Case No: HT-2016-000319

Neutral Citation Number: [2018] EWHC 558 (TCC)

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

Rolls Building, Fetter Lane
London, EC4A 2NL
19 March 2018

Before :
THE HONOURABLE MR JUSTICE FRASER

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Between :

(1) HABERDASHERS' ASKE'S FEDERATION TRUST LIMITED **(2) THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF LEWISHAM**	**Claimants**
-and-	
(1) LAKEHOUSE CONTRACTS LIMITED **(2) CAMBRIDGE POLYMER ROOFING LIMITED**	**Defendants**
- and –	
(1) ZURICH INSURANCE PLC **(2) QBE CASUALTY SYNDICATE 386** **(3) CNA INSURANCE COMPANY LIMITED**	**Third Parties**

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The Claimants were not represented and did not appear
Andrew Bartlett QC and Robert Stokell (instructed by **Kennedys LLP**)
for the Second Defendant
Colin Edelman QC and Talia Barsam (instructed by **DAC Beachcroft LLP**) for the First Defendant and all of the Third Parties

Hearing dates: 26 and 27 February 2018

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Judgment

Draft distributed to parties on 12 March 2018

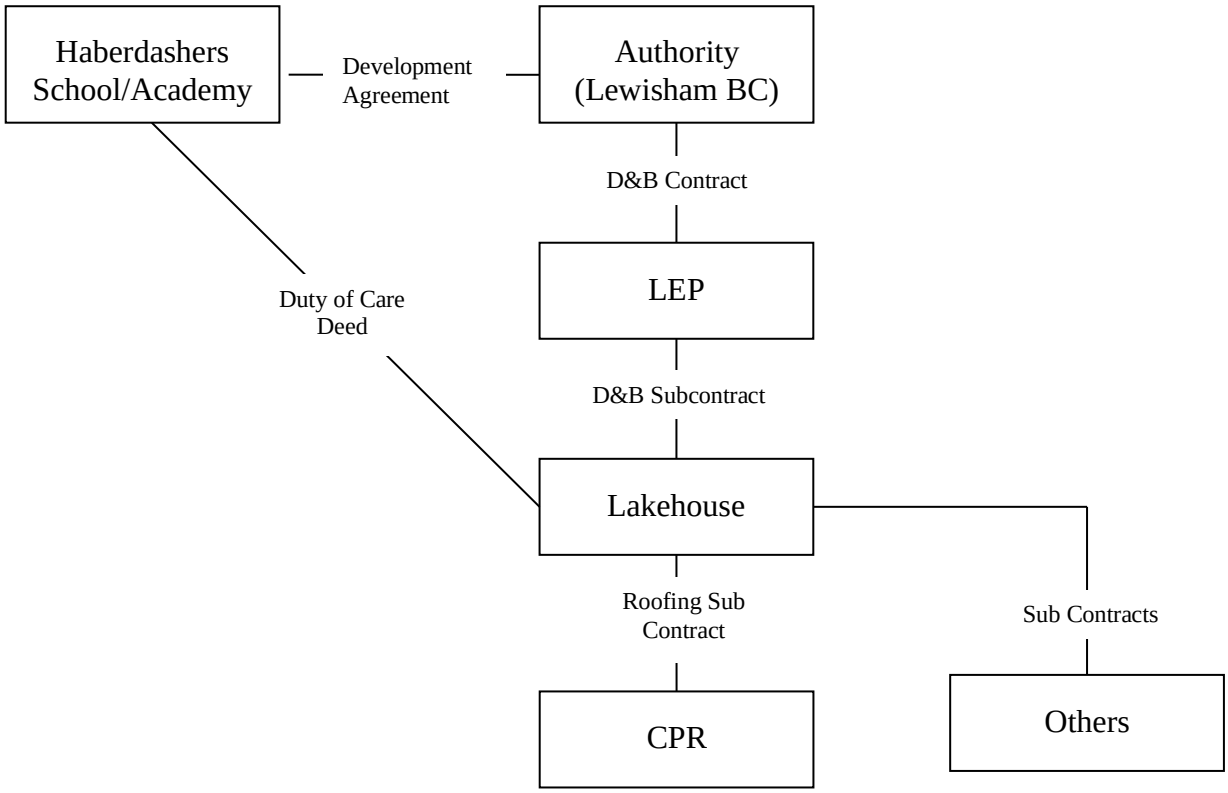
Mr Justice Fraser:

Introduction

1. This judgment concerns the proper construction of insurance provisions arising out of project-wide cover for a development that consisted of extension and other works to a school in Lewisham. The school is situated in the London Borough of Lewisham ("Lewisham"). Haberdashers' Aske's Federation Trust Ltd ("Haberdashers") owns and operates a number of schools, including the particular school in these proceedings which is Hatcham College, Temple Grove Site, Hunsdon Rd, London SE14. Lewisham owns the actual building itself, which is occupied by the school, and the school is operated by Haberdashers. Lewisham and Haberdashers are the Claimants in the proceedings. The First Defendant, Lakehouse Contracts Ltd ("Lakehouse") was the main contractor for works to the school, and the Second Defendant, Cambridge Polymer Roofing Ltd ("CPR") was a sub-contractor to Lakehouse for the works, which were performed in 2009 and 2010. The terms upon which CPR contracted with Lakehouse are material, and I deal with these below in some detail. Each of the three Third Parties – Zurich Insurance plc, QBE Casualty Syndicate 386 and CNA Insurance Co Ltd – are insurers who between them provided both the primary and excess layers of cover under the project-wide insurance. I shall come to the detail of that cover below. There is no difference in the interests of the three Third Parties and I shall refer to them as the Project Insurers. I shall refer to the project-wide insurance as the Project Insurance.

2. Certain major works were being performed at the school in 2009 and 2010, with Lakehouse as the main contractor under a Design and Build contract form dated 29 June 2009 ("the main contract"). The other party to the main contract was what is called a Local Education Partnership or "LEP". The LEP in this case was an entity called Lewisham Schools for the Future LEP Ltd. LEPs generally were public-private special purpose vehicles, set up to develop schools under a Government initiative called Building Schools for the Future or "BSF". LEPs were 10-year strategic partnerships between a local authority, private sector companies and Building Schools for the Future Investments (BSFI), the funding arm of the BSF programme. BSF was therefore a way of bringing the private sector into what had been traditionally a publicly funded activity, namely the education of children. Education also involved charities, and the historical developments that led to Haberdashers being involved in education in Lewisham are not relevant for these proceedings.

3. Although Lakehouse contracted with the LEP, it also entered into what is known as a Duty of Care Deed with Haberdashers. By this deed, Lakehouse owed certain duties directly to Haberdashers. Lakehouse also entered into a number of sub-contracts, one of which was with CPR for the roofing works, but also other sub-contractors entered similar agreements. As is the case with a great many main contractors on a great many construction projects, many different sub-contractors would be engaged. The contractual framework overall can be demonstrated by the following diagram.



4. The contract between the LEP and Lakehouse was essentially for works to extend the buildings at the School. There were existing Victorian buildings there, which were already being used. The purpose of the arrangements to which I have referred above was to extend, refurbish and supplement these, to improve and increase the buildings available for schooling at the site. This involved some limited demolition of the existing buildings too. Lewisham and Haberdashers entered into a development agreement on 29 June 2009 under which the latter agreed to enter into a 125-year lease upon completion of those works. The LEP entered into an agreement called the Design and Build Contract with Lewisham, and it was for this reason that the contract between Lakehouse and the LEP described Lakehouse as the Design and Build Subcontractor, and described what was in reality the main contract (in construction project procurement terms) as the Design and Build Subcontract. Although by its terminology this might suggest LEP was the main contractor, in practice the position of main contractor in the traditional sense of construction projects was occupied by Lakehouse. This does not affect the issues the subject of this judgment, and I simply make that clear to avoid confusion arising from the terminology.

5. Lakehouse engaged CPR to perform roofing works. On 6 April 2010 CPR were to undertake what is called “hot work” for this purpose, and Lakehouse issued what is called a “hot work permit” to permit this work to be done. Such work involves the use of a blowtorch to stick down roofing membrane. At 1514 hours on that day a fire occurred in the area of the hot work, which spread and caused extensive damage to the buildings. It took some time for the works of reinstatement to be undertaken.

6. Haberdashers and Lewisham issued proceedings on 28 November 2016 in the Technology and Construction Court seeking damages in excess of £11 million from Lakehouse and CPR, alleging breaches of the Duty of Care deed, the Design and Build Subcontract and common law duties of care. On 21 December 2016 Lakehouse issued an additional claim against its co-defendant CPR, seeking a contribution, alternatively an indemnity, in respect of Lakehouse's liability to the two claimants Haberdashers and Lewisham. On 23 December 2016 CPR issued additional claims under Part 20 against the three Project Insurers, seeking a variety of declarations. Essentially, and this is in summary only, the case brought by CPR against the Project Insurers was that Project Insurance was in place for the period 25 June 2009 to 25 August 2010, that CPR was entitled to the benefit of that insurance, and that this provided CPR with a defence to the additional claim brought by Lakehouse. The insurance arrangements are dealt with below.

7. Thereafter, the parties entered into a settlement agreement dated 21 December 2017 whereby Lakehouse paid to Lewisham and Haberdashers the total sum of £8.75 million inclusive of costs, interest and damages in respect of the fire. In reality, these funds came from the Project Insurers. This left as live issues in the proceedings only those between Lakehouse, CPR and the Project Insurers. Essentially, these issues were to what extent, if any, CPR was entitled to the benefit of the Project Insurance. It was an express term of the roofing sub-contract entered into between Lakehouse and CPR that CPR obtain its own third-party liability insurance cover, and this cover in the sum of £5 million was in force at the time of the fire. This dispute is essentially the extent to which the Project Insurers have a valid claim upon that insurance fund of £5 million of CPR's insurers. The Project Insurers have paid out the settlement sum of £8.75 million to Haberdashers and Lewisham. CPR (by its insurers) argues that the existence and terms of the Project Insurance, and the terms of the roofing sub-contract, means CPR is entitled to the cover provided by the Project Insurance, notwithstanding the existence of CPR's own insurance cover, and that cover provides a defence to the additional claim. Which of these positions is the correct one in law requires analysis of the Project Insurance, and the terms of the roofing sub-contract, together with analysis of the means by which a sub-contractor becomes entitled to be covered by Project Insurance of this type.

8. On 20 June 2017 Mr Acton-Davis QC, sitting as a Deputy High Court Judge, ordered that the issues of the liability of the Project Insurers to CPR (on the assumption that the fire was caused by the negligence of CPR), and CPR's entitlement to the declarations at [29] below, be determined as preliminary issues. Evidence of fact was served by both Lakehouse and CPR. Lakehouse and the Project Insurers served statements from Mr Dean Ball, the Construction Managing Director of Lakehouse, and Ms Janine Wood, who at the time in 2009 was an underwriter for QBE European Operations PLC, which manages Lloyds Syndicate 386. CPR served witness statements from Mr Wale, the Managing Director of CPR, and Mr Shortland, who is a loss adjuster and gave evidence relating to CPR's liability insurers, then known as Faraday Reinsurance Company, but now known as Faraday Underwriting Ltd ("Faraday"). There was some limited cross-examination of Mr Ball but none of it, in my judgment, was directly relevant to these preliminary issues or the declaration(s) sought.

9. The dispute was summarised in the following emotive way in CPR's skeleton argument. "Should clause 6 be interpreted (as CPR contends) in a way that takes account of the context and upholds both the insurance scheme and the subcontract terms or (as project insurers contend) in a way that conflicts with the context, damages the insurance scheme and potentially destroys the subcontractor?" A footnote added "the fact that project insurers state, through the mouth of Lakehouse, that they intend to seek a judgment limited to the sum of £5 million [the amount of CPR's own insurance cover] is a tacit recognition that CPR's only major asset is its own separate insurance cover."

10. It was also suggested by each party that victory for the other on the preliminary issues would have an unmeritorious result. CPR submitted that victory for the Project Insurers would mean that, having paid out the loss, the Project Insurers could recover from a party whom they had been paid to insure.

11. I am not sure that summarising the dispute in emotive terms, and making submissions about damage to an insurance scheme and destruction of a sub-contractor, are either relevant or helpful. The point concerning uninsured losses – it should be remembered that CPR's insurance cover is only £5 million, and the loss here is £8.75 million – is one to which I shall return. Lakehouse made clear in its additional claim against its co-defendant CPR that it only seeks a maximum of £5 million, and so the question of recovery by the Project Insurers of the amount of the settlement above that figure (which is a difference of £3.75 million) does not strictly arise. The evidence of fact did not really advance either party's submissions to any appreciable degree. All of the issues before the court on the preliminary issues are essentially ones of construction and legal analysis.

The roofing sub-contract terms

12. On 4 June 2009 Lakehouse sent CPR an enquiry requesting a quotation for roofing works on the project on the basis that the main contract would be on the BSF's Design and Build form of contract, but subject to Lakehouse's own terms and conditions. The inquiry stated: "The main contract will be run under a BSF Design and Build form of contract." It also stated: "Your quotation should be ... in accordance with our terms and conditions enclosed." The BSF contract was regarded by Mr Wale as a "partnering contract", and he also said that his experience of such contracts meant "all parties, including main contractors and subcontractors, are covered under the Project Insurance Scheme, and everyone involved knows this". There was a BSF Standard Form Design and Build Contract made available by BSF which was available for parties entering into such contracts. Within that document, clause 25 dealt with insurance and the footnotes make clear that the insurance had to provide protection both to the Authority and the Governing Bodies, and would usually be on a project-specific basis.

13. On 23 June 2009 CPR provided a quotation as requested, but enclosed CPR's own terms and conditions. Further correspondence passed between the parties, including a further quotation submitted by CPR, and on 13 August 2009 Lakehouse issued a sub-contract order to CPR for works to commence on 19 August 2009. In relevant part this order stated the following:

    1. "Please carry out the following works in accordance with the attached referenced documents."

2. “This Sub Contract order is based on: Lakehouse Standard T&Cs”.
3. Those standard terms and conditions were printed under the following heading “Lakehouse Sub-Contract Terms and Conditions” and it is common ground that they govern the contractual relationship between Lakehouse and CPR. Clause 6 states:

“6. INJURY DAMAGE AND INSURANCE

6.1 The Sub-Contractor shall be liable for and shall indemnify the company against any loss, expense, claim or proceedings whatsoever in respect of:-

6.1.1 Personal injury or death of any person arising out of or caused by the carrying out of the Sub-Contract Works or as a result of the Sub-Contractor’s failure to comply with its obligations under these terms and conditions.

6.1.2 Loss, injury or damage to any real or personal property but only to the extent that it is due to any, act, omission or default by the Sub-Contractor in connection with the Sub-Contract works or as a result of the Sub-Contractor’s failure to comply with its obligations under these terms and conditions.

6.2 The Contractor shall take out and maintain insurance in respect of claims arising out of his liability under Clause 6.1. Insurance in respect of claims for personal injury to, or death of any person under a contract of service or apprenticeship with the Sub-Contractor shall comply with all relevant legislation. For all other claims under Clause 6.1 the insurance should be not less than £2 million (or such other sum as may be specified in the order) for any one occurrence of series of occurrences arising out of one event.

6.3 The Sub-Contractor shall be responsible for the Sub-Contract Works and any loss or damage to all work executed and material and goods for use in connection with the Sub-Contract Works until completion of the Sub-Contract Works except to the extent that any loss or damage is caused by the negligence, omission or default of the Company.

6.4 The Sub-Contractor shall take out and maintain suitable all risks insurance in respect of any loss or damage to all work executed and materials and goods for use in connection with the Sub-Contract Works for their full reinstatement value or such other sum as may be specified in the order.

6.5 The Sub-Contractor shall be responsible for all of its temporary works, plant, tools, equipment and other property not intended for incorporation into the Sub-Contract Works and shall take out adequate insurance to cover the cost of replacing or installing such items.

6.6 Where it is stated in the Order, the Sub-Contractor shall take out and maintain for a period of 12 years from completion of the Main Contract Works a policy of professional indemnity insurance…..

6.7 When required to do so, the Sub-Contractor shall provide such evidence as the Company may reasonably require that the insurances referred to in this section 6 are being maintained. If the Sub-Contractor is unable to provide the evidence that the Company reasonably requires that such insurances are being maintained the Company may itself take out any such insurances and set off against any payment otherwise due to the Sub-Contractor or deduct from any payment otherwise due to the Sub-Contractor or otherwise recover from the Sub-Contractor the premium for such insurance…"

14. It was therefore an express term of the roofing sub-contract that CPR obtain its own insurance. This it did, and it was this that was placed with Faraday with a limit of cover of £5 million. In fact, in order for CPR to have been considered by Lakehouse as a sub-contractor at all, it had provided answers earlier in the year to Lakehouse in a document entitled Supply Chain Questionnaire. Those responses were forwarded to Lakehouse by CPR under cover of a letter dated 3 February 2009, and in the answers CPR provided, confirmation of its own insurance cover was provided. This was contained in a document headed "Liability Insurances – Cambridge Polymer Roofing Ltd" dated 26 September 2008 from its insurers that stated that various insurances were "held with ourselves". These included Employers Liability, Public Liability and Products Liability. Lakehouse was basically interested in having as sub-contractors (or as were called in evidence members of its supply chain, which amounts to the same thing) those with insurance cover.

15. Although it is put in a number of different ways by Mr Bartlett QC for CPR – and I deal with these ways below in the section of the judgment entitled "Analysis" – the essence of all his submissions can be distilled into one consistent result, or principle, which is this. When one comes to construe the roofing sub-contract terms within the context of the project-wide insurance scheme and what he submits was the common intention of the parties, the result is that CPR is a co-insured party under the Project Insurance Policy and is entitled to the benefit and protection of that cover, notwithstanding its own separate insurance cover provided by Faraday. Mr Edelman QC's submissions are all to the opposite effect, namely that although Project Insurance was in place and provided the "first call" in terms of making good the losses suffered by the fire, the Project Insurers are entitled to bring a subrogated claim against CPR in Lakehouse's name to recover the losses insured by CPR under its own policy with Faraday. Crucial to his analysis is the existence of CPR's own insurance cover, expressly required by the terms of the roofing sub-contract.

The existence of the Project Insurance

16. Before coming to the terms of the Project Insurance itself, it is helpful to outline the mechanism by which this came to be instituted. On any construction project, and this one was no different, there will usually be a great number of different legal entities

engaged in the works, and also a number financially or beneficially interested in their outcome. Developers may themselves be joint ventures; they will not always own the land themselves; there are a variety of different methods of procurement of the works themselves; and (as here) the end-result in terms of buildings may be intended to be used by a party, or parties, who have themselves incurred no (or only limited) financial outlay in performing the works. They will all have different rights and interests, as well as different financial exposure in the event of (for example) a fire during the works. Additionally, there are a large number of risks that may impact not only upon the parties themselves associated with any particular project, but adjacent buildings, and even other land (as well as the land itself), may themselves suffer damage. It is therefore entirely commercially sensible for all these risks, and all these different entities, to be covered by a single insurance policy, which is what Project Insurance is. Contractors' All Risk insurance, or "CAR", is designed to cover all these different parties and their different interests.

17. In this instance, the LEP was obliged to take out the "Required Insurances" by reason of clause 25 and Schedule 12 of the contract it had with Lewisham, which was the Design and Build Contract executed on 29 June 2009. By these provisions in clause 25, the LEP was to take out and maintain insurance, and "these insurances must be effective in each case not later than the date on which the relevant risk commences" by reason of clause 25.1.1.

18. Clause 25.3 of the Design and Build Contract is headed "Nature of the Insurances" and states that the Authority and the Academy Trust (which means Haberdashers) shall, where indicated in Schedule 12 (insurances), be named "as co-insureds with any other party maintaining this insurance". It must also "contain a clause waiving the Insurers' subrogation rights against the Authority and the Academy Trust and their respective employees and agents, acting properly in the course of their employment or agency." This is consistent with the intention of the Standard Form contract made available by BSF.

19. Schedule 12 is headed "Insurances" and the insureds are listed in Schedule 12 Part 1. Part 1 is headed "Policies to be taken out by the LEP and maintained during the carrying out of the Works". The Insureds in the list include the LEP, the Authority (here, Lewisham Borough Council), the Academy (Haberdashers), the Contractor (here, Lakehouse), and subcontractors (of which CPR was one) either of LEP, and/or of Lakehouse "of any tier", each for their respective rights and interests in the project.

20. Towards the beginning of the hearing, it appeared as though there may be or were disputes, based upon the dates that the primary and excess layers of cover became operative, and when CPR became ascertained as a sub-contractor, which went to whether CPR could be capable of being classed as an insured at all. However, any confusion in this respect was promptly dispelled by Mr Edelman QC for Lakehouse as soon as he came to make his own submissions. He made it clear that the date upon which cover was provided by any of the Project Insurers, and the date upon which Lakehouse either enquired of or contracted with CPR, was not relevant at all. This was because he accepted, on behalf of Lakehouse and the Project Insurers, that, absent the existence of the express requirement for (and existence of) the separate CPR insurance under the Lakehouse standard terms and conditions in the roofing sub-contract, CPR would be entitled to the benefit of the Project Insurance. In other

words, CPR could potentially be a member of the class of insureds, but in this instance was not, and the reason for that was that CPR and Lakehouse had separately and expressly agreed that CPR would have its own insurance.

21. In my judgment, this sensible stance streamlined the scope of the disagreement of the parties to the declarations sought by CPR. It also rendered unnecessary any detailed exposition of the way that Mr Bartlett QC sought to persuade me that CPR was covered by the Project Insurance policy by potentially (and theoretically) falling within the class of insured. This point was effectively conceded by Mr Edelman QC, subject to his overriding point that, on its true construction, clause 6 of the roofing sub-contract demonstrated that Lakehouse and CPR had expressly agreed that CPR would obtain insurance cover of its own. His submission was that, given the legal device adopted to include any sub-contractor within the Project Insurance is one of the implication of a term in any sub-contract with Lakehouse, an express term to the contrary in such a sub-contract necessarily excludes the existence (and/or the scope) of any such implied term.

22. Mr Bartlett analysed the Design and Build Contract between the LEP and Lewisham rather differently. He submitted that subject to specified extensions and exclusions, the public liability cover of the Project Insurance was required to indemnify the insureds against liability in respect of accidental damage to property arising out of or in connection with the works, with a cover limit of not less than £50 million in respect of any one occurrence. The Required Insurances must provide the benefits of the endorsements specified in Schedule 12. Endorsement 2 states among other things that (a) for the purpose of the policy the insureds must be considered to be separately insured, and (b) the insurers waived all rights of subrogation against any insured party (subject to exceptions which are not relevant for present purposes). Endorsement 5 states that the policy is to provide primary cover for the insured parties, as if any other policy held by an insured party covering the loss, damage or liability were not in force. He submitted that in this context endorsement 2 was important, because it preserved the right of one insured (eg, the Authority) to sue another insured (eg, the LEP, or Lakehouse) for damage, so that the bill had to be picked up by the Project Insurers pursuant to the liability cover, "while at the same time, it prevents the project insurers using the name of the party indemnified (in this example, the LEP) to sue another insured party (such as Lakehouse or a subcontractor) in order to try to pass the bill on somewhere else." He argued that this was consistent also with endorsement 5, which demonstrated, as he put it, "an intention that the bill should rest with the project insurers and not be passed on to or shared with a general insurer of one of the insured parties."

23. The concept of subrogated rights is well known. If a party is insured against an insured risk, and that risk eventuates and causes loss, the insurer will make good to the insured party the loss suffered as a result of the occurrence of the event, the risk of which was an insured risk. However, the insurer is entitled to bring a subrogated claim, that is a claim in the name of the insured party, against any other party legally responsible for the event. The existence of the insurance does not relieve the wrongdoer (or the other party legally responsible for the event) of any liability it would otherwise have, absent the existence of the insurance policy, to make recompense for having caused that event. In this way, the existence of the insurance policy is to the benefit of the insured party (who will usually be the party that has paid

the premium) and the innocent insured party's recovery of the policy funds does not act to the benefit of the wrongdoer, or party who caused the loss. Mr Bartlett's submissions generally, but in particular the last passage in the preceding paragraph that states "the bill should rest with the project insurers and not be passed on to or shared with a general insurer of one of the insured parties" amounts to a different way of stating that there should be no ability for the Project Insurers to bring a subrogated claim against CPR in this case.

24. In the contractual agreement between Lakehouse and the LEP, even though that contract was entitled "the Design and Build Subcontract", the parties were defined as "the D&B Contractor" (meaning Lakehouse) and the LEP. In clause 25 the LEP promised to comply with the insurance obligations of the D&B Contract (the agreement between Lewisham and the LEP) in so far as they related to the carrying out of the works. Its obligations as to both the CAR insurance and the liability insurance fall within this, as they both relate to the carrying out of the works. Clause 26.3.6(d) states that this Sub-Contract contemplates that the Schedule 12 insurance scheme will be implemented so that Lakehouse and its sub-contractors are insureds under the Required Insurances, which Mr Edelman accepted. Under this clause Lakehouse, where required, gave authority on its own behalf and, so far as relevant on behalf of its subcontractors, for the Project Insurers to pay the proceeds of the Project Insurance to the LEP.

25. Under clause 1.4 of the Design and Build Sub-Contract, Lakehouse was responsible to the LEP for "the acts and omissions of any [Lakehouse] Related Party as if they were the acts and omissions of" Lakehouse.

The terms of the Project Insurance

26. The Zurich Insurance Ltd ("Zurich"), the first of the three Project Insurers who are parties to these proceedings, quoted on 25 June 2009. Zurich agreed to 'hold covered' as from that date. The primary project insurances are contained in a JLT market reform contract policy, numbered B0901LB0913154000. This was accompanied by a Zurich ZPPP wording of May 2008, which is effectively standard policy wording, although whether it is standard or not does not make any difference, as it plainly applies to the insurance in this case. The JLT wording shows a preparation date of 14 October 2009 and was signed and stamped by Zurich on 20 November 2009. Handwritten annotation on one of the pages states that it replaces a slip signed on 6 August 2009. The excess project insurances are contained in a JLT Single Project Excess Third Party Liability policy no. B0901LB0913157000, which was signed on 25 June 2009 by the other two Project Insurers (QBE as to 80% and CNA as to 20%) as insurers of £49m in excess of the primary layer of £1m. The primary and excess cover together therefore provided an aggregate of cover of £50 million. The agreed start date of cover was stated to be 25 June 2009. The project insurances substantially complied with the requirements of clause 25 and Schedule 12 of the D&B Contract. In particular, the list of insureds set out in the JLT contract expressly included "Lakehouse Construction Limited" as insured C1, and "sub-contractors of ... Insured C1".

27. Once Mr Edelman had clarified the position of the Project Insurers as I have set it out in [20] and [21] above, the scope of the dispute seemed to me to be far narrower than it may have appeared. Whether such clarification was necessary or not does not much

matter, in my judgment. Paragraph 14 of the Project Insurers' Part 20 Defence seemed to set out the same approach to the analysis as Mr Edelman's oral submissions.

28. In any event, even on the case of the Project Insurers, the correct construction of clause 6 of the roofing sub-contract terms, and the Project Insurance, together with the way in which benefit of the latter could (or on Mr Bartlett's case, should) be extended to CPR, requires analysis of the legal mechanics by which cover would be available to a sub-contractor under a policy of Project Insurance.

Declarations sought

29. There were originally four declarations (one of which had three sub-parts) sought by CPR in the Part 20 Particulars of Claim against the Project Insurers. They were as follows:

1. CPR is an Insured under the Project Insurance;

2. In the alternative to (1), pursuant to section 1 of the Contracts (Rights of Third Parties) Act 1999, CPR is entitled to enforce the Project Insurance as if it were an Insured under the Project Insurance;

3. CPR will be entitled under the Project Insurance to an indemnity against any damages, interest and/or costs which it becomes liable to pay to the Trust and/or to Lewisham and/or to any other party claiming in respect of the fire, and to its costs;

4. If and insofar as any claim brought against CPR is a subrogated claim made by any or all of the Third Parties, the Third Parties are not entitled to pursue it, on the basis that:

(a) CPR is a co-insured under the Project Insurance; and/or

(b) There is no right of subrogation and the claim is barred by reason of the waiver of subrogation in the Project Insurance; and/or

(c) The said Claimants have received satisfaction for the claimed loss or damage from the Project Insurance.

30. By the time of the hearing of the preliminary issues, these declarations had become one and CPR sought only the following declaration:

"In regard to Lakehouse's additional claim against CPR for indemnity or contribution, which is brought by the Named Third Parties in the name of Lakehouse, it is declared that the Named Third Parties are not entitled to pursue this claim against CPR."

31. Mr Edelman drew my attention not only to the evolving (and reducing) declaration(s), but to the different way that the case brought by CPR seemed to be put at the hearing of the preliminary issues, compared to the pleadings. Essentially, this is a forensic point. Refinement of argument and submissions often occurs, particularly where there are perceived to be difficult points of construction. I am satisfied that the single declaration proposed by CPR at [30] encapsulates all relevant issues of liability and difference between the parties before me in terms of the correct construction of the Project Insurance and the terms of the roofing sub-contract.

32. There was also, as there sometimes is in commercial cases that turn on points of construction, the temptation to provide illustrations of "commercial sense" by the use of hypothetical, and occasionally extreme, examples of what any particular construction of the relevant terms could potentially mean in practice. This temptation was not always resisted. Given the primacy given to the words actually used by the parties – an approach that ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900,

Arnold v Britton [2015] UKSC 36 and ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24 all make clear is necessary – illustrations of the (unlikely) extreme examples of any particular competing construction are not helpful. Viewing matters with hindsight is not particularly helpful either. One party may have agreed to something in a contract which, with hindsight, he, she or it may have wished had not been agreed. The fact that events occurred that lead either to unforeseen consequences, or to what one party considers an uncommercial outcome, are not of direct assistance. It is agreed that CPR has insurance cover although its insurers have reserved their rights in this respect. Potentially, such cover may provide indemnity for the loss suffered due to the fire at the school. The fact remains that extreme hypothetical examples are rarely (if ever) likely to be of assistance in resolving points of construction.

Analysis

33. There is no doubt that the definition of Insured in the Project Insurance Policy included sub-contractors of Lakehouse. The list of insureds set out in the JLT contract expressly included "Lakehouse Construction Limited" as insured C1, and "sub-contractors of ... Insured C1" as set out at [26] above. Schedule 12 Part 1 of the contract between the LEP and Lewisham lists the Insureds, and these specifically identify the LEP, Lewisham, Haberdashers, the Contractor (which is Lakehouse), and subcontractors (of which CPR was one) either of LEP, and/or of Lakehouse "of any tier". In my judgment, this plainly includes all Lakehouse sub-contractors, whether those sub-contracts were agreed prior to the implementation of the Policy Insurance, or afterwards. This is also made clear by clause 26.3.6(d) of the contract between Lakehouse and the LEP.

34. The way in which the Policy Insurance comes to provide insurance to any particular sub-contractor must however be analysed in terms of existing legal principle.
The approach adopted by Mr Edelman on behalf of the Project Insurers was that the terms agreed by Lakehouse and CPR in the roofing sub-contract were highly relevant. This is supported by the decision of the Court of Appeal in ***Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd*** [1992] 2 Lloyd's Rep 578 in which it was held that a sub-contractor under a ship-building contract did not have the benefit of a policy under which the insurers agreed to include "Sub-Contractors as additional co-assured for their respective rights and interests". Parker LJ stated as follows:
"… for the purposes of ascertaining intention one may look not only at the policy documents but also at the contract between the assured and the alleged co-assured." (at 584 col.1)

35. The submissions on behalf of the Project Insurers were to accept that the Project Insurance was to provide insurance cover to all who worked on the site, which obviously included the main contractor (Lakehouse) and any sub-contractors. If, at the time that the Policy Insurance was taken out, Lakehouse already had agreed contractual terms with any particular sub-contractor, that sub-contractor would become covered by the Policy Insurance from the inception of the insurance cover. This is because such a sub-contractor would be an existing and named member of a definable class, namely a sub-contractor of Lakehouse. If a sub-contractor were to be subsequently appointed by Lakehouse, and the Policy Insurance was already in place – the phrase for this used in submissions was a subsequently ascertained sub-

contractor – then this sub-contractor too would be covered by the Project Insurance (subject to the exception contended for by Mr Edelman). This sub-contractor would become insured under the Project Insurance by means of a term implied into the sub-contract between it and Lakehouse. This implication of a term would occur by means of a standing offer to a sub-contractor to be included in the Project Insurance, that offer being accepted by the sub-contractor by execution of the sub-contract. The exception contended for by Mr Edelman was where an *express* term was agreed between Lakehouse and (as here) CPR that the latter would have its own insurance. The standing offer can also be analysed in different ways. It could be an offer from Lakehouse on the Project Insurers' behalf, available to sub-contractors, made to the sub-contractor. It could also, potentially (although this was not explored in any great detail) be an offer from higher up the contractual chain (if not from the Project Insurers themselves). In a sense, given the offer itself is the same in each case, the identity of the offeror is not that important. The offeree would be the sub-contractor. The nature of the implied term itself requires some consideration too. Mr Edelman submitted that the term was that the sub-contractor could not be sued by the main contractor for matters covered by the Project Insurance. The same effect would be achieved by an implied term that the indemnity provided by the Project Insurance would cover acts and/or omissions by the sub-contractor itself.

36. Mr Bartlett approached the matter rather differently. He maintained that ***Stone Vickers*** was distinguishable, and posed the question "how may parties other than the principal insured participate in a contract of insurance?" and analysed the answer by three alternative routes. The first was the concept of agency; the second was what he called "an intermediate route", namely the concept of a standing offer; and the third was formation of a contract by conduct. In each scenario, the ultimate answer he proposed was that the Project Insurance was intended to, and did as a matter of law, include CPR as an insured party notwithstanding the presence of the express term to which I have referred in clause 6 of the roofing sub-contract. He also submitted that the context in which the issues had to be determined was that it was the intention of the parties (by which he included both Lewisham and LEP, as well as Lakehouse), if not the intention of the whole scheme of Project Insurance generally, that cover be provided to the whole spectrum of contractor, sub-contractor and sub-sub-contractors who would be working on the site.

37. Both counsel agreed that this is the first case in which the court has had to decide on how subcontractors in the construction industry come to participate in project insurance policies. The issue of the extent of coverage (or inclusion) of Project Insurance, and the effect upon that of other insurance cover obtained separately by a sub-contractor as a result of an express term, is one of potential importance for obvious reasons. Mr Bartlett expressed this point as "the requirements for binding [a sub-contractor] to the contract" of insurance, or in other words, being covered by the Project Insurance. Further, the way in which a sub-contractor may become a party to Project Insurance of this type was said not to have received full legal analysis in decided cases or textbooks.

38. A large number of authorities were relied upon in argument, including some from the Commonwealth, as well as authoritative and widely known textbooks including *Arnould: Law of Marine Insurance and Average* (2015 18th Ed.) Sweet & Maxwell/Thomson Reuters; *Bowstead and Reynolds on Agency* (2017 21st Ed.) Sweet

& Maxwell/Thomson Reuters; and *McGillivray on Insurance Law* (2017 13th Ed.) Sweet & Maxwell/Thomson Reuters. I only propose to refer to those decisions that are necessary to resolve the issues in this case. I shall also deal with the different legal methodologies in the order outlined by Mr Bartlett. However, I consider that the approach in ***Stone Vickers*** is correct and applies to this situation; the terms agreed by Lakehouse and CPR are of central relevance when considering intention of the parties, which here must mean, primarily, the intention of Lakehouse and CPR. That is not to exclude the intention of the other parties, but as I explain below, I consider the same result is reached regardless of how far the concept of who are "the parties" is cast.

Agency

39. The first way of approaching this matter is to consider the law of agency. Both parties were agreed that although this may be easily expressed for simple cases, it is more problematic for more complicated situations. That alone may suggest that as a theory it not only has its limitations, but it is not much of a legal theory at all for this situation. If a theory only works in a few limited scenarios, then by definition it cannot be of wide application. Such restrictions therefore cast doubt on whether it is a workable legal theory for Project Insurance of this type. It is however a theory that has received some consideration in the few cases on the subject.

40. Much consideration was given in submissions to the decision of Colman J in ***National Oilwell (UK Limited) v Davy Offshore Limited*** [1993] 2 Lloyd's Rep 582. In that case, the plaintiffs ("NOW") agreed to supply to the defendants ("DOL") a subsea wellhead completion system to be used as part of a floating oil production facility which DOL were constructing for use on the Emerald Field in the North Sea. There was a contractual term in the agreement between NOW and DOL that DOL would procure certain, limited, insurance. NOW commenced an action against DOL for sums said to be due on outstanding invoices, and were met with a defence and counterclaim in which DOL sought damages for delivery of defective parts, and late delivery. NOW defended that counterclaim by a plea that DOL's counterclaim for damages was brought by DOL's insurers who had paid DOL's claim in respect of these losses, and who had asserted their rights of subrogation under a Builders' All Risks policy. This policy was wide in its scope and far wider than the insurance that DOL was contractually obliged (in its agreement with NOW) to procure. NOW maintained that it was a co-assured under the wider Builders' All Risks policy, which included an express waiver of subrogation clause by the insurer for the benefit of any insured under the policy. NOW therefore relied upon that as a defence to the counterclaim. NOW also relied upon the existence of an implied term in the agreement that DOL was not entitled to claim against NOW for loss and damage in respect of which a claim had been paid, or was payable, by the insurers under the policy. Further pleadings were exchanged and the insurers themselves started their own action against NOW, contending that NOW was *not* a co-assured and that NOW was not entitled to rely upon the terms of the policy by way of defence to the claim for loss brought by DOL. Having reviewed various authorities, Colman J summarised the principles in the following terms:

> "(1) Where at the time when the contract of insurance was made the principal assured or other contracting party had express or implied actual authority to enter into that contract so as to bind some other party as co-assured and intended so to bind that party, the latter may sue on the policy as the

undisclosed principal and co-assured regardless of whether the policy described the class of co-assured of which he was or became a member.
(2) Where at the time when the contract of insurance was made the principal assured or other contracting party had no actual authority to bind the other party to the contract of insurance, but the policy is expressed to insure not only the principal assured but also a class of others who are not identified in that policy, a party who at the time when the policy was effected could have been ascertained to qualify as a member of that class can ratify and sue on the policy as co-assured if at that time it was intended by the principal assured or other contracting party to create privity of contract with the insurers on behalf of that particular party.
(3) Evidence as to whether in any case the principle assured or other contracting party did have the requisite intentions may be provided by the terms of the policy itself, by the terms of any contract between the principal assured or other contracting party and the alleged co-assured or by any other admissible material showing what was subjectively intended by the principal assured.

I would only add that it is unnecessary to consider on the facts of the present case what is the position where, at the time when the contract of insurance was entered into, the alleged co-assured could not be ascertained as a member of the class referred to in the policy, but only qualified for membership at a later stage or where at the time of the policy it was only intended to insure all persons in the class or who might in future qualify as members of the class, although it would then have been impossible to identify the alleged co-assured as such. These are difficult points considered in Arnould Marine Insurance 16th ed. para. 243. I express no view on whether privity of contract could be established in such cases."

(at 596 col.1 – 596 col.2)

41. He found that NOW fell within the description of "Other Assured" under the definition of "Assured" in the policy terms. He held that NOW could establish privity of contract with the insurers but in order to do so NOW would have to establish that the insurers were undisclosed or unnamed principals of DOL, or that they were entitled to and did ratify the policy, and in both cases it was necessary for them to establish that at the time of effecting the policy it was DOL's intention to effect insurance on behalf of NOW. Although the agreement between DOL and NOW did have an obligation upon DOL to procure insurance, this was confined to cover only up to the time of delivery of each item (and not beyond that time, or in relation to any other property) and there was nothing in the agreement itself which gave any wider authority to DOL to bind NOW to the policy contended for by NOW. Where the sub-contract (ie the agreement between NOW and DOL) made express provision for limited insurance to be procured or effected by DOL for the protection of NOW, "it was difficult to envisage how it could be said that it had to be taken to have been the common assumption of DOL and NOW that DOL would be authorised to effect yet wider protection on behalf of NOW" (at 583 col.2 sub-paragraph (6) of the headnote).

42. The language used, in particular the term "ratification", and the consideration of the extent of the authority given to DOL by NOW to procure insurance on NOW's behalf, makes it clear that close consideration was given to the principles of agency, in terms

of considering and explaining how it could be that NOW fell to be covered at all by the insurance policy. The passages I have referred to at [40] and [41] above make it clear that although privity was established (this seems to have been common ground), it was the limitation of authority on the part of DOL to obtain or effect insurance on behalf of NOW that was determinative in terms of restricting NOW's access to the benefit of the Builders' All Risks policy cover.

43. There are two important points that present a difficulty in approaching this matter by way of using the rules on agency, including ratification by an unidentified principal. These are identified in *Bowstead and Reynolds on Agency*, (2017 21st Ed.) at 2-067. These are that the person (which here would be CPR) for whom the agent (the main insured) professed to act must be a person capable of being ascertained at the time the insurance was effected, and also whether the additional party should be able validly to ratify if he had no insurable interest at the time the insurance was effected. Mr Bartlett drew my attention to these passages in Bowstead. Admittedly, contrary views are also identified in Bowstead, including a passage that states (also in 2-067):
'. . . . policies for marine insurance on goods have long been taken out for the benefit of "all those to whom they do, may or shall appertain", or similar wording; and it has often been assumed that beneficiaries of such policies may sue on them. It seems that in such a case the understanding is that the agent who procures the insurance need not at the moment have in mind any particular person or persons as the intended principal or principals, provided that there is some general contemplation as to the person or persons intended to benefit.'

44. If that person, who is at best only subject to some general contemplation rather than ascertainment or identification, has "long been taken" to have the benefit of marine insurance on goods, then it seems to me that they cannot themselves have had any insurable interest in the goods at the time that the insurance policy was effected Mr Bartlett drew attention to the dicta in ***Feasey v Sun Life*** [2003] EWCA Civ 885 where, as regards the time at which the insurable interest must exist, Waller LJ stated at [72]:
"One other general point…relates to the date at which an insurable interest must exist, and (where relevant) the date at which it must be valued. In an indemnity policy the relevant date is the date of loss…"

45. That may deal with the second of the problems identified by Bowstead (although it would mean the ratification could not happen before the date of loss, as that date would be the date that the party obtained an insurable interest) but it does not deal with the first.

46. For agency to be the correct approach, either the conceptual difficulties identified by Bowstead are not problems at all, or the concepts of agency are being strained to accommodate this particular situation. I consider it is probably the latter, and to be fair to both counsel, they each recognised the difficulty in applying the law of agency. The situation before the court on these proceedings is rather different to the situation in the ***National Oil*** case. DOL was the main assured in that case, and Lakehouse is not in the same situation here. Further, DOL had an obligation in that case to procure insurance for the benefit of NOW (admittedly far narrower in its scope than the Builders' All Risks policy cover) whereas here, it was almost the exact opposite – CPR had an express obligation to provide its own insurance cover.

47. The same Judge considered the same principles in the ***National Oilwell*** case in a subsequent case, albeit some 12 years later. In ***BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd*** [2005]1 Lloyd's Rep 307, Colman J came to consider preliminary issues in a different case where the principal issue was as to the correct construction of a term in the contract between the parties which governed the obligation to insure. BP's contention was that the terms of the relevant clause limited the scope of its own obligation to insure, with the result that Kvaerner was only entitled to the benefit of the contract of insurance to the extent of that limited obligation to procure cover. The cover that had been obtained was somewhat wider than that. Colman J decided that issue against BP, but Kvaerner had sought to advance a secondary argument that it was entitled to the benefit of the insurance to its full extent, even if BP's obligation to insure under its contract with Kvaerner was to effect insurance of more limited scope than BP had in fact taken out. In support of that argument, Kvaerner had relied upon the fact that at the time the policy was entered into the Notes on Insurance (which defined the "Basis of Insurance") had been brought into existence, but the clause which BP relied upon as limiting the extent of its obligation to insure had not yet been agreed. Kvaerner also relied on the Invitation to Tender, and its subsequent Tender proposal, as conferring Kvaerner's authority on BP to effect the insurance for Kvaerner by reference to the scope of cover identified in the Invitation to Tender and the Notes on Insurance. Thus Kvaerner argued that at the time the cover was obtained, BP had "intended that Kvaerner should have the benefit of cover in respect of the whole of the project and not the much more limited scope which BP's construction of the [agreement between BP and Kvaerner] would provide for" (this is at [62] of the judgment).

48. Colman J's conclusion in relation to that alternative argument is at [99]:

> "In my judgment, that argument would have failed. Since *National Oilwell v Davy Offshore, supra,* it is settled law and was when the CAR policy was underwritten that in order for a contractor not identified as a principal co-assured in a CAR policy to be entitled to the benefit of cover as another assured under such policy, the insured operator must have assumed a contractual obligation to such contractor to procure the benefit of cover for him. A mere intention to do so in the future is insufficient. Consequently, when an underwriter insures under a CAR policy, a Principal Assured and an unidentified Other Assured, the cover to which he agrees extends only to that which is given by the policy to the Principal Assured and to those Other Assureds with whom the Principal Assured has contracted and will contract to procure cover and only to the extent to which such cover is by the terms of the contract to be procured."
>
> (emphasis added)

49. Mr Bartlett was not entirely supportive of that reasoning, to put it mildly. He submitted that the ***National Oilwell*** case did not say that, and that Colman J's analysis in [99] of ***BP Exploration v Kvaerner*** was both wrong and obiter. Mr Edelman submitted that upon analysis, Colman J had correctly summarised his own earlier judgment, and the observations he made concerning Kvaerner's alternative argument were correct. That argument would have failed, and it would have failed for the reasons explained by the Judge.

50. I prefer the submissions of Mr Edelman for the Project Insurers on this point. In my judgment, ***BP Exploration v Kvaerner*** and the ***National Oilwell*** case are consistent with one another, as one would indeed expect given they were decided by the same judge. It is clear that Colman J had the details of his own decision in the ***National Oilwell*** case very much in mind when he explained what he did in [99] of ***BP Exploration v Kvaerner***, and I would do more than hesitate before disagreeing with such a distinguished judge of the Commercial Court on this point. In any event, I do not consider there is any reason, powerful or otherwise, to do so. As Lord Neuberger JSC stated in ***Willers v Joyce (No.2)*** [2016] UKSC 44 at [9]:
"So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary:" see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63" at [59].

51. Rather to the contrary and in any event, I consider that the dicta of Colman J to which I have referred above as being correct. It was obiter as Kvaerner's secondary argument did not arise, and so the statement at [99] is not part of the ratio decidendi of the case. However, I consider it still to be persuasive, and highly persuasive at that.

52. Doubt has been cast on some elements of the reasoning of Colman J and that is whether the inquiry into the intention of the putative agent is a subjective or objective one. Colman J had approached the matter as though it were subjective intention that mattered. In ***Magellan Spirit Aps v Vitol SA (The "Magellan Spirit")*** [2016] Lloyd's Rep 1, Leggatt J (as he then was) at [16] – [20] cast doubt on whether the test was a subjective one. It is therefore objective intention that must be considered. He cited a passage from ***Garnac Grain Co Inc v H M F Fauré & Fairclough Ltd*** [1967] 1 Lloyd's Rep 495 that stated the following:
"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it . . . But the consent must have been given by each of them, either expressly or by implication from their words and conduct." (at page 508 col 2, per Lord Pearson)

53. However, two points arise. Firstly, Lakehouse do not put their case on subjective intention. Although the point of subjective or objective intention was not, as a direct result of this, argued before me, if I were asked to express a view I would state that objective intention is relevant. Secondly, such doubts as have been expressed concerning intention do not undermine, in my judgment, the validity of the conclusions of Colman J on the relevant matters that arise in this case, and the passages to which I have referred in this judgment.

54. It should also be noted that the fact that Lakehouse have argued their case from the point of objective intention is the reason why the majority, if not all, of the evidence of fact in this case was not relevant. I have considered the matter from both points of

view, both taking the evidence into account and also not taking it into account at all. The answer, in my judgment, is the same regardless of which avenue is adopted.

55. The problem which emerges for Mr Bartlett even if the agency approach is adopted is that the intention of Lakehouse (and also of CPR) is best considered by paying attention to the express terms agreed in the roofing sub-contract. This shows that the objective intention of the parties was that CPR have its own insurance. I consider that the dicta of Colman J is in any event explicable, and consistent with, the next analysis of the legal methodology, namely that of the standing offer.

Standing offer

56. This is a different legal concept to that of agency and ratification. It is a mechanism consistent with the common law approach to cases where an insurance policy may encompass a class of unidentified insureds, but privity of contract must be observed. It is one supported by *McGillivray on Insurance Law* (2017 13th Ed). which states, at 1-197:

"It is unsettled whether the person claiming the benefit of the insurance must be capable of ascertainment at that time, and not only subsequently, or whether subsequent ascertainment is no bar as long as that person belongs to a class of persons whose interests are expressly covered. Commercial convenience favours the latter view, but it is difficult to reconcile with the agency view that the principal should have been able to enter the contract at the time it was made. It may be more satisfactory to interpret the class wording in the policy as a standing offer made by the insurer to insure persons who are subsequently ascertained as members of the defined grouping."

(emphasis added)

57. It was not necessary, but was an interesting diversion nonetheless, to consider the case of ***Carlill v Carbolic Smoke Ball Co*** [1893] 1 QB 256, which Mr Bartlett cited. This historic well-known case of an advertisement promising a large cash payment to users of the patented smoke ball if it were used as required, yet the user still contracted influenza, is well known to most law students and all practitioners. It does not however advance analysis of the situation concerning Project Insurance to any appreciable degree. Neither does a case that raises similar issues, namely notices to the public, namely ***Bowerman v Association of British Travel Agents*** [1996] CLC 451.

58. The idea of a standing offer is an approach that deals with, and avoids, the difficulty with the agency concept which is spelt out in Bowstead at 2-067 (and identified as a footnote in McGillivray) which states

"… a person who had no interest at the time of the insurance should not in principle be able to ratify and therefore should not be able to sue on such a policy as principal."

59. There are two points to note if the standing offer is the correct analysis, which I consider it is. The first is that the offer is said to be one made by the insurers. The second is that the offer is "made by the insurer to insure persons who are subsequently ascertained as members of the defined grouping". The offer would be accepted by a sub-contractor joining, upon execution of the sub-contract, what the authors of McGillivray would describe as "the defined grouping". The acceptance of that offer

leads to the implication of a term in the contract between (here) Lakehouse and CPR. In my judgment, that is the only contract in existence into which a term could be implied that could benefit CPR.

60. However, although I consider this is the correct analysis, the standing offer analysis presents two formidable obstacles to Mr Bartlett's case. The first is that, if CPR executed a contract with an express term that it would obtain, provide, or have its own insurance, as here, it would never join the defined grouping at all, at least not to the extent that it had insurance cover of its own. This is not circular reasoning. The very act of what would lead to CPR joining the defined grouping, namely the execution of the roofing sub-contract, expressly stated and agreed on its own express terms that CPR would have its own insurance. This presents a difficulty to the coming into existence of such an implied term at all. The second problem may simply be a way of restating the first problem in different language, or it may be an entirely different and freestanding problem. For there to be an implied term to the effect contended for by CPR in this case, such a term would have a directly contrary effect to the clear express term contained in clause 6 of the roofing sub-contract. I know of no principle of English law that states that implied terms can entirely contradict and exclude the operation of express terms dealing with the very same subject matter. Indeed, I would go further, and state that if there is an express term, as here, imposing upon CPR the express obligation to obtain its own insurance, then that term itself excludes the possibility of implying a term to the contrary. That would be the effect of the term for which Mr Bartlett contends.

61. Mr Bartlett placed reliance upon the fact that this was a BSF project, and stated that "it is standard that there is project insurance covering subcontractors who work on the site, and every such subcontractor is included in it. Accordingly, in the present case there was implied authority." However, I do not see this as in any way excluding the potential for the main contractor Lakehouse, and the sub-contractor CPR, to agree an express term between them that specifically required CPR to obtain insurance cover of its own. It is not contentious that absent this express term, CPR would be covered by the Project Insurance. The issue of implied authority is not what is contentious; the contentious point is whether that express term negates the implication of an implied term, and I consider that it does. It can also be considered from a different point of view too. In the presence of such an express term, by what legal method would the term for which Mr Bartlett contends be implied? It cannot be necessity (which was the point upon which Mr Bartlett relied), as any necessity for insurance cover has been satisfied by the express term. It cannot be business efficacy either, for the same reason.

62. Indeed, on any approach – standing offer or the application of agency principles – it is necessary to consider the intention of the parties. It is by defining who those parties are that provides the answer, in my judgment, to the issues in this case. The correct identification of "the parties" is probably Lakehouse, and CPR. Even if I am wrong about that, and however "the parties" are defined, they must include as one of the parties, CPR itself. There are numerous possibilities for who "the parties" are. They could be (at its simplest) the Project Insurers and CPR. They could be all the parties in the project, the Project Insurers, Haberdashers, Lewisham, the LEP, Lakehouse and CPR. They could be simply Lakehouse and CPR as I have said. Regardless of the permutations, CPR itself must undoubtedly be included in the definition of "the

parties". And CPR's intention, objectively assessed on the face of the roofing sub-contract itself by its very terms, was to obtain its own insurance, and *not* to rely upon the Project Insurance. I consider that to be a powerful indicator to the correct answer, if not to constitute the answer itself.

63. In ***Gard Marine and Energy Ltd v China National Chartering Co Ltd*** [2017] 1 WLR 1793 the Supreme Court considered the question of joint insurance, a distribution of insurance proceeds clause and whether that precluded the hull insurer's rights of subrogation, and the owner's rights to recover in respect of losses by the hull insurer against the charterer for breach of a safe port undertaking. The charter had been on what is called the Barecon 89 charter form, which had within it clause 12 dealing with joint insurance, and a distribution of insurance proceeds clause. The Supreme Court held that this precluded rights of subrogation of hull insurers, and dismissed the hull insurer's appeal against the Court of Appeal, who had allowed the sub-charterers' appeal from a finding at first instance allowing the claim by the hull insurers. Lord Sumption stated the following at [98] onwards:

"98. The starting point is the general rule that insurance recoveries are ignored in the assessment of damages arising from a breach of duty: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *Parry v Cleaver* [1970] AC 1. This can conveniently be called the collateral payments exception. It is a departure from the general principle that collateral benefits are brought into account, and is probably best regarded as being based on public policy. Insurance recoveries are a benefit which the injured party has bought in consideration of his premiums, which are intended to inure to his benefit alone, not that of third party wrongdoers. Moreover, the courts have traditionally been concerned to preserve the subrogation rights of insurers against those who are legally responsible for the loss, which are an important part of the economics of insurance. The effect of the collateral payments exception is that as between the insured and the wrongdoer who has caused the loss, they are not treated as making good the former's loss or as discharging the latter's liability. The assumption underlying it is that as far as the wrongdoer is concerned, insurance is *res inter alios acta*, ie, loosely translated, none of his business. The rule thus stated falls to be modified in a case where insurance manifestly is the wrongdoer's business because, for example, he is a co-insured and/or the insurance is taken out for his benefit. The business context in which this has most commonly arisen is the co-insurance of employer, contractor and subcontractors under standard forms of building contract.

99. It is well established, and common ground between the present parties, that where it is agreed that the insurance shall inure to the benefit of both parties to the contract, they cannot claim against each other in respect of an insured loss. Co-insurance is the paradigm case. The principle first appears in the United States, but was successively adopted in early editions of *MacGillivray on Insurance Law*, by the Supreme Court of Canada in *Commonwealth Construction Co Ltd v Imperial Oil Ltd* [1978] 1 SCR 317 and by the English courts in a line of cases beginning with the decision of Lloyd J in *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127. What is less clear is its juridical basis. Lloyd J was inclined to think that it was based on the rule against circuity of action, which is difficult to accept given that the insurer will not be a party to any litigation between the co-insureds. The better view, which was endorsed by the House of Lords in *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 WLR 1419, paras 61-65 (Lord Hope), is that it is an implied term of the contract of insurance and/or of the underlying contract between the co-

insureds pursuant to which their interests were insured. The implication is necessary because if the co-insureds are both insured against the relevant loss, the possibility of claims between them is financially irrelevant. It would be absurd for the insurer to bring a subrogated claim against a co-insured whom he would be liable to indemnify against having to meet it. It should be noted that this reasoning is relevant only to the position as between the co-insureds. In all of the English cases before this one the question arose between the co-insureds and their insurer. None of them raised the question how the principle about co-insurance affects claims against a third party wrongdoer who is not himself a co-insured and is not party to the arrangements between them. There is no necessity to exclude a claim against him and indeed no reason why either of the co-insureds or their insurer should wish to do so. It is impossible to identify any contract whose business efficacy depends upon that result being achieved.

100. As between a co-insured (or his insurer) and a third party wrongdoer, a different question arises which none of the existing English authorities purports to answer. The question is this: when we say that one co-insured cannot claim damages against another for an insured loss, is that because the liability to pay damages is excluded by the terms of the contract, or is it because as between the co-insureds the insurer's payment makes good any loss and thereby satisfies any liability to pay damages? The significance of this question may be illustrated by a hypothetical case. Suppose that A and B are engaged in some contractual venture, involving the use of A's property. The property is insured in their joint names. It is damaged in breach of some contractual duty owed to A by B, but the cause of the damage is some act of B's agent, X. If the effect of the co-insurance is that B's liability to pay damages to A is excluded, then B never had a relevant liability and has suffered no loss which he can claim over against X. But if its effect is that payment by the insurer makes good A's loss as between A and B and thereby satisfies any liability of B, the result is different. The effect is to exclude the collateral payments exception, so as between A and B the receipt of the insurance proceeds must be taken into account. However, the fact that the insurer's payment has made good the loss as between A and B does not mean that it has done so as between B and the stranger, X. As between B and X the insurance is *res inter alios acta*. Indeed, its normal consequence is that the claim will survive to be pursued by the subrogated insurers. Either analysis will achieve the object of the implication, namely to prevent claims between co-insureds. But they have radically different consequences for claims against third parties. Which is the correct analysis must depend on the particular terms of the particular contract. The answer will not necessarily be the same in every case."

(emphasis added)

64. However, and it may well be stating the obvious, in order to avail itself of what is effectively immunity from suit by a co-insured, CPR has to demonstrate that it is a co-insured in the first place.

65. Lord Toulson, giving the leading judgment for the Supreme Court in ***Gard*** on the question of whether the contractual scheme permitted claims between them, described the issue in the following terms:

"139. The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common

practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract: see, for example, *Cooperative Retail Services v Taylor Young Partnership."*

(emphasis added)

66. ***Co-operative Retail Services v Taylor Young Partnership*** [2002] UKHL 17 concerned the construction of new office premises. Under the main contract, liability for damage caused before practical completion to the works which was due to the contractors' negligence or breach of statutory duty was excluded, the contractors being required to take out and maintain a joint names policy in respect of the building owner, for all risks insurance providing cover against loss or damage to the works in respect of specified perils. These perils included fire. There was a specific contractual scheme for the way in which the loss was to be remedied in terms of expenditure on insurers' funds, and also in respect of delay relating to the reinstatement and completion of the works. Before practical completion a fire occurred and damage was caused. The works were restored by the contractors in accordance with the scheme and thereafter the building owner brought an action against the defendants (the architects and engineers), who issued contribution proceedings against the main contractors and electrical subcontractors. A preliminary issue was tried on assumed facts, and HHJ Wilcox held that such a claim was not open to the defendants. The Court of Appeal dismissed the defendant's appeal, and concluded that since the contractual scheme for restoration and completion of the project was to be funded only under the joint names insurance policy, and the building owner and defendants were to bear other losses themselves, the contractors were not liable to compensate the building owner in respect of the fire damage and so no contribution could be sought from the contractors by the defendants.

67. The House of Lords dismissed the appeal by the defendants. They found that having regard to the purpose of the all risks policy, which was to provide funding for the reinstatement of the works whatever the cause of the fire, the effect of the contractual scheme was to eliminate the ordinary rules of compensation for negligence and breach of contract. All the building owner could do was require the contractors to perform the reinstatement works and authorise the release of the insurance moneys for payment therefor. There are two passages that are relevant, in my judgment.

68. At [39] Lord Hope stated:
"The issue which lies at the heart of this question is whether the effect of the contractual arrangements between these parties is to be taken to be that Wimpey and Hall were never under any obligation to pay compensation to CRS for fire damage caused by their negligence, omission or default, as the entire cost of making it good was to be recovered from the insurers under the joint names policy; or whether they were under an obligation to pay compensation for that damage to CRS until it was made good in the event that the insurance cover failed or proved to be inadequate."

At [46] he also said:

"There is no doubt that both the main contract and the sub-contract contain provisions which have the effect in the clearest terms of excluding liability for damage to the works, work executed and site materials due to the negligence, breach of statutory duty, omission or default of the contractor and the sub-contractor respectively: see clause 20.3 of the main contract and clause 6.4 of the sub-contract. This has not been disputed by Mr Blackburn [counsel for the defendants]. It is also plain that the purpose of the all risks insurance which the contractor is required to take out and maintain in joint names of the employer, the contractor and the sub-contractors is to provide funds for the reinstatement of the works in the event of their being damaged up to and including the date when the certificate of practical completion is issued, whatever the cause of the fire. But the contractual scheme does not end there. For an understanding of its true effect it is necessary to pay close attention to the provisions of clause 22A.4, which deal with what is to happen in the event of loss or damage affecting work executed or any site materials occasioned by any one or more of the risks covered by the joint names policy."

69. It is therefore obvious that the answer in the ***Co-operative*** case depended upon the actual contractual arrangements between the parties. Again and again throughout the authorities, emphasis is placed upon the fact that the answer in any particular case is one of construction, and it therefore critically depends upon the provisions of the particular contract in each case. In the instant case, that means the terms of the roofing sub-contract. Thus, again, and regardless of whether the matter is approached from starting with consideration of the overall Project Insurance scheme and focusing inwards to the roofing sub-contract itself (which is how I would characterise Mr Bartlett's approach); or starting with the roofing sub-contract and expanding the view outwards (which is how I would characterise the approach of Mr Edelman) the central crux of this case on either approach is clause 6 of the roofing sub-contract, namely the express term between Lakehouse and CPR that CPR obtain its own insurance cover.

70. How, it could be posed rhetorically, could the parties be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, when those parties had expressly agreed that CPR would obtain its own separate insurance? When looked at this way, Mr Bartlett's argument that CPR was deemed to have knowledge of the main contract conditions between LEP and Lakehouse (which included reference to Project Insurance) by virtue of clause 1.7 of the roofing sub-contract is, if anything, a point against CPR. This is because, with deemed (or actual) knowledge of the Project Insurance, CPR expressly agreed a term that governed its relationship with Lakehouse (and hence its involvement in the project) that it would have its own insurance. That is directly contrary to there being an intention that there would be an insurance fund which would be the sole avenue for making good the relevant loss and damage. It was an express agreement to create a second insurance fund.

Acceptance by conduct

71. The third route which was suggested on behalf of CPR is acceptance by conduct, the acceptance being that CPR would be included in the Project Insurance. This analysis was said by Mr Bartlett to be "the most fitting in the present case". It is of course the case that offer and acceptance do not need to be identified if it is clear in some other

way that parties intended to be legally bound. A contract may be found to have come into existence as a result of parties' conduct, where a conventional offer and acceptance analysis is elusive; ***RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH*** [2010] UKSC 14, [2010] 1 WLR 753.

72. In explaining this analysis, Mr Bartlett submitted that it was the primary intention concerning who should be covered by the Project Insurance that was relevant, the common intention being that of the LEP and the insurers. The difficulty with this analysis is not the notion of acceptance by conduct, a well-known and entirely unobjectionable principle of the law of contract, but rather that as constructed here, it elevates the intention of the LEP and the Project Insurers *above* that of the express intention of Lakehouse and CPR. I do not consider that can be correct. Further, objectively considered, I do not consider that it can be said that the intention of the Project Insurers would be that any other insurances, obtained by means of an express term between Lakehouse and any sub-contractor, would either never be called upon, or would be entirely redundant. The LEP would most likely be neutral – the source of insurance funds would not matter to the LEP, as long as any loss was covered by insurance. Indeed, the provisions in the relevant contracts that made it clear that the Project Insurance would be the Primary Insurance point to the contrary. Clause 12 of the JLT wording states:
"12. Primary Insurance
The Insurers agree that this insurance provides the primary cover for risks insured under this Policy. In the event that any risk insured under this Policy is also insured under any other policy of insurance effected by any Insured, the Insurers agree to indemnify the Insured as if such other policy of insurance did not exist except in respect of……"

73. Such a clause is contrary, in my judgment, to an intention on the part of the LEP and the Project Insurers that any other policy of insurance was either not necessary or would not be utilised or called upon to make good any loss. All this clause means is that the Project Insurance would pay out first, as though other policies of insurance were not in place. In my judgment it leaves open the question of recovery by the Project Insurers against those other policies. There would be no need for such a clause if the arguments contended for by Mr Bartlett were correct, because there would be no "such other policy of insurance" that could cover the loss. Further and in any event, and if I am wrong about the meaning and effect of that clause, it cannot have primacy over an express term between Lakehouse and CPR in my judgment.

74. I do not consider that the notion of acceptance by conduct is more apt in this situation than that of the standing offer, nor (even I am wrong about that) that it would make available to CPR any further arguments. As well as the difficulties I have identified in this respect, it comes up, again, against the obstacle of the express term in clause 6 of the roofing sub-contract itself.

75. This therefore brings me to the two further areas upon which Mr Bartlett relies, namely waiver of subrogation and the Contracts (Rights of Third Parties) Act 1999.

Waiver of subrogation

76. This is a short point, because it depends upon CPR being entitled to rely upon the terms of the Project Insurance itself. CPR would, if entitled to rely upon those terms, be an Insured under the Project Insurance and vice versa.

77. It is not in doubt that Part 2 of Schedule 12 required, via Endorsement 2, that insurers agreed to waive all rights of subrogation which they may have or acquire against any insured party. Where such a clause exists, rights of subrogation are prevented from arising. This is common ground between the parties; there are various statements of principle to the same effect in the authorities but it is unnecessary to recite them given this common ground. However, Mr Edelman relies upon the assertion that CPR was not an insured party. If my analysis above is correct, and clause 6 of the roofing sub-contract prevents CPR from being an insured party (because the term that would have to be implied for CPR to have that status would be contrary to the express term agreed by Lakehouse and CPR) then CPR is not entitled to rely upon the waiver of subrogation term within the Policy Insurance.

78. This is, in reality, the same point but approached from the standpoint of a co-insured not being able to be sued by another co-insured for the loss covered by the policy which applies to both of them. The only way in which CPR could take advantage of this is if CPR were to be entitled to the benefit of the Project Insurance. I do not consider that CPR is so entitled, and therefore this is the end of this argument too.

The Contracts (Rights of Third Parties) Act 1999

79. As can be seen from the second alternative declaration in [29] above, the Contracts (Rights of Third Parties) Act 1999 was relied upon by CPR from the beginning in terms of constituting a defence to the additional claim.

80. Section 1 of the Contracts (Rights of Third Parties) Act 1999 enables a person in certain circumstances to obtain by law the benefit of a contract to which that person is not a party. The section provides:

"(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if--

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) ... ...

(6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation."

81. As CPR accepts, insurance policies often exclude the operation of the Act by means of an express provision framed to ensure that the contract does not fall within the terms of s1(1). An express exclusion of this kind was contained in the JLT contract

form in this case which stated the following: "Nothing in this Policy is intended to confer on any person any right to enforce any term of this Policy which that person would not have had but for the Contracts (Rights of Third Parties) Act 1999." This same wording appears elsewhere too, namely the ZPPP wording.

82. The Project Insurers rely on this exclusion at paragraph 15 of their Defence to the Part 20 claim by CPR. Mr Bartlett argues that the position is altered by reason of the provisions of the "Authority's Insurance Policy Endorsement" in the JLT form. This Endorsement commences with the words: "Notwithstanding any other provision of this Policy, the following endorsement shall apply." It finishes with: "This endorsement overrides any conflicting provision in this Policy." The Endorsement contains a definition of the insured as those parties so described in the Policy Schedule. The natural meaning of this expression encompasses all the insureds listed in the Policy Schedule, which Mr Bartlett argues includes CPR. However, this is a circular argument.

83. The Endorsement purports to confer benefits on the insureds, as so defined. However, in order to be able to take advantage of, or enjoy the benefits of, the endorsement, CPR must bring itself within the definition of the insureds. In other words, the answer to this strand of CPR's argument, is that to be able to rely upon the endorsement (which Mr Bartlett does seek to rely upon, to avoid the exclusion of any rights under the Act) CPR must be an insured under the Project Insurance. The answer to the two approaches will always therefore be the same, in this case. The Act cannot give CPR any route which would not be available to it as an insured under the Project Insurance.

84. Given I have found that the presence of the express term in the Lakehouse CPR roofing sub-contract prevents CPR from being covered by the Project Insurance because this prevents the implication of the term necessary to make CPR an insured, it follows that it cannot be entitled to the benefit of the endorsement, which is available for insured parties. This argument by CPR therefore fails too.

Other matters

85. Mr Bartlett deployed the doctrine of contra proferentem in his written argument, to assist his interpretation of what the correct construction should be. To be fair to him, he did not rely upon it in his oral submissions. In my judgment, there is precious little, if anything, of this doctrine remaining in commercial cases. This is made clear in a number of authorities such as ***K/S Victoria Street v House of Fraser (Stores Management) Ltd*** [2011] EWCA Civ 904 at [68] per Lord Neuberger MR; ***Transocean Drilling UK Ltd v Providence Resources PLC*** [2016] EWCA Civ 372 at [20] to [21] per Moore-Bick LJ; and ***Persimmon Homes Ltd and others v Ove Arup Partners Ltd and others*** [2017] EWCA Civ 373 at [52] per Jackson LJ. It does not in any case assist CPR. There is no ambiguity in the terms of the roofing sub-contract.

86. I referred above to the issue of uninsured losses, and the scope of what any implied term might be. This encompasses part of Mr Bartlett's "destruction of the sub-contractor" point. In this case, Lakehouse brings a claim against CPR limited to the extent of CPR's insurance cover, namely £5 million. The losses incurred by the Project Insurers exceed this figure, as the settlement sum is £8.75 million. Because of the way that the case is framed against CPR and due to that specific limit on recovery, the point does not arise in these proceedings. One argument that may arise in a future

case could be that the presence of an express term requiring insurance of a particular limit negates the implication of *any* term in relation to the whole insurance cover, leading to a claim in excess of the sub-contractor's insurance cover. It is not necessary in this case to determine that point, although I have doubts that such an argument would succeed. The intention of the parties, Lakehouse and CPR, was expressly that insurance would be obtained by CPR. I doubt in the commercial context that such an intention, objectively ascertained, would be that CPR would be exposed to the whole amount of the losses incurred on the occurrence of an insured event, regardless of any limit on the cover of CPR's own insurance policy. As I have said, that argument does not arise in this case and the point is not relevant to resolution of the preliminary issues.

87. Also, a different way of testing the commercial sense of the outcome of my findings in this case is to pose a different procedural scenario. Consider if CPR's insurers had rejected cover for the fire, and rather than issue Part 20 proceedings against the Project Insurers, CPR had joined its own insurer as a Part 20 Third Party. Could that Third Party, CPR's own insurer, rely upon the existence of the Project Insurance to avoid liability under CPR's own policy? I doubt that it could. Under this hypothetical procedural scenario, the concept of double insurance would arise. This refers to a situation where an assured is insured against the same risk with two independent insurers. CPR would, if Mr Bartlett were correct (contrary to my findings in this judgment) be an assured under its own insurance, and also be an assured under the Project Insurance. The same risk – the fire – would therefore be indemnified against by two independent insurers under two different policies. In situations of double insurance, it is well established that there is a right of equitable contribution between the different insurers. This right of contribution exists – only between two insurers - whenever a loss has occurred against which each of two or more insurers has contracted to indemnify the particular assured, regardless of whatever differences there may be in other respects between the policies. This approach was not explored at all in argument, and my comments in this paragraph form no part of my decision making on the issues before me. I refer to it simply because I take some secondary comfort that the same answer would be reached by this alternative hypothetical route.

Conclusions

88. In my judgment, for the reasons explained in the body of this judgment, Lakehouse is entitled to bring a claim (which is a subrogated claim being brought by the Project Insurers) against CPR for the losses suffered as a result of the settlement with the two Claimants. To the extent that CPR and Lakehouse expressly agreed in the roofing sub-contract terms that CPR was required to have its own individual insurance cover, CPR is not entitled to the protection of the Project Insurance. The Project Insurers can therefore recover (alternatively, Lakehouse are not prevented from recovering on their behalf) the full amount of the insurance cover which CPR had in place by reason of the separate policy at the time of the fire. It follows that CPR are not entitled to the declaration which is sought in these proceedings.