Case No: A3/2015/0761 & A3/2014/0762

Neutral Citation Number: [2016] EWCA Civ 1003
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON MERCANTILE COURT
His Honour Judge Mackie QC
2013-936

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2016

Before :

LORD JUSTICE LAWS
LORD JUSTICE LEWISON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

	GREAT LAKES REINSURANCE (UK) SE (Formerly GREAT LAKES REINSURANCE (UK) PLC)	**Appellant**
	- and -	
	WESTERN TRADING LIMITED	**Respondent**

- -
- -

Mr Robert Moxon Browne QC an **Mr Lucas Fear-Segal** (instructed by **Kennedys Law LLP**) for the **Appellant**
Mr Ben Elkington QC (instructed by **Edwin Coe LLP**) for the **Respondent**

Hearing dates: 21 & 22 June 2016

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Judgment **Lord Justice Christopher Clarke:**

1. The question in this appeal is whether a company, insured under a policy providing cover against fire, is, or may be, entitled to an indemnity consisting of the cost of reinstatement after the building insured was destroyed by fire. On 26 January 2015 HH

Judge Mackie QC sitting in the Mercantile Court decided that the company was entitled to a declaration as to entitlement and it is from that decision that the insurers appeal.

2. The properties concerned (hereafter "the Property") are 1-8 Station Street, in Central Walsall. The principal building, at 1-7 Station Street, is known as the Boak Building. It was built as a leather factory in about 1906 and is an historic listed local landmark. The Property is owned by Mr Chinderpal Singh ("Mr Singh"). No 8 is part of a terrace and has a large shed behind it. The claimant insured, now the respondent, is Western Trading Limited ("Western Trading"). Mr Singh is its only director and its principal shareholder. The other shareholder and company secretary is his wife. Western Trading exists to hold and manage Mr Singh's property portfolio. Some properties, such as the Property, are owned by Mr Singh personally. Others are owned by Western Trading.

3. The defendant insurers, now the appellants, are Great Lakes Reinsurance (UK) Plc, an insurance company which is a subsidiary of Munich Re (hereafter "the insurers").

4. The Boak was suitable for conversion. In January 2009 planning permission was given for its conversion into 31 residential flats.

5. By 24 July 2012 the Property, which was let to a company owned by Mr Singh's son, was essentially a shell, unused save for occasional rough storage on the ground floor and, in the case of No 8, was derelict and awaiting demolition. On that date it was destroyed by fire and its listed building status was in consequence revoked. At trial the insurers contended (i) that Western Trading had no insurable interest in the Property; (ii) that the policy was avoidable for misrepresentation and non-disclosure; and (iii) that Western Trading was in breach of warranty. The judge did not accept that any of that was so [61] [100] and [105] and there is no appeal from his decision on these points.

The insurance

6. Western Trading had had a series of polices with the insurers. For the 2012/3 policy year it purchased insurance on the Property, which included material damage, loss of rent and liability cover. The sum insured for the buildings was £ 2,121,800, which represented what was understood to be the rebuilding cost of the Property. For the 2010/11 and 2011/2 policy years the figure for "Present Building Value (rebuilding cost)" had been £ 2,000,000 and then £ 2,060,000. The premium charged for the 2012/3 year was a percentage (0.19%) of the rebuilding cost of £ 2,121,800.

7. The market value of the Property was much less than the sum insured. The experts agreed that the value of the Property before the fire was only £ 75,000, based on its existing condition and user.

8. The Insuring Clause of the Material Damage section of the Policy – Section A - provided

as follows:

> *"Subject to the General Conditions and Exclusions of this Certificate, 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 Assured against loss of or damage to the property specified in the Schedule (hereinafter referred to as 'the Property') caused by or arising from the Perils shown as operative in the Schedule, occurring during the period of this insurance.*
>
> *"Underwriters shall not be liable for more than the Sum Insured stated in the Specification or in the Certificate in respect of each loss or series of losses arising out of one event at each location as stated in the Schedule."*

9. The Memoranda [sic] in respect of Section A included a reinstatement clause in the following terms:

> *"4) Reinstatement*
>
> *It is hereby agreed that in the event of the property insured under item 1 of this Section of the Certificate being lost, destroyed or damaged by any peril insured hereunder the basis upon which the amount payable under each of the said Items of the Certificate is to be calculated shall be the reinstatement of the property lost, destroyed or damaged subject to the following special provisions and subject also to the terms and conditions of the Certificate except in so far as the same may be varied. For the purpose of the insurance under this Memorandum 'reinstatement' shall mean:*
>
> *a) the carrying out of the following work, namely,*
>
> *i) Where property is lost or destroyed, the rebuilding of the property, if a building … in a condition equal to but not better or more extensive than its condition when new.*
>
> *5) Special Provisions*
>
> *a) The work of reinstatement (which may be carried out upon another site and in any manner suitable to the requirements of the Assured subject to the liability of the Underwriters not being thereby increased) must be*

carried out with reasonable despatch otherwise no payment beyond the amount which would have been payable under the Policy if this Memorandum had not been incorporated therein shall be made;

...

c) No payment beyond the amount which would have been payable under the Policy if this Memorandum has not been incorporated herein shall be made until the cost of reinstatement shall have been actually incurred."

10. The judge accepted - at paragraphs [12] [28] [57] and [59] - the evidence of Mr Singh, whom he found to be straightforward and truthful, as to the terms upon which Western Trading let and managed the properties which were owned by him. That evidence was to the following effect:

i) Western Trading had the right to sub-let the properties and to receive and enjoy the rent received from the sub-tenants;

ii) In return Western Trading was responsible and paid for the upkeep and maintenance of the buildings, for arranging insurance for the properties, and for the outgoings on the properties. This arrangement applied to the Boak building for which Western Trading paid all the outgoings and which it had a responsibility to replace in the event of fire.

iii) Western Trading paid Mr Singh rent. The amount was not calculated by reference to the total rents collected by Western Trading but reflected what Mr Singh thought was a reasonable charge and what Western Trading could afford to pay.

iv) The rent paid was recorded in the accounts and financial statements of Western Trading and was declared in Mr Singh's personal accounts and in his tax returns.

11. The arrangements between Mr Singh and Western Trading were not recorded in writing. Mr Moxon Browne QC on behalf of the insurers has drawn our attention to the evidence given by Mr Singh in cross examination. It is in fairly general terms and leaves a number of matters unclear including (a) how exactly the arrangements came to be made; and (b) the exact nature of the tenancy, if that is what it was, whether for a term, periodic or at will. However, the insurers do not seek to challenge the judge's findings of fact.

12. The judge referred [113] to Mr Singh's evidence that he genuinely intended to reinstate

the Boak both for emotional and economic reasons. As to the former, members of his family had owned the Boak for 33 years and his children had had links with it when growing up. The building had been a feature of their family life. In 2002 he had bought his brother's half interest for £ 100,000 when he, himself, owned half.

13. The primary relief that Western Trading sought was a declaration that it was entitled to be indemnified under the terms of the Policy in respect of the losses it had suffered and was continuing to suffer as result of the fire up to the limits of indemnity contained within the Policy. Further or alternatively it claimed to be entitled to the cost of reinstating the Property up to the limit of £ 2, 121,800 and to a loss of rent in the sum of £ 29,500. (As to the latter Western Trading was awarded £ 14,750).Western Trading later reversed this position by contending, in a response of 20 December 2013 to a request for further information of its Reply, that its primary case was that it was entitled to recover the cost of reinstating the Property even though it had not yet been reinstated because the insurers had wrongfully purported to avoid the policy and refused to accept any liability – a conclusion which would not appear to flow from the premise. Then in its opening [103] of 19 November 2014 it said that the primary relief sought was a declaration.

14. At the trial the insurers relied on the defences set out in [5] above all of which had been pleaded. There was no pleading which said that a declaration would be inappropriate, even if the substantive defences were rejected.

15. The judge decided that Western Trading had the right to be indemnified up to the limit of indemnity for the cost of reinstating the Property if it did so. He plainly regarded the making of a declaration as a sensible approach not least because it would protect the insurers. If Western Trading did not reinstate, the insurers would be "*spared the consequences of the declaration*" [130].

16. Mr Moxon Browne submitted to the judge that, although the insurers had failed in their substantive defences, Western Trading's only remedy was in damages for any reduction in open market value, relying on some observations of Megaw, LJ in *Leppard v Excess Insurance Co Ltd* [1979] 2 Lloyd's Rep 91. Even if a declaration was technically available, it would, he submitted, be inappropriate to grant one for three reasons.

17. First, Mr Singh had shown no signs of making reinstatement [137]. As to that, the judge repeated [138] that the grant of a declaration would remove from the insurers the concern about whether there was a genuine intention to reinstate, or whether reinstatement would take place.

18. Secondly, it was said that there were difficulties in construing what reinstatement meant in the context of a non-standard building. Mr Moxon Browne pointed to a difference of view on that topic in the decision of this court (obiter on this point) in *Beaumont v*

Humberts [1990] 49 EG 46. As to that the judge felt that the fact that judges might disagree about the approach in one context did not mean that the matter could not be resolved in another. I note that in that case Taylor LJ, as he then was, felt that "*the problem of valuing for reinstatement a house of this special kind did not admit of a precise, incontrovertible answer*".

19. Thirdly, there was uncertainty about who might carry out any proposed reinstatement and for whose benefit, other than Mr Singh. It was wrong in principle to make a declaration relating to rights in the case of a hypothetical, uncertain or undefined future event. The judge regarded this as another way of putting the issue of practical feasibility. Issues of detail could be resolved by agreement, ADR or, if necessary, the court. In any event the grant of a declaration would remove the insurers' concern about Western Trading's intentions.

20. Lastly reliance was placed on the decision of Forbes J in *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440 in which he said that the claimant must prove a genuine intention to reinstate which was not mere eccentricity. Mr Singh's pleaded intention to reinstate the Boak using modern materials/architecture was said to be eccentric because such a building would have no aesthetic or sentimental value and would serve no commercial purpose.

21. As to that the judge held that Western Trading has a contractual right under the policy to reinstatement; that "eccentricity" did not come into it; and that, if it did, there was nothing eccentric about reinstating a building with which Mr Singh's family had had long and close connections.

22. Accordingly, the judge thought that a declaration was a particularly suitable remedy. In the result he made a declaration, subject to a condition not now material, that:

> *"the Claimant is entitled to be indemnified by the Defendant under the terms of Policy No. P01957/2012/PO in respect of* ***the losses*** *it has suffered (and is continuing to suffer) as a result of the fire on 24th July 2012, up to the limits of indemnity within the Policy".*

23. Mr Moxon Browne submits that this declaration should not have been made for two reasons. Firstly, it begs the question as to what are the losses that Western Trading has suffered or will suffer in respect of which it is entitled to an indemnity. It does not deal with whether that covers reinstatement or what reinstatement means. Secondly, there are, in any event, no relevant losses. There was neither an accrued breach of the contract of insurance nor any prospect of any future one. The measure of Western Trading's loss was the reduction in the open market value of its interest in the Property on account of the fire and there has been none. The declaration has, therefore, "*nothing to bite on*" and

is pointless (ground 3 of the appeal). He puts as the first ground of the insurers' appeal that the judge failed to decide whether the insurers were in breach of indemnity.

24. There is some force in the first contention. Something has gone awry in the link between judgment and declaration. The judge thought that a declaration would be appropriate because of the protection it would afford the insurers. If reinstatement took place, they would have to pay. If reinstatement did not take place, they would not. If there was a dispute as to whether what had been done amounted to reinstatement that could be resolved when the question arose by a number of different possible means,

25. That, however, assumes that the declaration is to the effect that if reinstatement takes place payment of the cost of it must follow. Western Trading and the judge may have thought that that was the effect of the declaration made, as the citations from the judgment that I am about to make appear to indicate. But in my judgment it is not. The declaration simply refers to losses. The judge was not assisted by the fact that the declaration was (a) in the form put forward on behalf of Western Trading; and (b) that the insurers agreed on the form of the declaration save for the suggestion that "*the losses*" should be changed to "*any losses*"

Intention to reinstate – what did the judge decide?

26. The judge's approach has another curious feature. At para [113] he recorded that in his evidence Mr Singh confirmed that he would want to reinstate the Boak building and that his intention had always been that the claimant would develop that building. As to that the judge said:

> *"I refer below* ***to how I see*** *the Claimant's expressed intention to* ***reinstate but do so briefly because, if a Declaration is granted, the issue does not matter.*** *Similarly, there is late but extensive evidence about the Claimant's experience of development by itself, or the lack of it, and, for the same reason* ***I find it unnecessary to make a finding on the issue. Either the Claimant can or will reinstate or it will not****".*

Later on, however, he said the following:

> "*123 A practical as opposed to conceptual reason why market value of the site might be irrelevant is that the Property was, and is, not for sale****. The Claimant proposes to develop it into flats****, perhaps for renting out. The experts did not have a full opportunity to evaluate that proposed development although Mr Clarke made some helpful and objective comments.*
>
> *124. The Boak building is* ***intended by the Claimant*** *to be the*

> *focal point of development of Station Street both on the Property and on other land Mr Singh owns. The value of the Boak Building to the Claimant is said to go beyond the value of the Property".*

And later:

> "*159 The only circumstances in which the Defendant would not have to pay the full cost would be if there were no reinstatement (a risk which the Declaration will protect it against).* ***I have accepted Mr Singh's evidence that he wishes to reinstate.*** *Why else would his preferred remedy depend on reinstatement"? The other evidence suggests that his previous scheme was uneconomic and that what he had in mind until the fire may well have been development of the site by others. There is however no reason to doubt the Claimant's sincerity in the situation following the fire where he already owns the site and sees value in* ***a scheme of reinstatement*** *which will produce income and which, unlike some quite different project, will to a degree be paid for by insurers. Mr Singh is a very successful property investor and has no doubt often seen opportunities which others have failed to detect."*

27. However, at paragraph 146 the judge said under the heading "*Genuine intention to reinstate"*:

> *"The wish to reinstate must be genuine. The test of that is what the Claimant does if and when it has the benefit of a declaration".*

28. There is a degree of ambiguity in the judge's approach. He regarded a declaration as the route forward; observed that, on that footing, the issue of intention did not matter; and decided that it was unnecessary to make a finding on that issue. Whether or not Mr Singh had the necessary intention would be determined by what he did – which suggests that he was not determining that now. Despite that he said that he accepted that Mr Singh "wished" to reinstate the site, a state of mind which is not inevitably the same as intention.

29. There was considerable evidence before the judge of Mr Singh's intentions: e.g. paragraphs 15. 23, 24, 27 and 28 of Mr Singh's second witness statement. In his fourth witness statement of 21 November 2014 Mr Singh set out his understanding of the concept of reinstatement in this litigation as being the rebuilding of the stripped out Boak building to a condition equal to but not better or more extensive than its condition when new in any manner suitable to the requirements of Western Trading subject to the liability of the insurers not being thereby increased and with appropriate economies in

the use of modern materials, and said:

> *"I confirm that, prior to the fire on 24 July 2012, it was the Claimant's intention that it would perform any reinstatement works in the event that the building was destroyed. That remained the case after the fire, and the reinstatement works which are now planned will be undertaken by the Claimant".*

30. Mr Janes of Janes Lathwood, Western Trading's expert quantity surveyors, assessed the cost of reinstating the Property on two bases. The first involved the use of heritage materials (e.g. imperial sized bricks and timber floors) and the second involved using modern materials (e.g. modern bricks and block and beam floors). The range of cost was between £ 2.41 and £ 2.5 million and the insurers accepted - in counsel's notes for closing submissions - that what he had costed constituted reinstatement within the policy definition and that no further refinement of the definition was necessary. These costings were on the basis that what was being notionally reinstated was an industrial unit configured as it was immediately prior to the fire and stripped of all services. The insurers' expert did not perform this exercise but it was apparent to the judge that he believed that the limit would be exceeded [151].

Cross examination of Mr Singh

31. Mr Singh was cross examined on his intentions by Mr Moxon Browne. There are passages in his evidence which cast doubt as to whether he in fact intended to reinstate as opposed to develop in some yet to be determined way. In particular at Day 2 page 35 there was this exchange

> "*Q… We are talking about what you now intend to do and you have told us that because of your feelings for the building you aspire to put back what was there.*
>
> *A No* ***I didn't say that, you're saying that.***
>
> ***Q Well.***
>
> ***A I've again told you a number of time I can't put back what's there****, but I'm saying any new structure of residential type the similar sort of format of development is the most common-sense approach to it."*

A little earlier Mr Singh had, in an obscure passage, said that the building:

> *"…. does lend itself for a very good residential or office or any type of use the way the building is laid out. It's laid out in a C-section with the windows absolutely on both elevations, which*

gives a very nice residential layout. I can't think of – ***if we were to rebuild a new shell being in a much different format***

Q Well the trouble about that….

A That would accommodate this type of use inside the building."

32. A little later Mr Singh said:

> *"…Of course, I would have reinstated this by now had I been paid out and* ***I will still do something if I receive the funds***
>
> *Q I am sure you will…*
>
> *A Even if it's on the basis –* ***this is on the basis I do develop it, I will develop that site. I don't know what the local authority will in the end allow me.*** *Obviously this is part of the same consultation I had for several years on a previous planning permission."*

33. In addition, on 16 January 2013 Mr Singh's son – Sunny Singh - wrote to the council a letter which included the following:

> *"If I'm honest with you, my view as a developer is the site and the adjoining dilapidated buildings, which are beyond economical repair and use, need to be cleared and the site tidied up, all rubble took away, ground study done,* ***and a fresh approach put to it and I will try my best to attract some good quality covenants to redevelop the site which will I'm sure will [sic] have a domino effect to other parts of the adjoining roads. Unfortunately, the Boak previously anchored the development and that is not possible now. T****here is no other plans I can formally give you now for the site as it is market driven. But one thing is clear it will be near impossible to market the site off-plan with any buildings on it. The market has changed. It needs a clean tidy site, fresh approach, fresh marketing, and I am confident we can attract* ***some form of design and build*** *but I'm sure you will agree we need to take it one step at a time. I welcome your thoughts on this, but we must be relatively quick as my father is rapidly losing interest."*

34. In one passage of his evidence Mr Singh described his son's letter as representing "*of course …a sensible approach*" and said, in relation to a possible joint venture *"I mean all along we're open to a bit of business*". His son's evidence was that the letter was "*a*

bit of bluff", written without his father's knowledge, and in general terms, to stall the council which was threatening some form of court action. He agreed that "*Market driven means could be flats, it could be a hotel. I don't know, it could be anything"*.

35. As the judge observed [117] Sunny Singh's email "*certainly suggests a future for the site closer to the Defendant's perspective than that of the Claimant*".

36. I note also that in May 2014 Mr Singh applied for planning permission to demolish the adjacent houses and ancillary premises at 9 – 13 Station Street and to clear the whole site at 1-13 Station Street. The Planning Statement accompanying the application stated in part that the "*owners do not have any clear proposals to developing the site ...proposals for type of use have yet to be discussed with Walsall Municipal Borough Council subject to a feasibility report of the type of use in demand with the area*". That permission was granted in August 2014. The report that led to the permission recorded that the Council did not have a redevelopment scheme before it. Further, as the judge found [113] Mr Singh told Mr Chubb, the insurers' surveyor that it was *"uncertain whether the redevelopment of the building in its location is viable*".

37. Lastly, Mr Janes' evidence in cross examination appeared to accept the view of Mr Taft, the insurers' quantity surveyor, that either form of reinstatement which he had costed was a waste of money because, in Mr Taft's words "*the resulting structure would effectively prevent any potentially profitable development of the site*" because you could only get 31 flats out of it. He was asked this:

> *"Q It is the nub of the case is it not Mr Janes? As long as there is a Boak building on the site it does not have any value, but if you get rid of the Boak it does. It is as simple as that.*
>
> *A Assuming you get planning permission for something else – which, if that came out of (Mr Bird's evidence) last week is the case."*

38. Mr Janes' view that there was no development value of the site with the Boak building on it was consistent with the advice of Janes Lathwood (his then firm) in October 2008, and the view of Mr Peter Clarke, the insurers' expert valuer, that the pre-fire scheme for 31 flats would not have been economically viable: see [61] below. Mr Janes' estimate of the cost of developing the site as it was before the fire in accordance with the planning permission and demolishing No 8 was £ 2,595,000. Mr Taft's figure was £ 3,793,300. Mr Singh appears at one stage in his cross examination to have been speaking of a cost of £ 1 million with flats earning £ 300,000 per annum gross.

39. As I have said, Mr Moxon Browne submits that there should be no declaration. The court should determine what the measure of indemnity was for someone in the position

of Western Trading, and, in particular whether Western Trading is entitled to recover the cost of reinstating the Property. When it does do so it will, he submits, find that that Western Trading suffered no loss. To that issue I now turn.

Measure of indemnity - the authorities

40. Where real property is destroyed the measure of indemnity to which the insured is entitled will depend on (i) the terms of the policy; (ii) the interest of the insured in, or its obligations in respect of, the property insured; and (iii) the facts of the case including, in particular, the intention of the insured at the time of the loss. If the insured has a limited interest in the property it will be material to consider whether the subject matter of the insurance is the whole interest in the property insured and not solely that of the insured himself and, if it is the whole interest, whether the insured is accountable to others for any sum received in excess of his interest. The materiality of these questions is apparent from a number of authorities.

Castellain v Preston

41. In *Castellain v Preston* [1883] 11 QBD 380 a vendor sold a house which had been insured by the vendor with an insurance company. Between contract and completion the house was destroyed by fire. The vendor received the insurance money from the insurance company. The purchase was completed and the price was paid to the vendor without any abatement on account of the fire. The insurance company was held entitled to recover a sum equal to the insurance money from the vendor by virtue of its right of subrogation.

42. The judgments of the court make clear the basic principle that a contract of insurance, such as a fire policy, is a contract of indemnity only and that the insured is entitled to an indemnity but "*shall never be more than fully indemnified*"; per Brett LJ at p 386.

43. Bowen LJ considered the case of a house which was insured by a tenant against fire and which was destroyed by fire. As to that he said this at page 400:

> *"I have no doubt the insurance offices seldom take the trouble to look to the exact interest of the tenant who insures, or perhaps of the landlord who insures, and for the best of all reasons because it is generally intended that the insurance shall be made, not merely to cover the limited interest of the tenant, but also to cover the interest of all concerned. In most cases, the covenants as to repair throw liability on one side or the other, and in a large class of leases the liability to repair is by the provisions of the lease thrown upon the tenant. Therefore, in these cases no question ever can arise between the insurance office and the tenant from*

> *year to year, or the tenant for years, as to the amount which the insurance office ought to pay."*

Reynolds v Phoenix Assurance Co Ltd

44. In *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440 the plaintiffs took out insurance in respect of some Maltings in Suffolk, which they had purchased for £ 16,000. They purchased insurance with a sum insured of £ 550,000 representing the cost of replacement. Under the insurance the Insurers agreed that:

> *"...if the property insured ... or any part of such property be destroyed or damaged by fire the Insurers will pay to the insured* ***the value*** *of the property at the time of the happening of the destruction or the amount of such damage or the insurers* ***at their option*** *will reinstate or replace such property or any part thereof."*

45. A fire destroyed about 70% of the building. It was agreed between the insurers' adjusters and the insured's assessors that a figure of £ 243,320 would represent the cost of rebuilding less a figure for betterment. An issue then arose as to whether the plaintiffs would reinstate (it being their contention that that was the responsibility of the insurers if they so elected) and as to what was the measure of indemnity. The insurers claimed that the plaintiff's loss was to be measured by the value of the building (either market value or modern replacement) and not the cost of rebuilding an obsolete building, which was about £ 250,000, when a modern replacement was £ 55,000.

46. Forbes J held that the argument that the parties contracted on the basis that reinstatement was the appropriate method of giving an indemnity would be rejected. The words in the policy which were appropriate to reinstatement were there because the parties must be taken to have contemplated not the inevitability but the possibility that reinstatement might be the appropriate way of giving indemnity. Nevertheless, the cost of reinstatement still remained a possible means of measuring it even though prior agreement to that effect could not be found in the contract. The relevant test in a case where the owner was not inevitably to be dispossessed was "*would the owner for any reason that would appeal to an ordinary man in his position rebuild it if he got replacement damages or was his claim of damages a mere pretence?*" On the facts of that case the plaintiffs did have a genuine intention to reinstate if given the insurance money; this was not a "*mere eccentricity*" but arose from the fact that they would not be properly indemnified unless they were given the means to reinstate the building "*substantially as it was before the fire"*. The fact that their intention was dependent on receipt of the insurance money did not mean that they were being eccentric in holding it. The test was not: what would the insured do if he was using his own money? Accordingly, the plaintiffs were entitled to £ 243,320. This was not a case where any

reinstatement had begun.

47. This case does not assist the insurers. Even though the insured was unable to invoke the express wording relating to reinstatement, reinstatement was held to be the measure of indemnity. In the course of his judgment Forbes J observed:

> "*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 could not 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."*

Leppard v Excess Insurance

48. In *Leppard v Excess Insurance* [1979] 1 WLR 512 the plaintiff bought a remote cottage in Cornwall for £ 1,500 in 1972. In 1974 he insured it for £ 10,000. He signed a declaration in the proposal form that "*the sums to be insured represent not less than the full value (the full value is the amount which it would cost to replace the property in its existing form should it be totally destroyed)*". Under the policy, which incorporated the proposal, the insurers agreed to provide insurance and indemnity and "*at [their] option by payment reinstatement or repair indemnify the insured in respect of (A) loss or damage caused by .... (1) fire*." In 1975 the plaintiff increased the insured value to £ 14,000 and in October 1975 the cottage was destroyed by fire. The insurers denied liability and the plaintiff brought an action for a declaration that the insurers were liable either by payment calculated upon the basis of the full reinstatement cost or actual reinstatement to indemnify him in respect of the loss caused by the destruction of the cottage. It was agreed that the cost of reinstatement after taking into account betterment would be £ 8,694.

49. The Court of Appeal held that the "*full value*" in the policy was the maximum amount payable and there was nothing in the wording of the policy which expressly or by inference provided that the loss was agreed or deemed to be the cost of reinstatement even though that sum was greater than the actual loss. Accordingly, the plaintiff was entitled only to his actual loss. Since in October 1975 he was ready and willing and wished to sell the cottage for £ 4,500 that sum was the real value at the time of the fire and he was entitled to recover only that sum less £ 1,500, the value of the site. Megaw LJ expressly rejected the analysis of the trial judge that the plaintiff's claim was basically for specific performance. It was a claim for damages for breach of a contract to

indemnify.

50. There are a number of important differences between that case and this one. The policy gave the insurer, not the insured, the option to reinstate. Nothing in the wording of the policy provided that the loss to be indemnified was the cost of reinstatement. The insured had never occupied the property and had no intention of reinstating it. On the contrary it was on the market for sale and the insured would have jumped at £ 4,500 as the price if he could get it.

McClean Enterprises Ltd v Ecclesiastical Insurance

51. A similar result arose in *McClean Enterprises Ltd v Ecclesiastical Insurance* [1986] 2 Lloyd's Rep 416. Staughton J (as he then was) rejected an argument that insurers could not rely on a condition in the same form as clause 5 (c) because the insured could not reinstate until the insurers had paid their claim as they did not have the resources to so; so that to give effect to the condition would be to allow the insurers to take advantage of their own breach of contract. He did so on the basis that it was not proved that the insured would have reinstated if the insurers had paid promptly; the insured had sold the property, and had not done so as a result of any failure of the insurers to pay.

Lonsdale & Thompson Ltd v Black Arrow Group

52. In *Lonsdale & Thompson Ltd v Black Arrow Group* [1993] Ch 361 landlords under a 1978 lease covenanted to insure the demised premises – a warehouse in Liverpool - for their full reinstatement value and "*in the case of destruction or damage to the demised premises by any insured risk …to ensure … that all moneys payable be laid out and applied in …reinstating the premises".* The insurance policy taken out by the landlords provided that the amount payable under the policy was to be calculated as the reinstatement of the premises destroyed or damaged. In 1989 the landlords contracted to sell the freehold. Before completion the premises were destroyed by fire but the sale went ahead and the full price was paid. The insurers refused to pay for the rebuilding of the premises on the ground that the landlords had parted with their beneficial interest from the date of the contract and, having received the full price on completion had been indemnified for their loss.

53. Jonathan Sumption QC, as he then was, sitting as a deputy High Court Judge, having observed that the question was "*rather more difficult than at first sight appears*", held that the insurers were liable to pay the landlords the sum necessary to reinstate the demised premises. He observed [368B] that the starting point for answering the question whether the vendors' recovery from the insurers was confined to the loss which they had suffered in respect of their own limited interest at the time of the fire was that they unquestionably had an insurable interest in the premises up to the full reinstatement cost

on account of their obligation to insure for the full reinstatement value.

54. Having observed that "*subject to the express terms of the policy the measure of the indemnity is the diminution in value of the thing insured as a result of the operation of the insured peril*" he said this:

> *"If the assured has only a limited interest in the property, being, for example, a tenant or reversioner, a trustee, a mortgagee or a bailee, the value of his own interest may have diminished by much less than the value of the property or the cost of its reinstatement. But it does not necessarily follow that if the assured recovers the whole diminution in the value of the property or the whole cost of reinstatement he will be getting more than an indemnity. That must depend on what his legal obligations are as to the use of the insurance proceeds when he has got them. If he is accountable for the proceeds to the owners of the other interests, then he will not be receiving more than an indemnity if the insurer pays the full amount for which the property was insured. This will be so, whether the assured is accountable to the owners of the other interests as a trustee of the proceeds of the insurance or simply on the basis that he owes them a contractual obligation to pay those proceeds over to them or to employ them in reinstatement. None of this means that a party with a limited interest who insures the entire interest in the property is insuring on behalf of the others as well as for himself. All that it means is that his obligations as to the use of the insurance moneys once they have been paid are relevant in determining whether he will recover more than an indemnity by getting the measure of loss provided for in that policy."*

55. Mr Sumption held that the insurers were liable under the policy for the full reinstatement value of the premises. The position was different from that in *Castellain v Preston*. In the latter case the only person apart from the insured who had an interest in the property was the purchaser and the insured was, on the facts of that case, not accountable to him. Accordingly, the insured would be receiving more than an indemnity if he were allowed to keep the insurance proceeds without accounting to the insurer. In *Lonsdale* the insured landlords were liable to the tenant to lay out the insurance monies received in reinstatement of the premises.

Measure of indemnity: the insurers' case

56. The insurers say that the measure of indemnity is the reduction, if any, in the open market value of the Property. That value has increased on account of the fire. As the judge found [107ff] Western Trading had in 2007/8 looked into the possibility of

developing Station Street into a residential development with a Mr Parkes who owned properties to the north of the Boak building. These were decaying industrial buildings fronted in some cases by locally listed houses. The plan at that stage was that the two of them acting either jointly or separately would sell their land with the benefit of planning permission to developers or enter into a joint venture for development with them.

57. On 21 July 2008 TWS, a firm of architects applied, on behalf of Mr Singh for detailed planning permission and Listed Building Consent to convert the Boak building to 31 residential flats and, at the same time applied for outline consent to develop Mr Parkes' land. The proposed scheme involved the demolition of No 8.

58. On 24 October 2008, however, after an application for planning permission had been made in respect of the Boak building, Mr Singh was advised by Janes Lathwood that any attempt to convert the Boak building and then sell the flats would probably incur a loss of £ 2.2m. The main problem was that the requirement to retain the listed Boak structure, with its large windows symmetrically arranged, severely limited the number of flats which a conversion would yield.

59. On 22 December 2008 the District Valuer, who had been asked to assess possible section 106 contributions, advised the Local Authority that Mr Singh's proposed scheme was not viable. He projected a loss of £ 570,502 even if no cost was attributed to the existing building; or £ 419,672 if you added back the proposed section 106 contributions.

60. On 6 January 2009 detailed planning consent and listed building consent was granted for the conversion of the Boak into 31 residential units and outline planning permission was given to Mr Parkes. However, by that time the housing market in Walsall had stalled and the development of the Boak building was mothballed until the market improved.

61. Mr Clarke, whose evidence the judge preferred, describing him in the course of final submissions as "*an absolute model of what an expert should be",* considered that the pre-fire scheme for 31 flats would not have been economically viable but that a post-fire scheme for 48 flats would be. As a result the Property was worth about £ 75,000 before the fire but after it (following delisting) it was worth about £ 500,000. Hence, Mr Moxon Browne submitted, there has been no reduction in market value and there was no loss to be indemnified. Nor was there any likelihood of any loss in the future.

62. The matters set out in the previous paragraph are referred to in [119] and [120] of the judge's judgment. However, at [161] the judge said that site value only became relevant if he was wrong to grant a declaration and wrong in his approach to damages. It would, however, be unnecessary to reach any decision on the issue and unhelpful to do so at that stage and he would not, therefore do so. If the issue ever had to be decided there would, he held, be a need for further or at least updated expert evidence involving, for instance

more about the cost and practicalities of Western Trading's replacement scheme. The insurers contend that the judge was wrong to leave the matter open. They seek recognition of the fact, as they submit, that there was no loss of market value effected by the destruction.

Measure of indemnity - conclusion

63. I am satisfied that, in the present case, the measure of Western Trading's indemnity *under the Memorandum* is the cost of reinstating the Property. The judge accepted that Western Trading was bound to insure the Property and to replace it in the event of fire. It had, therefore, an insurable interest in the Property. The total sum insured was not intended to represent the anticipated impact on the sale value of the Property of the destruction of the buildings. Under the terms of the Memorandum the amount payable was to be *"the reinstatement of the property lost"* defined as "*the rebuilding of the property …in a condition equal to but not better or more extensive than its condition when new*". The policy provided that the work of reinstatement might "*be carried out upon another site and in any manner suitable to the requirements of the Assured subject to the liability of the underwriters not being thereby increased*". Western Trading had, therefore, an express contractual entitlement, subject to certain conditions (as to which see [66] below), to the reinstatement cost.

64. Further in the light of the judge's finding that Western Trading was bound to reinstate the Property, this was not a case where Western Trading had a limited interest in the Property without being bound to account to anyone for the insurance monies in excess of its own interest. It was insuring against the cost of that which, on the judge's findings, it was obliged by contract to do.

65. Mr Moxon Browne submitted that there could be no obligation on the part of Western Trading in the absence of a request to reinstate and there was no evidence of such a request. As to that, the obligation as found by the judge was not an obligation to replace on request. Even if a request was needed it seems to me that, if Mr Singh genuinely intended that Western Trading should reinstate, a request by him to Western Trading to do so should be regarded as having been made. On that assumption Mr Singh intends Western Trading to reinstate and has arranged for it to sue insurers for that purpose. It is implicit in that stance that reinstatement is what he is requiring Western Trading to do. Further, since he is the owner of the Property and the sole director of Western Trading there is a degree of artificiality in demanding an express request.

Conditions

66. The cover provided by the Memorandum is, however, subject to two important conditions. Clause 5 (a) of the Memorandum provides that:

"The work of reinstatement...must be commenced ***and carried out***

> *with reasonable despatch otherwise no payment beyond the amount which would have been payable under the Policy if this Memorandum had not been incorporated therein shall be made"*

Clause 5 (c) provides that

> "*No payment beyond the amount which would have been payable under the Policy if this Memorandum haD not been incorporated herein shall be made until the cost of reinstatement shall have been* ***actually incurred".***

Indemnity under the Insuring Clause alone.

67. Since no reinstatement has actually begun and no costs have been incurred it is necessary to consider what would have been payable under the Policy if the Memorandum had not been incorporated.

68. Where the insured is obliged to replace the lost property the cost of doing do is *prima facie* the measure of indemnity: see *Castellain v Preston; Reynolds v Phoenix Assurance Co Ltd;* at any rate where there is a genuine intention to replace: see also *Clarke* on *Insurance Contracts* at 28-2A and *Colinvaux's Law of Insurance* (10th edition) at 10-36.

69. Even where the insured is the owner of the property, and not someone with an obligation to reinstate or repair, 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 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 10-38 & 39; or if no one in his right mind would reinstate: *Reynolds v Phoenix*. That is not shown to be the position in this case. Mr Taft, the insurers' quantity surveyor, accepted that it would cost less to convert the reinstated shell into flats than it would to build flats from scratch from the pile of rubbish now at the site; and that development of the Boak would enhance the value of properties at 8-13 Station Street, and contribute to "pump priming" any development.

70. In *Keystone Properties Ltd v Sun Alliance and London Insurance Plc* [1993] S.C. 494 the Court of Session had to consider a policy in respect of a warehouse and night club in Edinburgh which were destroyed by fire. Under the policy the insurers undertook to pay the cost of reinstatement, defined as "*the cost of rebuilding the buildings destroyed or of restoring the damaged portions to a condition substantially the same as but not better or more extensive than the condition of the buildings…when new*", or, as an alternative

basis where the cost of reinstatement had not been incurred at the time of the hearing, the insured was entitled to recover "*the value of the buildings at the time of their destruction*" The First Division, upholding the judgment of the Lord Ordinary, held that the best measure of loss on the alternative basis was – in that case but not invariably - the estimated probable cost of restoring the damaged buildings into their pre-fire state less an allowance for betterment and that the insured was entitled to claim on that basis without reference to market value. The case is, thus, an example of one in which the insured, unable to rely on a clause dealing specifically with reinstatement, was entitled to an indemnity in respect of the "*value of the buildings*" destroyed determined by reference to the cost of reinstatement,

71. The pleadings in *Keystone* (which is not binding upon us and which was not relied upon by either party) did not aver any intention on the part of the insured to reinstate the buildings to their pre-fire condition or even that it would be reasonable to do so but did aver an intention at the date of destruction to develop the premises. The case is cited in *Clarke* as authority for the proposition that cost of reinstatement is the measure of indemnity if at the time of the loss the insured intended to retain and use the insured property even if "*the claimant had no intention of using the insurance money to reinstate the property*". Reference was made in *Keystone* to the judgment of Parker J, as he then was, in *Pleasurama v Sun Alliance* [1979] 1 Lloyd's Rep 389 where he held that the cost of reinstatement was the primary measure of damage under a policy covering a bingo hall where the relevant obligation of the issuers was to pay "*the value of the property*" at the time of its destruction and where the insured had decided not to re-build.

72. I doubt whether a claimant who has no intention of using the insurance money to reinstate, and whose property has increased in value on account of the fire, is entitled to claim the cost of reinstatement as the measure of indemnity unless the policy so provides. In any event Mr Elkington did not seek to contend that in this case the cost of reinstatement would be recoverable if Mr Singh had no intention of doing so. The true measure of indemnity is "*a matter of fact and degree to be decided on the circumstances of each case*" per Forbes J in *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, e.g. as a result of planning problems, or because a markedly more attractive alternative presents itself.

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

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

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

Superfluity

78. It could be said that, if the cost of reinstatement is, or may be, recoverable under the Insuring Clause alone, clauses 5 (a) and (c) of the Memorandum are without practical content and that the policy must, therefore, be interpreted as meaning that whenever there is a claim for reinstatement no payment will be made until the cost thereof has been incurred.

79. I do not regard this as the correct approach. There are undoubtedly circumstances in which the amount recoverable under the insuring clause, apart from the Memorandum, will be less than the cost of reinstatement e.g. where at the time of loss the insured

intends to sell the Property or demolish it. In such cases the clauses serve to show that reliance cannot be placed on the express obligation to pay the reinstatement cost unless the conditions in 5 (a) and (c) are complied with.

80. In addition, the benefits to the insured under the Memorandum are wider than under the Insuring Clause in two respects so that special conditions are appropriate. First, under clause 4 (a) (i) the cost of reinstatement means the rebuilding of the Property in a condition equal to but not better or more extensive than its condition when new. So there can be no question of a deduction on account of the reinstatement producing a building in better condition than it was at the time of its destruction (although the justification for a deduction for betterment is, itself open to question: see *McGillivray* 21-020).

81. Second, clause 5 (a) entitles Western Trading to reinstate on another site altogether – a measure of indemnity for which the insuring clause does not provide.

82. Lastly, nothing would have been simpler than for the insurers to say in plain terms that in no circumstances would anything be paid towards the cost of reinstatement until it had actually been incurred. But they did not. Instead they provided that if the conditions for entitlement to the cost of reinstatement in the Memorandum were not met it would be necessary to consider what entitlement there was under the Insuring Clause alone.

Ground 2 of the appeal

83. The second ground of the insurers' appeal was that the judge was wrong to hold that where an insurer has repudiated the policy, it cannot rely on the proviso that the costs of reinstatement will only be repaid once they have been incurred. I do not regard the judge as having reached that conclusion. What he held [128], by reference to clause 5 (a), was that the requirement on the insured to begin to reinstate cannot be regarded as arising for the purpose of that clause until the insurer has confirmed that it will indemnify. He was, as he said, agreeing with the passage in *MacGillivray* which states as follows (20-022):

> *"[I]t is rather hard that an insured, who needs the money with which to repair his property, should be expected to incur the cost of reinstatement from his own funds. This is particularly so if the insurers in breach of contract deny liability under the policy or assert that the insured should be compensated on a basis other than reinstatement. It is therefore submitted that the requirement that the insured should commence and carry out the work of reinstatement with reasonable dispatch should only operate if the insurers, in accordance with their contractual obligations, accept that reinstatement is the appropriate measure of indemnity."*

84. Prior to referring to that passage the judge had said "*The Defendant says that as the*

Claimant has failed to reinstate with reasonable despatch that is an end of the matter". That is said to be a misunderstanding of the insurers' position. The submission of Mr Moxon Browne was that the passage from McGillivray was in accordance with common sense and fairness, but was unsupported by authority. The insurers' position was, he says, that as there had, in fact, been no reinstatement there could be no indemnity based on the cost of it.

85. Whether an insured has acted with reasonable despatch is a question of fact. I would, however, accept that in many cases, of which this is one, the insured will not have failed to act with reasonable despatch whilst insurers deny any liability or assert that the insured is not entitled to be compensated on the basis of reinstatement. I would not regard Western Trading as having failed to act with reasonable despatch because it had not commenced reinstatement before the conclusion of these proceedings.

Failure to determine whether there was any drop in value

86. If the cost of reinstatement is (or becomes) the measure of indemnity it is unnecessary to decide whether the judge was wrong not to determine that there had been no loss of market value on account of the destruction of the Property, and I do not propose to do so. The question is more difficult than it might at first sight appear, not least because the exact nature of Western Trading's interest in the Property lies unexplored both in the evidence and in the submissions. It may be that the correct analysis is that what it enjoyed was a tenancy at will, although such a tenancy with an obligation to reinstate would be a curious creature, which any tenant would be likely to seek to terminate, as would any freeholder if the site had become more valuable as a result of the fire. Whether such interest in the Property as Western Trading enjoyed had any and, if so, what market value seems to me highly debatable; and any comparison between any such value before and after the fire problematic. It may depend on whether Western Trading is in fact called on to reinstate. I am, also, reluctant, in present circumstances, to decide that which the judge declined to decide because he thought that more evidence was necessary, although I am somewhat puzzled as to why he did so since I am sceptical as to whether any of the matters referred to in [123] – [126] of the judgment precluded a determination of whether there had been a loss in market value.

The alternative claim for damages

87. The judge addressed the question of the relief to be granted if he was wrong about granting a declaration. His conclusion was that if Western Trading reinstated the Property then the insurers would have to pay the cost up to the limit of cover. The site value before and after the fire was, thus, he held, irrelevant unless the differential led Western Trading not to reinstate; the only circumstances in which the defendant would not have to pay the full cost would be if there was no reinstatement *"(a risk which the*

Declaration will protect it against)".

88. At [160] the judge observed that if the declaration was unavailable then a solution might be to award damages conditional and payable upon reinstatement taking place. To like effect in *Reynolds v Phoenix* Forbes J had suggested that the sensible way of proceeding would be for the £ 243,000 to be paid into a joint account in the names of both solicitors, the sum only to be paid out in settlement of the cost of rebuilding, observing that "*such a simple solution apparently never occurred to anyone*".

89. It is common ground that the judge did *not* hold that Western Trading had an existing right to recover the costs of reinstatement. On the contrary, he confirmed that, if no reinstatement was carried out, there would be no obligation to pay the cost of reinstatement [159]

Discussion

90. Insurers seek a determination of the measure of indemnity, and, in particular whether the measure under the Insuring Clause alone is loss of value or cost of reinstatement. As I have said, in my judgment, if the court is satisfied that Western Trading had the requisite intention it is *prima facie* entitled to be paid that cost by the insurers under the Insuring Clause before reinstatement begins; subject to the possibility of the court taking one or other of the steps specified in [76] above.

91. The insurers submit:

(a) that the judge did not properly consider or decide:

(i) what reinstatement meant in the context of the Memorandum and

(ii) what exactly Mr Singh meant by reinstatement and

(b) that it was unclear whether or not Western Trading intended or would in fact carry out that which that concept demanded. The judge should have reached a decision on whether it genuinely intended to reinstate the Boak. Only if he found such an intention should any declaration have been made.

92. As to (a) (i) the judge referred [143] to Mr Janes' costing of two schemes of reinstatement. I do not think that he failed to consider what reinstatement meant under the Memorandum, which defines that term and to which Mr Singh referred in his fourth witness statement. But he left for further determination whether what was in fact done amounted to reinstatement on the ground that "*any dispute about what is or is not reinstatement can be resolved, or at least substantially narrowed on the basis of the approach in Tonkin*": [149]. That is a reference to the observations of HH Judge Peter

Coulson QC, as he then was, in *Tonkin v UK Insurance Ltd* [2006] EWHC 550, 586ff as to how insureds should treat with insurers in relation to reinstatement claims.

93. As to (a) (ii) it seems to me that the judge took Mr Singh to mean by reinstatement what he had said in his fourth witness statement to be his understanding of the concept, which was the second scheme costed by Mr Janes.

94. As to (b), the judge pointed out any concerns on that score would be resolved if the Declaration route was taken, since, when the work had been carried out, any dispute about whether it amounted to reinstatement could then be resolved in the light of what had actually been done [139] – [141].

What relief should Western Trading be granted?

Declaration

95. In the light of the conclusion that I have reached as to the measure of indemnity under the Memorandum I am satisfied that it was open to the judge to make a declaration to the effect that, if Western Trading reinstated the Property, it would be entitled to an indemnity from the insurers. The power of the court to make a declaration is discretionary and is not circumscribed by any statute or rule*: Padden v Arbuthnot Pensions & Investments Ltd* [2004] EWCA Civ 82. A declaration may be made when there is a "*real and present*" dispute between the parties and the court is satisfied that the making of a declaration is the most effective way of resolving the issues raised: *Rolls-Royce plc v Unite the Union* [2010] 1 WLR 318. The Court will not interfere with the decision to grant a declaration unless the judge has acted on some wrong principle or is plainly wrong: *Milebush Properties Ltd v Tameside MBC* [2011] EWCA Civ 270. As the judge pointed out more than once, a declaration would give the insurers a measure of protection which an award of damages would not.

96. In circumstances where there was a dispute as to whether or not the insured genuinely intended to reinstate and where the judge was minded to accept that it had that intention it was I think open to him to accede to the insured's application for a declaration if the wording of it was appropriate. It was, however wrong to make a declaration with the wording put forward by Western Trading. A declaration in that form served the purpose of ruling out (albeit by implication only) the applicability of the defences which the judge had expressly rejected and of confirming that the policy had not been validly avoided, although it is not clear to me that that was the primary purpose of the declaration. But it did not, in terms, achieve its undoubtedly intended purpose of making clear that if reinstatement was carried out the insurers would be required to indemnify Western Trading in respect of the cost up to the limits of the policy. That defect can, however, be remedied by a change in the wording.

97. To that end Western Trading put forward the following alternative wording:

> "*It is declared that (i) the Claimant had an insurable interest in the subject matter of Policy No P01957/2012/PO; (ii) the Defendant was not entitled to avoid Policy No P01957/2012/PO; (iii) the Claimant was not in breach of warranty; and (iv) if the Claimant carries out reinstatement of the property lost then it will be entitled to be indemnified by the Defendant for the cost of so doing, up to the limit of indemnity of £ 2,121,800".*

98. I would regard that declaration as curing the defects of the one made by the judge. The declaration made should be varied and to that extent the appeal should be allowed.

Damages

99. It is, however, necessary to consider whether the grant of a money judgment, rather than a declaration, is, in the light of the history of this case, now the appropriate remedy. Western Trading decided to seek, primarily, a declaration. It was only in the alternative that it sought a money judgment. The declaration that it sought and obtained is, as drafted, not fit for purpose. But that can be cured. The insurers declined to accept a declaration, with the protection which it would give them if properly drafted, and sought a determination of the measure of indemnity. They did so in order to be able to say that, on the true measure, there is no loss and no prospect of one. This necessarily required a determination as to whether Western Trading is presently entitled to recover the cost of reinstating the Property even though it has not yet been reinstated which, in turn requires a determination as to whether there is a genuine intention to reinstate.

100. In those circumstances it could be said (i) that, although he said that he did not need to do so, the judge has in fact decided that Mr Singh intends that Western Trading should reinstate; (ii) that that must mean reinstatement as set out by Mr Singh in his fourth witness statement and as costed by Mr Janes; and (iii) that the cost of that reinstatement will exceed the limit under the policy. The insurers, having sought a determination of the true measure of indemnity and as to the intentions of Western Trading must now, in the light of what I hold to be the measure of indemnity under the Insuring Clause and the judge's findings, give effect to the indemnity provided for by the Insuring Clause.

101. Not without some hesitation I have come to the conclusion that we should not order that for the following reasons.

102. First and foremost, a claim for damages has, save for an interval when the further information of the Reply held sway, always been a claim advanced by Western Trading only in the alternative to the primary claim for a declaration. I did not understand Mr

Elkington to resile from that position.

103. Second, the judge said that it was unnecessary to make a finding as to Western Trading's intention; and that the insurers would be protected against the possibility that in truth reinstatement was not what Mr Singh intended because the proof of the pudding would be in the eating. In those circumstances we should not, in my view, treat what the judge said as an *obiter* finding of intention which compels us now to make a monetary award. To do so would confound the whole basis upon which he made his decision and mean that, contrary to what he said, it *was* necessary to decide what exactly Mr Singh's intention was; so that, if the judge is to be taken to have decided that he intended to reinstate (or if we do), the insurers would have no protection if, in the event, no reinstatement took place. I note also that one of the insurers' complaints is that the judge did not make a finding about whether Western Trading genuinely intended to reinstate.

104. Thirdly, there is reason to suppose that Mr Singh's intention was not as clear cut as his fourth witness statement suggested: see [31ff] above. The passages to which I have referred appear to show that Mr Singh had in mind a development with a similar format as the Boak building but which was not a reinstatement. The judge did not find it necessary to deal with this aspect of his evidence and did not refer to it. On his approach there was no need to do so. But if a monetary award is now to be made it would be necessary to do so.

105. I would be reluctant to treat what the judge said in the passages which I have cited as determinative of the issue of intention when he (i) plainly did not intend it to be so; (ii) regarded the issue of intention as one that did not arise if a declaration was made, and which it was unnecessary to decide; and (iii) thought that genuineness of intention would be determined by what did or did not happen. In addition, no decision appears to have been made even now as to what scheme of development will take place and no planning permission has been granted. In those circumstances any intention may be regarded as sufficiently inchoate or doubtful to make a declaration the more appropriate remedy.

106. For these reasons I regard a declaration in the terms set out in [97] as the appropriate remedy. If Western Trading effects what can properly be regarded as a reinstatement of the Boak building it will be entitled to an indemnity.

107. I do not regard it as necessary for the declaration to provide a further definition of "reinstatement". It will include the two versions of reinstatement costed by Mr Jones and anything that comes within the definition in the policy: see conditions 4 and 5 of the Memorandum.

108. I agree with the judge that the question whether reinstatement has occurred can most appropriately be determined in the light of what has been done. I would hope that the

parties, acting sensibly, would be able to agree what works will or will not, once carried out, amount to reinstatement. I would add the further observation that whether or not there has been reinstatement of the Property is a different question from whether there has been a change of the use to which the restored building is put.

Costs

109. The judge ordered the insurers to pay all the costs of the action, including costs from 1 May 2014 on an indemnity basis. Costs on that basis were ordered on the footing that the declaration obtained was at least as advantageous to Western Trading as the Part 36 offer it had made expiring on 1 May 2014 to settle the action for an immediate payment of £ 1.85 million.

110. The insurers contend that that order was wrong. They lost on the three issues to which I have referred. But they had shown that Western Trading had suffered no loss and that there was no likelihood that it would do so in the future. Save for a small loss of rent claim they had seen off the damages claim and the declaration sought should not have been granted. They should recover the costs of the action save in respect of what they describe as the policy responses.

111. In my view the insurers were and remain in substance the losers and the judge was entitled to award Western Trading their costs. None of the defences of lack of insurable interest, non-disclosure, misrepresentation or breach of warranty succeeded and Western Trading has secured a declaration, the primary relief sought, which in its amended form gives effect to that which the judge sought to achieve.

112. I do not, however, accept that the declaration was a better outcome than immediate payment of £ 1.85 million. It may turn out to be such. But since one possible result is that no reinstatement takes place it may not.

113. Western Trading contends that, even so, an order that all its costs should be paid on the indemnity scale was justified in the light of the way in which insurers had conducted the litigation; but would be content to limit its claim to the period after 1 May 2014. The judge was not satisfied that indemnity costs should be awarded on any other basis than that which he adopted and I do not think that we should do so. He was much better placed than we are to judge whether the matters relied on by Western Trading in its skeleton argument before us should lead to indemnity costs and I am not persuaded that his decision in this respect was outwith the bounds of his discretion.

114. I would therefore vary the order as to costs so that they are all assessed on the standard scale and the appeal should be allowed to that extent also.

Lord Justice Lewison:

115. I agree.

Lord Justice Laws:

116. I agree.