All England Commercial Cases/2002/Volume 1/Jan de Nul (UK) Ltd v AXA Royale Belge SA (formerly NV Royale Belge) - [2002] 1 All ER (Comm) 767

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Jan de Nul (UK) Ltd v AXA Royale Belge SA (formerly NV Royale Belge)

[2002] EWCA Civ 209

COURT OF APPEAL, CIVIL DIVISION

SCHIEMANN, HALE AND RIX LJJ

14–16, 19 NOVEMBER 2001, 20 FEBRUARY 2002

Insurance – Liability insurance – Third party's rights against insurers – Negligent performance of dredging contract with port authority – Whether policy covering failure to fulfill contractual obligations – Whether cost of removing silt deposited in public waterway constituting financial loss resulting from property damage.

Water and watercourses – Navigation – Public right of navigation – Public nuisance – Port authority responsible for maintenance of public right of navigation – Interference with public right of navigation by silt negligently deposited by claimant on land not owned by port authority – Port authority removing silt – Whether port authority suffering special damage so as to be entitled to sue in public nuisance.

The claimant insured contracted with a port operator to carry out certain dredging operations in the port's estuary, the whole of which was subject to a public right of navigation. The port operator had a statutory duty under ss 9 and 14 of the Transport Act 1981 to maintain the harbour, including areas which it did not own. The claimant had a third party liability policy with the defendant insurers, under which the port operator was a co-insured. The policy covered civil extra-contractual liability under the policy for property damage and immaterial damage, defined as financial damage consequent upon such property damage. In the event, the claimant failed to take reasonable care to ensure that its operations did not result in the deposit of excessive amounts of silt in areas outside the dredged channel, where it would interfere with adjacent land and with the activities of other users of the waterway, and failed to carry out investigations which would have caused it to appreciate that that its proposed method of working would create a significant risk of widespread siltation. The claimant admitted that it had acted negligently in allowing the excess silt to be deposited. The siltation gave rise to complaints from third parties who asserted that navigation was interfered with, and various third parties suffered substantial injury above that suffered by the public at large. One such third party was the port operator itself, which claimed as owner of some of the river bed and as occupiers and conservators of the port. The remaining third party complaints were initially directed to the port operator, which reasonably took measures to remove some of the silt. The costs of those measures were withheld from the claimant by the port operator under the dredging contract. The port operator also called upon the claimant to remove silt from the areas outside the dredged channel by way of remedial works, which it insisted the claimant was obliged to do under the dredging contract. The claimant denied that it was liable to do this under the contract but reasonably did it. The claimant sought the costs incurred under the policy and the port operator assigned any claim it might have had under the policy to the claimant. The judge held that the claimant was entitled to recover those costs under the policy. The defendant insurers appealed, contending, inter alia: (i) that

the damage was the result of a failure by the claimant properly to fulfil its contractual obligations, and that the policy was not designed to respond to such failure; (ii) that the necessary legal relationship of the port operator with the property damaged had to be as owner or occupier, and accordingly that the port operator's relationship with land, such as the river bed, as conservators with statutory responsibilities for the estuary did not suffice; and (iii) that the port operator in its capacity as conservators of the estuary was not entitled to sue the claimant.

Held – (1) The clauses which the insurers relied upon as showing that the damage caused in the instant case was a result of a failure by the claimant properly to fulfil its contractual obligations, and therefore that the policy was not designed to respond to such failure, were not crystal-clear and would be construed against the insurers. Those clauses were designed to make it clear that cover did not extend to any liability which the claimant might incur to the port operator either through failure to carry out the contract works or a result of a failure to exercise due skill and care in providing professional services in connection with those works. The right approach was to ask whether, if there had been no contract, the port operator or any other third party could have recovered damages from the claimant for its tortious acts: since the answer to that question was in the affirmative, the policy was applicable. When the appropriate parts of the general conditions, the special conditions and the brokers' clauses were read together, it was only damages resulting from contractual liability to the port operator which were excluded. Liability in tort to third parties was not caught at all by the exclusion, and liability in tort to the port operator, as opposed to liability in contract to the port operator, was also not caught. What was excluded was damages which could only be recovered in contract (see [15]–[18], below).

(2) It was legitimate for the purposes of construing the policy to regard the waterway, comprising the river bed, the banks and the water, as being the property; to regard the deposit of quantities of silt which interfered with its previous use as a waterway as being damage to property; and to regard the cost of moving the silt from the adjacent areas as financial loss resulting from property damage covered under the policy and thus constituting consequential immaterial damage. Furthermore, on the assumption that the policy did not respond unless the insured was exposed to suit by a third party who had some legal relationship with that property, there was no reason to suppose that the framers of the policy had in mind any particular concept of ownership or possession. It followed that the relationship of conservators with the bed of the estuary and the water above it was a sufficient relationship (see [33], [34], below).

(3) The submission that there could be no liability in the claimant in tort to compensate the port operator for the cost of removing silt unless the port operator were under a duty to remove that silt, that it was under no such duty and that its only duty was to protect users of the waterway from danger, which could have been achieved by making it clear that some parts of the waterway were only navigable by craft of certain draft, would be rejected. It was clear that regardless of the port operator's attitude, the siltation would have been removed. The siltation constituted a public nuisance for which both the port operator and the claimant were liable. The port operator and the claimant had either to remove the silt or pay for the costs of that being done. There was no need to pray in aid a duty as conservator to ensure the siltation's removal. Once it was accepted

that the silt constituted an obstruction to navigation, and that it was reasonable to remove it, then it did not matter whether the port operator was under a statutory obligation to remove the silt at the time it did or whether it would have been entitled to let the silt remain for the moment and merely warn members of the navigating public that their rights had been obstructed. In principle a person was not entitled negligently to cause quantities of silt to be deposited in such a way as to interfere with the right of navigation and a tort would be committed if that was done. Whether entitled or under a duty to do so, the port operator had suf-

fered sufficient special damage so as to enable it to sue in public nuisance for the cost of doing so. Moreover, the loss suffered by the port operator was not relational economic loss: it was a loss reasonably incurred in the fulfillment of its statutory functions. It followed that, quite apart from the contract, the port operator was entitled to sue the claimant in both public nuisance and negligence and accordingly the appeal would be dismissed (see [56]–[60], [64], [65], [93], below); *The Ella* [1915] P 111 considered.

Notes

For liability insurance in general, see 25 *Halsbury's Laws* (4th edn reissue) paras 660–684, and for special damage by reason of an obstruction to the public right of navigation, see 34 *Halsbury's Laws* (4th edn reissue) para 728.

Cases referred to in judgment

Cattle v Stockton Waterworks Co (1875) LR 10 QB 453, [1874–80] All ER Rep 220, DC.

Dee Conservancy Board v McConnell [1928] 2 KB 159, [1928] All ER Rep 554, CA.

Ella, The [1915] P 111.

*Leigh & Sillivan **Ltd** v Aliakmon Shipping Co **Ltd**, The Aliakmon* [1986] 2 All ER 145, [1986] AC 785, [1986] 3 WLR 902, HL.

Louth DC v West (1896) 65 LJ QB 535, DC.

Putbus, The, Owners etc of the ship Zenatia v Owners of the ship Putbus [1969] 2 All ER 676, [1969] P 136, [1969] 2 WLR 2141, CA.

Appeal

Axa **Royale Belge** SA (formerly known as **NV Royale Belge**) (the insurers) appealed from the order of Moore-Bick J on 31 July 2000 ([2000] 2 Lloyd's Rep 700) whereby he held the insurers liable under a policy of third party liability insurance to the respondent, **Jan de Nul** (**UK**) **Ltd** (JDN), in respect of third party claims arising out of the respondent's dredging operations in Southampton Water. The facts are set out in the judgment of the court.

Nicholas Hamblen QC and *Michael Ashcroft* (instructed by *Clyde & Co*) for the insurers.

Alistair Schaff QC and *Simon Kerr* (instructed by *Davies Arnold Cooper*) for JDN.

Cur adv vult

20 February 2002. The following judgment of the court was delivered.

SCHIEMANN LJ.

OVERVIEW

[1] This is the judgment of the court.

[2] **Jan de Nul** (**UK**) **Ltd** (JDN), an English subsidiary of a Belgian company, contracted with Associated British Ports (ABP) to carry out certain dredging

operations in Southampton Water. They had a third party liability policy with AXA Royal **Belge** SA (Royal **Belge**). Before the court is an appeal by the insurers from a long and careful judgment of Moore-Bick J ([2000] 2 Lloyd's Rep 700) in which he held them liable under that policy. Two broad points fall for decision: (i) to what relevant claims (eligible claims) does the policy respond; and (ii) what third parties have eligible claims.

[3] The background to the matter is as follows.

[4] The port of Southampton lies on the confluence of the Rivers Test and Itchen, Southampton Water being the name given to that part of the estuary which extends from the lower tidal reaches of the Test and the Itchen to the Solent. Prior to October 1996 a navigation channel was maintained at an advertised depth of 10ÿ2m from the Solent to the container port which lies at the head of Southampton Water in the lower reaches of the Test. A similar, though slightly shallower, channel was maintained leading from the main channel to a number of commercial berths in the lower reaches of the Itchen as well as the Empress Dock. Just downstream of the container port there is a large area known as the Upper Swinging Ground which is maintained to the same depth as the channel to enable vessels using that part of the port to turn. The Middle and Lower Swinging Grounds provide similar facilities further down the channel. The whole of the north-eastern side of the estuary above the point where the Itchen enters Southampton Water is occupied by Southampton Docks, which lie directly on the main navigation channel. On the south-western side, however, the depth of water outside the main channel is very **limited** and this side of the estuary is mainly occupied by a variety of small commercial organisations and yacht clubs. The only exception of any significance is the Marchwood military port which lies opposite the lower end of the Western Docks. An advertised depth of 8m is maintained throughout about two-thirds of the area of the military port extending out to the main channel; in the remainder of the port an advertised depth of 4ÿ9m is maintained.

[5] The judge found that it was a well-recognised risk of any large-scale dredging operations that nearby areas in which the dredgers were not working would nevertheless become silted. He found (at 710 (para 24) in his judgment that—

> '**Jan de Nul** failed to take all reasonable care to ensure that its operations did not result in the deposit of excessive amounts of silt in areas outside the channel where it would interfere with adjacent land and with the activities of other users of the waterway. If **Jan de Nul** had carried out the investigations which in my view ought to have been undertaken … it would have appreciated that its proposed method of working created a significant risk of widespread siltation.'

[6] The result of the method of work adopted was that large amounts of material were put into suspension and were carried away by the action of the tide from the place where JDN were dredging to the adjacent areas in other parts of the estuary. We refer to such nearby areas where silt settled as the adjacent areas.

[7] The port of Southampton is operated by ABP, a statutory corporation regulated by the Transport Act 1981. By virtue of s 9 of that Act it is the corporation's duty to provide port facilities at its harbours to such extent as it may think expedient. Port facilities are defined by s 14 as meaning, amongst many other things, the improving and maintaining of a harbour. The judge referred to them as conservators.

[8] The siltation caused by JDN gave rise to justified complaints from operators of wharves, yacht clubs and others at the side of the estuary (collectively referred to hereafter as third parties) who asserted that navigation was interfered with, as was the use of slipways and moorings. The judge found (at 715 (para 44) and following) that various third parties had suffered substantial injury above that suffered by the public at large. One such third party was ABP, who had claims as owner of some of the river bed and as occupiers and conservators of the port. The remaining third party complaints were initially directed to ABP which reasonably took measures using their own dredgers to remove some of the silt. The taking of those measures cost ABP some £778,000, which it withheld from JDN under the dredging contract.

[9] ABP also called upon JDN to remove silt from the adjacent areas by way of remedial works which it insisted JDN was obliged to do under the dredging contract. JDN denied they were liable to do this under the contract but reasonably did it. The total cost incurred by ABP and JDN between them came to a little over £2·5m.

[10] The judge held that JDN were entitled to recover nearly all of the £2·5m under the policy. JDN and ABP were both covered under the policy and ABP assigned its claim to JDN. However, in the event nothing turns on this and this judgment is only concerned with JDN's liability to ABP and other third parties.

[11] Much of this case turns on the proper interpretation of the policy. The contract of insurance is contained in three documents—the general conditions, the brokers' clauses and the special conditions. This, while not unusual, always leads to difficulties in reconciliation. In the present case, added to those difficulties are difficulties attributable to the fact that in the originals the words are in French and Dutch and have clearly been used in the context of a Belgian legal background. The parties agreed that the judge (although he had before him some expert legal evidence as to foreign law) and we had no choice but to use the not wholly satisfactory English translations and apply them in the context of an English legal background.

[12] The general conditions are a standard form document. They form the basis of the contract in the sense that they contain the primary insuring clause, definitions, exclusions, and other fundamental terms of cover, but they also contain whole sections which have no application to the present contract. The brokers' clauses

appear to be a set of standard clauses devised by J Van Breda Co and approved by **Royale Belge** for use in policies effected through them. They state that they take precedence over the general conditions, except where those are more favourable to the insured. The brokers' clauses also provide that the special conditions shall take precedence over all others. The special conditions have clearly been drawn up to embody terms which relate to this specific contract. They include, for example, the identity of the insured, a description of the insured activities and the dates of cover, as well as clauses relating to the nature and extent of the cover provided.

[13] The clauses with which we are presently concerned are set out in an appendix to this judgment.

[14] The structure of the remainder of this judgment is as follows. (i) Paragraphs [15]–[36] indicate our conclusions as to what are eligible claims. (a) The insurers submit that the policy does not respond to any damage caused by the insured failing properly to carry out their obligations under the contract. Paragraphs [15]–[21] are concerned with this submission and we come to the conclusion that it does not avail the insurers. (b) The policy does not relevantly

respond unless damage has been caused to someone's property. Paragraphs [22]–[37] of this judgment are concerned with the effect of this limitation on any claim made by ABP as conservators of Southampton Water. (ii) Paragraphs [39]–[53] rehearse various findings of fact or of law which were made by the judge and which are no longer disputed. (iii) Paragraphs [54]–[65] indicate our conclusions as to whether ABP in their capacity as conservators were entitled to sue JDN and paragraphs [66]–[69] deal with a related procedural point. (iv) The judgment concludes with a variety of miscellaneous matters.

CONSTRUCTION OF THE POLICY: THE CONTRACT WORKS EXCLUSION: GROUND OF APPEAL 1

[15] The insurers submit that in substance what occurred was the result of a failure by JDN properly to fulfil their contractual obligations—in particular to dispose of the dredged material at the designated disposal sites—and that the policy was not designed to respond to such failure. They rely on cl 6.6 of the general conditions, cl 7 of the brokers' clauses and the italicised passage in the special conditions.

[16] The judge deals with this in his judgment (at 727–729 (paras 97–104)). He accepted that the meaning of the exclusion clause was not crystal-clear and held that he was entitled to construe it against the insurers. He regarded the clauses as being designed to make it clear that cover did not extend to any liability which JDN might incur to ABP either as a result of a failure to carry out in whole or in part the contract works or as a result of a failure to exercise due skill and care in providing professional services to JDN in connection with the works.

[17] We agree with the judge. The right approach is to ask whether, if there had been no contract, ABP or any other third party could have recovered the damages from JDN for JDN's tortious act; if the answer is in the affirmative, then the policy responds. The fact that JDN would never have been on site had it not been for the contract is nothing to the point, nor is it to the point that the tortious act might give rise to liability in contract.

[18] Reading the three documents together, it is only damages resulting from contractual liability to ABP which are excluded: if there is liability in tort to third parties that is not caught at all by the exclusion; if there is liability in tort, as opposed to liability in contract, to ABP that is also not caught, particularly if one bears in mind that ABP are expressly nominated as a third party in the special conditions. What are excluded are damages which could *only* be recovered in contract.

[19] This approach fits in easily with a reading of general conditions cll 1.1.1 and 6.6 and with a reading of brokers' conditions cll 7 and 10. The exclusion clause in the special conditions, while open to the construction for which the insurers contend, arguably also lends support to the approach outlined above: 'late execution of an order or a work, costs made for recommencing or correcting the work that was wrongly executed' are classic examples of claims which can only arise in contract.

[20] The contrary approach, which involves reading the words in the special conditions so as to exclude liability to third parties for acts which also happen to be breaches of contract, would, in the circumstances of this contract involving dredging operations, have the effect of excluding from cover most of what one would naturally think of as third party liability.

[21] By way of tailpiece we add that, although in para 3(c) of the grounds of appeal it was submitted that liability to ABP sounded only in contract and not in tort, this point was not argued in front of us.

CONSTRUCTION OF THE POLICY: PROPERTY DAMAGE: INTRODUCTION

[22] It is common ground that for present purposes the policy does not respond unless there is damage to property. However, if there is such damage to property, then the policy also responds to what the general conditions refer to as 'consequential immaterial damage', namely, 'any financial loss resulting from property damage covered under the policy'. We are not concerned with bodily injury nor was it argued in front of us that there should be recovery for what in cl 1.2.2 of the general conditions is called 'non-consequential immaterial damage'.

[23] It is important to keep separate questions relating to the proper construction of the policy and questions relating to the circumstances in which JDN might be liable at the suit of a third party. This part of this judgment is concerned solely with the construction question.

[24] For the purposes of analysis of the policy one must bear in mind the existence of the following possible parties—the insured, a third party who claims against the insured, and a fourth party who claims against the third party. (It is of course possible to have someone who in respect of the same damage can make claims both against the insured and against a third party—in such a case he is both a third party and a fourth party.)

[25] The judge said (at 732 (para 116)):

> '… **Royale Belge** is not bound to indemnify **Jan de Nul** against liability to third parties for losses which do not flow from bodily injury to, or from damage to the property of, the third party claimant himself. This is a matter of some potential importance if only because almost half the amount of the claim in this case relates to remedial work carried out in the area of the Marchwood channel and basin in order to restore the previous depth of water. It raises the question, therefore, how liability in negligence to ABP as conservator of the port is to be characterised under this policy. Perhaps the first point to make in this context is that I am here concerned with the construction of a policy of insurance, not directly with the distinction which has been drawn in the law of negligence between loss flowing from damage to property in the ownership or possession of the claimant and loss flowing from damage to property in which he has some lesser interest which is described as “pure economic loss”. The precise relationship between the claimant and the property damaged which is necessary for the loss to be recoverable under this policy depends on the construction of the contract as a whole. In the present case ABP's position as conservator of the port carried with it a responsibility for the maintenance of the port and a right to recover in negligence damages in respect of the cost of removing obstructions to navigation. Bearing in mind the nature of the policy I think that it is to be construed as extending to a liability of this kind. Mr. Hamblen accepted that in cases where silt was deposited on land owned or occupied by ABP the cost of removing it (assuming that to be justified) would be

> recoverable as the cost of making good damage to property. In the present case I think that the nature of ABP's responsibility for and interest in the physical condition of the waterway is such that the liability of **Jan de Nul** to ABP for damage represented by the cost of removing silt from the river bed in order to restore the previous depth of water is also properly to be characterized as a liability for damage to property rather than one for “non-consequential immaterial damage”. This is in my view consistent with the general scheme of section 1 of the general conditions which, as I have said, seek to exclude liability only for “pure” economic loss. It follows that **Jan de Nul** is entitled to recover
>
> *[**2002**] 1 All ER (Comm) 767 at 774*
>
> under the policy in respect of its liability to ABP for the costs of carrying out remedial works wherever those were required. That includes the dredging of the Marchwood channel and basin as well as the waters in the area of Weston jetty and Marchwood wharf.'

[26] When this paragraph is read as a whole it is clear that the judge concluded, in agreement with the insurers' submissions, that something for which the insured was responsible must have caused something to property which could be described as property damage and that the third party had to have some sort of legal relationship with the property. However, in agreement with JDN's submissions, he concluded that that relationship need not be as owner or occupier but that the relationship of the conservators with the areas in relation to which they had statutory responsibilities sufficed. That last conclusion is challenged by the insurers by their third ground of appeal.

[27] JDN for its part, by respondent's notice, challenges the judge's holding that there is any necessity for the third party to have a relationship with the property. All that is necessary, they submit, is that there should be property damage. To whom the property belongs they submit is irrelevant from the point of view of deciding (1) whether there has been property damage within the meaning of the policy, and (2) whether there has been consequential immaterial damage within the meaning of the policy.

CONSTRUCTION OF THE POLICY: THE CONSERVATORS AND PROPERTY DAMAGE: GROUND OF APPEAL 3

[28] Some of the land on which the silt settled was owned or occupied by ABP. This section of the judgment, however, is concerned with the position of ABP in respect of silt on land which fell within the **limits** of its statutory responsibility as conservator but which it did not own.

[29] The insurers submit that it was illogical of the judge simultaneously to hold what they claim are two contradictory positions: (1) the policy does not respond to claims in public nuisance by riparian parties founded on the interference with their rights of navigation and access to the estuary because those riparian parties do not own any relevant property; (2) the policy does respond to claims made by the conservator founded on interference with the rights of navigation of others.

[30] The insurers seek to focus the argument on identifying the property and asking who is the owner or who is in possession thereof in English law. They submit that any physical property which had been damaged as a result of the silting was the property of a fourth party, not that of the conservator.

[31] JDN submit that ABP had a sufficient relationship with the river bed, even where it did not own it, for it to be right to regard damage to the river bed as damage to the conservator's property.

[32] Before the policy responds there must be damage to property. Property damage is defined in the general conditions as meaning 'damage to, destruction or loss of property'. The insurers say that all that could be

described as property is the river bed and this has not been damaged. The rights which ABP have as conservators cannot be described as property. They point to the judgment where the judge says that 'there is no evidence that ABP as owner of the river bed suffered any significant damage as a result' and to the fact that the judge did not allow JDN to run a case that they incurred liabilities to ABP in the latter's capacity as owner of the river bed (see [2000] 2 Lloyd's Rep 700 at 720 (para 65)).

[33] The answer to this point is that it is legitimate for the purposes of construing this policy to regard: (1) the waterway, comprising the river bed, the banks and the water as being the property; (2) the deposit of quantities of silt which interfered with its previous use as a waterway as being damage to property; and (3) to regard the cost of moving the silt from the adjacent areas as financial loss resulting from property damage covered under the policy and thus constituting 'consequential immaterial damage'.

[34] We proceed for present purposes on the assumption that the policy does not respond unless the insured is exposed to suit by a third party who has some legal relationship with that property. It is noteworthy that the policy does not indicate what that relationship needs to be. There is no reason to suppose that the framers of the policy had in mind any particular concept of ownership or possession, still less English concepts. We agree with the judge that the relationship of conservator with the bed of the estuary and the water above it is a sufficient relationship.

CONSTRUCTION OF THE POLICY: WHOSE PROPERTY?: RESPONDENTS' NOTICE

[35] The reasoning of the judge, as appears from para 112 (at 731) onwards, went as follows: (i) the fundamental protection provided by the policy is cover against liability for loss represented by bodily injury or physical damage to property; (ii) to this is added cover against liability for financial loss (immaterial damage) flowing from bodily injury or damage to property; (iii) financial loss which does not flow from bodily injury or damage to property (non-consequential immaterial damage) is not covered save in a very **limited** class of cases which is of no present relevance; (iv) the way in which section 1.2 (of the general conditions) as a whole is drafted strongly suggests that the policy addresses the question of the scope of the cover solely by reference to the position of the third party; (v) where damage to the third party's property causes him financial loss over and above the cost of repairing the damage, that is consequential financial loss and recoverable under the policy. However, where the third party suffers financial loss as a result of damage to the property of a fourth party in which he has no direct interest, that, from the third party's perspective, is pure economic loss (or in the terms of the policy 'non-consequential immaterial damage') and therefore irrecoverable under the policy.

[36] JDN by respondents' notice challenge this conclusion. They submit that it would be surprising if a major category of tortious liability were to be excluded from cover in the policy. In a dredging contract, damage arising out of interference with public rights of navigation is likely to arise and is just the sort of thing for which cover would be likely to be sought. They submit that the structure of the policy is to give wide general third party cover coupled with various detailed exclusions. One should start by looking at the special conditions and note that there is a long section headed 'exclusions' which starts 'Only the following are excluded from cover' and there is no mention of an exclusion arising out of interference with public rights of navigation.

[37] The point is one of some nicety in relation to a policy whose wording is of no general interest. The validity of the judge's conclusion is only of importance if his conclusion that a claim by the conservators is an eligible claim is wrong. As we have indicated, we agree with the conclusion of the judge on this point. We therefore do not propose to express a concluded view on this part of the respondents' notice.

[38] We now pass on from questions concerning the proper construction of the policy to record various factual findings of the judge which are not challenged and then his findings as to which third parties had potential claims under English law against JDN or ABP.

FINDINGS OF FACT OR LAW NO LONGER CHALLENGED

[39] Much of the following was the subject of prolonged dispute at trial but can be taken as established for present purposes. The references are to paragraphs in the judgment under appeal.

[40] JDN were negligent towards the owners and occupiers of property adjoining the estuary in failing to exercise reasonable care to avoid damage by siltation (see [2000] 2 Lloyd's Rep 700 at 709–710 (paras 22, 24)).

[41] By reason of this negligence most of the third party claimants suffered some interference with the use of facilities situated on the bed of the river or adjacent to the waterway which either caused immediate financial loss or was likely to do so if the silt was not removed within a relatively short time (see at 711 (para 29)).

[42] There is a public right of navigation throughout the tidal waters of the estuary (see at 713–714 (para 38)).

[43] Access to certain parts of the estuary was significantly affected by the deposit of silt and there was in those areas a substantial interference with the public right of navigation (see at 714 (para 41)).

[44] Any significant interference with an individual's commercial operations or the enjoyment of private rights resulting from the obstruction to navigation would represent damage over and above that suffered by the public at large and would be sufficient to support an action in public nuisance (see at 715 (para 44)).

[45] It was reasonable for ABP and JDN to incur the cost of remedial work and the cost claimed was reasonable (see at 717 (para 49)).

[46] *The Ministry of Defence—Marchwood Military Port.* It was common ground that the Crown is the owner and occupier of the river bed in the area of Marchwood Military Port. As such it had sufficient interest to make a claim in negligence and private nuisance. The depth of water in the area of the military port had been reduced by up to 2m with consequent interference with the approaches to the port and the use of the berths. The degree of interference was sufficient to require remedial dredging in order to keep the port fully operational. In these circumstances the Ministry of Defence on behalf of the Crown had a good claim against JDN in negligence and private nuisance for £509,797·67 (see at 711, 717 (paras 27, 49) bis).

[47] *Southern Water Services—Slow Hill Copse.* Southern Water made use of a berth at Slow Hill Copse for the transport of wastewater sludge. Siltation in the area of the berth caused a reduction in the depth of water of 1–2m which interfered with its use. Costs of £68,894·42 were reasonably incurred in removing the siltation (see at 717 (para 51)). (The judge held that Southern Water had possession of the relevant land and could therefore claim in negligence and private nuisance. The premiss and therefore the conclusion are disputed by the insurers.)

[48] *Husband's Shipyards **Ltd**.* The judge held that Husband's was in possession of that part of the foreshore on which it carried on business and had a claim in negligence and nuisance. (There is an issue as to whether on the evidence before him the judge was entitled to come to his conclusion as to possession.) The extent to which the depth of water was reduced was sufficient to interfere significantly with

the company's operation. It was reasonable to incur costs totalling £109,303·85 in removing the silt (see at 718, 719 (paras 58, 59)).

[49] *ABP in respect of interference with berths 30–36.* These berths were occupied by ABP as statutory authority. As a result of the dredging works silt was deposited in these berths and in the Itchen approaches in sufficient quantities to reduce the depth of water to below the advertised minimum and to interfere with normal commercial operations. Any significant restriction in the depth of waters in the Itchen approaches would be likely to have serious commercial implications for a busy port of this kind. The costs incurred in order to restore the original depth of water were reasonably incurred. The judge held that ABP was entitled to recover those costs in nuisance and negligence (see at 720, 735–736 (paras 66, 128)).

[50] *Marchwood Yacht Club and owners of private moorings.* A survey established that there was a massive amount of siltation sufficient to cause some areas of the mooring ground to dry out at low water for the first time. The siltation undoubtedly interfered at certain times of the tide with navigation throughout the Marchwood Basin and those who were prevented from reaching or leaving their moorings or the yacht club slipway at certain times of the tide suffered damage beyond that suffered by the public at large. Simply to have left the silt where it was could have had a serious effect on the club's activities. The area in which the moorings lay formed part of the general area of the Marchwood Basin in which rights of navigation were generally affected by the deposit of silt. The degree of siltation in this area of the port was such that it did constitute an obstruction to navigation and could not simply be left as it was. It was reasonable to take steps costing £728,686·50 to restore the original depth of water in this area. They were entitled to succeed in public nuisance (see at 719–720 (paras 60–64)).

[51] *Southern Water Services—Weston Jetty.* The judge held that Southern Water had no interest in the relevant land. However, it could claim in public nuisance. Here too there was an obstruction of the public right of navigation as a result of which Southern Water suffered particular damage. If no steps had been taken to remove the silt he thought it very likely that there would have been serious interference with the use of the jetty as natural siltation further reduced the depth of water. Costs of removing siltation totalling £14,281·16 were reasonably incurred (see at 717–718 (paras 53, 54)).

[52] *Marchwood Wharfage* ***Ltd****.* It was common ground that they had no interest in land. The judge held they had a claim in public nuisance. There was a substantial amount of silt present and as it consolidated it would be likely to present an obstruction to the use of the berth. Siltation was or would eventually become an obstruction in that part of the port. If no steps had been taken to remove the silt it is likely that sooner or later there would have been a significant interference with its business. Costs of removing the silt totalling £46,426·80 were reasonably incurred (see at 718 (paras 55–57)).

[53] *Hampshire Wildlife Trust* (*HWT*). HWT owned and occupied some marshes. These were covered by silt as a result of JDN's negligence. This silt did not of course interfere with navigation and indeed was not removed. HWT having investigated the matter decided that there was no need to remove the silt from their land. In consequence grounds of appeal 5 and 6 raise a discrete issue, which we consider in [71] ff, below, as to whether HWT could have recovered from ABP the cost of investigating whether or not the siltation had caused damage, namely £100,765·83 (see at 721–722 (paras 71–73)).

THE LIABILITY OF JDN TO THE CONSERVATORS : GROUND OF APPEAL 3

[54] The judge found that ABP in their capacity as conservators were in a position to sue JDN in tort. This was a major issue for a number of reasons. First, silt was removed from a considerable area of the river bed owned by those who had suffered no damage from the deposit of silt thereon. Second, some of those who had suffered damage, namely those who could only sue in public nuisance, did not, in the judge's view, have

a sufficient relationship to property damage to make any claim by them an eligible claim under the policy. This is the subject of the respondents' notice. Third, there was and, by ground of appeal 4, still remains an issue in relation to Southern Water Services—Slow Hill Copse and Husband's Shipyards as to whether they were in occupation of the relevant land.

[55] The judge said this in relation to the liability of JDN to the conservators:

> '75. It is convenient to deal first with the question of **Jan de Nul**'s liability to ABP. As I have already said, ABP is charged under the Transport Act, 1981 with the duty of operating and maintaining the port of Southampton. Mr. Schaff submitted that as conservator of the port ABP is entitled at common law to recover the cost of removing obstructions to navigation from those responsible for creating them in cases where the obstruction has been caused by negligence. In support of that proposition he drew my attention to a line of authority beginning with *The Ella* ([1915] P 111). In that case the defendants' vessel had negligently collided with and sunk a barge in the port of Southampton thereby causing an obstruction to navigation. The harbour authority incurred expense in lighting and buoying the wreck which it sought to recover from the defendants. The Court held that the plaintiff was under a duty both by statute and at common law to keep the channel fit for navigation and that the defendants were in breach of duty towards the plaintiff which was entitled to recover the expenses it had incurred in performing its duty to abate the nuisance.
>
> 76. The decision in *The Ella* was approved and applied in *Dee Conservancy Board v. McConnell* ([1928] 2 KB 159, [1928] All ER Rep 554). In that case a vessel sank through the negligence of her owners in the river Dee obstructing navigation. The plaintiffs as conservators of the river Dee sought to recover from the defendants the costs which they incurred in removing the obstruction. The Court of Appeal held that they were entitled to do so at common law. Lord Justice Scrutton considered ([1928] 2 KB 159 at 167, [1928] All ER Rep 554 at 559) that the board had a common law right to remove the obstruction and recover the cost from the defendants by virtue of the fact that it had a duty to maintain the navigable channel. I do not understand his conclusion to rest on his earlier reference to the fact that the board was also the owner of the river bed. Nor did any such consideration play a part in the reasoning of either Lord Justice Sankey or Lord Justice Russell.
>
> 77. These two authorities were considered in (*The Putbus, Owners etc of the ship Zenatia v Owners of the ship Putbus* [1969] 2 All ER 676, [1969] P 136) in which the Court of Appeal was concerned with the nature of the liability incurred towards the harbour authorities of Rotterdam by the owners of a vessel which caused a collision and consequent obstruction of the navigable channel. Lord Denning M.R. said ([1969] 2 All ER 676 at 679, [1969 P 136 at 150): "That is a liability of a type which is imposed by the common law of England, namely a liability to damages for negligence. By our English law there is a public right of passage through our navigable channels, whether in
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> a port or the approaches to it. That right is infringed when, through negligence on the part of the owners, a vessel has sunk in such a position as to cause obstruction in the channel. The public authority concerned—the Port Authority, or the Crown, as the case may be—is in duty bound to remove the obstruction, and, having done so, it has a common law right to recover against the owners as damages, the reasonable cost of the work: see *The Ella* … and *Dee Conservancy Board v. McConnell* …" Similar statements of principle are to be found in the judgments of Lord Justice Edmund Davies and Lord Justice Phillimore.
>
> 78. These authorities do in my view support Mr. Schaff's submission that where an obstruction to navigation has been caused by negligence it is the duty of the port authority to preserve

> rights of navigation which provides the foundation for the right to recover the cost of removing that obstruction from the person who has caused it. There is no reason in principle to restrict this right of recovery to cases of obstruction by wreck; on the contrary, I think that it must be co-extensive with the harbour authority's duty to remove obstructions to navigation whatever their nature may be. I am satisfied, therefore, that Mr. Schaff is right in saying that ABP was entitled at common law to recover from **Jan de Nul** the reasonable cost of removing siltation from those areas in which it represented an obstruction to navigation.' (See [2000] 2 Lloyd's Rep 700 at 722–723.)

[56] It was submitted that there could be no liability in JDN in tort to compensate ABP for the cost of removing silt unless ABP were under a duty to remove that silt. It was submitted that ABP were under no such duty. Their only duty was to protect users of the waterway from danger. It was submitted that they could have contented themselves with making it clear that some parts of the waterway were only navigable by craft of such and such draft.

[57] We find it difficult to accept this part of the argument. The insurers accepted in para 17 of their outline reply submissions that:

> 'It is clear that regardless of ABP's attitude this siltation would have been removed. The siltation consisted of a public nuisance for which both ABP and JND are liable. ABP and JND were either going to have to remove it or pay for the costs of that being done. There is no need to pray in aid a duty as conservator to ensure the siltation's removal.'

We agree.

[58] Once it is accepted that the silt constitutes an obstruction to navigation and that it is reasonable to remove it, then it seems to us that it does not matter whether ABP were under a statutory obligation to remove the silt at the time when they did or whether they were entitled to let the silt remain for the moment and merely warn the navigating public that their rights had been obstructed.

[59] In principle a person is not entitled negligently to cause quantities of silt to be deposited in such a way as to interfere with the right of navigation. He commits a tort when he does so. This we understand to be accepted by the insurers.

[60] The only persons who can sue for public nuisance are the Attorney General and persons suffering special damage. The position of conservators is regulated by statute. They are clearly entitled to clear the river bed. They may be under a duty to clear the river bed. But whether entitled or under a duty to do so they suffer sufficient special damage as to enable them to sue in public nuisance for the cost of doing so. As the insurers point out in para 84 of their

main written submissions: 'The port/harbour authority would, in an appropriate case, have a remedy in public nuisance; an alternative considered in *The Ella* ([1915] P 111).'

[61] There Evans P said (at 121):

> '… by the fault of the defendants … a public nuisance was created by the obstruction of the channel, and the expenditure of money by the harbour authority in abating the nuisance, whether pursuant to a right, or in performance of an obligation, constituted special damage: *Louth District Council* v. *West* ((1896) 65 LJ QB 535).'

[62] That was an appeal to the Divisional Court in a case where a highway authority had justifiably removed an obstruction from roadside waste. Cave and Wills JJ each thought it too plain for argument that the highway authority had suffered special damage, the latter saying of the highway authority—'They have by statute such special interest in the abatement of the nuisance as is sufficient to give them the right to abate it for themselves' (see (1896) 65 LJ QB 535 at 536). It is right to point out that in that case the highway authority was accepted to be under a duty to remove the obstruction.

[63] Further, we agree with the judge that the harbour authority can sue in negligence. We were much pressed by the insurers with submissions, encapsulated in paras 75–84 of their written submissions in support of the appeal, to the effect that to impose liability in a case such as the present would be to act in a manner not consonant with cases which restrict liability for relational economic loss. They rely amongst others on the cases mentioned by the judge ([2000] 2 Lloyd's Rep 700 at 711 (para 29)) where he said—

> 'it is well established that in cases of this kind there is no liability in negligence for what is termed “pure” economic loss, that is, financial loss resulting from damage caused to the property of a third party in which the claimant has some form of economic interest. This principle is established by a line of authority stretching from *Cattle* v. *Stockton Waterworks Co* ((1875) LR10 QB 453) to (*Leigh & Sillivan* ***Ltd*** v*. Aliakmon Shipping Co* ***Ltd****, The Aliakmon* [1986] 2 All ER 145, [1986] AC 785) … purely contractual rights in respect of the property which is damaged are not sufficient to support an action in negligence … only those claimants who could show legal ownership or a possessory title to property damaged by siltation could pursue a claim in negligence.'

To this JDN riposte with arguments, set out in para 39 of their written submissions.

[64] We do not set these matters out at length since in imposing liability for the cost of removal of the silt by the harbour authority on persons who, by causing the silt to be there, negligently obstructed the public right of navigation, we are not concerned with relational economic loss. The loss is the loss of the harbour authority when it reasonably incurs costs in fulfilling its statutory functions.

[65] We therefore consider that, quite apart from the contract, ABP was entitled to sue JDN.

THE PROCEDURAL POINT: WAS THE JUDGE ENTITLED TO ALLOW JDN TO PURSUE A CASE IN NEGLIGENCE AS CONSERVATORS?: GROUND OF APPEAL 2

[66] The insurers have a genuine sense of grievance because the point was raised late. However, the question for us is whether the judge made a mistake in

principle when he overruled the insurers' objection to the point being raised. He was considering the matter at the end of a long trial and was well placed to form a view on it. We would be reluctant to interfere with that. By the time of the appeal the insurers had plenty of time to research the law and think the point through. They had great difficulty in showing any prejudice. This is because once one accepts that the silt banks obstructed the right to navigation, that ABP reasonably decided to remove them, that the costs of so doing were reasonable and that it does not matter whether or not the existence of the silt banks constituted a danger—all points hotly in dispute before the judge—it is difficult to think of any prejudice suffered by the insurers from not being able to anticipate the point in their preparation of evidence.

[67] The nearest we got to identifying possibly relevant evidence which had been shut out by the procedural course adopted by the judge concerned evidence in relation to contributory negligence. This had not been pleaded, an application by the insurers for permission to amend to do so having been withdrawn after JDN had objected on the ground that new evidence would be involved. The insurers claimed that they would not have withdrawn the application had they known that the conservators point was being run. Had the application for amendment been pursued and allowed then, submitted the insurers, evidence might have been led to show that ABP had a share in the responsibility for the damage and this evidence might have led the court to conclude that it was just and equitable to reduce the damages otherwise payable by JDN to ABP. If that had happened it would reduce the amount which JDN could claim under the policy.

[68] The insurers did not, once it had been made clear that the conservators point was in play, renew any application to amend so as to plead contributory negligence. The insurers did not suggest in front of the judge or before us that the running of the conservators point required an amendment of the pleadings by JDN. The insurers could have applied to the judge for an adjournment to enable them to call any further evidence they had in mind or at any rate to discover whether there was such evidence. They did not do so. The judge was conscious of the fact that the conservators point was not crisply formulated until late in the day and expressly referred to that fact in his judgment (see [2000] 2 Lloyd's Rep 700 at 720 (para 65)). The insurers have even now not identified any further evidence which they might have led had they been more alert to the conservators point.

[69] Our conclusion is that there was no injustice in allowing JDN to rely on the conservators point and that, in any event, the judge was well within his discretion in so deciding.

DID HUSBAND'S SHIPYARDS AND SOUTHERN WATER SERVICES (IN RESPECT OF SLOW HILL COPSE) HAVE SUFFICIENT INTEREST IN THE RIVER BED AFFECTED BY SILTATION TO PERMIT A CLAIM IN NEGLIGENCE OR NUISANCE?: GROUND OF APPEAL 4

[70] This raises points of no general importance and no significance. Given that we agree with the judge that ABP was able to sue JDN and that the policy would have responded to such a claim, we propose to say no more about it.

HWT: LIABILITY FOR INVESTIGATIVE COSTS: GROUND OF APPEAL 5

[71] The judge found that JDN had been negligent and that they owed a duty of care to those who owned the soil on which silt was deposited. That is not now challenged. As to a claim in private nuisance the judge said (at 713 (para 36))—

> 'I do not think that capital dredging on the scale undertaken here which resulted in the deposit of substantial quantities of silt on neighbouring properties was a reasonable user of the land in question, especially when the consequences of carrying out the work in the chosen manner were reasonably foreseeable. Accordingly, I would hold that all the elements of the tort in nuisance could have been made out by those who had sufficient interest in the areas affected, even if **Jan de Nul** had taken all reasonable precautions to avoid such damage.'

[72] The judge did not proceed on the basis that HWT could sue in public nuisance and the parties before us have proceeded on the basis that if a claim in private nuisance fails then a claim in public nuisance must also fail.

[73] When dealing specifically with HWT the judge said (at 721–722):

'71. … Hampshire Wildlife Trust owns and occupies the Eling and Redbridge Marshes at the head of the estuary which it maintains as a nature reserve. As a result of the dredging the mud-flats forming part of these reserves [sic] were covered by silt to a depth of 10–15cm. The Trust was concerned that the silt would have an adverse effect on important feeding grounds for waterfowl. It therefore commissioned an investigation into the effects of the siltation at a cost of £100,765.83 which led to the conclusion that no long-term damage had been sustained.

72. The Trust had sufficient interest in the land in question to support a claim in negligence or nuisance, but did it suffer any damage over and above the mere infringement of its rights as owner and occupier? Mr. Schaff submitted that the deposit of silt of itself made it necessary for the Trust to investigate the implications for the marshes as a nature reserve and that the cost incurred in carrying out that investigation could properly be regarded as damage flowing from **Jan de Nul**'s wrongful act. Mr. Hamblen, on the other hand, submitted that in a case of this kind an occupier of property is only entitled to recover for actual damage to the property and cannot recover in negligence or nuisance the cost of finding out that no damage has in fact been suffered.

73. This argument is scarcely an attractive one if, as must usually be the case, there has been some form of physical interference with the property in question which has given rise to the need for an investigation. In the present case **Jan de Nul** caused silt to be deposited on land owned and occupied by the Trust. It thereby committed an actionable nuisance by interfering with the Trust's use and enjoyment of its land, although the damages recoverable for that nuisance would reflect the nature and degree of the interference. In a case where it is necessary for the landowner to carry out investigations to determine the long term effect of an interference of that kind, I do not think that it is an answer to his claim to say that no damage has been done. Nor can the cost incurred in carrying out an investigation be classed as pure economic loss; rather it is a case of loss incurred in response to and by reason of a physical interference with property. If the investigation was a reasonable response to the interference with his property the owner can in my view recover the costs incurred in carrying it out.'

Nuisance

[74] Mr Hamblen QC submits that no cause of action arises in nuisance until damage to land has been caused and that in the present case, as HWT discovered

*[**2002**] 1 All ER (Comm) 767 at 783*

after its expensive investigation, no such damage had been caused. He contrasts a cause of action in trespass which can arise without damage but points out that it is common ground that the facts of the present case do not give rise to a cause of action in trespass, although the distinction between trespass and nuisance can be an extremely fine one (see *Clerk & Lindsell on Torts* (18th edn, 2000) para 19-02).

[75] He drew our attention to the following passage in *Clerk & Lindsell* (para 19-06):

'… the tort of nuisance still provides sanctions against excessive interferences from activities which are not in themselves unlawful or unpermitted by public control over the use of property … A private nuisance may be and usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by: (1) causing an encroachment on his neighbour's land, when it closely resembles trespass; (2) causing physical damage to his neighbour's land or building or works or vegetation upon it; or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.'

[76] He submitted that it was impossible to fit the facts of the present case neatly into any of the three categories identified by *Clerk & Lindsell*.

[77] We have developed our law of torts incrementally and this has led to the fact specific formulations which one finds in the textbooks. It is notorious that actions in nuisance are protean but they are all concerned with unreasonable interference by one person with the enjoyment of another of his land. Sometimes that interference takes the form of damaging the land, sometimes that of disturbing (for instance by emitting noise or smells) the owner in his enjoyment of his land, sometimes that of preventing him from exercising a right (such as a right of way) over land. The underlying policy of the law is to protect a claimant against what Markesinis and Deakin in their book on *Tort Law* (4th edn, 1999) describe at p 422 as 'unreasonable interference with the claimant's interest'. Phrases such as 'physical damage to land' are portmanteau phrases which embrace the concept of land being affected and this resulting in damage to the economic interests of another.

[78] We consider that the dumping of large quantities of silt in the circumstances of the present case did constitute an unreasonable interference with HWT's enjoyment of its land. HWT had a right to be left to use its nature reserve for breeding purposes without having to worry whether the silt which JDN by their negligence had put there would interfere with their breeding programme. That worry could only be avoided either by carrying out a study as was done in the present case and finding out that there was no need to do anything or by dredging out the silt.

[79] It is reasonable that JDN should pay for the cost of the study. If no study had been commissioned by HWT and they had simply gone ahead at much greater expense to remove the silt, JDN could reasonably have complained that no attempt had been made to see whether this was necessary.

[80] There is no dispute that the property was physically significantly affected in as much as large amounts of silt were deposited on it. Equally there is no dispute that the owner suffered damage by reason of JDN's activities in as much HWT paid for the investigation. We agree with the judge that, given these

factors and that the investigation was reasonably undertaken and that the amount paid was a reasonable amount, JDN is liable in nuisance.

Negligence

[81] Mr Hamblen submitted that HWT would not have any cause of action in negligence unless it could show damage to its land. We are prepared to accept that no cause of action in negligence can arise without damage but see no reason why that damage need be to HWT's land as opposed to their bank account. Provided that it was foreseeable that the deposit of such quantities of silt as were deposited might well give rise at the least to HWT reasonably commissioning a survey as to whether damage would be done to its reserve, we see no reason in principle why the cost of such a survey—whatever it showed—should not be recoverable.

[82] Given that it is now common ground that JDN behaved negligently and that they owed a duty of care to HWT, and given that it has not been suggested before us that it was not foreseeable that HWT would commission such a study as they in fact commissioned, we agree with the judge that JDN would have been liable in negligence.

[83] Mr Hamblen drew our attention to the cases on relational economic loss which inhibit claims by a claimant whose own property has not been affected but who has suffered harm from damage inflicted on a

third person's property (see *Clerk & Lindsell* para 7-126). He submitted that it would be contrary to the policy of the law as exemplified in those cases to allow recovery in the present case. We have not found those cases of any assistance. Recovery was refused in those cases as a **limiting** device because of a fear of indeterminate liability. To allow recovery in circumstances such as those with which we are concerned—where the property of the claimant has been affected and where this has led to the reasonable expenditure by the claimant of moneys which would not have been expended had it not been for the act in question—does not give rise to any such fear of indeterminate liability. To allow recovery in such cases is fair, just and reasonable.

HWT: DOES THE POLICY RESPOND TO ANY LIABILITY WHICH JDN HAS TO HWT?: GROUND OF APPEAL 6

[84] Mr Hamblen submitted that the expenditure of moneys on the investigation amounted to 'non-consequential immaterial damage' as defined in cl 1.2.2 of the general conditions and that therefore the policy did not respond. The crucial question is therefore whether that expenditure is properly characterised as 'financial loss resulting from … property damage', the last being defined as 'damage to, destruction or loss of property'. His argument essentially was that HWT's property was, as it turned out, not damaged and therefore the costs of the investigation, while undoubtedly financial loss, could not be described as resulting from property damage. It is a neat and forceful point. The judge did not in terms address it.

[85] We confess to an instinctive desire towards construing the policy in such a way as to permit recovery of the costs of an investigation reasonably undertaken by a third party in order to discover whether land undoubtedly affected by the activities of JDN had been *adversely* affected by those activities. This is for the following reasons.

[86] There is no doubt that if the siltation had had the effect of preventing wildfowl breeding on HWT's land, then the policy would have responded to the

cost of removing the silt. That quantity of silt would, within the meaning of those words in this policy, have amounted to property damage. If it had been removed the policy would have responded.

[87] There will be cases, of which this was one, where there is room for legitimate doubt as to whether indeed such property damage has been incurred. If, in the circumstances of the present case, the insurers had, after the silt had been removed, sought to argue that the silt would not have interfered with the breeding, the burden of proof would have been on them and proof would have been difficult.

[88] Section 27.3 of the general conditions imposes on the insured a duty 'to take all reasonable action to prevent and mitigate the consequences of the loss'. It is manifestly in the interests not only of the insured but also of the insurers that, where property damage as a result of the insured's activities is reasonably suspected, investigations be undertaken, before vastly expensive remedial operations are embarked upon, to see whether such damage has indeed been caused. The protection of the insurers lies in the fact that it must be reasonable to commission the investigation and the price paid for it must be reasonable.

[89] However, whatever our sympathies, we must construe the policy which is the bargain which the parties struck.

[90] We have found this part of the case particularly difficult but have come to the conclusion that the policy does indeed respond to the costs of the investigation. It is clear from the definition of the phrase 'property damage' that it is used in a wider sense than its literal one which would not embrace loss. HWT are third parties, extra-contractual liability to whom is in principle covered. *The deposit of unasked-for silt on HWT's land*

amounts to inflicting property damage because it has altered HWT's land. HWT has incurred financial loss by paying for the investigation. That loss results from the deposit of unasked-for silt on HWT's land.

[91] The only part of this formulation which poses any difficulty is the sentence in italics. Does the mere deposit of quantities of silt on land qualify as property damage as that phrase is used in the policy? We think that it does.

[92] Damage is not an entirely objective concept purely related to value. We note that it seems to be accepted by Mr Hamblen in relation to the Marchwood Military Port that the deposit of the silt did constitute property damage notwithstanding that there is nothing to suggest that the river bed upon which it was deposited itself suffered damage. If a skilful painter overpaints X's daubs unasked, he inflicts property damage for the purposes of this policy even if the world will pay more for the canvas now than it would have done before he came on the scene. If a lump of concrete is dropped on X's car, property damage has been inflicted even if someone can persuade an avant-garde gallery curator that the resultant object is a work of art worth more than X paid for the car. What if anything X can recover is a separate question which does not fall to be answered at this stage of the inquiry.

CONCLUSION

[93] This appeal is dismissed.

Appeal dismissed.

James Brooks Barrister. *[**2002**] 1 All ER (Comm) 767 at 786*

INSURANCE APPENDIX

GENERAL CONDITIONS

Section 1—AIM OF THE COVER

1.1 Legal Grounds—Covered activities—Insured persons

1.1.1 The insurers cover the insured's extra contractual liability for damage caused to third parties during the operation of the business in connection with the activities described in the special conditions … By extension the contractual liability is covered if it results from a fact which on itself, can give rise to extracontractual liability; yet, the cover is **limited** to the compensation that would be owed if the liability claim had been given an extracontractual ground …

1.2 Damage Covered

1.2.1 Bodily injury and property damage are covered.

1.2.2 The covers stipulated in the special conditions for bodily injury and property damage are extended … to immaterial damage. Cover is afforded for consequential immaterial damage and for non-consequential immaterial damage provided the latter is caused by an abnormal occurrence which is unintentional and unexpected for the policyholder, his entities or officers. Immaterial damage consequential to non-covered bodily injury or property damage is excluded …

[The general conditions contain the following definitions.] Immaterial damage shall mean any financial damage resulting from the loss of advantages connected with the exercise of a right or with the use of an object and especially: loss of business, customers, good trading reputation, profits, use of moveable or immovable property, production standstill and similar losses. Consequential immaterial damage shall mean any financial loss resulting from bodily injury or property damage covered under this policy. Non-consequential immaterial damage shall mean the so-called 'purely immaterial' damage which is not consequential to bodily injury or property damage. Property damage shall mean damage to, destruction or loss of property, excluding theft …

Section 2—SPECIAL COVERS

2.1. Risks of fire, flames, explosion, smoke , water, pollution, environmental impairment and nuisance to neighbours …

2.1.3 NUISANCE TO NEIGHBOURS

The cover includes personal and property damage for which compensation can be claimed on the basis of s 544 of the Belgian Civil Code regarding nuisance to neighbours or on the basis of similar provisions of foreign law …

Section 6—EXCLUSIONS

Insurance cover is not granted in the following cases:

[There then follow a whole list of exclusions including damage caused by an insured's gross negligence, damage caused by motor vehicles, damage caused by aircraft, damage caused by breach of trust, unfair competition, and then follows an important clause.]

6.6 Damage resulting from non-performance or partial performance of contractual undertakings, such as late execution of an order or a work, costs made for recommencing or correcting the work that was wrongly executed. [The list then continues with fines imposed by the court, damage resulting from war strike and lockout, damage resulting from the presence of asbestos, and various liabilities of the directors and managers of the business pursuant to Belgian legislation.]

BROKERS' CLAUSES …

7. *Liability of the insured*

This insurance covers the civil extra-contractual liability of the insured for physical and material damage, insofar as the liability is in connection with his professional or business activities and the loss caused is to a third party or parties. It also covers immaterial loss such as stoppages of work and loss of profit or use resulting from a covered physical or material damage; immaterial damage resulting from a non-covered dam-

age is not insured, excepted as provided in Article 11.1 (neighbour nuisance); immaterial damage which does not result from physical or property damage is only covered if it is caused by abnormal or unforeseen occurrence beyond the control of the management … Contractual liability is covered if it results from a cause that can, in itself, give rise to extra-contractual liability; the guarantee is however **limited** to the amount of compensation due if the claim had an extra-contractual basis.

10. Explanation of Risk

The guarantee of this policy is general and extends to all cases in which claims can be made against the third party liability of the insured. The clarification below is purely illustrative and may not be interpreted in a **limited** manner.

The guarantee concerns inter alia …

10.8 Neighbour nuisance on basis of Art 544 of the Civil Code or equivalent foreign legislation. Neighbour nuisance caused by an environmental pollution is only covered if the provisions of Art 11.3 are met. Unless the special terms and conditions specify otherwise the guarantee is **limited** to 5,000,000F per claim and per year. For clearness sake: the liability for neighbour nuisance which only follows from contractual obligations is not insured.

(i) **SPECIAL CONDITIONS**

Policyholder: Jan De Nul (**UK**) **Ltd** …

Insured activities: DREDGING OPERATIONS IN THE SOUTHAMPTON PORT …

INSUREDS

Within the insured business, the Principal of the works, ASSOCIATED BRITISH PORTS—PORT of SOUTHAMPTON, is insured as well. That party remains, however, a third party with respect to the other parties …

EXCLUSIONS:

Only the following are excluded from cover:

[There then follow a series of exclusions which include damage caused by fraud, road accidents caused by motor vehicles, damage caused to plant and animals entrusted to the policy holder, damage resulting from war, damage connected with nuclear energy, non-accidental pollution, damage resulting from breach of trust etc and then follows the important clause—] *damage resulting from non-performance or partial performance of contractual undertakings, such as late execution of an order or a work, costs made for recommencing or correcting the work that was wrongly executed, professional liability*. (Our emphasis.)