



Case Nos: CL-2020-000705 and CL-2021-000536

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

CL-2020-000705

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

SKY UK LIMITED

Claimant
(705 Claim)

MACE LIMITED

Claimant
(536 Claim)

- and -

- (1) RIVERSTONE MANAGING AGENCY LIMITED
2) THE UNDERWRITING MEMBERS OF LLOYD'S
SYNDICATE

**3210 FOR THE 2014 YEAR OF ACCOUNT
SUBSCRIBING TO POLICY B0509DD190814**

- (3) OLD COMPANY 18 LIMITED
(4) ASPEN INSURANCE UK LIMITED
(5) ROYAL & SUN ALLIANCE INSURANCE PLC
(6) HSB ENGINEERING INSURANCE LIMITED
(7) BERKSHIRE HATHAWAY INTERNATIONAL
INSURANCE LIMITED
(8) MSI CORPORATE CAPITAL LIMITED

Defendants

Anneliese Day KC, Crispin Winsor KC and Simon Kerr (instructed by **Herbert Smith
Freehills LLP**) for the **Claimant in the 705 Claim**
Paul Reed KC, Ebony Alleyne and James Shaw (instructed by **Clyde & Co LLP**) for the
Claimant in the 536 Claim
Andrew Rigney KC, Simon Goldstone and Patrick Maxwell (instructed by **DAC Beachcroft
LLP**) for the **Defendants**
Hearing dates: 26 June 2023

POST JUDGMENT RULING

HH Judge Pelling KC:

Introduction

1. This is a Ruling in relation to three issues of principle that were argued on the date fixed for the hand down of the substantive judgment in these proceedings. Having regard to the issues that arose I considered it safer to hear the arguments before deciding whether to hand down the judgment in the form it had been circulated to the parties in draft – see Consequentials Transcript (“AH1”) at page 1, lines 3-20. In the end, all parties were agreed that it could and should be handed down and I did so at the end of the hearing.
2. The issues that are determined by this Ruling are:
 - i) A submission by the defendants that the claim by Sky should be dismissed notwithstanding the conclusions reached in the substantive judgment because, it is alleged, Sky has failed to prove its quantum claim (“Sky Dismissal Application”);
 - ii) A submission by the defendants that the claim by Mace should be dismissed for essentially similar reasons and because there was no good reason for Mace to bring any claim at all given the terms of the Policy and that Sky had brought its own proceedings under the Policy in relation to the same subject matter (“Mace Dismissal Application”); and
 - iii) An application by Sky for a payment on account in light of the conclusions reached in the substantive judgment (“Payment on Account Application”).

The Sky Dismissal Application

3. This is not the place to set out a comprehensive summary of the judgment that I have handed down. That speaks for itself. All parties disavow any intention to re-open the handed down judgment. Mr Rigney KC however maintains that what Ms Day KC and Mr Reed KC seek is just that. Both Ms Day and Mr Reed maintain that Mr Rigney’s clients are attempting to do the very thing that he maintains the claimants are trying to do. Regrettably the parties remain as far apart as they were during the trial. It is this uncompromising hostility that in large part explains where currently this litigation has got to.
4. In summary there were a large number of coverage issues that arose in relation to the claim, many of which were resolved in favour of the defendants but one of the most important of which (that relating to the retained liability provision) was resolved in favour of the claimants. This was important for Sky given its potential impact on the extent of the indemnity to be provided under the Policy and also for Mace given the contractual arrangements (summarised in the judgment) made between it and Sky concerning who ultimately would bear the sums represented by the Retained Liability.
5. However, I concluded that the defendants were correct in the submissions they had made to the effect that the scope of the indemnity was confined to damage occurring within the period of insurance. I concluded that the claimants’ causation case succeeded but that their respective quantum cases were to be rejected. As to this last

point there were broadly four remedial schemes that were considered in the course of the trial - the Sky and Mace schemes, each of which involved the repair and replacement work necessary given the current extent of the damage to the Sky Central roof (and any further damage that occurs prior to completion of remedial work) and two proxy schemes put forward by the defendants, not on the basis that either should be carried into effect but as a means of calculating what was properly recoverable under the indemnity (subject to their submissions on coverage and causation) when limited as it should be to damage occurring during the period of insurance.

6. I concluded that broadly damage should be calculated by reference to the work encompassed in the defendants' 2018-9 scheme. That scheme however required temporary works to be installed during the currency of the construction work, consisting of a temporary roof structure to waterproof the remedial work while it was being carried out and crash decks to be inserted within the building at roof level to protect property and people below and operatives working above. I concluded that the defendants' proposed temporary works did not constitute a reasonable solution for the reasons identified in the substantive judgment, that Sky's alternative temporary roof solution and Mace's crash decking solution should form the basis of the assessment of the indemnity but in each case adjusted to reflect the more modest nature of the 2018-9 scheme when compared to the Mace and Sky remedial schemes. I rejected the defendant's case that Sky would not have been entitled to recover the cost of decanting its staff affected by the work and I accepted Sky's case that it was entitled to require the work to be carried out as far as possible out of ordinary working hours.
7. I paused the assessment exercise at that point because I could not reach a final conclusion on the amount of the indemnity to be provided since the only sums available to me in respect of the defendants' 2018-9 scheme were those provided by the quantum experts on the basis that the 2018-9 scheme was adopted in its entirety. I had trailed this as a possibility at the start of and at various stages during the trial. I had understood that if I made the relevant findings as a matter of principle the necessary adjustments would be made by the experts and that whilst it might be necessary for me then to carry out an assessment of which expert's evidence I preferred, that assessment would be in relation to their evidence applying the conclusions of principle that I had reached in the judgment. That struck me then and strikes me now as the least unsatisfactory way of resolving finally the quantum issues that arise. Whilst in some cases it might be possible to come to a conclusion as to the sum recoverable without further assistance even though none of the parties' quantum cases had succeeded in full, this is not one of them because all the metrics relevant to an assessment of the indemnity are highly dependent on expert evidence and in this case would involve deducting sums attributable to temporary works as contended for by the defendants from the sums the experts had arrived at for the 2018-9 scheme and then adding a sum for the temporary works that I concluded would be necessary as well as making the necessary adjustments for the scope of work within the 2018-9 scheme, for out of hours working and decanting costs. Attempting to arrive at a figure without such assistance would be little more than a guess and would have merited criticism from any party who was dissatisfied with the outcome.
8. Mr Rigney had indicated in his closing submissions that if I came to conclusions that in the end I came to he would be submitting that the outcome should be that Sky's

claim for an indemnity should fail and the claim should be dismissed. I anticipated that this dispute would have to be resolved once my substantive judgment became available – see paragraph 186 of the judgment. In the event that issue was argued in full at the hand down hearing and my conclusions in relation to that issue are set out below.

9. In summary, Mr Rigney submits that in light of the conclusions I have reached I should dismiss Sky's claim in its entirety because there is no evidence that permits me currently to calculate the impact in financial terms of the conclusions I have reached concerning the temporary works issue (the temporary roof structure and the crash deck structure) or my conclusions concerning decanting and out of hours working because the impact of each will have to be calculated by reference to the work to be carried out under the 2018-9 scheme and that exercise has not yet been carried out. He also submitted that there would have to be a calculation carried out that discounts the cost of all this work back to the date when that work should have been carried out. He maintains that interest would be an irrelevance because none of the work has in fact been carried out. I note that if and to the extent the discounting and interest points had not been taken into account by the experts in the evidence they gave at the trial, they would be new points not mentioned before.
10. Mr Rigney maintains that this is the fair and appropriate outcome because:
 - i) Sky chose to advance an all or nothing case that it was entitled to recover the whole of the cost of replacing or repairing the roof in its current state notwithstanding the submission of the defendants that such was manifestly in excess of the indemnity provided by the Policy – an issue that it had pleaded from the outset - and further chose not to engage as it should have with the defendants' quantum case as I found at paragraph 223 of the judgment;
 - ii) The conclusion I have reached is not one that was pleaded or contended for by any of the parties or considered in detail by the experts; and
 - iii) The reason the relevant evidence is not available is because of “ ... Sky's misguided and defiant insistence that the only appropriate relief was a full indemnity for addressing all damage to the Roof up to the date of the trial and beyond ...” and because it “ ... brought the wrong case, and failed to engage with any other analysis ...”

This leads Mr Rigney to submit by reference to the case law to which I refer below that the only “... *orthodox, principled and correct result is that Sky's claim should be dismissed...*” and that “ ... *Courts do not (and, in order to do justice between the parties, should not) try to rescue claimants by affording them a second attempt to bring the right case (here, a case that Sky could have run from the outset but chose to disparage).*” It is worth pointing out that it was only at a very late stage that defendants put forward their proxy schemes with the result that the experts were still meeting to narrow the issues posed by the defendants scheme and filing reports in relation to it after the trial had started. It is also fair to note, as Mr Reed submitted, that given the state of the evidence there were in excess of 40 different possible permutations that could have applied to the quantification of the indemnity to which Sky was entitled. Finally, it is also fair to note that the situation that arises is the result

of the failings of the defendants case concerning the temporary works about which I made findings in the substantive judgment.

11. Ms Day submits on behalf of Sky that the defendants' submissions are misconceived and of a piece with what she characterises as the ultra aggressive and entirely unreal approach of the defendants to this claim from the outset and their failure to engage with the claimants generally or Sky in particular. She describes Mr Rigney's approach as being "... *an extraordinary attack on the judgment...*" and as being "...*characteristically aggressive and entirely (un)meritorious ...*" – see AH1/3/8-19 - and that in material respects the defendants' submissions are misleading. She submits that on the pleadings and throughout the trial it was recognised that the court may reach different conclusions from those contended for by the parties and that it was obvious that was a possibility given the coverage issues in dispute, the liability issues in dispute and the absence of any agreement as to what the correct approach should be to repairing the roof whichever period was looked at. Furthermore, she submits that the law is not as contended for by Mr Rigney and that the response he contends for is obviously wrong. Mr Reed adopts these submissions. He has other submissions in relation to the defendants separate submissions that Mace's claim should be dismissed which I return to below. They do not impact on the issue I am now considering.
12. I start by setting out the law and then applying it to the facts relevant to this dispute. Before doing so, I repeat the observation I made in the main judgment – it is unfortunate that the parties did not invite the judge at the first CMC to direct trial of the coverage issues as a preliminary issue or of the liability issues including the coverage issues before attempting to determine the quantum issue that followed. However none of the parties did so. Although Mr Rigney criticises me at least impliedly for not directing that in August 2022, that was not the application before me, I had not had any previous role in this litigation and splitting up the trial was still opposed by the claimants. If that was something the defendants seriously wanted to be considered at that stage they could and should have issued a formal application seeking such an order. In my judgment, the situation that now applies results directly from a failure by each of the parties to analyse the impact of the coverage issues on all that followed. However, the result of this failure is not something that can be attributed to any one of the parties. It is the collective responsibility of all. I would also add that whilst Mr Rigney criticises Sky for not engaging with the schemes put forward by the defendants, the defendants put them forward only very late in the process with the relevant experts working on them after the trial had commenced. The criticism advanced against Sky in relation to its failure to engage with the defendants' quantum case should be viewed in that context.
13. The legal principles that apply in this area are well established and in summary are as follows:
 - i) Generally, the task of the court is to make whatever findings it can on the evidence before it and where there is a rational and evidential basis on which to arrive at an assessment of damages the court should do the best it can to determine a figure on the evidence available – see Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (A Firm) [2012] EWCA Civ 1417; [2013] 1 EGLR 119 and W Nagel v Pluczenik [2018] EWCA Civ 2640 at paragraphs 51-3. As Leggatt LJ put it in his judgment in W Nagel v Pluczenik (ibid.) at paragraph 51:

“ ... the fact that further or better evidence could have been obtained does not relieve a defendant of the obligation to pay damages, provided that there is a rational basis on which to estimate the claimant’s loss. It is a well established principle that, where it is clear that the claimant has suffered a substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence ...”

and at paragraph 53 that:

“... although persuaded that the claimant has suffered loss which justifies a substantial award of damages, shortcomings in the evidence adduced by the claimant may lead the court to assess the damages on a less generous or more conservative basis than might have been justified if better evidence had been adduced...”

but

- ii) There may come a point where the court concludes that the claimant’s failure to adduce evidence on which the court can rely in order to prove loss means the claim must fail for want of proof – see W Nagel v Pluczenik (ibid.) at 52 – but such cases will be rare, extreme and that solution ought to be a last resort. This last point is established by a number of reported cases including by way of example Tai Hing Cotton Mill Ltd v. Kamsing Knitting Factory [1979] AC 91, where the appeal committee of the Privy Council concluded that damages had been assessed on a wrong basis but concluded that “ ... *the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is.*”

- 14. Although the defendants relied on MMP v Antal [2011] EWHC 1120 (Comm) as supporting their submission that in this case I should dismiss Sky’s claim, in my judgment they were mistaken in doing so. That claim was a claim for damages for repudiatory breach of contract which led to the claimant not trading for a period of months. Flaux J (as he then was) held that damages were to be assessed by reference to the loss of profits that would have been made during the non trading period but for the repudiatory breach less the actual net profits made over the same period – see paragraph 5 of the judgment. However, the claimant did not claim damages to be assessed on that basis but by reference to the effect of the repudiation on the value of the claimant company calculated using the Discounted Cash Flow method. The defendant made clear that it resisted any attempt by the claimant to advance a claim for damages on any other basis and submitted the claim should fail if the approach adopted by the claimant was rejected. In that case it appears to have been accepted that such a change of tack would have required an amendment to the pleadings and no such application was made. Flaux J rejected the claimant’s approach as wrong in principle and declined to assess damages by reference to a notional loss of profits on the basis that no alternative had been pleaded and no disclosure had taken place by reference to such an alternative. Similar considerations led Cockerill J to reach the

conclusions she reached in Ardent Advisors Limited v. UK Web Media Limited and others [2021] EWHC 63 (Comm) – see paragraphs 122-3.

15. In my judgment the defendant's submission by reference to these authorities that I should dismiss Sky's claim is wrong. My reasons for reaching that conclusion are set out below. In summary however, firstly, it was expressly contemplated by the pleadings that a judge might reach the conclusions that I have, secondly the experts were agreed that such a conclusion was practical and its effects could be calculated and thirdly I was asked to reach conclusions on the issues of principle (which I have done) in order that the financial implications could then be worked out. This I not to say that any party is entitled raise for the first time issues of principle that have not so far been raised or otherwise seek to qualify the conclusions so far reached.
16. Even if all this is wrong however, the alternative is not to dismiss the claim as the defendants contend. As I have said, the defendants put forward two proxy schemes as a method for calculating the amount due under the indemnity provided by the Policy. I have in principle adopted the defendants' 2018-9 scheme but rejected their case concerning temporary works, decant and out of hours working. The experts had provided evidence as to the value to be attributed to the 2018-9 scheme as it had been formulated by the defendants as follows: (a) Liam Holder on behalf of Sky - £42,300,229; (b) Ronan Champion on behalf of Mace - £55,700,054; and (c) Danny Large on behalf of Insurers - £38,652,562.
17. Since I am satisfied that the effect of deducting the sum in each valuation attributable to the defendants' temporary works solution and adding in the costs of the temporary works solution I consider reasonable would be to increase these sums, as would adding decant and out of hours working costs, the minimum that Sky would be entitled to on any view would be whichever of these sums I assess is to be preferred. I have only not so far carried out that exercise because of the conclusions that I reached concerning temporary works, decant and out of hours working costs.
18. Mr Rigney submits that I cannot carry out an assessment on this basis because of the conclusions I have reached on the temporary works, decant and out of hours working issues. That is wrong. As I have said the only effect of those conclusions would be to increase the estimates each of the experts have arrived at. If Mr Rigney is right and there is no evidence that can or should be permitted that enables the effect of those conclusions to be assessed then I consider it would be entirely appropriate to conclude that Sky would be entitled to recover whatever unadjusted value should be attributed to the 2018-9 scheme. This would be a straight forward application of the point made by Leggatt LJ in paragraph 53 of his judgment in W Nagel v Pluczenik (ibid.), the relevant part of which I quoted from earlier and would involve me assessing which of the three expert's valuations was to be preferred ignoring the conclusions I have reached on the issues of principle I was asked to decide – the adequacy of the defendants' proposed temporary works solution and the decant and out of hours working issues.
19. Mr Rigney submits that I cannot adopt this approach because it would be necessary to discount these present day values back to what would have been the correct value when the period of insurance expired. The sums contended for by the experts as being the correct value to be attributed to the 2018-9 scheme was not caveated by reference to this issue. As I recall it, the first time this point was mentioned was in Mr Rigney's

oral submissions at the hand down hearing. It did not feature in either the evidence or closing submissions at trial to the best of my recollection. The only issue that was considered was the effect of accelerated receipt in relation to the cost of the Sky or Mace schemes. Even in relation to that issue, the point was left open because the quantum experts considered that until the relevant issues of principle had been resolved, it would be pointless to attempt to resolve accelerated receipt and interest issues – see paragraph 1.6.7 – 1.6.9 of the third joint report by the quantum experts, who said in relation to that issue (as with many others) that “ *(w)e agree to place ourselves at the disposal of the Court to agree the quantification, should the Court determine that a credit for the accelerated receipt of funds is a matter for quantification ... We similarly place ourselves at the Court’s disposal to assist with any interest calculations which are similarly affected by various inputs, which are not known at this stage.*” If my recollection is correct (and Mr Rigney did not suggest it was wrong when I made that point in the course of his submissions) it would be wrong in principle to take account of this new point at this stage for the purpose I am now considering it. In any event the consequence of discounting back to the date when the period of insurance expired would I think result in a conclusion that Sky would be entitled to interest on the reduced sum from that date to judgment under the Senior Courts Act 1981 and at the judgment Act rate thereafter until payment. In reality therefore the effects of discounting back in the manner suggested by Mr Rigney may end in being of no material significance.

20. In summary therefore, had I concluded that Mr Rigney was right to submit that I should not permit an assessment to take place taking account of the conclusions that I have reached, I would nevertheless have concluded that the sum to which Sky is entitled under the Policy is the unadjusted value to be attributed to the 2018-9 scheme – that is a sum to be assessed by reference to the evidence available at trial in the range of between £38,652,562 and £55,700,054. Had I reached that conclusion, I would then have proceeded to assess to arrive at a figure analysing the expert evidence relevant to that assessment.
21. It remains to explain in detail the reasons why I consider Ms Day’s submissions are to be preferred over those of Mr Rigney on the primary issue. They are as follows:
 - i) I do not accept that the way in which Sky has pleaded its case precludes me assessing what is due under the indemnity applying the findings I have made in the judgment. In paragraph 37(1) of its amended Particulars of Claim, Sky pleaded that it was entitled to be indemnified under the Policy in respect of its scheme (being that set out in Schedule 1) or the Mace scheme “ *... or on the basis of any other remedial scheme adjudged appropriate by the court ...*”. It carried forward that approach in paragraph 38 of its amended Particulars of Claim, where it claimed by way of damages such loss, cost or expense “ *... as has been incurred or will be incurred by any of the parties insured under the CAR Policy, whether as set out in Schedule 1 hereto (including those referable to the Sky Scheme or, alternatively, the Mace Scheme or, in the further alternative, an Alternative Scheme)* or otherwise.” In schedule 1 to the amended Particulars of Claim, Sky pleaded in terms at paragraph 1 that it intended to remediate the roof and was claiming the cost of so doing and at paragraph 2 that “ *Sky claims the cost of remedial works involved in the Sky Scheme or, alternatively, the Mace Scheme, or, in the further alternative, such*

other Alternative Scheme as the Court may adjudge appropriate.” It is simply wrong therefore to assert that Sky pleaded its case exclusively by reference to the Sky scheme. To the contrary, its pleadings contemplated that the court trying the dispute would come to a conclusion it was entitled to an indemnity that fell short of the cost of carrying out either the Sky or the Mace schemes. Although Mr Rigney maintained this was nothing to the point because no relevant alternative case was pleaded, in my judgment that point lacks force given the way the parties chose to present their cases. Given the multitude of issues concerning coverage, liability and quantum that arose, attempting to plead the alternatives attributable to every permutation would have greatly added to the length, complexity and cost of preparing the pleadings without serving any useful purpose given the way in which the parties presented their respective cases.

- ii) It is also wrong to say that Sky did not engage with the defendants in relation to their schemes at any rate in the period just before the start of the trial and thereafter – see paragraph 1.5.2 – 1.5.3 and Appendix E of the third joint statement of the quantum experts.
- iii) Although Mr Rigney submitted that the conclusion I have reached is not one that was considered as a possibility by the experts, I am unable to agree. It was considered by Messrs Bailie, Strutt and Howie in their “*Remedial Works Design / Structural Engineering & Construction Management / Buildability Experts' Joint Statement*”, where Mr Baillie and Mr Strutt concluded that Sky’s unamended temporary roof solution could be used with the defendant’s notional scheme. It will be recalled from the main judgment that there were criticisms of the inflatable temporary roof structure originally submitted for by Sky that were addressed by Sky’s revised temporary roof structure. This last point was addressed by Mr Baillie in his supplemental report, where he confirmed that what he had said in the joint report remained his opinion “ ... *because the temporary inflatable roof, or alternative temporary roof structure, could be utilised to undertake the scope of the Insurers' Scheme, however this ought to be subject to a revised temporary works design.*” All this culminated in the evidence in the “*Second Joint Statement on Quantum*” of Messrs Holder, Champion and Large that:

“Hybrid Schemes

1.5.3 As noted in our first joint statement 2, we are aware that the parties and their Technical Experts have commented to different degrees on various ‘hybrid’ schemes where various parts of some schemes are used for the repair / replacement works. Potentially, this gives rise to a substantial multiple of different quantum scenarios.

1.5.4 We agree that it is not clear to us which, if any, of these hybrid schemes might be appropriate (in any event this is a matter for others) and therefore we do not think it is practical for us to provide a cost

assessment on all of these potential hybrid schemes in this joint statement.

1.5.5 We intend to focus our work on the three main schemes.

1.5.6 We agree that in the event the Court decides that a particular hybrid solution is preferred, we place ourselves at the disposal of the Court to agree the quantification of any such Scheme.” [Emphasis supplied]

This statement makes clear the multiple different possibilities that were being considered during the trial, the practical impossibility of attempting to assess the consequences of each of those possibilities ahead of conclusions on the issues of principle being reached and that final quantification would have to await determination of whatever solution was in the end considered appropriate. This point was re-emphasised by the quantum experts in their third joint statement where they again said that “(w)e agreed to place ourselves at the disposal of the Court to agree the quantification of any such Scheme that in the event the Court decides that a hybrid solution is preferred.” Having repeated in paragraph 1.6.48 that “ ... it is in any event not practical for us to provide a cost assessment on each of these potential hybrid schemes in this joint statement.”

- iv) At trial, the defendants had advocated a hybrid approach albeit not the one I considered appropriate. So in his supplemental report, Mr Howie (the expert who gave evidence on behalf of the defendants) expressed the opinion that his temporary roof solution (which in the event I rejected as not being a reasonable solution in the main judgment) was capable of being used in combination with the Sky scheme – something that made its way into the defendants’ opening submissions at paragraph 323. Mr Baillie addressed that evidence in his supplemental report on the merits. Had I accepted Mr Howie’s evidence on this point and had otherwise concluded that the Sky or Mace scheme was one for which an indemnity should be provided precisely the sort of exercise that my judgment refers to would have had to be undertaken and the defendants could not credibly have objected to such an exercise.
22. I consider therefore that the appropriate course is to put in place a series of directions which enable the quantum issues between the parties to be resolved in light of the conclusions that I reached. This will involve as I have said removing the temporary work content from the defendants 2018-9 scheme, adding in temporary works to be carried out in the manner referred to in the judgment but adjusted to take account of the fact that the work to be done is that within the defendants 2018-9 scheme not the Sky or Mace schemes.
23. Whilst this will largely by a quantum expert exercise it is likely that there will have to be construction management expert evidence as well to enable the adjustments to scope of the temporary works to be considered. I emphasise however that this expert witness input is strictly limited to carrying into effect the conclusions that I have so far searched as set out in the main judgment. It is not an opportunity to revisit the

scope or pricing of the work covered by the 2018-9 scheme (other than in relation to the temporary works decant and out of hours working issues) whether by seeking to rely on rates lower than those already used by the experts to arrive at their opinion as to the cost of carrying out the defendants' 2018-9 scheme or otherwise, nor is it an opportunity to adduce further evidence to fill lacunae in the factual evidence. If the factual evidence does not exist to enable particular elements to be calculated with certainty that will have to be resolved by assessing the damages on a less generous basis than might have been justified if the relevant evidence had been available. This may for example impact the notional effect of decanting.

24. There will then have to be a Scott Schedule that sets out the respective parties' cases on the issues that remain to be decided and a round of written submissions. Ms Day submits that there will have to be a hearing of up to 4 days to resolve the quantum issues. I expressed the view that an attempt ought to be made to resolve these issues by agreement at a mediation but it is not necessary that I direct a stay for that. The inevitable gap between the delivery of this ruling and the hearing to resolve the outstanding issues will provide such an opportunity. Given the conclusions set out above, I invite the parties to supply written submissions relevant to the directions needed to carry this into effect. If any party is dissatisfied with this approach I have outlined as to how this dispute should be resolved, then they are at liberty to seek permission to appeal. However in relation to that issue if no other it will be necessary for permission to be sought following circulation of this Ruling before the costs of complying with these directions starts to be incurred.

The Payment on Account Application

25. By CPR r.25.7, an interim payment order may be made where a claimant has obtained judgment for damages or another sum of money to be assessed or where the court is satisfied that if the claim went to trial, the claimant would recover judgment for a substantial sum and where those conditions are satisfied, the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.
26. Mr Rigney did not dispute that in principle Sky was entitled to recover an interim payment – see AH1/147/1-11 – but maintained that the sum sought by Sky of £50m was too high. I agree with that submission. In my judgment the interim payment should be £38,652,562, being the value that Mr Large had arrived at as the cost of the 2018-9 scheme. True it is that it included a temporary works scheme that I have rejected and for which a downward adjustment will have to be applied but it takes no account of the upward adjustment necessary for the temporary works I have found should have been included nor the decanting and out of hours elements for the scheme I consider Sky would have been entitled to an indemnity in respect of.
27. Mace applied for a payment on account in respect of what it alleges to be direct costs which it is entitled to recover under the Policy. That was not the subject of any argument at this hearing and in any event is unarguable for the reasons set out below.

The Mace Dismissal Application

28. Turning now to the Mace claim, Mr Rigney submitted that it should be dismissed on the basis that I had concluded that it is only entitled to cover in respect of loss or

damage (as defined in the Policy) occurring down to Practical Completion and had accepted a submission by the defendants that Mace had not proved or attempted to prove what if any sum was recoverable by it or on its behalf down to that date. That is so but there remain two points that I need to consider in some detail before deciding whether the Mace claim should be dismissed. The first is an assertion by Mace that it was entitled to declarations concerning the scope of the cover under the Policy and secondly a submission by Mace that I have not so far considered a claim by it to recover costs incurred by it which it was contended were recoverable under the Policy.

29. The declaration concerning indemnity sought by Mace is that set out in paragraph 42 of its amended Particulars of Claim:

“Mace claims a declaration that the Defendants and/or CAR Insurers (and each of them) are liable to indemnify Mace in respect of repairing, reinstating or replacing the damaged Roof and/or repairing the damage and any associated loss, cost or expense that Mace and/or any of the parties insured under the CAR Policy has paid or incurred or may pay or incur to repair the damage or in relation thereto, subject to the Sum Insured or Limit of the CAR Policy.”

Mr Rigney submits that Mace’s claim for declaratory relief should fail on the basis that the declaration sought was to the effect that Mace was entitled to be indemnified in respect of the same damage for which it had claimed damages and since Mace had failed to establish an entitlement to an indemnity for such damages there was no entitlement to the declaration sought; that the only declaration that Mace would be entitled to is that it is entitled to an indemnity in relation to damage that occurred down to Practical Completion but that is not the declaration sought and in any event such a declaration would serve no practical purpose and therefore should not be granted as a matter of discretion.

30. Mr Reed submits that Mace was a party to the Policy and therefore had a right to bring a claim for breach of its terms. By its amended Defence, the defendants put in issue Mace’s coverage. If Mace was found not to be insured at all or not insured to a material extent then Mace could be exposed to a subrogated recovery by the Defendants in the name of Sky for the full amount or a material part of any judgment. I agree that in those circumstances, it was appropriate for Mace to have sought declaratory relief. Although much time has been expended by the defendants on the one hand and Mace on the other in exploring whether Mace’s claim should have been brought at all, that is immaterial for present purposes. It was entitled to a declaration that it was an Insured under the Policy given the position of the defendant on that issue and paragraph 42 of the amended Particulars of Claim enables me in principle to grant an appropriately framed declaration as to the scope of the cover to which it was entitled in the light of the conclusions I reached on those issues in the judgment. Mace also maintains (correctly) that the issues that arose concerning retained liability had a direct impact on Mace for the reasons explained in paragraph 52 of the judgment. As Mr Reed put it in his written submissions, “... *there was a substantial risk that Mace (and only Mace) would be paying to Sky any shortfall in recovery under the Policy...*” I accept that was so.

31. Mr Rigney is correct to submit that Mace’s monetary claim was not in respect of or limited to damage suffered in the period down to Practical Completion and failed for the reasons explained in the judgment. That is an issue that is obviously relevant to costs but does not entitle me simply to ignore Mace’s claim for declaratory relief or the fact that I have concluded that it was an Insured in respect of relevant Damage suffered down to Practical Completion. Mr Reed’s (obviously correct) acknowledgment that Mace “... *has always been accepted ... that there can only be one payment for a sum that is claimed and the construction contract contains a payment provision in that regard ...*” will no doubt be an issue that will have to be considered when costs come to be decided but it is not material to whether the claim ought to be dismissed.
32. The point that remains is whether there is any monetary claim made by Mace that remains to be resolved. First, as I held in the judgment, Mace had not made any attempt to identify what if any sum was recoverable by it or on its behalf down to the date of Practical Completion or why it should have sued separately from Sky for the same or a sub set of the same monetary remedy as Sky. Mr Reed submits that “... *(i)t is, of course, correct that these issues were not addressed by Mace separately during the trial. This was because they were not pleaded and the available time was used for the evidence and oral submissions on the pleaded issues ...*”. With respect if that is so then it is too late now to want to advance such a claim. The point was made by repeatedly by Mr Rigney in his written and oral openings and closing submissions. At no stage did Mace make any attempt to reserve its position, even if in principle it could have at that stage.
33. Mace maintains that it has a direct claim under the Policy for £11.4m odd in respect of its own costs of carrying out investigation works in connection with damage to the roof. Mace maintains that it is entitled to a declaration that it is indemnified for the costs of investigating the cause of the damage, remedial works, and preparation of the remedial scheme, those costs having been incurred for the purpose of repairing the damage. I disagree. It is entitled to be indemnified in respect of the damage as defined down to the date of practical completion. Mr Reed maintains that Mace is entitled to recover what he characterises as his direct costs. As to that, Mr Rigney’s closing submission at the end of the trial was that Mace had not demonstrated any entitlement to a monetary remedy in respect of any relevant period – that is damage occurring prior to Practical Completion. I accepted that submission. This was not in any sense a last minute point. Mr Rigney had made the point in the course of his opening submissions, where he had submitted:

“With respect to the allegedly incurred costs

358.1 All of the costs were incurred in and after 2020, several years after Practical Completion. For reasons already set out in Section C above, such costs are irrecoverable.

358.2 Further, all of the costs appear to concern the preparation and development of the Mace Scheme, in its various incarnations. However, in circumstances where the Mace Scheme will not be implemented, it could not be said that costs might be said to be incurred in the ‘repair, reinstatement or replacement’ of damaged property (as opposed to in the

investigation as to a potential way of addressing damage/resisting a claim for negligence). They therefore fall outside the Basis of Settlement provisions and are not to be indemnified.

358.3 Finally, if this head of claim were recoverable in principle, and Mace was able to demonstrate that the alleged costs had been incurred, it would still have to prove that such costs were incurred in connection with actual damage that had occurred during the Period of Insurance, rather than in the investigation of potential or threatened damage, or of damage that post-dates the Period of Insurance. It has not done so.”

Each of these points remained unaddressed by the end of the trial. The second point is particularly relevant because in one of the schedules that I was given in the course of the closing submissions I was presented with what was an agreed statement of what quantum figures remained in dispute in relation to each of the schemes. Mace’s direct costs were said to be £9,858,440 and to be part of the sum claimed for and in respect of the Mace scheme costs, which I have held is not to be recoverable under the Policy. Whilst I accept that it would have been open to Mace in principle to plead or at any rate prove a claim for costs incurred by it in respect of Damage as defined that occurred prior to practical completion, it made no attempt to do so. Although Mr Reed emphasises that in the end there was an agreed sum in respect of this element (£9,858,440), that does not assist for present purposes since there is no agreed sum by way of direct costs said to have been incurred by Mace in respect of damage that occurred down to practical Completion and no claim for any Mace costs other than as an element of the Mace scheme. As I have explained in the judgment the Policy responds to the extent of the defendants 2018-9 scheme with the adjustments identified in the judgment. That did not include and was not alleged during the trial to include any part of what Mace describes as its incurred costs. As I have said they were claimed only as part of the Mace scheme costs.

34. In the result, Mace is entitled to judgment for declarations that give effect to my conclusions concerning the true scope of the Policy but not to any money judgment.

DATED this the 14TH day July 2023