. The offers were not however accepted, and by June 2017 the possibility of building a new facility behind Castle Mill had fallen away.

94. In that context BM was instructed to submit two schemes to the Council for rebuilding at Crossfield Works: as a manufacturing unit, and as a banqueting / wedding venue. Pre-application submissions were made in September 2017, and in December 2017 the Council indicated that reconstructing Crossfield Works as a manufacturing facility was likely to be supported, whereas a banqueting / wedding venue would likely not be. It seems that it was around this time that Sartex decided that Crossfield Works was the best site for reinstating the shoddy hard pad facility, and it does not appear that alternatives were pursued after this. In April 2018 Sartex instructed BM to make a planning application for the rebuilding of Crossfield Works as an industrial / warehousing facility. Drawings were prepared, and a Heritage Impact Assessment Report was produced in December 2018. The applications for planning permission and listed building consent were made in January 2019.

95. The Council responded in early February 2019 identifying a lengthy list of other reports and supporting documentation which would be necessary if the matter were to be pursued. Mr Ahmed's evidence was that these had now been instructed. Endurance points to a number of factors as indicating that this does not reflect a genuine intent to reinstate at Crossfield Works, still less a fixed and settled one. In particular it points to the timing, and the lack of any real progress over the years.

96. As to that, it is now some 8 years since the fire, and it is fair to say that little has been achieved in respect of the reinstatement of Crossfield Works. No architect or quantity surveyor appears to have been appointed; no contractor has been retained (the contractor Mr Ahmed says had been lined up, appears to be dormant); the Council has not been approached in relation to the additional land Sartex propose to use on the site (although Sartex says there is no need to do so); and detailed drawings have not been drawn up. Endurance submits that if reinstatement were genuinely intended, the outstanding points flagged by the Council would have been addressed, and there would be supporting evidence of the steps taken; some work on site clearance would have started; and advice would have been taken as to whether the proposed rebuilding was economical.

97. There is considerable force in many of these points. Indeed Mr Ahmed accepts that the redevelopment scheme has not progressed as quickly as he would like, despite (he says) him having chased BM on a regular basis. But it remains his clear evidence that Sartex's intention is to reinstate the Crossfield Works into a warehouse / manufacturing facility, where it will install the necessary plant and machinery to restart shoddy hard pad production, a business which Mr Ahmed remains convinced is potentially a very profitable enterprise.

98. In this connection, it may be that Sartex will not reinstate the buildings on the site in exactly the same form as they were before the fire. Whether and to what extent it does so may depend on the planning position. In this connection, as pointed out by HHJ Coulson QC in *Tonkin v. UK Insurance Ltd* [2006] EWHC 1120 (TCC), it is not necessary for there to be exact reinstatement. It is open to the insured to take advantage of the consequences of the fire to the property to make significant changes to what was there before, a matter he considered at [154] to [156] in connection with what he referred to as "*Option 3*". The important point is that if the insured makes such changes, he cannot expect insurers to pay for them, and doing so cannot increase insurers' liability. In such cases insurers' liability is to be assessed by a notional reinstatement scheme, which is in essence what the parties in this case have done in agreeing the reinstatement cost of £2,345,293 (or £1,931,223, net of average).

99. Before setting out my conclusions in relation to Sartex's intentions, I should also address the position in relation to the plant and machinery. The replacement of this has taken second place in Sartex's thinking, on the grounds (as stated by Mr Ahmed) that there was no point in replacing the plant and machinery until it had premises where it could commission and use it. Accordingly, it did not take steps to replace it until recently, other that in respect of a couple of items which it located at attractive prices.

100. On 15 October 2018, however, and in anticipation of being able to install the equipment at the rebuilt Crossfield Works, Sartex entered into an agreement with a Chinese company (Ying Yang) for the purchase of all the outstanding plant and machinery. The total price is $3.078 million. Ying Yang is a company Sartex has dealt with before, and it has purchased various items of machinery from it for its Castle Mill premises. A deposit of $56,000 has been paid under the October 2018 contract, and delivery is to take place from the middle of 2019, although it appears that there is flexibility to postpone it, if necessary.

101. Endurance is again sceptical about this agreement. It points to the absence of documents showing the negotiation of it; the similarity of the price payable to the sum insured under the Policy; the absence of shipping dates, which is relevant to the terms and timing of the

letter of credit pursuant to which payment is to be made, and the improbability of Crossfield Works being ready to receive any of the equipment in the middle of 2019. Again, there is some force in these comments. On the evidence before me, I cannot however conclude that it is not a genuine contract, and indeed Endurance did not in terms submit that it was a sham. Its point rather was that its effect and consequences were uncertain, and that its timing is consistent with a late attempt to persuade the Court that there is an intention to reinstate, where none in fact exists.

102. In addition, Endurance points to the fact that no detailed funding plan or arrangements are yet in place, either to pay for the buildings, or the plant and machinery, which would be expected if there were indeed a genuine intention to reinstate. Mr Ahmed said that there have been discussions with various lenders, and he is confident of being able to arrange asset finance nearer to the date when shipment, and payment, is needed. Indeed it was apparent from Mr Ahmed's evidence that he remains convinced about the profitability of the shoddy hard pad line, having refreshed his earlier research into it. While it appears that recovery in these proceedings will be necessary to enable Sartex to pay for the reinstatement of the buildings, Mr Ahmed said that even if these proceedings were lost, he would not cancel the contract for the plant and machinery.

103. While I did not understand Endurance to suggest to Mr Ahmed that Sartex could not afford to pay for the reinstatement of the buildings if successful in these proceedings, it was suggested that the planned reinstatement was uneconomic, and the absence of a redevelopment value for the proposal was a further indication that it was not genuinely intended. In Endurance's submission, the costs of reinstatement of the buildings were likely to exceed by many times the value of the end product, and that no-one in their right mind would reinstate in those circumstances. Mr Ahmed's evidence was that he was not interested in the redevelopment value, which he said was not relevant to his decision to reinstate at Crossfield Works. On the basis of *Reynolds v. Phoenix*, the reasonableness, or eccentricity, of a decision to reinstate is in any event to be determined on the assumption that the insurance moneys are available to the insured.

104. Mr Ahmed's repeated evidence was that Sartex has always intended to reinstate the buildings, plant and machinery lost in the fire, and that from early 2018 it has intended to do so by reinstating the manufacturing facility at Crossfield Works. It is undoubtedly the case that the process has taken longer than would be expected, particularly in circumstances where Sartex has been deprived of what it considers to be a valuable business opportunity. But the delays that have occurred need to be seen in the light of the position Sartex found itself in after the fire, and its efforts to find alternative locations to restart the shoddy hard pad manufacturing. They also need to be seen in the light of the way in which Mr Ahmed does business. It is apparent from the 6 years or so which he took to research and establish the manufacturing line at the Crossfield Works before the fire that he does not always move quickly.

105. After the fire, attempts were made to find alternative premises on which to restart the business, first in England, and then in Pakistan, and then in England again. Mr Ahmed had always considered the shoddy hard pads business to be a good one for Sartex, and (in my judgment) has always intended to restart it, if and when he found a suitable place to do so. The process of identifying a suitable place has involved not just exploring other sites, but also an evaluation of competing uses of Crossfield Works. Neither Sartex, nor the Partners, have sought to sell Crossfield Works; it has always been Sartex's intention

to keep the premises, and to rebuild them for what it considered to be the most beneficial use permitted.

106. I accept that if Sartex had identified a different development opportunity for Crossfield Works which was likely to be supported by the Council and which it considered to be a better use for the site, then it would probably have pursued that, rather than reinstating it as a manufacturing and warehousing facility. In those circumstances, it would likely (in my judgment) have reinstated the shoddy hard pad lines elsewhere. The extent to which any work to be done at Crossfield Works could accurately be described in those circumstances as reinstatement of the buildings (either in the option 3 sense referred to in *Tonkin*, or otherwise) would depend on the nature of the scheme which Sartex adopted. But as alternative possibilities at Crossfield Works became more limited, and as Sartex was unable to find appropriate manufacturing premises elsewhere, reinstating the manufacturing facility at Crossfield Works has become its clear solution.

107. I found Mr Ahmed to be a straightforward witness, and his evidence as to Sartex's intentions should in my judgment be taken at face value. On the basis of the material before me I accordingly conclude that Sartex has at all times since the fire genuinely intended to reinstate the plant and machinery lost in the fire, and has at all times intended to reinstate them at an appropriate manufacturing site. Immediately after the fire, that was intended to be achieved by reinstating the manufacturing facility at Crossfield Works. From mid-2011 Sartex considered various alternatives (both for Crossfield Works, and the location of the replacement manufacturing site), but from early 2018 Sartex has intended to reinstate the manufacturing facility at Crossfield Works, so that the shoddy hard pad lines can be reinstated there.

108. I accordingly conclude that in all the circumstances, including events before and after the fire, and up to and including the trial, that the reinstatement basis is the appropriate measure of indemnity, both in respect of the buildings, and the plant and machinery. It is that measure which most fully indemnifies Sartex for the loss caused by the fire. Further, if it were necessary (as Endurance submits) for Sartex to show at the date of the trial that it has a genuine, fixed and settled intention to reinstate the buildings, plant and machinery, it has in my judgment done so. On the facts of this case, I do not consider the date of the expiry of the limitation period to be relevant, but if it were, I would make the same findings in respect of it.

109. Having made those findings, Sartex's alternative case for a declaration does not arise; Sartex is entitled to be indemnified on the reinstatement basis. But despite the findings I have made, which I have made on the balance of probabilities, I would accept that the overall circumstances, including in particular the delay and the other factors referred to by Endurance, give rise to a real possibility that the reinstatement of the buildings, plant and machinery may not take place. If therefore, I were wrong in my conclusion that Sartex is presently entitled to the agreed cost of reinstating the buildings, plant and machinery, I would have taken a similar course as the court in *Great Lakes*, and granted a declaration in the terms sought by Sartex.

Betterment

110. Endurance submits that if (as I have held) Sartex is to be indemnified on the reinstatement basis in respect of the buildings at Crossfield Works, then there should be a deduction from the agreed reinstatement costs figure of £2,345,293.20 (or £1,931,223 net of

average) on account of betterment. No particular amount was identified for these purposes, but it was suggested by Endurance that a deduction of between a quarter and a third would be appropriate, as had been indicated by Forbes J in *Reynolds v. Phoenix* (at p.453):

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

111. Sartex objected to there being any deduction for betterment on a number of grounds. The first was that it was inconsistent for insurers to use (as had been done) a pre-betterment figure for the purposes of determining average, and then to seek to apply betterment to the claim net of average, as doing so would produce a double reduction. I do not consider that is correct. It is common ground that average under Section A of the Policy is to be calculated by reference to the value of the buildings at the time of the loss, and that such value is to be assessed on the contractual reinstatement basis, which is on a new for old basis, i.e. without betterment. An agreed reduction has been calculated on that basis.

112. Sartex's second argument was that no reduction for betterment is provided for in the Policy, and so none should be made. While it is correct that the Insuring Clause does not deal expressly with betterment, I do not consider that its failure to do so means that no deduction can be made for betterment, if such a deduction is necessary to reach the figure which indemnifies the insured for its loss. In this sense, betterment is an inherent element of the indemnity principle.

113. Sartex's third argument was that the law has moved on since the judgment in *Reynolds v Phoenix*. In *Great Lakes* (at [80]) Christopher Clarke LJ observed that: "*the justification for a deduction for betterment is open to question*", and referred to the passage in MacGillivray on Insurance Law, 14th Ed. (at 21-020) which states:

> *It is submitted that in cases where the insured has no practicable alternative to repairing real property that has been damaged (as opposed to replacing property that has been lost), it may in some circumstances be appropriate to allow the full cost of reinstatement subject always to the limit of the total sum insured in the policy.*

114. Sartex further referred to decisions in other claims for damages in contract and tort, and contended that there is no reason in principle why the assessment of loss in the context of an insurance claim should be different to the assessment of damages in claims against third party tortfeasors or contract breakers, when the object (in both cases) is to compensate the injured party. Mr Elkington referred me in particular to passages from *The Gazelle* (1844) 2 W Rob 279, *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, at 468 and 473, and *Lagden v O'Connor* [2004] AC 1067, in which Lord Hope referred to those cases, and continued as follows (at [34]):

> *Of course, the facts in these two cases were quite different from those in this case. But I think that the principles on which they were decided are of general application, and it is possible to extract this guidance from them. It is for the*

> *defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.*

115. There is considerable force in the argument that (in the absence of express terms addressing the position) betterment in this area of insurance law should be treated in the same way as in other areas of the law. The long-established basis for a deduction for betterment in this area of insurance law is that the insured, by reason of receiving something "new for old", has received a benefit by reason of the better condition and quality of the "new", and that an allowance for that benefit should be made so that the indemnity reflects his actual loss, and no more. But in circumstances where the insured has chosen (or has received) the most reasonable and least expensive option available to him, it is a benefit that is in effect an unavoidable consequence of the loss. It is very arguable that in such circumstances making a deduction for betterment deprives the insured of a full indemnity for his loss.

116. The principle of betterment in this area of insurance law is however as well established today as it was at the time of *Reynolds v. Phoenix*. The potential hardship caused by its operation is well known, and was indeed recognised in *Reynolds v. Phoenix* itself. It is often addressed by express policy terms (including, in the present case, the specific reinstatement provisions in Condition 7 of Section A of the Policy). But where it is not, I do not consider it open to me to depart from the well established principles surrounding its application, and accordingly I do not accede to Mr Elkington's submission that it should be approached in the same way as it is in the assessment of damages in other areas of the law.

117. Whether any, and if so, what, deduction for betterment is to be made on the facts of any particular case is however necessarily fact sensitive. It depends on the damage suffered, and the repairs proposed to be made. In *Tonkin*, HHJ Coulson QC had the benefit of detailed bills of quantity for the proposed reinstatement scheme, and was able to consider on a line by line basis any contentions of the insurers that deductions should be made for betterment, or indeed that they did not constitute reinstatement at all (see, e.g., at [359]).

118. I do not have the benefit of detailed bills of quantity in this case, nor indeed do I have details of the notional reinstatement scheme which the parties have used as the basis for their agreed reinstatement cost of the buildings of £2,345,293.20. In paragraph 2.7.3 of the Joint Statement of the expert quantity surveyors, in which this figure was agreed, it was stated that it was "*the likely cost of reinstating the Buildings destroyed or damaged in the fire to the condition they were in immediately before the fire as they were at 2011, using modern materials*". While this language might have suggested that the figure had

made all appropriate allowances, it was apparent from comments attached to the Joint Statement that this description was not intended to deal with betterment, and that each expert had different views as to how it should be approached.

119. Endurance's expert, Mr Taft, considered that the fact that an old building is being replaced by a new one will inevitably result in an element of betterment, albeit some modern materials would lead to a reduction in building costs, while others might increase the costs. While it was (in his view) extremely difficult to establish a cost differential for general betterment, he noted that loss adjusters calculated a range of figures to account for it, including percentage deductions of 25%, 30%, or 35%. He was not able to comment on whether that approach was appropriate, or whether any of those percentages were the correct ones to use in this case.

120. Sartex's expert, Mr Taylor, broadly agreed with the principles set out by Mr Taft, but without further details of the pre-fire specifications, and those of the new scheme, he considered it was very difficult to assess the cost of any betterment, and he did not believe that a notional percentage was appropriate. In his view, in order to provide a cost estimate for betterment, there would need to be a detailed set of drawings and specifications for the new scheme, which could be compared with the original, and which would enable any items of betterment to be identified and costed.

121. Neither expert followed up their respective comments with any further evidence designed to fill the gaps identified by each of them, and neither was called to give evidence at the trial. As a result, I do not consider that I have a sufficient evidential basis on which to make any reduction for betterment in this case. In circumstances where the notional reinstatement cost has been agreed, the onus is on the insurers to identify, and justify, any particular reductions they consider should be made, and they have not done so. On the evidence before me, I do not consider that the notional reduction proposed by Endurance of a third or a quarter (or somewhere between those proportions) is appropriate or warranted.

20% Co-insurance

122. As referred to earlier, the dispute between the parties as to whether or not the 20% co-insurance provision applied at the time of the fire turns on (1) the upshot of the call between Mr Adamson (of Paladin) and Mr Chadwick (of the brokers, Henderson) on 19 May 2011, and (2) what was agreed at the meeting at Crossfield Works on 23 May 2011, attended by Mr Ahmed (of Sartex), Mr Fielder (the underwriter), Mr Chadwick, and Mr Knape (the surveyor).

123. It is common ground between the parties that in order to be binding it was necessary for the 20% co-insurance provision to be agreed between insurers and Sartex, and that it was not something which could be imposed unilaterally by insurers. Endurance's case is that the 20% co-insurance provision was agreed during the call on 19 May 2011; it was accordingly in place at the time of the meeting on 23 May 2011, at which it was accepted and agreed by Sartex. Sartex's case is that no such agreement was reached during the call on 19 May 2011, or at the meeting on 23 May 2011, and that the provision accordingly was not applicable at the time of the fire.

124. As to the background to the events of 19 and 23 May 2011, it will be remembered that the 20% co-insurance provision was originally imposed by Mr Fielder on 11 May 2011,

following surveys of Crossfield Works on 5 April and 11 May 2011. Mr Fielder was concerned about the amount of stock which was building up on the premises, which (contrary to assurances given by Mr Ahmed) had not been reduced following the survey on 5 April 2011.

125. In his email to the brokers on 11 May 2011, Mr Fielder imposed what he described as a 20% co-insurance excess (subject to a minimum of £25,000), until such time as the stock was reduced to an acceptable level and the plant became operational. Sartex immediately pushed back on this through Henderson, leading to Mr Adamson (Mr Fielder's manager) agreeing by email on 13 May 2011 temporarily to rescind the excess, while reserving insurers' rights to re-impose any altered terms pending establishment of the facts on site. It was with this in mind that a further site visit was arranged for 23 May 2011.

126. On 19 May 2011, following a review of the risk by Mr Fielder, Mr Adamson and Mr Garrido (of Montpelier), including consideration of the photographs taken by Mr Knape at the time of his survey on 11 May 2011 (which showed a deteriorating stock position), insurers decided to reimpose the 20% co-insurance provision. This was communicated to Mr Chadwick by email from Mr Fielder that day. As the email stated, insurers were still uneasy about the stock level, and had "*decided to reimpose the 20% Co-insurance (minimum £25,000) excess effectively immediately, until the matter could be resolved next week*" (a reference to the meeting which had been arranged at the site for the following Monday, 23 May 2011).

127. Mr Chadwick immediately queried this by email, suggesting that matters should be left as they were until the site visit, and followed his email with a call on 19 May 2011 to Mr Adamson. By an internal email to Mr Fielder and Mr Garrido written and sent shortly after the call, Mr Adamson summarised the discussion he had had with Mr Chadwick. According to this email, Mr Chadwick had pointed out the difficulties he had in communicating the coverage restrictions to Sartex (with both Mr Ahmed and Mr Khan being away), and both he and Mr Adamson noted that it would be difficult to give notice of changed terms under the Policy prior to Monday.

128. Mr Adamson's email further recorded that after he had stressed insurers' concerns about the risk, including the apparent increase in combustible stock on the premises, matters were left by him requiring Henderson to use their very best endeavours to communicate the coverage restrictions to Sartex as soon as possible, which Mr Chadwick agreed to do. This was duly done by Mr Tierney the following morning (20 May 2011), when he informed Mr Kahn of the position by email, expressing his disappointment with insurers' stance and stating that "*[t]his will be reviewed on Monday when both insurers and [Mr Chadwick] will be present and hopefully this matter can be resolved"*.

129. Both Mr Adamson and Mr Chadwick gave evidence about the call between them on 19 May 2011. Given the length of time between the call and their evidence, I do not consider that their evidence takes matters much further than the contemporaneous report of the call prepared by Mr Adamson. I am however satisfied that no agreement binding on Sartex was reached between them on the call that the 20% co-insurance provision would apply with immediate effect.

130. Before returning to the events surrounding the call, it is necessary to consider in more detail what insurers meant when they referred to "*imposing*" or "*reimposing"* the 20% co-insurance provision. There was some confusion in the evidence as to whether insurers

had, or believed they had, a right to impose such an additional term unilaterally under the Policy, or whether it was something that needed to be agreed between them and Sartex if it were to apply.

131. As to the legal position under the Policy, insurers did not have the right to impose additional terms unilaterally. But what they did have was a number of ways to protect their position in circumstances where the risk turned out either to be not as presented at the time of placing, or where it had changed materially since then. These included the possibility of avoiding the Policy for non-disclosure or misrepresentation at the time of placing, of relying on the alteration of risk or duties of the insured provisions in General Conditions 11 and 14 of the Policy, and of giving 30 days' notice to cancel the Policy under General Condition 17.

132. These represented the principal underwriting actions open to insurers if they were concerned about the presentation of the risk to them, or the way the risk had deteriorated since it was written. Even if they did not consider the circumstances to be such that they could engage the options relating to the presentation or alteration of the risk, they nonetheless had the right to cancel the Policy on 30 days' notice if they decided that the risk was not one they wished to continue to insure.

133. In some circumstances insurers might also be able to rely on subjectivities imposed by them at the time the risk was written, and to insist on additional terms before removing any conditions to their commitment. In the present case, this was not however an option available to insurers in May 2011. Although the original risk was written subject to survey, the survey had led to the risk improvement requirement (the RIR) referred to earlier, which had been satisfied in March 2011. The subjectivity accordingly ceased to apply at that time.

134. The options open to insurers under the Policy, and in particular the right to cancel on 30 days' notice, in practical terms gave insurers the ability to stipulate additional terms as the price for continuing on risk. If such additional terms were in fact fair and reasonable (as in this case Mr Chadwick agreed they were), the practical position is that the insured is likely to have little choice but to accept them, on the basis that it is unlikely to find better cover elsewhere. This does not mean that the insured does not have to agree to them, but it is perhaps understandable how insurers came to use the language of imposition.

135. The position therefore was that the "*imposition*" of the co-insurance provision was (as Mr Adamson appreciated) in effect the offer of revised contractual terms by insurers to Sartex. It was open to Sartex to decline to proceed on that basis, but if that were its position, then insurers (by one means or another) would likely take formal steps to come off risk, or otherwise limit their exposure.

136. I am satisfied that Mr Adamson appreciated that agreement by Sartex was necessary, and part of the purpose of insisting in the call on 19 May 2011 that the additional terms be communicated to Sartex was to enable it to decide on its position. He was aware from Mr Chadwick that Henderson was not in contact with the relevant individuals at Sartex at that time, and that in the context of Sartex's previous objection to the 20% co-insurance provision, he (Mr Chadwick) would need their instructions before he could agree to it. Although in parts of his evidence Mr Chadwick stated that he agreed to the provision on the call, in the overall context of the call (and the terms of Mr Adamson's internal email

shortly after it), I do not conclude that he did more than agree that the terms were reasonable, and that Henderson would communicate them to Sartex.

137. It was in this context that the meeting on 23 May 2011 took place at Crossfield Works. As already mentioned, it was attended by Mr Ahmed, Mr Fielder, Mr Chadwick and Mr Knape. No contemporaneous notes of the meeting were taken (or have survived), although an email sent by Mr Fielder to Mr Chadwick after the meeting, together with the survey report produced by Mr Knape on 24 May 2011, throw some light on what was discussed.

138. It is accepted by Mr Ahmed that he was aware at the time of the meeting that insurers had sought to reimpose the 20% co-insurance provision at the end of the previous week, and indeed that he considered it was in place at the time of the meeting. Given that one of the main purposes of the meeting was to sort out whether or not it was to apply going forward, it is to be expected that it was discussed.

139. It appears that the visit started with an inspection of the inside of the premises, in which it was apparent that the overall position had not improved since the earlier site visit by Mr Knape on 11 May 2011. The electrical supply had still not been installed, but to facilitate limited production, a generator (together with a fuel supply tank) had been installed, although it was not working at the time of the visit. The stock levels were similar to those observed on 11 May 2011, and had not been reduced. The stock was piled high and near to the machinery, which Mr Fielder regarded as a substantial fire risk.

140. After the inspection, it appears that the group had a conversation in the yard of the premises. Mr Ahmed's account of the discussion which took place was that Mr Fielder agreed that Sartex could have until 15 June 2011 to get full production up and running, and to sort out the stock levels, and if that did not happen, the 20% co-insurance provision would apply. The matter would therefore be reviewed on 15 June 2011, but the 20% co-insurance provision would only apply if the position had not been satisfactorily resolved by then.

141. Mr Fielder accepted that it was agreed that the position would be reviewed in mid-June, in the light of Mr Ahmed's further promises that the problems on site would be resolved by then, but he disagreed that there was any suggestion that the 20% co-insurance provision would not apply in the meantime. From his point of view, that provision was already in place, and was not objected to at the meeting – indeed (in his oral evidence) he could not recall it being specifically discussed. The relevance of 15 June 2011 for him was that if the stock and production position had not been sorted out by then, insurers would consider further underwriting actions, including coming off risk. It was clear to him that the provision was in place, and if Sartex had refused to accept it, he would have immediately given notice to come off cover.

142. The day after the meeting Mr Fielder sent Mr Chadwick an email confirming the discussion at the premises. The email summarised the position as seen in relation to the machinery and the stock, and stated that Mr Fielder wanted a letter from Sartex giving various information, including the anticipated start date for full production, which would enable stock levels to reduce. The email continued: "*On receipt we may consider reducing excess level (currently it is 20% co-insurance with £25,000 min)… In any event we need this plant to be up and running and stock issue sorted by the 15th June or as close as possible, otherwise we may need to consider our position*".

143. Mr Chadwick's evidence in his witness statement was that there was a discussion as to whether insurers would be willing to lift the provision, but Mr Fielder refused to do so, and all those present at the meeting accepted and agreed that it remained in place. His oral evidence was less emphatic, although still to the effect that there was no dispute at the meeting that the 20% co-insurance provision was in place, and indeed (like Mr Fielder) his recollection seemed to be that it was not discussed at the meeting. From Mr Chadwick's point of view, Mr Ahmed knew that insurers were insisting on that provision, and there was no objection to it.

144. In January 2012 Mr Chadwick produced a note of the meeting. This was produced in circumstances where Sartex had indicated a complaint to Mr Wilkinson of Henderson about the 20% co-insurance provision, and Mr Wilkinson had asked Mr Chadwick for a note of what had happened on 23 May 2011. The note records that following discussion "*it was agreed that the position regarding the co-insurance clause would be reviewed on receipt of confirmation in writing from the client that the generator is up and running, anticipated date of full production and realistic timescale when electrical supply will be fitted*."

145. Mr Fielder's email of 24 May 2011 is in my judgment the most reliable account of what took place at the meeting. Although, as I have said, I considered Mr Ahmed to be a straightforward witness, I am not able to accept his recollection that it was agreed that the co-insurance provision would only apply if the problems on site had not been satisfactorily resolved by 15 June 2011. While he has no doubt convinced himself of the accuracy of that recollection, I am satisfied that it is wrong. In the absence of material improvements to the stock situation (which had not happened), it is improbable that Mr Fielder would have been willing to countenance such a position, and certainly not without referring the matter to Mr Adamson and Mr Garrido. His email on 24 May 2011, which was never challenged by Mr Chadwick, is in any event inconsistent with Mr Ahmed's recollection.

146. Given that one of the purposes of the meeting was to resolve the question as to the application of the co-insurance provision, I consider that it is likely to have been discussed, although the fact that both insurers and the broker considered it a reasonable provision to apply might have meant (in the light of the stock situation observed on site) that the discussion about it was not extensive. But I am satisfied that the discussion as to the circumstances in which it might be reduced, or what might happen on 15 June 2011 if the situation had not improved, were on the basis that it was accepted that the 20% co-insurance provision was in place. This was likely to have been an express agreement by Mr Ahmed, or implicit from his conduct. If the provision had not been agreed, it would be expected that there would have been a substantial debate about it, and the email record afterwards would have been very different.

147. These conclusions are supported by events after the meeting. On 26 May 2011, the day after the fire, Mr Chadwick and Mr Wilkinson of Henderson visited Sartex to discuss the insurance position. Mr Wilkinson was new to the file, and was briefed by Mr Chadwick in advance. Mr Wilkinson's evidence (which I accept) was that Mr Chadwick informed him that the 20% co-insurance provision had been agreed following the survey on site. When they visited Sartex, the effect of the provision in reducing the amount of Sartex's insurance claim was discussed. Its application was not at that time challenged by Mr Ahmed, which would have been expected if it had not in fact been agreed a few days earlier, or if (as Mr Ahmed has suggested) there had been an express agreement that it

would not apply. The application of the provision was not disputed by Sartex until later in the year.

148. Endurance also relied on the fact that when Sartex subsequently commenced proceedings against Henderson in March 2015 for alleged breach of duty in connection with the placing of the Policy it included allegations of breach of duty in relation to the 20% co-insurance provision, which were premised on the provision being in place and binding. They also point to the fact that the business interruption claim was settled at a figure of £657,127, which included a full reduction for the 20% co-insurance. Although they are inconsistent with the agreement alleged by Mr Ahmed to have been made on 23 May 2011, I do not consider that these factors ultimately take matters much further.

149. There are two further matters to refer to in this connection. The first is Sartex's contention that Endurance must show not only that the 20% co-insurance provision was agreed, but that it was also agreed to extend to fire risks under the Policy. The basis for this contention is that the excess of £5,000 in the Policy, which applied from inception, did not apply to fire risks. It is fair to say that this was something of a surprise to Mr Adamson and Mr Fielder, but it is common ground that the wording of the Policy does not extend that excess to fire risks.

150. Sartex's contention is that when the 20% co-insurance provision was first imposed, and then reimposed, it was expressed in terms of being an "*excess*", and therefore (it is suggested) a revision to the excess provision in the Policy, which did not apply to fire risks. Ingenious as this argument is, I cannot accept it. It is quite clear that the rationale for the imposition (and then agreement) of the 20% co-insurance provision was to address what insurers prudently considered to be an increase to the fire risk. That was the purpose of the provision, and I have no doubt that it was understood as such by all concerned. It is properly to be considered as a free-standing provision, but if that is wrong, and it was a revision to the existing excess provision in the Policy, the same was accordingly revised in this respect to extend to fire risks.

151. The second matter to refer to is Endurance's alternative submission that if it is wrong as to the applicability of the 20% co-insurance provision, then Sartex needs to give credit in its claim on the Policy for some or all of the settlement sum of £1m paid to it by Henderson in settlement of the action brought against them. The basis for this contention is that the claim against Henderson (as referred to above) included a claim based on the existence of the co-insurance provision, and that therefore (if the provision does not apply) it has received a benefit from Henderson which needs to be brought into account in its claim on the Policy. I have serious reservations as to the correctness of this submission in law, but in view of the findings I have already made, it is unnecessary for me to consider it further, and I accordingly do not do so.

Market value of the buildings

152. If, contrary to my earlier conclusions, the reinstatement basis of indemnity does not apply, there is a further issue between the parties as to what is the correct market value of the Crossfield Works for the market value basis of indemnity. The issue arises in the following way. The amount offered, and paid, by insurers in respect of the buildings, plant and machinery claims under the Policy was a total of £2,141,527. This was net of 20% co-insurance, and comprised (rounded up) £1,141,527 for the open market value of

the buildings, and £1,000,000 for the open market value of the plant and machinery. The gross sum for the open market value of the buildings was on this basis £1,426,908.

153. Sartex has never taken issue with these figures. The List of Issues accordingly stated that the figure of £2,141,527 was the appropriate amount to be paid if Sartex's recovery was limited to payment on an indemnity (i.e., market value) basis, and if a 20% deduction for co-insurance was applicable. No permission was sought for expert evidence on the market value of the buildings by either side.

154. Following disclosure, and the review of information relating to the value of Crossfield Works before the fire, Endurance concluded that the open market figure for the buildings on which its offer (and payment) had been made, was far too generous. It accordingly applied in August 2018 to amend its pleadings to introduce a counterclaim for the return of the monies overpaid, and to amend the List of Issues to delete the reference to the £2,141,527 (which included the £1,141,527 in respect of the buildings) being the appropriate amount to be paid on the market value / 20% co-insurance basis. Its application to do so was dismissed by Moulder J by Order dated 5 October 2018.

155. By its Rejoinder served to Sartex's Re-Re-Amended Reply, Endurance specifically denied that the open market value of the buildings was £1.427 million. The Rejoinder was served on 8 February 2019, with permission in principle from Christopher Hancock QC (sitting as a Deputy Judge) by Order dated 1 February 2019. That Order gave permission to Sartex to serve its revised Reply, a copy of which had been attached to its application for permission served in December 2018. The terms of the Rejoinder were not however available to the Court when permission to serve it ("*if so advised*") was granted.

156. The position now adopted by Endurance is that it accepts that it is bound by the figure of £1,141,527 for the open market value of the buildings, being the figure which it offered and paid many years ago. With its application to claim recovery of what it regards as its overpayment having been dismissed, it accepts that it cannot now seek to re-open that. But what it does say is that does not mean that Sartex is entitled to recover £1,426,908 as the market value of the buildings, should it succeed on the 20% co-insurance issue.

157. As to this, Endurance points to the denial of that figure being the open market value of the buildings in its Rejoinder, and to the principle that the List of Issues does not supersede the pleadings. Its point is that if Sartex wants to recover more than £1,141,527 in respect of the market value of the buildings, it needs evidence to establish that claim, which it has not adduced.

158. As I have concluded that Sartex is entitled to be indemnified on the reinstatement basis, and not on the market value basis, and as I have also concluded that the 20% co-insurance provision does apply, this point does not arise. It is nonetheless right that I should express my views on it briefly. It is unfortunate that the issue has arisen in the way it has. The consequences which Endurance now says flow from the relevant part of its late Rejoinder were clearly not appreciated by Sartex, and in so far as it in fact raises issues which would need to be addressed by expert evidence, the pleading was too late to put them in play.

159. But for present purposes there is a short answer to the point. The £1,141,527 figure which Endurance accepts it is bound by is the product of the 20% co-insurance provision

being applied to the gross figure of £1,426,908. It therefore follows as a matter of calculation, rather than expert valuation evidence, that if the 20% co-insurance provision is not in play, the gross figure is the applicable amount of recovery. If the point were relevant, I would accordingly have held that Sartex could recover the full £1,426,908 in respect of the open market value of the buildings.

Other matters

160. As mentioned at the start of this judgment, there were a number of subsidiary issues between the parties which it is not necessary to address in any detail. The first of these relates to Sartex's insurable interest in the buildings, plant and machinery. Endurance had contended that Sartex's interest was limited; it was the licensee of the premises, and there was material to suggest that it did not own three items of the machinery. In view of the terms of the licence, and the fact that Sartex was on any view the bailee of any machinery not in fact owned by it, these points would not reduce the amount of the indemnity otherwise payable to Sartex, and I did not understand them to be pursued by Endurance.

161. The second relates to the issue of average concerning the buildings (there being no equivalent issue in relation to the plant and machinery). During the course of the hearing, the parties agreed that the appropriate reduction to be made was 17.7%, which reduced the agreed amount payable if the reinstatement basis of indemnity applied from £2,345,293 to £1,931,223.

162. The third relates to the question of salvage. Under General Condition 15 of the Policy Endurance has in effect the right to be given access to the premises for the purposes of realising salvage. The parties have agreed that the value of the remains of the plant and machinery on site is £17,280. They have also agreed that in the interests of efficiency, the appropriate way to deal with the matter at this stage is for Sartex to keep the benefit of the salvage, but for a compensating allowance or payment to be made to Endurance. In light of the findings I have made, the appropriate course is accordingly for Sartex's claim on the Policy to be reduced by £17,280.

The amounts payable

163. As a result of my findings, Sartex is entitled to recover more than the £2,141,527 already paid to it by Endurance under the Policy in respect of its buildings, plant and machinery claims. As already stated, the underlying amounts payable on the reinstatement basis of indemnity are agreed:

    (1) In relation to the buildings, the reinstatement cost at the date of the fire is agreed at £2,345,293, reducing to £1,931,223 after the application of average (at 17.7%), and to £1,544,978 after application of the 20% co-insurance provision. A total of £1,141,527 has been paid to date by insurers in respect of this element of the claim, leaving (after rounding) a balance of £403,452.

    (2) In relation to the plant and machinery, the reinstatement cost at the date of the fire is agreed at £3,600,000. This is subject to a cap of the sum insured of £2,500,000, reducing to £2,000,000 after application of the 20% co-insurance provision. A total of £1,000,000 has been paid to date by insurers in respect of this element of the claim, leaving a balance of £1,000,000.

164. The total payable is accordingly £1,403,452, from which the agreed salvage figure of £17,280 is to be deducted, giving a balance of £1,386,172. Sartex has further claimed interest on this sum from 25 May 2011 (the date of the fire), alternatively from 21 October 2011 (the date when liability was accepted under the Policy), at the rate of 3% above base rate from time to time. As this was not a matter addressed by Endurance during the trial, I will hear further submissions in relation to the appropriate rate and period at which interest should be payable.

Conclusions

165. For the reasons set out above, I conclude that Sartex is entitled to be indemnified on the reinstatement basis in respect of the buildings, plant and machinery which were damaged or destroyed in the fire at Crossfield Works on 25 May 2011. Its claim in respect of the buildings is not subject to any deduction for betterment. I also conclude that Sartex's insurance was at the time of the fire subject to a 20% co-insurance provision, and that its claim for indemnity in respect of the buildings, plant and machinery is to be reduced accordingly.

166. The upshot is that Sartex is entitled to judgment on its claim for £1,386,172, plus interest. I would ask Counsel to draw up a draft Order reflecting the conclusions in this judgment, and I will hear further argument in relation to the appropriate rate and period of interest recoverable by Sartex.