PLEASE NOTE: THIS OPINION SUPERSEDES THE OPINION ISSUED ON 29 JULY 2026
[2026] CSOH 70

OUTER HOUSE, COURT OF SESSION

[2026] CSOH 71

CA23/25

OPINION OF LORD SANDISON

In the cause

BELLSHILL PROPERTY LIMITED

Pursuer

against

(FIRST) BORLAND INSURANCE LIMITED; (SECOND) TRADEBE HEALTHCARE NATIONAL LIMITED; and (THIRD) GRUPO TRADEBE MEDIOAMBIENTE SL

Defenders

Pursuer: McBrearty KC, Roxburgh; CMS Cameron McKenna Nabarro Olswang LLP
First Defender: McClelland KC; Brodies LLP
Second and Third Defenders: Barne KC; BTO Solicitors LLP

29 July 2026

Introduction

[1] The pursuer in this commercial action seeks payment from the defenders jointly and severally, or severally, of the sum of £5,256,904.11 in respect of losses arising from the total destruction by fire in July 2021 of a large warehouse-type unit extending to about 3,000 square metres with an 800 square metre mezzanine floor owned by it at Inchinnan Road, Bellshill Industrial Estate. The first defender is an insurance broker which arranged the pursuer's insurance cover for the unit. The second defender was, at the time of the fire,

the tenant of the unit and used it for the purpose of processing clinical waste. An activity being carried out in the course of that processing caused the fire which destroyed the unit. The third defender guaranteed the second defender's obligations under the lease. The second and third defenders maintain that the pursuer's case against them is irrelevant, and that matter came before me for discussion at debate.

Background

[2] In terms of the lease between the pursuer and the second defender, the former was obliged fully to insure the unit against various risks, including fire, and the second defender was obliged to pay the premium for that insurance cover. Through its property agents, the pursuer instructed the first defender, an insurance broker, to arrange the necessary cover. A policy which was thought to insure the unit against the relevant risks was obtained from a Luxembourg insurance company called Builders Direct SA, with cover supposedly commencing on 7 December 2020 for the period of a year. However, that cover was subject to a stipulation that there were no composite or sandwich panels at the unit, and in fact the unit's previous use as a cold store had resulted in it being fitted with composite insulation panels which spanned virtually the full height of its internal walls, and its ceiling. The policy's coverage for fire was, further, subject to a condition that the electrical systems at the unit be inspected within 2 months of the inception of the policy, ie by 7 February 2021. No such inspection took place within that period, or indeed at any time before the fire. The pursuer maintains that the first defender was at fault in arranging a policy subject to those conditions without specifically drawing their existence to its attention, and provides a detailed explanation of why it makes that claim. The case against the first defender is, however, not the subject of argument at this stage save insofar as it touches upon the case

against the second defender (which, through the medium of the guarantee, is also the basis of the case against the third defender).

[3] In terms of the lease of the unit, the second defender was obliged not to do anything that might invalidate any insurance cover for the unit, and not to use it for any purpose that might make any additional premium payable for such insurance, without first agreeing to pay that premium. At the time the insurance policy was arranged, the second defender was using a steam treatment to sterilise the waste it was processing at the unit, and it is claimed that the policy was issued on that basis. In March 2021, without informing anyone else, it changed its processes to involve the use of gas-fired burners to dry the waste being processed, and it was one such gas-fired dryer which started the disastrous fire in July of that year. The pursuer alleges that the use of the gas burners materially increased the risk of fire being generated by the second defender's operations at the unit.

[4] The insurer declined liability under the policy, and the pursuer maintains that that was a result of the actions and omissions of both the first and second defenders. It claims that, had the first defender acted with due care, an insurance policy would have been obtained which would have covered the risk of the unit being destroyed by fire at the relevant date. It claims that, had it been made aware that the second defender proposed to use gas burners as part of its operations at the unit, it would, further, have obtained a policy which would have covered the risk of the unit being destroyed by fire in consequence of those operations. Had valid cover been in place, it maintains that it would have received payment from an insurer in the amount of £4,599,000 as the insured value of the unit, together with a payment of £657,904.11 in respect of loss of rent.

Submissions for second and third defenders

[5] On behalf of the second and third defenders, senior counsel submitted that the action should be dismissed as against them. It was clear that the loss in respect of which the pursuer sought reparation was that suffered in consequence of the refusal of the insurer who issued the policy apparently in place to pay out in respect of the destruction of the unit and the consequent loss of rent. A number of reasons had been put forward by the insurer for refusing to pay. They included a failure to make a fair presentation of the risk in terms of section 3 of the Insurance Act 2015 by not disclosing (i) the presence of composite panelling, (ii) the use of an industrial shredding machine, and (iii) the use of gas burners for drying; and also a failure to comply with the policy requirement to have the electrical installation at the unit inspected within 2 months. The pursuer's case against the second defender was based on a claimed breach by that defender of its lease. The relevant obligations said to have been incumbent on the defender were those set out in Part 4 of the schedule to the lease, as follows:

> "Schedule Part 4 – Insurance and Damage Provisions
>
> …
>
> 1.2 The Tenant must comply with the requirements of the insurers and must not do anything that may invalidate any insurance.
>
> 1.3 The Tenant must not use the Premises for any purpose or carry out or retain any Permitted Works that may make any additional premium payable for the insurance of the Premises, unless it has first agreed to pay the whole of that additional premium."

The landlord also had obligations under Part 4 of the schedule to the lease, principally (in terms of Clause 2.1 thereof) to:

> "insure (with a reputable insurer) … the Premises against the Insured Risks in their full reinstatement cost (including all professional fees and incidental expenses, debris removal, site clearance and irrecoverable VAT) … subject to all normal commercial

> excesses, limitations and exclusions as the insurers may impose and otherwise on the insurers' usual terms."

There were other related obligations on the landlord about noting the tenant's interest in the unit on the policy, notifying the tenant about material variations to the insurance cover, and concerning the deployment of any monies recovered under the policy. It was submitted that the insurance arrangements contemplated by the lease amounted to the kind of scheme which was described in *Mark Rowlands Ltd* v *Berni Inns Ltd* [1986] 1 QB 211 at 232G - 233B, [1985] 3 WLR 964 at 979D - H, per Kerr LJ, as indicating that the intention of the parties must have been:

> "that in the event of damage by fire, whether due to accident or negligence, the landlord's loss was to be recouped from the insurance moneys and that in that event they were to have no further claim against the tenant for damages in negligence … the tenant is entitled to say that the landlord has been fully indemnified in the manner envisaged by the provisions of the lease and that he cannot therefore recover damages from the tenant in addition, so as to provide himself with what would in effect be a double indemnity."

[6] For the pursuer's case against the second defender to be causally relevant, the claimed breaches by that defender of its obligations under the lease had to have caused or materially contributed to the insurer's refusal to pay. However, the insurer denied liability under the policy on the basis of the pursuer's failures to make a fair presentation of the risk and to comply with the electrical inspection condition. Those things had nothing to do with the second defender.

[7] The clause relied upon by the insurer as a basis for avoiding the policy (in addition to the provisions of the Insurance Act 2015) was Clause 25 of the general conditions of the policy, which provided:

"**25. Fair presentation of the risk**

The Named Insured must make a fair presentation of the risk to the Company at inception, renewal and variation of the Policy The Company may avoid the Policy and refuse to pay any claims where any failure to make a fair presentation is:

(a) deliberate or reckless; or

(b) of such other nature that, if the Named Insured had made a fair presentation the Company would not have issued the Policy

The Company will return the premium paid by the Named Insured unless the failure to make a fair presentation is deliberate or reckless

If the Company would have issued the Policy on different terms had the Named Insured made a fair presentation, the Company will not avoid the Policy (except where the failure is deliberate or reckless) but the Company may instead:

(c) reduce proportionately the amount paid or payable on any claim, the proportion for which the Company is liable being calculated by comparing the premium actually charged as a percentage of the premium which the Company would have charged had the Named Insured made a fair presentation;

and/or

(d) treat the Policy as if it had included such additional terms (other than those requiring payment of premium) as the Company would have imposed had the Named Insured made a fair presentation …"

The insurer did not seek to rely on Clause 21 of the general conditions of the policy as a basis for discontinuing insurance cover That clause was in the following terms:

"**21. Change of Risk**

This insurance shall cease to be in force if there is any alteration in the Premises which increases the risk of injury or damage unless such alteration is agreed in writing by the Company."

Even if the terms of that clause did actually address the situation of any increase in risk arising from the use of the dryers, it was not relied upon by the insurer. It could not in any event have done so, standing the terms of Clauses 3 and 4 of section A ("Property Damage") of the policy:

"3. **Mortgage/Freeholder/Lessor**

The interest of the mortgagee/freeholder/lessor in the insurance by this Section shall not be prejudiced by any act or neglect of the Named Insured or occupier of any

Building hereby insured where the risk of Damage is increased without the authority or knowledge of the mortgagee/ freeholder/lessor provided the mortgagee/freeholder/lessor shall immediately on becoming aware thereof give notice in writing to the Company and pay an additional premium if required.

4. **Non-invalidation**

Notwithstanding General Conditions 1 and 2 the insurance by this Section shall not be invalidated by any act or omission or by any alterations in respect of any portion of the Premises hereby insured not occupied by the Named Insured whether constituting an increase in risk or not unknown to the Named Insured provided that immediately the Named Insured becomes aware thereof shall give notice to the Company and pay an additional premium if required."

General conditions 1 and 2 referred to in Clause 4 were in the following terms:

"**1. Condition Precedent**

The due observance of the terms provisions and amendments of this Policy by the Insured insofar as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers and information supplied on or in connection with the Proposal shall be a condition precedent to any liability of the Company to make any payment under this Policy

2. Misrepresentation and Fraud

This insurance shall be voidable

(a) if the Insured has concealed or misrepresented and/or failed to declare any fact or circumstance material to the insurance or its subject matter or

(b) if the Insured or anyone acting on the Insured's behalf has committed fraud attempted fraud or sworn falsely concerning this insurance or its subject matter

whether before or after loss

If the Insured notifies any claim knowing it to be false or fraudulent as regard amount or otherwise this Policy shall become void and all claims hereunder shall be forfeited"

The pursuer's case was that it was unaware of the commencement of the use of the gas burners. These clauses, properly construed, meant that the pursuer's interest in the policy would not be invalidated by an increase in risk of which it was not aware: *The Seashell of Lisson Grove Ltd* v *Aviva Insurance Ltd* [2011] EWHC 1761 (Comm), [2011] 2 CLC 831, especially at [30] and [38]; *Ansari* v *New India Assurance Limited* [2009] EWCA Civ 93, [2009] Lloyd's Rep LR 562; *Colinvaux's Law of Insurance* (14th Edition), paragraphs 20-172 and 20-173.

[8] The pursuer also sought to rely on Clause 8 of the coverage exclusions from the "Property" section of the policy, which provided:

> "**Exclusions**
>
> The insurance provided under this Section does not cover
>
> …
>
> 8. Damage to that part of the Property
>
> (a) caused by fire resulting from its undergoing any heating process or any process involving the application of heat
>
> (b) resulting from its undergoing any process of production packing treatment commissioning servicing or repair"

However, that clause meant that the policy would not cover damage to any specific item that caught fire because it was being heated as part of a process, but would still cover any further fire damage that spread beyond that item. It prevented claims for self-inflicted fire damage to items being intentionally heated, but did not remove cover for accidental fire spread. That interpretation was supported, in particular, by the terms of paragraph 8(b). On the pursuer's approach, a building undergoing repair did not benefit from cover if that repair resulted in extensive damage. Further, on its approach, any fire caused by a heating source within the property could potentially be caught by the exclusion. The insurer was informed from the outset that the waste being processed was to be sterilised by steam. That involved a heat source. On the pursuer's approach, a fire connected to the production of steam would be excluded from cover.

Submissions for pursuer

[9] On behalf of the pursuer, senior counsel submitted that the question at issue was whether, assuming that the second defender was in breach of the terms of the lease, that breach caused any loss to the pursuer. The second defender argued that it did not, because, properly construed, the insurer would not have been entitled to avoid the policy based on its actions. The pursuer maintained that the insurer would have been entitled to avoid the policy on the basis of the second defender's use of the gas burners when that use had not been disclosed at any point prior to the fire.

[10] The relevant part of the pursuer's averments for present purposes was that the second defender had started to use gas burners without notifying the pursuer of that fact. It was obvious that that might invalidate insurance cover, or at least increase the premiums payable for cover. The use of the burners had materially increased the risks associated with the operations at the unit and indeed had caused the fire. The conduct of the second defender in this regard was one of the grounds on which the insurer had purported to avoid the insurance policy.

[11] Contracts of insurance were subject to the general principles regarding construction of contracts: *Re United London and Scottish Insurance Co Ltd* [1915] 2 Ch 167 at 172 (reference might also have been made to *Financial Conduct Authority* v *Arch Insurance (UK) Limited* [2021] UKSC 1, [2021] AC 649, [2021] 2 WLR 123 at [47]). The ultimate aim was therefore to determine what a reasonable person with all the background knowledge reasonably available to the parties would have understood to be the effect of the provisions in question. Context was thus relevant, as were the objectives that reasonable persons in the position of the parties would have had in mind: *Glenfiddich Wind Ltd* v *Dorenell Windfarm Ltd* [2025] CSOH 62, 2026 SC 45 at [53].

[12] The policy was made up of the schedule and the policy wording. The policy wording contained various sets of terms and conditions which applied to distinct categories of insurance. The second defender relied upon Clauses 3 and 4 under the cover part of section A ("Property Damage") of the policy.

[13] Clause 3 applied to claims made by a mortgagor, freeholder or lessor who was not the named insured. In this case, the pursuer was both the owner of the property and the named insured. Accordingly, the clause was not relevant.

[14] Clause 4 was a non-invalidation clause. The purpose of such clauses was to allocate risk between the insurer and the insured. They did so by preventing an insurer from avoiding a policy in specified circumstances, but did not extend cover to risks which were materially different to those insured, or else expressly excluded in terms of the policy wording. The operation of Clause 4 was subject to three conditions: (a) the named insured becoming aware of a relevant act, omission or alteration which might otherwise have given rise to a right in the insurer to avoid the policy before damage occurred (the view of Teare J to the contrary in *Seashell of Lisson Grove* being wrong); (b) the named insured informing the insurer of that matter immediately upon becoming aware thereof; and (c) the payment of any additional premium required. If the insurer would not have accepted the risk, the clause could not come into operation. The existence of those conditions was consistent with the purpose of the provision: to ensure that an insured who identified a matter which would give the insurer grounds to avoid the policy did not find that the insurance was avoided as a result of him bringing the matter to the attention of the insurer.

[15] The first point to note in construing Clause 4 was that it referred back to the policy's general conditions 1 and 2. General condition 1 made compliance with the terms and conditions of the policy a condition precedent to payment being made in respect of any

claims. General condition 2 provided, *inter alia*, that the insurance would be voidable if the insured failed to disclose any facts or circumstances material to the insurance or its subject matter. That did not purport to override any exclusions contained within the policy, nor did it require the insurer to provide cover for risks which were materially different from those disclosed at the outset.

[16] Secondly, Clause 4 provided that the insurance would not be invalidated by an act or omission of an occupier which was unknown to the insured. The use of the word "invalidated" made it clear that the clause was preventing a right to avoid the insurance which would otherwise arise (see for example *Ansari*). It was not providing for a risk which was otherwise excluded to become an insured risk. That was consistent with the requirement on the insured to make payment of an additional premium, if required, on notifying the insurer of the matter. That presupposed that the act, omission or alteration was one which the insurer would have been willing to insure for a higher premium. Reference was made to *Colinvaux, op cit* at [9-022] and to *Greenock Steamship Co* v *Maritime Insurance Co Ltd* [1903] 1 KB 367. The clause clearly could not have been intended to oblige an insurer to continue to insure a risk which it would not initially have been willing to take on. The clause accordingly only contemplated acts, omissions or alterations that still fell under the scope of the risk initially presented for cover to the insurer, not a materially different risk.

[17] Turning to look at the exclusions in the policy, it was clear that there was a general exclusion in respect of fires arising from processes involving the application of heat. Exclusion 8 in the policy's Part A (Property Section) was widely drafted and consisted of two parts. Part (a) covered damage to the property caused by fires resulting from, *inter alia*, any process involving the application of heat. The wide drafting of the provision was

consistent with the insurer's stated position that it would not have insured the property had it been aware of the intention to use gas burners. The pursuer offered to prove that the fire in the property resulted from the use of the gas burners in the dryers. That was a process involving the application of heat. Assuming that the fire was caused by the use of gas burners in the dryers, the pursuer could not in any event have sought to invoke Clause 4 to prevent the insurer from refusing to make payment under the policy, because the damage caused by that mechanism would in any event have been excluded from cover.

[18] Turning to the question of notification, the pursuer was not aware of, and accordingly did not notify the insurer of, the second defender's use of the burners prior to the fire. In consequence, the insurer did not have an opportunity either to insist on the payment of an additional premium or to insist that the second defender cease using the burners in order for cover to be maintained. The conditions in Clause 4 were therefore not met. On one view, it might seem odd that the application of the clause should depend on whether or not the insured identified the relevant acts or omissions prior to the event which gave rise to a claim. However, looked at in the context of the relationship between the parties, that reading, which was the natural meaning of the words used, was also the meaning which made the most commercial sense. The clause was looking to determine who should bear the risk of the occupier of the property failing to comply with terms of the insurance policy. Given that it was the owner of the property who had the ability to monitor the occupier, it was logical that he should bear the risk: he was best placed to guard against it. Equally, it had to be recognised that where the owner leased the property to a tenant, the owner would not be at the property at all times so as to monitor the actions of the tenant. If the owner identified a breach by the tenant prior to any loss being caused, he ran the risk of the insurer avoiding the policy on being advised of the prior breach. To avoid that

unfairness, the clause provided that the insurer could not avoid the policy based on the prior breach provided that the insured advised him of it immediately. This enabled the insurer to increase the premium to reflect the increased risk associated with the actions. It was also implicit that the insurer could insist that actions in breach of the insurance policy were stopped, which failing it would withdraw cover. In contrast, where the actions in breach of the policy caused loss prior to their being intimated to the insurer, they provided the insured with no assistance. He had not made his disclosure or paid the additional premium and so he was not protected from the invalidation of the policy. To conclude otherwise would run the risk of creating perverse incentives. Moreover, it would place the risk of non-compliance by the occupier of the premises on the insurer, who did not have the means to police the occupier's actions. That was not a commercially sensible reading of the clause.

[19] Having formed concerns in the course of the debate about the extent to which the issue of the causative contribution, if any, of the actions of the second defender to the loss which the pursuer claims to have suffered had been identified and addressed, I offered parties the opportunity to make further written submissions on this point. In response, the pursuer submitted that it averred that, had it not been for the failures of each of the first and second defenders, it would have had a valid policy of insurance in place at the time of the fire, which could not have been avoided. It averred that had the actual policy which was obtained not been avoided, or had an equivalent policy been obtained from an alternative insurer, it would have received payment under a valid policy in place at the time of the fire. Its position was that the failures of each of the first and second defenders caused it loss. The first defender's actions resulted in the insurer being entitled to refuse to make payment under the actual policy in place on the occurrence of the fire. The second defender's actions resulted in the unit being destroyed by fire in circumstances in which the policy actually in

place would not have paid out. It was the combination of these events which resulted in the outcome of which the pursuer complained, namely not having an insurance policy which would pay out in the event of the fire that occurred.

[20] The question arose as to whether, in circumstances where the first defender's negligence had resulted in the actual policy in force being voided *ab initio*, any subsequent act of the second defender could have caused the pursuer loss. However, when dealing with two independent wrongs, either of which would have been sufficient on its own to cause loss, the law treated both as being causatively relevant. The issue arose from the manner in which the "but for" test of causation was applied. If the "but for" test was applied separately to each wrong, then a claim based on either of them alone would fail. The second defender's failure did not, on its own, cause the loss because, as a result of the first defender's negligence, there was no cover in place. The first defender's failures did not, on their own, cause loss because, even if it had fulfilled its duties and there had been a valid policy put in place, the increase in risk arising from the second defender's undisclosed operations would mean that that policy would not have paid out. It would result in obvious unfairness to a pursuer if each of the defenders could simply blame the other. The law therefore did not take that approach.

[21] In *Financial Conduct Authority* at [182] (a case about causation in the slightly different context of whether damage suffered could properly be regarded as having been caused by the eventuation of an insured risk), it was observed that:

> "It has, however, long been recognised that in law as indeed in other areas of life the 'but for' test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event. An example given by Hart and Honoré in their seminal treatise on Causation in the Law, 2nd ed (1985), p 206 is a case of two fires, started independently of each other, which combine to burn down a property: see *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co* (1920) 146 Minn 430;

> *Kingston v Chicago & Northwestern Railway Co* (1927) 191 Wis 610. It is natural to regard each fire as a cause of the loss even if either fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred."

In *Heskell* v *Continental Express Ltd* [1950] 1 All ER 1033 at 1047, Devlin J noted that:

> "….it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate the competing causes and ascertain which of them is dominant."

On that basis, the law approached the "but for" test by considering the concurrent causes together. As was explained by Macgregor, *Law of Damages*, 22nd Edition, at 9.005:

> "The 'but for' test thus requires the court to consider whether the wrongdoer's act or omission was necessary for the loss that was suffered. The basic question is whether the loss would still have been suffered if the wrongful act had not occurred. The test 'directs us to change one thing at a time and see if the outcome changes', with the only things to be changed to be the removal of the wrongful act and any other unlawfulness of the defendant or third parties that would otherwise occur. The removal of unlawful acts by the defendant or third parties is designed to ensure that a victim is not made worse off by further wrongdoing. Thus the court often asks whether the loss would have been lawfully suffered."

[22] Applying the test in this way, the "but for" test was passed in respect of each of the alleged wrongs. Looking first at the second defender, and ignoring the wrong of the first defender, there would have been a valid policy of insurance in place when the second defender came to use the gas burners. Had the second defender intimated its intention to use the gas burners, there would have been an insurer in the market who would have provided insurance to cover that additional risk. The "but for" test was therefore made out. Looking next to the first defender, if one ignored the wrong of the second defender, then, but for the first defender's failures, there would have been an insurer in the market who would have insured the risks in question; accordingly, there would have been a policy of insurance in place that would have paid out at the time of the fire. Again, the "but for" test was made out.

[23] That approach was consistent with the approach taken by the House of Lords in *Baker* v *Willoughby* [1970] AC 467, [1970] 2 WLR 50. In that case an individual's leg had been injured in a car accident caused by the defendant's negligence. Before he had obtained judgment against the defendant, the individual was shot in the same leg, which had to be amputated. The defendant sought to argue that the claimant would have lost his leg in any event and so the original accident could not be viewed as the cause of the injury. Lord Reid rejected that argument. He explained, at [1970] AC 492B - C, [1970] 2 WLR 55H:

> "If it were the case that in the eye of the law an effect could only have one cause then the respondent might be right. It is always necessary to prove that any loss for which damages can be given was caused by the defendant's negligent act. But it is a commonplace that the law regards many events as having two causes: that happens whenever there is contributory negligence for then the law says that the injury was caused both by the negligence of the defendant and by the negligence of the plaintiff and generally it does not matter which negligence occurred first in point of time."

[24] In *Williams* v *The Bermuda Hospitals Board* [2016] UKPC 4, [2016] AC 888, [2016] 2 WLR 774, the Board observed that:

> "[38] …Lord Simon said [in *McGhee v National Coal Board* [1973] 1 WLR 1 at 8] that where on the balance of probabilities an injury is caused by two (or more) factors operating cumulatively, one (or more) of which is a breach of duty, it is immaterial whether the cumulative factors operate concurrently or successively.
>
> [39] The sequence of events may be highly relevant in considering as a matter of fact whether a later event has made a material contribution to the outcome (as *Hotson v East Berkshire Health Authority* [1987] AC 750 illustrates), or conversely whether an earlier event has been so overtaken by later events as not to have made a material contribution to the outcome. But those are evidential considerations. As a matter of principle, successive events are capable of each making a material contribution to the subsequent outcome."

[25] *Performance Cars Ltd* v *Abraham* [1962] 1 QB 33, [1961] 3 WLR 749, which considered the issue of damage caused by multiple wrongful acts, was not in point. In that case, an individual was involved in two car accidents, neither of which was the result of his fault. In the first his car was damaged such that it needed to be resprayed. In the second his car was

damaged again but only to the area which already required to be resprayed. He obtained an award of damages against the driver of the first vehicle but was unable to extract payment. He therefore sued the driver of the second vehicle. That claim was unsuccessful. Lord Evershed MR explained that this was because "the necessity for respraying was not the result of the defendant's wrongdoing because that necessity already existed". Put another way, nothing the second driver did altered the position of the other two parties. His actions were collateral or *res inter alia actos*. In contrast, in this case the pursuer had suffered a loss when the first defender's failures resulted in it not having a valid and enforceable policy of insurance in place at the time of the fire. However, it was not until the fire took place that that loss could be quantified. Had the fire arisen from an insured risk then the loss would have been recoverable from the first defender alone. However, the fire arose from an uninsured risk as a result of the second defender's breach of contract. This was not, therefore, a case where the loss arose from the actions of one defender alone. Rather, as in *Williams*, the breaches of each of the first and second defenders operated cumulatively to cause the outcome: the loss of a policy of insurance that would have paid out on the fire. It followed that the respective breaches of the first and second defenders were capable of making a material contribution to the pursuer's loss, being the loss of payment under a valid policy of insurance in place at the time of the fire. As identified in *Williams*, the extent of each party's contribution was a matter to be determined after evidence. It would be for the court, having heard evidence, to determine whether the proper analysis was that both the first and second defenders were liable (either jointly and severally, or severally) for the pursuer's loss; that the first defender alone was liable as a result of its failure to cause a valid policy of insurance to be put in place; or that the second defender alone was liable, on the basis that its breach of contract was a supervening cause which removed the causal relevance of the first defender's breach.

Submissions for first defender

[26] On behalf of the first defender, senior counsel noted that it sought an order for apportionment of damages amongst all the defenders jointly and severally, and thus had an interest in resisting the dismissal of the pursuer's case as against the other defenders. That case was relevant and sufficiently specific for proof before answer.

[27] The pursuer's case against the second defender was that its breach of the lease contributed to the pursuer not having "a" valid insurance policy in place to respond to the fire. That case was broader than the second defender having caused the insurer to avoid "the" policy actually in place. Rather, a case was made against the second defender that disclosure of its use of burners would have brought about a reassessment of the insurance arrangements sufficient to ensure "a" policy was in place which was not susceptible to avoidance in the circumstances of the fire. That might have been an amended policy with the existing insurer, or a new policy with a different insurer. It followed that the second defender was not exculpated from liability by reference to the terms of the policy which was actually in place and the circumstances in which it was avoided. Had it complied with its obligations, on the pursuer's averments, the building would have been insured and the pursuer would not have suffered loss.

[28] The pursuer's claimed loss might be characterised broadly as the absence of insurance cover at the time of the fire rather than narrowly as the avoidance of the policy actually in place. If the pursuer's loss was characterised in the broader way, there was more than one route to causation of that loss. One route was to cause avoidance of the existing

policy. Another was to cause the absence of any other policy. The pursuer's averments made it clear that it was seeking to make out the broader case. It averred that the second defender was obliged in terms of the lease to tell the pursuer before introducing the use of heat into its processes, so that the insurance consequences could be identified. If that had been done, the insurance cover would have been renegotiated, which would probably have led to a new insurance policy with a different insurer being in place before the fire. The liability of the second defender did not depend on its breach constituting a *novus actus interveniens*. It was sufficient that its breach was a separate cause of the absence of insurance at the time of the fire.

Reply for the second and third defenders

[29] In the additional written submissions for the second and third defenders, it was suggested that the question for the court was whether the loss the pursuer sought to recover was caused by the first defender or the second defender, or was somehow contributed to by both. The second defender's actions did not cause the loss that was claimed in the present action. There was no policy in place at the time it started to use the dryers, because the pursuer failed to fulfil conditions precedent to cover in respect of the composite panels and the electrical inspection. The effect in law was that there was no policy. Secondly, the insurer avoided the policy *ab initio*. That had retrospective effect such that, in law, the policy was never in place. Accordingly, nothing the second defender did or did not do resulted in the pursuer's loss of the policy or any other policy that the first defender should have put in place. The loss was caused long before the second defender's use of the dryers began.

[30] Applying the usual "but for" test of causation, the first defender was liable to the pursuer on the averred facts. There was no question that the application of that test would

result in the exoneration of both the first and second defenders. Had the first defender fulfilled its duties, a valid insurance policy would have been in place. That policy would have responded to the fire, notwithstanding the subsequent use of the dryers by the second defender, due to the non-invalidation clauses. The actions of the second defender were causally irrelevant. Furthermore, the corollary of there being no insurance policy was that there could have been no breach by the second defender of the lease obligations relied on by the pursuer. Those obligations only arose if there was an insurance policy in place. In any event, the failure by the pursuer to put in place a valid insurance policy was itself a breach of its obligation under paragraph 2 of the schedule Part 4 to the lease. The mutuality principle meant that, standing the pursuer's breach, there was no requirement on the second defender to comply with its counterpart obligations. The fact that this was not known at the time was irrelevant.

[31] The first defender appeared to argue that the second defender ought to be regarded as at least potentially solely responsible for the loss of "a" policy which would have been in place at the time of the fire as opposed to "the" policy which was then thought to be in place, on the basis that the latter's actions would amount to a *novus actus interveniens*. In other words, it suggested that the effect of its own breaches would have been causally obliterated by the supervening conduct of the second defender. That was not a case which either it or the pursuer had pleaded. Firstly, the first defender's case against the second defender was based entirely upon the case made by the pursuer against the second defender. Secondly, the terms of the hypothetical policy that might have been secured were not identified. There was no basis in logic or averment for suggesting that the hypothetical policy would not also have included the very endorsements in relation to which there was non-compliance in respect of the actual policy (ie composite panels and electrical

inspection), or that the pursuer would have complied with any endorsements. Thirdly, no *novus actus interveniens* argument could succeed in circumstances where the first defender's duty was to guard against such third party intervention as in fact occurred (as here, by putting in place a policy that would have protected the pursuer precisely against the very *novus actus* that was said to have occurred, ie the tenant increasing the risk by its activities on the premises): Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th Edition) at 109 - 110, and the cases cited therein: *London Joint Stock Bank Ltd* v *Macmillan* [1918] AC 777; *De La Bere* v *Pearson Ltd* [1908] 1 KB 280; *Stansbie* v *Troman* [1948] 2 KB 48; *Home Office* v *Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 WLR 1140; *P Perl (Exporters) Ltd* v *Camden LBC* [1984] QB 342, [1983] 3 WLR 769; *Maloco* v *Littlewoods Organisation Ltd* 1987 SC (HL) 37, 1987 SLT 425, per Lord Goff of Chieveley at 1987 SC (HL) 77, 1987 SLT 438H; cf *Weld-Blundell* v *Stephens* [1920] AC 956. Fourthly, any rights and obligations that arose between the pursuer and the second defender were *res inter alios acta* when it came to the pursuer's rights against the first defender, and could not impinge on or otherwise harm the rights the pursuer had against the first defender. The first defender's argument for complete exoneration from the consequences of its breaches failed.

[32] The key issue for the court remained the cause of the pursuer's loss. That did not require resort to speculative and unspecified counterfactuals. Had the first defender complied with its duties, there would have been in place a policy that would have responded to the fire.

[33] The loss that the pursuer sued for was the loss of insurance proceeds, not the loss caused directly by the fire. It claimed that the second defender's actions resulted in the policy apparently in place not paying out, but that was not the case. The alleged increase in risk brought about by the use of the dryers after the policy's inception did not mean that the

policy would not pay out. The consequence of the first defender's breaches was that there was no insurance in place at all.

[34] *Financial Conduct Authority* v *Arch Insurance* made it clear that, generally speaking, the "but for" test for causation should be applied:

> "[181] We agree with counsel for the insurers that in the vast majority of insurance cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y."

The authorities relied on by the pursuer did not assist it. *Baker* v *Willoughby* addressed the issue of whether a supervening event diminished the impact of initial harm. Lord Pearson stated at [1970] AC 496B - D, [1970] 2 WLR 59E - G:

> "The original accident caused what may be called a 'devaluation' of the plaintiff, in the sense that it produced a general reduction of his capacity to do things, to earn money and to enjoy life. For that devaluation the original tortfeasor should be and remain responsible to the full extent, unless before the assessment of the damages something has happened which either diminishes the devaluation (e.g. if there is an unexpected recovery from some of the adverse effects of the accident) or by shortening the expectation of life diminishes the period over which the plaintiff will suffer from the devaluation. If the supervening event is a tort, the second tortfeasor should be responsible for the additional devaluation caused by him."

The passage in *Heskell* v *Continental Express* cited by the pursuer's dealt with torts. In the immediately following sentence, Devlin J noted that "In the case of breach of contract, the position is not so clear." There was in any event no departure from the requirement that the tort in question had to have been a cause of the loss before a claim would sound in damages.

[35] *Williams* v *Bermuda Hospitals Board* was a medical negligence case which decided that the "material contribution" approach to causation in respect of an indivisible injury was not confined to cases in which the timing or origin of the contributory causes was simultaneous and was a development of *Wardlaw* v *Bonnington Casting Ltd* 1956 SC (HL) 26, 1956 SLT 135. It held that, as a matter of principle, successive events were capable of each making a

material contribution to an injury. There was no suggestion of a departure from the "but for" test: see [47].

Decision

[36] It is appropriate, indeed necessary, in a case like this to consider the precise sequence of events and their legal effects in determining which particular event or events caused or made a material contribution to the loss in respect of which the pursuer maintains its claim. In order to determine the causal contribution, if any, which the alleged breach of contract on the part of the second defender made to the pursuer's loss, it is necessary first of all to determine where matters stood when that supposed breach took place in March 2021. As at that date, there was no insurance cover against damage to the unit by fire, because of the following endorsement to the policy:

> "**PD 85 -Electrical Installations Inspection Condition**
>
> It is hereby noted and agreed that Condition 12. Electrical Inspection Condition, under Section A Property Damage is deleted and replaced by the following: Electrical Inspection Condition It is a condition precedent to the Company's liability in respect of Damage by fire lightning and explosion that the electrical systems at the Premises of the Named Insured is inspected within 2 months of the policy inception and every subsequent three years by a certified IEE/NIC/EIC electrical contractor and any defects identified by that inspection be rectified immediately a record of such inspections shall be kept which shall be produced to The Company on request."

In consequence of that endorsement, it was a condition precedent to the insurer's liability in respect of fire damage that the electrical systems at the unit were to be inspected by 7 February 2021. That had not happened. Cover for fire damage to the unit accordingly ceased on that date, and that was one of the reasons advanced, correctly, on behalf of the insurer in declining liability by way of letter to the pursuer from its loss adjusters dated 28 September 2021. Although the policy as a whole remained in place, cover for damage from fire, lightning or explosion was not present from 7 February 2021, and that had nothing to do with any act or omission of the second defender.

[37] After the claimed breach of contract by the second defender had taken place, indeed after the fire, the insurer purported by the letter of 28 September 2021 to avoid the policy as a whole *ab initio* in terms of the Insurance Act 2015 and Clause 25 of the general conditions of the policy (the terms of which have already been set out) and to return the entire premium paid, on the basis that the pursuer had not made a fair presentation of the risk at inception of the policy. The letter made it clear that the insurer did not regard that failure as deliberate or reckless, and it follows from the terms of Clause 25 that it was maintaining that it would not have issued the policy at all if a fair presentation had been made. It was certainly entitled to avoid the policy given that the presence of composite panels at the unit had not been disclosed to or agreed by it and the presence of the following further endorsement to the policy:

> "**PD 7 - Composite Panels Condition**
>
> Unless noted and agreed by the Company there are no composite/sandwich panels at the Premises"

[38] The letter of 28 September also purported to avoid the policy for want of fair disclosure at policy inception on the basis that the use of industrial shredders at the unit had not been disclosed to it. This matter was not the subject of any specific endorsement on the policy and further evidence and consideration would be required in order to determine whether it formed a proper basis for policy avoidance. That exercise is, however, unnecessary, since neither the use of such shredders (if indeed such use occurred), nor what was or was not disclosed to the pursuer in that regard by the second defender, is presented in this action by the former as a breach of any relevant duty incumbent on the latter.

[39] The letter finally purported to avoid the policy for want of fair disclosure on the basis that the use of gas burners for drying waste at the unit had not been disclosed to it. However, that was not a valid ground for avoidance of the policy. Gas burners were not being used at the inception of the policy, and no renewal or variation thereof had occurred by the time of the fire. It is true that Clause 21 of the policy's general conditions provided for cover to cease if there was any alteration in the premises which increased risk unless such alteration was agreed in writing by the insurer, but questions arise as to whether the use of the gas burners amounted to an "alteration to the Premises" in terms of that clause, no reliance was placed on the clause by the loss adjuster's letter, and it is in any event not a clause which would justify the avoidance of the policy *ab initio*. It is also true that the pursuer was obliged to notify the insurer of any fact or event affecting the risks insured which might be material, in terms of general condition 3:

> "**3. Alteration**
>
> The Named Insured shall give notice to the Company as soon as reasonably practicable of any fact or event affecting the risks insured by this Policy which is or might be material to the Company"

However, that clause again was not relied upon on behalf of the insurer, would not give rise to a right to avoid the policy *ab initio* (as opposed to justifying its termination from the point of non-disclosure) and falls to be read as part of the contractual arrangements as a whole, including Clauses 3 and 4 of the Property Damage section of the policy, the terms of which have already been set out.

[40] Before turning to examine those provisions, however, it is appropriate to consider the pursuer's more fundamental position that exclusion 8 from that section rules out any liability on the part of the insurer for damage to the unit caused by, *inter alia*, fire resulting from any heating process or process involving the application of heat, or for damage

resulting from any process of production or treatment. I do not accept that submission. The clause excludes liability for damage "to that part of the Property" due to fire resulting from "its" (ie the part of the property ultimately damaged by fire) undergoing a heating process, any process involving the application of heat, or a process of production or treatment. The fire in this case was not caused by any part of the unit undergoing such a process; what was being heated or otherwise produced or treated was the waste material being dealt with as part of the operations of the second defender. The clause in question is plainly designed to exclude liability where a part of the insured property itself is being heated or otherwise processed in one or other of the listed ways, and in consequence thereof catches fire. An obvious example would be if paint was being stripped from a wooden window frame with the assistance of a blowtorch. If the window frame caught fire as a result of that treatment, the consequent damage to it would not be covered by the policy; if the fire spread to other parts of the building, that damage would be covered. The pursuer's construction of the clause ignores its wording at a very basic level and is not supported by any cogent contextual or purposive approach to its likely meaning, whereas the second defender's construction, which is effectively that favoured above, is consistent with a reasonable allocation of risk arising from work being carried out to the insured property itself without trenching too deeply upon a basic purpose of the insurance policy, namely protection of the insured from the consequences of destruction of the property as a whole by fire.

[41] One next turns to Clauses 3 and 4 of the Property Damage section of the policy. Taking Clause 3 first, the pursuer argued that it did not apply to the circumstances of the present case because (so far as potentially relevant to the facts of this case) it only preserved the interest of the owner of the property in question where that owner was not the named

insured; as the pursuer was both the owner and the named insured in the circumstances under examination, the clause did not apply. Again, it is difficult to reconcile that suggestion with the wording of the clause. If it had said only that the interest of the mortgagee/freeholder/lessor was not to be prejudiced by an act or neglect of the named insured, then it would have been easier to see at least the beginning of a basis for the suggestion that those respective persons were being figured to belong to different and mutually-exclusive groups, but in fact the clause includes an occupier as being a kind of person whose actions might prejudice the interests of a mortgagee/freeholder/lessor, which leaves open the possibility of a named insured falling into one or other of those latter categories of person. At the very least, it can certainly be said that the language of the clause is not inherently supportive of the pursuer's favoured construction.

[42] I doubt that it would be useful to attempt any sort of detailed textual analysis of this and the other generic clauses in the policy; they come from what is effectively a booklet seemingly compiled to provide general wording apt to cover a wide variety of circumstances that might or might not be relevant to a particular policy of insurance issued by the insurer, with the unhappy result that that while all sorts of eventualities are dealt with to some extent, one is left with the distinct impression that none is dealt with in an especially considered manner. The drafter of the booklet, as will have become apparent from the clauses in it already quoted, appears to have a serious aversion to punctuation of any kind, with no obvious explanation for the few exceptions to that rule, all adding to the rather impressionistic air which the text conveys. Even the bespoke elements of the policy had been put together carelessly; the pursuer was obliged to have the tenant's interest in the policy noted on it (schedule Part 4 to the lease, Clause 2,2.1), but did not do so. Though no party sought to make anything of it, even the property which the policy bore to cover was

not actually the unit belonging to the pursuer, but another unit with a different owner and a different postcode on another part of the industrial estate in question. In all of these circumstances, the notion that one might usefully agonise over things such as word placement and linguistic nuance in the policy is not a sensible one. One is driven in a case like this to those old familiars, context and purpose. The context is obvious; the allocation of the risk of property damage as amongst the insurer and various persons (mortgagees, freeholders, lessors, named insured and occupiers) with a potential interest in or connection to the property. The purpose of the clause is that the position of anyone falling into the first three of those categories is not to be prejudiced by unauthorised and unknown actions or omissions of anyone falling into the latter two, the risk of such actions and omissions being borne by the insurer, and no doubt reflected in the premium charged. That analysis provides no support for the suggestion that the interests of a named insured who is also an owner is indeed to be prejudiced by the unauthorised and unknown acts or omissions of an occupier; quite the contrary.

[43] The application of Clause 4 to the facts of the present case was challenged in a little more detail on behalf of the pursuer. Counsel commenced that challenge by pointing out the content of the policy general conditions 1 and 2 (in essence, the requirement of due observance of the terms of the policy by the insured and the need for true and full disclosure on its part) which Clause 4 references at its outset, in an apparent attempt to argue for a limitation on the scope of application of the clause. However, the purpose of the reference to those general conditions in the clause is expressly to state that it applies "notwithstanding" the content of those conditions, indicating clearly that any effect which they might otherwise have had on the situation contemplated by the clause is not in fact to apply in that situation.

[44] It was next submitted that the clause only applied if the insured discovered and reported what was being done at the insured premises before damage had occurred, paying any additional premium required. That was the proposition directly addressed in the context of clauses functionally identical to Clause 4 in the present policy by Teare J in *Seashell of Lisson Grove*, where his Lordship observed:

> "30. … The clause enables the assured to advance his claim notwithstanding an act, omission or alteration which has increased the risk of damage … so long as the act, omission or alteration is unknown to or beyond the control of the assured and he gives immediate notice of it once aware of it and pays the additional premium required.
>
> 38. The clause applies where there is an increase in the risk of damage unknown to or beyond the control of the assured and provides for the insurance not to be invalidated where the Insured gives notice of the increased risk once aware of it and pays any additional premium required. … I do not consider that the assured is disabled from relying upon it where damage is in fact caused before the assured is able to give notice of the increased risk."

[45] Like Teare J, I can see no warrant in the language of Clause 4 for limiting its application to cases where the issue is discovered and reported, and any additional premium paid, before damage occurs; indeed, were that to be the case, it is difficult to see any worthwhile commercial purpose which the clause might serve. Looking at the matter from the point of view of context and purpose, the effect of the clause is not to expose the insurer to liability for any type of damage falling outwith what would otherwise be the extent of the cover at the relevant time; it is to allocate the risk of covered damage from a cause unknown to the insured because he is not in occupation of the relevant part of the insured premises away from the insured and to the insurer for so long as that lack of knowledge pertains, and to prevent the insurer from declining liability for any damage which results from the unknown issue on the basis that the risk profile to which he was exposed was not that figured when the policy was incepted or last reviewed. There is

nothing surprising about that outcome; the risk arising from an unknown issue of this kind has to lie with someone until it is discovered and disclosed, and at a very basic level insurers are in the business of taking on, for a price, risk which those who would otherwise be subject to it do not wish to bear, while those who take out insurance policies are seeking to relieve themselves of risks, known and unknown, to property in which they are interested. So long as the insured made a fair presentation of the risk as known to him on inception or last review of the policy, and does not withhold disclosure of a relevant issue once it becomes known to him, it makes entire commercial sense for liability for damage resulting from the risk posed by that issue while it remains unknown to both insured and insurer to be borne by the latter.

[46] Nor is the insurer compelled, as and when the issue is disclosed, to accept the new risk profile going forward for the remaining duration of the policy. If he does not find the risk as now ascertained acceptable in exchange for an adjustment to the premium (as appears to be the attitude of the insurer in the present case, as previously explained), he has a right, not to avoid the policy *ab initio*, but simply to cancel it for the future; in the policy presently under examination, that right is expressly set out in general condition 15, in the following terms:

> "**15. Cancellation**
>
> This insurance or any cover included herein may be cancelled at any time by the Company by giving at least thirty calendar days' notice by Recorded Delivery letter to the Named Insured at the last known address The Named Insured shall be entitled to the return of a proportionate part of the premium corresponding to the unexpired Period of Insurance Where the premium payable is subject to an instalment plan and the deposit premium has not been paid to the Company within a specified time from the commencement of the Period of Insurance the Policy shall be treated as cancelled from such commencement date"

[47] The position as at the date of the second defender's alleged breach of duty may thus be summarised as follows: as at that date, there was no policy cover against damage to the unit by fire, because of the failure of the pursuer to comply with the electrical installation inspection condition precedent by 7 February 2021. If that had not been the case, and cover against damage by fire had remained in place during March 2021, the failure of the second defender to disclose that it was going to start using gas burners, and their use, would not have entitled the insurer to avoid the policy as against the interests of the pursuer because of Clauses 3 and 4 of the Property Damage section of the policy (the loss of the unit by fire further not being damage excluded from the insurer's liability by Clause 8). However, the insurer would have been entitled to (and in due course did) avoid the policy as a whole *ab initio* because of the pursuer's failure to make a fair presentation of the risk in relation to the presence of composite panels at the unit. It follows that the absence of cover from the policy actually in place at the time of the fire for the damage thereby suffered by the pursuer was not in any way caused or contributed to by the second defender. Nothing done or not done by the second defender made any difference to the absence of such cover in fact or in law.

[48] That established, it may be seen that any case which the pursuer may have against the second defender must depend on the proposition that, had it complied with an obligation incumbent upon it, a sequence of events would have been set in motion which would have resulted in cover against damage by fire being in place by the time any such fire took place. In other words, a relevant case could only consist in a claim that fulfilment of its supposed obligations by the second defender would have fixed the problem which had been created, according to the pursuer's case, by the first defender.

[49] The first question which is raised once that is recognised as the true state of affairs is whether the second defender was indeed subject to any relevant obligation when, in March 2021, it commenced the use of gas burners in its waste processing operations at the unit, and, if so, what the nature and extent of any such obligation was. It will be recalled that the only obligations relied upon by the pursuer are those set out in Clauses 1.2 and 1.3 of Part 4 of the schedule to the lease, the terms of which have already been narrated.

[50] The pursuer also had obligations under Part 4 of the schedule to the lease, in particular under Clause 2.1 thereof, to insure the unit against various risks, including damage by fire, and for the reasons already explained was in breach of that obligation, so far as it concerned that particular form of damage (along with damage from lightning and explosion), from February 2021. Although the policy as a whole was later avoided with retrospective effect, that had not happened as at March 2021, and so insurance against damage from a variety of other causes remained in place at that point. Given that the obligations of the pursuer and the second defender were undoubtedly part of a single contractual scheme of rights and duties pertaining to the insurance of the unit and giving rise to the distinct legal outcome described in *Mark Rowlands Ltd*, it might be thought that the pursuer's failure to maintain cover against damage by fire, lightning and explosion absolved the second defenders, by the operation of the principles of mutuality of obligation, from the obligations which would otherwise have been incumbent upon it in terms of Clauses 1.2 and 1.3 of Part 4 of the schedule to the lease. The second defender latterly came briefly to assert that proposition, but in my view it is, at least if stated generally, over-simplistic. Looking at the matter either as one of the presumed intention of the parties to the lease (which I consider to be the proper mode of analysis), or else as a pure point of law, the more appropriate approach is to construe Clauses 1.2 and 1.3 of Part 4 of the schedule in the

context of the particular insurance situation which pertained from time to time. By way of illustration of the point, the unit remained insured in March 2021 against, for example, damage by flooding, or suffered by way of being struck by a vehicle delivering waste for processing. It is not easy to see why the absence of fire cover specifically should absolve the second defender from any obligations whatsoever which it would otherwise have had in relation to the availability of insurance cover for the unit in general, or the terms upon which such cover might be made available, all the while recognising that it could not properly be criticised for actions which might have imperilled cover that might have been, but in fact was not, in place at the material time.

[51] Turning from the abstract to the particular, and dealing first with Clause 1.2, it appears to me that the second defender could not properly be said to be in breach of its contractual obligations, in the context of its deployment of the gas burners, for failing to comply with any requirements of the insurer; the insurer had no (or at least had not made known any) general or particular requirements in that regard. Nor could its use of the gas burners be regarded as amounting to something that might invalidate the insurance actually in place (which is how I consider Clause 1.2 can only sensibly be read); as already seen (and even if fire cover had actually been in place), Clauses 3 and 4 of the Property Damage section of the policy prevented such use having that effect so long as the position remained unknown to the pursuer, which it maintains was indeed the case.

[52] Things are, however, rather different in relation to Clause 1.3. I consider that it is at least arguable that the deployment of the gas burners amounted, in the abstract at least, to the use of the unit for a purpose which might have made an additional premium payable for its insurance. The fact that the particular insurer then on risk to some degree subsequently maintained that it would not have been prepared to insure the unit at all, whatever

premium might be paid, if gas burners were to be used is a matter that can be taken into account, along with any other relevant factual feature of the case established at proof, in making a final determination of whether a breach of obligation on the part of the second defender actually took place. There thus remains an arguable basis, albeit one that has to pass through a somewhat straitened gate, on which it may be maintained that the second defender breached an obligation with which it was required to comply in terms of Clause 1.3 of Part 4 of the schedule to the lease when it commenced the use of the gas burners without ascertaining whether that might have made an additional premium payable for the insurance of the unit, and agreeing to pay any such additional premium.

[53] If the pursuer is ultimately able to establish that the second defender committed such a breach of contract, it will then have to establish a causal link between that breach and the loss it claims to have suffered in the form of having no insurance cover for damage to the unit by fire when it was destroyed by that mechanism. That seems unlikely to be easy to do. Presumably it would involve demonstrating on a balance of probabilities something like the following: the second defender, if acting in accordance with its obligations, would have informed the pursuer that it wished to start using the gas burners at the premises. The pursuer would have made enquiries about whether that would increase the premiums payable, possibly through the first defender, and would on this occasion have obtained the offer of some form of valid fire insurance covering such use, probably with another insurer altogether. The provision of such insurance might have involved various fire precautions being taken, including possibly stripping out all the composite panels in the unit, the second defender would have accepted the taking of such precautions, whatever disturbance to its operations might thereby have been occasioned, and would have agreed to pay whatever new premium was proposed in preference to simply carrying on with its previous method

of steam treatment of the waste. Despite whatever precautions the new insurer might have insisted upon in relation to the outbreak of fire from the use of the gas burners, a fire would still have happened and the building would still have been damaged to some material extent by it. The pursuer's pleadings, though not addressing these matters in any detail, are just about sufficient to enable it to attempt to prove what it needs to prove, and the basic proposition, that breach of contract on the part of the second defender caused or materially contributed to its claimed loss, is plain enough. Likely difficulties in the way of the pursuer proving what will be required of it are not sufficient to deny it the opportunity to attempt to do so.

Disposal

[54] The case will proceed to proof before answer. Parties will be afforded an opportunity to make submissions on whether any particular averments should be refused probation in light of the foregoing observations, and to deal with the formal excision of an alternative case currently stated by the pursuer but which it abandoned in the course of the debate.