

Appeal against the decision that a claim for costs resulting from the repair of storm damage, not covered by NFU Mutual, should be allowed because NFU had opted to repair the property. The Court also confirmed that the relevant prescription period in Alderney is six years.

[2022]GCA74

IN THE GUERNSEY COURT OF APPEAL  
(CIVIL DIVISION APPEAL NO. 558)

15<sup>th</sup> November 2022

Before:

Jonathan Crow, KC  
Sir Timothy Le Cocq, KC  
James Wolffe, KC

Between:

ADRIAN JOHN LEOPARD

Appellant

- and -

NFU MUTUAL INSURANCE SOCIETY LIMITED

Respondent

Advocate N.J. Barnes for the Appellant

Advocate S.R. Geall for the Respondent

Crow JA:

INTRODUCTION

1. The Appellant (“**Mr Leopard**”) has brought a claim against the Respondent (“**NFU Mutual**”) and against Beaumont Structural Consultants Limited (“**Beaumont**”) for losses incurred in relation to damage to his property at Seldomin, Rue de Longis, Alderney (“**the Property**”). Mr Leopard had insured the Property through NFU Mutual under the terms of a Premier Homes Policy (“**the Policy**”) the applicable law of which is the law “*of the part of Great Britain*” in which the insured lives, *i.e.* Alderney.
2. Cracking to the Property caused by storm damage and subsidence was noticed in March 2009. On 1 April 2009, Mr Leopard notified NFU Mutual of an insurance claim. Initially NFU Mutual repudiated liability. Mr Leopard then employed Beaumont to advise him as to the causes of damage and to establish whether he was entitled to an indemnity under the Policy. According to Mr Leopard’s pleadings, as a result of Beaumont’s advice, NFU Mutual accepted liability in May 2013.

3. Mr Leopard’s pleaded case is (i) that NFU Mutual elected to arrange for repairs to be carried out, rather than paying for the cost of the repairs, and (ii) that he retained Beaumont to supervise the works. The works of stabilisation and repair were carried out under Beaumont’s supervision. According to Mr Leopard, although Beaumont was “nominally” retained by him, NFU Mutual paid Beaumont’s fees. Mr Leopard alleges that NFU Mutual failed to approve the expenditure necessary to complete the work, and the work was only completed after inordinate delays in September 2018.
  
4. These proceedings were issued on 16 July 2020 – that is, just over eleven years after Mr Leopard first notified NFU Mutual of his claim under the Policy. Mr Leopard claims £165,523. It would appear from the terms of the Cause and a report (“**the Fulford report**”) to which the Cause refers for the claimed costs, that the financial heads of claim include: (i) alleged costs of completing the repair work not met by NFU Mutual; and (ii) losses (notably loss of rent) allegedly sustained by reason of delay. As we will explain in more detail below, we understand Mr Leopard’s claim to be advanced both under reference to provisions of the Policy and by way of damages for breach of contract.
  
5. The pleaded claim against NFU Mutual includes an allegation that “*a term is to be implied to the policy in order to give it business efficacy that any claim would be settled within a reasonable time*” and that NFU Mutual was in breach of that term because of the delay caused by (i) its initial repudiation of liability until May 2013 and (ii) delays in the repair work for which it was responsible: see paras. 2, 4, 11 and 12 of the Cause.
  
6. Defences were filed by NFU Mutual on 5 November 2020 and contained *exceptions de fond* relying on prescription. By agreement between the parties, the Court of Alderney directed the following two preliminary issues to be determined:
 

*“Whether by the laws and customs of Alderney personal actions (actions mobilières) are prescribed by the lapse of (a) six years or (b) 30 years.*

*Was [Mr Leopard’s] claim against [NFU Mutual] brought within six years of the accrual of the cause(s) of action (to include a determination of whether the term pleaded at paragraph 2 of the Cause (that any claim would be settled within a reasonable time) was implied to the Policy.”*
  
7. In a judgment given on 21 April 2021, the Court of Alderney’s answers to those preliminary issues were that (i) personal actions are prescribed by the lapse of six years and (ii) the claim had been brought after the expiry of the prescription period. That ruling was then appealed to the Royal Court of Guernsey, which upheld the Court of Alderney in a judgment dated 21 April 2022 (“**the Judgment below**”). Mr Leopard now appeals to this court against the Judgment below. Beaumont has taken no part in the hearings on the preliminary issues.

## PRELIMINARY ISSUE 1

### Introduction

8. The first question is whether the Royal Court was correct in holding that the period for prescription in relation to personal actions in Alderney is six years, not thirty years. That question falls to be answered under two headings: (i) first, by reference to legislation, and (ii) secondly by reference to customary law.
  
9. The starting point for the debate under both headings is not in doubt. The customary law of Normandy is the common inheritance of the Bailiwick of Guernsey, *i.e.* including Alderney:

Warburton, *Treatise on the History, Laws and Customs of the Island of Guernsey* (1822), p. 72; Jacob, *Annals of some of the British Norman Isles constituting the Bailiwick of Guernsey* (1830), p. 25. It has been rightly said that: “*The Island of Alderney has ever been part and parcel of the Bailiwick of the Island of Guernsey, – and, the Law to be administered in the said Island of Alderney has been the Law of the Bailiwick*”: MacCulloch and Métivier, *A Report on the Nature and Extent of the Jurisdiction of the Royal Court of Guernsey over the Island of Alderney* (1938) (“**the 1853 Report**”),<sup>1</sup> at p. 6. It is important to emphasise that the position is not that the law of the island of Guernsey was imposed on and applied to the island of Alderney. Rather, they share a common legal inheritance. This will be significant in the analysis that follows.

10. The prescription period under Norman customary law was thirty years: see Terrien, *Commentaires du Droit Civil* (1574), Vol. 8, Chapter 29, p. 338; Laurent Carey, *Essai sur Les Institutions, Lois et Coûtumes de L’Île de Guernsey* (1889), p. 207.<sup>2</sup> The question is whether that has been reduced to six years. The first issue is whether it has been reduced by legislation.

## **The legislation**

### Introduction

11. The framework within which that question falls to be answered is not in doubt. Ordinances passed by the States cannot alter customary law: see para. 30 of *Jersey Fishermen’s Association Ltd v. States of Guernsey* [2007] UKPC 30, citing the *Report of the Privy Council on Proposed Reforms in the Channel Islands* (March 1947), Cmd. 7074. The ultimate legislative authority for the Bailiwick is His Majesty in Council, and accordingly alterations can be made to customary law (and, as a matter of legislation, can only be made) by Order in Council: Warburton, *op. cit.*, at pp. 68 – 69. Furthermore, where an Order in Council “*is of general application [it] becomes a Law for the whole Bailiwick, – binding alike on every part of it*”: p. 9 of the 1853 Report.
12. The issue under this heading of the appeal is accordingly whether the period of prescription under customary law applicable in Alderney has been altered by Order in Council.

### Early written sources

13. Norman customary law was first reduced to writing in the early thirteenth century. A commentary was first written by Renville, with a further edition by Terrien in 1574. In the late sixteenth century, certain differences appear to have emerged as to whether, and if so to what extent, the customary law of Guernsey had departed from that of Normandy, as recorded in Terrien. Elizabeth I accordingly instructed the Governor, the Bailiff and the Jurats to examine and report upon that issue. Their report led to an Order in Council dated 23 October 1583, ratifying *L’Approbation des Lois, Coustume, et Usages de L’Île de Guernezey* (“**L’Approbation**”).
14. Article X of *L’Approbation* provides that the Jurats of Alderney “*shall regulate their judgments according to the laws and constitutions used in the island of Guernsey*”.<sup>3</sup> In using this language, *L’Approbation* was expressing a clarification and confirmation of the existing state of affairs in respect of the common inheritance of Norman customary law throughout the Bailiwick: it did not impose any novel instruction to the Jurats of Alderney to adopt the law of the island of Guernsey.

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<sup>1</sup> The Report was produced in 1853, but not published until 1938.

<sup>2</sup> The *Essai* was written in the mid-eighteenth Century, but it existed only in manuscript form until its printed publication in the late-nineteenth Century.

<sup>3</sup> This translation of the original appears in Jacob, *op. cit.*, at p. 27, and also in para. 13 of an article by Nik van Leuven QC, *The Constitutional relationships within the Bailiwick of Guernsey – Alderney*, *Jersey Law Review*, June 2004.

As such, it has rightly been said that “*the laws observed in Guernsey were not, at this time first introduced into the Island of Alderney; but – that they had always been in force there*”: pp. 3 – 4 of the 1853 Report.<sup>4</sup>

15. The binding effect of *L’Approbation*, and in particular Article X in relation to Alderney, has been recognised ever since. Although there is now not a separate record of it, the submissions of the respondent to the Privy Council in the case of *Le Mesurier v. Barbenson* in 1814 apparently referred to an Ordinance of 1761 which was passed by the States of Alderney stipulating that the Court of Alderney “*shall regulate its Judgments and Proceedings according to the Laws and Constitutions used in the said Island of Guernsey, as it is enjoined by the Order of the Royal Commissioners, Anno 1585*”.

#### The 1840 & 1841 Orders

16. The first two pieces of legislation to which our attention was drawn are not directly relevant to the question of prescription, but they play a part in Advocate Barnes’s submissions at a later stage in the argument, and it is convenient to deal with them in their proper chronological place. The first is an Order in Council made on 13 July 1840 (“**the 1840 Order**”) amending the law of inheritance and succession “*in the said island of Guernsey*” (emphasis added). The second is an Order in Council dated 8 May 1841 (“**the 1841 Order**”) making similar, but not identical, changes to the law of succession and inheritance “*in Alderney*”. Advocate Barnes draws attention to the fact that separate legislative provision was expressly made in this regard for each island. He also draws attention to the fact that, in the later legislation which is directly relevant to the issues in this appeal, express reference is made to the 1840 Order, but not the 1841 Order.
17. We will deal with the inferences that can, and cannot, be drawn in relation to the relevant legislative provisions later. For present purposes, it is sufficient to note that, in the 1840 Order, (i) the words of supplication asked “*in behalf of the Inhabitants of the said Island of Guernsey*” for the amendment to be made to the “*law in the said island*” (emphasis added in each case); (ii) the formal words of enactment similarly provided that “*Her Majesty ... doth order ... that such changes shall in future have force of law in the said Island of Guernsey*” (emphasis added); and (iii) it concluded with a direction that the Order and the *Projet* should be entered “*upon the Register of the said island and observed accordingly*” (emphasis added). Correspondingly, the 1841 Order was explicit in its application only to the island of Alderney.

#### The 1844 Order

18. The next piece of legislation is not directly relevant to the issue under appeal either, but again it forms part of the legislative context in which the parties’ arguments on the relevant legislative provisions were based, and it is accordingly convenient to deal with it here. It is an Order in Council dated 19 June 1844 (“**the 1844 Order**”). It stated that a Report was read to the Board from “*the Committee of Council for the Affairs of Guernsey and Jersey*” dated 18 June dealing with three separate matters in respect of which Ordinances had been passed by the Court of Chief Pleas in Guernsey and subsequently approved by the States of Guernsey, and it asked for Her Majesty’s approval in relation to each one. Two of the matters concerned criminal procedure and trials. The third was explained by the following quotation from the Report:

*“That the term, within which personal actions and suits relating to personal property may be instituted in Guernsey, extending to thirty years, and it appearing that the interests of justice, the security of all classes, and especially the protection due to heirs, would be greatly promoted were the said term considerably abridged; the said Court of Chief*

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<sup>4</sup> The Report was produced in 1853, but not published until 1938. The same point is made in para. 13 of the article by van Leuven, fn 3 above.

*Pleas, at a meeting held on the 11<sup>th</sup> April 1836, passed an Ordinance reducing to Ten Years the term within which actions in personalty on simple contract, and without specialty, may be instituted*” (emphasis added).

19. The 1844 Order then recites that the Ordinance so passed by the Court of Chief Pleas was submitted to the States of Guernsey at a meeting held on 27 March 1844, and that the States unanimously approved the same and resolved that that Ordinance (together with the other two, dealing with criminal matters) should be submitted to Her Majesty “*in order that, if approved by [Her] Majesty, they might receive [Her] Majesty’s most gracious confirmation, and thereupon have the force of law in Guernsey*” (emphasis added). The Report then humbly prayed that Her Majesty might confirm the three Ordinances “*and to order that they shall thenceforth have the force of law in Guernsey*” (emphasis added).
20. The 1844 Order recites that the Board advised Her Majesty to approve the three Ordinances. The words of enactment then follow, stating that “*the said three Ordinances passed by the Court of Chief Pleas in the Island of Guernsey, and approved by the States of the said island*” were approved and ratified accordingly, “*Whereof the Lieutenant-Governor of the Island of Guernsey, the States of the said island, and all other persons whom it may concern are to take notice and govern themselves accordingly*” (emphasis added in each case).
21. For the purpose of resolving the issue under appeal, it is instructive to decide whether the 1844 Order reduced the period from thirty years to ten years only in relation to the island of Guernsey, or in relation to the whole Bailiwick. In our judgment, the legislation had the effect of altering the law throughout the Bailiwick, for an accumulation of reasons:
  - (i) The question of interpretation must be approached against the historical background set out above. In particular, the prescription period of thirty years derived from Norman customary law, which was the shared inheritance of the whole Bailiwick. Accordingly, the court should start by recognising the fact that the reference, in the petition that led to the 1844 Order, to the prescription period of thirty years “*in Guernsey*” is a reference to the prescription period applicable throughout the Bailiwick of Guernsey, not merely on the island of Guernsey.
  - (ii) From that recognition flows a presumption that any request to Her Majesty to amend the “*law in Guernsey*” would be a request to amend the law applicable to the Bailiwick as a whole, unless there was something sufficiently compelling in the language used in the request, or in the context as a whole, to demonstrate clearly that the request was being made for an amendment only to the law on the island of Guernsey.
  - (iii) There is nothing in the language of the 1844 Order to displace that presumption. The petition asked for an amendment to the “*law in Guernsey*”. Neither read in isolation nor in the context outlined above is there anything in that wording to suggest that the request was being made only in relation to the law on the island of Guernsey, and not in relation to the Bailiwick as a whole.
  - (iv) Indeed, when contrasted with the language used in the 1840 Order, which referred specifically to a petition made “*in behalf of the Inhabitants of the said Island of Guernsey*” for an amendment to be made to the “*law in the said island*” (emphasis added in each case), it becomes even more clear that the reference in the 1844 Order to the proposed amendment to the law “*in Guernsey*” was intended as a request for an amendment to the law of the Bailiwick as a whole.

- (v) The words of enactment in the 1844 Order refer to “*the Court of Chief Pleas in the Island of Guernsey*” and to “*the States of the said island*” and also to “*the Lieutenant-Governor of the Island of Guernsey*” (emphasis added in each case). However, no assistance can be derived from these words in relation to the issue with which we are concerned. Both the Court of Chief Pleas and the States may have sat (physically) in the island of Guernsey, but they had power to legislate by Ordinance for the Bailiwick as a whole. Similarly, the Lieutenant-Governor may have resided on the island of Guernsey, but he was the Monarch’s personal representative in the Bailiwick. As a result, we do not consider that the use of the words “*of the said island*” have any significance in the present context.
- (vi) The formal words of enactment state that Her Majesty approved the Report. It will be recalled that the Report referred to the petition to amend the “*law in Guernsey*”. That was a reference to the law of the Bailiwick as a whole. Accordingly, that was the amendment that was approved by the Order in Council.
- (vii) Furthermore, the 1844 Order states that the Ordinances were “*approved and ratified*”. In other words, the effect of the Order in Council was identical to the effect of the Ordinances. The effect of the Ordinances is explained in the Report, as outlined above. It should be recalled in this context that the Court of Chief Pleas and the States of Guernsey had the power to make Ordinances applicable to the whole Bailiwick and, for all the reasons outlined above, there is nothing in the 1844 Order to suggest that the Ordinance with which we are concerned applied only in the island of Guernsey. On the contrary, since all the indications are that the relevant Ordinance applied throughout the Bailiwick, that was also the effect of the Order once made.
- (viii) It is significant and sufficient for present purposes that the operative words of enactment in the 1844 Order do not state expressly that the amendment applies only in the island of Guernsey. On the contrary, they expressly provide that the Lieutenant-Governor, the States “*and all other persons whom it may concern*” are to take notice and govern themselves accordingly. In our judgment, the words “*all other persons whom it may concern*” were intended to and did apply to the people of the whole Bailiwick.
- (ix) Stepping back from the wording to consider the relevant context, it is apparent that the 1844 Order was passed in response to a Report from “*the Committee of Council for the Affairs of Guernsey and Jersey*”. We have been shown nothing to suggest that that committee’s function was limited to the island of Guernsey and did not extend to the whole Bailiwick. On balance, it seems far more likely that the committee was making a Report in respect of the Bailiwick.
- (x) Finally, the public policy considerations listed in the Report as favouring the proposed amendment (namely “*the interests of justice, the security of all classes, and especially the protection due to heirs*”) were not peculiar to the island of Guernsey, but would apply with equal force in relation to the whole Bailiwick.

22. For these reasons, it is clear in our judgment that 1844 Order had the effect of amending the law throughout the Bailiwick.

#### The 1847 Order

23. The first directly relevant piece of legislation is the Order in Council made on 22 July 1847 (“**the 1847 Order**”). Like the 1844 Order, it recites the fact that a Report had been presented by “*the Committee of Council for the affairs of Guernsey and Jersey*”. The Report referred to a letter

from “*the Bailiff of the Island of Guernsey*” with four *Projets de Loi* adopted by “*the Royal Court of that island*” and approved by the States (emphasis added in each case). The four *Projets* dealt with proposed amendments to the law “*as it exists in Guernsey*”<sup>5</sup> in relation to: (i) “*prescription or limitation as applied to claims relating to personalty*”; (ii) “*the form of Wills for the disposal of personal estates*”; (iii) “*the dividing of real property*”; and (iv) “*the law of Guarantee*”. The Order in Council then recites that Her Majesty had agreed to approve and ratify the four *Projets*.

24. This appeal is directly concerned with only one of those *Projets*. The 1844 Order having reduced the period of prescription in respect of “*actions in personalty on simple contract, and without specialty*” from thirty years to ten years, the effect of the 1847 Order was to apply the same reduction to “*Toutes choses mobilières et actions personnelles*”.
25. The words of enactment that then follow begin slightly differently from those used in 1844, but they end in the same way. They begin by saying that Her Majesty directed that “*this Order, together with the said Projets of Law ... be entered upon the Register of the Royal Court of the Island of Guernsey, and observed accordingly*” (emphasis added). They then say this: “*Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief, the Bailiff and Jurats of the Royal Court of the said island, and all other persons whom it may concern, are to take notice and govern themselves accordingly*” (emphasis added).
26. For substantially the same reasons as those given above in relation to the 1844 Order, we would have held without hesitation that the 1847 Order was similarly intended to apply in relation to the Bailiwick as a whole, at least so far as it effected a reduction in the period of prescription. The fact that, on its true construction, the 1844 Order had the effect of reducing the period of prescription throughout the Bailiwick serves as a specific reason for interpreting the provisions of the 1847 Order dealing with prescription as having the same application.
27. Nevertheless, Advocate Barnes for Mr Leopard has an additional and different argument in relation to the 1847 Order. He points out that one of the other *Projets de Loi* with which it dealt, namely the one concerning *testaments d'immeubles*, was amending earlier legislation, namely the 1840 Order, which applied expressly and only to the island of Guernsey, and further that the 1847 Order did not amend the 1841 Order which applied only in Alderney. From that, he extrapolates the proposition that the whole of the 1847 Order was intended to apply only to the island of Guernsey, not to the Bailiwick as a whole. We do not accept that argument. The 1847 Order was dealing with four separate *Projets de Loi*: even assuming that one of those *Projets* was concerned only with matters on the island of Guernsey, that would not provide any basis for interpreting each of the other three *Projets* or the Order as a whole as being so limited. In circumstances where more than one Ordinance was being approved by a single Order in Council, there is in our judgment *no a priori* reason for interpreting the scope of application of all Ordinances, and hence of the Order as a whole, as being uniform. In this case, Advocate Barnes could identify nothing in the language of the 1847 Order, in so far as it had the effect of reducing the prescription period, to require the inference that its application was limited to the island of Guernsey and did not extend to the Bailiwick as a whole. Nor could he suggest any rational policy reason why the legislator would have wished to produce that result.
28. For these reasons, in our judgment it is clear that the reduction in the prescription period effected by the 1847 Order applied throughout the Bailiwick.

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<sup>5</sup> The words “*as it exists in Guernsey*” follow immediately after reference to “*the law of Guarantee*” at the end of the list of *Projets*, but in our judgment to more natural reading of the provision as a whole is that the expression is being used to refer to the existing law in relation to each subject matter of the four *Projets*.

### The 1852 Order

29. The next piece of legislation is an Order in Council made on 5 March 1852 (“**the 1852 Order**”). It is not directly in point, because it is dealing with the prescription period in relation to realty, which was reduced from forty to thirty years. Nevertheless, our attention was drawn to the language used in the Order, and we were invited to draw certain inferences from the differences between this and the other legislation with which we are directly concerned.
30. In broad terms, the overall structure of the 1852 Order is similar to the earlier ones, although there are slight differences: it refers to a Report from the Committee; it refers to a petition from the Bailiff of Guernsey; it refers to a *Projet de Loy* (sic) having been adopted at the Chief Pleas and then by the States; it asks for Her Majesty’s approval; and it recites that that approval was given. The reason why Advocate Barnes seeks to rely on this particular Order in Council is that it refers several times to “*the Bailiwick*”. From this, he invites us to draw an inference that the nineteenth century draftsmen specifically referred to the Bailiwick by name when legislation was intended to apply generally, and that references in other legislation to “*Guernsey*” or “*the island of Guernsey*” should be interpreted specifically as referring only to the island and not to the Bailiwick as a whole.
31. We reject that argument for a number of reasons.
  - (i) First, we would express doubt whether it is safe to assume that different legislative instruments, dealing with different subject matters, which were drafted on separate occasions over a lengthy period of time, have necessarily adopted a uniform linguistic usage.
  - (ii) It is, in any event, apparent that the draftsmen of the various Orders in Council which we have considered did not adopt a uniform usage. For example, even in relation to the purely formal words of enactment, different formulations were used. On one occasion Her Majesty might “*approve and sanction*” the proposed changes in the law (1840), while on another she might merely “*approve*” them (1847), and on yet another the amendments might be “*approved and ratified*” (1844). There is no technical reason for these slight differences, and it cannot be suggested that they were intended to produce different results. The conclusion we draw from these entirely incidental discrepancies is that different hands held the pen in drafting these various instruments, and as a result we should be careful not to attach too much significance to ostensibly different linguistic usages.
  - (iii) Specifically, little can be derived for the purposes of this appeal from the occasional use of the word “*Bailiwick*” in the 1852 Order, and its absence from the 1847 Order. The 1852 Order refers twice to “*the Bailiwick of Your Majesty’s Island of Guernsey*” (emphasis added). In light of that use of language, it would in our judgment be particularly hazardous to infer that the nineteenth century draftsmen only ever intended to refer to the Bailiwick if he specifically used the word “*Bailiwick*” and that all references to “*Guernsey*” or even “*the island of Guernsey*” are necessarily intended to exclude the other islands in the Bailiwick. Guernsey. The Bailiwick and the island of Guernsey are to some extent conflated.

### The 1853 Report

32. Next in the chronology is the 1853 Report, which has already been quoted several times in relation to various general principles. More specifically in relation to the wording of Orders in Council, it records (at p. 59) that “*In a modern Order in Council relating to the community at large ... no mention is made of the subordinate Authorities of Alderney or Sark; – they are merely included*

among “all other Persons whom it may concern”.” This reinforces the inference identified in para. 21(viii) above.

33. The 1853 Report then specifically mentions the 1847 and 1852 Orders as being of general application throughout the Bailiwick. It adds this with regard to the 1847 Order (and one other Order of 1849 with which we are not concerned): “*The States of Alderney at the Chief Pleas after Michaelmas, 1850, ordered these several Laws to be also entered on the register of that Island, for the purpose of being observed there.*” This is a significant piece of information because many of the records of Alderney were destroyed during the German occupation and, but for the 1853 Report, the fact that the 1847 Order was registered in Alderney would have been unknown. The fact that it was so registered is not of itself proof as to its true effect – indeed the 1853 Report states that the act of registration in Alderney may be useful for the inhabitants, but is not determinative as to the application of a law on the island – but it is informative as to the understanding of the authorities in Alderney at the time and provides further comfort in relation to the interpretation we prefer, namely that it applied in Alderney.
34. The 1853 Report then also adds this: “*In the Act of the Alderney States ... it is among other things stated that the effect of the Orders in Council was to change entirely the ancient Laws of the Bailiwick; – and that having been once sanctioned by Her Majesty for the Island of Guernsey, it was needless to make any further application to Her Majesty, in order that they should be in force in Alderney*”. The States of Alderney could not, by their own authority alone, alter the customary law of the island; and, as noted above, their understanding of the 1847 Order is not conclusive as to its true effect. Nevertheless, it is all of a piece with the interpretation of the 1847 Order which we prefer, and it is significant that the 1853 Report says that the States of Alderney “*were undoubtedly correct in supposing that having once been sanctioned by Her Majesty – the Laws in question did not require any repetition of the Sanction, in order to be in force throughout the Bailiwick*”.

#### The 1889 Order

35. The second directly relevant piece of legislation is an Order in Council made on 13 December 1889 (“**the 1889 Order**”). Its effect was to reduce the period of prescription for “*all mobiliary demands and personal actions*” from ten years to six years. Its structure again takes the familiar form, with references to a Report from the Committee, a petition from the States of Guernsey, a *Projet de Loi* adopted by the States of Guernsey, a request for Her Majesty’s approval to the same, and a statement that such approval is granted.
36. Advocate Barnes relies specifically on the following features in support of his argument that the Order does not apply in Alderney:
  - (i) Unlike the 1852 Order, the 1889 Order does not refer in terms to “*the Bailiwick*”.
  - (ii) Indeed, the 1889 Order records the fact that the States’ petition sought Her Majesty’s approval for an amendment to the law of prescription “*at present in force in the Island of Guernsey*” (emphasis added).
  - (iii) The words of enactment provide that the *Projet* is approved and ratified, and “*shall have the force of law within the Island of Guernsey*” (emphasis added).
37. Notwithstanding this language, we reject the argument on behalf of Mr Leopard for the following reasons:

- (i) The correct starting point for the exercise is to bring to bear on the interpretation of the 1889 Order the various linguistic, historic and contextual considerations outlined above, including the fact that the prescription period in Alderney had already been reduced from thirty years to ten years. It would have been incongruous for the legislation in 1889, making a further reduction to six years, not to have applied in Alderney.
- (ii) Against that context, when the 1889 Order says that “*by the laws at present in force in the Island of Guernsey, all mobiliary demands and personal actions are prescribed by a lapse of ten years*” it is referring to the prescription period for personal actions throughout the Bailiwick. Whilst the prescription period of ten years was enacted by a law in force in the Island of Guernsey, that law applied, as we have explained, throughout the Bailiwick. The expression “*the Island of Guernsey*” in this Order is, in this context, being used interchangeably with “*the Bailiwick of Guernsey*” – or, to adopt the language used in the 1852 Order, it is being used interchangeably with (or as an abbreviation of) “*the Bailiwick of Your Majesty’s Island of Guernsey*”.
- (iii) The 1889 Order records that, the existing period of ten years “*having been found in practice inconvenient and excessive,*” the States had adopted the shorter period of six years in the *Project*. There is no reason to believe, and none has been suggested, why the same policy objection to the period of ten years would not have applied as much in relation to Alderney as it did in relation to the island of Guernsey. As a matter of legislative purpose, there is accordingly no basis for suggesting that the 1889 Order was intended to apply only to the island of Guernsey, and not to the Bailiwick as a whole.

38. For all these reasons, in our judgment the 1889 Order plainly had the effect of reducing the prescription period in respect of personal claims to six years. That is sufficient to dispose of the first issue in the appeal. Nevertheless, for the sake of completeness, we will also deal with various other materials post-dating the 1889 Order on which the parties have relied in the course of their submissions on this issue.

#### The 1909 Order

39. A further Order in Council was made on 2 April 1909 (“**the 1909 Order**”) reducing the prescription period for realty from thirty years to twenty years. It referred back to the 1852 Order, and in that context it mentioned “*the ancient Law of Normandy which was still in force in the Bailiwick of Your Majesty’s Island of Guernsey*” (emphasis added). It went on to ask for His Majesty’s approval that the reduction in the prescription period to twenty years “*may have the force of Law in the Bailiwick of Guernsey*” (emphasis added). Advocate Barnes again sought to rely on these express references to “*the Bailiwick*” in support of his argument, but for the reasons already given we derive no more assistance from the 1909 Order than we did from its predecessor in 1852.

#### The 1941 Law

40. On 1 February 1941, An Act of Proclamation of Law (“**the 1941 Law**”) was made by the British Civil Lieutenant-Governor “*of the Island of Guernsey*” (emphasis added). It was expressed to be made in exercise of the power conferred on the Lieutenant-Governor “*by an Order of the Commandant of the German Forces in occupation of the Bailiwick of Guernsey*” (emphasis added). The 1941 Law promulgated a *Projet de Loi* which was “*designed to protect the rights of persons where they would be otherwise adversely affected by reason of the occupation of this Island by German Forces*” (emphasis added). Our attention has again been drawn to the separate references made to the “*Bailiwick*” and to the “*Island,*” but we do not derive any assistance from

the wording of the 1941 Law for present purposes. For example, there is an internal inconsistency within it between references to the German occupation of the island and of the Bailiwick. Furthermore, it is not obvious why any person's rights on Alderney might not be as adversely affected as a person's rights on the island of Guernsey. Notwithstanding any purely linguistic points, it is not apparent to this court why the 1941 Law should not have been intended to apply throughout the Bailiwick. For the purpose of this appeal, we do not need to reach a definitive ruling on its correct interpretation, but we suspect that the several references to "Island" and "Bailiwick" serve only as another illustration of the lack of precision in drafting that seems to characterise much of the legislation we have had to consider.

#### The 1945 Law

41. After Liberation, a further Order in Council was made on 14 August 1945 ("**the 1945 Order**") approving a *Projet* adopted by the States of Guernsey under the title *Confirmation of Laws (Guernsey) Law* ("**the 1945 Law**"). The 1945 Order referred in the usual way to a Report from the Committee and a petition from the States of Guernsey asking for approval of the *Projet* to have "*the force of Law within the Bailiwick of the Island of Guernsey*" (emphasis added). That approval was given in the terms sought. Nevertheless, a direction was made only that the *Projet* and the 1945 Order "*be entered upon the Register of the Island of Guernsey and observed accordingly*" (emphasis added). The formal words of enactment ended with the familiar instruction requiring "*the Lieutenant-Governor or Commander-in-Chief of the Island of Guernsey, the Bailiff and Jurats, and all other His Majesty's officers, for the time being, in the said Island, and all other persons whom it may concern ... to take notice and govern themselves accordingly*" (emphasis added).
42. There could not be, and has not been, any doubt that the 1945 Law was intended to apply throughout the Bailiwick. That being the position, we would draw the following brief conclusions regarding the 1945 Order:
  - (i) The registration of any legislative instrument only in the island of Guernsey is not necessarily an indication that its scope of application is limited to that island.
  - (ii) An instruction issued to officials who are described as holding office "*in the island of Guernsey*" to abide by any given legislative provision is not necessarily indicative of an intention that the legislation in question applies only to the island of Guernsey.
  - (iii) The words "*all other persons whom it may concern*" are competent to and (subject always to the context) are also likely to describe the officials and residents of the other islands in the Bailiwick, apart from the island of Guernsey.
43. These considerations, taken together with the various other matters discussed above, fortify the conclusion that the legislation with which we are concerned has indeed reduced the prescription period for personal actions in Alderney to six years.

#### Laughton v. Main

44. The Court of Alderney decided, in *Laughton v. Main* (24 February 1994), that both the 1847 Order and the 1889 Order applied on Alderney, and that the prescription period for personal actions was accordingly six years. It is a short judgment, but none the worse for that. It accords with the interpretation we prefer, and the fact that the Court of Alderney took that view nearly thirty years ago and that no appeal was pursued, and no other judicial ruling appears to have been made disagreeing with it in the intervening years, all provides further substantial support for the conclusion we have reached.

### Vaudin v. Hamon

45. On 19 June 1973, the Privy Council gave judgment in the case of *Vaudin v. Hamon* on appeal from Sark. An attempt was made in that case to argue that the 1909 Order, the 1941 Law and the 1945 Law applied only to the island of Guernsey, not to the Bailiwick, and hence did not extend to Sark. Their Lordships rejected that argument. They held that, “*while accepting that the language used is not entirely precise, nevertheless, upon a consideration of these enactments, [they] are clearly of opinion that the distinction sought to be drawn should not be made, and that the legislation applied throughout the Bailiwick*”. Whilst that ruling is not directly in point, the approach taken by the Privy Council is entirely congruent with the interpretation we prefer in relation to the 1847 and 1889 Orders.

### Conclusion on the legislation

46. For the reasons discussed above, it is in our judgment clear that the period of prescription in relation to personal actions on Alderney is six years. As such, it is not strictly necessary to deal with the second aspect of the first issue, namely whether the Royal Court was right in holding that the customary law of Alderney has developed such that the prescription period for personal actions is now six years. Nevertheless, since the Royal Court gave a ruling on that issue; we heard submissions on it; and it is a short point that can be disposed of succinctly, we will express our views.

## Customary Law

### Introduction

47. In case it was subsequently held to be wrong on the question of legislative interpretation, the Royal Court proceeded to deal with an alternative argument in paras. 21 & 47 – 52 of the Judgment below. Leaving aside the position under legislation, the court considered “*whether it can be said that the customary law of Alderney has developed such that [it] can conclude the prescription period for personal actions is now six years*”: *ibid.*, at para. 47.

### The Judgment below

48. The Royal Court cited the Privy Council judgment in *A (Appellant) v. R (Respondent)* [2018] UKPC 4 (Appeal № 0064 of 2017), at para. 33, as authority for the proposition that customary law can evolve, although it can only do so congruently with express legislation. The Royal Court then listed a number of factors which together led to the conclusion that it would be appropriate for the court to confirm that the prescription period for personal claims in Alderney is six years. The considerations it took into account in reaching that conclusion were that:
- (i) the legislative intent manifested in Article X of *L’Approbation* and in the Ordinance of 1761 is that the Court of Alderney should apply the law of Guernsey;
  - (ii) the prescription period in Alderney for claims in relation to realty was clearly consistent with that on the island of Guernsey (by virtue of the 1852 and 1909 Orders), and on that basis it would be anomalous if the prescription period in relation to personal claims was different;
  - (iii) in 1850, the States of Alderney had evinced an intention to be bound by the 1847 Order and, although there was no clear record of whether it also registered the 1889 Order, there was equally no record that a different stance had been taken;
  - (iv) the decision in *Laughton v. Main* had stood as unchallenged authority on the ostensible position under the relevant legislation for twenty-eight years;

- (v) in particular, it was apparent that, in the intervening period since that decision had been taken, the States of Alderney had not petitioned for legislation to reverse it;
- (vi) the “*aids to navigation*” laid down in *C (a minor) v. Director of Public Prosecutions* [1996] 1 AC 1, at 28, did not preclude judicial development of customary law in this regard.

Discussion & conclusion

49. In our judgment, the (strictly *obiter*) ruling of the Royal Court on this issue should be upheld.
50. It was common ground between the parties that the legal framework for the debate is laid down by the Privy Council in its judgment in *A (Appellant) v. R (Respondent)*. From that judgment, it is clear that neither the inherent nature of customary law, nor the express terms of *L'Approbation*, nor any subsequent legislation applicable to Alderney has the effect of preventing the judicial recognition of developments in customary law, although no such developments can ever abrogate directly applicable legislation, and any judicial recognition of a development in customary law should always be consistent with legislative policy in relation to matters on which there has been express enactment. We would observe that the very purpose of *L'Approbation* appears to have been to record how far the customary law of the Bailiwick had already evolved away from its original Norman inheritance by the time it was written. That of itself provides confirmation that customary law is not fixed once and for all time.
51. Advocate Barnes did not suggest that a reduction in the prescription period from thirty years to six years was precluded by any express legislative provision. Rather, he submitted that the rule on prescription was too fundamental to be altered by judicial decision-making, citing *Singleton v. Le Noury*, a judgment of this court on 5 June 1990. The issue in that case was whether a servitude can be acquired by positive prescription. The court held that it could not. Whilst recognising that customary law will develop over the centuries, the court in that case held that such development cannot change “*the fundamental and substantive common law*” (*ibid.*, at p. 18). Taking that approach, the court considered that the principle of “*nil servitude sans titre*” and “*Droit de servitudes de vues, égouts de maisons, et autres choses semblable par la Coutume générale de Normandie ne peut être acquise par la possession ou jouissance, fut-elle de cents ans, sans titre*” as set out in the writings of Laurent Carey, Basnage and Berauld are part of the *coutume* or fundamental common law and cannot be altered by judicial decision.
52. Although not mentioned by the parties in argument, we have also had regard to the fact that the customary prescription period of thirty years in French law was re-enacted in the Napoleonic Code, and remained in force in France for some categories of proceedings until it was altered by legislation as recently as 2008. We have also had regard to the observations made in *Reforming the French Law of Obligations: Comparative Reflections on the Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (Bloomsbury, 2009), edited by John Cartwright. The point is made there that case-law was unsuitable to remedy any perceived defects in relation to prescription periods because “*thirty years is thirty years, and even the most ingenious interpreter will find it difficult to persuade anyone to the contrary*”: *ibid.*, at p. 347.
53. Whilst recognising the force of these observations, and without doubting the validity of the decision of this court in *Singleton v. Le Noury* in relation to the issue under consideration in that case, we nevertheless consider that the Royal Court was right in relation to the issue in this case, for an accumulation of reasons:
- (i) Our attention has not been drawn to any express legislation applicable to Alderney that would preclude the development of customary law in relation to the prescription

period applicable to personal claims. Accordingly, this was not a situation where the Royal Court was attempting to ‘interpret’ a legislative provision (such as that in the Napoleonic Code) stipulating “*thirty years*” as if it meant “*six years*,” nor was it a situation where the court below was proposing to make a development of customary law inconsistently with any express legislative provision.

- (ii) Furthermore, as the Royal Court noted in the Judgment below, the overriding legislative intent manifested in *L’Approbation* and the Ordinance of 1761 is that the Court of Alderney should apply the law of the island of Guernsey. This provides a compelling basis for proceeding on the assumption that any individual legislative amendment to the customary law of the island of Guernsey was intended by those foundational legislative instruments to be applied in Alderney, unless the specific terms of any particular amendment manifest a positive legislative intent that it should not be so applied. Advocate Barnes’s argument was not that there was a positive legislative intent (nor, indeed, any policy justification) for not applying the 1847 or 1889 Orders to Alderney. Rather, his argument was simply that that was the linguistic effect of the words used in the enactments. That being the position, we consider that the Royal Court was entitled to take Article X of *L’Approbation* and the Ordinance of 1761 into account in reaching the conclusion that the Court of Alderney should apply the prescription period of six years, even if the 1847 and 1889 Orders did not on their face expressly provide as much.
- (iii) In the same context, the Royal Court was also entitled to take into account the symmetry between the law in the island of Guernsey and that in Alderney with regard to the prescription period for claims in relation to realty. On its own, this would not be of much weight – a common prescription rule in relation to realty does not require a common prescription rule in relation to other matters. However, the Royal Court was entitled to take the view that it added to the cumulative weight of the various considerations which justified its conclusion.
- (iv) Similarly, we consider that the Royal Court was right to take into account the fact that, in 1850, the States of Alderney had evinced an intention to be bound by the 1847 Order, and the fact that there was no record that a different stance had been taken in relation to the 1889 Order. Against the background of the legislative intent evinced in *L’Approbation* and the Ordinance of 1761, to which we have referred above, it would have been incongruous and surprising if the States of Alderney had viewed the 1889 Order differently. In the absence of any record that the States did take a different approach to the 1889 Order, or any good reason why they should do so, we are entitled to proceed on the footing that the States viewed the 1889 Order in the same way as the 1847 Order. In light of the destruction of the Alderney records, the absence of any specific record does not justify a contrary inference.
- (v) Perhaps most importantly, the Royal Court was fully entitled to take into account the fact that the decision in *Laughton v. Main* had stood unchallenged for twenty-eight years, and that the States of Alderney had not petitioned for legislation to reverse it. The reason why we regard this as a particularly important consideration is not because this court should regard the Court of Alderney as being necessarily correct on the point of legislative interpretation. Rather, we have in mind the principle that “*coûtume fait loi et la meilleure loi est la coûtume du pays*”. Significantly, it is “*coûtume*” that makes the law, not judicial decisions. In other words, the function of the court is to recognise the evolution of customary law, not itself to make new law of its own volition by judicial innovation. In this context, it is significant that the question which the Royal Court posed itself in the Judgment below is carefully expressed in the terms already quoted: “*whether it can be said that the customary law of Alderney has developed such that [the court] can conclude*

*the prescription period for personal actions is now six years*” (emphasis added): *ibid.*, para. 47. In our judgment, this was the right question and, irrespective of whether the Court of Alderney was correct as a matter of legislative interpretation in *Laughton v. Main*, the fact is that the law of Alderney has been regarded as settled on the basis of that decision for a generation. The Royal Court in this case was giving recognition to that as a fact, viewed in the context of all the other matters it took into account. In other words, it was recognising the development of customary law that had already occurred, rather than itself purporting to alter the prescription period through judicial decision-making.

54. For these reasons, we consider that the Judgment below was correct on this issue. Had it been necessary to decide the point, we would have concluded that, if the prescription period in relation to personal claims under the law of Alderney was not directly reduced to six years by the combined effect of the 1847 and 1889 Orders, the Royal Court was right in recognising that the reduction had occurred by the evolution of customary law.
55. I have had the advantage of reading in draft the judgment of Wolffe JA dealing with the second preliminary issue, and I agree with it entirely.

**Wolffe JA:**

## **PRELIMINARY ISSUE 2**

### **Introduction**

56. I have read in draft Crow JA’s judgment on the first Preliminary Issue. I agree both with his conclusion that the relevant prescriptive period is six years, and his reasons for reaching that conclusion. I will accordingly address the second Preliminary Issue, namely:

*“Was [Mr Leopard’s] claim against [NFU Mutual] brought within six years of the accrual of the cause(s) of action (to include a determination of whether the term pleaded at paragraph 2 of the Cause (that any claim would be settled within a reasonable time) was implied to the Policy.”*

57. The Deputy Bailiff dealt with this Preliminary Issue succinctly in the following terms:

*“The position in England and Wales is clear and I can see no reason why the same principles should not apply in this jurisdiction. The implied term as argued by the Appellant “that any claim would be settled within a reasonable time” is not one that is recognised at common law. The case law is longstanding and clear (see MacGillivray on Insurance Law 21-055, *Callaghan v. Dominion Insurance Co* [1997] 2 Lloyd’s Rep 541 and *Sprung v. Royal Insurance (UK) Ltd* [1999] Lloyd’s Rep I.R. 111). Further, applying the principles set out in *Musa Holdings Limited v. Newmarket Holdings (Guernsey) Limited* GCA Judgment 14/2014, there is no proper basis for implying the term sought to be implied by the Appellant into the insurance contract and the Appellant has failed to make out a case as to why the contract requires the term sought to be implied in order to give the contract business efficacy. This is not an area where judicial law-making is appropriate or necessary.”*

### **The procedural context**

58. Although this is framed as a Preliminary Issue, we remind ourselves that we are again dealing with an *exception de fonds*. In *Cherub Investments Ltd v. The Channel Islands Aero Club (Guernsey) Ltd*, GCA No. 11, 1982, quoted in *Yaddehige v. Credit Suisse Trust Ltd*, GCA Judgment 5/2008, Hoffmann JA stated:

*"Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistent with the pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action".*

In this context, the court must take Mr Leopard's pleaded case at its height. The court must also, as the judgments in *Yaddehige* explain, give the latitude to the pleadings which is appropriate when it is considering whether the Cause should be dismissed without hearing evidence.

59. We can accordingly dispose of the second Preliminary Issue at this stage only if we are able to conclude, on the basis of Mr Leopard's pleadings and the arguments advanced before us, that the obligations upon which Mr Leopard founds had already prescribed before these proceedings were raised on 16 July 2020. We will accordingly require to identify the obligations upon which Mr Leopard founds, and to consider whether we can determine, at this stage, when those obligations first became enforceable. This exercise will require us to address certain issues which, it would appear, have not previously arisen for decision in the Guernsey courts concerning the obligations of an insurer under a contract of indemnity insurance such as the Policy.
60. For the reasons which we set out below, we cannot conclude, at this stage, that Mr Leopard's action had prescribed before these proceedings were raised. We accordingly allow the appeal. The Court of Alderney will require to address whether or not the action had prescribed in light of this judgment.

### **The legal context**

61. The Advocates who appeared before us confirmed that there is no relevant statute law. In particular, there is no statute applicable to Alderney equivalent to the Marine Insurance Act 1906 which applies in the United Kingdom. It follows that the issues fall to be determined by reference to the customary law of Alderney. This may be taken, for these purposes, to be the same as the customary law of the rest of the Bailiwick of Guernsey. Where we refer in our analysis to the law of Guernsey that should, accordingly, be understood to include the law of Alderney.
62. The Deputy Bailiff proceeded on the basis that the law of Guernsey is, in all relevant respects, the same as the common law of England & Wales. We observe, at the outset, that the common law of England & Wales has been the subject of legislative reform specifically directed to the question of timely settlement of claims.
63. The relevant features of the unreformed English common law which we take from the authorities which were placed before us, are these:
- (i) The insured's claim under a policy of indemnity insurance is of the nature of a claim for unliquidated damages for breach of contract by reason of the insurer's failure to hold the insured harmless against the insured peril (*Sprung v. Royal Insurance (UK) Ltd* [1999] Lloyd's Rep I.R. 111).
  - (ii) The insured's cause of action for damages arises when the insured peril occurs and time accordingly runs, subject to any provisions of the insurance contract, for the

purposes of limitation from that point (*Callaghan v. Dominion Insurance Co* [1997] 2 Lloyds Rep 541).

- (iii) There is no cause of action in damages for the late payment of damages; the insured's only remedy, if the insurer does not pay promptly, is an award of interest (*Sprung, supra*).
- (iv) Subject to the specific provisions of any particular contract, an insurance contract is not subject to an implied term that the insurer will not unreasonably refuse or delay indemnity (*Insurance Corporation of the Channel Islands v. McHugh* [1997] LRLR 94).
- (v) If the insurance contract gives the insurer an option to reinstate or repair the property, and the insurer exercises that option, the insurer is treated as having undertaken a contract to repair or replace the property (*Brown v. Royal Insurance Co* (1859) 120 ER 1131).

64. The fourth of the propositions which we have set out above has been changed by statute for the jurisdictions of the United Kingdom. Section 13A of the Insurance Act 2015 (“**the 2015 Act**”), which came into force on 4 May 2017, provides that it is an implied term in every contract of insurance that if the insured makes a claim under the contract the insurer must pay any sums due in respect of the claim within a reasonable time. The enactment of section 13A followed a recommendation of the Law Commission and the Scottish Law Commission in their joint Report *Insurance Contract Law: Business Disclosure; Warranties; Insurer’s Remedies for Fraudulent Claims; and Remedies for Late Payment* (Law Com No 353; Scot Law Com No 238) (“**the Law Commissions’ Report**”).

65. The Law Commissions’ Report contained a substantial critique of the common law. It characterised the starting point of the English common law cases – the “hold harmless principle” – as a “legal fiction” (para. 25.8). It described that principle as follows (*ibid*):

*“the insurer’s obligation under a contract of indemnity insurance is not, as one may expect, to pay insurance claims in return for payment of the premium. Rather, the English courts have held that the indemnity insurance contract is underpinned by the legal fiction that an insurer’s primary obligation is to ‘hold the indemnified person harmless against a specified loss or expense’; that is, to prevent the event which is insured against from happening.”*

66. The practical consequence of characterising the insured’s claim as a claim for unliquidated damages for breach of contract was (subject, now, to section 13A of the 2015 Act) to exclude any remedy, other than the payment of interest, where an insurer failed to pay the sum due under an insurance contract within a reasonable time or at all. The effect may be illustrated by the facts of *Sprung*. Mr Sprung owned a small family business. He insured his factory against theft and “*sudden and unforeseen damage*”. Vandals broke in and the factory and plant were badly damaged. Mr Sprung submitted a claim to his insurers which they rejected. Mr Sprung did not have the finance to carry out repairs and was unable to raise loan finance. Six months later he went out of business. He sued the insurers. Four years later, the insurers abandoned their defence and Mr Sprung was awarded an indemnity for the damage to his plant and machinery, plus simple interest and costs. The judge found that the claim should have been paid four years earlier. As a result of the insurers’ failure to pay at that time, Mr Sprung had sustained a further loss of £75,000. The Court of Appeal, with “*undisguised reluctance*” (*per* Evans LJ) concluded that he was not entitled to claim this further loss, on the basis that the Court was bound by the principle that there can be no award of damages for late payment of damages.

67. In criticising the English common law, the Law Commissions' Report made the following points (Chapters 25 and 26).
- (i) As the facts of *Sprung* illustrate, the payment of interest on the insurance monies does not always compensate the insured for additional losses which may be sustained as a result of late payment of insurance monies.
  - (ii) This was out of step with developments in the general law of contract, notably the acknowledgment in *Sempra Metals v. Inland Revenue* [2007] UKHL 34 that, subject to the rules on remoteness and mitigation, those who default on a contractual obligation to pay money may be liable in damages for loss caused thereby.
  - (iii) The principle did not apply to all insurance contracts. The effective prohibition on claiming damages for failure to settle an insurance claim within a reasonable time did not apply to life insurance or to property insurances where the insurer exercises a contractual option to repair or reinstate rather than to pay money.
  - (iv) The absence of any legal requirement for an insurer to pay within a reasonable time frustrated the purpose of insurance. It did not reflect the legitimate expectations of the insured, who will rely on insurance in a time of crisis. It did not incentivise prompt payment. The Law Commissions quoted (para. 26.12) Lord Mance, commenting extrajudicially:  
  

*“The law currently allows the situation where an insurer may delay dealing with a claim to its own financial benefit, at least in cash-flow terms, and to the detriment of the insured, potentially putting him under financial pressure to settle, and possibly even out of business.”*
  - (v) Although the High Court and Court of Appeal had proceeded on the basis that they were bound by the decision in *Sprung*, in *Mandrake v. Countrywide Assured Group* [2005] EWCA Civ 850, Rix LJ had suggested that if the issue were reviewed by the House of Lords this “*may well lead to some clarification and amendment of the law*”.
  - (vi) Other jurisdictions examined by the Law Commissions provide a remedy where an insurer unreasonably fails or delays to pay an insurance claim. So far as the comparative research of the Law Commissions disclosed, the position of English law in excluding any such remedy appeared to be unique.
68. The Law Commissions reported that there was widespread support, including from the insurance industry, for statutory reform. They recommended the enactment of a statutory implied term requiring insurers to pay claims within a reasonable time. Despite their criticism of the “hold harmless principle”, they did not recommend its abolition for the law of England & Wales, on the basis that this might have unforeseen consequences, particularly as regards the application of interest and the law on limitation of actions, when abolition was not necessary to provide a remedy for late payment. Consistent with that recommendation, section 13A of the 2015 Act provides a specific remedy for late payment but the Act does not amend the “hold harmless principle” in the law of England & Wales.
69. On behalf of NFU Mutual, Advocate Geall invited us to proceed on the basis that the law of Guernsey is, in all relevant respects, the same as the unreformed common law of England & Wales. Whilst he acknowledged the general relevance of the writings of Pothier and Jersey case-law, he submitted that English common law is the primary source to which the Guernsey courts look on matters of contract and specifically in relation to insurance law. He pointed out that

Alderney has not introduced legislation equivalent to the 2015 Act, that the 2015 Act post-dated the subject-matter of this case and that it was not a complete codification. He took us to the Law Commissions' Report to show that they had recommended a specific limitation period and had recorded policy arguments which had been advanced by some consultees against reforming the law. He submitted that reform of the law would be a matter for the legislature. He cautioned us against judicial law-making or cherry-picking from other jurisdictions. To depart from English common law principles would, he submitted, leave Guernsey law in a state of uncertainty and might have unforeseen consequences.

70. On behalf of Mr Leopard, Advocate Barnes relied on *Morton v. Paint* GCA Civil Division – Appeal No. 219 and *Yaddehige, supra*, to demonstrate that, whilst this court may regard English cases as persuasive, it is not bound by them. He relied on *Morton* and *A v. R supra* for the proposition that it is open to this court to develop the customary law. He invited us to develop the law in this case. He adopted the criticisms of *Sprung* advanced in the Law Commissions' Report. He referred us to the following cases (as well as to Appendix A to the Law Commissions' Issues Paper 6, *Damages for Late Payment and the Insurer's Duty of Good Faith*) to show that other jurisdictions had not adopted, or had departed from, the English common law position: (i) *Fagnoli v. GA Bonus plc* 1997 SCLR 12, 31B-C (Scotland); (ii) *Tropicus Orchids Flowers and Foliage Pty Ltd v. Territory Insurance Office* [1997] NTSC 46, para. 7.4 (Australia; Northern Territory); (iii) *Brescia Furniture Pty v. OBE Insurance (Australia) Ltd* [2007] NSWSC 598, paras .507-510 (New South Wales); (iv) *Ontario Inc v. Non-Marine Underwriters* 2000 CanLII 5684 (Ontario); and (v) *Young v. Tower Insurance* [2018] NZLR 291, para. 163, and *Southern Response Earthquake Services Ltd v. Dodds* [2020] NZCA 395, para. 194 (New Zealand).
71. Advocate Geall's submissions cautioning us against judicial law-making and cherry-picking from other jurisdictions were well-made. However, those submissions beg the question of whether the law of Guernsey is, on the specific issues which we require to decide, the same as the unreformed law of England & Wales. We recognise that English case-law is often a source of persuasive guidance on matters of contract law, and specifically in relation to insurance contracts. However, the fact that other jurisdictions either have not adopted, or have departed from, the English common law, the criticisms of the common law position contained in the Law Commissions' Report and the fact that English common law has now been changed by statute, invite a question - although they do not answer that question - as to whether Guernsey law is, in the present context, in all respects the same as the unreformed common law of England & Wales. We will address the issues, so far as they arise in this case, in the course of this judgment.

## **The Policy**

### *The terms of cover*

72. The Policy is described as an Islands' Insurance "Premier Home Policy". It includes the following cover.

*"Buildings are insured against **damage** by the following*

...

*6 Storm and flood.*

*7 Land movement of the site on which **your buildings** stand.*

...

*How **we** will settle **your** claim*

***We** will settle claims by paying the cost of repairing or replacing **your buildings**.*

***We** will reduce **your** benefit to allow for wear, tear and loss of value if:*

- when the **damage** happens, **your** sum insured is less than the full rebuilding cost;  
or
- **you** have not kept **your buildings** well maintained.

If **you** do not repair or replace **your buildings**, **we** will pay the loss in market value or the cost of repair or replacement, whichever is the less.

**We** may, at our option, replace **your buildings** or arrange for repairs to be carried out.

The most **we** will pay for **damage** to **your buildings** is the sum insured for **buildings** shown in **your schedule** and any extra amount for **index linking**. The amount **we** will pay will include any costs for:

- Clearing the site (removing debris, demolition, or shoring, Propping up);
- Professional fees (architects, surveyors and legal fees); and
- Meeting building regulations requirements.

...

#### *Additional Insurance*

You are also insured for the following if they happen during the **period of insurance**.

##### *1. Rent and accommodation costs*

If **you** cannot live in **your home** because of **damage** insured by this section **we** will pay for:

- Loss of rent or ground rent; and
- The reasonable costs of similar accommodation for **you** and **your household**.

**We** will pay these costs until **your home** is fit to live in.

The most **we** will pay is 25% of the sum insured for **your buildings**.”

73. The General Conditions applicable to the Policy include the following.

#### *“How to claim*

If anything happens which might result in a claim, **you** must do the following:

- tell **us** as soon as possible;
- provide all the written details and documents that **we** ask for at **your** expense;
- tell the police about any theft, attempted theft, **damage** caused by malicious people or vandals, or lost property insured under the Personal belongings section;
- do not admit responsibility or try to settle a claim without our written permission. You must send **us** any letters **you** receive about the incident immediately; and
- **you** must not abandon any property to **us**.

#### *Our rights if you claim*

**We** may:

- enter any building where **damage** has taken place and take control of the remains;
- take over, defend or settle a claim made against **you**; and

- *at our own expense, take legal action in your name to get back any payment we have made under your policy.”*

74. The documents filed with the court include Policy Schedules for the periods 17 June 2008 to 16 June 2009 and 15 June 2016 to 14 September 2016. The 2008-9 Policy Schedule specifies £158,734 as the “Sum[ ] insured or liability limit” for Buildings. The 2016 Policy Schedule specifies, in respect of the Buildings Insurance, a “Rebuilding cost” of £529,698.

Overview of the relevant provisions of the Policy

75. NFU Mutual is obliged under the Building insurance section of the Policy (“the Buildings Cover”) to indemnify Mr Leopard against damage to the Property by the specified insured perils. That obligation falls to be made good by one of the mechanisms which are set out in the Policy after the words “*How we will settle your claim*”. The primary mechanism for giving effect to NFU Mutual’s indemnity is payment of “*the cost of repairing or replacing*” the buildings insured. The amount is further specified to include costs of site clearance, professional fees and compliance with building regulation requirements.

76. The requirement to pay the cost of repairing or replacing the buildings insured is qualified in three respects: (i) it is subject to reduction “*to allow for wear, tear and loss of value*” if the sum insured is less than the full rebuilding cost or the insured has not kept the buildings well maintained; (ii) if the insured does not, in fact, repair or replace the buildings, the insurer is required to pay the lesser of the loss in market value or the cost of repair or replacement; and (iii) the maximum which falls to be paid under this provision of the Policy is the sum insured shown in the Policy Schedule and any extra amount for index linking.

77. The Policy gives NFU Mutual an option to fulfil its obligation to indemnify Mr Leopard by replacing the buildings or arranging for repairs to be carried out. The exercise of this option would substitute for the requirement to pay money an obligation to replace the buildings or to arrange for repairs to be carried out. If NFU Mutual exercise the option to repair, they would fall to be treated as having undertaken the obligations ordinarily incident to a contract to repair or replace the Property - including an obligation to complete the works of repair or replacement and, there being no contractually specified date for completion of the works, an obligation to complete those works within a reasonable time. These propositions are vouched by the authorities to which we were referred, notably *Brown v. Royal Insurance Co* (1859) 120 ER 1131, *Maher v. Lumbermen’s Mutual Casualty Company* [1932] 2 DLR 593 and *Davidson v. Guardian Royal Exchange Assurance* 1979 SC 192, and we are satisfied that they are consistent with Guernsey law.

78. The cover for rent and accommodation costs provided by para. 1 of the Additional Insurance is, having regard to its terms, available regardless of the mechanism adopted for giving effect to the indemnity under the Buildings insurance.

**Mr Leopard’s claim**

79. In order to determine whether the obligations upon which Mr Leopard founds have prescribed, we require to identify those obligations. The Cause should specify the obligations founded upon, and relate the losses claimed to those obligations in a manner which allows the reader to discern clearly the case or cases being advanced. In the present case, this is not as straightforward as it should be. In particular, the reference to the Fulford report, which is lengthy and discursive, to identify the costs claimed does not assist the reader to identify clearly the case advanced and the obligations founded upon. However, in dealing with an *exception de fonds*, we must recognise that deficiencies in the pleadings which do not go to the substance of the case may be capable of being addressed at a later stage. The exercise before us requires us to identify, reading the

pleadings fairly and with appropriate latitude, the obligations which have been founded on in the Cause, so as to decide whether or not those obligations had prescribed before these proceedings were raised.

80. In para. 2 of the Cause, Mr Leopard relies on the following provisions of the Buildings Cover:

*“We will settle claims by paying the cost of repairing or replacing **your buildings**.*

...

*We may, at our option, replace **your buildings** or arrange for repairs to be carried out.”*

He avers that: *“It was a term to be implied to the policy in order to give it business efficacy that any claim would be settled within a reasonable time”*. He also quotes from para. 1 of the Additional Insurance (the loss of rent cover).

81. Mr Leopard alleges (para. 6) that NFU Mutual *“elected to arrange for repairs to be carried out rather than paying the cost of repairs”*. He claims that there was a breach of the pleaded implied term by reason of delays: (i) in accepting liability under the Policy; and (ii) in completing the repair works. Mr Leopard’s pleadings do not disclose whether his averment that NFU Mutual opted to repair the Property is based on a specific communication to that effect, or an inference from conduct, or on some other basis. We received no submissions as to whether the exercise of an option to repair requires unequivocal notice within a reasonable time (see *MacGillivray on Insurance Law*, 15<sup>th</sup> edn (2022), para. 21-003). We must accordingly proceed, for the purposes of addressing an *exception de fonds*, on the basis that Mr Leopard’s averment that NFU Mutual elected to arrange for repairs to be carried out rather than paying the cost of repairs is well-founded.
82. On a fair interpretation of the Cause, we understand Mr Leopard to advance claims both under the Policy and by way of damages for breach of contract. He claims alleged costs of repairing the Property which have not been met by NFU Mutual. This is a claim which could in principle be founded either on the contractual obligation to indemnify under the Buildings Cover or (on the footing that NFU Mutual has exercised its option to repair) as a head of loss by way of damages for breach of contract. As we have noted above, the Cause explicitly relies (at para. 2) both on the requirement to pay the costs of repair under the Buildings Cover and also on the provision permitting NFU Mutual to elect to repair the Property. Mr Leopard also claims losses (including loss of rent) by way of damages for breach of contract under reference to the pleaded implied term and specifically also claims loss of rent by reference to para. 1 of the Additional Insurance.
83. The claim to loss of rent advanced under para. 1 of the Additional Insurance and the claim to loss of rent advanced by way of damages for breach of the pleaded implied term not only proceed on different legal bases but would relate to different periods of time and be different in amount. The claim under para. 1 of the Additional Insurance would run from the point when the Property became uninhabitable by reason of an insured peril. By contrast, the claim for damages based on breach of the pleaded implied term would run only from the date when the pleaded implied term was breached. Further, we agree with Advocate Barnes’ submission, advanced on the basis of *Davidson v. Guardian Royal Exchange Assurance* 1979 SC 192, that, if Mr Leopard has a well-founded claim for breach of the pleaded implied term, the contractual limit on the cover provided by para. 1 of the Additional Insurance would not apply to that claim.
84. Before us, Advocate Barnes argued, on behalf of Mr Leopard, that, if NFU Mutual had elected to repair the Property, it was, as a matter of law, obliged to complete the repairs within a reasonable time and that the issue of prescription should be addressed on that footing. As we have

stated at para. 77 above, we accept that, if NFU Mutual did elect to repair the Property, it was under an implied obligation to do so within a reasonable time. Against that background, it seems to us that, reading the Cause fairly, the obligations upon which Mr Leopard founds are these:

- (i) an alleged obligation to pay damages for breach of the obligation to carry out and complete the repair of the Property pursuant to the election to repair, and to do so within a reasonable time; and
- (ii) the contractual obligation to pay loss of rent under para. 1 of the Additional Cover.

85. Although Advocate Barnes advanced the case on the footing that NFU Mutual had exercised the option to repair, we also heard detailed submissions as to what the position would be if NFU Mutual were required to fulfil its obligation of indemnity by paying the cost of repair. If NFU Mutual did not, in fact, exercise the option to repair, the question of whether Mr Leopard had (non-prescribed) claims on the basis that the mechanism for fulfilling NFU Mutual's obligation of indemnity was payment of the cost of repair could arise. Indeed, that was the footing upon which the case seems to have been argued before the Deputy Bailiff. We consider that the Cause is capable of being read as encompassing that alternative case, upon the footing that Mr Leopard founds on the following obligations:

- (i) the contractual obligation under the Buildings Cover to indemnify by paying the cost of repairing the Property;
- (ii) the contractual obligation to pay loss of rent under para. 1 of the Additional Insurance; and
- (iii) an obligation to pay damages for loss allegedly sustained by reason of breach of the pleaded implied term.

### **Mr Leopard's case advanced on the basis that NFU Mutual opted to repair**

#### *Introduction*

86. We will address the case which Advocate Barnes advanced to the effect that NFU Mutual exercised the option to repair the Property under the following headings:

- (i) Is the argument available to Mr Leopard?
- (ii) The claim for damages for breach of contract.
- (iii) The claim under para. 1 of the Additional Insurance.
- (iv) Conclusions.

#### *(i) Is the argument available to Mr Leopard?*

87. Before the Deputy Bailiff Mr Leopard did not advance an argument relying on the implied obligations which would flow from the exercise of the option to repair. Advocate Geall argued that this argument is not open to Mr Leopard on his pleadings, on the basis that he does not advance a case based on a new contract arising from the exercise of the option. For the following reasons, we have concluded that it is open to Mr Leopard to advance this argument.

88. Mr Leopard expressly pleads that NFU Mutual exercised the option to repair the Property. The heads of his financial claim are consistent with that claim. They include: (a) a claim for the cost

of completing the repair works; and (b) a claim for losses (notably loss of rent) allegedly sustained as a result of delay in completing the repair works. These are claims which (on the hypothesis that NFU Mutual elected to repair the Property) could be advanced as claims for damages by reason of a failure to carry out and complete the repair of the Property and to do so within a reasonable time.

89. The pleading of the claim for loss of rent both under para. 1 of the Additional Insurance and also by way of damages for delay is also consistent with such a case. As we have explained above, these claims are separate claims, with different legal bases, which do not coincide, though they may overlap, and which are both, at the level of legal principle, available if NFU Mutual has exercised the option to repair the Property.
90. We do not consider that it was necessary for Mr Leopard to plead that a “new contract” had been entered into by reason of the pleaded exercise of the option. If NFU Mutual exercise the contractual option to repair the Property, the obligation to carry out the repair works arises from a provision of the insurance contract itself – namely the provision under which NFU Mutual exercise the option to repair the Property. It suffices that Mr Leopard has relied in his pleadings on: (i) that provision of the insurance contract; and (ii) the pleaded implied term, upon which the claim for damages by reason of delay is based, that “*any claim would be settled within a reasonable time*”.
91. The pleaded implied term is set out immediately after the following quote from the Policy: “*We will settle claims by paying the cost of repairing or replacing your buildings ... We may at our option replace your buildings or arrange for repairs to be carried out*”. We recognise that the phrase “*any claim would be settled*” in the pleaded implied term could, as a matter of textual analysis, be read as referring back to the words “*settle claims*”. If it were to be read in this way, the term would not apply if, in fact, NFU Mutual has (as Mr Leopard alleges) exercised the option to repair. However, this would be an unduly narrow approach to the pleaded implied term. In our view, it can, and should, on a fair reading of the Cause as a whole, be read as asserting that NFU Mutual was obliged to fulfil the obligations incumbent upon it in settlement of the claim (whether by payment or by carrying out works of repair) within a reasonable time.

(ii) The claim for damages for breach of contract

92. Mr Leopard’s claim for damages (so far as advanced on the footing that NFU Mutual opted to repair the Property) is predicated on the allegation that NFU Mutual did not complete the required repairs within a reasonable time. The claim advanced on that basis would encompass both the costs of completing the repairs (so far as not completed by NFU Mutual) and losses (notably loss of rent) allegedly sustained as a result of the alleged breach of an implied obligation to complete the works of repair within a reasonable time. The claim for damages accrued only when loss was first sustained by reason of the breach of contract upon which Mr Leopard relies – *i.e.* upon the expiry of the reasonable time for completion of the works. If that date was prior to 16 July 2014, this claim had prescribed before the proceedings were raised.
93. We are faced with an immediate difficulty that Mr Leopard does not, in his pleaded Cause, identify what he contends would have been a reasonable time for completion of the works. Without such an averment, his claim is defective, since any claim which he might have for damages would only be in respect of any losses caused by the failure to complete by that date.
94. Advocate Geall pointed out during the oral hearing that the Fulford report states (para. 172) that, in the view of the author of that report, a reasonable time for completion of the works would have been 24 months from the initial claim in 2009. On the basis of a “notional claims programme: reasonable claims management”, the author identifies the end date of that period as 30 March

2011. We note, however, that the Fulford report also contains (para. 205) an “Optimum Programme to Practical Completion from Date of Uretek Works” (which we understand to be stabilisation works undertaken after NFU Mutual accepted liability under the Policy), which gives an end date of 29 March 2015.

95. Advocate Geall’s reliance on para. 172 of the Fulford report proceeds on the assumption that, if NFU Mutual elected to repair the Property, the reasonable time for completion ran, as a matter of law, from the date of the loss rather than from a later date such as the date when NFU Mutual exercised the option to repair. If that assumption were to be correct, that would appear to have the consequence, on Mr Leopard’s averments, that by the time NFU Mutual exercised the option to repair (which was presumably only after they had accepted liability), it was already in breach of contract by reason of not having completed the repair within a reasonable time.
96. In *Brown v. Royal Insurance Co* (1859) 120 ER 1131, Lord Campbell CJ made an observation which would tend to support the implicit assumption upon which Advocate Geall’s argument is predicated: “*The case stands as if the policy had been simply to reinstate the premises in case of fire; because, where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do*”. However, the specific point was not at issue in that case, and we heard no argument on it. In the circumstances, we do not consider that it would be fair to proceed on that assumption without the issue having been explicitly addressed. If the reasonable time for completion of the works were in fact to run from a different starting point, we cannot, on the basis of the pleadings and the arguments before us, conclude that the obligation founded upon has prescribed, albeit that the quantum of the loss might be less than that claimed. We accordingly cannot safely conclude, at this stage, that this element of the claim has, in its entirety, prescribed.

(iii) The claim to loss of rent under para. 1 of the Additional Insurance

97. Under para. 1 of the Additional Insurance, NFU Mutual undertook an obligation (up to a contractual limit of 25% of the sum insured) to pay for loss of rent or ground rent, and the reasonable costs of similar accommodation if Mr Leopard could not live in the Property because of damage insured under the Buildings cover. The provision states: “*We will pay these costs until your home is fit to live in*”.
98. Advocate Barnes argued that NFU Mutual’s obligations under the Policy were continuing obligations. He referred us to para. 31-035 of *Chitty on Contracts*, which explains that in the case of a continuing breach of duty, such as of a covenant to keep in repair, the claimant will succeed in respect of so much of the continuing breach as occurred within the relevant time bar period, and, indeed, that if the breach consists in a failure to act, it may be held to continue *die in diem* until the obligation is performed. In inviting us to reject that argument, Advocate Geall referred us to *Griffiths v. Liberty Syndicate* 4472 [2020] EWHC 948 (TCC), *Equitas Ltd v. Walsham Brothers & Co Ltd* [2013] EWHC 3264 (Comm), *Euro Pools Plc (in administration) v. Royal and Sun Alliance Insurance Plc* [2018] EWHC 46 (Comm), *MacGillivray on Insurance Law*, paras. 21-055 and 21-079, and *Colinvaux’s Law of Insurance*, para. 10-076.
99. These arguments were presented principally in relation to the Buildings Cover. We will explain below why we agree with Advocate Geall that the obligation to pay the costs of repair under the Buildings Cover is not a continuing obligation. However, para. 1 of the Additional Insurance, upon which Mr Leopard also relies, clearly does impose a continuing obligation. If the Property is rendered uninhabitable by damage covered by the Buildings Cover, that provision requires the insurer to meet time-related costs and/or losses arising over a tract of time and to do so until the Property again becomes inhabitable.

100. On the basis of Mr Leopard's pleadings, a claim under para. 1 of the Additional Insurance first became available to him in 2009. However, on his pleadings, the Property remained uninhabitable after 19 July 2014. Subject to the contractual limit on a claim under para. 1 to 25% of the sum insured, a claim under para. 1 continued to be available to Mr Leopard for the period when the Property remained uninhabitable after 19 July 2014.
101. The parties did not, in their submissions, address this head of claim separately from their arguments on the principal Buildings Cover. We have accordingly heard no argument on how para. 1 of the Additional Insurance falls to be applied in these circumstances. Nor have we heard argument as to how the contractual cap on the amount payable under para. 1 would fall to be applied. It may be that, once the accumulated claim under para. 1 reaches 25% of the sum insured, the claim under para. 1 crystallises, so that, if that date occurred before 20 July 2014, the claim under para. 1 has prescribed. But there may be other possible analyses and it would not be appropriate for us to go further at this stage. It suffices, in the context of addressing an *exception de fonds*, that we cannot determine at this stage whether this claim has or has not prescribed.

(iv) Conclusions

102. We accordingly allow the appeal, albeit on grounds which were not addressed before the Royal Court. The case will require to return to the Court of Alderney. We make the following observations.
- (i) The case advanced before us by Advocate Barnes depends critically on whether or not, as a matter of fact, NFU Mutual opted to repair the Property rather than to pay the costs of repair. The analysis at paras. 92 to 101 above depends on a finding that NFU Mutual did indeed opt to repair the Property.
  - (ii) If NFU Mutual did, indeed, opt to repair the Property:
    - (a) Mr Leopard's claim for damages depends critically on a determination as to the reasonable time to complete the works of repair. There is a legal question, which we have identified at paras. 94 to 96 above, as to the correct starting point for assessing the reasonable time. If the correct starting point is the date when the claim was made in 2009, then it may be, standing the terms of the Fulford report, that Mr Leopard's claim for damages has, indeed, prescribed.
    - (b) Whether Mr Leopard has any unprescribed claim for loss of rent under para. 1 of the Additional Insurance may depend on how the financial limit on the amount payable under that paragraph falls to be applied. We refer to the discussion at paras. 99 to 101 above.
103. Whilst it will be for the Court of Alderney to decide how to proceed, it may well be that it would facilitate expeditious resolution of these issues if Mr Leopard were required to plead his case more fully, in particular so as to be explicit as to the basis of the averment that NFU Mutual opted to repair the Property, and as to what his case is as regards the reasonable time to complete the works of repair, and as regards the way in which he alleges that para. 1 of the Additional Insurance should apply to his loss of rent claim. The Court of Alderney could then consider whether it would be appropriate for the legal issues which we have identified and/or the question of whether NFU Mutual did indeed opt to repair the Property to be addressed as further preliminary issues.

**The alternative case: if NFU Mutual did not opt to repair**

Introduction

104. As we have observed above, although Advocate Barnes advanced the case on the footing that NFU Mutual had exercised the option to repair, we also heard detailed submissions as to what the position would be if NFU Mutual were required to fulfil its obligation of indemnity by paying the cost of repair. We accept that this alternative case would, within the terms of the Cause, be open to Mr Leopard. As we have observed, that alternative case would rest on the following obligations:
- (i) the contractual obligation under the Buildings Cover to indemnify by paying the cost of repairing the Property;
  - (ii) the contractual obligation to pay loss of rent under para. 1 of the Additional Insurance; and
  - (iii) an alleged obligation to pay damages for loss allegedly sustained by reason of breach of the pleaded implied term.
105. As regards the second of these claims – the claim under para. 1 of the Additional Insurance – the analysis which we have set out at paras. 97 to 101 above would apply equally to this alternative scenario. We require to address, separately: (i) Mr Leopard’s contractual claim under the Buildings Cover for payment of the costs of repair; and (ii) Mr Leopard’s claim for damages for an alleged breach of the pleaded implied term.

(i) The contractual claim under the Buildings Cover for payment of the costs of repair

106. In terms of the Buildings Cover, “*Buildings are insured against damage by*” specified insured perils. This language implies the grant of an indemnity. For reasons we explain below, we interpret the indemnity, in the context of this Policy, as a contractual undertaking to make good loss sustained by Mr Leopard as a result of damage to the Property by any of the specified perils. The Policy proceeds on the basis that as soon as damage has been caused to the Property by an insured peril, Mr Leopard may make a claim for indemnity.
107. In the absence of contractual provisions suspending the enforceability of the obligation to indemnify, we interpret this language to reflect a common contractual intention that NFU Mutual’s obligation to indemnify Mr Leopard accrues as soon as damage has been caused to the Property by an insured peril. The provisions of the Policy which set out the alternative mechanisms for satisfying NFU Mutual’s obligation to indemnify would not, in the absence of any other provisions, postpone the accrual of that obligation. Indeed, those alternative mechanisms presuppose, in the absence of language or provisions suspending the accrual of the obligation to indemnify, that the right to claim on the indemnity (and therefore the obligation to indemnify) has already arisen.
108. This interpretation of the Policy is supported by two decisions to which Advocate Geall referred us: *Scott Lithgow v. Secretary of State* 1989 SC (HL) 9; and *Callaghan, supra*.
109. *Scott Lithgow* concerned a contract between the parties for the construction of two submarines. In 1974 cables supplied by subcontractors, part already installed, were found to be defective, and had to be replaced. Scott Lithgow received a sum by way of damages from the subcontractors but claimed that this was less than the total loss which had been sustained by them through having to replace the cables. In 1977, Scott Lithgow submitted a priced claim for the balance to the Secretary of State.

110. In 1981 Scott Lithgow raised proceedings against the Secretary of State, relying on a contractual indemnity against loss, damage and liability. Clause 15(5) of the contract provided that *“In the event of incident [sic] whereby loss, damage or liability may result in a claim under the indemnity [SL] should report the circumstances ... to the principal naval overseer immediately and in the interests of prompt settlement should submit their priced claim as soon as possible thereafter”*. The Secretary of State argued that the claim had prescribed under section 6 of the Prescription and Limitation (Scotland) Act 1973, which provided that any obligation arising from, or by reason of any breach of, a contract or promise prescribed if the obligation had subsisted for a continuous period of five years.
111. It was, accordingly, critical to identify the date upon which the Secretary of State’s obligation to indemnify Scott Lithgow under that clause became enforceable. The Secretary of State contended that this was on the occurrence of the casualty, *i.e.* when the cables were found to be defective in 1974, and that the obligation had accordingly prescribed. Scott Lithgow argued that the submission of a priced claim was a condition precedent to enforceability of the indemnity and that, since this had been submitted in 1977, the obligation had not prescribed.
112. In his speech, Lord Keith of Kinkel (with whom Lord Brandon of Oakbrook, Lord Templeman, Lord Oliver of Aylmerton and Lord Goff of Chieveley agreed) observed, in passing, that Scots law *“has not adopted the English view that the right of action in the event of non-payment under a policy of insurance is one for unliquidated damages. Scott Lithgow’s right of action is here a contractual one, not one in reparation”*. He held that clause 15(5) did not set out conditions precedent to a valid claim, and continued: *“If that is so, it is incapable of indicating the punctum temporis at which the claim, and the corresponding obligation to indemnify, come into existence. Prima facie, the claim and the obligation arise when the casualty occurs. I am unable to find in cl. 15(5) any expression or implication of a contrary intention.”* He concluded: *“the Secretary of State’s obligation to indemnify arose at the time when the cables were found to be defective, so that it has now been extinguished by prescription.”*
113. *Callaghan* concerned a property insurance claim for fire damage. The policy provided that *“if ... the Property ... be destroyed or damaged by ... FIRE ... the insurers will pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at their option reinstate or replace such property or any part thereof”*. Sir Peter Webster’s judgment contains a helpful analysis of the provisions of a policy which are similar to those in the present case.

*“Expressions such as “to insure against” or to “save harmless from” loss may be capable of misleading. It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position. ... the quantification of the plaintiff’s claim is not a pre-requisite to a cause of action. Thus there is a primary liability, that is to say to indemnify, and a secondary liability, that is to say to put the insured into his pre-loss position, either by paying him a specific amount or it may be in some other manner. The fact that the insurer has an option as to the way in which he will put the insured into his pre-loss position does not mean that he is not liable to indemnify him, in one way or another, immediately the loss occurs.”*

114. As regards the specific provisions setting out the alternative mechanisms for indemnifying the insured, Sir Peter stated: *“I cannot conclude that these words have the effect of postponing the insurer’s primary liability; they merely indicate the alternative ways in which that liability may*

*be satisfied*". The same may be said of the provisions of the Policy in the present case which set out the different ways in which a claim may be settled.

115. We should comment at this stage on three matters.

*(a) Was the obligation one to reimburse costs of repair incurred?*

116. Although there are averments to the effect that NFU Mutual caused delay by not approving work for payment, Advocate Barnes did not advance any argument that the requirement to pay "*the cost of repairing or replacing*" the Property should be construed as an obligation to reimburse costs actually incurred, so as to be enforceable only if and when repair work took place. In our view, he was correct not to make such an argument. Unless a policy of property insurance stipulates otherwise, the insured is not obliged to use the insurance proceeds to repair or reinstate the insured subjects. As we read the relevant provisions of the Policy, NFU Mutual was obliged to make good its obligation of indemnity by paying a sum quantified by reference to the cost of repair (subject to the various explanations, adjustments and limits set out in the Policy). This obligation was not, on the terms of this Policy, suspended unless and until the repair work was actually undertaken.

117. As a matter of principle, the cost of repair could, with appropriate technical or expert input, be identified before the repair work had taken place. Indeed, the Policy provides that if the Property is not repaired, the "cost of repair" is one of the alternative measures of the sum to be paid. To read the provision as a conditional one would beg too many questions: would the whole amount be due once repair work started? or was no payment due until the repair work had concluded? or did the obligation accrue as and when particular items of work were started or completed? This lack of clarity supports the interpretation that this is simply a mechanism for making good the obligation of indemnity, and does not suspend that obligation's accrual.

*(b) Was the obligation to pay the cost of repairs an obligation to pay the cost of repairs within a reasonable time?*

118. Advocate Barnes argued that NFU Mutual's obligation under the Policy to pay the cost of repairs was an obligation to pay "within a reasonable time". He relied on a "general principle of contract law" to the effect that, in the absence of any provision as regards time for performance, contractual obligations fall to be performed within a reasonable time. Advocate Geall relied on *Callaghan supra*, for the proposition that the obligation to indemnify accrues immediately when loss is suffered as a result of an insured peril.

119. In various contractual contexts, if no time is specified for performance of an obligation, the law will imply that the obligation must be fulfilled within a reasonable time. There are two reasons why this doctrine is not applicable to the obligation of indemnity contained in the Buildings Cover of the Policy. First, as we have explained, the provision requiring NFU Mutual to settle a claim by paying the cost of repair is simply one of the mechanisms by which the (pre-existing) obligation to indemnify may be fulfilled and does not postpone or delay its accrual for the purposes of prescription. Advocate Barnes' submission was predicated on a separation between the obligation to indemnify and the mechanism of indemnification by payment which would not, on our interpretation of the terms of the Policy, be sound. Secondly, if a contractual obligation requires to be fulfilled within a reasonable time it usually follows that the obligation is not legally enforceable until the expiry of that reasonable time. That would not, in our view, be consistent with the terms of the Policy which presuppose that the insured is entitled to claim under the Buildings Cover as soon as the Property has been damaged by an insured peril.

*(c) Was the obligation a continuing obligation?*

120. Nor do we consider that the obligation to pay the cost of repair in fulfilment of the obligation of indemnity was a continuing obligation in the sense which we discussed at paragraph 98 above. As we have explained, NFU Mutual's obligation of indemnity accrued and became enforceable at a single point in time – ie when the Property was damaged by an insured peril. Of course, once exigible, NFU Mutual's obligation of indemnity remained enforceable unless and until it was extinguished, whether by being fulfilled, or by the operation of prescription, or otherwise. However, the same is true of any enforceable obligation, but that does not mean that it is a “continuing obligation” which becomes exigible of new every day.
121. There are two possible qualifications to our conclusion that Mr Leopard's cause of action accrued when the Property was damaged by an insured peril. They may not make any difference in the present case, but we mention them for completeness.
- (i) One practical consequence of our interpretation of the Policy is that NFU Mutual's obligation to indemnify Mr Leopard by paying the cost of repair could accrue before a claim had been made and before the cost of repair had been, or could have been, quantified (and, indeed, would be subject to defeasance if NFU Mutual opted to repair the Property, or if Mr Leopard decided not to repair it and the proper measure of his claim was the diminution in value). This invites a question as to whether there are any provisions which suspend the accrual of the cause of action under the Policy. The Policy states that if anything happens which might result in a claim, Mr Leopard “*must*” inter alia tell NFU Mutual as soon as possible and “*provide all the written details and documents that*” NFU Mutual ask for. By contrast with the provision at issue in *Scott Lithgow*, these provisions are framed in peremptory language. It may be that they could be regarded as conditions precedent which would suspend the enforceability of NFU Mutual's obligation of indemnity. However, Mr Leopard has not relied on these provisions in the Cause, nor did Advocate Barnes advance any argument to the effect that these provisions suspended the accrual of the obligation of indemnity, and we accordingly proceed on the basis that, even if these provisions were conditions precedent, this would make no difference on the facts of this case.
  - (ii) Pothier, in his *Traité du Contrat d'Assurance* (para. 119), states that an action on the insured's indemnity under a contract of marine insurance (the type of insurance with which the *Traité* principally deals) opens not when the vessel is lost but when news of the loss is received. Neither party drew our attention to this passage, but it might support an argument that, in the case of latent damage, the relevant date for prescription purposes is not when the property is damaged, but when the damage becomes apparent. We need not consider that question further in the present case, since Mr Leopard claimed on the Policy in 2009.
122. Subject to these possible qualifications, it follows from our analysis of the Policy that, if NFU Mutual's obligation to indemnify Mr Leopard by paying the costs of repair (if it did not opt to repair the Property) accrued, on his pleadings, by 2009, when damage to the Property was identified and he made a claim on the Policy. It had accordingly prescribed before these proceedings were raised.
123. In reaching our conclusion on this aspect of the case, we have not required to rely on the “hold harmless principle”, as it was formulated by the Law Commissions in the passage which we have quoted at para. 65 above – although, as it happens, our conclusion as regards the accrual of the obligation to indemnify under the Buildings Cover of this Policy is the same as would pertain on an application of the “hold harmless principle”. We do not need to consider whether the Law Commissions' formulation of that principle correctly reflects English law. In our view, the right starting point in Guernsey law, when considering an obligation to indemnify (whether contained in an insurance policy or in any other contract), is to analyse the terms of the contract in question.

124. Depending on its terms, an obligation to indemnify against loss may be construed either as an obligation to prevent the loss from arising (*i.e.* the “hold harmless principle” as it was explained by the Law Commissions) or, alternatively, as an obligation to make good a loss caused by the casualty to which the indemnity applies should such a loss arise. If the obligation is of the former character, the indemnitee’s claim, should the loss occur, will be a claim for damages for breach of contract by reason of the indemnitor’s failure to prevent the loss from arising. If the obligation is of the latter character, the indemnitee’s claim will be brought under the contract, and will be of the nature of a claim for payment under the contract. That would be the juristic basis of the claim whether the quantum of the payment under the contract is a determinate sum (as in the case of a valued policy) or an unliquidated amount quantified by reference to the indemnitee’s loss or to some contractually stipulated criterion.
125. We do not consider that it is necessary, or indeed helpful, as a matter of Guernsey law, to start with an assumption that all indemnity insurance contracts are of the former character – *i.e.* that the “hold harmless principle”, as it was characterised by the Law Commissions, applies to all contracts of indemnity insurance. Such an analysis may be apt in certain cases, for example, in the case of liability insurance or, as was the position historically, if a fire insurer provides fire protection services to its customers. However, in the case of a contemporary property insurance, such as the Policy, it is *prima facie* unlikely that the true interpretation of the contract is that the insurer undertook to prevent the property from being damaged by an insured peril. The more natural reading is likely to be, subject always of course to the terms of the policy itself, that the insurer simply undertook to make good loss sustained by the insured if the property is damaged by an insured peril.
126. In the event that the obligation to indemnify is of this character, there will be further, consequential, questions: (i) as to the way in which the loss is to be made good (for example, by payment of money or reinstatement); (ii) as to the basis of quantification if the loss is to be made good by payment of money; and (iii) as to when the cause of action against the insurer accrues. All of these issues are readily capable of being addressed as questions of interpretation, without reference to the “hold harmless principle”. On the other hand, the terms of particular contracts – for example, contracts specifying the amount due (as in a valued policy), or contractual provisions suspending the enforceability of the obligation – may sit less easily with an analysis which characterises the claim as one for unliquidated damages for breach of contract on the “hold harmless principle”.
127. We recognise that identifying the date when the obligation becomes enforceable will have consequences not only as regards the running of prescription, but also as regards the court’s power to award interest under the Judgments (Interest) (Bailiwick of Guernsey) Law 1985. We note that whilst an early date for accrual of the cause of action may favour the insurer in the context of a time bar argument, it may favour the insured so far as the potential to receive an award of interest is concerned and as regards the possibility, if the law allows such a claim, of claiming damages for breach of contract (subject to mitigation and remoteness of damages) by reason of failure to pay the relevant amount on the date when it became due.
128. We also recognise that one consequence of the conclusions which we have reached about the law is that, if NFU Mutual did not in fact exercise the option to repair, its obligation of indemnity apparently prescribed while the repair works were ongoing. That might seem a hard result from Mr Leopard’s perspective, particularly if a significant part of the delay was (as Mr Leopard alleges) attributable to the insurer’s initial repudiation of the claim. However, at the level of principle, there is no reason why Mr Leopard could not have formulated a claim by reference to the cost of repair before any repairs had, in fact, been carried out, or whilst they were ongoing, albeit that he would no doubt have required technical or expert input to identify the reasonable costs of repair. In *Scott Lithgow*, Lord Keith observed (at page 22):

*“I do not consider that there is force in the consideration that if the obligation to indemnify were to arise on the occurrence of the casualty, payment might have to be made or accepted on the basis of a rough or inadequate estimate of the loss. Quite apart from the fact that many claims of various kinds are assessed on the basis of estimates, there is no good reason why resort to arbitration [or, we might add, court proceedings] should not be made within five years after the casualty [being the prescriptive period applicable in that case], even if when that is done the amount of the claim cannot yet be precisely quantified. In the event that exceptional difficulty were to be encountered in such quantification the arbiter [or judge] might reasonably be expected to allow time for it to be completed.”*

129. In other jurisdictions, the potential for prescription to extinguish an insurer’s obligation of indemnity before repair works had been completed may be mitigated by a rule that the running of time, for the purposes of prescription or limitation, is interrupted by part performance or acknowledgment of the obligation: see, for example, section 29 of the Limitation Act 1980 (England & Wales) and sections 6, 7 and 10 of the Prescription and Limitation (Scotland) Act 1973 (Scotland). It has not been suggested that the Guernsey law of prescription contains any similar rule.

*(ii) The pleaded implied term*

130. We turn now to the question of whether or not the pleaded implied term applied if NFU Mutual did not exercise its option to repair the Property.
131. Advocate Barnes argued that the English common law position excluding such an implied term, was unfair. He suggested that it was “*hardly likely that either party would contend that the insurer would not agree to pay a legitimate claim within a reasonable time*”. In written submissions, he noted that in other jurisdictions (Scotland, Canada and New Zealand) an obligation to settle insurance claims within a reasonable time had been derived from the insurer’s obligation of good faith, and that Pothier, in his *Traité du Contrat d’Assurance*, although not dealing with late payment, stated that a duty to act in good faith is owed by both parties to an insurance contract. However, during the oral hearing he eschewed reliance on an obligation of good faith as the basis for the pleaded implied term and founded on the general law on the implication of terms.
132. Advocate Geall referred us to *Newmarket Holdings (Guernsey) Ltd v. Musa Holdings Ltd*, GCA Judgment 14/2014, for the law on the implication of terms. He argued, under reference to *Insurance Corporation of the Channel Islands Ltd v. McHugh* [1997] IRLR 94 and *Tonkin v. UK Insurance* [2007] LRIR 283, that an insurer has no implied obligations as regards the handling of a claim. An insurer who advances a spurious defence, puts the insured to proof of facts the insurer knows to be true, or deliberately delays settlement, would, he argued, not be in breach of contract in the absence of express provisions. The insured would, in such a case, have a remedy by way of complaint to the Ombudsman. He submitted that reform in this area of the law should be left to the legislature.
133. Advocate Geall further submitted that there was no legislative basis for importing a duty of good faith into Alderney insurance contracts. The judgments in the *The Star Sea* (reported as *Manifest Shipping Co v. Uni-Polaris Insurance Co* [2003] 1 AC 469) concerned the express provision of the Marine Insurance Act 1906, which does not apply to Alderney. In any event, *The Star Sea* shows that even if the insurer has an obligation of good faith, that does not have the status of an implied term of the contract, nor does it provide a basis for implying terms imposing obligations on the insurer as regards claims handling.

134. Advocate Geall recognised that in *Haden-Taylor v. Canopus Underwriting Ltd* [2014] JRC 221, MJ Thompson, Master of the Royal Court of Jersey, had concluded, under reference to *Sutton v. Insurance Corporation of the Channel Islands Ltd* [2011] JLR 80 and Pothier, that it was arguable, in Jersey law, that an implied term of good faith exists in relation to the performance of the obligations under a contract of insurance. He pointed out that *Haden-Taylor* was an interlocutory decision and that the observations of the Deputy Bailiff in *Sutton*, on which the Master of the Royal Court had relied, were based on texts such as Domat and Le Gros, which Advocate Geall submitted were not directly relevant to the law of Guernsey.
135. In any event, he argued that even if the contract contained an implied obligation of good faith, this did not provide a basis for the pleaded implied term obliging the insurer to settle claims within a reasonable time. Such an implied term had consistently been rejected in English law. Scots law proceeds on a different conceptual foundation, since the insurer's obligation is not analysed as an obligation to hold the insured harmless: *Strachan v. Scottish Boatowners' Mutual Insurance Association* 2010 SC 367; *Scott Lithgow Ltd v. Secretary of State for Defence, supra*. In New Zealand law, it was questionable whether Gendall J's analysis in *Young v. Tower Insurance* [2018] NZLR 291, deriving an obligation to settle claims within a reasonable time from the insurer's obligation of good faith, had survived *Taylor v. Asteron Life Ltd* [2020] NZCA 354 and *Southern Response Earthquake Services Ltd v. Dodds* [2020] NZCA 395. Reference was made to *MacGillivray on Insurance Law*, 15<sup>th</sup> edn (2022), paras. 19-083 and 16-172, fn 515.
136. The parties proceeded, in argument before us, on the footing that relevant guidance on the implication of terms in Guernsey law was to be found in *Newmarket Holdings (Guernsey) Ltd v. Musa Holdings*. In that case, Beloff JA referred to the exposition of principle by Lord Hoffmann in *Attorney General of Belize v. Belize Telecom* [2009] UKPC 10, at paras. 16 to 27, and quoted from *Woodbourne Trustees Ltd v. Generali Worldwide Insurance Company Ltd* 2011-12 GLR, Note 5, for the following observations:
- “(c) *the issue as to whether any further term were to be implied could arise only if there were something missing or not dealt with in express terms ... or if the express terms required an implied term to make sense ... ;*
  - (d) *the necessity for implying a term had to arise from the construction of the express terms; it was not to be considered in isolation from or in contradiction of, the express terms, and it had to be required in order to make real sense (commercially or otherwise) of the express terms – not merely to add what the parties might reasonably have added if they had so decided ...; and*
  - (e) *a term was only to be implied if it would be necessary to give business efficacy to the contract; it had to be so obvious that it went without saying; it had to be capable of clear expression, and it was not to contradict any express term of the contract”*
137. Since *Newmarket Holdings (Guernsey) Ltd v. Musa Holdings* was decided, the UK Supreme Court, in *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, has revisited Lord Hoffmann's remarks in *Attorney General of Belize* and reinforced the application of the business necessity test in cases to which that test properly applies.
138. We agree with Advocate Geall that the implication into the Policy of the pleaded implied term would not be justified by reference to the business necessity test. We have already held that the obligation to indemnify under the Buildings Cover accrued (subject to the two possible qualifications which we have mentioned) when the Property was damaged by an insured peril. The settlement of the claim accordingly took place in a context where, if the insurer was dilatory in its approach to settling it, the insured could, in principle, bring proceedings at any time to enforce the insurer's obligation to indemnify. The Judgments (Interest) (Bailiwick of Guernsey)

Law 1985 would allow the Court to award interest from the date when the obligation first accrued – under this Policy, from the date when the Property was damaged by an insured peril – or such other date as the Court might consider appropriate. Against that background, we could not hold that business necessity would require the implication of a separate obligation into this contract to pay the claim within a reasonable time.

139. This does not mean that an insurer has no obligations as regards claims handling. *Newmarket Holdings (Guernsey) Ltd v. Musa Holdings* and *Marks and Spencer plc* discuss the test for the implication of an implied term to supplement the express terms of a particular contract. Different questions arise when the Court is considering whether a particular term falls to be implied, as a matter of law, into all contracts of a particular juristic type or governing a particular relationship. Such terms may be implied into particular classes of contract either as a matter of customary or common law (as, for example, the obligation implied into contracts for the repair of property that the work must be completed within a reasonable time) or by statute (as, for example, the term implied into insurance contracts governed by one of the laws of the United Kingdom by section 13A of the Insurance Act 2015).
140. It is clear that the parties to an insurance contract governed by Guernsey law owe mutual obligations of good faith. Pothier, *Traité du Contrat d'Assurance*, paras. 113, 191-6, states as much, and it is a well-established doctrine of English law that insurance contracts are contracts of utmost good faith. As Pothier explained (*Traité du Contrat d'Assurance*, para. 191) the mutual obligations of good faith which lie on the insured and the insurer are the basis for the obligations which lie on each party of proactive disclosure of information relevant to assessment of the risk and the premium. Those specific obligations of disclosure arise because, on these essentials of the contract, both parties are vulnerable to informational asymmetry.
141. Although not discussed by Pothier in this context, we consider that the implied obligation of good faith can also have a role in the settlement of claims. Under an insurance contract the insurer accepts the risk of the insured peril and undertakes to indemnify the insured against loss which such a peril may cause. As Mance J pointed out in *McHugh*, once an insured peril has occurred there “*is an objective end (the ascertainment of the appropriate measure and quantum of indemnity) towards which it can be said that both parties ... are or should be working*”. And as the facts of *Sprung* illustrate, in the wake of an insured peril, an insured is liable to be in a financially vulnerable position. These considerations, taken together, provide a principled basis upon which specific content can be given to the requirements of good faith in the context of claims handling.
142. It would not be consistent with the insurer’s general obligation of good faith, in the context of the “objective end” to which Mance J referred, for an insurer to seek to take unfair advantage of the insured’s economic vulnerability, for example by advancing a defence which it knew to be spurious or deliberately delaying a payment which the insurer knew to be due, with a view to securing a settlement at less than the proper value of the indemnity. Such conduct would be directly contrary to the purpose of the contract.
143. *The Star Sea* confirms that, as a matter of English law, the duty of utmost good faith applies not only in the making of the contract but also in the course of its performance. Whether the content of that post-contract duty and the consequences of its breach are, in English law, to be accommodated within the general principles of contract law, or fall to be regarded as an independent rule of law, are questions which have been debated at the highest level: see *The Star Sea*, *supra*, and *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45, discussed in *Taylor v. Asteron Life Ltd* [2020] NZCA 354. In Guernsey law, we see no reason not to regard obligations derived from the requirement of good faith as implied obligations of the insurance contract.

144. These cases specifically concerned the fraudulent claims rules, and have emphasised that the standard required of an insured under that rule is one of honesty and not a broader standard of good faith. That rule has been justified “*by pointing to the asymmetrical positions of the parties to an insurance contract, the insurer being vulnerable on account of the dependence on the insured for information both at the formation of the contract and in the processing of claims*”: *Versloot Dredging BV*, supra, para. 9, per Lord Sumption. It seems to us that, in the context of a contract characterised by good faith, similar reasoning justifies holding that an insurer is subject to an implied obligation not to take unfair advantage of the insured’s vulnerability in the settlement of claims. After all, the very purpose of the contract is protection of the insured against an insured peril, and once such a peril has occurred, the insured is likely to be economically vulnerable for the reasons identified by Lord Mance identified in the comment quoted from the Law Commissions’ Report at para. 67(iv) above. We do not consider that recognising such an implied obligation would be alien to the law of Guernsey.
145. Mere denial of a claim which ultimately proves to be well-founded, would not, of itself, necessarily be indicative of a breach of the insurer’s obligation of good faith. An insurer is entitled to investigate a claim, and to dispute its liability on properly arguable grounds, provided that in doing so it is acting with a view to ascertaining whether or not it is obliged to indemnify the insurer and to determining the proper value of the indemnity. However, once the insurer has concluded that the claim is well-founded, it would hardly be consistent with good faith for it to continue to withhold payment.
146. Nor does the passage of time – even considerable time – necessarily imply a want of good faith on the part of the insurer. There may be many reasons for apparent delay, which would be compatible with good faith on the part of the insurer. If not every delay implies a want of good faith, the pleaded implied term could be consistent with the obligation of good faith only if the phrase “reasonable time” in the pleaded implied term were regarded as meaning “time consistent with fulfilling the obligation of good faith”. Understood in that way, the pleaded implied term would add nothing to the underlying obligation of good faith. On the other hand, if the pleaded implied term were to be understood to impose a more onerous obligation on the insurer, it would go beyond what, in our view, good faith requires.
147. We accordingly take the view that Advocate Barnes was correct not to seek to justify the pleaded implied term by reference to the obligation of good faith, and that the standard which the law implies, as a matter of good faith, into the contract in relation to claims handling is reflected in the specific obligation which we have identified above not to take unfair advantage of the insured’s vulnerable position following the occurrence of an insured loss. Mr Leopard advances no case on that footing.

## **Conclusions**

148. As we have explained above, we are allowing the appeal on the basis of the case advanced that NFU Mutual opted to repair the Property. If it is determined in due course by the Alderney Court that NFU Mutual did not opt to repair the Property, Mr Leopard’s claim for loss of rent under para. 1 of the Additional Insurance would require to be addressed in the way we have explained at paras. 97 to 103 above. But: (i) Mr Leopard’s claim for payment of the costs of repair (so far as not already met) under the Buildings Cover has prescribed; and (ii) the claim for damages which Mr Leopard advances on the basis of an alleged breach of the pleaded implied term fails because that term does not apply to a claim under the indemnity where NFU Mutual has not opted to repair the Property.

## **DISPOSAL OF THE APPEAL**

149. For the reasons given in this judgment and in the judgment of Crow JA, the appeal has been partially successful. We direct the parties to seek agreement as to any consequential orders and, failing such agreement within 14 days of this judgment, we direct the parties to provide written submissions on any consequential issues that remain in dispute within 14 days thereafter, and responsive written submissions, if any, within 7 days after that. The court will determine any such disputed consequential issues on the papers.

**Le Cocq JA:**

150. I have had the advantage of reading in draft the judgments of Crow and Wolffe JJA and I agree with them, for the reasons set out therein.